Bankruptcy STILL Is Not the End!

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In our blog post *Bankruptcy — it's not the end!* posted on August 21, 2013[1] we discussed case law which permitted a lender to obtain a deficiency judgment against a mortgagor notwithstanding that the mortgagor had filed for bankruptcy. In *CIBC Mortgage Corp. v. Stenerson*,[2] the Court permitted the deficiency judgment even though the mortgagor was bankrupt because the mortgagor had made payments under the mortgage post-bankruptcy. The Court held that by making the payments, the mortgagor had affirmed the mortgage contract and therefore continued to be liable.

However, other cases disputed imposing such liability on the mere basis of payment and a divergent line of authority developed.[3]

> "These cases hold that mere possession and continued payment is insufficient to warrant liability on a personal promise to pay. Rather, there must be a clear acknowledgement of the continuing obligation… some Courts impose the additional requirement of fresh consideration."[4]

The conflicting line of cases was recently considered by Justice Topolniski of the Alberta Court of Queen's Bench in *Servus Credit Union v. Sulyok ("Sulyok")*.[5] In *Sulyok*, the debtor granted a high ratio mortgage to Servus Credit Union ("Servus"). Years later the debtor filed for bankruptcy. Servus filed a proof of claim as a secured creditor in the bankruptcy. The debtor was separated from his spouse during the bankruptcy period and she continued to make the payments on the mortgage. After the debtor was discharged from bankruptcy, the debtor's wife stopped paying the mortgage. The debtor notified Servus that he intended to move back into the property and make the payments. The debtor made partial payment of the arrears and cured the default on payment of the condominium arrears. Servus started foreclosure proceedings once the debtor advised that he could not make any more payments. Servus obtained an Order – Sale to the Plaintiff. The issue was whether the debtor was still liable for the deficiency given his prior bankruptcy.

At the initial hearing, the Master refused to grant the deficiency judgment. The Master stated that further consideration was required and that there needed to be evidence that the parties had turned their minds to the continuation of personal liability. Servus appealed.

On the appeal, Justice Topolniski reviewed the provisions of the *Bankruptcy and Insolvency Act ("BIA")*.[6] She made particular note that when the *BIA* was amended in 2009, the issue of reaffirmation of contracts was considered in the Senate Reports. The reports specifically recommended that reaffirmation of contracts post-bankruptcy be prohibited for unsecured transactions and that a principled approach be adopted for the reaffirmation of secured transactions. Parliament chose not to follow these recommendations.

The Justice found that the requirement of fresh consideration or an express reaffirmation failed to adequately balance the rights of all stakeholders involved in these situations. The Court quoted,

> "The rehabilitative purpose of s. 178(2) [of the *BIA*] is not meant to give the debtors a fresh start in all aspects of their lives. Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct."[7]

The Court found that where a debtor remains in possession of property after bankruptcy and continues to make payments due under the contract then the debtor has affirmed the contract, including the covenant to pay.

Lenders should be particularly happy with this decision as they do not have to turn their mind to whether new consideration is provided or take any extra steps to get the borrower to reaffirm their contractual obligations

subsequent to bankruptcy. At least in Alberta, all the lender has to do is carry on with the contract in the normal course if the debtor is also prepared to do so.

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[1] http://www.albertaforeclosureblog.com

[2] 1998 CarswellAlta 388 (Alta. Q.B.)

[3] Scotia Mortgage Corp. v. Winchester, (1997) 205 A.R. 147 (Alta. Q.B.); Day c. Banque Laurentienne du Canada, 2014 QCCA 449 (Que. C.A.); Scotia Mortgage Corporation v. Berkers, 2016 NSSC 12 (N.S.S.C)

[4] Servus Credit Union v. Sulyok, 2018 ABQB 860 (Alta. Q.B.) at 62

[5] Ibid.

[6] R.S.C. 1985, c. B-3

[7] Quoting from Alberta (Attorney General) v. Moloney, [2015] 3 S.C.R. 327 at 83