# COURT OF APPEAL FOR ONTARIO

CITATION: Scott, Pichelli & Easter Limited v. Dupont Developments Ltd., 2022 ONCA 757
DATE: 20221107
DOCKET: C70461

Lauwers, Roberts and Trotter JJ.A.

BETWEEN

Scott, Pichelli & Easter Limited as assignee for CAM Moulding & Plastering Ltd. and Gentry Environmental Systems Ltd. by its Trustee, Scott, Pichelli & Easter Limited

Plaintiffs (Appellants)

and

Dupont Developments Ltd., The Rose and Thistle Group Ltd., Florence Leaseholds Limited, Beatrice Leaseholds Limited and ADA Leaseholds Limited

Defendants (Respondents)

Antonio Conte and Ilona Isakovitch, for the appellants

Michael A. Handler and Emily Evangelista, for the respondents

Heard: October 11, 2022

On appeal from the judgment of the Divisional Court (Justices Michael A. Penny, Phillip Sutherland, and Lise G. Favreau), dated October 5, 2021, with reasons reported at 2021 ONSC 6579, allowing an appeal from a decision of Justice Lorne Sossin of the Superior Court of Justice, dated July 30, 2019, with reasons reported at 2019 ONSC 4555.

**Lauwers J.A.:**

[1] The appellants are construction lien claimants. The respondents are the mortgagees under a vendor-take-back mortgage registered on title to the property before the date on which the first lien arose. The property was sold under power of sale. On May 11, 2015, Newbould J. issued an Amended and Restated Approval and Vesting Order approving the sale. The order required the lesser of the net proceeds of the sale or the sum of $1,289,524.14 to be paid into court, pending resolution of the priority dispute between the lien claimants and the mortgagee. Eventually the net proceeds of sale in the amount of $608,119.43 were paid into court pursuant to Newbould J.'s vesting order. There is a shortfall in the remaining reserve. The issue is who gets the balance, the lien claimants or the mortgagee.

[2] Many pages of judicial text have been written in this saga, the most immediate being the Report of Master Albert determining the priorities, dated May 17, 2018 (2018 ONSC 3126), the motion judge's partial refusal to confirm the Master's Report, dated July 30, 2019 (2019 ONSC 4555), his reconsideration decision, dated November 6, 2019 (2019 ONSC 6118), and the Divisional Court's decision, dated October 5, 2021 (2021 ONSC 6579), reversing the motion judge in part and confirming Master Albert's Report. The courts below all decided that the vendor-take-back mortgage has priority over the liens, but they disagreed on the extent of that priority.

[3] In particular, the Master found that the mortgage principal, together with interest and related charges, has priority over the lien claims. The motion judge

agreed that the mortgage principal had priority over the liens but found that the lien claims had priority over the mortgage interest and other charges. The Divisional Court (per Sutherland J.) reversed and restored the Master's ruling.

[4] To be precise about what is at stake, I note that after the vesting order was executed and the required payments made, the net proceeds paid into court were $608,119.43. The Master's consent order dated June 13, 2016 permitted the payment out of court of $195,896.27 to the mortgagees following settlement of four of the lien claims, thereby reducing the amount held in court to $412,223.16.

[5] The competing claims are those of the lien claimants and the mortgagees. The Master valued the balance of the lien claims at $70,658.85 for CAM Moulding & Plastering Ltd. and $258,476.58 for Gentry Environmental Systems Ltd. for a total of $329,135.43. The mortgagees claim arrears in interest in the amount of $429,104.15, enforcement expenses in the amount of $463,892.46 for receiver's fees, and $108,676.64 for other charges.

[6] The stakes are these: if the lien claimants are successful, then they will recover the full amount of their liens at $329,135.43, leaving the balance for the mortgagees; but, if the mortgage interest has priority, then all the remaining funds will go to the mortgagees.

[7] This appeal turns on a question of law relating to the interpretation of s. 78 of the *Construction Act*, R.S.O. 1990, c. C.30, as amended by the *Construction Lien Amendment Act*, S.O. 2017, c. 24. More specifically, the question is whether

the priority that the prior mortgages have over lien claims extends to arrears in interest, fees, charges, and expenses that relate to the mortgage and its enforcement, under s. 78(3) of the *Construction Act*.

[8] The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it. The interpreter must attend to text, context, and purpose, to which I now turn: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 117, 118-124.

[9] The purpose of the *Construction Act* is to protect lien claimants by ensuring that they are compensated for the increase in the value of a property to which their work contributed. But this purpose is hedged about with exceptions. One exception is for mortgages. The policy orientation of the Act can be seen in s. 78(1) and the mortgage exception is found in s. 78(3):

> Priority over mortgages, etc.
>
> 78 (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.
>
> Building mortgage
>
> (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.
>
> Prior mortgages, prior advances

> (3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,
>
> (a) the actual value of the premises at the time when the first lien arose; and
>
> (b) the total of all amounts that prior to that time were,
>
> (i) advanced in the case of a mortgage, and
>
> (ii) advanced or secured in the case of a conveyance or other agreement.

[10] The appellants urge this court to apply literally the language of s. 78(3)(b)(i), which protects only amounts that were "advanced in the case of a mortgage". The appellants present their arguments in two forms.

[11] The appellants' most radical argument is that a vendor-take-back mortgage is not a mortgage in which an advance of cash has taken place. Accordingly, the entire mortgage amount is subordinated to the interests of lien holders. The appellants argue that a vendor-take-back mortgage is the equivalent of a collateral mortgage where the subordination of the collateral mortgagee's interests is accepted law: *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) 294 (Ont. S.C.), aff'd (2004), 1 C.B.R. (5th) 159 (Ont. Div. Ct.). I would reject this argument. Giving effect to it would impair the use of vendor-take-back mortgages in the real estate market. In my view, a vendor-take-back mortgage is the equivalent of an advance for the purposes of the *Construction Act*.

[12] Both parties invoke the Supreme Court's decision in *M. Sullivan & Son Ltd. v. Rideau Carleton Raceway Holdings Ltd.*, [1971] S.C.R. 2, but take different views of its impact. The Supreme Court decided that principal and interest are equally secured by a mortgage:

> This legislation has been in force for a long time. Until the issue was raised in these proceedings, there was no case which drew any distinction between the rights of the mortgagee to priority for principal and his rights to priority for interest.
>
> Both the trial judge and the Court of Appeal in this case have rejected any such distinction and I agree with them. Principal and interest are equally secured under the mortgage. The right to interest is an essential, inseparable, constituent part of the advance made on account of the mortgage. Without such a right no building loans would ever be made in a commercial way. The registration of a claim for lien or notice in writing of such a claim cannot stop the running of interest or affect the mortgagee's priority for continuing interest on advances validly made under s. 13(1) of The *Mechanics' Lien Act*. [Emphasis added.]

[13] The appellants' second argument, which hearkens back to *Sullivan*, is that interest and other costs are not advances of funds to the mortgagor and are accordingly not given priority over liens under the *Construction Act*.

[14] The appellants submit that this expansive language was appropriate in *Sullivan* because at issue there was a building loan, which is a different thing than an ordinary mortgage, as in this case. Section 78(2) of the *Construction Act* affords better protection to building loans.

[15] I do not agree with the appellants' approach. Instead, I would accept the approach taken by Wilton-Siegel J. in *Re Jade-Kennedy Development Corp.*, 2016 ONSC 7125, 72 C.L.R. (4th) 236, at para. 49:

> *M. Sullivan & Son* and *XDG Ltd.* demonstrate that the concept of an "advance" is not limited to the principal amount advanced under a mortgage. It includes all amounts which the mortgagor is contractually obligated to pay in respect of any such principal amount advanced, including interest and the costs of registration, perfection and enforcement of the mortgagee's security for the advance irrespective of when incurred. As the Supreme Court noted, without such a right, building loans and other commercial loans would not be made in a commercial manner. [Emphasis added].

[16] I would reject the appellants' argument that *Sullivan*'s application is restricted to building loans, for three reasons. First, this argument has no support in the precedents. The practice has developed in accordance with the approach in *Sullivan* to extend beyond building loans, as Wilton-Siegel J. noted. The Supreme Court in *Sullivan* did not expressly limit its findings to building loans. In *Jade-Kennedy* Wilton-Siegel J. observed that without such priority, even "other commercial loans would not be made in a commercial manner."

[17] It would be unwise to interfere with settled practice. The *Sullivan* approach has already been followed by Ontario courts in the context of mortgage priority over construction liens. In *830889 Ontario Inc. v. 607643 Ontario Inc.* (1990), 43 C.L.R. 181 (Ont. Gen. Div.), Hoolihan J. held that because principal and interest are equally secured under a mortgage, and "advances" or "money advanced"

include interest, interest payments with respect to two non-building mortgages had priority over a construction lien. This finding has been accepted by text writers to stand for the principle that a mortgagee's "priority include[s] a continuing claim to interest": Harvey J. Kirsh & Matthew R. Alter, *A Guide to Construction Liens in Ontario*, 3rd ed. (Toronto: LexisNexis Canada, 2011), at § 10(B)(vi). It seems to be settled practice that a mortgagee's "priority also extends to any interest on an advance that is paid on account of a mortgage": *Halsbury's Laws of Canada*, "Real Property", (Toronto: LexisNexis Canada, 2021 Reissue), at HRP-99.

[18] I note that the *Report of the Attorney General's Advisory Committee on the Draft Construction Lien Act* (Toronto: Ministry of the Attorney General, April 1982), which led to the enactment of the *Construction Lien Act*, does not comment on the specific question of the priority of interest and other expenses. The Committee commented, at pp. 180-181, only on the relative priorities of prior and subsequent advances under what was then s. 80(3), now s. 78(3):

> "[P]rior" interests are generally accorded priority over the lien. However, under subsection 3 the priority of those interests is limited in the case of advances made prior to the commencement of the improvement of the actual value of the premises at the time when the making of the improvement commences. Where advances are made in respect of those interests after this date, they are entitled to priority in respect of those advances in accordance with much the same rules as apply under subsection 6, in respect to advances under subsequent interests.

[19] Second, the appellants were not able to point to textual support for the proposition that the statutory language in the *Mechanics' Lien Act* is sufficiently

different than the statutory language in the *Construction Act* such that the interpretation of the former in *Sullivan* does not apply to the latter. Section 13(1) of the *Mechanics' Lien Act* used the language of "payment or advances made on account of any conveyance or mortgage". Section 78(3)(b)(i) uses the language of "advanced in the case of a mortgage".

[20] Nor does the contrast between the subparagraphs (i) and (ii) of para. 78(3)(b) of the *Construction Act* assist the appellants. They submit that mortgage interest is "secured" by a mortgage but is not "advanced" under it, in the words of s. 78(3)(b)(i). They argue that the *Construction Act* makes the relevant distinction by using the words "advanced or secured" in relation to a conveyance "or other agreement" in s. 78(3)(b)(ii). I disagree. The "other agreement" language in subsection (ii) seems to refer only to a vendor's lien on property. The appellants were not able to provide any other examples of the operation of the language in subsection (ii). A vendor's lien is clearly not an advance.

[21] Third, the effect of adopting the novel interpretation that the appellants propose is not entirely clear, but it would impose additional risk on purchase money mortgagees, who might then be required to actively monitor properties to ensure that improvements made by owners did not deplete the mortgagee's entitlement to payment for interest. (The argument that an improvement might increase the equity to the mortgagee's ultimate advantage is not much comfort to a mortgagee.) The appellants' proposed approach would introduce a sea change in risk

assessment by mortgage lenders that is simply not warranted by the legislative history or long-standing practice. The possibility of inadvertently doing harm is very much present.

[22] The appellants also argue that the mortgage value prescribed in s. 78(3) (being "the lesser of, (a) the actual value of the premises at the time when the first lien arose; and (b) the total of all amounts that prior to that time were, (i) advanced in the case of a mortgage") functions as a cap to limit the amount the mortgagee can take out of the proceeds of sale to pay interest and the associated expenses of enforcing the mortgage. There is no support for this approach in the cases. Once the exigible value of the mortgage is capped, the normal incidents of mortgage law apply to that capped mortgage balance, including recovery of interest and enforcement costs.

[23] In conclusion, the priority created by s. 78(3) for prior mortgages extends to the arrears in interest and enforcement costs. I would dismiss the appeal with costs payable in the amount of $17,000 to the respondent, all-inclusive.

Released: November 7, 2022 "P.L."

"P. Lauwers J.A."
"I agree. L.B. Roberts J.A."
"I agree. Gary Trotter J.A."