COURT OF APPEAL FOR ONTARIO

CITATION: BCIMC Construction Fund Corporation v. 33 Yorkville Residences Inc., 2023 ONCA 1
DATE: 20230103
DOCKET: C70635

Doherty, Zarnett and Sossin JJ.A.

In the Matter of an Application under Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended; and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

BETWEEN

BCIMC Construction Fund Corporation and Otéra Capital Inc.

Applicants

and

33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership

Respondents

Brendan D. Bowles and John Paul Ventrella, for the appellant GFL Infrastructure Group Inc. and agents for Adam Pantel, counsel for the appellant Royal Excavating & Grading Limited c.o.b. Michael Bros Excavation

Robert John Kennaley, for the appellant Aqua-Tech Dewatering Company Inc.

Geoff Hall and Alexander Steele, for the respondent PricewaterhouseCoopers Inc., in its capacity as court-appointed receiver of 33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership

Heard: December 19, 2022

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated April 29, 2022, with reasons reported at 2022 ONSC 2326.

REASONS FOR DECISION

[1] The appellants are lien claimants who provided services to the owner of a condominium development. That owner went bankrupt in the very early stages of construction. A dispute developed as to the quantum of the priority to which the appellants were entitled under s. 78(2) of the *Construction Act*, R.S.O. 1990, c. C.30.

[2] Section 14 of the *Construction Act* gave the appellants liens on the interest of the owner of the condominium for the price of the services or materials supplied by the appellants. Section 22(1) of the *Construction Act* required the owner to retain a holdback equal to 10 percent of the price of the services or materials provided by the appellants. Section 78(1) provided that the appellants' liens had priority over all mortgages "[e]xcept as provided in this section". Section 78(2) addresses the extent of lien claimants' priority when the mortgage is what is commonly referred to as a "building mortgage". The section reads:

> 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.

[3] The owner did not hold back any of the required funds. On the motion, the appellants submitted that to the extent there were deficiencies in the holdbacks when calculating the quantum of the priority created in the lien claimants' favour

under s. 78(2), the lien claimants were entitled to a priority of 20 percent (10 percent x 2) because there were two building mortgages in place.

[4] The respondent receiver submitted that, under the scheme established by the *Construction Act*, there was only one holdback regardless of the number of building mortgages. Any deficiency in that holdback for the purposes of s. 78(2) is determined by deducting any amount held back by the owner from the 10 percent requirement in s. 22.

[5] The motion judge accepted the position advanced by the respondent.

[6] There are two issues on the appeal. The first is jurisdictional and the second goes to the substantive merits of the appeal.

[7] The receiver submits that the appellants have no right of appeal under s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The respondent further contends that in the circumstances, this court should refuse leave to appeal.

[8] The appellants take the position that they do have a right of appeal under s. 193(c), which provides that an appeal is available:

> [I]f the property involved in the appeal exceeds in value ten thousand dollars.

[9] Alternatively, the appellants submit that this is a case for leave to appeal.

[10] We find it unnecessary to decide whether the appellants have a right of appeal. Assuming without deciding that leave to appeal is necessary, this is an

appropriate case for the granting of leave. The appeal raises a matter of statutory interpretation of some importance. The appellants' position on the merits is arguable. It would be helpful for this court, as the appellate court of the province, to resolve the question of statutory interpretation raised by the parties. Allowing the appeal to proceed would not interfere in any significant way with any ongoing proceeding.

[11] We grant leave to appeal.

[12] Turning to the merits, the parties have both made forceful, attractive submissions in support of their respective interpretations of s. 78(2). They agree that as the matter is one of statutory interpretation, the standard of review is correctness.

[13] We have carefully reviewed the arguments and the reasons of the motion judge. The motion judge correctly identified and applied the modern purposive and contextual approach to statutory interpretation. He reviewed the factors relevant to that analysis, including the language of the section, and the context and purpose of the provision. The motion judge also reviewed related authority from the Superior Court: *G.M. Sernas & Associates Ltd. v. 846539 Ontario Ltd.* (1999), 48 C.L.R. (2d) 1 (Ont. S.C.).

[14] We accept that correctness is the applicable standard of review. Applying that standard, we see no error in the motion judge's identification or application of

the applicable rules of statutory interpretation. We agree with his interpretation of the statute and his application of that interpretation to the facts of this case.

[15] The appeal is dismissed.

[16] The parties have agreed that the successful party on appeal should have costs fixed at $30,000, including relevant taxes and disbursements. So ordered.

"Doherty J.A."
"B. Zarnett J.A."
"L. Sossin J.A."