SUPREME COURT OF NOVA SCOTIA

Citation: *Bridgewater Bank v. Viner,* 2019 NSSC 363

Date: 20191204
Docket: Hfx 475246
Registry: Halifax

Between:

Bridgewater Bank

Plaintiff

v.

Donna Darlene Viner

Defendant

v.

Shelley Viner

Intervenor

Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	June 4, 2019, in Halifax, Nova Scotia
Final Written Submissions:	June 21, 2019 and July 24, 2019
Written Release:	December 4, 2019
Counsel:	Stephen Kingston, for the Plaintiff Donna Darlene Viner did not appear

By the Court:

Overview

[1] This is an application for a deficiency judgment by a mortgagee, Bridgewater Bank, following foreclosure and sale of the property, against the defendant only and not in relation to the intervenor. The mortgagee has filed affidavits of its counsel, Stephen Kingston, and Cristal Van Esch-Rose in support of the application. The defendant is not currently represented in the proceeding. Despite being served on May 16, 2019, the defendant neither provided written submissions nor appeared.

[2] In October 2012 the mortgagor, Donna Viner, entered into a mortgage with Computershare Trust Company regarding the property, which is located on Clarence Road, Beaconsfield, Nova Scotia (the "Property"). The mortgage principal was $88,880.00. On March 2, 2018, Computershare assigned its interest in the mortgage to Bridgewater Bank (the "Bank"). That assignment was registered on March 26, 2018.

[3] The mortgagor, Donna Viner, defaulted on the mortgage. The Bank filed a Notice of Action on April 11, 2018. The mortgagor, Ms. Viner, subsequently filed a Notice of Defence, and Shelley Viner, her sister, was granted intervenor status in

September 2018. Shelley Viner was a tenant on the Property, paying monthly rent to the mortgagor.

[4] On September 18, 2018, Justice Jamie Campbell presided over the foreclosure hearing. The Viners did not attend the hearing. Justice Campbell granted Summary Judgment along with an Order for Foreclosure, Sale and Possession. The order settled the debt at $77,953.51. The Bank bought the Property at the auction on October 23, 2018, for $12,500.00. The Bank then issued a Notice to Quit to Shelley Viner under the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, requiring her to vacate the property by January 31, 2019. In the meantime, she was required to pay rent to the Bank through Veranova Properties Ltd. ("Veranova") the Bank's property manager. The Prothonotary ratified and confirmed the sale on December 27, 2018.

[5] On the night of January 31 and February 1, 2019, the house on the Property was destroyed by fire. A February 2018 appraisal had valued the Property at $90,000. After the fire, the Property was valued at $33,000.00, according to a realtor's Comparative Market Analysis.

[6] Before the fire, the Bank had placed insurance on the property, with a $50,000.00 deductible. The Bank declined to claim the loss due to the high deductible. Instead, it seeks a deficiency judgment against the mortgagor, relying

on the post-fire appraisal to calculate the deficiency amount. This raises questions about what is fair in the circumstances and whether a mortgagor can be asked to bear the cost of a mortgagor's business decision in relation to the placement of insurance.

Issue

[7] The issue on this application is the appropriate calculation of the Bank's deficiency judgment, including protective disbursements.

Valuation of the property

[8] Deficiency judgments are authorized by Civil Procedure Rule 72.11, which permits a mortgagee to include in a "statement of claim or notice of application for foreclosure, sale, and possession … a claim against a person who is liable for the amount, if any, by which the mortgage debt exceeds the amount realized from the sale." Assessment and calculation are dealt with under Rules 72.12 and 72.13. The court must first determine the value of the property, in accordance with Rule 72.13(1):

> Calculation of deficiency
>
> 72.13 (1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:

> (a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the mortgagee;
>
> (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee is both reasonable and greater than the bid;
>
> (c) the amount bid by, or on behalf of, the mortgagee, if the property is sold by public auction to the mortgagee and the resale price or the value of the property is less than the bid;
>
> (d) the value of the property, in all other circumstances.

[9] As the plaintiff notes, where the property is sold to the mortgagee at the auction, and has not been resold by the time of the deficiency judgment motion, the court will look to the best objective evidence of value to establish a deemed resale amount. In this case, there are two possible sources: the February 2018 appraisal, valuing the Property at $90,000, and the post-fire Comparative Market Analysis, giving a value of $33,000. At the auction, the property was not sold to a third party, but to the mortgagee, and it has not been resold. The Bank cites *Royal Bank of Canada v. Marjen Investments Ltd.* (1998), 164 N.S.R. (2d) 293, [1998] N.S.J. No. 4 (C.A.), where the court said:

> 31 The Court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (per Hart, J.A. in *Adshade*, *supra*). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the Court to look to objective evidence of value (per Hallett, J.A. in *Nova Scotia Savings and Loan v. MacKay*, *supra*). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property

> for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in *Offman*, *supra*, the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

[10] I raised with counsel for the mortgagee my concern about the reasonableness of the insurance policy, and particularly the reasonableness of placing a policy with a deductible of $50,000 on a property then valued at $90,000. The Bank maintains that it was not a “mortgagee in possession” at the time of the fire, but merely the owner of the property. The Bank cites the statement in Walter M. Traub, *Falconbridge on Mortgages*, 5th edn., that a mortgagee in possession “must manage the property as a person of ordinary prudence would manage it if it were its own…” (p. 32-8). Nevertheless, the mortgagee agrees that, as contemplated by Rule 72.13(1)(d), the court may take into account a broad range of circumstances, including the post-foreclosure damage to the property and the terms of the insurance coverage placed on the property by the Bank. The Bank submits the following:

1. There is no suggestion that the fire resulted from any negligence or fault on behalf of the Bank;
2. The Bank acted reasonably and prudently in arranging for insurance coverage on the Property;

3. The Bank maintains a significant portfolio of properties across Canada. The deductible it has negotiated allows for cost savings on premiums, which works to the advantage of the Bank's customers, while still allowing for protection of the Bank's interests;

4. There is no chance of "double recovery" to the Bank; and

5. The amount of the post-fire valuation exceeds the highest bid at the foreclosure sale.

[11] Counsel for the mortgagee cites *Louie v. The Owners of Strata Plan VR-1323*, 2015 BCSC 1832, where the owner of a condominium unit claimed that the owner of the 71-unit development was negligent in placing insurance with a deductible of $50,000. After the plaintiff's unit was damaged by a tenant, the plaintiff claimed that the developer was responsible for the first $50,000 of the repair costs, while the developer and the insurers refused to pay, citing the deductible. The court held that the evidence did not support the conclusion that the developer was negligent in placing insurance with such a high deductible (paras 109-111). The mortgagee submits that this case supports its argument that the best evidence of value is the post-fire appraisal.

[12] While I accept that (as the Bank submits), taking out insurance with a high deductible does not on its own establish negligence or a failure to exercise ordinary

prudence, it does not obviously follow from this that the mortgagor should bear the risk of the Bank's decision to take out insurance with a high deductible in order to reduce premium costs across its various properties. This is particularly so when the deductible is over half the value of the insured property.

The mortgagee's rights and obligations

[13] The precise duty owed by a mortgagee to a mortgagor is somewhat unsettled in Nova Scotia, but the Supreme Court has expressly held that the standard is not that of a prudent owner. It is at least negligence, or possibly gross negligence. In *V. Rankin's Mechanical Contracting Ltd. v. First City Developments Ltd.* (1985), 68 N.S.R. (2d) 207, 1985 CarswellNS 107 (S.C.T.D.), the mortgagee took possession before the judicial sale, and the property was eventually re-purchased by the mortgagor, First City. There was a delay in closing the sale and First City did not take possession for about a month. Meanwhile, the pipes froze in some vacant units, causing damage. The court distinguished between the duty owed by a regular mortgagee in possession versus the mortgagee in possession prior to the closing:

> 50 There is one further issue that was not raised in argument; that is, whether a mortgagee in possession should have a higher duty of care imposed upon him following the sheriff's sale than he owed under the common law to his mortgagor. <u>The law is clear that the duty of a mortgagee in possession to his mortgage is not to be grossly negligent. He does not have to act as a prudent owner would</u>: *Halsbury's Laws of England* (4th ed.), Vol. 32, p. 321, para. 702, quoted in first

> decision at p. 17. Whereas, if the mortgagee, who is in possession between the date of the sheriff's sale and closing, is in a position analogous to that of a vendor to his purchaser pending closing, a mortgagee in possession has a duty to exercise reasonable care which would be equated with the degree of care that would be exercised by a prudent owner. I have concluded that the question is academic in the context of this case as I am satisfied that CMHC's failure to winterize the premises or, alternatively, to allow First City to do so amounted to gross negligence. It would seem to me that the time has come for making a mortgagee in possession liable to his mortgagor for ordinary negligence.
>
> …
>
> 53 Anyone familiar with the management of property in Canada, as would CMHC be, would realize the absolute necessity of winterizing vacant premises. Failure to act to prevent such damage constitutes gross negligence. [emphasis added]

[14] In *Royal Trust Corp of Canada v. Begg*, 1999 NSCA 35, 1999 CarswellNS 51, the Court of Appeal referred with approval to a passage from C.W. MacIntosh's *Nova Scotia Real Property Practice Manual* regarding the management responsibilities of a mortgagee in possession:

> 21 In the publication, *Nova Scotia Real Property Practice Manual*, Charles W. MacIntosh, Q.C., describes the responsibilities of a mortgagee in possession, at p. 12-83, as follows:
>
> > Entry into possession is attended by certain responsibilities that are assumed in consequence of this action, which action takes away from the mortgagor the management and control of the operation.
> >
> > 1. The mortgagee in possession must manage the property in a prudent manner and be reasonably diligent in obtaining rents and profits therefrom.
> >
> > 2. The mortgagee becomes a trustee of the property for the owner and can be held liable for mismanagement or ordinary negligence if proper measures are not taken to guard against freeze-ups, flooding, and similar damage to the building.

> 3. The mortgagee in possession must account for the rents received by him.
>
> 4. A mortgagee in possession is liable to maintain the property in reasonable repair insofar as the revenue from the property permits and is liable for waste or for inappropriate improvements….

[15] A mortgagee does not become a mortgagee in possession automatically as the result of buying at the sale. If the mortgagee is not in possession, its obligations to the mortgagor will be more limited: *Conrad* at para. 36. But the mortgagee will always owe a duty to make reasonable efforts to receive as high a return from the sale of the property as possible in the circumstances: *Prenor Trust Co. of Canada v. Seawood Enterprises Ltd.* (1992), 115 N.S.R. (2d) 181, 1992 CarswellNS 145 (S.C.T.D.). In the trial decision (reversed on other grounds: 121 N.S.R. (2d) 144), Kelly J. said:

> 40 A mortgagee who purchases at a sheriff's sale, if it intends to resell the property, has an obligation to the mortgagor and any guarantors. This obligation is somewhat analogous to a mortgagee in possession in the English practice. Lord Denning expressed that obligation in *Standard Charter Bank v. Walker*, [1982] 3 All E.R. 938 at p. 942:
>
> > If a mortgagee enters into possession and realizes the mortgaged property, it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible and also to the guarantor so that he is made liable for as little as possible on the guarantee. This duty is only a particular application of the general duty of care to your neighbor which was stated by Lord Atkin in *Donaghue v. Stevenson*, [1932] A.C. 562 ... and applied in many cases since ... The mortgagor and the guarantor are clearly in very close "proximity" to those who conduct the sale. The duty of care is owing to them, if not to the general body of creditors of the mortgagor.

> If it should appear that the mortgagee or the receiver have not used reasonable care to realize the assets to their best advantage, then the mortgagor, the company, and the guarantor are entitled, in equity, to an allowance. They should be given credit for the amount which the sale should have realized if reasonable care had been used. Their indebtedness is to be reduced accordingly. [emphasis added]

[16] Arguably, at least, this contemplates a stand-alone duty of care owed by the mortgagee to the mortgagor throughout the foreclosure proceeding. Could such a duty of care be broad enough to require a mortgagee to obtain adequate insurance after purchasing at the sale? There appears to be no authority directly on this point. Whether or not the lender is in possession, it may make reasonable efforts to protect and preserve the value of the property and seek the disbursements necessarily incurred as a result (Rule 72.13). However, the *Civil Procedure Rules* do not state that the lender *must* do anything.

Determining whether a mortgagee is in possession

[17] Falconbridge states that whether the mortgagee is in possession depends on "whether the mortgagee has deprived the mortgagor of control and management of the mortgaged premises" (p. 22-7). To be in possession, the lender must know, or be deemed to know, that it is in possession as mortgagee: *First City Developments Ltd. v. Central Mortgage & Housing Corp.* (1981), 50 N.S.R. (2d) 199, 1981 CarswellNS 96 (S.C.A.D.), affirming 46 N.S.R. (2d) 425, 1981 CarswellNS 322 (S.C.T.D.), at para 30. While the test for deemed possession seems simple, various

factors come into play and the cases are fact-specific. The lender's conduct post-default is the strongest indicator of whether it is in possession. For example, the lender may take possession by ejecting an occupant or, if there is a tenant, by requiring the tenant to pay rents to the mortgagee instead of to the mortgagor (Falconbridge, p. 32-1). Other factors include the conduct of the borrower, the intentions of the lender or borrower regarding possession, and whether the property was vacant or occupied by either the borrower or tenant. The mortgage may also contain a clause specifically allowing the lender to enter onto the property for various reasons, yet still not be deemed in possession: *CIBC Mortgages Inc. v. Melanson*, 2009 NSSC 291, at para 26.

[18] In this case, the Bank says it was not a mortgagee in possession. The caselaw indicates that appointing a property manager and attempting to collect rents is not enough to give rise to "possession" (see, for instance, *First City*). The Bank's Notice to Quit indicates an intention to possess, but does not amount to possession itself. The mortgage contains several clauses that say the Bank may enter the property or conduct repairs without taking possession.

[19] Falconbridge further notes that the lender must enter possession as the mortgagee and not, for example, as owner of the property, before the additional obligations of a mortgagee in possession will arise (p. 32-2):

> … As owner, the mortgagee was under no obligation to repair or keep up buildings or to obtain tenants.
>
> So, if a mortgagee enters into possession as tenant for life or as purchaser of the equity of redemption, or as trustee or agent for the mortgagor, or in any character other than that of mortgagee, it will not be chargeable as mortgagee in possession. Generally, however, a mortgagee who enters into possession will be treated as mortgagee in possession, and be chargeable as such, though the mortgagee calls itself trustee, manager or agent of the mortgagor. [emphasis added]

[20] The law supports the view that because the Bank owned the property at the time of the fire, it was not a mortgagee in possession. However, I am not satisfied that these basic statements address the scenario where the mortgagee owns the property, but still owes a duty to the mortgagor by virtue of the potential for a deficiency judgment. Simply put, it does not matter whether the Bank is a mortgagee in possession or not for the purpose of determining the Bank's duty in those specific circumstances. As owner, the Bank was in a position to unilaterally affect the mortgagor's interests, and did so through its decision about insurance on the property.

[21] There is no Nova Scotia caselaw speaking directly to a duty to insure. The Court in *V. Rankin* briefly considered insurance in *obiter*, noting that the borrower-purchaser failed to insure its property after the sale, but before taking possession, which put the property at risk. One caveat to this is where the mortgagee has voluntarily taken out insurance. Falconbridge cites *Campbell v. Canadian Co-operative Investment Co.* (1907), 5 W.L.R. 153, 1907 CarswellMan 5 (Man. Trial),

for the proposition that "[i]f a mortgagee, rather than the mortgagor, undertakes to insure, the mortgagee can be liable for a failure to properly place insurance" (p. 38-7).

Conclusion

[22] I conclude that the Bank was not a mortgagee in possession before or after the sale. It hired Veranova as property manager to collect rent on its behalf and to inspect the property. However, neither Veranova nor the Bank did anything to oust the Viners from care and control until the end date on the Notice to Quit, January 31, 2019. There is no evidence that they either entered the property to do repairs, changed the locks, or even had keys. If there was a lease between Donna Viner and Shelley Viner, there is no evidence that the lease was reassigned to the Bank such that the Bank became Shelley Viner's new landlord. Theoretically, the Viners could have kept possession until the Bank obtained a further order under Rule 72.09. However, the authorities indicate that the lender does not need to be in possession for some duty to arise.

[23] I agree with counsel for the Bank that when the lender purchases a property, it becomes the owner. But I am not satisfied that the mortgagee thereby ceases to have the responsibilities of a mortgagee. Nova Scotia law allows the mortgagee to purchase the property at the judicial sale. While the mortgagor's interest in the title

to the property is extinguished, the mortgagor retains an interest in the value of the property, being entitled to any surplus and liable for any deficiency. There is essentially a dual role held by the lender-as-owner in Nova Scotia, as it must consider the borrower's interest. The precise obligations of a mortgagee-as-owner do not appear to have been litigated in Nova Scotia. The availability of negligence law in a similar context was considered by this Court in *Prenor Trust*. There is no dispute that the lender owes a duty of care to the borrower. The issues would be the standard of care and whether an inadequate insurance policy breaches that standard.

[24] In addition, having placed insurance on the property, the mortgagee has voluntarily taken action to protect its interest, as well as the mortgagor's, in the event of destruction of the property. There is no suggestion that this was the responsibility of the mortgagor, whose interest by then had been foreclosed upon and who was not in possession. The Bank argues that its approach to insurance was a reasonable way to minimize premiums across multiple properties. This may be, but it does not explain why the mortgagor should bear the increased risk arising from the destruction of the property where the Bank was either a mortgagee in possession or an owner. For a mortgagee in possession, or an owner retaining a similar duty to the mortgagor, to fail to obtain adequate insurance in circumstances

where they intend to sell the property – and where the mortgagor still has an interest in the value of the property – must amount to negligence. The Bank was within its rights to manage its insurance as it did, but it does not follow that it is entitled to look to the mortgagor to recover the loss resulting from the destruction of the property at a time when the Bank owned the property, or when the property was vacant due to the Bank's eviction of the occupant. The mortgagor should not have to bear the disproportionate burden of the mortgagee's business decision to carry insurance with such a high premium that there is no utility in making a claim on the insurance. This is not reasonable. The Bank must bear the consequences of its business decision with regards to the fire policy and the deductible. I conclude it would be unreasonable and unfair to foist this upon the mortgagee. Accordingly, the deemed sale proceeds shall be calculated based on the pre-fire appraisal.

Protective disbursements

[25] Among the elements of a deficiency judgment authorized by Civil Procedure Rule 72.13(1) are "reasonable charges authorized by the mortgage instrument." Rule 72.13(2) expands on this phrase:

> (2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:

> (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;
>
> (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;
>
> (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[26] A foreclosing mortgagee is entitled to recover reasonable costs for preserving and protecting the property pending resale, even if the mortgagee retains title at the time of the application for a deficiency judgment: *Bank of Nova Scotia v. Allen*, 2010 NSCA 47. I am mindful of the comments about the need to justify protective disbursements within the language of the rule in such cases as *Royal Bank of Canada v. Kafrouny*, 2014 NSSC 153, *CIBC v. Samson-Hahn*, 2015 NSSC 149, and *Bank of Montreal v. Dukeshire*, 2019 NSSC 58.

[27] In this case, the applicant summarizes the charges billed by Veranova, the property management company, in the affidavit of Cristal Van Esch-Rose, a Veranova employee. Ms. Van Esch-Rose attached, as Exhibit "C", a Veranova Fee and Disbursement Report, giving total charges of $1426, including HST. More specifically, she stated at para. 7:

> Occupancy Checks, Inspections, Attend premises re: photos, delivery of correspondence, and posting notice to tenants -- $701.00, plus HST $105.15 for a total of $806.15. These services form part of the listed charges on the invoice from Veranova's inspector attached hereto as Exhibit "B".
>
> Separate and apart from the third party invoice, Veranova billed the Plaintiff for fees associated with managing this work, and sourcing the third party contractor.

> Veranova's charges in that regard are $539.00, plus $80.85 HST, for a total of $619.85.

[28] Ms. Van Esch-Rose states in her affidavit that after being retained in January 2018, Veranova "retained independent contractors to conduct inspections and provide services as regards the property." An invoice issued by Byrne Crooks Property Management is attached at Exhibit B. The invoice is dated April 1, 2019, but does not indicate the dates the work it describes was actually done. However, Ms. Van Esch-Rose states that the property was checked on January 23 and October 31, 2018 (para. 5). This appears to be the source of the sum of $806.15 on the Crooks invoice.

[29] The affidavit of Ms. Van Esch-Rose does not indicate what provision of the mortgage justifies the expenses. In his brief of May 7, 2019, counsel refers to s. 12.5, and specifically s. 12.5(a)(ii), which states:

> (a) If any of the events set out in section 12.4 occurs, we may, with or without declaring the loan immediately payable, enforce our rights by taking certain actions, which include:
>
> …
>
> > (ii) Foreclosure or sale. We may take court proceedings to foreclose your right, title, and equity of redemption to your property. If we obtain a final order of foreclosure from the court, your property will belong to us. We may also ask the court to order the sale of your property under the court's supervision. If the amount we receive from the sale of your property is less than the loan amount, you must pay us the difference.

[30] Nothing in this language authorizes "the expenditure to be made and charged to the mortgage debt", as required by Rule 72.13(2)(a).

[31] Additionally, the affidavit makes no apparent attempt to justify the expenses incurred as to either necessity or reasonableness. While inspections of the property would likely be justifiable (within reason), it does not follow that, for instance, Veranova's management fees are either necessary or reasonable.

[32] I have a final concern with the disbursements as claimed. The record in this proceeding indicates that Veranova was retained as property manager for the property on January 23, 2018. However, the Bank did not receive the assignment of the mortgage until March 2, 2018, and the proceeding was not commenced until April 11, 2018. I fail to see how an expenditure could be authorized by the mortgage instrument at a time when the party incurring the expense had no interest in the mortgage.

[33] For all of the foregoing reasons, I conclude that the Bank has not proven the reasonableness of the disbursements claimed.

Conclusion

[34] The Bank's deficiency judgment shall be calculated on the basis of the pre-fire appraisal. The protective disbursements are denied. Counsel for the Bank may prepare an order accordingly. The Bank shall bear its own costs of the motion.

Brothers, J.