

CANADA / JUDGMENT

Tekamar Mortgage Fund Ltd. v. Hegel

2018 BCSC 1369

COURT

Supreme Court of British Columbia

DECIDED

16 August 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1369 Tekamar Mortgage Fund Ltd. v. Hegel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tekamar Mortgage Fund Ltd. v. Hegel,

2018 BCSC 1369

Date: 20180816

Docket: SH49918

Registry: Kamloops

Between:

Tekamar Mortgage Fund Ltd.

Petitioner

And

Ron Hegel, also known as Ronald Hegel,

also known as Ronald Edward Hegel

Tekamar Mortgage Fund Ltd.

Thompson Valley Law Corporation

Respondents

Before: The Honourable Mr. Justice Butler

Reserved Reasons for Judgment

Counsel for the Petitioner / Respondent:

S.H. Stephens

P. O'Neill

Counsel for the Respondent R. Hegel:

T. Boyar

Place and Date of Hearing:

Vancouver, B.C.

August 1 and 2, 2018

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2018

Table of Contents

History of the Property and foreclosure proceedings. 4

Application of June 25, 2018. 6

Position of the appellant. 6

Position of the respondent. 7

Standard of review.. 7

Application to adduce fresh evidence. 9

Test for approval of sale. 10

Analysis. 11

Requirement for a new appraisal 11

Failure to take into account the development potential 13

The Property has not been properly marketed. 14

Summary. 15

[1] The appellant, Ron Hegel, is the registered owner of a 59.3-acre property in Monte Creek, British Columbia (the "Property"). He appeals an order for sale of the Property made by Master Taylor on June 25, 2018 (the "Order").

[2] Foreclosure proceedings were initiated by Interior Savings Credit Union ("Interior Savings") in relation to the Property on March 12, 2014. Mr. Justice Ehrcke granted an order nisi on June 2, 2014. Interior Savings obtained an order for exclusive conduct of sale in December 2014 and the Property has been listed for sale since that time. Tekamar Mortgage Fund Ltd.

("Tekamar"), the respondent on this appeal, held a second and third mortgage against the Property. In August 2016, when Interior Savings applied for approval of an offer to purchase the Property for \$725,000, Tekamar paid out Interior Savings and took an assignment of the first mortgage. The amount required to pay out the first mortgage, including costs, was approximately \$730,000, a little more than the full amount of the purchase price. The amount owing to Tekamar is now in excess of \$1.6 million (\$888,935 on the first mortgage; \$635,645 on the second mortgage; and \$105,835 on the third mortgage). There are also numerous judgments registered against the Property.

- [3] The current listing agent for the Property, Denise Bouwmeester of RE/MAX Real Estate, has marketed the Property since she received the listing in March 2015. She continued to act as the listing agent after Tekamar took the assignment and obtained an order for conduct of sale in September 2016. Tekamar accepted an offer to purchase the Property earlier this year and brought the application on June 25, 2018 to approve that sale.
- [4] The Order approved the sale to Loralie Thomson, Leon Thomson and Vernon Ferris for \$1.1 million, with a closing date set for 30 days after court approval. The closing date was extended to August 3, 2018. I was advised that the purchasers will not agree to a further extension of the closing date. Accordingly, there is some urgency to the appeal. I heard the appeal on August 1, 2018, and indicated to the parties that I would provide my ruling the next day. On August 2, 2018, I dismissed Mr. Hegel's appeal with costs to the respondent. I indicated to the parties that I would provide written reasons for my decision. These are my reasons for dismissing the appeal.

History of the Property and foreclosure proceedings

- [5] Mr. Hegel and his ex-wife Sherrielynn live on the Property and have done so for many years. Mr. Hegel's brother also lives on the Property. Mr. Hegel is on a disability pension and his ex-wife is also disabled. The Property is on the South Thompson River and has approximately one mile of riverfront. Part of the Property is zoned Agricultural (AF-1) and part is zoned Small Holdings (SH-1). There are two five-acre sections at the east end of the Property with the latter zoning. Mr. Hegel wants to subdivide the Property to create two five-acre lots from those sections of the Property. He has been working towards that goal for some time. A 1,620 sq. ft. mobile home is located on the Property, along with a 65 ft. x 42 ft. workshop with a three bedroom suite upstairs. There is a considerable amount of junk and scrap metal on the Property, including machinery, trucks, skidoos, mining equipment, vehicles and other materials. The Property also has a gravel pit.

- [6] The appellant maintains that the Order should be set aside because the purchase price does not reflect the true value of the Property. Determination of the value of the Property is a difficult issue. The annual property assessment notices from BC Assessment for the last four years show an assessed value for the Property that greatly exceeds the amount of the approved offer. The assessed values for the last four years are: \$1.59 million in 2015; \$1.966 million in 2016; \$2.171 million in 2017; and \$2.312 million in 2018.
- [7] The only appraisal before the Court, dated July 9, 2015, values the Property at \$1.2 million. It was commissioned by Interior Savings after the Property had been listed for sale for about six months. When the proceeding was commenced, Mr. Hegel obtained an appraisal that estimated a market value of \$2.237 million. Presumably that was the appraisal used when the original listing price was established. The body of that appraisal report was not before Master Taylor but the cover letter for that appraisal, dated December 17, 2014, is attached to Mr. Hegel's affidavit of June 25, 2018 and indicates the appraised value.
- [8] While the assessed values suggest that the Property has significantly more value than the ordered sale price, the history of attempts to sell the Property suggests that the Property has a lower value. The Property was first listed for sale after the order nisi for \$2.2 million. Subsequently, the list price was reduced many times, as follows:
- December 2014 to March 2015: \$2,200,000;
 - March 2015 to July 2015: \$1,500,000;
 - July 2015 to October 2015: \$1,200,000;
 - October 2015 to December 2015: \$1,100,000;
 - December 2015 to February 2016: \$999,900;
 - February 2016 to March 2016: \$799,000;
 - October 2016 to December 2016: \$1,600,000 (the price was increased after Tekamar obtained an order for conduct of sale in September 2016);
 - February 2017 to August 2017: \$1,490,000;
 - August 2017 to September 2017: \$1,390,000;
 - October 2017 to March 2018: \$1,290,000; and
 - March 2018 to present: \$1,240,000.
- [9] Prior to the offer approved by the Order, only three offers were made for the purchase of the Property: \$500,000 in February 2016; \$725,000 in May 2016; and \$955,000 in March 2018. The latter offer was by the same individuals who made the offer approved by Master Taylor.

Application of June 25, 2018

- [10] Mr. Hegel was served with the application to approve the sale and attended at the hearing. He was not represented by counsel. Tekamar's counsel made submissions to the court and other counsel appeared for some of the parties who held judgments registered against title. Mr. Hegel did not file an application response. He did swear an affidavit that was filed on the day of the hearing and was considered by the court after a recess was taken to permit counsel and the court to read the affidavit. Master Taylor permitted Mr. Hegel to make limited submissions. Mr. Hegel indicated that he had other sources of funds that he expected would become available to pay out Tekamar. He emphasized that the Property was worth much more than the sale price. Master Taylor rejected Mr. Hegel's submissions. He did not give detailed reasons but noted that Mr. Hegel had not taken steps to preserve his equity in the Property even though he had years to do so. He also relied on submissions from Tekamar's counsel in rejecting some of the statements in Mr. Hegel's affidavit.

Position of the appellant

- [11] The appellant makes two principal submissions on appeal. He says that the Court cannot be satisfied that the purchase price reflects the true market value of the Property. The fact that the sale price is less than 50% of the value in the 2018 assessment notice from BC Assessment is striking. The fact that the court relied on an appraisal that was three years out of date is concerning. Second, he says that the Property was not properly marketed. The realtor who marketed the Property for the last three years did not appreciate the subdivision potential and failed to direct marketing to sophisticated developers.
- [12] The appellant says that an order approving a sale is a final order and so the appeal must proceed as a rehearing on the basis of the record before the master on a standard of correctness. He says that even though the Order was discretionary, this Court can substitute its assessment of the propriety of the sale based on the evidence before the master. In the circumstances here, the appellant says the Court should conclude that the sale of the Property for \$1.1 million was improvident.
- [13] The appellant also presented new evidence in the form of an affidavit from Mr. Hegel. He argues that the fresh evidence which provides marketing information about a nearby property should be admitted on this appeal.

Position of the respondent

- [14] The respondent says the order in question is discretionary and so considerable deference must be afforded to the decision because of the considerable experience masters have in dealing with foreclosures. The respondent says the Order should not be set aside unless the Court clearly concludes that the discretion was wrongly exercised either because insufficient weight was given to relevant considerations or the Order would result in an injustice.

- [15] The respondent says there is no reason to interfere with the Order; there is no reason to conclude that the master's exercise of discretion was clearly wrong. When considering if a sale is provident numerous factors must be considered, including the length of time the property has been exposed to the market, the number of competing offers and the extent of the deficiency that will result from the sale. All of those factors strongly support the master's exercise of discretion. There is no rule that a mortgagee must submit a fresh appraisal for each sale application. Further, the B.C. Assessments are not admissible as evidence of value. After a certain amount of exposure to the market, the price that is offered speaks more directly to the value of the property than does an appraisal.
- [16] The respondent opposes the admission of the new evidence on the basis that it does not meet the test for fresh evidence on an appeal.

Standard of review

- [17] Both counsel contested the standard of review as put forward by the other party. The appellant relies on *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd.*, 2014 BCSC 458, and *Canadian Western Bank v. 353806 B.C. Ltd.*, 2017 BCSC 1072. The appellant emphasized that under the test set out in *Kokanee*, the appeal must proceed as a *de novo* hearing and that the standard of review is correctness. The respondent relies on *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317, and stressed the deference that is owed to masters given their great experience in foreclosure applications.
- [18] While the parties emphasized different aspects of the standard of review to be applied when this court entertains an appeal from the decision of a master in a foreclosure, the standard of review is not controversial. Indeed, the positions of the parties were not dissimilar.
- [19] In *Kokanee*, Mr. Justice Gaul noted at para. 14 that because a final order for sale raises questions vital to the final issue, an appeal from an order for sale is a rehearing on the merits and the judge is able to substitute his or her own assessment of the evidence for that of the master. However, in commenting on the standard of review at para. 15, he referred to the decision of the Court of Appeal in *Baron Enterprises*:

15 The parties to the present appeal agree that the master's order in question is a final order and therefore the proceeding before me is in essence a *de novo* hearing. While the law permits me to substitute my judgment for that of the master, in considering this appeal I have kept in mind the fact that masters hear and resolve applications for the approval of sales in foreclosure proceedings on a much more regular basis than judges of this court, and consequently they have accumulated a level of expertise in this area of law that should not be ignored or quickly discounted. On this point, I have taken note of and have adopted the following observations of Mr. Justice Esson in *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317:

- [44] the masters, a relatively small and cohesive group, have heard the great majority of applications to approve sales. They have gained a level of experience in these difficult matters which is higher than that of most judges. That being so, it is appropriate that judges hearing appeals from masters in these cases should start with the assumption that the masters understand the legal principles and factual considerations applicable to such applications.
- [45] In saying that, I should not be taken as suggesting that the principles laid down in *Abernim Corp. v. Granges Explor. Ltd.* [citation omitted] should be modified . . . But, in deciding whether to give effect to a different view, a judge should give due recognition to the reality that masters have certain advantages arising out of their great experience in matters of this kind.
- [20] I take this to be an accurate statement of the law. On an appeal from an order for sale, this court must consider the evidence that was before the master and may substitute its judgment for that of the master. However, in doing so, the court must give due recognition to the expertise that masters bring to consideration of applications to approve sales in foreclosure proceedings. In other words, some deference is owed to the master's decision.
- [21] Here, I do not have the benefit of considered reasons from Master Taylor. Accordingly, it was necessary for me to reserve on the appeal overnight so I could examine the evidence that was before the court when the Order was made. Having done that, I am satisfied that the sale of the Property was provident and that the appeal should be dismissed.

Application to adduce fresh evidence

- [22] The appellant applies to adduce fresh evidence in the form of an affidavit of Mr. Hegel, dated August 1, 2018. Mr. Hegel swears that he became aware of a recent listing for a 50-acre property with a similar exposure to the river that has been listed for sale for \$6.9 million.
- [23] The test for admission of fresh evidence is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775. For fresh evidence to be admitted it must meet the following test:
- the evidence should generally not be admitted if, by due diligence, it could have been adduced at the hearing;
 - the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue;
 - the evidence must be reasonably capable of belief; and
 - it must be such that if believed it could reasonably be expected to have affected the result.
- [24] The new affidavit does not meet the test for admission of fresh evidence. The fact of the listing of the 50-acre property for sale at that price is reasonably capable of belief and the listing is new such that the information could not have been adduced at the hearing of the application for approval of the sale. However, the application fails on the other two branches

of the test. The fact that another property was recently listed for sale for a higher price is of little assistance to the Court. The features of the new property are different from those of the Property. The new property is five kilometers closer to Kamloops. The information received from the listing realtor suggests the new property has potential for a single-family or townhouse development with zoning approval for a golf course with a 100-unit resort. The Court has no way to assess any of this information, including whether the list price is reasonable or realistic.

- [25] Given the inability of the Court to compare the attributes of the property referred to in this affidavit to those of the Property, the listing information could not reasonably be expected to have affected the Order. The application to adduce fresh evidence is dismissed.

Test for approval of sale

- [26] In *Kokanee* at para. 27, Mr. Justice Gaul set out the test to be applied when considering whether a sale is provident:

27 My review of the jurisprudence leads me to conclude that before finding a proposed sale is provident, the court must be satisfied that both the marketing and sales process has been a fair and proper one for all, and that the proposed price reflects the fair market value for the property in question.

- [27] However, the market value of a property cannot always be determined by appraisal evidence. As noted in *Bank of Nova Scotia v. Marvin*, 2016 BCSC 1033, at para. 28, a property is only worth what someone will pay for:

28 An appraisal report in a foreclosure proceeding is not a precise determination of the value of a property but is simply an educated opinion by an expert as to the value of a property. Ultimately, however, a property is worth what someone is prepared to pay for it after it has been adequately exposed to the market. In some circumstances, the marketing history of a property can lead to the conclusion that the appraiser's opinion was incorrect.

Analysis

- [28] The issue to be considered on appeal is thus whether there was a fair marketing and sales process and whether the proposed sale price reflects market value for the Property. I would answer both of these issues in the affirmative. In doing so, I reject the three main arguments raised by the appellant, which are that:

- given the difference between the sale price and the B.C. Assessment values, the court should not have approved the sale without a new appraisal;
- the sale price fails to take into account the development potential of the Property and the fact that Mr. Hegel has taken significant steps forward to facilitate subdivision of the two five-acre lots; and

- the Property has not been properly marketed by Ms. Bouwmeester.

Requirement for a new appraisal

[29] The appellant concedes that there is no requirement for a new appraisal, but says the onus of proof is on the respondent who cannot satisfy the Court that the sale price is provident without an updated appraisal. While this argument has some appeal, the history of the foreclosure overrides the concern about the dated appraisal.

[30] The Property has been listed for sale for three and a half years, most of that with RE/MAX, a large international real estate broker. As noted in the marketing report prepared by Ms. Bouwmeester, dated May 4, 2018, the Property has been continuously marketed by the following means:

- a large (8' by 16') sign is posted on the Property;
- the listing appears in the Kamloops This Week real estate publication and on the internet site for that publication;
- it is marketed on numerous sites including: mls.ca, realtor.ca, remax.ca, global.remax.com (with translation) and dianebouwmeester.com, as well as The Western Investor. The mls, realtor and bouwmeester sites include an aerial video of the Property that was made by drone. The bouwmeester site had numerous professional photos; and
- a package of information was provided to realtors and interested parties that included a title search, regional district building information request, and information on septic field, archeological issues, water licenses etc.

[31] In spite of this lengthy exposure, the Property has attracted little interest and few offers. The approved offer is the highest received during the entire listing. This history suggests the Property has significant negative features. The May 14, 2018 marketing report and Ms. Bouwmeester's June 6, 2016 report that is attached to her affidavit of July 19, 2016 describe some of the factors that affect the Property's marketability. The Property is full of equipment, including "many vehicles in different conditions and ages, semis, larger vans plus a lot of scrap metal." Ms. Bouwmeester notes that the old equipment is visible from the highway, which may discourage potential buyers. She also notes that the presence of the old vehicles and equipment may cause potential purchasers to have concern about contamination of the Property. There is nothing in the material before the Court suggesting that these difficulties have been ameliorated.

[32] Ms. Bouwmeester's affidavit and 2016 market report also provided information about steps taken by Mr. Hegel to interfere with the marketing of the Property. While there was no recent evidence about such activities, his activities appear to have made the marketing difficult up to 2016.

- [33] While Mr. Hegel's affidavit describes steps he has taken to try to subdivide the Property, counsel conceded that subdivision is not imminent. Further, if Mr. Hegel's assertions about the prospects for successful subdivision have merit, he could have taken steps to buy out Tekamar's position and develop the Property. His failure to do so or raise financing to enable this to take place during the three and a half years since the order nisi suggests that the subdivision option does not add significant value or that it has too much risk.
- [34] The comments in Marvin are relevant here; an appraisal in a foreclosure is no more than an educated opinion as to the value of a property but ultimately, "a property is worth what someone is prepared to pay for it after it has been adequately exposed to the market." The July 9, 2015 appraisal and the earlier appraisal suggest very different values for the Property. It is evident that it is not easy to determine the value of this property. However, the order nisi was granted more than four years ago. Mr. Hegel has been motivated to sell the Property or refinance it but has been unable to do either. The mortgagees have marketed it with a major brokerage firm for three and a half years. In these circumstances, it was not unreasonable for the master to approve the sale without a new appraisal.
- [35] Before leaving this argument, I should comment on the appellant's reliance on the BC Assessment values for the Property. I agree that the much higher value shown in the annual assessments in comparison with the sale price raises a question for the Court. However, the assessments do not provide admissible evidence of value: *Dosanjh v. Liang*, 2015 BCCA 18. Accordingly, I must consider the real evidence of value and that includes not only the appraisals but the historical evidence about the attempts to sell the Property. I am not persuaded that in these circumstances the annual assessments provide reliable, let alone admissible, evidence of value.

Failure to take into account the development potential

- [36] As I have previously commented, while Mr. Hegel has taken steps to pursue this issue, there is no certainty that the Property can or will be subdivided. The Property is some distance from Kamloops and there are still significant hurdles to subdivision.
- [37] As this court has noted in *Romspen Mortgage Corporation v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222, and in *Bancorp Income Mortgage Fund Ltd. v. Central Manor Holdings Ltd.*, 2011 BCSC 126, the potential for development does not always translate into higher market values in a foreclosure.
- [38] In *Romspen* the court approved a sale of development property for \$5.9 million where the property had been listed for sale for two and a half years and other conditional offers had been presented in excess of \$11 million. Mr. Justice Thompson noted at paras. 21-24 that negative contingencies that bear on the prospects for development are an integral feature of the property and that "[m]arket value is not determined in a vacuum or as a thought experiment."

[39] In Bancorp Income Mortgage Fund, Master Bouck noted the marketing efforts made by the receiver and concluded at para. 50:

50 In the simplest of terms, the market has spoken. The Property has attracted few offers and only one serious buyer. The offer before the court is the best evidence of the Property's fair market value.

The Property has not been properly marketed

[40] The appellant submits that the evidence shows that the Property has not been marketed to sophisticated buyers. The failure to do so means that the sale price is improvident and the Order should be set aside to permit further marketing to a sophisticated audience.

[41] A review of the evidence provides no support for this argument. I have already indicated that the Property has been marketed by a large international real estate broker for three and a half years. While the marketing may not have been carried out in the way that urban development properties are marketed, I can conclude that the Property was widely exposed to potential purchasers in Kamloops and beyond. More importantly, it is very clear from the evidence that it would be difficult to market the Property in a targeted way. This is not a sophisticated development property; it is rural property a considerable distance from Kamloops. Parts of the Property are filled with abandoned vehicles and scrap metal. Further, the appellant has taken active steps to interfere with the marketing of the Property.

Summary

[42] The appeal is dismissed with costs to the respondent.

"BUTLER J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/13/2018BCSC1369.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/tekamar-mortgage-fund-ltd-v-hegel-2018>

Prepared on 26 October 2026 · Esheria