

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Bank of Nova Scotia v. Allen, 2009 NSSC 290

**Date:** 20090929

**Docket:** Hfx. No. 294521

**Registry:** Halifax

**Between:**

The Bank of Nova Scotia

Applicant

v.

Terry J. Allen

Respondent

**Judge:** The Honourable Justice Arthur J. LeBlanc.

**Heard:** March 11, 2009, in Halifax, Nova Scotia

**Last Written Submission:** March 20, 2009

**Written Decision:** September 29, 2009

**Counsel:** Stephen Kingston, for the Applicant  
Respondent, not in attendance

**By the Court:**

[1] This is an application for a deficiency judgment arising from the foreclosure sale of the defendant's property. The proceeds of the Sheriff's sale resulted in a deficiency between the amount recovered and the amount owing to the applicant pursuant to the foreclosure order. The issue is whether the court should grant a deficiency judgment in view of the fact that the mortgagee purchased the property at the foreclosure sale.

[2] The parties entered into a mortgage agreement whereby of the Plaintiff, the mortgagee, advanced funds to the Defendant, the mortgagor. As a result of a default by the Defendant, the Plaintiff obtained an order for foreclosure and sale to recover the amount outstanding, which was \$61,389.77 as of June 20, 2008, with interest to accrue thereafter at the rate of 6%. The foreclosure sale was held on August 14, 2008, and the property was sold to the Plaintiff for \$4,111.42. The Plaintiff's taxed costs were calculated at \$3,439.41. There were no independent bidders at the sale.

[3] Before the foreclosure sale, the Plaintiff obtained an appraisal that estimated the fair market value of the property at between \$60,000 and \$65,000, as of June 27, 2008.

[4] Since the foreclosure sale, the Plaintiff has incurred expenses that it characterizes as relating to the preservation of the value of the property, rather than enhancing or increasing its value. The Plaintiff agrees that to allow the mortgagee to enhance the value of the property, claim those expenses on deficiency, and then recover a higher sale price based on the enhanced value, would represent double recovery.

[5] The expenses claimed by the Plaintiff include occupancy check, “Drive By/Inspections,” light cleaning (apparently at the time of securing the property), preparing a property condition report, lock changing and securing, cutting grass, removing various debris and garbage, something referred to as “Scrub and Shine,” repairing the furnace, winterizing, snow removal, the appraisal, hydro, water and oil. The Plaintiff claims property management charges of \$3,798.79, including HST.

[6] The total deficiency claim advanced by the Plaintiff is \$65,365.43, comprised of the principal debt set out in the foreclosure order (\$61,389.77), interest from June 20 to August 14, 2008 (\$536.25) and taxed costs (\$3,439.41). The balance of the deficiency claimed arises from the difference between deemed sale proceeds of \$65,000, less property management fees (\$3,708.79) and sheriff’s fees and taxes

(\$4,111.42), for an amount realized of \$57,179.79. The difference between the amount claimed and the amount realized was \$8,185.64, plus interest and costs of \$500.00, for a total deficiency claim of \$8,922.08.

[7] The question is whether the Applicant is entitled to recover the total deficiency, and whether this situation is similar to one where an independent party purchases the property at the foreclosure sale or the mortgagee has disposed of the property at the time of the application for a deficiency judgment. The Applicant maintains that I should apply *Royal Bank v. Marjen Investments Ltd.*, [1998] N.S.J. No. 4, where the Court of Appeal allowed the Bank to recover a deficiency for reasonable expenses incurred to the date of the application, including reasonable expenses incurred to maintain the property. Bateman, J., writing for the Court, stated, at para. 59:

It has been the practice in Nova Scotia to allow a mortgagee on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to account for any income earned on the property during that same period. In *Nova Scotia Savings and Loan v. MacKay et al.* (1980), 41 N.S.R. (2d) 432 Hallett, J., as he then was, at p. 437, explained the rationale for so doing:

In *Briand v. Carver et al.* (1968), 66 D.L.R. (2d) 169, where the mortgagee purchased the property at the Sheriff's Sale for \$50.00 and the evidence indicated that it was worth \$5,500.00, the mortgagee's claim for deficiency of \$4,561.78 was refused. The

Court exercised its discretion and, relying on equitable principles, held that to allow the deficiency under the circumstances would have been inequitable in that the plaintiff would have had both the property and a judgment for the deficiency. Since that time, mortgagees, when applying for deficiencies, have followed the practice of supporting their claims with affidavits of realtors as to the market value of the property at the time of the sale so that the Court could assess the adequacy of the price obtained at the Sheriff's Sale when considering the application for the deficiency judgment. This Court has therefore imposed certain obligations on the mortgagees before a deficiency judgment will be granted and it would seem only just that coincident with these obligations mortgagees should, where the mortgagee has purchased at the Sheriff's Sale, if the mortgagor has so contracted and the mortgagee has so pleaded, have the right to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor. In particular, a mortgagee should, if the mortgage so provides, be entitled to claim on the covenants to reimburse the mortgagee for real estate commissions actually paid and reasonable legal fees on the resale plus costs of maintenance, repairs and taxes during the period the property is held by the mortgagee after purchase at the foreclosure sale and prior to disposing of the same, less any revenue from the property. It goes without saying that the mortgagee must manage the property prudently and make reasonable efforts to dispose of the property at the best price that can be obtained at the earliest possible time. The foregoing expenses should be allowed by the Court in calculating the ultimate deficiency where it does not exceed the deficiency on the Sheriff's Sale.

[8] Justice Bateman continued, at para. 61:

...While the default judgment is to be entered not later than twenty days after the Sheriff's sale, the amount due is not entered until the deficiency, if any, is determined by the Court. When the mortgagee has purchased the property at the Sheriff's sale, with intention to resell it, it is unlikely that the resale will occur within the twenty-day period. The mortgagor, however, is entitled to the benefit

of the deficiency calculated on the resale price, if higher than that paid by the mortgagee at the Sheriff's sale. It is illogical, and unfair, in those circumstances to require the mortgagee to bear the burden of any reasonable expenses incurred while preserving the property for resale. Against those expenses should be offset any income derived from the property. A deficiency judgment is intended to provide to the mortgagee a judgment for the amount by which the proceeds from the security fell short of the amount owing on the mortgage. The mortgagor benefits from the mortgagee reselling the property because the higher price obtained lowers the deficiency judgment.

[9] The Applicant states that *Marjen* was applied in *Scotia Mortgage Corp. v. Banfield* (1998), 170 N.S.R. (2d) 347 (C.A.), and in *Bridgewater Bank v. George*, 2008 NSSC 351, 2008 CarswellNS 651 (S.C.). In the latter case, Smith, A.C.J. applied *Marjen* and held that reasonable expenses incurred by the mortgagee while preserving the property prior to resale were properly recoverable on the application for deficiency judgment. She also stated that on an application for deficiency judgment, the court must be provided with evidence upon whereby it can satisfy itself that the expenses claimed were properly and reasonably incurred. Evidence must be presented which satisfies the court that the expenses were both proper and reasonable.

[10] This application is governed by Rule 47 of the *Civil Procedure Rules (1972)*, which provides, in part:

Order for amount due on mortgage

47.09. (1) Unless the court otherwise orders, in a proceeding for foreclosure, sale and possession, default judgment shall occur on the earlier of twenty (20) days after the date of sale by public auction or payment to the sheriff, but judgment for any amount due shall not be entered before the proceeds of sale have been realized and a deficiency, if any, has been determined by the court.

(2) Interest on any judgment shall be pursuant to the *Interest on Judgments Act*.

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Order for deficiency judgment

47.10. (1) Where in the case of sale pursuant to rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements, as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.

(2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of the sale, the court, in determining the amount of the deficiency, may deem the sale price to have been the fair market value of the property at the time of the sale.

(3) An application for deficiency judgment shall be made to the court within six (6) months from the date of the Sheriff's Sale, on ten (10) days notice.

[11] In adopting the new *Civil Procedure Rules*, the court specified that the mortgagee could seek payment of protective disbursements in a deficiency judgment application, but did not specify that the protective disbursements were to be approved by the court in situations where the mortgagee had retained title to the

property at the time of the application for the deficiency judgment. I refer specifically to Rule 72.13 of the 2009 Rules:

72.13(1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:

- (a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the mortgagee;
- (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee is both reasonable and greater than the bid;
- (c) the amount bid by, or on behalf of, the mortgagee, if the property is sold by public auction to the mortgagee and the resale price or the value of the property is less than the bid;
- (d) the value of the property, in all of the circumstances.

(2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate a claim by evidence specifically set out in an affidavit of the mortgagee, or its agent showing all of the following:

- (a) the term in the instrument authorizing the expenditure to be made and charge to the mortgage debt;
- (b) the necessity of the expenditure for preserving or otherwise protecting the mortgage property;

- (c) the reasonableness of the amount of the expenditure both in its fairness for the work done and materials supplied, and its value for protecting the property.

[12] The question that arises is whether *Marjen* applies where the mortgagee still has title to the property at the time the application for deficiency judgment is filed. It is clear that it applies where the mortgagee has disposed of the property prior to the application. In this instance, I am satisfied that the mortgage instrument authorizes expenditures to be made and charged to the mortgage debt. However, that is not conclusive with respect to the amount of the deficiency judgment.

[13] This issue was addressed by MacAdam, J. in *Bank of Montreal v. Kennedy* (2006), 243 N.S.R. (2d) 126, where there was an application by the mortgagee for a deficiency at a time when the mortgagee still had title. The deficiency covered expenditures incurred before and after the Sheriff's sale, and included the plaintiff's taxed costs, protective disbursements, sheriff's fees and the appraised value of the property. The protective disbursements included occupancy and security checks, snow removal, lawn maintenance, clean-up and garbage removal, attendances to secure the property, utility payments, administrative fees, winterizing and minor repairs to an oil tank. MacAdam, J. approved the appraisal

of \$10,000.00. He did not have jurisdiction to recalculate the legal fees and disbursements, which had been addressed by the Small Claims Court. He was concerned about a reduction in the value of the property from \$29,568.75 (the original amount of the mortgage) to \$10,000.00 on a second appraisal, reflecting a decrease of about \$20,000.00.

[14] The mortgagee in *Kennedy* relied on *Marjen* in support of its claim for the deficiency judgment, including protective disbursements. MacAdam, J. referred to Justice Bateman's tracing (in *Marjen*) of the development of earlier versions of Rule 47.10, including Rule 47.10(2), as originally enacted in 1984. He noted the distinction between a situation where a third party purchased the foreclosed property at the Sheriff's sale, and where the property was sold by the mortgagee prior to making an application. He stated, at paras. 22-23:

Until the 1995 amendment, it is clear the calculation of the deficiency judgment differed, depending on whether the mortgagee had resold the property prior to the time of the application. Where the property was resold, Rule 47.10(2)(b) was applicable and the amount realized on the resale, if reasonable, was used in calculating the deficiency. Also to be taken into account was any income derived from the property prior to the resale as well as any costs of resale and expenses reasonably incurred to derive income from the property, as well as any costs reasonably incurred to protect or preserve it. On the other hand, where the property was not resold, the mortgagee remained the owner as of the date of the application. In such a circumstance Rule 47.10(2)(a) was applicable and the deficiency was based on a calculation using an appraisal made as of the date of the sheriff's sale. As the property continued to be owned by the mortgagee from

that date forward, any changes, alterations, improvements, and additions, were, and remained, to its own account. If, following the determination of the deficiency, the mortgagee was successful in selling the property, then any proceeds realized from such sale were to the account of the mortgagee. There was no duty on the mortgagee, in such a circumstance, to account to the mortgagor, or anyone else, in the event it was successful in achieving a higher price, having regard to the effort and expenses it incurred, nor, for that matter, could it attribute to the mortgagor, or anyone else, any loss it may have sustained in the event it was unsuccessful in realizing an amount greater than the value as of the date of the sheriff's sale, together with adjustments reflecting any income or expenses incurred in the interim. The property was the mortgagee's from the day it completed the terms of the purchase at the sheriff's sale until it was later able to sell the property. If the resale occurs subsequent to the application for deficiency, there is, of course, no sale price, reasonable or otherwise, to bring to the attention of the court in determining the deficiency. The property is owned by the mortgagee until it decides to sell it.

There is, of course, a logical reason for the long standing difference in assessing the "fair market value of the foreclosed property" when it has been resold by the mortgagee with the circumstance when the mortgagee owns the property. In the former, as noted in the authorities, the mortgagor obtains the benefit of the mortgagee's expenditures in preserving and protecting the property. In the latter, the benefit is solely for the account of the mortgagee. Once the foreclosure proceeding is completed, and if the mortgagee continues to own the property, it receives, with no obligation to account to the mortgagor, the amount of any realization, in the event the property is subsequently sold.

[15] MacAdam, J. went on to cite further comments from *Marjen* respecting the application of Rule 47.10 after its amendment in 1995. He said, at paras. 24-25:

As noted by Justice Bateman, in *Marjen*, at para. 29, Civil Procedure Rule 47.10 was re-enacted effective as at September 1, 1995. The Rule now reads:

47.10(1) Where in the case of sale pursuant to rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.

(2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of sale, the court, in determining the amount of the deficiency, may deem the sale price to have been the fair market value of the property at the time of the sale.

(3) An application for deficiency judgment shall be made to the court within six (6) months from the date of the Sheriff's Sale, on ten (10) days notice. (Emphasis added)

In *Marjen* at paras. 30 and 31, Justice Bateman continued:

In subparagraph (1), the word "may" has been substituted for "shall". The change in the wording of Rule 47.10(1), *inter alia*, purports to remove the court's obligation to award a deficiency, and substitutes a discretion. This does not, however, effect a substantive change in the law since, pursuant to its equitable jurisdiction, the court has always had a discretion to refuse the application for a deficiency. In this regard, the change does no more than to codify the existing jurisdiction of the court.

The court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (*per* Hart, J.A. in *Adshade*, [1983] N.S.J. No. 56, *supra*). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the court to look to objective evidence of value (*per* Hallett, J.A. in *Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch* (1980), 41 N.S.R. (2d) 432; 76 A.P.R. 432 (T.D.)). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. Where the property has not been resold, the best

evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in *Offman, supra*, the court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

[16] MacAdam, J. emphasized that Bateman, J.A. did not consider the amendments and the new Practice Memorandum to have effected any change in the law respecting valuation of property for the purpose of calculating a deficiency judgment (paras. 26 - 27). He went on to refer to Justice Bateman's comments on the chambers judge's decision to use the appraisals, rather than the resale price, as the basis for determining market value (para. 28.) She said, at para. 54 of *Marjen*:

... The Rule does not distinguish, as did its predecessor, between the circumstance where the mortgagee applies for a deficiency before reselling the property and that where the mortgagee applies after the property is resold. When the property has been resold, the judge, in the proper exercise of his or her discretion, must consider all of the circumstances, which includes evidence of the resale price and the market activity as well as other relevant details surrounding the foreclosure. A market appraisal is simply one estimate of "fair market value". Provided the mortgagee has, in the circumstances, made reasonable efforts to resell the property the court should not without good reason depart from that price as the true indicator of value. With respect, in my view, the Chambers judge erred, in these circumstances, in equating the appraised value with "fair market value" ...

[17] MacAdam, J. cited Justice Bateman's observation that it was Nova Scotia practice to "allow the mortgage on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to

account for any income earned on the property during that same period,” taking the view this comment related to situations where the property has been resold, as in *Marjen*, rather than where the mortgagee still held the property, as in *Offman* (para. 30). He continued, at paras. 31-34:

Nowhere in the reasons of Justice Bateman is it suggested the failure of the Supreme Court in 1995, to stipulate a new procedure for deficiency judgments resulted in the law remaining the same where the mortgagee has resold the property but changed where the mortgagee has not resold the property. Such an inconsistency is nowhere evident in the reasons of Justice Bateman. To permit mortgagees to enter judgment against mortgagors for expenditures designed to improve the value of the foreclosed property, which they then own, and where the mortgagor does not receive the benefit of any such enhanced value is unconscionable. Nor is it an adequate response that appraisals, as at the date of the application, will sufficiently compensate the mortgagor for these costs. Historically, even in periods of increasing property values, appraisals filed on deficiency applications have not shown increases in value commensurate with the costs and expenses being claimed by mortgagees. As observed by Justice Bateman "appraisal reports are a best guess, albeit by a person experienced in the real estate field." The appraisals filed on this application only serve to confirm the concern in relying on appraisals when other means of setting values are available.

Admittedly the court, in the circumstance where the bid at the sheriff sale is less than the fair market value, will have to rely on an appraisal made as of that date. There is no other alternative. However, mortgagees should take note that when the tendered appraisal value is markedly less than the original principal amount of the mortgage, they may be required to substantiate the basis for such reduced value.

If, as a result of the 1995 Rule changes the law relating to deficiency application was not changed, it was not changed in respect to the distinction that existed between the circumstance where the mortgagee resold the property prior to the deficiency application and where it has not resold the property. Neither equity, fairness, *Marjen* or common sense suggests otherwise.

Such a conclusion is consistent with the general tenor of the reasons in *Marjen* that the law in respect to deficiency applications has not been altered by the 1995 amendment. If, as suggested, the law in respect to deficiency applications is unchanged by the amendment and the subsequent new Practice Memorandum, then the absence of change would presumably apply to both the circumstance where the property has been resold, as well as the circumstance where the property has not been resold by the mortgagee, as of the time of the deficiency application. There is nothing in the reasons of Justice Bateman to suggest, whereas the law in respect to the entitlement of the mortgagee to claim expenses as well as the obligation to account for income in the circumstance where the property has been resold has not been changed by the 1995 amendments, on the other hand, in the circumstance where the property has not been resold, the absence of any entitlement to claim expenses or obligation to account for income has been changed by the 1995 amendment.

[18] The deficiency sought before MacAdam, J. exceeded the amount of the mortgage, although \$6000.00 had been paid on the mortgage, and the plaintiff had title, with the “the right to retain the realization from any future sale of the property” (para. 38). He concluded, at para. 40:

In respect to the plaintiff's application I have, although expressing concerns, in respect to the credibility of the appraisals submitted on this application, indicated I would allow a deficiency claim. However, in determining the amount, all of the expenses claimed that were incurred in respect to the property subsequent to the day of the sheriff's sale are not allowed. Counsel for the plaintiff has suggested the mortgagor is the beneficiary of some of these disbursements because of the increased appraisal value shown in the second appraisal by Kennedy Appraisals, suggesting the increase in value between March and August may have related to the cleaning of the property. That may indeed be the case, although, apart from counsels suggestion, there is no evidence to support such a position and I am not satisfied the evidence substantiates such a conclusion. If indeed that was the case then it was always available to the plaintiff to file an affidavit by the appraiser making such an assertion and outlining the basis of the same. The onus is on the applicant and I am not satisfied that onus has been met in the present circumstance.

[19] In *Bridgewater Bank*, Smith, A.C.J. granted the deficiency judgment, accepting the price actually obtained by the mortgagee from the sale of the property to a third-party, but reducing the protective disbursements claimed from \$2,679.28 to \$1000, and the cost of winterizing from \$780.90 to \$79.80. There had been a transfer of title prior to the hearing of the application, but after the application has been filed. The issue before Smith, A.C.J. was different than the issue before MacAdam, J. Smith, A.C.J. applied *Marjen*, stating that reasonable expenses incurred by the mortgagee while preserving the property for resale are recoverable on an application for a deficiency judgment. The disbursements that she disallowed were excessive and not supported by evidence, or in certain instances, unreasonable. Therefore, there was no need to consider *Kennedy*.

[20] In my view, *Kennedy* is persuasive in these circumstances, and I apply it accordingly. I am disallowing any protective disbursements incurred after the Sheriff's sale. I am varying the amount of the deficiency judgment to allow interest to the date of these reasons. Costs are allowed in the amount of \$1000.

[21] I note that subsequent to the hearing and final submissions, counsel gave notice that the property had re-sold for an amount less than the appraised value. I have not taken this into account in this decision.

**J.**