COURT OF APPEAL FOR ONTARIO

CITATION: Bianco v. Deem Management Services Limited, 2021 ONCA 859
DATE: 20211202
DOCKET: C68214 (M52219)

Gillese, Trotter and Nordheimer JJ.A.

BETWEEN

Donald Dal Bianco

Applicant (Appellant)

and

Deem Management Services Limited and
The Uptown Inc.

Respondents

David T. Ullmann and Brendan Jones, for the appellant

Eric O. Gionet, for the respondent, Maxion Management Services Inc.

R. Brendan Bissell and Joël Turgeon, for the receiver, Crowe Soberman Inc.

Jeffrey A. Armel, for EXP Services Inc.

Harold T. Rosenberg, for Deep Foundations Contractors Inc.

Edward L. D'Agostino, for Kieswetter Excavating Inc.[1]

Heard: November 17, 2021

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated March 10, 2020, with reasons reported at 2020 ONSC 1500.

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[1] Counsel for the lien claimants EXP Services Inc., Deep Foundations Contractors Inc. and Kieswetter Excavating Inc. appeared but did not make any written or oral submissions.

Nordheimer J.A.:

[1] Donald Dal Bianco appeals from the order of the motion judge, who determined that the lien claimants in this matter, including the respondent, Maxion Management Services Inc. ("Maxion"), had priority over the appellant's registered mortgage. For the following reasons, I would dismiss the appeal.

A. BACKGROUND

[2] The motion proceeded on the basis of an agreed statement of facts. A summary of those agreed facts is sufficient to set the background for the motion.

[3] On May 31, 2018, pursuant to an order of the Superior Court of Justice, Crowe Soberman Inc. was appointed as Receiver of:

1. the property known municipally as 215 and 219 Lexington Road, Waterloo, Ontario (the "Real Property"),
2. the assets and undertakings of Deem Management Services Limited related to the property, and
3. the property, assets and undertakings of Uptown Inc.

[4] The receivership arose out of a project that contemplated the redevelopment of the Real Property as a seniors' retirement residence called the Uptown Residences (the "Uptown Project"). The respondent, Maxion, was the general contractor on the Uptown Project. At some point in early 2018, Maxion was advised to cease construction. Shortly after construction ceased, various service providers

registered construction liens against title to the property, commencing on March 7, 2018, that ultimately totalled $7,673,672.48.

[5] The Uptown Project was sold by the Receiver in the summer of 2018. After making certain distributions, including payment of the first and second mortgages, the Receiver still holds in trust the sum of $5,477,224.57 (inclusive of interest but exclusive of the fees of the Receiver and its counsel) from the proceeds of sale.

[6] As a result of competing priority claims between the lien claimants and a third mortgage held by the appellant, the Receiver has not been able to distribute these remaining funds.[2]

[7] The third mortgage was granted by Deem Management to the appellant on February 14, 2018 and registered on February 23, 2018. The third mortgage was registered after the time when the first lien arose. The third mortgage secured the principal amount of $7,978,753.45. The amounts secured by the third mortgage were all advanced between 2012 and 2015 without security having been registered. The first advance was made on April 22, 2012, and the final advance was made on January 22, 2015.

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[2] The Receiver identified that the third mortgage may be invalid, including under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, and the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33. By order of the Superior Court of Justice, the determination of that issue awaits the determination of the priority issue raised in this case.

[8] All of the funds advanced, that were secured by the third mortgage, were intended, and were in fact used, in an improvement within the meaning of s. 78 of the *Construction Act*, R.S.O. 1990, c. C.30, on the Real Property through the Uptown Project.

[9] As for the procedure on the motion, the parties agreed that Maxion would be the moving party, the appellant would respond, and the Receiver would also make submissions. Counsel for some of the other lien claimants appeared on the motion but did not make submissions or file material. Some of the lien claimants also appeared on this appeal, but again did not make submissions or file material.

B. THE DECISION BELOW

[10] The motion judge began her analysis with reference to various sections of the *Construction Act* but she focussed on s. 78.

[11] The motion judge correctly noted that the general intention of s. 78 is to give priority to lien claimants over mortgages, subject to certain defined exceptions. Those exceptions are set out in s. 78. The motion judge said that the onus is on the mortgagee to prove that its mortgage falls within one of those exceptions in order to gain priority over the lien claimants. In support of these general principles, the motion judge cited *Boehmers v. 794561 Ontario Inc.* (1993), 14 O.R. (3d) 781 (Gen. Div.), aff'd. (1995), 21 O.R. (3d) 771 (C.A.).

[12] The motion judge referred to both of the exceptions that the appellant alternatively sought to bring itself within, namely, ss. 78(2) and 78(6). The motion judge decided that neither of those exceptions applied to the third mortgage. She therefore concluded that the liens had priority over the third mortgage.

[13] In reaching her conclusion, the motion judge also explained that the appellant's position, if accepted, would be contrary to the proper functioning of the *Construction Act*. She said, at para. 42:

> If mortgagees are entitled to "lie in the weeds" while advancing funds for the project and then attempt to gain priority later by registering mortgages after liens arise, this would be unfair to lien claimants and contrary to the overall protection intended by the Act.

C. JURISDICTION

[14] Before turning to my analysis of the issues raised, I should explain how this appeal comes before this court instead of the Divisional Court as would normally be the case under s. 71(1) of the *Construction Act*.

[15] After this appeal was launched, the Receiver brought a motion for directions as to the proper venue for the appeal. A panel of this court ruled that the appeal lay to this court because the order in question had been granted, at least partly, in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*, R.S.C. 1985,

c. B-3.[3] The panel noted that the Receiver had authority to seek the court's directions under s. 249 of the *Bankruptcy and Insolvency Act* and paragraph 34 of the receivership order. Consequently, any appeal of the resulting order lay to this court under s. 193 of the *Bankruptcy and Insolvency Act*.

[16] That decision then led to a motion to quash the appeal, brought by the respondent Maxion, on the basis that leave was required under the *Bankruptcy and Insolvency Act* because the appeal did not fit within the subsections of s. 193 relied upon by the appellant, namely ss. 193(a)-(c). The appellant subsequently brought a motion for leave to appeal, which was heard by the panel at the same time as the appeal on the merits.

[17] I do not consider it necessary to resolve the issue raised by the motion to quash for two reasons. First, the issue was not pressed by counsel at the hearing. Second, even if the appeal does not fit within any of the subsections relied upon (and I do not make any finding in that regard), I would grant leave to appeal under s. 193(e). The issues raised are of importance to the law relating to construction liens generally and the parties have fully argued those issues.

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[3] *Dal Bianco v. Deem Management Services Limited*, 2020 ONCA 585, 82 C.B.R. (6th) 161.

D. ANALYSIS

[18] As a starting point, it is useful to set out the relevant portions of s. 78, which read:

> (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.
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> (2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.
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> …
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> (6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,
>
> > (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
> >
> > (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

[19] I will consider the two subsections relied upon by the appellant in the same order that the motion judge did, beginning with s. 78(6).

[20] With respect to subsection 78(6), I agree with the motion judge that, on its plain meaning, the subsection does not apply to the third mortgage. In particular, the subsection refers to “any advance made in respect of” the mortgage. In this case, the advances were made well before the third mortgage was given and registered. Indeed, the third mortgage was given and registered more than three years after the last advance and almost six years after the first advance. I do not see how, in those circumstances, it could be said that the advances were “made in respect of” the third mortgage.

[21] On this point, a great deal of effort was spent by the appellant with reference to the legislative history of s. 78 and, in particular, the stated intention of the legislature to avoid the effects of the decision of the Supreme Court of Canada in *Dorbern Investments Ltd. v. Provincial Bank of Canada*, [1981] 1 S.C.R. 459. In *Dorbern*, the court had held that a subsequent registered collateral mortgage took priority over an unregistered lien even where the work covered by that lien predated the mortgage. Based on *The Mechanics’ Lien Act*, R.S.O. 1970, c. 267, as it was then worded, the court found that registration set the relevant priorities, absent specific notice of the lien.

[22] The appellant criticizes the motion judge for failing to refer to this legislative history. In my view, that criticism is misplaced. While the motion judge may not have referred to the legislative history, her decision is consistent with the intent of s. 78, to the degree that that intent is revealed by the legislative history. Of more

importance is the fact that the motion judge's conclusion is consistent with the wording of s. 78(6).

[23] The decision in *Dorbern*, and its impetus for changes to the provisions of the *Construction Act*, have limited relevance to the issues raised by this case. Here, the mortgage was not a collateral mortgage but a direct mortgage. Further, the legislative change *Dorbern* caused, namely the addition of s. 78(5), is of no direct relevance to the issues this court is called upon to determine.

[24] The appellant also faults the motion judge for relying on two previous decisions which the appellant submits are distinguishable from this case. Those two decisions are *Jade-Kennedy Development Corp. (Re)*, 2016 ONSC 7125, 72 C.L.R. (4th) 236, aff'd 2017 ONSC 3421, 72 C.L.R. (4th) 256 (Div. Ct.), and *XDG Ltd. v. 1099606 Ontario Ltd.* (2014), 186 O.A.C. 33 (Div. Ct.).

[25] The appellant attempts to distinguish those two cases on the basis that they involved collateral mortgages used to secure advances unrelated to the property. The appellant points out that the third mortgage was a direct mortgage to secure advances that led to the improvements on the Real Property.

[26] However, having attempted to make that distinction, the appellant then curiously goes on to submit that, in enacting s. 78, the legislature did not intend to distinguish between collateral and other mortgages. Having thus eliminated the basis on which it attempts to distinguish these two cases, the appellant resorts to

submitting that the two decisions were wrongly decided because those cases also failed to take into account the “true intent” of the legislature.

[27] In my view, the appellant’s effort to avoid the effects of these two cases fails. Those two decisions are consistent with what both the motion judge and I say is the effect of the plain wording of s. 78(6), that is, that a mortgage will only be given priority to the extent that any advances are made “in respect of” the mortgage. That was not the factual situation in those two cases, and it is not the factual situation here. Indeed, it was not the factual situation in *Dorbern*, where the Supreme Court of Canada reached the same conclusion in its interpretation of s. 14(1) of *The Mechanics’ Lien Act* and the proper meaning to be given to “advances made on account of any conveyance or mortgage”.

[28] The appellant’s effort to avoid the effect of *Dorbern*, on this point, by noting the difference in the wording of the two subsections between “on account of” and “in respect of”, the former being narrower than the latter, is unpersuasive in the context of these cases and these legislative provisions.

[29] I now turn to s. 78(2) where the wording is, I accept, less plain. However, notwithstanding that lack of clarity, I reach the same conclusion on the facts of this case. I accept that the thrust of s. 78(2), and the wording “[w]here a mortgagee takes a mortgage with the intention to secure the financing of an improvement”, is

to restrict the priority of the lien claims relating to that improvement solely to any deficiency in the holdback amount, and not over the mortgage generally.

[30] In this case, though, the appellant cannot bring itself within that exception for the same reason that undercuts the appellant's reliance on s. 78(6), and that is that the wording of s. 78(2) suggests that the intention to secure the financing operates prospectively. In other words, to fit within s. 78(2), the mortgagee must take the mortgage with the intention to secure financing of an improvement, which financing is then made. It does not operate retrospectively, that is, with respect to an intention to secure financing of an improvement that has already been made.

[31] That conclusion with respect to the intention of s. 78(2) is consistent with the intention of s. 78 generally, which is to give priority to lien claimants. If a secured party wishes to propel its claim past the general priority given to lien claimants, then it bears the onus of bringing itself clearly within one of the exceptions set out in s. 78. In this case, the appellant has failed to discharge that onus, both with respect to s. 78(6) and s. 78(2).

[32] Before concluding, I will address two other points raised by the appellant. First, the appellant says that the motion judge erred in failing to address the submissions of the Receiver. The motion judge was not required to specifically address any party's submissions. What the motion judge was required to do was

address the substance of all of the submissions made and reach a conclusion in light of all of those submissions. That is what the motion judge did in this case.

[33] Second, the appellant complains about the "public policy" point that the motion judge made, in paragraph 42 of her reasons, where she referred to mortgagees not being entitled to "lie in the weeds" while advancing funds. I do not consider it necessary to comment on the manner in which the motion judge expressed the point. The *Construction Act* sets out the general principle of providing lien claimants with priority. The basic concern that the motion judge identified regarding any conclusion that would undermine that legislative intent remains a valid one.

E. CONCLUSION

[34] I would dismiss the appeal with costs to the respondent, Maxion, in the agreed amount of $30,000 inclusive of disbursements and HST. The Receiver did not seek costs.

Released: December 2, 2021 "RRS"

"Grant Huscroft j.a."

"I agree. R.R. Sharpe J.A."

"I agree. K.E. Feldman J.A."