

CANADA / JUDGMENT

Elite Mortgage Corp. v. Fell

2020 BCSC 2007

COURT

Supreme Court of British Columbia

DECIDED

18 December 2020

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2020 BCSC 2007 Elite Mortgage Corp. v. Fell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Elite Mortgage Corp. v. Fell,

2020 BCSC 2007

Date: 20201218

Docket: H218221

Registry: New Westminster

Between:

Elite Mortgage Corp.

Petitioner

And

Aaron Michael Fell, Stephen Squeo & Denise Squeo,

Stacy Lynn Fell, James Edward Mac Hardie,

Fairwest Holdings Ltd. a.k.a. Farwest Holdings Ltd.,

JB Tile & Stone Ltd., Lee Hansen, Tenants In Occupation,

Katheryn Veronica Berezowskyj

Respondents

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Respondent,

Fairwest Holdings Ltd. a.k.a.

Farwest Holdings Ltd. via teleconference:

B. Grewal

Counsel for the Respondent,

Kathryn Veronica Berezowskyj

via teleconference:

A. Kaderly

Place and Date of Hearing:

New Westminster, B.C.

October 30, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 18, 2020

Introduction

- [1] Fairwest Holdings Ltd. ("Fairwest") seeks payment out of court of approximately \$421,000 in respect of a mortgage granted by Aaron Michael Fell on August 1, 2019 (the "Fairwest Mortgage"). Mr. Fell granted the Fairwest Mortgage over property located at 18728 66 Avenue, Surrey, BC (the "Property") in order to secure the sum of \$400,000 that he owed to Fairwest. I note that at various places in the materials, Fairwest is referred to as "Farwest". For consistency, I will use the name "Fairwest" throughout.
- [2] Mr. Fell defaulted on the Fairwest Mortgage.
- [3] Fairwest was not Mr. Fell's only creditor nor the only party with a charge registered against the Property. In early 2020, Elite Mortgage Corp. petitioned the Property into foreclosure and on July 24, 2020 it obtained an order approving the sale of the Property for \$1,115,486.00.
- [4] On August 21, 2020, following completion of the sale of the Property, Elite Mortgage Corp. was paid out the amount owing to it, as was another mortgagee, Toronto Dominion Bank. The balance of the proceeds, \$567,024.64, was paid into court.
- [5] From that amount, \$150,391.20 was recently paid out to the Family Maintenance Enforcement Program in respect of support owing to Mr. Fell's former spouse.

- [6] There were a number of other charges registered against the Property which Fairwest claims priority over. It now seeks payment of the amount owing to it by Mr. Fell from the remaining sales proceeds.
- [7] Kathryn Berezowskyj opposes Fairwest's application in part. She has also filed her own application in which she seeks payment of 50% of the remaining proceeds to her. Ms. Berezowskyj is also a former spouse of Mr. Fell, from whom she separated in June 2019. She claims an entitlement to one-half of the proceeds from the sale of the Property pursuant to an order dated September 30, 2020 issued in her family law proceeding with Mr. Fell.

Background

- [8] While the essential facts underlying the two applications are summarized above, it is useful to provide a bit more background.
- [9] Ms. Berezowskyj and Mr. Fell were in a marriage-like relationship from January 2007 to June 29, 2019 when Ms. Berezowskyj moved out of the Property, which was the family home. Ms. Berezowskyj and Mr. Fell have two children together, ages 2 and 7. Mr. Fell's son from his former marriage also lived with them.
- [10] Ms. Berezowskyj filed a notice of family claim on August 16, 2019, in which she sought equal division of family property. On August 19, 2019, she registered a certificate of pending litigation ("CPL") against the Property.
- [11] On September 30, 2020, Ms. Berezowskyj obtained a final order in the family law case that included the following terms:
11. Except for the net equity in former family home located at 18728 66th Avenue, Surrey, British Columbia (the "Former Family Home"), the Respondent [Mr. Fell] will retain those assets that are in his name
 13. If there is any equity remaining in the Former Family Home after the sale thereof, the Parties will divide such equity equally, pursuant to s. 81 of the Family Law Act.
 15. The Respondent is solely responsible for all debts in his name and in the name of the company Breakwater Marine Ltd .and shall indemnify the Claimant with respect to the same, including but not limited to the Respondent's personal debts, the judgments and encumbrances registered against the Former Family Home, and corporate debts and liabilities of Breakwater Marine Ltd
- [12] The Fairwest Mortgage was entered into on August 1, 2019, a little over a month after Ms. Berezowskyj and Mr. Fell separated. The mortgage was registered in the land title office on August 2, 2019.
- [13] Mr. Miller, the director of Fairwest, described the Fairwest Mortgage in his 1st affidavit:

The Respondent, Aaron Mitchell Fell provided Farwest with the Mortgage to secure the sum of \$400,000 owing by him to Farwest.

[14] No evidence was provided by Fairwest about the alleged debt owing by Mr. Fell, including when--or even if--money was advanced by Fairwest to Mr. Fell. No written loan agreement was produced. The only reference to the debt I could find in the evidence is a term set out in the standard form mortgage, under the heading "Additional or Modified Terms" that states:

This mortgage is collateral security for a settlement of loan and boat sale amounts owing to Farwest Holdings Ltd. and JB Tile & Stone Ltd. ("the Mortgagees") by Breakwater Marine Ltd., the principal of which is Aaron Michael Fell who has guaranteed these loans and agreed to the settlement amount

[15] A copy of the Fairwest Mortgage document is in the record. Of note, under s. 5 "Payment Provisions", the applicable interest rate is stated to be "N/A". In a schedule to the mortgage, the lenders are identified as Farwest Holdings Ltd. and JB Tile & Stone Ltd.

[16] In Mr. Miller's second affidavit, he deposes that:

There was a verbal agreement between Farwest and Mr. Aaron Michael Fell in regard to interest rate that was to be charged on the mortgage. The parties had agreed upon 3.64% as the going rate of interest on a yearly basis.

[17] Also in the record is a title search for the Property which identifies the mortgagees as "Farwest Holdings Ltd .as to an undivided 60/100 interest [and] JB Tile & Stone as to an undivided 40/100 interest".

[18] Lastly, attached to an affidavit sworn by a legal assistant to Fairwest's counsel is a letter purportedly signed by Mr. Fell stating:

I Aaron Michael Fell hereby consent to Farwest Holdings Ltd. being paid the sum of \$414,000.00 plus costs in the sum of \$1,425.00 from the sale of the property which is the subject of the above noted proceeding.

[19] The proceeding referred to is this one in which Fairwest has brought its application. Mr. Fell's letter does not indicate when it was signed, apart from a reference to August 2020.

Legal Framework

[20] This case involves the interaction between provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA] and the Land Title Act, R.S.B.C. 1996, c. 250 [LTA].

[21] Sections 81 and 103 of the FLA provide:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

Enforceability of interest in property

103 (1) In this section, "spouse's interest" means the interest of a spouse arising under section 81 [equal entitlement and responsibility], a property agreement or an order respecting property division.

- (2) Section 29 of the Land Title Act applies to a spouse's interest in land.
- (3) If, on acquiring property other than land, a person does not have actual notice of a spouse's interest in the property, the spouse's interest is not enforceable against that person.
- (4) Despite subsections (2) and (3), a spouse's interest is enforceable against the other spouse from the date of separation, unless a property agreement between the spouses, or an order, provides otherwise.

[22] Section 29 of the LTA provides in part:

Effect of notice of unregistered interest

29 (1) For the purposes of this section, "registered owner" includes a person who has made an application for registration and becomes a registered owner as a result of that application.

- (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner

- (a) a transfer of land, or

- (b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than

- (c) an interest, the registration of which is pending,
 - (d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
 - (e) the title of a person against which the indefeasible title is void under section 23 (4).

[23] The operation of these provisions is addressed in *Bradshaw v. Stenner*, 2013 BCSC 2051, where Madam Justice Holmes, as she then was, said:

[38] Section 103 of the Family Law Act makes clear that a spouse's interest arising under s. 81 of that Act is subject to s. 29(2) of the LTA:

[reproduces s. 103]

- [39] Vukelic v. Vukelic, 43 A.C.W.S. (3d) 614, [1993] B.C.W.L.D. 2726 (S.C.) at para. 27, and Antenen v. Antenen (Guardian ad litem of) (1992), 68 B.C.L.R. (2d) 300 (S.C.), make clear that a spouse's interest in land acquired by reapportionment under the former Family Relations Act will rank ahead of a registered charge on the land only if the charge is pre-dated by both the triggering event (under the Family Relations Act) associated with the spouse's interest and registration of a *lis pendens* (now CPL) under the Land Title Act.
- [24] This point was confirmed by Mr. Justice Voith in *Nayyar v. Manufacturers Life Insurance Company*, 2016 BCSC 1587 at para. 49.

Discussion

Priority of Interests

- [25] Fairwest takes the position that this is a straightforward claim in debt and that it is entitled to payment of what it is owed by virtue of the fact that its mortgage has priority over any remaining charges registered against the Property, including the CPL registered by Ms. Berezowskyj.
- [26] Ms. Berezowskyj submits that she has a claim to one-half of the remaining net equity in the Property due to the final order issued in the family law proceeding.
- [27] She submits that by virtue of ss. 81 and 103 of the FLA, she is entitled to a one-half interest in the Property as a tenant in common as of June 29, 2019, when she and Mr. Fell separated. As a result, subsequent charges, such as the Fairwest Mortgage, could only attach to Mr. Fell's interest in the Property.
- [28] She submits that Bradshaw is distinguishable because she did not acquire her interest in the property through reapportionment, as was the case there, but by operation of s. 81 of the FLA, pursuant to which her interest vested immediately upon separation.
- [29] Ms. Berezowskyj cites *Joyal v. Joyal* (1995), 8 B.C.L.R. (3d) 148 (S.C.) in support of her position. The facts of that case are somewhat complicated but, essentially, it involved a family law proceeding between Mr. and Mrs. Joyal. The only family asset of any value was the former matrimonial home, which was encumbered by three mortgages, two of which were found to be family debt and the third a personal debt of Mr. Joyal. As part of the family law proceeding, each of Mr. and Mrs. Joyal was entitled to a one-half interest in the property.
- [30] Mr. Joyal's lawyer in the family proceeding commenced an action against him for unpaid fees. He obtained default judgment and registered that judgment against Mr. Joyal's one-half interest in the home. At the time he did so, there was no *lis pendens* (now a CPL) on the property protecting Mrs. Joyal's interest.

[31] The home was subsequently foreclosed upon and the net proceeds paid into court after payment of the three mortgages.

[32] Mrs. Joyal then brought an application for a declaration that her interest in the net proceeds ranked in priority to the lawyer's judgment. Mr. Justice Drost agreed. In his view, because the third mortgage attached to the property was found to be a personal debt of Mr. Joyal, payable out of his share of the property, at the time the lawyer registered his judgment, Mr. Joyal no longer had a beneficial interest in the property.

[33] Justice Drost said at paras. 26-30:

26 a judgment charges only the beneficial interest of the judgment creditor.

27 In *Davidson v. Davidson*, [1946] 2 D.L.R. 289 (S.C.C.), Estey, J. held that the B.C. Torrens Legislation retained the common law rule with respect to judgment creditors. Therefore, where the judgment debtor has disposed of his entire interest in the land, even though he may remain on the title as a registered owner, the judgment does not attach.

28 This rule is preserved in s. 79(2) of the Court Order Enforcement Act, which reads in part as follows:

- (2) From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor specified in the application referred to in section 80 in the same manner as if charged in writing by the judgment debtor under his hand and seal,
 - (a) to the extent of his beneficial interest in the land;...
 - (c) subject to the rights of a purchaser who, prior to the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment.

29 Thus, the effect of the two statutes is to provide a judgment creditor with a lien and charge on the subject land only to the extent of the judgment debtor's beneficial interest therein. It does not guarantee that a judgment registered against the title of a registered owner will attach to all or part of that owner's registered interest.

30 The rule that a judgment creditor can only attach to the beneficial interest of the judgment debtor, and can stand in no better position with respect to a beneficial interest in the land than does the judgment debtor himself, was relied upon by Coultas, J. in *Martin Commercial Fueling Inc. v. Virtanen*, (1993), 84 B.C.L.R. (2d) 289 (B.C.S.C.). In that case, the judgment creditor registered judgment against land in which the judgment debtor held a one-third interest as tenant-in-common. However, prior to registration of the judgment, the judgment debtor had joined in an agreement for the sale of the land to a third party. It was held that the judgment did not attach to the land because the debtor had already parted with his beneficial interest in the land. However, in the circumstances of that case, the judgment did attach to the judgment debtor's share of the net proceeds of sale.

- [34] Joyal was cited more recently by Madam Justice Wedge in *The Owners, Strata Plan No. VIS3578 v. Canan Investment Group Ltd.*, 2012 BCSC 339 where she confirmed at para. 37 that "[i]t is well established that a judgment creditor can only attach the interests of the judgment debtor".
- [35] In light of this principle, Ms. Berezowskyj submits that the Fairwest Mortgage only attached to Mr. Fell's one-half interest in the Property because it was registered after the beneficial interests in the Property had been divided, pursuant to ss. 81 and 103 of the FLA, giving Ms. Berezowskyj a one-half interest in the Property as a tenant-in-common.
- [36] In my respectful view, Joyal is distinguishable from this case. It dealt with a judgment, as distinct from a mortgage, and it applied s. 79(2) of the Court Order Enforcement Act, R.S.B.C. 1979, c. 75 (now s. 86(3), R.S.B.C. 1996, c. 78).
- [37] Here, the exact circumstances that arise are dealt with by s. 29 of the LTA, to which s. 103 of the FLA is expressly made subject. Section 29 makes it clear that a registered charge has priority to an unregistered interest.
- [38] This was confirmed by the court in *Bradshaw*. I do not agree with Ms. Berezowskyj that *Bradshaw* is distinguishable on the basis that Ms. Berezowskyj did not acquire her interest in the Property by reapportionment, but pursuant to s. 81 of the FLA. Section 103 of the FLA makes it clear that a spouse's interest under s. 81 is subject to s. 29 of the LTA.
- [39] For these reasons, I find that the Fairwest Mortgage has priority over Ms. Berezowskyj's interest in the Property.
- [40] In coming to this conclusion, I have not considered any further remedies Ms. Berezowskyj may have against Mr. Fell or what, if any, recourse she may have under the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 and/or the Fraudulent Preference Act, R.S.B.C. 1996 c. 164 for encumbering family property post-separation, as these issues were not before me.

Payment of Funds

- [41] With regard to Fairwest's application for payment out of the funds in court, notwithstanding my findings on the priority issue, I am not satisfied that the existing evidentiary record supports the relief sought. There are several flaws in Fairwest's application materials.
- [42] First, The Fairwest Mortgage describes the mortgagees as both Fairwest and JB Tile & Stone Ltd. Both are registered on the charge to the property, with Fairwest having a 60% interest and JB Stone a 40% interest. Despite this, the application is brought solely in the name of Fairwest. The application does not disclose any evidence about the relationship between Fairwest and JB Stone or the basis upon which Fairwest can apply for payment of the entire amount on its own.

- [43] Also, although perhaps a minor point, the title search lists "Farwest" as one of the mortgagees. The style of cause refers to "Fairwest" Holdings Ltd. a.k.a. "Farwest" Holdings Ltd. There is no evidence anywhere in the record explaining how or why Fairwest uses two different spellings of its name and which is in fact the proper legal entity.
- [44] Second, the evidence of the alleged underlying debt of Mr. Fell is wholly inadequate. The only descriptions of the alleged debt are reproduced at paras. 13 and 14 above; although Fairwest's application is also purportedly supported by Mr. Fell by way of the undated letter referred to in para. 18. There is no written loan agreement and the timing of the mortgage is suspect, following almost immediately upon Mr. Fell's separation from Ms. Berezowskyj. Mr. Fell's letter purporting to agree to the payment out to Fairwest is similarly suspect.
- [45] Section 29 of the LTA provides that a registered charge will have priority over an unregistered interest "except in cases of fraud in which [the charge-holder] has participated". Here, the evidence is such that I cannot be satisfied there is an absence of fraud so as to find that s. 29 applies. I am not suggesting there has in fact been fraud. Rather, Fairwest has simply not provided sufficient evidence to support its application for payment out of the funds.

Interest

- [46] Finally, Fairwest claims interest on top of the \$400,000 principal. Although the Fairwest Mortgage stated there was no interest payable, Fairwest claims the mortgage was amended by a "verbal agreement" between Mr. Miller and Mr. Fell for payment of interest at 3.64%. The alleged verbal agreement has no apparent date, does not stipulate from when it is effective, and does not address how and when interest will be compounded. Such an agreement--if it can even be called that--cannot amend the terms of the mortgage.
- [47] The alleged oral agreement is contrary to the long-standing requirement from the Statute of Frauds, now incorporated in s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253, that contracts in respect of land must be in writing and signed by the parties. As such, an oral agreement to add or vary the interest payable cannot amend a written mortgage contract that charges an interest in land: *Toronto-Dominion Bank v. Lenec* (1984), 60 B.C.L.R. 36; *Kendell v. Kendell*, 2006 ABQB 664 at paras. 21-35.
- [48] Furthermore, even if the alleged agreement was put in writing, the amount of interest owing would not be valid against other registered interests, such as Ms. Berezowskyj's, as it was not registered against title: LTA, ss. 27(1) and 29(2); *Kendell*, at para. 30.
- [49] To be clear, this is not a case in which the mortgage agreement did not state an interest rate such that the federal Interest Act, R.S.C. 1985, c. I-15 applies. Rather, the Fairwest Mortgage provided that no interest was payable and accordingly, Fairwest cannot now claim interest.

- [50] I would add that this alleged verbal agreement to pay interest, after the Fairwest Mortgage clearly excluded interest, underscores the suspicious nature of the circumstances surrounding the Mortgage.
- [51] For these reasons, I am unable to grant Fairwest's application at this time. It may reapply on a proper evidentiary foundation addressing the issues I have identified.

Conclusion

- [52] Fairwest's application is dismissed, with leave to reapply.
- [53] In terms of Ms. Berezowskyj's application, I have found that her interest in the Property ranks lower in priority to the Fairwest Mortgage. However, this is subject to Fairwest adducing evidence to establish the validity of its mortgage. In the circumstances, the appropriate order is to dismiss Ms. Berezowskyj's application with leave to re-apply in the event that Fairwest is unable to prove that its mortgage is valid.
- [54] The parties will each bear their own costs of these applications.

"Skolrood J."

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