IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *InstaFund Mortgage Management Corp. v. Li,* 2024 BCSC 1512

Date: 20240819
Docket: H240022
Registry: Vancouver

Between:

InstaFund Mortgage Management Corp.

Petitioner

And:

Clinton Li, Danny Ting Chug Ma, Crowe MacKay & Company Ltd., Trustee of the Estate of Xiao Bo Li, a Bankrupt, and All Tenants or Occupiers of the Subject Lands and Premises

Respondents

Before: The Honourable Mr. Justice A. Saunders

On appeal from: An order of an Associate Judge, dated June 20, 2024, indexed as *InstaFund Mortgage Management Corp. v Li*, 2024 BCSC 1144

Reasons for Judgment

Counsel for the Appellant/Respondent Danny Ting Chug Ma:	M. S. Menkes
Counsel for the Respondent/Respondent Crowe MacKay & Company Ltd., Trustee of the Estate of Xiao Bo Li, a Bankrupt:	J. R. Pollard A. Moussa, Articled Student
Place and Date of Hearing:	Vancouver, B.C. August 6, 2024
Place and Date of Judgment:	Vancouver, B.C. August 19, 2024

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[1] This appeal chiefly concerns the right of a chargeholder to obtain an order for conduct of sale following Order Nisi, and the interplay between R. 21-7(7) of the *Supreme Court Civil Rules* and s. 15 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*].

[2] The background to the within foreclosure proceedings, and the interest of the respondent, are described in the decision from which this appeal is taken, indexed at 2024 BCSC 1144. In brief, the respondent Crowe MacKay & Company Ltd. ("CMC") is the bankruptcy trustee of Xiao Bo Li; she is the mother of the respondent Clinton Li, who, along with the appellant Mr. Ma, is one of two registered owners of the subject property. CMC in its capacity as trustee had, prior to the within foreclosure proceedings being initiated, commenced a fraudulent preference claim against Mr. Li and Mr. Ma, and placed a certificate of pending litigation ("CPL") on title to the property. Mr. Li and Mr. Ma applied to have the CPL cancelled on the grounds of hardship, and in reasons dated May 30, 2023, indexed at 2023 BCSC 893, Master Scarth (as she then was) ordered that the CPL be cancelled on posting of security in the amount of $857,831.72.

[3] The within petitioner commenced foreclosure proceedings by way of a petition filed January 30, 2024. Order Nisi was granted May 2, 2024, with a six-month redemption period.

[4] The security ordered by Master Scarth was not paid, and the fraudulent preference claim of CMC remained secured only by the CPL. Interest continued to accrue on the petitioner's mortgage, at the rate of more than $23,000 per month, eroding the equity and therefore eroding the value of the security provided by the CPL. By way of a notice of application filed June 7, 2024, CMC applied for an order that the property be sold, and for conduct of sale.

[5] On June 20, 2024, Associate Judge Muir heard CMC's application and granted the order effective August 2, 2024, i.e., three months into the six-month

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redemption period. In so doing, Muir A.J. made note of the aforementioned R. 21-7(7) and s. 15 of the *LEA*, which provide as follows:

> **Order for sale**
>
> (7) A party of record may apply at any time for an order that the mortgage property be sold or put up for sale.
>
> **Order for sale**
>
> 15 The court may, before or after judgment in a proceeding
>
> (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
>
> (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

[6] Associate Judge Muir held,

> [23] Here, the Trustee is clearly a party of record, and it clearly has an interest in the land. The rule therefore applies, and it is clear that the Trustee may bring an application for conduct of sale.

[7] In opposing the application, the appellant cited the decision of Justice Kirkpatrick (as she then was) in *British Columbia (Minister of Competition, Science and Enterprise) v. Delta Fraser Properties Partnership*, 2003 BCSC 905 [*Delta Fraser*], in which there were competing applications for conduct of sale between a CPL holder, Peel, and the holder of third and fourth mortgages registered against title. At para. 43, Kirkpatrick J. said:

> In the case at bar, Peel has commenced action claiming, *inter alia*, specific performance of the Delta Land agreement, a declaration of vendor's lien or, alternatively, rescission of the Delta Land agreement. It is theoretically entitled to such relief. However, until the lien has been established by a judgment of the court, I think it ought not to have conduct of sale of the lands.
>
> [Emphasis added.]

[8] Further, the appellant points to Kirkpatrick J. having found some support for her conclusion in the holding in *Ahone v. Holloway*, 30 B.C.L.R. (2d) 368 at 376,

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1988 CanLII 3141 (C.A.), a decision dealing with the rights of the holder of a vendor's lien:

> Where the purchase price remains unpaid the holder of an equitable lien is entitled to a judicial sale once the lien has been established by a judgment of the court. Alternatively, the holder of a vendor's lien can claim rescission of the contract and the right to recover possession of the property.
>
> [Emphasis added.]

[9] Associate Judge Muir, however, distinguished *Delta Fraser* on the basis that here there was "no competition here between a subsequent mortgagee and the CPL holder, the trustee in bankruptcy" (para. 25). She noted that this same limited interpretation of *Delta Fraser*, as only having implications for situations of contested claims between registered holders of charges on title, was applied in *Jin-Ocean Mortgage Investment Corporation v. 1011066 BC Ltd.*, 2024 BCSC 847, where Associate Judge Robertson said,

> [81] As to the application for conduct of sale, as noted in [*Delta Fraser*] … while a CPL holder may apply for conduct of sale, a party with a defined interest such as a mortgagee will have preference…
>
> [Emphasis added.]

[10] On this appeal, the appellant says that the Associate Judge erred at para. 23 in describing CMC, a CPL holder, as clearly having an interest in the land. The appellant further submits the basis on which the Associate Judge distinguished *Delta Fraser* is inconsistent with s. 15 of the *LEA*, which grants the right to obtain an order for sale only to holders of interests in lands, and not to mere chargeholders with unproven claims. The appellant relies on the broader interpretation of *Delta Fraser* found in *Scotia Mtg. Corp. v. Lemky and Stuerzl Const. Ltd*., 2006 BCSC 511 [*Lemky*], where Master Baker said,

> [7] Kirkpatrick J. concluded that, as between the two respondents, Alberta was entitled to conduct of sale. One could argue that the facts of that case distinguish it from this case, in that no other respondent (or any party, for that matter) is competing with Stuerzl for conduct of sale. That distinction, in my mind, is not important. Were one to see the matter solely as a question of competing claims, surely Mr. Lemky's right under the order nisi to redeem the petitioner's mortgage before August 13, 2006 is competition to Stuerzl's claim for conduct of sale.

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Further, after quoting paras. 41–43 of *Delta Fraser*, Master Baker stated:

> [8] …Stuerzl does not have a lien to the property. It has a *claim* of lien only, and, as in *Ahone*, it can bring itself within s. 15 of the *Act* "…once the lien has been established by a judgment of the court".

The appellant notes that *Lemky* was more recently followed by Master Bouck, as she then was, in *HSBC Bank Canada v. A.S. Bains Developments Ltd*., 2015 BCSC 2194 [*A.S. Bains*].

[11] I agree with the appellant in respect of there being, strictly speaking, a distinction between a person with an interest in property, and the holder of an unproven claim. Applying that strict definition in interpreting s. 15, to disentitle the holders of unproven lien claims and other charges from seeking an order for sale would, however, seem inconsistent with long-established law and practice in this Province, to the effect that conduct of sale orders may be made to secure both proven and unproven claims. This Court's foreclosure practice rules have long extended the right to seek orders for sale to all parties to foreclosure proceedings, regardless of whether their claims have been proven. Commenting on the purpose of R. 50(7) under the *Supreme Court Rules*, B.C. Reg. 221/90, predecessor to R. 21-7(7), Macdonald L.J.S.C., in *Thompson Valley Savings Credit Union v. Jubbal* (1980), 21 BCLR 103 at 108–109, 1980 CanLII 566 (S.C.) said,

> Rule 50(2) required the mortgagee in foreclosure proceedings to name as a respondent those persons whose interest in the mortgage property they seek to extinguish. It would seem to me that the purpose of this rule would be to afford such persons the right to redeem the property, or the right to apply under R. 50(7) that the property be sold. I would hold that any respondent with an interest in, or claim to, the mortgage property named in the foreclosure proceedings, at the commencement of the proceedings, would have these rights. I would hold, as well, that any respondent with an interest in, or claim to, the mortgage property joined subsequently in the action generally would have the same rights to redeem or to apply for an order for sale.
>
> [Emphasis added.]

[12] Further light is shed by examining the legislative history of s. 15, which has its origins in s. 48 of the English *Chancery Procedure Amendment Act*, 1852*,* (15&16 Vict.), c. 86, as reproduced in *Miscellaneous Acts, B.C*. (1913), 232; it provided for

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applications for orders for sale to be made to both mortgagees and “incumbrancers”, without any requirement that the “incumbrance” be proven.

[13] In *Griffin v. Jorgensen*, 49 W.W.R. 191, 1964 CanLII 778 (B.C.S.C.), McFarlane J., as he then was, held at 192 that a third mortgagee could not apply for conduct of sale after order nisi had been obtained by a second mortgagee, on the grounds that an order nisi “is the judgment of the court”, and order absolute “is really ancillary or supplemental”. *Griffin* was explicitly approved of by the B.C. Court of Appeal, in *Locarno Investments Ltd. v. Industrial Mortgage & Finance Corporation Ltd.,* 61 D.L.R. (2d) 16 at 21, 1967 CanLII 551 (B.C.C.A.). In reaction, the Legislature, by way of the *Statute Law Amendment Act*, S.B.C. 1969, c. 35, s. 14, repealed s. 48 of the *Chancery Procedure Amendment Act* and enacted a new subclause to s. 2(12) of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213:

> (c) Upon the application of a mortgagee, a subsequent encumbrancer, a mortgagor, or a person claiming under either of them, the Court, in any action for the foreclosure of the equity of redemption in any mortgaged property, may, either before or after judgment, direct a sale of the property on such terms, including costs, as the Court sees fit.

The language of that amendment preserved the right of holders of unproven claims registered against title to apply for conduct of sale.

[14] In 1976 the *Supreme Court Rules* underwent wholesale amendment, including substantial new provisions governing foreclosure practice. These included the new R. 50(7), identical to the current R. 21-7(7):

> (7) A party of record may apply at any time for an order that the mortgaged property be sold or be put up for sale.

[15] Concurrently, the Legislature, by way of *Miscellaneous Statutes (Court Rules) Amendment Act, 1976*, S.B.C. 1976, c. 33, enacted a series of amendments to harmonize various statutory provisions with the new Rules. Section 94 of the *Miscellaneous Statutes (Court Rules) Amendment Act* repealed the wording of the 1969 amendment to the *Laws Declaratory Act*, and replaced it with the wording now found in s. 15 of the *LEA*:

> 15 The court may, before or after judgment in a proceeding

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> …
>
> on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

This is the point at which the statutory description of parties entitled to apply for sale, before or after order nisi, changed from “a mortgagee, a subsequent encumbrancer, a mortgagor, or a person claiming under either of them”, to “a person who has an interest in the property or land”.

[16] In my view, the fact that this amendment was enacted under a statute evidently intended only to harmonize legislation, concurrently with a new Rule that expanded the class of persons entitled to apply for sale to all parties of record, strongly implies that the amendment was simply intended to streamline or simplify the wording of the *Laws Declaratory Act*, without extinguishing the rights of lien claimants and other holders of unproven charges against title. A judicial gloss on the phrase “a person who has an interest in the property or land” in s. 15 that includes unproven lien claimants does no violence to the legislative purpose underlying these provisions, and is consistent with the interpretative rule prescribed by s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, that enactments be construed as being remedial, and given such fair, large and liberal construction and interpretation as best ensures the attainment of their objects.

[17] Accordingly, I find no error in the Associate Judge having found, within the meaning of s. 15, that CMC has an interest in land, and is entitled to obtain conduct of sale. To the extent those decisions were based on the more restrictive interpretation of s. 15, *Lemky* and *A.S. Bains* were wrongly decided.

[18] The question of whether the foreclosure proceedings were at a stage at which it was appropriate to grant conduct of sale, was a matter for the Associate Judge’s discretion, which I find was appropriately exercised. The evidence before her suggested that there was not sufficient equity in the property to avoid a shortfall should CMC obtain judgment on its fraudulent preference claim, and that the security afforded by the CPL was degrading with every passing day. There was no

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evidence adduced by the appellant of him or his co-owner Mr. Li having any facility to redeem the mortgage.

[19] The appellant argued before the Associate Judge, and on this appeal, that failing to give the mortgagors the full benefit of the six-month redemption period amounted to a collateral attack on the order nisi. The Associate Judge said:

> [27] Mr. Ma submits, in part at least, that this application is in effect a collateral attack on the order nisi. I do not agree. I think it is equivalent to the standard practice of a subsequent charge holder having the ability to step in and seek a sale of the property to protect its interest. That has been recognized for years, and I refer in particular to the reasons in *Berenbaum v. Atwal*, 1996 CanLII 1991 (B.C.S.C.), at para. 5:
>
> > Counsel submits, in the alternative, that it would be appropriate to pronounce now an order for sale to be effective three months after the date of the order nisi. He refers to a passage from the article on foreclosure practice written by McEachern, C.J.S.C., as he then was, at (1983) 41 Advocate 583 [...]
>
> [28] And I should say that this article is well known as a very seminal piece on foreclosure practice in British Columbia, and then it quotes:
>
> > If there is adequate security for all encumbrances, there should not be an order for conduct of sale until part way through the redemption period so that the mortgagor may have a chance to sell his property or redeem it. If he does not do so, when should the second or subsequent encumbrancers have an opportunity to protect themselves from being foreclosed by the first mortgagee? Halfway through the redemption period is a useful rule of thumb in this connection.

[20] I am in agreement with that analysis. The Associate Judge's ruling that her order would not take effect until August 2, 2024 was consonant with the six-month rule of thumb.

[21] The appeal is dismissed.

[22] The respondent seeks uplifted costs under Appendix B, s.2(5), to be fixed in the amount of $3,500, on the basis that the appellant filed a written argument in addition to the statement of argument filed as part of the appeal record under Rule 23-6(8.8). The respondent agreed not to object to the new written argument but stipulated that it would seek a costs remedy associated with having to prepare a second written argument. I find it appropriate to award fixed costs on the basis of

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Scale B, with uplift costs only in respect of Tariff Item 24. Costs are allowed in the amount of $2,475.00 plus taxes and disbursements.

"A. Saunders J."

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