

Court of King's Bench of Alberta

Citation: Scotia Mortgage Corporation v. Conejero, 2024 ABKB 66

Date: 20240202
Docket: 2310 00288
Registry: Red Deer

Between:

Scotia Mortgage Corporation

- and -

Norhel Moreno Conejero

**Memorandum of Decision
of the
Honourable Applications Judge M. R. Park**

Introduction:

[1] In effect, this is an application to determine priority to proceeds following the judicial sale of encumbered property.

Background:

[2] The Defendant was the owner of a residential condominium unit located in Red Deer (the “**Condo**”), against title to which a mortgage was registered in favor of the Plaintiff, Scotia Mortgage Corporation (“**Scotia**”).

[3] The Scotia mortgage went into default. Foreclosure proceedings then ensued, culminating in an Order Confirming Sale and Vesting Title, which I granted on October 31, 2023.

[4] At the time the Order Confirming Sale and Vesting Title was applied for, three caveats were registered against title to the Condo in favour of Condominium Corporation 9720481 (the “**Condo Corp**”). It is the caveat registered on May 27, 2023 (the “**May Caveat**”) that is the focus of this application.

[5] The May Caveat largely pertains to outstanding contributions (i.e. condo fees) going back to May, 2018. At no point has the Condo Corp commenced proceedings seeking either *in rem* or *in personam* relief in relation to these unpaid assessments.

[6] Scotia and the Condo Corp agree that certain of the outstanding contributions take priority to Scotia's mortgage and that certain of the contributions are limitations-barred such that they do not take priority. The question here is whether the Condo Corp can maintain the registration of the May Caveat notwithstanding the limitations issue and the issuance of a new title to the purchaser identified in the Order Confirming Sale and Vesting Title. If I permit the caveat to remain registered, I am effectively giving the Condo Corp priority to the limitation-barred assessments because, as Mr. Miciak points out, the caveat will have to be cleared from title as part of the conveyancing process. Scotia will clear it by paying the amounts said to be outstanding.

Analysis:

An application similar in nature to the one at bar was considered by Applications Judge Prowse in *The Owners: Condominium Plan No. 9311533 v. Shui Ming Tong Foundation, 2022 ABKB 826* ("*Shui Ming*"). In that matter, Applications Judge Prowse was called upon to determine if the owner of a condominium unit was entitled to immunity under the *Limitations Act*, R.S.A. 2000, c. L-12 (the "**LA**") in relation to "foreclosure" proceedings commenced to collect unpaid contributions under the *Condominium Property Act*, R.S.A. 2000, c. L-12 (the "**CPA**"), where liability for those unpaid contributions arose more than two years prior to commencement of the foreclosure proceedings. He found that the LA conferred immunity in those circumstances.

[7] Applications Judge Prowse was next asked to consider if the plaintiff condominium corporation was entitled to maintain registration of its caveat concerning the unpaid contributions against title to the condominium unit, notwithstanding that proceedings to recover those contributions were statute-barred.

[8] In concluding that registration of the caveat could be maintained, Applications Judge Prowse commented that if the only remedy available to the condominium corporation was to seek a remedial order (i.e. through a debt action or foreclosure proceeding), and that remedy was limitation barred, the corporation would have no choice but to discharge its caveat.¹

[9] However, Applications Judge Prowse noted a line of authority, beginning with *Hepburn, Re (1884), 14 Q.B.D. 394 (Eng. Q.B.)*, which essentially stands for the proposition that it is only rights that must be enforced in court which are lost when a limitation period has expired. If the debt can be collected by other means, in addition to court proceedings, then the debt may continue to exist for that purpose.²

[10] Applications Judge Prowse considered section 39.2 (4) of the CPA, which is essentially a statutory assignment of rents. If a condominium unit is tenant-occupied, and the unit owner's contributions are in arrears, section 39.2 (4) empowers the condominium corporation to collect

¹ *Shui Ming* at para. 22.

² *Shui Ming* at para. 25.

rent from the tenant and to apply that rent to the outstanding contributions. Applications Judge Prowse had the following to say about the impact of section 39.2 (4) in respect of the issue before him:

“There is no need for the condominium corporation to seek a “remedial order” in order to notify a tenant to pay the rent to the corporation. While unpaid contributions over two years old cannot be claimed in court proceedings, in my view the corporation can notify any present or future tenant to pay its rent to the corporation, where it can be applied in satisfaction of the unpaid contributions, no matter the date they accrued due. Hence the debt continues to exist. The overdue contributions are an “amount owing”. The corporation is not required to discharge its caveat as the contributions are still owing as contemplated by section 39.2 (11) (c) of the CPA.”³

[11] Under section 39.2 of the CPA, a condominium corporation may register a caveat against title to a unit if there are unpaid contributions levied against that unit. The corporation may maintain that registration, even following the sale of the unit (by way of judicial process or otherwise), as long as there remains an “amount owing” to the corporation for contributions. The effect of Application Judge Prowse’s decision is that there can remain an amount owing, and thus the ability to maintain registration of a caveat, even if the corporation no longer has the ability to pursue debt or foreclosure proceedings to collect the outstanding contributions.

[12] Although Application Judge Prowse’s reasoning holds some appeal, I accept Mr. Miciak’s contention that *Shui Ming* has effectively been overtaken by Justice Arcand-Kootenay’s unreported decision in *Condominium Corporation 0220695 v. Scotia Mortgage Corporation* (“*Condo Corp 022*”), which she rendered on February 9, 2023.

[13] In *Condo Corp 022*, Scotia sought an Order-Sale to Plaintiff in relation to foreclosure proceedings commenced against a Bruce Hillier, who was the owner of a condominium unit against title to which Scotia had registered a mortgage.

[14] In addition to being in default under his mortgage, Mr. Hillier was indebted to the condominium corporation for outstanding assessments, as a consequence of which the corporation registered a caveat against title to Mr. Hillier’s unit.

[15] As part of its application for an Order – Sale to Plaintiff, Scotia sought a declaration that there were no amounts owing to the condominium corporation as a result of the operation of the LA. On that basis, Scotia also sought an order directing the discharge of the corporation’s caveat.

[16] Scotia’s application was heard by Applications Judge Summers on August 9, 2022, a few months before *Shui Ming* was decided. An oral decision was issued that same day granting the relief sought by Scotia. The condominium corporation appealed that decision and that appeal was heard by Justice Arcand-Kootenay on January 20, 2023.

[17] By way of its appeal, and relying on the decision in *Shui Ming*, the condominium corporation asserted that by registering its caveat, it had preserved its claim for contributions in perpetuity and had effectively protected that claim from the operation of the LA.

³ *Shui Ming* at para. 24.

[18] In dismissing the condominium corporation’s application, Justice Arcand-Kootenay confirmed that the LA applies to claims for unpaid contributions and held that “a caveat cannot save an action that is otherwise statute barred”⁴. She further opined that it is the availability of an action that determines whether an amount remains owing to the corporation, concluding that:

“Where the caveat no longer relates to a valid claim, whether defeated by the passage of time, as the limitation period had lapsed to commence an action for the amounts owing under the caveat, the caveat ceases to meet the requirements of either section 39.2 (8) or section 39.2 (11) and thus will not remain registered as contemplated by either section.”⁵

Conclusion:

[19] Justice Arcand-Kootenay’s decision resolves any conflict in the decisions of Applications Judges Summers and Prowse and applies squarely to the circumstances before the court on this application.

[20] I am bound by decisions of Justices of this court unless they have been overruled by our Court of Appeal or by the Supreme Court of Canada, or unless there are contrary decisions by Justices of this court. No such exceptions are at play here. Applying *Condo Corp 022*, I find that the Condo Corp cannot maintain the registration of the May Caveat. That registration is to be discharged from title to the Condo.

[21] This was a matter whereby both Scotia and the Condo Corp sought the court’s clarification and direction. In those circumstances, I decline to award costs.

Heard on the 31st day of October, 2023.

Dated at the City of Red Deer, Alberta this 2nd day of February, 2024.

M. R. Park
A.J.C.K.B.A.

Appearances:

Gil Miciak, Duncan Craig LLP
for Scotia Mortgage Corporation

Colton T. Smethurst, Schnell Hardy Jones LLP
for Condominium Corporation 9720481

⁴ *Condo Corp 022* at para. 48.

⁵ *Condo Corp 022* at para. 54.