

NOVA SCOTIA COURT OF APPEAL
Citation: Fawson v. St. Clair, 2013 NSCA 123

Date: 20131030
Docket: CA 413065
Registry: Halifax

Between:

James Robert Fawson, Lynda Fawson and David Neville
Appellants

v.

Anna St. Clair
Respondent

Judge: The Honourable Mr. Justice Jamie W.S. Saunders

Appeal Heard: June 18, 2013, in Halifax, Nova Scotia

Subject: **Foreclosure and Sale. Surplus. Equity of Redemption. Implied trust. Validity and Priority of Competing Claims During Distribution. “Interlocutory” or “Final”. Judicature Act, R.S.N.S. 1989, c. 240, s. 41(d). CPR 72.14(3) and (4). Standard of Review.**

Summary: The appellants claimed priority to a surplus left over from a foreclosure sale on the basis that the beneficial interest in the property remained with a company they had formed to develop a cottage rental basis. The Chambers judge rejected their motion, finding that the surplus ought to be paid instead to a fourth investor who had asserted a legal claim to the funds. They appealed.

Held: Appeal dismissed. In this case the judge’s role was two-fold. In certain respects the appellants’ motion engaged the judge in

the exercise of his discretion. On that basis an appellate court will not intervene unless the judge erred in principle or, to the extent the judge was exercising a discretion, a patent injustice has occurred. Faced with a motion to distribute surplus left over after lands were sold at public auction, the judge was also bound to decide the validity and priority of competing claims to that surplus in accordance with long established legal principles. To that extent his disposition had to be right and is reviewable on appeal on a standard of correctness.

Applying these standards the judge's ruling was sound and amply supported in the record. The judge was satisfied that the parties had included as an express term of their agreement the provision that their arrangement would be void if the company failed to make the required mortgage payments to the bank. Default occurred. As soon as it did, the parties' agreement came to an end. The respondent was still a mortgagor on the mortgage with the bank on the lots for which she and the other three individuals had acquired title as tenants-in-common. She never waived or forfeited her legal rights to an undivided one-quarter interest in the property. The respondent and the three appellants, as mortgagors, were the holders of any equity of redemption; not the company. Upon default, whatever "interest" the company may have had pursuant to the trust agreement came to an end. Thus, the company had no "interest" when the sheriff's hammer fell while selling the lands at public auction years later.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 19 pages.