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CAN A CREDITOR WHO INSTITUTES A HYPOTHECARY RECOURSE RECOVER "EXTRA-JUDICIAL PROFESSIONAL FEES...FOR SERVICES"? A QUEBEC COURT RULES

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Since the amendments made to the *Civil Code of Québec* ("C.C.Q.") in 2002, article 2762 provides that:

2762. A creditor having given prior notice of the exercise of a hypothecary right is not entitled to demand any indemnity from the debtor except interest owing and costs.

Notwithstanding any stipulation to the contrary, costs exclude extra-judicial professional fees payable by the creditor for services required by the creditor in order to recover the capital and interest secured by the hypothec or to conserve the charged property.
(Emphasis added)

On June 30, 2010, the Syndicate of co-owners of the Tiffany Towers condominiums (the "Syndicate") obtained a judgment¹ ordering Ms. Schnabel to surrender her unit for it to be the object of a judicial sale resulting from unpaid condominium fees. The motion for leave to appeal this order having been dismissed, Ms. Schnabel filed a motion in the Court of Québec requesting that the said Court determine the specific amounts she had to pay to the Syndicate, in addition to the unpaid condominium fees, in order to avoid a judicial sale.

Judge Bousquet noted that the judgment rendered on June 30, 2010, which confirmed the existence of the debt owed to the Syndicate, provided, in particular, that:

[Translation]

"However, if an interested party wishes to exercise the right provided under article 2761 C.C.Q., either party may bring a motion before the practice division to have the Court determine the amount necessary to defeat the exercise of the right of the creditor [in the present case, the Syndicate of co-owners] by paying the creditor the amount due to him or remedying the omission or default set forth in the prior notice and any subsequent omission or default, and, in either case, by paying the costs incurred."

Among the amounts claimed by the Syndicate, we will focus herein on the amounts for the fees of the various lawyers acting for the Syndicate, as well as the indemnity claimed by the Syndicate as compensation for the time spent on the matter by its bookkeeper and chartered accountants.

As for the fees of the Syndicate's lawyers, the judge noted that the claim made by the Syndicate for judicial costs included both judicial costs and extra-judicial fees and that the latter are excluded. The legislator excluded professional fees from the calculation of the amounts due by a grantor of a hypothec to the holder thereof as a result of the exercise of the latter's hypothecary rights.

Basing itself on a 2009 decision,² the Syndicate tried to argue that the exclusion under this Article does not apply when the hypothecary recourse is exercised by a syndicate of co-owners, but the Court dismissed this argument for two reasons:

[Translation]

"[38] [...] Article 2762 C.C.Q. may produce results that are sometimes unfair, but it is not within the power of the courts to substitute themselves for the legislator and this Article, which is unambiguous, must be applied.

It is possible to envision exceptions, particularly when the payment of extra-judicial costs is provided for in a settlement putting an end to litigation, but this is not the situation in the present case whereas it was one of the elements taken into consideration by the Honourable Jean-François De Grandpré, S.C.J. in the above-mentioned case."

However, it is interesting to note that the judge suggested that the legal fees incurred by the Syndicate might represent damages that could be claimed but he refrained from ruling on the issue since no arguments to that effect were made by the Syndicate.

As for the indemnity claimed as compensation for the time spent on the litigation by the bookkeeper, who was an employee of the Syndicate, and the consultation fees charged by the chartered accountant firm, the judge was of the view that the costs of the services of the former had to be paid by Ms. Schnabel (seemingly since these services did not constitute "professional services"), but he refused to allow the recovery of the fees of the chartered accountants because they

¹ *Tiffany Towers Condominium Association v. Schnabel*, 2010 QCCQ 8300 ("Tiffany").

² *Syndicat des copropriétaires du Elgin v. Al Shawa*, 2009 QCCS 5700.

constituted extra-judicial fees for professional services under Article 2762 C.C.Q. In addition, no evidence was presented which allowed one to conclude that the "consultation" services were rendered in relation to the litigation between the Syndicate and Ms. Schnabel, even if it could have been said that Article 2762 C.C.Q. did not exclude them.

In short, the judge ordered Ms. Schnabel to pay the following costs:

- The condominium fees in arrears;
- The costs incurred for the services of the bookkeeper;
- The expenses, as determined at the time of the taxation of the bill of costs;
- The interest from the date of the judgment until the date of payment.

This decision was the subject of a motion for leave to appeal to the Court of Appeal, which it dismissed because at the time when the motion was heard the amounts referred to in the Court of Québec's order had already been paid.

COMMENTS

The judge's interpretation respecting the expressions "costs" and "extra-judicial professional fees...for services" may be questioned. According to several authors, and the Court of Appeal (in the case cited below), the exclusion of the payment of extra-judicial costs should be interpreted as only excluding lawyers' fees. In this respect, Mre Louis Payette is of the view that:

[Translation]

"The expression 'extra-judicial professional fees' used by the Code refers to the remuneration of legal counsel whose services were retained to recover the amounts due. In fact, the legislator usually uses this expression to refer to lawyers' fees; nothing indicates that he wanted to use it in a different sense here so as to include in this exclusion, for instance, the fees of appraisers, accountant-consultants or other service providers.³"

(Emphasis added)

This excerpt was not raised before the Court, and neither were the *Journal des débats* of the National Assembly⁴ and the case of *Bouchebel v. Société d'hypothèques CIBC*,⁵ in which the Court of Appeal, interpreting a similar provision, stated that:

[Translation]

"[34] The extra-judicial professional fees referred to [in Article 2667 C.C.Q.] are the fees due to the hypothecary creditor's counsel for his professional services, in addition to the judicial costs, and are not those of the other professionals who have been retained to recover the debt or conserve the charged property."

(Emphasis added)

The Court of Appeal had based its reasoning on the parliamentary debates surrounding the passing of Bill 50 modifying the C.C.Q. and principles of statutory interpretation,⁶ and referred in particular to an article by Mre Philippe Bélanger concerning the scope of the amendments made to Articles 2667 and 2762 C.C.Q.⁷

[Translation]

"By limiting our analysis solely to Article 2667 C.C.Q. and by interpreting the expression 'extra-judicial professional fees' in the light of the Quebec legislation *in pari materia*, it is easy to conclude that said expression encompasses only the fees due to the hypothecary creditor's counsel responsible for recovering the hypothecary debt or conserving the hypothecated property.

In fact, the expressions "extrajudicial fees" or "extrajudicial costs" are used by the Quebec legislator to refer to lawyer's fees both under the *Act respecting the Barreau du Québec*⁸ and the *Code of ethics of advocates*.⁹"

As the Court of Appeal dismissed the motion for leave to appeal, because the amounts owed by Ms. Schnabel to the Syndicate had been paid, we will not have the benefit of knowing its interpretation of the expressions "costs" and "extra-judicial professional fees" in Article 2762 C.C.Q. Nevertheless, it would be wise to keep in mind the opinion of the authors and the Court of Appeal in 2006 in *Bouchebel*, when faced with a similar situation.

Moreover, the judge in *Tiffany* has left the door open to claiming the reimbursement of extra-judicial costs as damages and made reference to possible exceptions to his determination. For example, when the payment of extra-judicial costs is provided for in a settlement putting an end to litigation, it would not be prohibited for a creditor to request extra-judicial costs (according to Mre Payette). Thus, it is recommended to stipulate that the debtor undertakes to pay such extra-judicial costs in a contract, while we wait for the issue to be determined by the Court of Appeal in a future case.

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- ³ Louis PAYETTE, *Les sûretés réelles dans le Code civil du Québec*, 4th edition, Cowansville, Éditions Yvon Blais, 2010, para 1695.
- ⁴ Québec, National Assembly, *Journal des débats*, n. 54 (March 27, 2002) p. 1 to 49; n. 93 (April 30, 2002), p. 5707 to 5721.
- ⁵ 2006 QCCA 342 ("Bouchebel").
- ⁶ See particularly: P.-A. Côté, *Interprétation des lois*, 3rd ed., Montréal, Thémis, 1999.
- ⁷ Philippe H. BÉLANGER, "La portée des modifications apportées aux articles 2667 et 2762 du Code civil du Québec : quels sont les frais qui ne peuvent plus être garantis par hypothèque?", in Service de la formation permanente, Barreau du Québec, vol. 189, *Développements récents en droit de la construction*, Cowansville, Éditions Yvon Blais, 2003.
- ⁸ R.S.Q., c. B-1, sec. 126.
- ⁹ http://www.cajj.qc.ca/doctrine/developpements_recents/189/1128/index.html_-_ftnref19#_ftnref19 R.S.Q., 1981, c. B-1, r. 1., sec. 4.02.01(x).

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