

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MIRAMICHI

Docket: N/SC/99/2010

Between: Scotia Mortgage Corporation,
Plaintiff

- and -

Brent Braysford and Dorothy Gallant,
Defendant

Before: Justice Jean-Paul Ouellette

Date(s) of hearing: January 20, 2011 and March 18,
2011

Date of decision: October 31, 2011

Appearances:

Chris G. Kierstead - solicitor for Scotia
Mortgage

No one appeared - on behalf of Brent
Braysford and Dorothy
Gallant

Ouellette, J.

Introduction

[1] Scotia Mortgage Corporation, hereinafter Scotia, seeks the deficiency amount owing on a defaulted mortgage. In this case, the mortgaged property was purchased by Scotia at the mortgage sale for \$1,000.00 and subsequently sold by private contract.

[2] The last payment received by Scotia Mortgage from the mortgagor, Brent Braysford and Dorothy Gallant, was on October 19, 2007. The principal amount owed was then \$37,914.20.

[3] Neither Brent Braysford nor Dorothy Gallant appeared, nor were they represented at the trial.

Issue

[4] At issue is the amount Scotia is entitled to as a result of this mortgage sale.

Factual Situation

[5] Scotia loaned Brent Braysford and Dorothy Gallant the sum of \$55,687.50, on August 24, 2000. This loan was secured by a mortgage on Braysford and Gallant's property, located at 6860 Route 8, Ludlow, New Brunswick.

[6] Braysford and Gallant defaulted under the terms of the mortgage. In February 2008, Scotia retained the services of a law firm to recover its outstanding amount owed on the loan. A Notice of Default letter was served on Braysford and Gallant who failed to respond and pay the amount owed.

[7] Scotia commenced a power of sale pursuant to the provisions of the mortgage and the *Property Act* R.S.N.B. [1973] C.P-19 and fixed the date of September 3, 2008 for the sale by public auction.

[8] At the mortgage sale Scotia purchased the property for \$1,000.00, which was the highest bid. It subsequently retained a real estate company to proceed with the sale of the property after having performed a current market analysis. The property was sold on December 8, 2009 for the amount of \$50,000.00.

[9] Scotia filed an action to recover its damages. On November 10, 2010 an interim default judgment was entered in favor of Scotia against Braysford and Gallant and a hearing for an assessment of damages pursuant to *Rule 80.11(3)* of the *Rules of Court* was set.

[10] In summary, the principal amount owed at time of the mortgage sale was \$37,914.20. The property was sold by private sale for \$50,000.00. Scotia claims judgment against Braysford and Gallant in excess of \$24,500.00 plus costs of this action.

[11] At the initial hearing, the Court received evidence in support of Scotia's claim by way of affidavit. Affidavits from the following individuals were filed: an employee with Scotia, dated November 17, 2010; an appraiser with ARA - Fredericton Appraisals, dated December 30, 2010; a licensed realtor with Exit Realty Advantage; and a law clerk with the law firm retained to do the mortgage sale, dated November 29, 2010. At a subsequent hearing, the law clerk filed another affidavit, dated January 31, 2011, to clarify some questions and another on April 15, 2011.

[12] A lot of contradictions and confusion was noted from these Affidavits. The principal amount varied from \$37,914.20 to \$40,372.13 which included interest, internal charges and legal fees. Under the heading of damages for legal fees claimed of \$13,166.99, it included protection fees, publication fees and appraisal fees. The property management fees claimed were \$11,137.13 and it also included protection fees. Property taxes and real estate commissions were also claimed.

Analysis and Conclusion

[13] At law, where a mortgagee buys the mortgage property at a price that cannot be seen to reasonably reflect the true market value at the time of the public sale, the deficiency must be calculated at the time of the subsequent private sale. (see: Bank of Montreal v. Arseneau [2004] N.B.J. No. 50)

[14] The law also requires that a mortgagee must act in good faith and take reasonable precaution to obtain a price for the property that can be defended as reasonable in relation to its true market value at the time of the sale. (See: Banque Nationale du Canada v. Desrosiers [1996], 167 N.B.R.

(2d) 241; Canadian Imperial Bank of Canada v. Haley [1979] 25 N.B.R. (2d) 304).

[15] It is established law that a mortgagee is entitled to sue the mortgagor on the covenant to recover the debt after the power of sale has been exercised. (See Rayner & McLaren, *Falconbridge on Mortgages*, Fourth Edition, Canada Law Book 1977 at page 443.)

[16] Since Bayview Credit Union Ltd. v. Gambit Holdings Development Ltd [2002] N.B.J. 217(C.A.), there seems to be two schools of thought in relation to what a mortgagee can claim after a mortgage sale as reasonable expenses. With all due respect to those of my colleagues who disagree, Bayview does not stand for the proposition that a mortgagor is not responsible for subsequent expenses and charges relating to a mortgaged property which were incurred after the mortgage sale.

[17] Bayview stands for the exclusion of expenses incurred after the mortgage sale that cannot be determined to be reasonable. That was the sole issue to be determined by the Court of Appeal. Drapeau, J.A., as he then was, wrote at paragraph 14 of Bayview the following:

14 That said, this Court must deal with the appeal as framed by the parties and resolve only those issues that are properly before it. The appellants do not take issue with Bayview's decision to calculate the deficiency under the mortgage as of the date of resale and the respondent has not filed a Notice of Contention. Moreover, they challenge only one of the post-mortgage sale expenses claimed by Bayview, namely the cost of demolition of the building housing 69 Durham Street and 158 Victoria Street. In my view, that expense cannot be charged to Gambit's account under the mortgage since it was not the owner of the properties in question when it was incurred. With respect, the trial judge erred in allowing Bayview to recover the demolition cost (\$15,525) from the appellants. It follows that the deficiency allowed at trial (\$62,710.83) must be reduced by \$15,525

[Emphasis Added]

[18] I will refer to the Nova Scotia Court of Appeal where it was held that the expenses or protection disbursements incurred by a mortgagee after a mortgage can be claimed by the mortgagee against the mortgagor. In Bank of Nova Scotia v. Terry J. Allen, [2010] N.S.C.A. 47, MacDonald C.J.N.S., in a unanimous decision wrote the following:

[10] I begin with this basic premise. By paying protective disbursements, the Bank protects not only its own interests but also those of the mortgagor. I say this because protecting the value of the property optimizes its sale price. Thus, the higher the sale price, the lower the shortfall payable by the mortgagor (or conceivably the higher the surplus payable to the mortgagor). The corollary to this is obvious. Denying a mortgagee recovery for such expenses would serve as a disincentive to incurring them. This in turn would lead to lower sale prices and indirectly greater risk to the mortgagor. Hallett, J.A. of this court in Nova Scotia Savings & Loan Co. v. MacKay and MacCulloch (1979), 41 N.S.R. (2d) 432, summarized it this way:

12 However, there are advantages to the mortgagor when the mortgagee bids in the property at the Sheriff's Sale in the absence of other reasonable bids as the mortgagee can then properly expose the property to the market and obtain the best price possible. Normally this results in a claim for a lesser deficiency than that claimed in the pleadings.

Mortgagees should not be discouraged from following such a course and, in my opinion, should have available a reasonably inexpensive remedy to recover the ultimate deficiency even where it exceeds the deficiency on the Sheriff's Sale.

13 It would seem to me that such a claim which includes the recovery of expenses reasonably incurred by the plaintiff to maintain the property if purchased by the plaintiff at the foreclosure sale and expenses incurred on the resale could be made in the Statement of Claim commencing the foreclosure proceedings provided the mortgage document contained a term that made the mortgagor liable for the same and provided further that such expenditures could be added to the principal owing on the mortgage even though incurred after the Sheriff's Sale. The standard mortgage document contains covenants of the mortgagor to maintain the property in a good state of repair, pay taxes and insurance and entitles the mortgagee to pay the same if they are not paid by the mortgagor and add any sums expended for this purpose to the mortgage debt. It would simply be a matter of extending the scope of these covenants.

[11] Nor, in my view is there any reason to distinguish between cases where, at the time of the deficiency judgment application, the property has been sold from those cases where the mortgagee retains the property. Granted, and as noted, in the latter situation, the ultimate sale price could exceed that which was estimated. Yet, this cuts both ways. It could also be lower than that estimated. In any event, the mortgagee would have to absorb the maintenance costs from the time of the deficiency judgment application to the date of the ultimate sale.

[12] Respectfully, it strikes me that the Chambers judge fell into error when classifying the purpose of protective disbursements. There he specifically relied on MacAdam, J. in *Kennedy*. Yet, MacAdam, J. said this:

[17] ... To permit mortgagees to enter judgment against mortgagors for expenditures designed to improve the value of the foreclosed property, which they then own, and where the mortgagor does not receive the benefit of any such enhanced value is unconscionable. ...

[Emphasis added.]

13 This presumption that protective disbursements are designed to better the property respectfully misses the mark. They are not designed to "improve" or "enhance" the property as MacAdam, J. describes. Instead, they are, as the

name suggests, simply designed to protect its value pending sale.

See also the Nova Scotia Court of appeal decisions in: Royal Bank v. Bremner (1997), 158 N.S.R. (2d) 355

[19] It is to be noted that the process followed by mortgagees in Nova Scotia is "foreclosure" and the process in New Brunswick is "power of sale". However, I am of the opinion that the reasoning employed by the Court of Appeal in Nova Scotia is equally applicable in New Brunswick. More precisely, expenses paid out by the mortgagee after the mortgage sale, that can be classified as a "protection disbursement", are equally beneficial to the mortgagor in that such expenses preserve the value of the property.

[20] In its position, this Court further relies on the covenants and conditions clauses contained within the mortgage documents which deal with the expenses and other obligations of the mortgagor. These are found in "OPTIONAL MORTGAGE COVENANT - No. FNFL-1031" which form part of the mortgage. I will refer to the provisions that address the issue of payments, insurance, taxes and other which are relevant:

" 12. The mortgagor covenants and agrees with the Mortgagee that in the event of default in the payment of any instalment(sic) or other moneys payable hereunder by the Mortgagor or on breach of any covenant, proviso or agreement herein contained, after all or any part of

the moneys hereby secured have been advanced, the mortgagee may, at such time or times as the mortgagee may deem necessary and without the concurrence of any person, enter upon the lands and premises and may make such arrangements for completing the construction of, repairing or putting in order any buildings or other improvements on the lands and premises, or for inspecting, taking care of, leasing, collecting the rents of and managing generally the lands and premises, as the mortgagee may deem expedient; and all reasonable costs, charges and expenses, including allowances for the time and service of any employee of the mortgagee or other person appointed for the above purposes shall be forthwith payable to the mortgagee and shall be a charge upon the lands and premises and shall bear interest at the mortgage rate until paid.

...

17. PROVIDED that any and all moneys expended by the mortgagee under any of the provisions hereof, including allowances for the time and service of any employee or agent of the mortgagee, shall be forthwith repaid to the mortgagee by the mortgagor and until repaid shall be added to the debt hereby secured and be a charge on the lands and premises hereby mortgaged, as being part of the moneys advanced hereunder and, shall bear interest at the rate aforesaid; and any such payment shall entitle the mortgagee to exercise the powers exercisable hereunder in case of default; and should the mortgagee pay the amount of any encumbrance, lien or charge either out of the moneys intended to be advanced on the security of this mortgage or otherwise, the mortgagee shall, in addition to all other rights, be entitled to all the rights, equities and securities of the person or persons, company, corporation or Government so paid off and is hereby authorized to retain any discharge thereof, without registration, for such period as, in the absolute discretion of the mortgagee, may be determined.

...

24. The mortgagor covenants with the mortgagee that the mortgagor shall pay all fees, costs as between solicitor and client, charges and expenses which are incurred in making and maintaining this mortgage as a charge on the lands and premises subject only to prior registered encumbrances permitted by the mortgagee, or in preparing and registering or renewing any security which is collateral to this mortgage, or in negotiating or effecting a renewal of this mortgage, or in advancing the money under this mortgage or in inspecting or revaluing the lands and premises, or in taking, recovering and keeping or attempting to procure possession of the lands and premises, or in any proceeding judicial or

otherwise to protect or to realize this security, and any amounts so paid by the mortgagee shall be payable forthwith by the mortgagor to the mortgagee.

[21] In concluding, the mortgage sale is an interim step taken by the mortgagee to realize on its security and the mortgage, being a contract between the mortgagor and mortgagee, is enforceable. To justify its claim for judgment, the mortgagee must present reliable evidence from which a court can conclude that the expenses incurred are reasonable.

[22] In this matter, the property was sold for \$50,000.00. It was appraised at \$66,000.00 as the market value on the open market. A licensed realtor had advised them that it should be listed at \$50,000.00 soon after the mortgage sale. A Scotia manager, through the law clerk, gave instructions to the listing agent to advertise the property at \$69,300.00. They received only one offer of \$39,000.00 before the conclusion of this sale at \$50,000.00, some 14 months after the initial listing. With the evidence on file, the Court must conclude that the property was sold at a reasonable price.

[23] As for the other amounts claimed, I would first emphasize that this mortgage sale, once initiated by the

bank, incurred unjustifiable delays and expenses beyond reason. As will be discussed, more than \$25,000.00 was spent to sell and dispose of this property. Furthermore, the principal amount owed was less than \$38,000.00.

[24] In its affidavit of November 17, 2010, a Scotia employee, in support of its claim for the outstanding amount, deposed the following details:

Principal Amount Owed	\$40,674.39
Accrued Interest	\$5,720.11
Property Management fees	\$11,137.13
Real Estate Commission	\$1,542.50
Corporate Risk Insurance	\$530.00
Discharge Fee	\$200.00
Property Tax	\$1,013.59
Legal Fees and Disbursements	\$13,166.99

Principal and Interest Owed

[25] The evidence on the principal amount owed on this mortgage varied. Its variance was explained as including interest, internal charges and legal fees.

[26] From the internal transaction history of the Bank, provided in the law clerk's affidavit of April 15, 2011, the last installment paid on this loan was October 19, 2007 and \$37,914.20 is shown as being the principal amount owed. At an interest rate of 6.4% per annum, the per diem amount is

\$6.81. The sale of this property was concluded on December 8, 2009. Interest on the principal amount owed at the time of sale is therefore \$5,322.19, for a total of \$44,236.39.

Property Management Fees

[27] As this property was on the market for close to two years, considerable expenses were incurred. In a nutshell, Scotia claimed a total of \$11,137.13, under this heading, itemized as follows: \$4,700.00 for electricity; snow removal, \$1,350.00; cleaning and repairs, \$1,700.00; management administrative fees and a management flat fee of \$2,054.29 plus H.S.T.

[28] The Court has received very little evidence to support these expenses, such as: \$350.00 average a month for electricity for an unoccupied residence; and management fee with a flat fee of \$1,659.29 without any explanation as to the services rendered. As it was presented, managing a residential property is the responsibility of the mortgagee and is not a claimable expense.

[29] In the circumstances, I would allow reasonable general expenses for electricity, snow removal, cleaning and

repairs. I determine that \$1,500.00 is a reasonable amount for these expenses.

Real Estate Commission

[30] Scotia is entitled to its expenses for the real estate commission in the amount of \$2,542.50.

Corporate Risk Insurance

[31] Evidence was submitted to explain the risk insurance fees as being general insurance coverage of the residence. The Court agrees with these expenses of \$530.00.

Discharge Fee

[32] After a mortgage sale, the legal and equitable title merge. In the case at bar, there is no evidence on file to support the amount of \$200.00 claimed nor that it was incurred.

Property Tax

[33] On closing of its sale in December 2009, Scotia paid property taxes in the amount of \$1,013.59, which is an allowable expense.

Legal Fees

[34] From the evidence, the legal fees alone were \$10,104.00 and were discounted to \$2,900.00 plus H.S.T. It was mentioned that they had set at \$1,300.00, the legal fees for the completion of the mortgage sale and \$1,600.00 for the sale of the property.

[35] It is shown from the documents in support that some expenses claimed by Scotia was for its legal counsel (not counsel of record) to serve as an intermediate between the Bank and the real estate agent while the property was for sale. These additional expenses are not justifiable in the case at bar.

[36] From the documents filed on April 15, 2011, it was observed that Scotia's first exercise of its power of sale was aborted at the last moment, after incurring all the

regular expenses to proceed. They explained that they were negotiating with the mortgagor to bring his mortgage up to date at the end of June 2009, which never materialized. They did so at their own risk and perils as it could not be justified in the case at bar. The mortgagee should incur these costs.

[37] The Court has no issue with the mortgage sale fees as suggested by counsel. However, as for the sale of the property, legal fees alone, on this sale, should not have exceeded \$800.00. In the case at bar, the legal fees of \$2,100.00 and H.S.T. is recoverable.

[38] After having dissected the information submitted in the various affidavits, the disbursements claimed by the Bank amount to \$8,582.17. They can be itemized as follows:

i.	Appraisal	\$2361.70
ii.	Publication fees	\$4829.44
iii.	Attendance at Mortgage Sale	\$ 164.16
iv.	Property Taxes	\$1013.59
v.	Faxes and Long Distance Charges	\$ 6.24
vi.	Internet Search Fees - Service NB	\$ 30.00
vii.	Auctioneer Services	\$177.04

All of these expenses are subject to H.S.T. except the internet search fees with Service New Brunswick. The court takes no issue with the item v, vi and vii at \$213.28 plus H.S.T. on the taxable item.

Appraisal

[39] For its appraisal of \$2,000.00 plus \$361.70 for mileage and H.S.T., Scotia filed in support an invoice containing the address of the property appraised. It lacks, to say the least, details. The affidavit of the law clerk states that she verily believes that the appraisal was based on the appraiser's review and the issues identified required consideration. The property consisted of two parcels, contained a collection of 32 acres, improved with a single family dwelling and three separate camps/cottages. These three camps/cottages had been removed from the property at the time of the appraisal. The Court will give no weight to this evidence.

[40] Attached to the law clerk's affidavit were disbursement sheets containing appraisal fees incurred in other files that Scotia submitted to other courts. In that regard, one appraisal was \$485.00, another was \$270.00 and the last was \$225.00. None were close to \$2,000.00. It is the conclusion of this Court to allow \$300.00 plus H.S.T.

Publication fees

[41] Scotia claimed \$4,829.44 as publication fees. At the last hearing, the Court learned that there had been two mortgage sale procedures instituted. The first was cancelled, as previously mentioned, for no acceptable reason. Later, it was learned that a provincial newspaper charged \$603.88 for a week of advertising.

[42] A mortgage sale is a common procedure and the Court is often asked to approve damages in these types of claims. It is known that the local newspaper charges less for four weekly publications than the provincial paper does for one.

[43] In a decision rendered on August 9th, 2011, in First National Finance GP Corporation v. Jardine, this Court approved the fee for publication in a local paper, for a mortgage sale, at \$384.00. On January 20, 2011 in CIBC Mortgage Inc. v. Landry, I did the same and the publication fees were \$557.76. For these reasons, I set, for the publication fee, an amount of \$550.00 plus H.S.T.

Attendance at Mortgage Sale

[44] Scotia claims attendance fees at the mortgage sale of \$164.16. This is part of the legal fees, which have already been approved.

Conclusion

[45] The Court therefore calculates the allowed damages as follows:

Principal and Interest	\$44,236.39
Disbursements	
General expenses	\$1,500.00
Real estate commission	\$2,542.50
Corporate Risk Insurance	\$ 530.00*
Property Taxes	\$1,013.59*
Legal Fees	\$2,100.00
Appraisal	\$ 300.00
Publication	\$ 550.00
Faxes and long distance	\$ 6.24
Service NB	\$ 30.00*
Auctioneer Services	\$ 177.04
H.S.T. on Taxable disbursements	<u>\$ 932.85</u>
Total Disbursements	<u>\$ 9,682.22</u>
Total amount owed	<u>\$ 53,918.61</u>

*Not subject to H.S.T.

[46] The net proceeds of the sale were reported to be \$50,082.98, leaving an outstanding balance of \$3,835.63. Scotia is entitled to interest from December 8, 2009 up to the date of judgment, set at \$433.79.

[47] It is therefore the order of this Court that Scotia shall have judgment against Brent Braysford and Dorothy Gallant in the amount of \$4,299.42, plus costs of \$600.00, under Rule 57, Tariff A, Scale 1, plus disbursements of \$100.00 for a total of \$700.00.

[48] The Court gives directions for judgment accordingly which shall be entered by the Clerk.

Justice Jean-Paul Ouellette
Court of Queen's Bench
of New Brunswick