

Indexed as:
**Bernard J. Kamin Ltd. v. Blue Mountain Capital
Corp.**

Re Bernard J. Kamin Ltd. and Blue Mountain Capital Corp.

[1990] O.J. No. 348

72 O.R. (2d) 264

43 C.L.R. 100

19 A.C.W.S. (3d) 1247

Action No. DC1350/89

District Court of Ontario

Zelinski D.C.J.

March 8, 1990.

Counsel:

Theodore P. Charney, for applicant.

Thomas D. Baulke, for respondent.

Sharon S. Wong, for interveners, Armking Contracting Limited and Simcoe Block (1979) Ltd.

Norman A. Kopperud, for intervener, 524614 Ontario Ltd.

(Thornbury Home Hardware Building Centre).

ZELINSKI D.C.J.:--

THE ISSUE

1 The applicant, which proposes to sell lands to the respondent pursuant to a power of sale contained in a mortgage, seeks a declaration, under the Vendors and Purchasers Act, R.S.O. 1980, c. 520, that the respondent's requisition that certain claims for lien and certificates of action be vacated prior to closing, is an invalid objection to title.

2 It is the position of the applicant that the requisition has no merit as:

- (a) it has complied with all of the provisions contained in Part III, and in particular s. 34 of the Mortgages Act, R.S.O. 1980, c. 296;
- (b) its mortgage is not a building mortgage nor were there any preserved or perfected liens in force at the time of advance or registration of its mortgage, either of which might subordinate the mortgage to the liens;
- (c) it has undertaken to register a bond in the form prescribed by s. 80(10) of the Construction Lien Act, 1983, S.O. 1983, c. 6.

3 It is the position of the respondent that, while the provisions of the Mortgages Act referred to are sufficient to resolve all interest subordinate to the applicant's mortgage, various provisions of the Construction Lien Act, 1983 may have the effect of giving the lien claimants in question, or some of them, a priority over the applicant's mortgage. This, it continues, can only be resolved by a trial in which such issues are resolved, or by vacating the claims and certificates. The proposed bond, in the respondent's view, will not resolve all of its concerns.

4 The respondent is friendly to the applicant and seeks to complete the subject transaction.

RELEVANT STATUTORY PROVISIONS

Vendors and Purchasers Act

3(1) A vendor or purchaser of real ... estate ... may at any time ... apply in a summary way to the ... district court ... in which the land ... is situate in respect of any requisition ... arising out of or connected with the contract, except a question affecting the existence or validity of the contract, and the court may make such order upon the application as may be considered just.

Mortgages Act

30(1) A mortgagee shall not exercise a power of sale unless a notice of exercising the power of sale in Form 1 has been given by him to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and any other persons subject to whose rights the mortgagee proposes to sell the mortgaged property ... [Emphasis added.]

.....

34. ... a statutory declaration by the mortgagee, his solicitor or agent as to default, a statutory declaration proving service, including production of the post office receipt of registration, if any, and a statutory declaration by the mortgagee or his solicitor that the sale complies with this Part ... is conclusive evidence of compliance with this Part ... sufficient to give a good title to the purchaser.

35. Where a notice has been given in professed compliance with this Part and ... the title of the purchaser is not liable to be impeached on the ground that the provisions of this Part ... respecting default and the provision of this Part respecting notice, have not been complied with, but any person damnified thereby has his remedy against the person exercising the power of sale.

Construction Lien Act, 1983

80(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.

[Subsequent subsections of s. 80 relate to specific situations involving building mortgages, prior and subsequent mortgages, advances, postponements and the like.]

80(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

- (a) a financial guarantee bond issued ... applies, or
- (b) a letter of credit or a guarantee from a bank ...

in a form prescribed is registered on the title to the premises and, upon registration, the security ... takes the place of the priority created ... and persons who have proved liens have a right of action against the surety ...

THE FACTS

5 The order and nature of various registered instruments is significant. These registrations may be summarized as follows:

- (1) A Pallister Backhoe lien was preserved on September 24, 1987, perfected on November 2, 1987, and released on May 13, 1988.
- (2) Marpan Investments registered a certificate of pending litigation against David Huha, and another, on June 1, 1988. The action related to an aborted agreement of purchase and sale.
- (3) A Laflamme Doors lien was preserved on December 15, 1988.
- (4) On April 7, 1989, mortgages from David Huha in favour of Sheldon Fischman, in trust, and subsequently in favour of the mortgagee (the "Kamin Mortgage") were registered. The Kamin mortgage was to secure \$25,000, which was the amount required to settle the Marpan lawsuit previously referred to. No moneys were paid out by the mortgagee as the mortgage was collateral to the debt created by the settlement. The applicant takes the position, which has not been challenged, that its mortgage was fully advanced at the time of its registration.
- (5) On April 17, 1989, the Laflamme lien was released. It had never been perfected. It related to windows and doors supplied between September 16, 1988 and October 21, 1988. The position of the applicant is that it had expired on or about January 19, 1989.
- (6) The Pallister Backhoe lien was vacated on August 11, 1989.
- (7) Six liens were preserved and perfected between May 5, 1989 and November 15, 1989. None of these lien claimants had commenced work or provided goods and services prior to the registration of the Kamin mortgage. Four of these lien claimants claim priority over the Kamin mortgage (and, in one instance, over the Fischman mortgage) on one or more of the following grounds:

(a) that the mortgage was a building mortgage;

(b) that the mortgage was either not advanced, or not fully advanced;

(c) that the lien has priority over any amounts not advanced;

(d) that the actual value of the subject lands was less than the outstanding encumbrances when the first lien arose;

(e) that the liens have priority to the extent of deficiencies in the hold-backs.

6 All of these situations are specifically dealt with in various subsections of s. 80 previously

referred to.

7 Notice of the exercise of the power of sale in the Kamin mortgage was given to affected parties, including the lien claimants on title on August 18, 1989. The proceedings taken in consequence of default were not challenged, nor were the documents registered pursuant to s. 34 of the Mortgages Act. For my purposes I presume that all of the things done and steps taken were proper.

8 No written notice of a lien was ever sent to the applicant by any lien claimants affected.

9 When this matter first came before me on December 15, 1989, none of the lien claimants who might be affected by my decision in this proceeding were given notice and as such none appeared before me. I adjourned matters at that time in order to cause the lien claimants to be served with notice of the proceedings. Five of the six lien claimants served were present and represented on the return date. The exception indicated by letter that he did not wish to participate in the proceedings. Two lien claimants wished only to maintain watch briefs. I permitted Armking Contracting Limited, Simcoe Block (1979) Ltd., and 524614 Ontario Ltd. (Thornbury Home Hardware), to intervene in these proceedings, at their request.

10 The interveners have not filed any materials, nor cross-examined on the applicant's affidavit nor did they indicate the wish to do so. As such the issue is to be resolved on the basis of the applicant's filings.

THE LAW

11 In its simplest terms, the applicant's first answer to the respondent's requisition is that, by virtue of the mortgagor's default in the Kamin mortgage and its strict compliance with Part III of the Mortgages Act, the applicant can transfer the mortgaged premises to the respondent free and clear of all liens.

12 Prior to amendments to the Mortgages Act which established the procedures now contained in Part III of that Act, a sale under a power of sale contained in a prior mortgage did not extinguish the rights of subsequently registered lien claimants: *Sparks & McKay v. Lord*, [1929] 63 O.L.R. 393, [1929] 2 D.L.R. 32 (C.A.). Since the amendments, assuming strict compliance with Part III of the Mortgages Act, subsequent mechanics' liens were extinguished by sales under power of sale: *L. Pupolin Plumbing & Heating Ltd. v. Sherwood Properties Corp.* (1977), 17 O.R. (2d) 668, 81 D.L.R. (3d) 282 (H.C.J.); *Re Canada Trust Co. and Mortgage Insurance Co. of Canada* (1980), 29 O.R. (2d) 333, 112 D.L.R. (3d) 730, 14 R.P.R. 99 (H.C.J.); *Re Central Mortgage & Housing Corp. and Federal Trust Co.* (1979), 24 O.R. (2d) 540 (Co. Ct.); *Re Canada Permanent Trust Co. and Heald* (1980), 31 O.R. (2d) 57 (Co. Ct.).

13 All of these cases dealt with mechanics' liens under the former Mechanics Lien Act. Under that Act, mortgages were either prior mortgages or subsequent mortgages, depending upon the time of registration. The consequences were principally determined by the timing of advances. The effect

of Part III of the Mortgages Act upon prior mechanics' liens was uncertain. In *Pupolin Plumbing*, supra, there were no liens registered at the time of the delivery of the appropriate notice of power of sale. Steele J. stated as follows in that case [at pp. 670-1]:

Section 34 of the Mortgages Act provides that a statutory declaration by the mortgagee showing default and the service of notice and that the sale complies with Part III of the Act and, where applicable, Part II, is conclusive evidence of compliance with the Part sufficient to give a good title to the purchaser. It is my opinion that the Legislature in enacting the Mortgages Act contemplated that a mortgagee would have the right to proceed with his power of sale and give good title to a purchaser provided that the appropriate notices had been given and that declarations indicating default had been complied with. On the motion before me, there is no complaint with respect to any of these matters other than the objection that the applicant Plumbing Company has priority over some of the advances under the mortgage by reason of the provisions of the Mechanics' Lien Act.

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I am of the opinion that the provisions of the Mechanics' Lien Act apply only to a mechanic's lien action and do not preclude a mortgagee from exercising his rights under his mortgage where a default has occurred. To hold otherwise and interpret ss. 7 and 14 as setting out some sort of priorities, would negate the right of any mortgagee to exercise his privilege.

14 Clearly, Justice Steele was of the opinion that the rights of all lien claimants under the Mechanics' Lien Act were subordinate to the rights of mortgagees at least to the extent of the enforcement of power of sale under Part III of the Mortgages Act.

15 In *Re Canada Trust*, supra, Callaghan J. (as he then was) [at p. 335] recognized the problem of a purchaser acquiring from a mortgagee under power of sale in circumstances where "... lien claimants, who are claiming priority over the mortgage, are successful in those proceedings". Indeed, he adopted language from Macklem and Bristow, *Mechanics' Liens in Canada*, 4th ed. (1978), p. 169, to identify the issue as follows:

The practice, where the trial has not been had, is for the mortgagee to give notice [in the mechanics' lien proceedings] to the lien claimants in accordance with the provisions of the Mortgages Act of his intention to sell the property under the power of sale clause in the mortgage. It is submitted that this does not in any way solve the problem since the mortgagee is really only advising the claimants that they may, if they wish, purchase the property themselves, and the question of priorities, and whether or not the mortgagee can pass on a good title free of the liens, is still undecided. It would appear that the wisest course for a

purchaser from a mortgagee to follow in such circumstances would be for him to await the disposition of the mechanics' lien action, at which time the priorities will be fixed.

16 Having thus defined the problem, he concluded as follows [at p. 336]:

The purpose of Part III is to enable a mortgagee to give a good title to a purchaser. It is clear from s. 35 that the title acquired by the purchaser is not to be impeached if the provisions of Part III have been complied with. Any person injured by the sale has his remedy preserved against the person exercising the power of sale. That mechanics' lien claimants are within the ambit of Part III and the protection afforded by s. 35 is clear from the provisions of s. 32(3). In my view, in the circumstances of this case, ss. 34 and 35 provide a complete answer to the requisition. While Part III does not establish the priorities as between the various parties, it does enable the mortgagee to give a good and marketable title to a purchaser which cannot subsequently be impeached by the claimants under the Mechanics' Lien Act who have notice of and are bound by this ruling.

17 The *Re Canada Trust Co.* judgment was released May 21, 1980, without reference to the judgment of Southey J. in *Re Walker and Greymac Credit Corp.* (1980), 30 O.R. 190 at p. 192, 115 D.L.R. (3d) 650, 14 R.P.R. 93 (H.C.J.), released May 2, 1980. In *Re Walker*, Justice Southey stated the problem, already defined, as follows:

The outcome of the motion depends on whether s. 34 of the Mortgages Act, quoted above, means that the vendor under a power of sale, who complied with the provisions of Part III of the Mortgages Act and has furnished conclusive evidence sufficient to give a good title to the purchaser can give a title which extinguishes the rights of lien holders who had priority over the mortgage before the power of sale was exercised.

18 He concluded [at pp. 192-4]:

Section 30 (1) clearly contemplates that mortgaged property may be sold under a power of sale subject to the rights of other persons. The persons to whose rights the property remains subject are not entitled to receive notice of the exercising of the power of sale, because their rights are not affected by the exercise of the power of sale. The same is true of persons having an interest in the mortgaged property prior to that of the mortgagee. For example, the mortgagee under a third mortgage, who exercises a power of sale, sells the property subject to the rights of the first and second mortgagees. Section 30 (1) does not require that notice of exercising the power of sale be given to the first and second mortgagees in such a case. If the third mortgagee has complied with the provisions of Part III of the Mortgages Act and has furnished the appropriate statutory declarations, he can

give good title to the purchaser under s. 34 of the Mortgages Act, but only to the extent of his interest as third mortgagee in the mortgaged property. The effect of s. 34, in my judgment, is not to extinguish the rights of the first and second mortgagee in such a case. Their rights, in my view, are unaffected by the exercise of the power of sale.

Similarly, a lien claimant who has priority over a mortgagee does not lose his interest in the mortgaged property when the property is sold under a power of sale in a mortgage over which the lien claimant has priority.

.....

Counsel for the mortgagee vendor relied heavily on *L. Pupolin Plumbing & Heating Ltd. v. Sherwood Properties Corp. et al.* (1977), 17 O.R. (2d) 669, 81 D.L.R. (3d) 282, in which Mr. Justice Steele placed a different interpretation on the provisions of the Mechanics' Lien Act and the Mortgages Act. That case involved an application to stay the exercise of a power of sale under a mortgage, but the case proceeded on the footing that the lien claimant was not entitled to priority over the mortgage on either of the grounds alleged in the case at bar. That is clear from the following passage at p. 672 O.R., p. 286 D.L.R.:

"In the present case, it is clear that the last advance made under the mortgage was long prior to the registration of a claim for lien and there is no evidence that notice was ever given by the lien claimant to the mortgagee. There is also no evidence to indicate that the amount of the mortgage is in excess of the value of the land."

It is clear that the judgment of Steele, J., is obiter dicta in so far as it dealt with the respective rights of a vendor under a power of sale in a mortgage and a lien claimant who has priority over the mortgage. The decision, therefore, is not a binding precedent on that point. I have decided, after anxious consideration, and notwithstanding the great respect with which I regard all decisions of Steele, J., that I am unable to follow and apply his decision in the case at bar.

Reference was also made to the decision of His Honour Judge Borins in *Re Central Mortgage & Housing Corp. and Federal Trust Co.* (1979), 24 O.R. (2d) 540, in which reliance was placed on *L. Pupolin Plumbing & Heating Ltd. v. Sherwood Properties Corp. et al.* Again, however, no question arose in *Re Central Mortgage & Housing Corp. and Federal Trust* as to the position of lien

claimants who claim priority over the mortgage under which a power of sale is being exercised.

19 From the foregoing it is apparent that Southey J. looked to the language of the Mortgages Act and reached the conclusion that lien claimants having priority over a mortgagee do not have those rights taken away as a consequence of a sale under Part III of the Mortgages Act because such sales only extinguish the interests of parties, including lien claimants, whose interests are subsequent to that of the mortgagee.

20 In my opinion, as a consequence of the enactment of the Construction Lien Act, 1983, and in particular s. 80 of that Act, any apparent inconsistencies between the foregoing decisions are resolved. Now lien claimants are protected for the value added to lands and premises by their actions and mortgagees continue to be secured for the moneys actually advanced, and interest (subject to hold-back requirements and consideration of the worth of the premises net of the added value). Section 80 sets up a code to resolve the competing priorities of mortgagees and lien claimants. Moreover the Construction Lien Act, 1983 is a specific statute relative to such priorities and, as such, it takes precedence over the Mortgages Act which is an Act of general application.

21 In *Norwon Electric Sault Co. v. Ross* (1984), 7 C.L.R. 1 (Ont. H.C.J.), Stortini L.J.S.C. concluded as follows:

In my opinion a reasonable interpretation of s. 80(1) leads one to the conclusion that if at the time a mortgage advance is made, there is a lien registered against the premises, all liens "arising from the improvement" have priority to all advances made subsequent to the registration of the first lien. Section 80 distinguishes between "liens arising from the improvement" and liens "preserved or perfected" against the premises. The former deals with work and service performed, the latter with registration.

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Section 80 creates a priority of all valid liens over mortgage advances made subsequent to any registered lien. Once there is a lien registered against the premises the payer such as the mortgagee is at risk of losing priority if it makes an advance in the face of one or more registered liens. The risk is that he will also lose priority over other liens arising and subsequently registered.

22 In Annotation No. 2, commenting on that case, the editor concludes, "... that as a result of the preservation of the lien ... all the liens arising from the improvement become entitled to priority over advances made after the date of the preservation of the lien ... it is difficult to understand how else the priority provisions of the Act could be interpreted. Subsection 80(1) of the Act provides in part that except as otherwise provided in s. 80, the liens arising from an improvement have priority over all mortgages."

23 Having regard to the prior status given to liens by the Construction Lien Act, 1983, I am of the opinion that the Mortgages Act does not, of itself, subordinate lien claims to facilitate power of sale proceedings under Part III.

24 The priorities created by the Construction Lien Act, 1983 are substantive, whereas Part III of the Mortgages Act deals with procedural requirements necessary to pass good title. The purpose of the Mortgages Act is to provide a procedure which will result in a title which cannot be impeached. It does not expunge priorities.

THE MORTGAGES ACT

25 The applicant's alternative answer to the respondent's requisition is that if the Construction Lien Act, 1983 takes precedence over the Mortgages Act, the Kamin mortgage has priority over all outstanding liens (under s. 80(6) of the Construction Lien Act, 1983). It argues that expired liens (Pallister Backhoe and/or Laflamme Doors) do not determine when the first lien arose as this must be based upon a subsisting lien.

26 The intervening lien claimants respond that, in a vendors and purchasers application, it is inappropriate for me to attempt to resolve priorities. The proceedings before me, they contend, should not be dealt with summarily when they have been raised as issues in the lien actions in which evidence specifically directed to these issues will be heard.

27 While this position taken by the interveners ignores the validity of the evidence of the applicant in this proceeding, I must presume that the issues over priorities stated in the lien actions are not frivolously made and are critical issues between the parties in those actions. As such I conclude they should be determined in the lien actions.

28 In *Re Upper Canada Estates Ltd. and Imperial Oil Ltd.* (1930), 38 O.W.N. 36 at p. 38 (H.C.J.), Middleton J.A. stated:

The Court may require notice to be given in cases in which it appears to the Court proper to consider the determination of the question not only as between the vendor and purchaser but so as to bind the third party. In many cases it is proper to give such a direction, but not where there is an acute controversy between the vendor and the third party which can only be resolved in an action upon oral evidence.

(Emphasis added.)

29 On the basis of this language, it may have been improper for me to have ordered notice be given to the lien claimants who were not originally "parties" to these proceedings but whose priorities are the basis of issues in their litigation. I am satisfied that these summary proceedings are not the proper place to resolve triable issues.

30 Finally, s. 80(10) provides a scheme for alternative security to be given by a mortgagee to relieve it of lienholders' claims created by s. 80(2) and (5) of the Construction Lien Act, 1983. As previously noted, the lien claimants are asserting priorities against the applicant pursuant to subsections of s. 80 in addition to s-s. (2) and (5). As such, an appropriate financial guarantee bond, letter of credit or guarantee will not dispose of all of the issues.

31 In the event, the requisition of the respondent has not been satisfied. The application fails.

Application dismissed.