



Bob Aaron bob@aaron.ca

April 3, 2010

Lender didn't have right to add credit card balance to mortgage

Does a mortgage lender have the right to add the outstanding balance on your Visa card to the amount outstanding on your mortgage?

That was the issue in a 2009 court case involving Toronto law firm Dale & Lessmann LLP and the Royal Bank of Canada.

When Dick Soong defaulted on the Royal Bank first mortgage on his house in 2007, the bank sold it under power of sale and applied the proceeds to pay off Soong's \$180,000 Homeline Mortgage and his \$60,000 line of credit.

The law which applies to power of sale proceedings requires that surplus funds be used to pay off debts subsequent to the first mortgage in the order of their priority.

In this case, there were two other mortgages on title. One was to ensure that the fees of Soong's trustee in bankruptcy got paid, and the other was for Soong's legal fees. After the power of sale proceedings, the Royal Bank applied about \$30,000 in surplus funds to pay off Soong's RBC Visa card debt instead of paying it to the second and third mortgage lenders.

Last year, the law firm asked the Ontario Superior Court to determine who had priority over the leftover money the Royal Bank for its Visa card debt, or the second and third mortgage lenders.

In 2005, Soong signed a Homeline Agreement with Royal Bank. Under this agreement, Soong placed an RBC mortgage on his house. The mortgage secured a conventional mortgage plus a variable rate line of credit. No reference was made in the contract or the mortgage of a Visa card agreement which had been signed 11 years earlier.

In August last year, the dispute came before Justice Harvey Spiegel, who had to decide whether the bank's Homeline Agreement entitled it to lump the Visa card debt into the mortgage or whether the subsequent mortgage lenders had a prior claim to the money.

The judge carefully reviewed the terms of the Homeline plan agreement and ruled that the Visa debt was not secured by the RBC mortgage and that the subsequent mortgagees were entitled to the surplus funds. The judge also ordered the Royal Bank to pay costs of \$4,000 to the law firm.

Geoffrey Stratton argued the case for Dale & Lessmann. He typically advises his clients to move any debt that might be secured by a mortgage and is not benefiting from a preferred rate to another financial institution. He also tells his clients to negotiate a better rate for any existing or future debts or lines of credit if they are going to be secured by the mortgage on their home.

In my own law practice, I find that homeowners are rarely aware of which debts are included in their mortgages and which are not. Banks often tack a secured line of credit on to the principal amount of the mortgage whether or not the consumer asks for it, and often, whether or not they are aware of it.

The problem with this practice is that when borrowers want a line of credit at a later date, they are unable to shop around for the best rates and terms because a line of credit is already registered on title.

Dale & Lessmann LLP v. Royal Bank of Canada, 2009 CanLII 47328 (ON S.C.)

Print: PDF Format

Date: 2009-09-09

Docket: CV-09-380969

URL: <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii47328/2009canlii47328.html>

Noteup: [Search for decisions citing this decision](#)

[ReflexRecord](#) (related decisions, legislation cited and decisions cited)

Decisions cited

- Canadian National Railways v. Canadian Pacific Limited, [reflex](#) [1979] 1 W.W.R. 358

COURT FILE NO.: CV-09-380969

DATE: 20090909

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DALE & LESSMANN LLP, Applicant

- and -

ROYAL BANK OF CANADA, Respondent

BEFORE: Justice H. Spiegel

COUNSEL: Geoffrey B. Stratton, for the Applicant

Leigh Ann Sheather, for the Respondent

HEARD: August 26, 2009

ENDORSEMENT

[1] It is not disputed that pursuant to the RBC Homeline Plan Agreement (the HPA) Mr. Soong granted the respondent a first Charge on his property to secure the repayment of the conventional mortgage loan and the variable rate line of credit provided for in the HPA.

[2] The issue is whether the Charge also secured the repayment of the Visa credit card debt owing by Mr. Soong. The respondent says it does. The applicant says it doesn't

[3] The respondent relies on paragraph 2 of the Standard Charge terms which provides as follows:

The Chargor has at the request of the Chargee agreed to give the Charge as a continuing collateral security for payment and satisfaction to the Chargee of all obligations, debts and liabilities, present or future, direct or indirect, absolute or continued, matured or not, extended or renewed, at any time owing by the Chargor to the Chargee incurred or arising either before or after the delivery for registration of the Charge.

[4] The respondent also relies on the definition of mortgage in the HPA which reads as follows:

Mortgage means the collateral first mortgage on the Property described on Schedule A of this Homeline Plan Agreement, securing all borrowings made under this Homeline Plan Agreement and all present and future amounts at any time owing by you as described in the Mortgage.

[5] The respondent therefore submits that a plain reading of these two provisions leads to the conclusion that the parties intended the Charge to secure not only the debts enumerated in the HPA but also all debts owing by Soong to the respondent at the time of registration of the Charge along with any debts he might owe in the future which includes the Visa credit card debt.

[6] The applicant refers to Schedule A of the HPA, the relevant portion of which reads as follows:

The following Property is to be charged by way of a First Mortgage in favour of Royal Bank of Canada as security for the Total Debt;

The HPA defines Total Debt as follows:

Total Debt means the total amount you owe to us from time to time under this Homeline Plan Agreement and all Homeline Plan Allocation Agreements. It is made up of the (i) the principal amount outstanding from time to time of each Mortgage Loan, plus interest at the applicable Mortgage Rate, (ii) the amount, on any day, of the principal balance outstanding under the RCL Credit Line, plus interest at the RCL Interest Rate (also known as the RCL Debt); and (iii) all insurance premiums, services fees and other fees and charges owing to us from time to time as described in the Homeline Plan Agreement or any Homeline Plan Allocation Agreement.

[7] The HPA provides the following with respect to applying moneys obtained from enforcing the Mortgage:

Applying moneys means any money we obtain from enforcing our rights under the Mortgage shall be used first to pay any amounts owing under any existing Mortgage Loan(s), then to amounts owing under the RCL Credit Line. You waive any right of set-off or deduction you may have under any loans described under this Homeline Plan Agreement.

[8] There is no specific reference to the Credit Card Debt in the HPA. Nor do the provisions of the Credit Card Agreement make any reference to a mortgage, charge or any other security for the repayment of the Credit Card Debt.

[9] In my view, a reading of all of the relevant provisions of the HPA as a whole does not lead to the conclusion urged by the respondent. Indeed the provisions cited above are capable of supporting a contrary conclusion. Schedule A to the HPA clearly states that the charge is security for the Total Debt. If the respondent intended the charge to be security for the Visa Credit Card Debt as well it could have easily included language in the definition of Total Debt that would have expressed that intention.

[10] I find that the words and all present and future amounts at any time owing by you as described in the Mortgage in the definition of mortgage under the HPA read together with paragraph 2 of the standard charge terms are at best ambiguous.

[11] To the extent that there is ambiguity the court is also entitled to consider the subsequent conduct of the parties as evidence of their intention at the time the contract was executed: *Canadian National Railway v. Canadian Pacific Ltd* (1978), *reflex*, [1979] 1 W.W.R. 358 (B.C. C.A.) at para. 48 aff'd 105 D.L.R. (3d) 170 (S.C.C.)

[12] I note that the respondent's monthly statements to Mr. Soong setting out the indebtedness secured by the Homeline Mortgage never included or referred to the Credit Card Debt.

[13] Furthermore on March 15, 2007 the respondent commenced an action claiming *inter alia* possession of the Property as a result of default pursuant to the charge. Paragraph 5 of the Statement of Claim alleged that there was due under the Charge for principal and interest the sum of \$180,643.19. Paragraph 9 alleged default in the Credit Line which amounted to \$59,917.27 for principal and interest. Paragraph 11 alleged all of the above indebtedness was secured by the mortgage. In my view a fair reading of the Statement of Claim leads to the conclusion that the words above indebtedness in paragraph 11 refers to the principal and interest due under the mortgage loan and the credit line but not the Visa Credit Card Debt.

[14] I therefore find on a proper interpretation of the terms of the HPA and the Charge that the Visa Credit Card Debt is not secured by the Charge.

[15] The applicant is entitled to the relief claimed in paragraph 1(a) and (b) of the Notice of Application.

[16] The applicant is entitled to the costs of this application which I fix in the sum of \$4,000 inclusive of disbursements and G.S.T.

H. Spiegel J.

DATE: September 9, 2009

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DALE & LESSMANN LLP

Applicant

-and-

ROYAL BANK OF CANADA

Respondent

Application under Rules 14.05(3)(d), (e), and (h)
of the *Rules of Civil Procedure*

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing on _____ day, the
day of _____, 2009, at 393 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date..... Issued by Local registrar: _____

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: Royal Bank of Canada
Personal Services Centre
4th Floor, 180 Wellington Street West
Toronto, Ontario
M5J 1J1

AND TO: A. Farber & Partners Inc.
Suite 1600
150 York Street
Toronto, Ontario
M5H 3S5

APPLICATION

1. The Applicant makes application for:

(a) a declaration that the indebtedness (the Credit Card Debt) under the Visa credit card issued by the Respondent in the names of Dick Soong and Tian Hong Liu, bearing Account Number 4515 xxxx xxxx 0011, is not secured by the mortgage receipted as Instrument No. AT94555 in the Registry Office for the Land Titles Division of Toronto (No. 80) on May 4, 2005 (the Homeline Mortgage);

(b) an Order that the Respondent provide a full accounting to the Applicant and to A. Farber & Partners Inc. of the proceeds the Respondent realized (the [Sale Proceeds](#)) from the exercise of its power of sale contained in the Homeline Mortgage of the lands and premises municipally known as 34 Sandyhook Square, Toronto (the Property);

(c) a declaration that the mortgage in favour of A. Farber & Partners Inc., receipted as Instrument No. AT1279106 in the Registry Office for the Land Titles Division of Toronto (No. 80) on October 12, 2006, represents a mortgage and charge on the Sale Proceeds ranking in priority to the Credit Card Debt, and that A. Farber & Partners Inc. is therefore entitled to monies from the Sale Proceeds before repayment of the Credit Card Debt;

(d) a declaration that the mortgage in favour of the Applicant, receipted as Instrument No. AT1279111 in the Registry Office for the Land Titles Division of Toronto (No. 80) on October 12, 2006, represents a mortgage and charge on the Sale Proceeds ranking in priority to the Credit Card Debt, that the Credit Card Debt is not a debt secured by the property or the Sale Proceeds, and that the Applicant is therefore entitled to monies from the Sale Proceeds before repayment of the Credit Card Debt;

(e) in the alternative, an Order for rectification of the Homeline Mortgage so as to carry out the common intention of the parties and reflect their true agreement;

(f) an Order that the Respondent pay all Sale Proceeds not secured by the Homeline Mortgage firstly to A. Farber & Partners Inc. and then secondly to the Applicant as subsequent encumbrancers under s. 27 of the *Mortgages Act*, R.S.O. 1990, c. M. 40;

(g) costs of this application on a substantial indemnity basis together with applicable Goods and Services Tax thereon in accordance with the Excise Tax Act, R.S.C. 1985, c. E-15, as amended; and

(h) such further and other relief as counsel may advise and this Honourable Court may permit.

2. The grounds for the application are:

(a) A. Farber & Partners Inc. and the Applicant each hold a mortgage registered on title to the Property subsequent to the Homeline Mortgage;

(b) on June 15, 2007, the Respondent sold the Property under its power of sale provision contained in the Homeline Mortgage;

(c) the Respondent retained monies representing from the Sale Proceeds and applied them to the Credit Card Debt, although the Credit Card Debt is not secured by the Homeline Mortgage and it was never the intention of the parties to do so;

(d) The Respondent erroneously claims that the Credit Card Debt is secured by the Homeline Mortgage and as a result the Respondent claims there are no surplus proceeds available for distribution to A. Farber & Partners Inc. or to the Applicant.

(e) In fact the Credit Card Debt is not secured by the Homeline Mortgage and the sales proceeds exceed the total indebtedness secured by the Homeline Mortgage, thereby leaving surplus proceeds available for distribution to A. Farber & Partners Inc. and to the Applicant under their subsequent mortgages.

(f) The Respondent failed to make disclosures to the borrower in accordance with the *Bank Act*, S.C. 1991, c.46, and its associated Regulation, *Cost of Borrowing (Banks) Regulations*, S.O.R./2001-101;

(g) The Respondent made false, misleading, or deceptive representations to the Applicant in violation of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A.

(h) The Respondent failed to apply the Sale Proceeds in accordance with s. 27 of the *Mortgages Act*, R.S.O. 1990, c. M.40;

(i) ss. 11, 17, 24, 66, 70, 80, 81, and 83 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A.

(j) ss. 452(1)(d) and 452(2)(b) and (d) of the *Bank Act*, S.C. 1991, c.46;

(k) ss. 1, 6(4), 10(h), 12(1), 12(3), 13(1), and 23 of *Cost of Borrowing (Banks) Regulations*, S.O.R./2001-101;

(l) rule 14.05(3)(d), (e), and (h) of the *Rules of Civil Procedure*; and

(m) such further and other grounds as counsel may advise and this Honourable Court may permit.

3. The following documentary evidence will be used at the hearing of the application:

(a) the Affidavit of Christina J. Wallis, sworn June 15, 2009; and

(b) such further and other evidence as counsel may advise and this Honourable Court may permit.

Date of issue: June 15, 2009.

DALE & LESSMANN LLP
Barristers & Solicitors
181 University Avenue, Suite 2100
Toronto, ON M5H 3M7

Geoffrey B. Stratton (55388D)
Tel: (416) 863-1010
Fax: (416) 863-1009

Lawyers for the Applicant.