

NOVA SCOTIA COURT OF APPEAL

Citation: *Jesty v. Xceed Mortgage Corporation*, 2014 NSCA 107

Date: 20141201

Docket: CA 423814

Registry: Halifax

Between:

Albert Jesty

Appellant

v.

Xceed Mortgage Corporation and Xceed Funding
Corporation, a body corporate

Respondent

Judges: Beveridge, Farrar and Bourgeois, JJ.A.

Appeal Heard: December 1, 2014, in Halifax, Nova Scotia

Written Release December 2, 2014

Held: Appeal dismissed per oral reasons for judgment of the Court.

Counsel: Duncan H. MacEachern, for the appellant
Lisa M. Wight, for the respondent

Reasons for judgment: (Orally)

[1] In the appellant's Notice of Appeal he outlines five grounds of appeal. In his factum, those grounds of appeal were reduced to three. The three grounds of appeal may be summarized to one ground of appeal, that being, the trial judge erred in finding that there had not been a breach of contract by XCEED Mortgage Corporation and XCEED Funding Corporation (collectively XCEED) in failing to distribute the mortgage funds as per the agreement between the parties.

[2] The background to the transaction leading to this appeal is not complicated. It is succinctly described in the trial judge's decision. This brief outline of the background facts is taken from the decision of Supreme Court Justice Michael J. Wood (now reported 2013 NSSC 385).

[3] In 2006 Mr. Jesty was looking to refinance his home in Sydney Mines to generate a surplus which could be applied to the arrears owing on two trucks used in his trucking business.

[4] XCEED ultimately approved a mortgage in the amount of \$126,042.40. It was a condition of the mortgage that XCEED would be a first charge on the house and that a number of debts would be paid out including first and second mortgages.

[5] Unknown to XCEED at the time of Mr. Jesty's application for mortgage approval was that there were amounts outstanding on the property for water and taxes as well as a judgment in the amount of \$11,554.32 in favour of the Minister of Finance (representing an amount owed for a workers' compensation assessment).

[6] Mr. Jesty acknowledges that XCEED advanced the agreed funds and that he signed the mortgage. His main complaint is that, after payment of the debts, there was no surplus available to pay outstanding amounts owing on the two trucks.

[7] Mr. Jesty was aware of the lack of surplus funds when the mortgage funds were drawn in November, 2006. Despite knowing this, he continued to make payments on the mortgage and, although there were occasions when the mortgage was in arrears, at the time the mortgage matured on December 1, 2011, he was not in default.

[8] XCEED did not renew the mortgage and demanded payment in full on January 9, 2012.

[9] No payment having been received by that date a foreclosure action was started on February 17, 2012.

[10] By Defence and Counterclaim Mr. Jesty raised the issues that were before Wood, J. below.

[11] Following a one day trial on November 22, 2013, Wood, J. granted judgment in favour of Xceed. He concluded:

[19] If Mr. Jesty is correct and there was a shortfall in the payment to Wells Fargo in November, 2006, then there should have been a reduction in payment on one of the other debts in order to retire the second mortgage and close the transaction. This reallocation of money would not have freed up any money from the mortgage advance for him.

[20] It is clear to me from the evidence that because of prior judgments against Mr. Jesty, any potential surplus from the Xceed mortgage was eliminated. Depending upon the situation with the second mortgage, there may not have been sufficient money to close the transaction in light of the existing encumbrances, although I have no evidence which would lead me to that finding.

[21] I am not satisfied that the lack of surplus funds available to Mr. Jesty is in any way the responsibility of Xceed. They were never advised by Mr. Jesty of the Worker's Compensation Board debt or the other judgments which had to be paid. Whatever Mr. Jesty's complaints are with respect to his dealings with the lawyer, I do not see how they could amount to a defence to an action on the mortgage where he acknowledges the advance of funds and execution of the document. The mere fact that Xceed required title insurance for the mortgage and the title insurer had a list of approved lawyers does not make those lawyers agents of Xceed.

[Emphasis added]

[22] I am satisfied that Mr. Jesty has not established an evidentiary or legal basis for his defence and counterclaim. I will, therefore, grant judgment in favour of Xceed.

[12] We are in agreement with the reasons given by Justice Wood. There is no evidentiary or legal basis to sustain the claims being made by Mr. Jesty. It follows, that if no legal or evidentiary basis exists for his claim below, then the appeal must also fail.

[13] This is not a complicated matter. Funds were advanced by XCEED in accordance with the mortgage documents, they were dispersed in accordance with

the provisions of the mortgage. There is no basis to argue that XCEED in any way breached its contractual obligations to Mr. Jesty. To the contrary, it fulfilled its obligations. It is Mr. Jesty, by failing to repay the funds due and owing under the mortgage, that has failed to live up to his obligations.

[14] I will very briefly address the affidavit of Duncan MacEachern filed on November 26, 2014, in which the appellant asked us to consider on this appeal, in essence, a fresh evidence application. The appellant has not provided even a superficially arguable basis to satisfy us that the affidavit ought to be introduced as fresh evidence. We will not consider it.

Conclusion

[15] The appeal is dismissed. XCEED shall have its costs of this appeal in the amount of \$5,000 inclusive of disbursements.

Beveridge, J.A.

Farrar, J.A.

Bourgeois, J.A.