

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Bank of Montreal v. Behner, 2009 NSSC 326

**Date:** 20091105

**Docket:** Hfx No. 312591

**Registry:** Halifax

**Between:**

Bank of Montreal

Applicant

v.

Paul D. Behner and Marilla A. Stephenson

Respondents

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** October 20, 2009, in Chambers, Halifax, Nova Scotia

**Final Written  
Submissions:** October 30, 2009

**Subject:** Enforcement of a collateral mortgage given to secure a guarantee for the payment of the debts of a company owned by the guarantor.

**Summary:** The Respondent, Behner, gave a collateral mortgage to secure a personal guarantee of the debts of his company. His wife signed as releasor. Subsequent to this the property was transferred to his wife's name only. A number of years later the Respondent gave another guarantee for a higher amount. The Bank demanded payment under both guarantees and succeeded in getting default judgment for the full amount of the company's indebtedness under the second guarantee. The Bank then proceeded to enforce its security under the first guarantee. The respondents challenged the Bank's foreclosure application based on the doctrine of *res judicata*. They argued that the Bank had no legal authority to seek foreclosure since they already had judgment for the full amount of the company's indebtedness under the second guarantee. Since the

Bank could not get judgment on the first guarantee their security was not enforceable.

**Issue:** The issue is whether the Bank is barred from pursuing enforcement of the 2002 Guarantee and from seeking an order for foreclosure against the property pledged as collateral security to the guarantee by virtue of the doctrine of *res judicata*.

**Result:** *Res judicata* does not apply. There is no need to first obtain judgment before proceeding to foreclosure on a collateral mortgage. The Bank need only establish that all conditions precedent to enforcement have been taken. The default judgment on the second guarantee clearly established that there was money owed in excess of the amount pledged by the first guarantee. There was no evidence of bad faith on the part of the Bank. The Respondent's notice of contest was set aside and an order of foreclosure, sale and possession was granted. [Reference **Credit Union Atlantic Ltd. v. Bonang** (1995), 145 N.S.R. (2d) 175 (N.S.C.A.)]

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**Counsel:** Stephen Kingston, LL.B., for the applicant  
John T. Rafferty, Q.C., for the respondents

**By the Court:**

[1] The Bank of Montreal (henceforth “the Bank”) filed a notice of application in chambers seeking an order for foreclosure, sale and possession of property presently registered in the name of Marilla A. Stephenson (henceforth “Ms. Stephenson”). When the mortgage was first given, title to the property was vested solely in the name of Paul D. Behner (henceforth “Mr. Behner”). Ms. Stephenson signed the document as spouse and releasor. She is joined in this application solely for the purpose of extinguishing any matrimonial interest she might have in the property by virtue of the *Matrimonial Property Act*, R.S.N.S., 1989, c. 275 (as amended). The Bank makes no monetary claim against Ms. Stephenson.

[2] The mortgage which is the focus of this application is a collateral mortgage given to secure the personal guarantee of Mr. Behner for the debts of Trax Construction Limited (henceforth “Trax”). The guarantee is limited to \$100,000.00 with interest at the Bank’s prime lending rate from time to time plus 1.25% per annum.

[3] The mortgage being foreclosed forms a third charge against the property. The two earlier charges are also in favour of the Bank which has given its consent to the enforcement of the third charge in the present proceeding.

[4] Subsequent to the placement of the third charge Mr. Behner conveyed title to the property to Ms. Stephenson and as previously indicated the Bank makes no monetary claim against her.

[5] The motion to grant the order for foreclosure is contested by Mr. Behner and Ms. Stephenson. The grounds of contest are:

1. The respondent, Paul D. Behner (“Mr. Behner”), executed a guarantee of Trax Construction Limited (“Trax”) that is dated August 25, 2008 in the limited amount of \$2,000,000 (the “2008 Guarantee”).
2. On June 2, 2009, the indebtedness owed by Trax to the applicant was less than \$2,000,000.
3. The applicant commenced an action in this court against Mr. Behner by filing a Notice of action for Debt, having Hfx. No. 312174, on June 2, 2009 (the “Action”) in which the applicant sought to obtain judgment against Mr. Behner pursuant to the 2008 Guarantee for the entire sum the applicant claimed to be owed to it by Trax on that date, being \$1,851,035.30, plus per diem interest of \$407.65 after that date. No claim was made against Mr. Behner in the Notice with respect to the Guarantee or the Mortgage referred to in the grounds relied upon by the applicant in this application.
4. The applicant obtained judgment against Mr. Behner in the Action on June 29, 2009.
5. The applicant is estopped from asserting a further claim against Mr. Behner pursuant to the Guarantee referred to in the grounds relied upon by the applicant in this application and the issue relating to Mr. Behner’s liability

as a guarantor of the debts of Trax owed to the applicant is *res judicata* and the aforesaid Mortgage is, therefore, of no force and effect and discharged.

[6] The Bank sent a letter of demand to Mr. Behner by certified mail dated April 20, 2009. The letter of demand made reference to both guarantees. It also provided Notice of Intention to Enforce a Security referencing the Collateral Mortgage which is the subject of this application.

[7] The Bank commenced an Action for Debt pursuant to the 2008 Guarantee by filing a Notice of Action for Debt on June 2, 2009 (henceforth the “Action). Default judgment for the full amount owed to the Bank by Trax, which stood at \$1,851,035.30 plus per diem interest of \$407.65 after the date of filing, was entered on June 29, 2009.

[8] The Notice of Application in Chambers seeking enforcement of the security given pursuant to the 2002 Guarantee and an order for foreclosure, sale and possession was filed on June 11, 2009. It was originally scheduled for hearing on July 2, 2009. The hearing had to be adjourned first to July 14, 2009 and then to August 4, 2009 and finally to October 20, 2009.

**ISSUE:**

[9] The issue is whether the Bank is barred from pursuing enforcement of the 2002 Guarantee and from seeking an order for foreclosure against the property pledged as collateral security to the guarantee by virtue of the doctrine of *res judicata*.

**THE BANK’S POSITION:**

[10] The Bank takes the position that the rules pertaining to foreclosure in Nova Scotia require it to commence a separate proceeding to enforce the mortgage. Furthermore, the Bank contends that it is not estopped from making a foreclosure application against Mr. Behner pursuant to the mortgage. It argues that the doctrine of *res judicata*, which encompasses both cause of action estoppel and issue estoppel, does not shield Mr. Behner from honouring his guarantee nor does it protect his property from being exposed as security for the repayment of debts owed by his company to the Bank.

**MR. BEHNER'S AND MS. STEPHENSON'S POSITION:**

[11] Mr. Behner and Ms. Stephenson take the position that the Bank lost any rights it might have had to enforce its security against the property pursuant to the 2002 Guarantee when it obtained default judgment against him for the full amount of Trax's indebtedness under the 2008 Guarantee. Since the mortgage was only given as collateral security for the 2002 Guarantee and since the Bank cannot now get judgment under that guarantee its' security is unenforceable.

**LAW:**

[12] Both parties rely on the case of **Credit Union Atlantic Ltd. v. Bonang** (1995), 145 N.S.R. (2d) 175 (N.S.C.A.) to support their argument.

[13] In **Bonang**, *supra*, the Court of Appeal was asked to determine whether the party foreclosing on a mortgage given as collateral security for a loan evidenced by a promissory note should be first required to vacate the judgment already obtained in an action commenced by the appellant against the respondent on the promissory note. The Chambers judge had ruled that:

The Court will grant the requested order for foreclosure after the plaintiff mortgagee has vacated or discharged the existing judgment with respect to the promissory note...

[14] The Court of Appeal reversed the Chambers Judge on this aspect of his decision. At paragraph 7 Justice Hallett writing for the panel which also included Bateman and Flinn, J.J.A. stated:

The learned Chambers judge apparently felt that since a mortgagee in an ordinary foreclosure action could not obtain a deficiency judgment prior to realizing the proceeds of the sale, it would be inequitable for the appellant to have judgment on the promissory note. *Rule 47.09(1)* does not apply to a judgment obtained by an action on a demand promissory note when the mortgage is merely collateral. Nor is it inequitable that a mortgagee take such a proceeding unless, of course, there was evidence to show that the mortgagee was acting in bad faith in commencing the action on the promissory note. Nor does *Rule 47.09* prevent a mortgagee from commencing an action on the mortgagor's covenants to repay; the Rule only applies to foreclosure proceedings and even then the court has a discretion to enter judgment prior to the realization of the sale proceeds. Such a discretion would only be exercised in exceptional circumstances.

[15] The **Rule 47.09** referred to above is found in the **Nova Scotia Civil Procedure Rules** (1972). Its current equivalent is Rule 72.11 – Deficiency Judgment.

[16] It is clear from **Bonang, supra**, that a mortgagee who first obtains a judgment is not precluded from pursuing its remedies under a collateral mortgage given to secure a promissory note provided there is no evidence of bad faith. The same would apply to a mortgagee under a collateral mortgage given as security for a personal guarantee which is the nature of the case that is now before me.

[17] The **Bonang, supra**, decision is equally clear that the mortgagee is not first required to obtain judgment before proceeding to foreclosure. Indeed when one looks at **Rule 72.07** the only reference to judgment is contained in paragraph (6) wherein the court has discretion to “provide for a default deficiency judgment under **Rules 72.11 to 72.13**” in an order for foreclosure, sale and possession.

[18] **Rule 72.07(5)** contains a list of the provisions that “must” be provided for in an order for foreclosure, sale and possession. Nowhere in this particular paragraph is there any reference to a judgment. The order must provide for an “amount settled” which reflects the amount owing on the mortgage as of the date of the hearing of the application.

[19] Counsel for Mr. Behner referred to paragraph 19 of the **Bonang, supra**, decision where Hallett, J.A., stated:

.... Under no circumstances could a creditor have two judgments for the same debt.

[20] That is not what is being requested in this application. The Bank has established that Trax owes it an amount well in excess of the \$100,000 guaranteed by Mr. Behner in 2002. The 2002 Guarantee contains a provision that states “...that this Guarantee is in addition to and not in substitution for any other Guarantee held or which may hereafter be held by said Bank.” It goes on to state: “The present Guarantee shall remain in full force and effect until all debts and obligations hereby secured have been irrevocably and indefeasibly paid and released.” The Collateral Mortgage was given as security for the performance of Mr. Behner’s obligations under the Guarantee. Ms. Stephenson signed this document as a releasor. She was identified as the spouse of the mortgagor. Her signature was witnessed by a different lawyer than the one who witnessed Mr. Behner’s signature. There has been no

evidence presented to suggest that the two signatories did not fully understand or appreciate the nature and potential consequences of signing such a document.

[21] The 2008 Guarantee contains a provision that states: “... and agrees that this Guarantee is in addition to and not in substitution for any other guarantees now or subsequently held by the Bank.” It is clear that the 2008 Guarantee was not intended to alter or to diminish or to detract in any way from the earlier guarantee given by Mr. Behner. They both continued to co-exist as legally enforceable documents each for separate amounts with one secured by a Collateral Mortgage.

[22] Counsel for the Bank suggested during oral submissions that Part IV of Practice Memorandum No. 13 might be of some assistance in determining the issue that is before the Court. Counsel for Mr. Behner and Ms. Stephenson was given until October 30, 2009 to make further written submissions on the point raised by opposing counsel. I have considered these submissions which were received in accordance with the deadline set.

[23] Paragraph 4.4 of Part IV states:

An alternative foreclosure procedure may also be available to creditors who hold collateral mortgages. A collateral mortgagee may first sue and obtain judgment for the amount owing upon the collateral security and then move to foreclosure the mortgage and sell the property. [emphasis added]

Reference is made to **Bonang**, *supra*.

[24] Paragraph 4.2 of Part IV is also of interest. It states in part:

4.2 Mortgagees wishing to foreclose a collateral mortgage may use the simple standardized statement of claim and other documentation, but amended, especially in regard to paragraph 2, to disclose the nature and particulars of the collateral instrument and the steps which have been taken to fulfill the conditions precedent to enforcement. [emphasis added]

[25] Practice Memoranda under the **Civil Procedure Rules** (1972) were intended to provide advice and guidance to the practising Bar. These particular paragraphs of Part IV help to add further clarity to the proper procedure to follow in those instances where a creditor first obtains judgment and then chooses to proceed with enforcement of its collateral security. It reflects the decision of the Nova Scotia Court of Appeal

in **Bonang**, *supra*. **Bonang** does not require that judgment first be obtained. Indeed, it appears to contemplate just the opposite. However, if judgment is obtained then the further remedy of enforcement under the Collateral Mortgage is still available to the judgment creditor. In most cases, the creditor need only establish that all conditions precedent to enforcement have been taken. Once this has been done, the Court may consider the application for an order for foreclosure, sale and possession.

[26] In the present application I am satisfied that the Bank has satisfied all conditions precedent for enforcement of their security. A proper demand for payment has been made to Mr. Behner. He has not responded and is therefore in default. *Res judicata* has no application in this situation. The two matters are separate and distinct in that they involve two separate guarantees, albeit both arising out of the same debt. Since there is no evidence of bad faith on the part of the Bank the order for foreclosure, sale and possession should be granted.

[27] Counsel for Mr. Behner raised a concern that the Bank could theoretically have judgment against his client for more than the total outstanding indebtedness of Trax. I see no possible jeopardy to Mr. Behner by allowing this application to proceed. Any amount recovered pursuant to the Sheriff's sale will be credited towards the outstanding balance owed by Trax and guaranteed by Mr. Behner. The procedure governing foreclosure and sale in Nova Scotia requires the supervision of the court. It is no different if the sale is pursuant to a collateral mortgage or a conventional mortgage. The court will ensure the integrity of the process and protect the equities of all parties. Mr. Behner need not be concerned with overpaying what is owed.

**CONCLUSION:**

[28] The issue of whether the Bank is barred or estopped from pursuing enforcement of its right to seek foreclosure of the property pledged as additional security for a personal guarantee given to the Bank by Mr. Behner is decided in favour of the Bank. Mr. Behner's Notice of Contest is set aside and the Bank's motion for an Order for Foreclosure, Sale and Possession is granted.

[29] The parties are allowed 10 days from the date of release of this decision to address, in writing, the issue of costs.

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Justice Glen G. McDougall