2004 SKQB 73

Q.B.G. A.D. 2004
No. 113 J.C. R.

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF REGINA

BETWEEN:

THE OWNERS: CONDOMINIUM PLAN NO. 91R052147

APPLICANT

- and -

PAGE CREDIT UNION

RESPONDENT

C.D. Demmans for the applicant

V.P. Dietz for the respondent

FIAT SMITH R.S. J.
February 25, 2004

Issue

[1] *The Condominium Property Act, 1993,* S.S. 1993, c. C-26.1 (the "Act") governs the creation and operation of condominiums in the Province of Saskatchewan. It creates for each condominium complex a corporation (s. 34) which is charged with the responsibility of the management and administration of the complex and enforcement of corporate bylaws and the like.

[2] Critical to the operation of any condominium corporation is the assessment and collection of common fees for upkeep of the property and the creation and collection of a reserve fund for the inevitable capital expenditures required. The Act provides, in part, at s. 55:

> **55**(1) The corporation shall establish the following funds for the purposes set out in subsections (2) and (3):
>
> (a) a common expenses fund; and
>
> (b) subject to subsection (6), one or more reserve funds.
>
> (2) A common expenses fund is established for the purpose of providing for the payment of the following expenses, other than expenses that are to be paid out of the reserve fund:
>
> (a) expenses incurred in the control, management and administration of the common property and common facilities, enforcement of the bylaws of the corporation and addition of additional common property and common facilities;
>
> (b) premiums of insurance; and
>
> (c) expenses incurred in the discharge of any other obligation of the corporation.
>
> (3) A reserve fund is established for the purpose of providing for the payment of:
>
> (a) any unforeseen common expenses; and
>
> (b) any major repair or replacement of common facilities, common property or assets of the corporation including roofs, exteriors of buildings, roads, sidewalks, sewers, heating, electrical and plumbing systems, elevators and laundry, recreational and parking facilities.

Section 63 of the Act provides, in part:

> **63**(1) A corporation may register an interest based on a lien against the title of a unit for the amount of a contribution to the common expenses fund or the reserve fund levied on the owner that has not been paid.

> (2) On the registration of an interest pursuant to subsection (1):
>
> (a) the corporation has a lien against the title for an amount that is equal to the amount of the unpaid contribution; and
>
> (b) the lien may be enforced in the same manner as a mortgage.

[3] There is no question the legislation gives the condominium corporation the benefit and status of a mortgagee respecting the recovery of funds owing on the common expense fund and reserve fund. The question raised by this case is whether the lien/mortgage created in s. 63 has priority over the interests of a mortgagee registered prior in time.

Background

[4] Patricia Grover ("Grover") granted a mortgage in June, 1999, in favour of Investors Group Trustco Ltd. That mortgage was eventually transferred to Page Credit Union. The mortgage encumbered a condominium unit in the complex operated by the applicant, The Owners: Condominium Plan No. 91R052147 (hereinafter the "Corporation").

[5] In January, 2002, Grover was in arrears to the Corporation with respect to moneys levied by the Corporation on the condominium owners for reserve funds. The Corporation sued Grover respecting the outstanding contributions to the reserve funds which is permitted under s. 58(4) of the Act, which provides:

> **58**(4) A fee levied pursuant to clause 56(1)(b) [permitting assessments for reserve funds] may be recovered by the corporation

> by an action for debt from the person who was the proper owner when the default occurred and when:
>
> (a) a resolution was passed; or
>
> (b) the action was instituted.

Judgment was registered against title to Grover's condominium unit on April 2, 2002.

[6] In addition to being in default to the Corporation, Grover was also in arrears under the mortgage in favour of Page Credit Union. Page Credit Union had obtained leave to foreclose and had issued a statement of claim, in late April, 2002 in which the Corporation was named a defendant who was interested in the equity of redemption. The Corporation did not respond to the claim by filing a demand for notice or any defence.

[7] In due course, Page Credit Union obtained final order for foreclosure and became registered owner of Grover's condominium unit on or about October 27, 2003.

[8] Shortly after Page Credit Union became registered owner of the Grover condominium unit, the Corporation contacted Page Credit Union and demanded payment of all outstanding levies for common costs and reserve costs which had been unpaid while Grover was registered owner. Suffice it to say, Page Credit Union demurred.

[9] The Corporation was adamant that it could impose Grover's arrears on Page Credit Union and registered a lien, as contemplated by s. 63 of the Act,

against Page Credit Union's unit (Grover's former condominium unit) on December 2, 2003. Page Credit Union's response was the appropriate lapsing notice which prompted the Corporation to apply to this Court for an order under *The Land Titles Act,* R.S.S. 1978, c. L-5 continuing the registration of its s. 63 lien and, in effect, to set aside the lapsing notice filed by Page Credit Union.

Foreclosure Action

[10] Page Credit Union asserts that the Corporation's interest in the property was terminated by the foreclosure action. I am inclined to agree. The Corporation had a registered interest in the property and was duly served as a party interested in the equity of redemption. It chose to stand silent. It is instructive to revisit the wording of the final order for foreclosure, which provided, in part:

> IT IS HEREBY ORDERED AND DECREED that the Defendants and all persons claiming through or under them or any of them be and they and each of them are hereby absolutely foreclosed from all their and each of their right, title and interest in and to the following lands:
>
> [Legal description]
>
> and that the title to the said lands be vested in the Plaintiff [Page Credit Union] free from all right, title, interest or equity of redemption on the part of the Defendants or any of them or of any person or persons claiming through or under them. . .

[11] It is not now available to the Corporation to take the position that it held some privilege which it chose not to assert in the foreclosure action but rather claim *post-facto* and which entitles it to a privilege in priority of the foreclosing Page Credit Union. The Corporation, having been named as a party

in the foreclosure action and served, was required to make its case within that action. It did not and as a result, any interest it had to assert against Grover's title has been foreclosed and is of no effect *vis-a-vis* Page Credit Union.

Statutory Priority?

[12] The foreclosure analysis begs the question of what would have taken place if the Corporation chose to engage Page Credit Union within the foreclosure action asserting some priority. In the absence of case law on the point, it is worthwhile to visit this scenario.

[13] The solicitor for the Corporation asserts that s. 63 should be broadly interpreted so as to allow a condominium corporation to file a lien against the title to a condominium unit based on any arrears, regardless of how many owners. Further, counsel for the Corporation argues that a s. 63 lien should have priority in the same way as a tax lien. In short, the Corporation posits that even a prior registered encumbrance would be subject to the interest of a s. 63 lien. In support of that proposition the Corporation points to the analysis of Armstrong J. in *Condominium Plan No. 82R42988 (Owners) v. Royal Bank of Canada* (1994), 122 Sask. R. 85 (Sask. Q.B.).

[14] With respect, the *Royal Bank* case is of no assistance to the Corporation. The fact scenario in that decision involved the Royal Bank taking title as transferee, not as foreclosing mortgagee. The Bank found itself taking title subject to existing encumbrances. That is not the situation here.

[15] There is absolutely nothing in the Act which points to or leads to an inference that a s. 63 lien should enjoy the same advantages as a tax lien. The privilege enjoyed by tax liens is grounded on specific provisions in the legislation granting such priority. The Act does not address any issue of priority.

[16] I conclude, a lien under s. 63 is an encumbrance that will have its priority determined by the same priority regime as other regular encumbrances. First in time of registration has priority.

[17] Accordingly, separate and apart from any foreclosure analysis, the Corporation is unable, based on its s. 63 lien, to ground a claim of priority over the interest of Page Credit Union in the Grover condominium unit.

Conclusion

[18] The Corporation is unable to maintain its s. 63 lien. The Notice to Interest Holder, being the lapsing notice filed by Page Credit Union, should be permitted to proceed so as to result in the lapsing of the Corporation s. 63 interest, registered as Instrument No. 123257909.

[19] Page Credit Union shall have the costs of this matter which I set at $450.00.

J.