

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: Messenger (Re), 2014 NSSC 4

Date: January 14, 2014

Docket: 36192

Registry: Halifax

District of Nova Scotia
Division No. 04-Yarmouth
Court No. 36192
Estate No. 51-1496999

In the Matter of the Bankruptcy of Charity Ann Messenger

Between:

Royal Bank of Canada

Applicant

and

Haley & Associates Inc., Trustee in Bankruptcy of
Charity Ann Messenger

Respondent

DECISION

Registrar: Richard W. Cregan, Q.C.

Heard: November 7, 2013, in Halifax, Nova Scotia

Counsel: Joshua J. Santimaw, for the Applicant
Shawn M. O'Hara, for the Respondent

Background

[1] This is an application to determine whether a mini-home which was owned by the bankrupt and placed on land also owned by her is a chattel or a fixture, and thus whether it is now an unencumbered asset in the estate of the bankrupt or is subject to a mortgage on the land given by the bankrupt to the Royal Bank of Canada.

[2] The bankrupt, Charity Ann Messenger (nee Atwood), acquired the land, which is located at Bear Point, Shelburne County, from her parents in 2002. At this time, or shortly thereafter, she acquired the mini-home and placed it on the land. Since then she has used it as her family home.

[3] In July 2009, she gave a mortgage to the Bank. Also on May 5, 2009, a PPSA Financing Statement with respect to the mini-home was registered with May 25, 2012 as the expiry date. No chattel mortgage or other security instrument intended to be covered by this Financing Statement was ever obtained by the Bank with respect to the mini-home.

[4] Ms. Messenger made an assignment in bankruptcy on May 11, 2011. Her Trustee is Haley & Associates Inc. On May 27, 2011, the Bank submitted a Proof of Claim for the unsecured debt of \$92,290.92. An amended Proof of Claim was submitted on June 15, 2011 claiming the same amount but declaring the debt to be secured and valuing the assets for the same amount.

[5] On April 19, 2012 the Trustee issued a Notice of Disallowance of Claim, Right to Property or Security to the Bank with respect to the Bank's claim of security in the mini-home, pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*), the reason being that the mini-home is not affixed to the land and therefore is not covered by the Bank's real property mortgage.

[6] The Trustee by Bill of Sale dated September 5, 2012 sold the mini-home to Ms. Messenger's father, Harold Newell, for \$10,000.00 which included H.S.T.

[7] This application is the Appeal of this Disallowance.

Evidence

[8] To determine whether the mini-home is a fixture or a chattel, one must carefully consider the nature of its structure. The evidence is in the report of Bob Inness, a property inspector engaged by the Trustee, and the affidavit of Colleen MacDonald, a property manager for Veranova Properties Limited engaged by the Bank. Both documents describe the mini-home.

[9] It is convenient to quote Mr. Inness' report in full:

ROB INNESS PROPERTY MONITORING AND MANAGEMENT

For: Haley and Associates, 197 Dufferin St # 306, Bridgewater, NS B4V 2G9

RE: 4789 Hwy 3, Bear Point, Barrington Passage

As requested, on Friday, October 25, 2013, at noon, I inspected the exterior of the mobile home in regard to moving it off the property.

1) The mini home is a 1999 Prestige Mini Home that is 16'x64', . The serial number is M26-7409 and the CSA # is 471874.

2) The driveway is a long sweeping driveway that is up from the highway. It should not pose any issues for the home mover. There is a wooden garbage box at the bottom of the driveway that would have to be moved.

3) Mini homes are moved on flatbed trailers so there is no concern about axles and tow hitches. The I-beam frames of the home do have tie down tabs welded on specifically to tie the home to the flatbed trailer.

4) The home is not attached to the property in any way. There is a flat area (pad) on the lot that was prepared with plastic over the ground then one inch rock to prevent moisture coming up under the home as well as to prevent grass etc from growing. The home is sitting on concrete cinder blocks on top of 2 inch thick, 24"x24" concrete blocks. By code, the pads are supposed to be steel reinforced but you can not tell by looking at them.

5) The skirting is vinyl with a wooden frame that is attached to the bottom of the home. Easily removed.

6) The power line and the telephone line are both attached to the power mast. There are three ground rods that wires would be have to detached from. Two are outside by the northeast corner and one is under the home near the access hatch.

7) There are two satellite dishes and one digital antenna that would have to be taken off before a move because they protrude out from the sides of the home.

8) Underneath the home is an ABS sewer line that would have to be detached from the home and then a length of pipe removed as well in order to back a flatbed trailer under the home. The water line would have to be detached as well.

9) There are front and back wooden steps that are bolted to the bottom sill with lag screws.

10) There is an outbuilding measuring 16X20 and it is about 16 feet high. The height would make it difficult to move because of power lines and overpasses. I believe most overpasses have a height restriction of just under 14'.

11) I am sending 19 photos by email.

Date: October 28, 2013

Signature _____

Robert T. Inness

and the following paragraphs from Ms. MacDonald's affidavit:

4. Veranova attended the property on November 15, 2102 and took photographs of the mobile-home, which demonstrates the following:
 - The land surrounding the mobile-home has been landscaped;
 - Power lines are connected to the mobile-home; and
 - A deck was constructed to enter the mobile-home;

6. Veranova again attended the property on January 16, 2013 and took photographs of the mobile-home which demonstrates the following.
 - A shed is located behind the mobile-home;
 - The land to the shed and behind the mobile-home has been landscaped;
 - A deck has been constructed to exit the rear-door of the mobile-home;
 - The mobile-home is on blocks with water and other wiring under it;

- The mobile-home has a skirt around its outside covering the blocks and wiring;
8. There are no wheels underneath the mobile-home.
 10. The mobile-home has utilities attached to it as well as water and sewer.

[10] Attached to Mr. Inness' report are 19 full page photographs and to Ms. MacDonald's affidavit are 17 small photographs.

Law

[11] The relevant principles were summarized in **Stack v. T. Eaton Co.** (1902), 1 O.W.R. 511 by Meredith, C.V. as follows:

I take it to be settled law:

1. That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
2. That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

3. That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.

4. That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

5. That even tenants' fixtures, put in for the purposes of trade, from part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

[12] The following comment limited to the relation between mortgagor and mortgagee was made in **Haggert v. The Town of Brampton** (1897), 28

S.C.R. 174:

In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee.

[13] In **CMIC Mortgage Investment Corp. v. Rodriguez**, 2010 BCSC 308, Rogers, J. quoted in paragraph 19 from the **Royal Bank of Canada v. Maple**

Ridge Farmers Market Ltd., [1995] B.C.J. No. 1696 (S.C.) rules applying these principles to more specific situations:

- 1) Any item which is unattached to the property, except by its own weight, and can be removed without damage or alterations to the fixtures or land that will need repair, is a chattel.
- 2) Any item which is plugged in and can be removed without any damage or alteration is a chattel.
- 3) Any item which is attached even minimally (i.e, it cannot simply be unplugged) is a fixture.
- 4) If a piece of equipment is attached to a structure, a part of which could be removed but which would be useless without the attached part, then the entire piece of equipment is a fixture. In other words, the item will be a fixture if it loses its essential character because it is of no use unless attached to a permanent and substantial improvement to the premises of which it formed part. The converse is also true. If an item can be detached without damage or alteration, and if the item retains its essential character without the attached part, then it will be a chattel.
- 5) Where an item is determined to be a fixture, it may nevertheless be removed if it can be shown that it is a tenant's fixture. A tenant's fixture may be removed from the premises during the currency of the tenancy provided that the tenant leaves the premises in exactly the same condition as he or she received them.
- 6) In very exceptional circumstances not covered by these rules the court should have resort to the purpose test. For example, a mobile home may be resting on the land by its own weight but it may be clearly established that it was intended to be a fixture. These circumstances should only arise rarely and in relation to very large or expensive items.

[14] Specific application of these principles to mobile homes which I take to include mini-homes is found in **Dolan v. Bank of Montreal**, [1984] S.J. No. 726 (SKQB) Affirmed, [1985] S.J. No. 941 (SKCA) as follows:

[8] The mobile home has had its wheels and undercarriage removed, and it rests on concrete blocks and is skirted with wood panelling. A porch addition was built onto the side of the mobile home and concrete steps were connected into place, as was a concrete patio. Sewer, water and power services were trenched and connected with the mobile home in May, 1976, and there has been extensive landscaping of the lot. Photographs of the mobile home convey an impression of permanence.

...

[18] The Dolan mobile home was placed on real property owned by Dolan at the time of acquisition thereof. The subsequent improvements and development of the property, together with the length of time that the mobile home has been located on the site, and the appearance of the home as similar to a bungalow, of the owner do not permit of any other conclusion but permanence.

[15] In contrast, the decision in **Dunwoody Ltd. v. Farm Credit Corp.** (1981), 15 Man. R. (2d) 208 (QB) resulted in the opposite conclusion. I quote Hamilton, J.:

4. The categorization of the mobile home is more difficult. The basis principle appears to be that if such an asset is attached to the land by its weight alone, it maintains a separate existence and does not become part of the realty. This principle has been applied to the mobile homes, although resting on blocks and attached to sewer and water services: *Royal Bank v. Beyak* (1981), 8 Sask. R. 145,

119 D.L.R. (3d) 505 (Q.B.), and cases cited therein. On the other hand, a mobile home resting (by its own weight) upon a full basement with windows in it, has been held to form part of the realty: *Plaza Equities v. Bank of N.S.*, [1978]3. W.W.R. 385, 84 D.L.R. (3d) 609, 11 A.R. 480 (T.D.). In that case D.C. McDonald J. made an extensive review of the relevant cases and their factual differences. Even though a person intends an asset to be attached by a certain security, it does not become attached solely because of that intent. In the case at bar, the lender intended that the mobile home would form part of the security for a loan, but neither that intent, nor the apparent acquiescence on the part of the borrower, means that the realty mortgage attaches the mobile home.

5. When considering the classification of a mobile home, one starts, I would think, with the presumption that it is something that is “mobile” and therefore a chattel. A very clear set of facts are surely required to remove it from the category of a “chattel” and to imbue it with the characteristics of permanence that would make it part of the realty. The intention or agreement to have the trailer attached by a certain form of security is not sufficient. Thus, for example, a trailer on wheels does not become part of the realty merely because it is referred to in a real property mortgage or because a lender advances money on the security of such a chattel. The intention required is the intention to give to what was originally a chattel the degree of permanence to make it part of the realty. If the chattel retains the characteristics of mobility associated with its type of construction and initial purpose, that is something easily moved from one location to another, it can hardly be said to become part of the realty with the degree of permanence that implies. In *Plaza Equities*, supra, the unit had the steel frame removed and its character was altered from a moveable object to a permanent residence affixed to the land in the same manner as a residence that might have been constructed on site. It became a “bungalow” in the eyes of appraiser and others. In *Atlin Air Ltd. v. Milikovic*, [1976] 4 W.W.R. 329 (B.C.), in spite of its attachment to a surface foundation and connection to various services, the unit retained its initial characteristics.

6. In the case at bar, the unit is described by all as a “mobile home”. The agreed statement of facts uses the same description. Although the unit rests on concrete blocks above a concrete pad, and although it has a porch addition and is connected to water and hydro, it retains its original mobility. The wheels have been removed, but the frame and protruding hitch remain. Its appearance does not imply permanence. Rather it appears to retain its appearance of mobility. It is still a mobile home. If the unit is still a “mobile” home, it cannot at the same time be part of the realty.

Analysis

[16] In light of the case law reviewed attention must be paid to the features of this mini-home.

[17] It was manufactured off site, presumably in a factory. Upon being placed and connected to service, it became a year round family home.

[18] It was delivered on a flat bed truck and presumably was lifted by a crane or other lifting device onto the foundation. There appears to be two heavy beams running its length, each set in from the outside wall what appears to be two or more feet. The floor joists rest on them. These beams rest on a number of blocks. Each appears to consist first of a concrete patio block about two inches thick resting on the gravel. On each of these blocks sits a standard concrete cinder block about ten inches high with the open spaces vertical. There are shims between the blocks and the beams. There is a black plastic pipe connecting the home to a sewer opening in the gravel. Presumably, there is a similar connection for water.

[19] There is a flimsy plastic skirting around the entire building. There is a power mast for electricity and an antenna for television. There are two sets of wooden stairs from the gravelled ground to the exterior doors. Their structural connection to the mini-home is minimal. Nearby is a large storage shed.

[20] From the time it was manufactured until it was placed on the foundation, there is no doubt that it was a chattel. The question is whether upon being so placed, did it cease to be a chattel and become a fixture, that is, part of the real property, or has it remained a chattel.

[21] I should first make it clear that any attempt to rely on the language of the mortgage, particularly the definition of “Property” in Section 1(22) of the mortgage, or any other agreement that Ms. Messenger had with the Bank, purporting to include the mini-home as part of the real property and thus secured by the mortgage is poorly founded. Such would only be binding on Ms. Messenger. Her Trustee is not bound by any such agreement. The Trustee is entitled to take the mini-home as it is regardless of such understanding. When one speaks of what was intended for the mobile home, what Ms. Messenger herself or the Bank intended is

not relevant, rather the intention is what one finds in looking at the mini-home itself, the physical context where it is found and the practice in the industry.

[22] The mini-home was a complete residential package when it left the factory. To make it habitable, all that need be done is place it on some concrete blocks and connect it to the sewer with plastic pipe, to a source of water again with a piece of pipe and to an electric power line, and have some facility for heat. This is little different from the many temporary facilities one sees on construction sites which are moved from project to project.

[23] It does have a flimsy patio skirt, but this does not have the permanence of a concrete foundation.

[24] It does rest on the ground by its own weight. The connection is simple. It can be just as easily removed and taken to another site by a flatbed without disturbing the land, just disconnect the sewer, water and electrical connections, which can easily be done. It remains very portable and can be easily transferred to another site.

[25] Earlier I have reviewed the general principle to be applied and I have quoted from two contrasting cases **Dolan** and **Dunwoody**. Both consider the indicia of permanence. **Dolan** notes a skirting of wood panelling, a porch, concrete steps and patio, extensive landscaping, an appearance similar to a bungalow. **Dunwoody** notes ease of moving from one place to another and an appearance of mobility. It rests on concrete blocks above a concrete pad.

[26] The pictures make it clear that the mini-home continues to look like a mini-home. The addition of steps and skirting appear flimsy and totally utilitarian. There is no significant landscaping, just a gravelled yard. There is little attempt to make it look permanent. As Hamilton, J. said in the quotation above, “ ... it retains its original mobility. It is still a mobile home.”

Conclusion

[27] Accordingly, I find that the mini-home has not effectively been attached to the reality to be a fixture. It is still a chattel. As the Bank has no chattel security, it is property of the bankrupt in the hands of the Trustee and the Bank has no security in it.

[28] The appeal of the Bank is dismissed. The Trustee is entitled to the costs of this application.

R.

Halifax, Nova Scotia

January 14, 2014