IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *First Circle Mortgage Investment Corporation v. Movassaghi,* 2024 BCSC 2358

Date: 20241211
Docket: H230588
Registry: Vancouver

Between:

First Circle Mortgage Investment Corporation

Petitioner/Respondent

And

Mohammad Movassaghi

Respondent/Appellant

Before: The Honourable Madam Justice Morellato

On appeal from: An order of an Associate Judge, dated October 17, 2024 (*First Circle Mortgage v. Movassaghi*, unreported, Vancouver Registry Docket No. H230588).

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner/Respondent:	J.B. Ross
Counsel for the Respondent/Appellant:	T.D. Goepel A. Gdaniec, Articled Student
Place and Date of Hearing:	Vancouver, B.C. November 8, 2024
Place and Date of Judgment:	Vancouver, B.C. December 11, 2024

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Introduction

[1] The appellant respondent ("Appellant") appeals the decision of an Associate Judge made October 17, 2024, wherein the Respondent Petitioner (or "Respondent") was granted an order approving the sale of real property which had previously been the subject of an *Order Nisi* granted in favour of the Respondent in a foreclosure proceeding.

[2] The appeal came before me on November 8, 2024 on a busy civil chambers day. Given the pending closing date, I dismissed the appeal with Reasons to follow. These are my Reasons.

[3] The property in question is legally described as Parcel Identifier 029-850-061, Strata Lot 426, Block 54, District Lot 541, Group 1, New Westminster District, Strata Plan EPS3242, and includes an interest in common property in proportion to the unit ("Property").

[4] The Appellant asserts that Associate Judge erred in granting the Order approving the sale based on the whole of the evidence, and in particular, erred by finding that the Respondent "had met their evidentiary burden in showing that the sale of the Property was for a price that reflected fair market value for the property and the property was marketed in a businesslike manner".

[5] In the alternative, the Appellant submits that the Associate Judge erred by misapprehending and/or misapplying the relevant facts or law.

Decision of the Associate Judge Under Review

[6] The Appellant opposed the application of the Respondent to approve the sale of the Property for $1.895 million. The opposition arose in part because the Property had been previously appraised, on August 16, 2023, at a market value of $2.525 million ("2023 Appraisal"). The Appellant asserted before the Associate Judge that the offer before the court was significantly less that the 2023 Appraisal.

[7] At the hearing before the Associate Judge, the Appellant also pointed out that the tax assessment on the Property, was "quite recently" $2.7 million. Counsel also argued before the Associate Judge that the court accept the representations of counsel that the current tax assessment is "$2.621 million or thereabouts". As such, argued counsel for the Appellant, the offer that the Associate Judge was being asked to approve was approximately $700,000 less than the appropriate amount.

[8] The reasons of the Associate Judge recognized the argument of the Appellant that the value of the Property, as proposed, was deficient and also reflected:

> [8] … insufficient marketing efforts, or at the very least, there is not sufficient evidence on which I am able to conclude that reasonable and provident marketing efforts were employed in deriving the amount of the offer.

[9] The Associate Judge noted that the legal principles to be applied were not significantly in dispute and were well settled, reasoning that to approve the order for sale:

> [10] … I am required to be satisfied that the proposed sale is a provident one, and I must be satisfied that the petitioner has secured the offer in question by proceeding in a businesslike manner and employed reasonable marketing efforts such that the price reflects fair market value.

[10] The Associate Judge then addressed the discrepancy between the 2023 Appraisal and the offer in question:

> [11] With respect to the discrepancy between the amount offered and the appraisal report, the petitioner relied on the often-cited decision of this court in *Romspen Mortgage Corporation v. Lantzville Foothills Estates Inc.,* 2013 BCSC 2222, where the court held that an appraisal of a property needs to be considered and may be instructive. There comes a point when the market speaks and the appraisal does not amount to much more than a prediction. That is clearly true in many cases and may be true in this case.

[11] The Associate Judge then applied *Romspen*, considering both the offer before the court for approval but also the fact that the Property had been listed for over at least three years at various price points without any sale:

> [12] The fact of the matter is that the appraisal, while perhaps instructive, does not appear to reflect any semblance of the value of this property. In

> saying that, I refer not simply to the offer obtained or, for that matter, the offer I am being asked to approve, but the fact that this property, as I said, has been listed over the past at least three years at various price points, including being listed by the petitioner in March of 2024, at a price of $2,398 million. The price of the property was subsequently reduced on at least two different occasions - on May 1 and then on July 10, 2024, - to $2.78 million and $1,995 million respectively.
>
> [13] The petitioner has had the property listed for sale and exposed on the multiple listing services with the assistance of a qualified realtor for more than six months. That is only part of the equation.

[12] The Associate Judge then addressed how the Property had also been listed previously at various price points:

> [14] Prior to that, the property had been listed sporadically for more than 800 total days between September 2021 and December 2023, again, at various price points, ranging from a high of $3,359 million to a low of $2.38 million. I point out that at none of those price points did the property sell, clearly and evidently, because this application has come on for hearing.

[13] The Associate Judge then squarely addressed the sufficiency of efforts that were made to sell the Property:

> [15] In terms of the sufficiency of the efforts that were made, submissions were heard by counsel for the respondent [Appellant in the proceeding herein] that the marketing report from the realtor engaged by the petitioner is deficient. The marketing report makes a point of noting that the owner was cooperative, having never been difficult or restricted access to the property.
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> [16] This cooperation has resulted in the property having received a total of more than 100 different inquiries from prospective purchasers, 12 of which have occurred since the making of the offer for which approval is sought, as well as 35 different showings of the property to prospective purchasers, 5 of which occurred since the making of the offer for which approval is sought.

[14] Notably, the Respondent Petitioner kept the Property available for sale after the subject offer had been made.

[15] As regards the efforts made to sell the Property, the Associate Judge reasoned:

> [17] In terms of the efforts that were made in addition to facilitating showings of the property, the realtor who was engaged by the petitioner states that the property has been advertised in print in the Vancouver Sun and online on an unspecified number of real estate websites, referred to as

> "numerous real estate websites," including Realtylink, rew.ca, maprealty.com, simonclayton.ca, Facebook, Instagram, and other social media sites.

[16] The Associate Judge addressed the arguments, also made before this Court that: there was no evidence as to the duration of these advertisements; no copies of the advertisements for the court to review; and "nothing in the report that would suggest that there had been any open houses", also noting "that is not the complete argument of the respondent". The Associate Judge then also reasoned:

> [20] With respect to the lack of evidence as to open houses, I do not find that to be a compelling argument. The fact of the matter is this property has been shown on at least 35 different occasions to prospective purchasers. There is no legal requirement on an application to approve sale to satisfy the court that the property has been subject to open houses. However, that might be helpful in circumstances where a petitioner is seeking to have an offer approved after a relatively short exposure to the market. Indeed, it may be helpful in other circumstances as well, but it is certainly not fatal to the present application.
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> [21] Similarly, with respect to the duration of the various advertisements, it may have been helpful and it may be advantageous for the court to look at the duration of the advertisements where there is any doubt. But in this case, again, the fact that there had been over 100 different inquiries from prospective purchasers and 35 different showings to prospective purchasers as well as numerous offers having been elicited over the past four months is suggestive of the fact that persons who may be interested in acquiring the property were aware of the property and were aware of the fact that the property was for sale and, indeed, followed up in that regard.

[17] In this light, the Associate Judge addressed the marketing efforts involved, noting that despite being listed for a significant period of time, not a single offer was made that approached the 2023 Appraisal value:

> [22] I cannot conclude on the evidence that the marketing efforts carried out by the realtor on behalf of the petitioner were anything other than businesslike. While the amount of the offer that I am being asked to approve is significantly less than the appraisal, that is certainly not determinative of the application. The fact that the property has been listed for a significant period of time and not a single offer has even approached the amount of the appraisal is suggestive of the fact that the appraisal is simply incorrect, or if it was correct at the time the appraisal was made, it is no longer correct.

[18] As noted by the Associate Judge, the highest offer obtained that he could discern, based on the information before the court, was an offer of $1.92 million. That offer was accepted; however, the buyer was unable to secure financing.

[19] The Associate Judge concluded as follows:

> [24] While it is regrettable for all concerned and in particular for the respondent [Appellant] that the amount of the offer does not reflect his expectations, this appears to be the value of the property based on the market, which has spoken following significant and at least reasonable and businesslike marketing efforts.
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> [24] In the circumstances, I find that the sale in the amount of $1.895 million is provident, and I approve the sale.

Standard of Review

[20] Under Rule 23-6 (8.1) of the *Supreme Court Civil Rules*, a party affected by an order made by an associate judge may appeal by filing a notice of appeal within 14 days after the order or decision was made.

[21] The applicable standard of review in cases regarding an order approving a sale under a foreclosure proceeding, is the standard of correctness. The parties are correct in this regard.

[22] In *Tri City Capital Corp. v. 0942317 B.C. Ltd*., 2020 BCSC 2079, the court reasoned:

> [58] In foreclosure proceedings, an order approving sale is a final order: *Canadian Western Bank v. 353806 B.C. Ltd.*, 2017 BCSC 1072 at para. 13. An appeal from a master's order approving sale is, therefore, a rehearing on the merits on a standard of correctness: *Tekamar Mortgage Fund Ltd. v. Hegel,* 2018 BCSC 1369 at para. 19; *Canadian Western Bank at* para. 11.
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> [59] In the absence of an order permitting fresh evidence, the rehearing proceeds on the record that was before the master: *Canadian Western Bank* at para. 11. There is no fresh evidence in this case.
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> [60] On the rehearing, the judge may substitute their own judgment for that of the master, however, given the expertise of masters in foreclosure proceedings, the judge should pay some deference to the master's decision: *Tekamar* Mortgage Fund Ltd. at paras. 19-20.

[23] Regarding the deference shown to the decisions of associate judges in such cases, I note that the court in *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd.*, 2014 BCSC 458, at para. 15, recognized that masters (and now associate judges) hear foreclosure proceedings much more frequently than do Justices of this court. As such, the court in *Kokanee* also reasoned that associate judges have acquired a

level of experience and expertise "that should not be ignored or quickly discounted." I agree.

Submissions of the Appellant

[24] The arguments before me on appeal largely reflected those before the Associate Judge in the first instance.

[25] The Appellant begins his submissions by underscoring the reasoning of our Court of Appeal in *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.,* 2013 BCCA 281, at para. 40, that a mortgagee (in this case the Respondent on appeal) who has conduct of sale by court order "must go about finding a buyer in a businesslike manner and the court must be satisfied that the proposed sale is provident in all the circumstances". This argues, the Appellant, is the legal test that the Respondent bears the onus of satisfying.

[26] The Appellant argues that the only evidence as to the value that was filed by Respondent was the 2023 Appraisal, which was substantially higher in its value of the Property than the proposed sale price advanced by the Respondent. The Appellant submits there is no evidence to show that the 2023 Appraisal was incorrect and "no explanation" as to why the court should approve the offer of $1.895 million that is "so much lower" than the 2023 Appraisal or the tax assessed value.

[27] The Appellant also underscores that there was evidence tendered before the Associate Judge regarding "comparable sales of units in the same building" from a Mr. Dimitri Schwartzman, a licensed real estate agent for 10 years.

[28] Mr. Schwartzman acknowledged he was not qualified as an appraiser but deposed, on October 8, 2024, that in his view the Property should be valued at $1,350.000 per square foot, or slightly over $2,500,000. The Appellant underscores that the Respondent did not file a response to Mr. Schwartzman's affidavit, nor did it tender evidence before the court of why similar square footage prices of units in the same building should not be an indicator of the Property's value.

[29] The Appellant acknowledges that the Mr. Schwarztman's affidavit does not constitute an appraisal but argues that his analysis did consider the price per square foot of certain units he asserts were comparable, including units in the same building at the Property. The Appellant asserts further that the offer approved by the Associate Judge puts the square foot price for the Property at $1,016.08 per square foot. However, according to Mr. Schwartzman, the sale price per square foot of the four units that have sold and that are in the same building were: $1,283.11 per square foot (listed as pending), $1,440.48 per square foot, $1,901.32 per square foot, and $1,283.27 per square foot. Counsel for the Appellant argues that the market research conducted by Mr. Schwartzman shows an average price per square foot of $1,420.09 for comparable units, notably a position somewhat different than the opinion of Mr. Schwartzman at paragraph 6 of his affidavit, although both take the position that the Property sold well below its value.

[30] The Appellant also asserts that the affidavit evidence of the Respondent that describes the marketing efforts to sell the Property is "generic and vague". He argues that there "did not appear to be any proactive marketing" but more of a "wait-and-see" approach to offers that were presented, that specifics of the advertising that were done are unknown and that there was no evidence of "reaching out to other real estate agents". He adds that there were no open houses, although concedes there is no rule of law that requires an open house.

[31] The Appellant acknowledges that the Property was listed for some time but argues that this factor alone does not satisfy the legal burden on the Respondent. Counsel argues that given the large discrepancy between the 2023 Appraisal value and the proposed sale price, in light of the additional evidence presented by the Appellant, more was required of the Respondent on the application to approve the sale in these circumstances. Counsel adds that the evidence presented by the Respondent does not establish that the proposed sale price reflected the market value, particularly in light of the financial discrepancy between the price of other units in the same building.

Submissions of the Respondent

[32] The Respondent provided additional and important contextual information that informed the court's analysis.

[33] The Property is a two-bedroom with a family room and two-and-a-half baths on the 47th floor, described as an inside penthouse in a high-rise residential and commercial complex, comprising 1865 square feet divided into three levels. In the Market Reporting Report dated September 24, 2024 of Mr. Clayton, the Property's main positive features are described as including sweeping views, over-height ceilings, and the exclusivity of penthouse living. However, there are negative features that were also identified including an "ongoing lawsuit with the developer regarding building deficiencies", a lack of external suite storage (although there is also reference to "ample storage" *en suite*), and "minimal outdoor space for a penthouse in this price range".

[34] The Respondent notes that the subject mortgage was the first mortgage and was registered on October 30, 2020. It underscores that the Property had an extensive listing history on the MLS and, prior to the commencement of the foreclosure proceedings, had been offered for sale unsuccessfully on numerous occasions.

[35] The Respondent deposes that since 2022, and before the foreclosure proceedings were commenced on August 22, 2023, the Property was listed as follow.

a) On July 12, 2022, the Property was listed for sale at a price of $3,239,000. On August 15, 2022, the listing price was reduced to $3,159,000. That listing was terminated on October 3, 2022.

b) The next day following the termination of the last listing for sale, on October 4, 2022, the Property was listed for sale at a price of $3,049,000. It was reduced further on October 25, 2022 to $2,999,000. It was reduced further on November 10, 2022 to $2, 899,000 and further reduced to $2,799,000 on

November 22, 2022. The Property was reduced again on December 9, 2022 to $2,749,000. That listing was terminated on February 3, 2023.

c) Three day after the termination of the previous listing for sale, on February 6, 2023, the Property was again listed for sale at a price of $2,699,000. It was reduced on April 5, 2023 to $2,550,000. The Property was further reduced on April 11, 2023 to $2,500,000. That listing was terminated on May 1, 2023.

d) On the same day as the previous listing, May 1, 2023, the Property was relisted for sale at a price of $2,490,000. It was reduced yet again on May 31, 2023 down to $2,449,000 and then further reduced on June 6, 2023 to $2,399,000 and relisted on July 12, 2023 at $2,588,000.

[36] As noted earlier in these Reasons, the Property was appraised on August 16, 2023 at $2,525,000.

[37] The Respondent filed its Petition on August 22, 2023. Master Bilawich granted an *Order Nisi* on October 30, 2023, with a four-month redemption period expiring on February 1, 2024, and a redemption amount of $2,139,735.52, plus interest accruing at the greater of 8.80% per annum or prime plus at 6.35%. The *per diem* interest was $789.46 on October 30, 2023 or $24,000 a month.

[38] On March 4, 2024, Associate Judge Vos granted an Order for Conduct of Sale. The property was then listed for sale by Simon Clayton of Macdonald Realty on behalf of the Respondent Petitioner. Mr. Clayton obtained his real estate license in 2003 and has remained at Macdonald Realty for the past 21 years. He has represented clients in over 450 transactions totaling over $550,000,000 in sales. He is a recipient of the Medallion Club award (10 years) from the real estate board of Vancouver, placing him in the top 10% of realtors in the City. He is a mentor at Macdonald Realty, is part of their training program, and deposed he is committed to fostering ethical practices and accountability.

[39] Mr. Clayton listed the Property for sale on March 24, 2024, initially at a price of $2,398,000. On May 1, 2024 the list price was reduced to $2,278,100. On July 10, 2024, the list price was reduced further to $1,995,000.

[40] During the period that the Respondent Petitioner had the Property listed for sale (prior to the acceptance of the offer that was before the Associate Judge on September 17, 2024), Mr. Clayton received 94 inquiries, which resulted in 34 viewings. Numerous offers were received, ranging from a low of $1,600,000 to a high of $1,920,000, as follows.

a) On June 23, 2024, an offer of $1,600,000 was received and rejected by the Respondent;

b) On July 2, 2023, an offer of $1,800,000 was received and counter-offered by the Respondent at $1,995,000 which was, at the time, $283,100 below the list price. The buyer made a further counter-offer of $1,820,000 to which the Respondent responded by repeating the previous offer at $1,995,000. The buyer showed no further interest;

c) On July 31, 2024, an offer of $1,920,000 was received and accepted by the Respondent; however the buyer was unable to secure financing and did not remove subjects;

d) On August 21, 2024, an offer of $1,860,000 was received and counter-offered by the Respondent at $1,925,000. The buyer showed no further interest;

e) On August 28, 2024, an offer of $1,850,000 was received and counter-offered by the Respondent at $1,925,000. The buyer further counter-offered at $1,900,000 with subjects, and the offer was accepted by the Respondent. However, the buyer did not remove subjects; and

f) On September 13, 2024, the offer that was before the Associate Judge was received at a price of $1,895,000 with subjects, which offer was accepted by the Respondent. Subjects were removed on September 23, 2024.

[41] Notably, Mr. Clayton's marketing efforts on behalf of the Respondent continued, under an anticipated sealed bid process, in the hope that competing bids would be received prior to the hearing of the Respondent Petitioner's application to approve the sale. On October 1, 2024, the listing price for the Property was reduced to $1,900,000. This generated eight additional inquiries and four more showings.

[42] Mr. Clayton continued to market the Property and advised all realtors of the extended bid deadline. Between October 10, 2024, and October 15, 2024, Mr. Clayton received four new inquiries and had one more showing. The party that viewed the Property did request a bid package but did not submit a bid. No other bids were received.

[43] The application for an order approving the sale of the Property was initially set to be heard on October 10, 2024. However, due to lack of court time, the application was adjourned to October 17, 2024; that was the next "foreclosure day" since Monday, October 13, 2024, was a holiday. No competing bids were presented on October 10, 2024.

[44] The Respondent underscores that Mr. Schwartzman's analysis assumes the actual units considered were directly comparable, adding that his analysis is not a proper appraisal and, further, the market response to the Property is very instructive, as is the significant effort made to sell the Property.at the highest value the market would bear.

Legal Analysis and Discussion

[45] In *366671 British Columbia Ltd. V. Arbutus Bay Estates Ltd*., 2021 BCSC 2334, the court considered the legal framework applicable to the approval of a sale in foreclosure proceedings, and reasoned as follows:

> [22] The parties agree that on an application for approval of sale in a foreclosure proceeding, the court must be satisfied the sale process was conducted in a "business-like manner" and that the proposed sale is "provident" in all the circumstances: *Mission Creek Mortgage Ltd. v. Angleland Holdings* Inc., 2013 BCCA 281, at para. 40; *Kokanee Mortgage MIC Limited v. 669655 B.C. Ltd.. 2014 BCSC 458* at para. 24; *Institutional*

> *Mortgage Capital Canada Inc. v. Plaza 500 Hotels Ltd.,* 2020 BCSC 888, at para. 34, leave to appeal ref'd 2020 BCCA 193.
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> [23] A "provident" price in the context of a foreclosure proceeding does not mean the best possible price the mortgagor could have obtained had they sold the Property themselves; the circumstances of a "forced sale" will inevitably be recognized by the market forces*: Institutional Mortgage Capital Canada Inc. v. Plaza 500 Hotels* at para. 103. The burden of proof is on the party applying for court approval, and that is *Kokanee* at para. 29.

[46] Considering the totality of the evidentiary matrix before me, I am satisfied that the Respondent has met its burden of proof. The evidence demonstrates the sale process was conducted in a "business-like manner" and that the proposed sale of the Property was "provident".

[47] I have certainly considered the Appellant's arguments made orally and in its written submissions that the 2023 Appraisal value is materially higher than the price approved by the Order Approving Sale. I have also considered the evidence presented by the Appellant from Mr. Schwartzman regarding the price of ostensibly comparable units including units in the same building as the Property. However, the August 2023 Appraisal is dated and Mr. Schwarzman is not a qualified appraiser, nor did he hold himself out as such. Moreover, I certainly agree with the Associate Judge that there were considerable and sustained marketing efforts at various price points that did not result in a sale until that under consideration before this Court.

[48] My conclusion in this regard is galvanized by the decision in *Lanyard Investments Inc. v. 3771 No. 3 Road Inc.,* 2024 BCSC 1664, at para. 23, where the court reasoned that appraisals are not always definitive or determinative. In *Lanyard*, the court relied on the analysis in *Romspen,* regarding the point in time where "the market speaks loudly" such that "appraisals become relegated to not much more than well-meant but inaccurate predictions". The same logic holds true in this case for both the 2023 Appraisal as well as the evidence of Mr. Schwartzman. Specifically, in *Romspen*, the court reasoned:

> [20] An appraisal is no more than an expert's opinion on what a property's sale price is likely to be if properly exposed to the market for an appropriate length of time. In a case where property has received a proper and lengthy exposure to the market, as I find this property has, there comes a point where

> the market speaks loudly and the appraisals become relegated to not much more than well-meant but inaccurate predictions. See *RBC v. Marjen Investments Ltd.* (1998), 1998 NSCA 37, 155 D.L.R. (4th) 538 (N.S.C.A.).

[49] The Property in this case was marketed for an extended period of time, with numerous and necessary price reductions. No offers were received while the Property was listed at $2,398,000. While listed at $2,278,100, two offers were received, one at $1,600,000 and one at $1,800,000 which was later increased to $1,820,000. More offers were received once the list price was reduced below $2,000,000. Those offers were all in the range of $1,850,000 to $1,920,000. No competing bids were submitted above the offer that was before this court. The market had indeed spoken.

[50] In the final analysis, on the facts before and in light of the guiding authorities, I find the Respondent satisfied the burden of establishing the sale process was conducted in a "business-like manner" and that the proposed sale is "provident" in all the circumstances. Quite apart from my own analysis, I also agree with the insightful reasons of the Associate Judge. I find no error of law in the decision and resulting order under Appeal.

[51] I am mindful that the Appellant is clearly disappointed with the sale price, and the outcome of this Appeal. However, the evidentiary matrix, when considered afresh and as a whole on this Appeal, simply does not support a failure on the part of the Respondent to market the Property in a business-like manner. Further, the evidence supports the conclusion that sale of the Property was for a price that was at fair market value, and that the sale was provident in the circumstances before the Court.

[52] This appeal is dismissed, with costs.

“Morellato J.”