NOVA SCOTIA COURT OF APPEAL

Citation: *Wolfridge Farm Ltd. v. Farm Credit Canada*, 2016 NSCA 46

Date: 20160531
Docket: CA 443239
CA 443918
Registry: Halifax

Between:

Wolfridge Farm Limited

Appellant

v.

Farm Credit Canada,
John Early, Lydia Early

Respondents

Judges:	Fichaud, Saunders and Farrar, JJ.A.
Appeal Heard:	May 24, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	John T. Early, III, as agent and vice-president, for the appellant Jeffrey P. Flinn and Kilian J. Schlemmer (Law Student), for the respondent Farm Credit Canada Respondents, John Early and Lydia Early, unrepresented

Reasons for judgment:

[1] At the hearing, John T. Early, III identified himself as agent and vice-president of the appellant, Wolfridge Farm Limited, with authority to speak on behalf of this corporate entity. He said he was not speaking on his own behalf or on behalf of his wife, Lydia Early, with the result that those two parties (identified as respondents in the style of cause), were unrepresented at the appeal. Mr. Early said they had chosen to proceed in this fashion. While this strikes us as a strange state of affairs, it has no bearing on the result.

[2] After hearing Mr. Early's submissions we recessed and then returned to Court to announce our unanimous decision that these appeals were dismissed, with reasons to follow. These are our reasons.

[3] For the purpose of this decision, it will not be necessary to provide a detailed review of the facts. A helpful summary may be found in the reported decision of Nova Scotia Supreme Court Justice James L. Chipman, 2015 NSSC 240, and a more fulsome account is provided in the affidavit of Nicholas Mott, of counsel to the respondent Farm Credit Canada, sworn July 27, 2015 and included within the Supplementary Appeal Book at pp. 15-19.

[4] The property in question is commonly referred to as the "Horse Farm" located at 1299 Ridge Road, Wolfville Ridge, Kings County, Nova Scotia. The appellant Wolfridge Farm Limited was incorporated in 2001. At that time the record shows John Early as President and Lydia Early as Director and Recognized Agent. That year, Farm Credit Canada (FCC) loaned $87,000 to Wolfridge to purchase the Horse Farm. The loan was secured by collateral mortgage, duly executed and recorded. FCC was the mortgagee; Wolfridge Farm Limited, John Early and Lydia Early were the mortgagors. John Early and Lydia Early guaranteed payment of the debts and liabilities of Wolfridge to a limit of $87,000 with interest. Wolfridge defaulted. In March, 2014, FCC made a demand on its loan and sued to recover the amount due together with its costs and expenses.

[5] FCC applied *ex parte* for an order for foreclosure, sale and possession against Wolfridge, and John and Lydia Early in relation to the subject property. Such an order was granted by Justice Gerald R.P. Moir on February 23, 2015.

[6] The hearing before this panel concerns two appeals brought by Wolfridge. The first relates to the oral decision and confirmatory order of Justice Chipman

dated August 7, 2015 (to which I made reference earlier). That appeal is identified as CA No. 443239.

[7] The second relates to the oral decision and confirmatory order of Justice Jamie S. Campbell dated August 27, 2015. That appeal is identified as CA No. 443918.

[8] In essence, the decision and order of Justice Chipman amended the previous order for foreclosure, sale and possession granted by Justice Moir by adding recitals to the previous order so that FCC's legitimate efforts to recover the monies and costs owed to it on account of the mortgagors' default, were not continuously frustrated by the mortgagors' perceived strategy of bidding, but then failing to ever complete the sale transaction, at auction.

[9] Justice Campbell's decision and order a few weeks later dismissed the motion brought by Wolfridge which sought to set aside the foreclosure sale ordered by Justice Chipman. Campbell, J. saw the appellant's motion as nothing more than an attempt to re-litigate the very same issues, before a different judge, in the hope that it would achieve a different result.

[10] We are unanimously of the view that both appeals are without merit. They stand dismissed with costs to the respondent, FCC.

[11] Justice Chipman did not err in law or in fact in refusing to stay or set aside the previous order of Justice Moir, or in varying the terms of that order by adding recitals to it so as to prevent the mortgagors from interfering with FCC's legitimate collection efforts in recovering its losses under the terms of its collateral mortgage.

[12] In particular, there is no merit to the appellant's complaint that Chipman, J. erred by failing or refusing to deal with its attempt to exercise its equity of redemption. The appellant received notice that its loan with the respondent was in arrears on March 17, 2014. John Early and Lydia Early were personally served with FCC's Notice of Action and Statement of Claim seeking foreclosure, sale and possession of the property. Upon becoming aware of the foreclosure proceedings in 2014, the mortgagors could have, but never did, file a proper motion to obtain a redemption order pursuant to *Civil Procedure Rules* 72.16 and 23.11, or to discontinue the foreclosure action under s. 42 of the *Judicature Act*, R.S.N.S. 1989, c. 240. See for example, *Canadian Imperial Bank of Commerce v. Hurlbert*, 2008 NSSC 408.

[13] In the weeks leading up to the August 7, 2015, foreclosure auction, the mortgagors could have, but never did, file a proper motion seeking a redemption order, or asking the Court to use its general discretion to abridge filing deadlines in order to hear their motion for a redemption order, prior to the foreclosure auction.

[14] In our view, Chipman, J. can hardly be faulted for "failing" to consider a motion for a redemption order, that was never properly before him.

[15] Neither did Chipman, J. err (as suggested by Mr. Early in his arguments) by holding that the two motions filed by the appellant and the Earlys (one seeking a "cancellation" of the foreclosure sale and the other seeking to set aside the default judgment) were virtually identical, in that they repeated the same "claimed principles of natural justice", cited the same evidence, and sought essentially the same forms of relief such that in Justice Chipman's view he ought to adjudicate both matters at the same hearing. He gave both sides ample opportunity to be heard. We reject Mr. Early's submission that Justice Chipman considered a motion that was not before him, or that he failed to address the merits of the appellant's position, or that he failed to appreciate the fact that the Earlys had delivered a cheque to FCC's counsel which they thought was sufficient to repay the debt occasioned by their arrears, and stop the sale.

[16] Further, had the appellant seriously intended to redeem the property prior to the foreclosure sale on August 7, 2015, it was required to pay the respondent the full amount due on the mortgage plus costs within the prescribed time. Redemption requires such payment to be made prior to the sale. See for example, *Credit Union Atlantic Ltd. v. Bonang*, [1995] N.S.J. No. 103, 1995 CanLII 4275 (NSCA); *Golden Forest Holdings Ltd. v. Bank of Nova Scotia*, [1990] N.S.J. No. 230, 1990 CanLII 2489 (NSCA)).

[17] Finally, having reviewed the transcript of the proceedings before Justice Chipman, we are satisfied that there was nothing in the manner in which he dealt with the appellant's representatives which would cause a reasonable and informed person, viewing the matter realistically and practically, to think that Justice Chipman was biased, and had not decided the matter fairly and impartially. See for example, *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.

[18] Neither did Justice Campbell err in law or in fact in dismissing the appellant's subsequent attempt to set aside the foreclosure sale held on August 7,

2015. In our view, Campbell, J. was correct when he rejected the appellant's argument that it still had the "right" to redeem, notwithstanding the sale of the property on August 7, 2015. Justice Campbell reasoned:

> …What's argued then is that, because the money is offered, the sale should now be set aside. Foreclosure sales don't permit redemption after the fact. A foreclosure sale cannot be set aside just because the mortgagor shows up with a cheque. As … noted in [here, Campbell, J. obviously misspoke. It is clear that he intended to refer to two cases: first, the decision of the Supreme Court of Canada in *Zinck v. Lobster Point Realty Corp.*, [1953] 1 S.C.R. 285, as well as the decision of Hallett, J.A., writing for this Court in *Golden Forest Holdings Ltd. v. Bank of Nova Scotia*, 1990 N.S.J. No. 230 (C.A.)] once the sheriff has knocked a property down to a purchaser, any right of redemption, unless there are proper grounds for setting aside the sale, is terminated. Proper grounds for setting aside a sale would include fraud, mistake, or misconduct. There is no evidence here that the process has been defective in any sense. There is no hint whatsoever of fraud, and no evidence of any mistake or misconduct. Mr. Early has made assertions and allegations of sharp practice, but in my view there is nothing at this point to substantiate those allegations. …

[19] Based on our careful review of the record and our consideration of the parties' submissions, we see nothing here which would warrant our intervention.

[20] Accordingly, both appeals are dismissed with costs to the respondent, FCC. We fix the total amount for both combined appeals at $3,000 inclusive of disbursements. We are aware that the appellant did post $6,000 security for costs for these appeals, as previously ordered by our colleague , Justice Bryson (2016 NSCA 19). Accordingly, counsel for FCC is now free to ask the Registrar to transfer to the credit of FCC the sum of $3,000 forthwith. We leave it to the appellant and its representatives to seek recovery of the balance of the posted security for costs held by the Registrar.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.