

ONTARIO

# *Land Titles Act*

R.S.O. 1990, Chapter L. 5; as amended

**IN THE MATTER OF** the *Land Titles Act*, R.S.O. 1990, c. L.5, s. 57(7);

**AND IN THE MATTER OF** the title to land registered in the Land Registry Office for the Land Titles Division of Stormont as Lots 32 and 33, Plan 160, City of Cornwall, County of Stormont, in the name of Raymond Seguin and Diane Seguin;

**AND IN THE MATTER OF** an Application by Menard Renovations Centre Inc. for payment of compensation out of The Land Titles Assurance Fund in respect of the failure of the Land Registry Office for the Land Registry Division of Stormont (No. 52) to abstract a second mortgage registered on February 25, 1997, as Instrument No. 275510 against Lots 32 and 33, Plan 160, City of Cornwall, County of Stormont, by Menard Renovations Centre Inc.

## DECISION

This matter came before me for hearing on July 6, 1999 at 10:00 a.m. at Court Services Division, 29 Second Street West, Cornwall, at which time appearing before me were:

Mr. Barrie Wilson	Solicitor for the Claimant
Mr. Raymond Seguin	Witness for the Claimant
Mr. Gary Dionne	Witness for the Claimant
Mr. Gaitain Menard	Witness for the Claimant
Mr. Michael John Tarle	Appraiser, Witness for the Claimant

In arriving at my decision, I have considered the evidence presented on the hearing of this matter as well as the revised Affidavit in Support of the Application for Payment dated December 9, 1999 and received in my office on December 22, 1999.

This matter involved an error made in the recording of the registration of a mortgage. Mr. Seguin granted a blanket mortgage against a number of properties securing a debt to Menard Renovations Centre Inc. ("Menard"). The Registrar failed to abstract the mortgage against one of the properties. As a result, when Power of Sale proceedings were commenced, Menard was not notified of the proceedings.

The theory of the claimant's case is that if it had been notified of the sale of the property, it would have bought and held it for a period of time and later sold it for a profit sufficient to cover Mr. Seguin's outstanding debt.

The amount of the claim is \$52,640.00.

## THE EVIDENCE

Items 1 to 9 were entered as exhibits.

Mr. Seguin is the former owner of the property at issue in this matter. He was involved in the construction business. In the course of his business Mr. Seguin incurred a debt of \$45,270.55 to Menard for the purchase of building materials. Since Mr. Seguin was unable to discharge his debt, he granted a blanket mortgage to Menard that was secured against a number of properties. A review of the register indicates that the mortgage, instrument 275510, was secured against the following properties (this evidence was not led by the claimant, but was determined from a review of the register):

Lot 33 Plan 160, Lot 32 Plan 160, Lot 357 Plan 79, Lot 25 Plan 9, Lot 24 Plan 9, Lot 206 Plan 16, and Lot 356 Plan 79.

The mortgage was not entered against Lots 32 and 33 on Plan 160 ("the property") although these were included in the blanket mortgage. The claimant's application indicates it was of the opinion that there was enough equity in Lots 32 and 33 to secure the debt, and that none of the other properties had sufficient equity to provide adequate security.

Gary Dionne had been employed by Menard as a controller for a period of 3 ½ years at the time of the hearing. It was his evidence that Menard has an equipment rental outlet, a lumber yard and also sells custom kitchens and bathrooms. Menard's business is mainly the sale of products and in renovations.

Mr. Seguin's properties generated monthly rental income. Exhibit 1, a projection of revenues and expenses, was entered by Mr. Dionne. The document was tendered to show the revenue stream associated with the property. The document indicates that if the property was purchased by Menard for \$150,000, Menard could have resold it and made sufficient profit to discharge Seguin's debt of approximately \$45,000. The document was intended to show that a purchaser would be willing to pay \$200,000 for the property based on the annual income of \$47,040 generated. The profit projections contained in Exhibit 1 were based on a purchase price by Menard of \$150,000. The evidence on the hearing and in the claimant's affidavit indicated Menard would have been willing to pay up to \$160,000 for the property.

Menard obtained the information regarding the rental income from Mr. Seguin. Although Mr. Seguin appeared as a witness, he did not give testimony as to the rental income of the property. I advised that I would be willing to grant an adjournment to the claimant in order for Mr. Seguin to provide direct evidence as to the rental income. I would also have been prepared to receive cancelled rent cheques or a financial statement from Mr. Seguin as evidence of rental income. The claimant tendered no such direct evidence.

Despite the aforementioned evidence regarding Menard's claim of a lost opportunity to purchase and resell the property, it was Mr. Dionne's evidence that Menard did not normally buy and sell property in the course of their business. He testified "We are not in the business of selling homes and we don't want to be...".

The claimant called Michael John Tarle as a witness to provide evidence as to the value of the property. Mr. Tarle is an appraiser accredited by the Appraisal Institute of Canada and has given evidence in court proceedings on a number of occasions. He did not submit an appraisal report, but his evidence was that on October 22, 1997 the property was valued at \$160,000.

Mr. Tarle used the sales comparison approach and the income approach in arriving at a value for the property. He considered 5 comparables.

## LEGAL ANALYSIS

The land at issue was registered under the *Registry Act*. Section 116 of the *Registry Act* provides:

- (1) A person wrongfully deprived of land registered under this Act by reason of,  
(a) the deletion of an entry under section 56 or 67; or  
(b) any error or omission in recording a registered instrument,

is entitled to compensation out of The Land Titles Assurance Fund formed under section 54 of the *Land Titles Act*.

In order to succeed, a claimant must demonstrate (among other things) it has lost an interest in land. I find that a lost opportunity to make a profit does not constitute an interest in land. The claimant did not provide any caselaw to support this argument.

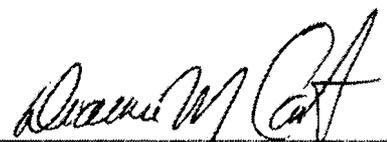
The only interest in land the claimant had was the mortgage, and it did not lose that as a result of not being notified of the power of sale proceedings. A mortgage contains a personal covenant by the mortgagor to pay the debt. The obligation of Mr. Seguin to pay the outstanding debt remained regardless of the fact that the mortgage was not abstracted against Lots 32 and 33.

The claimant has also not satisfied me on the issue of remoteness. The claimant's position is that if it had been notified of the power of sale proceedings, it would have purchased the property for \$150,000 and later sold it at a price sufficient to offset Mr. Seguin's \$45,000 debt. It is possible that had the claimant been involved in bidding for the property, the price could have gone well beyond \$150,000. Moreover, it was Mr. Dionne's evidence that Menard was not in the business of selling homes. Menard's business is mainly in the sale of building products and in renovations.

In addition to establishing that they have lost an interest in land, claimants must also establish, pursuant to subsection 57(4) that they are "unable by such means or otherwise to recover just compensation for the person's loss". The Land Titles Assurance Fund is a Fund of last resort. As indicated above, a mortgage contains a personal covenant by the mortgagor to pay the debt. Mr. Seguin's obligation to discharge his debt under the mortgage was not eliminated by the failure to abstract the mortgage against Lots 32 and 33. The claimant's evidence was that Lots 32 and 33 provided the best security; however, the claimant did not satisfy me that it has suffered a demonstrable loss.

**I HEREBY ORDER** claimant's case dismissed.

Dated at Toronto, this 22nd day of September, 2000.



Dianne M. Carter  
Deputy Director of Titles

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