C.A. No. 114305

NOVA SCOTIA COURT OF APPEAL

Cite as: Credit Union Atlantic Ltd. v. Bonang, 1995 NSCA 170
Hallett, Bateman and Flinn, JJ.A.

BETWEEN:

CREDIT UNION ATLANTIC LIMITED, a body corporate Appellant - and - TERRY M. BONANG and BONITA LYNN BONANG Respondents	Michael F. LeBlanc for the Appellant Respondents not appearing Appeal Heard: September 20, 1995 Judgment Delivered: October 10, 1995

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Bateman and Flinn, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of a Chambers judge refusing to grant an application for an order for foreclosure and sale of the respondents' real property unless the appellant mortgagee discharged a judgment it had entered and registered in the Registry of Deeds on November 7th, 1994. The judgment was in the amount of $75,375.93. The judgment was obtained in a suit commenced by the appellant against the respondents on a demand promissory note made by the respondents in the appellant's favour. The mortgage sought to be foreclosed had been given as collateral security for the loan evidenced by the promissory note. After reviewing the facts and some case law, the learned Chambers judge concluded his decision in the following words:

> "The Nova Scotia foreclosure procedure is unique in Canada. It is derived from an old Irish procedure.
>
> The procedure followed by the plaintiff mortgagee in the present case is clearly not in accord with that long-standing, unique procedure. If the present claim were allowed to proceed, the plaintiff mortgagee would end up with the following remedies: judgment on the promissory note; costs of that judgment; sale of the mortgaged property and, if the plaintiff mortgagee purchased at sale the property itself or, if a third party was the purchaser at sale, the proceeds of the foreclosure sale; costs of the application for foreclosure; costs of the application for confirmation of the Sheriff's sale; judgment for any deficiency; and costs of the application for the deficiency. The totality of all those remedies would be inequitable to the mortgagors. Moreover, if the plaintiff were successful, its success would be perceived as encouraging a multiplicity of actions and permitting benefits which have never been previously granted, and are not available to mortgagees whose mortgages are non-collateral.
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> This plaintiff mortgagee, like all others who foreclose, is required to follow the normal procedure for foreclosures as set out in the applicable case law and the **Civil Procedure Rules**.
>
> The Court will grant the requested order for foreclosure after the plaintiff mortgagee has vacated or discharged the existing judgment with respect to the promissory note, together with any consequential execution, no costs being chargeable to the defendant mortgagors, and after counsel on behalf of the plaintiff mortgagee has

> filed an affidavit confirming that it has done so. The order for foreclosure will also provide for interest at the rate prescribed in the **Interest and Judgment Act**, R.S.N.S. 1989, c. 233, for the period subsequent to the date that the judgment with respect to the promissory note, now ordered discharged or vacated, was originally entered. The order for foreclosure which will issue will explicitly provide that the plaintiff mortgagee will have one-half of its costs of the application for foreclosure, the application for confirmation of the sale, and any application for deficiency judgment, plus disbursements."

The appellant has raised three issues on this appeal:

> "1. The Honourable Justice erred in law when he concluded that a mortgagee could not proceed to foreclose under a Collateral Mortgage if that Mortgagee had already taken Judgment under the terms of the Promissory Note to which the mortgage was collateral.
>
> 2. The Honourable Justice erred in law when he ordered that only one-half of the costs of the application for foreclosure and sale, confirmation of the sale and application for deficiency judgment would be awarded.
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> 3. The Honourable Justice erred in law when he ordered that the order for foreclosure and sale provide for interest on the indebtedness at the rate prescribed in the **Interest on Judgments Act**, Revised Statutes of Nova Scotia, 1989, c. 233."

Disposition of the Appeal

The learned Chambers judge erred when he refused to grant the foreclosure order because the appellant had obtained judgment through its action on the demand promissory note. The foreclosure practice in Nova Scotia is somewhat unique in that a mortgagee cannot sell mortgaged property without obtaining an order of the Supreme Court that both forecloses the interest of the mortgagors (subject to the right of redemption up to the date of sale) and directs the Sheriff to sell the property in accordance with the terms as provided in the court order. The mortgagors may redeem the property at any time prior to the Sheriff's sale upon payment of the money due to the mortgagee for principal, interest and costs. After the sale the Nova Scotia practice requires that the mortgagee apply to the court to have the sale

confirmed (**Nova Scotia Savings & Loan v. Co v. Corcoran** (1978), 29 N.S.R. (2d) 192). In short, the foreclosure practice in Nova Scotia provides for a sale that is supervised by the court as opposed to a sale conducted by the mortgagee under a power of sale without any involvement of the court. In Nova Scotia if there is a deficiency on the sale of the property, the mortgagee may apply for a deficiency judgment provided he has asked for this relief in the statement of claim. If a surplus is realized the Sheriff pays the money into court to be distributed to the persons entitled according to their priorities. All of this is provided for in **Civil Procedure Rule 47**.

In arriving at his conclusion the learned Chambers judge may have had the provisions of **Rule 47.09** in mind. At the time the learned Chambers judge ruled on this matter the **Rule** provided:

> "47.09 (1) Unless the court otherwise orders, in a proceeding for foreclosure or foreclosure and sale, a judgment for any amount due on a mortgage shall not be ordered, entered or enforced before the proceeds of sale have been realized."
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> In July of 1995 the **Rule** was altered and now reads:
>
> "47.09(1) Unless the court otherwise orders, in a proceeding for foreclosure, sale and possession, default judgment shall occur on the earlier of 20 days after the date of sale by public auction or payment to the Sheriff, but judgment for any amount due shall not be entered before the proceeds of sale have been realized and a deficiency, if any, has been determined by the court.
>
> (2) Interest on any judgment shall be pursuant to the **Interest on Judgments Act**."

The change is not material to this appeal.

The learned Chambers judge apparently felt that since a mortgagee in an ordinary foreclosure action could not obtain a deficiency judgment prior to realizing the proceeds of

the sale, it would be inequitable for the appellant to have judgment on the promissory note. **Rule 47.09(1)** does not apply to a judgment obtained by an action on a demand promissory note when the mortgage is merely collateral. Nor is it inequitable that a mortgagee take such a proceeding unless, of course, there was evidence to show that the mortgagee was acting in bad faith in commencing the action on the promissory note. Nor does **Rule 47.09** prevent a mortgagee from commencing an action on the mortgagor's covenants to repay; the Rule only applies to foreclosure proceedings and even then the court has a discretion to enter judgment prior to the realization of the sale proceeds. Such a discretion would only be exercised in exceptional circumstances.

Rule 12.04(2)(d) and **(f)** of the **Civil Procedure Rules** is relevant in a consideration of the decision of the learned Chambers judge. That **Rule** provides:

> "12.04 (2) On the application, the court may,
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> (d) direct a sale of the mortgaged property on such terms as the court thinks fit without previously determining the priorities of encumbrancers or the amount due on their encumbrances:
>
> (f) make such other order as is just."

In addition **Rule 51.18(1)(f)**, which has general application, is relevant. It provides:

> "51.18. (1) On the adjudication of a claim, including any part thereof, the court may,
>
> (f) give such other directions or make such other order as is just."

The Court's jurisdiction under R**ule 12.04(2) (d)** or **(f)** and **Rule 51.18(1)(f)**, to make an order on terms, does not extend to permit the learned Chambers judge to order the mortgagee to vacate a validly obtained judgment on the promissory note as the price to be

paid for obtaining the order for foreclosure and sale of property mortgaged as collateral security for a loan. The fact that a mortgagee is restricted by **Rule 47.09** is an insufficient reason to impose such a condition on the appellant in these proceedings. The default judgment obtained by the appellant in the action on the demand promissory note could only be set aside on an application under **Rule 12.06**.

There is no case law in this Province that supports what the learned Chambers judge did in this instance. Authority in other jurisdictions supports the taking of judgment on a promissory note without impairing the right of a lender to subsequently foreclose on a collateral mortgage (**Halsbury's Laws of England**, (4th) Volume 32, Mortgages, paragraph 980; **West Coast Finance Ltd. v. Petersen** (1965), 49 D.L.R. (2d) 735; **Bank of Nova Scotia v. Dorval et al.** (1979), 104 D.L.R. (3d) 121 (Ont. C.A.)). The fact that the Nova Scotia practice requires a mortgagee to realize on security of real property by way of judicial sale, rather than pursuant to a power of sale in a mortgage without judicial supervision, is not a logical reason to order the mortgagee to vacate the judgment as was done by the learned Chambers judge in this instance. In fact, the Nova Scotia requirement that a sale of mortgaged real property is under the supervision of the Supreme Court lends support to the procedure followed by the appellant as the court can ensure that the borrower is fairly dealt with in the foreclosure of the collateral security. There was no evidence of the mortgagee acting in bad faith; the learned Chambers judge exceeded his discretionary power in the terms he imposed.

However, as noted by the learned Chambers judge, the standard form of statement of claim used in foreclosure proceedings, and as used by the appellant, should have been modified to disclose the fact that the mortgage was collateral to the promissory note and that judgment had been obtained in an action on the note prior to the commencement of the foreclosure proceedings. There is nothing in the documentation filed in support of the

application (other than an appearance of the judgment on the abstract showing encumbrances against the property), that would have alerted the learned Chambers judge to the fact that this was a foreclosure of a collateral mortgage and that judgment had been entered in the action on the promissory note.

The record before us does not disclose the form of foreclosure order sought but it is reasonable to assume that it was in the standard form given the other documentation filed in support of the application.

Second Ground of Appeal

I am of the opinion that the learned Chambers judge improperly exercised his discretion as to costs by penalizing the appellant for having taken legal proceedings on the promissory note and obtaining a judgment in default of defence. This was not inequitable; the appellant was entitled to sue on the promissory note without commencing proceedings to realize on the collateral mortgage. There was no evidence before the Chambers judge that would indicate that the appellants, in taking such action, acted out of improper motives. It very well may be that the appellant credit union was not comfortable in foreclosing on one of its members' homes and chose to simply sue on the promissory note in the first instance

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Third Ground of Appeal

The learned Chambers judge was correct to limit interest to 5% after the judgment on the promissory note was entered by the appellant. Section 2(1) of the **Interest on Judgments Act**, S.N.S. 1989 c. 233 provides:

> "2 (1) Until it is satisfied, every judgment debt shall bear interest at the rate of five per cent *per annum* or, where another rate is prescribed pursuant to subsection (2), at that other rate."

Having decided to sue on the promissory note and obtain judgment, the appellant was no longer entitled to interest at 14.5% as provided for in the note. The mortgage was simply collateral security for the debt. The appellant's right to 14.5% interest ceased when it entered judgment on the note. The appellant was wrong to have claimed interest after this date at 14.5% as it did in the statement of claim and the other documents supporting the application for the order for foreclosure and sale. The substantial reduction in the rate of interest should discourage lenders holding this type of security from suing on the promissory note rather than foreclosing the collateral mortgage. Thus, the multiplicity of actions the learned Chambers judge feared, if this practice were countenanced, is unlikely to occur.

General Comments

It was appropriate for the Chambers judge to be concerned about the possibilities of double recovery and the costs associated with proceeding by way of two actions but the learned Chambers judge acted arbitrarily in requiring the appellant to vacate the judgment and in ordering that the appellant would have only half its costs in the foreclosure proceedings in the absence of evidence that warranted making such an order.

Under the standard foreclosure order the sheriff's sale is under the supervision of the court. In this instance had the appellant received money on the judgment pursuant to an Execution Order on the personal property of the respondents, after an order for foreclosure had been obtained but prior to the sheriff's sale, the mortgagors would have been entitled to redeem their property prior to the sheriff's sale for the amount then owing on the judgment plus costs, that is, they would be given credit for any amounts realized by way of execution.

In these circumstances, if the property was bought at a sheriff's sale by the

mortgagee for a nominal sum, the mortgagors should have the benefit of **Rule 47.10** which applies to applications for deficiency judgments in a standard foreclosure action. Under no circumstances could a creditor have two judgments for the same debt.

The whole proceeding with respect to foreclosure of mortgaged property is under the supervision of the Supreme Court in Nova Scotia and the interest of unrepresented mortgagors, where there has been default of defence, are protected by the Court pursuant to the Rules and the practice.

At the time the application for the foreclosure order was made **Rule 47.10** provided:

> "47.10 (1) Where in the case of a sale pursuant to Rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, disbursements authorized by the mortgage instrument, interest and costs, and the mortgagor is a defendant, the plaintiff shall be entitled to an order for payment of the deficiency (together with interest on that amount at the rate provided for in the mortgage from the date of the sale to the date of the order), if such relief has been claimed.
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> (2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to Rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of sale, the court, in determining the amount of the deficiency, may deem the sale price to have been
>
> (a) the fair market value of the property at the time of the sale as established by independent appraisal;
> or
> (b) the amount realized upon a resale of the property if the court is satisfied that the price obtained was reasonable, but in that event any income derived from the property before resale shall be added to the price obtained and there shall be deducted therefrom the costs of resale (including real estate commission paid to a third party), expenses reasonably incurred to derive income from the property and other costs reasonably and necessarily incurred to protect or conserve it.
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> (3) An application for deficiency judgment pursuant to sub-paragraph (2), unless otherwise ordered by the court, shall be made within six months from the date of the Sheriff's Sale on ten days notice

> and any deficiency judgment allowed shall not exceed the difference between the amount realized by the plaintiff from the Sheriff's Sale and the amount owing to the plaintiff at that date determined in accordance with the provisions of the order for foreclosure and sale."

In July 1995 **Rule 47.10** was amended. It now provides:

> "47.10 (1) Where in the case of sale pursuant to Rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements, as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.
>
> (2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to Rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of sale, the court, in determining the amount of the deficiency, may deem the sale price to have been the fair market value of the property at the time of the sale.
>
> (3) An application for deficiency judgment shall be made to the court within six months from the date of the Sheriff's sale, on ten days notice."

This is a more simplified test but the principle is the same.

Accordingly, when a creditor who has taken judgment on a promissory note secured by a collateral mortgage on real property commences action to realize on the security, the order for foreclosure and sale should contain provisions that would ensure that the mortgagors be given the benefit of the rules relating to deficiency judgments so that the mortgagors will receive full credit against the judgment for the market value of the collateral security as provided for in **Rule 47.10** and in accordance with the practice.

Conclusion

The appeal ought to be allowed in part; there will be no order for costs as the problem created for the appellant was, in part, caused by the inadequacy of the documentation

filed in support of the application to disclose the full and correct facts; the statement of claim and affidavits in support ought to have reflected what, in fact, the mortgagee had done. I am not suggesting that the mortgagee or its solicitor acted to deceive the Court as the solicitor for the mortgagee brought these matters to the attention of the Chambers judge which led to the decision that was rendered by the learned Chambers judge.

Hallett, J.A.

Concurred in:

Bateman, J.A.

Flinn, J.A.

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R E A S O N S
FOR
JUDGMENT
BY:
HALLETT, J.A.