NOVA SCOTIA COURT OF APPEAL
Citation: Behner v. Bank of Montreal, 2010 NSCA 54

Date: 20100618
Docket: CA 321628
Registry: Halifax

Between:

Paul D. Behner and Marilla Stephenson

Appellants

v.

Bank of Montreal

Respondent

Judge(s): MacDonald, C.J.N.S.; Saunders, Oland, JJ.A.

Appeal Heard: June 2, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed with costs per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.

Counsel: John T. Rafferty, Q.C., for the appellant
Stephen J. Kingston and Joe McNally, for the respondent

Reasons for judgment:

[1] The appellant, Paul Behner, gave the respondent, Bank of Montreal, two personal guarantees. The first guarantee was secured by a collateral mortgage; the second was unsecured. The Bank obtained default judgment pursuant to the second, unsecured guarantee, for the total amount of the indebtedness owing to it. In a separate proceeding, it applied for an order for foreclosure on the collateral mortgage which secured the first guarantee. Mr. Behner and his wife, the appellant Marilla Stephenson, contested the Bank's application.

[2] In his decision dated November 5, 2009 (2009 NSSC 326), Justice Glen G. McDougall held that the Bank was not barred, by virtue of the doctrine of *res judicata*, from seeking an order for foreclosure. His order granting the Bank's motion is dated December 2, 2009. Mr. Behner and Ms. Stephenson appeal. For the reasons which follow, I would dismiss their appeal.

Background

[3] On November 6, 2002, Mr. Behner executed a guarantee of all debts and liabilities at any time owing by Trax Construction Limited (Trax) to the Bank. This 2002 guarantee was limited to the maximum principal amount of $100,000 and collaterally secured by a mortgage against property at 18 Beechwood Terrace, Halifax (the "Property"). Title to the Property was then in the name of Mr. Behner. Ms. Stephenson signed the collateral mortgage as spouse and releasor.

[4] In 2004, title to the Property was conveyed to Ms. Stephenson. She executed two mortgages in favour of the Bank, both of which gained priority over the 2002 collateral mortgage by way of postponement agreements.

[5] On August 25, 2008, Mr. Behner executed a second guarantee of Trax's indebtedness in favour of the Bank. This 2008 guarantee was limited to the maximum principal amount of $2,000,000. The Bank did not obtain any collateral mortgage as security for this guarantee.

[6] Both of the 2002 and 2008 guarantees Mr. Behner signed included provisions reading:

> IN CONSIDERATION of the Bank of Montreal (hereinafter the "Bank") dealing with TRAX CONSTRUCTION LIMITED herein referred to as the Customer, the undersigned hereby jointly and severally guarantee(s) payment to the Bank of all present and future debts and liabilities direct or indirect or otherwise, now or at any time and from time to time hereafter due or owing to the Bank from or by the Customer . . .
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> . . . AND IT IS FURTHER AGREED that this shall be a continuing guarantee and shall cover and secure any ultimate balance owing to the Bank, including all costs, charges and expenses which the Bank may incur in enforcing or obtaining payment of the sums of money due to the Bank from the Customer either alone or in conjunction with any other corporation, person or persons, or otherwise howsoever, or attempting to do so. The Bank shall not be obliged to seek any recourse against the Customer or other persons or the securities it may hold before being entitled to payment from the undersigned of all and every debts and liabilities hereby guaranteed. . . .
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> THE UNDERSIGNED . . . acknowledges that this Guarantee has been delivered free of any conditions and that no representations have been made to the undersigned . . . under this Guarantee save as may be specifically embodied herein and agrees that this Guarantee is in addition to and not in substitution for any other Guarantees held or which may hereafter be held by said Bank. . . . The present Guarantee shall remain in full force and effect until all debts and obligation hereby secured have been irrevocably and indefeasibly paid and released.
> [emphasis added]

[7] On April 20, 2009, the Bank made demand for payment on Trax for the amount then outstanding of some $1,100,000. On the same day, it made demand for payment on Mr. Behner pursuant to his 2002 and 2008 guarantees, and gave a Notice to Enforce Security, which specifically referred to the mortgage collateral to the 2002 guarantee.

[8] On June 2, 2009, the Bank commenced an action against Mr. Behner pursuant to the 2008 unsecured guarantee only. It sought judgment for $1,851,035.30, being the amount claimed to be owed by Trax as at June 2, 2009, together with *per diem* interest thereafter.

[9] On June 11, 2009 the Bank filed a Notice of Application claiming payment of $100,000 pursuant to Mr. Behner's 2002 guarantee and, in default of such payment, an order for foreclosure, sale and possession of the Property secured by

its collateral mortgage. That Notice was served on both Mr. Behner and the Property's current owner, Ms. Stephenson. In supplemental materials, the Bank confirmed that it was not seeking judgment against Mr. Behner or Ms. Stephenson but, rather, an order for foreclosure, sale and possession pursuant to the collateral mortgage.

[10] On June 29, 2009, the Bank obtained default judgment against Mr. Behner in its action on his unsecured 2008 guarantee for $1,863,419.31 inclusive of interest and costs. While some funds have since been paid, Trax remains substantially indebted to the Bank.

[11] The appellants contested the Bank's application for a foreclosure order against the Property pursuant to the mortgage collateral to the 2002 guarantee. They asserted that the issue of Mr. Behner's liability as a guarantor of the debts of Trax to the Bank was *res judicata* and, therefore, the collateral mortgage was of no force and effect and discharged. The motions judge rejected their claim and granted the Bank an order for foreclosure, sale and possession.

Grounds of Appeal

[12] The appellants submit that the motions judge erred in granting the order for foreclosure against the Property. They say that:

1. he erred in law in holding that the Bank was entitled to an order for foreclosure against property pledged as collateral security to a personal guarantee without having first determined that it was entitled to have judgment on the guarantee;

2. he erred in law in holding that the doctrine of *res judicata* did not apply; and

3. he erred in law in holding the Bank was not barred or estopped from seeking an order for foreclosure against property pledged as collateral security to a personal guarantee.

Analysis

[13] On appeal, as they had before the motions judge, both parties referred to the decision of this court in *Credit Union Atlantic v. Bonang* (1995), 145 N.S.R. (2d) 175 (N.S.C.A.). There, the Credit Union had obtained judgment on a demand promissory note made by the respondents in its favour. It successfully appealed a Chambers judge's refusal of its subsequent application for an order for foreclosure and sale of the respondents' real property pursuant to a mortgage given as collateral security for that loan.

[14] Hallett, J.A. writing for this court stated:

> [10] 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.

[15] In his decision, the motions judge agreed with the Bank's submission that this decision supported its position. He stated:

> [16] It is clear from **Bonang**, *supra*, that a mortgagee who first obtains a judgment is not precluded from pursuing its remedies under a collateral mortgage given to secure a promissory note provided there is no evidence of bad faith. The same would apply to a mortgagee under a collateral mortgage given as security for a personal guarantee which is the nature of the case that is now before me.
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> . . .
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> [25] . . . . **Bonang** does not require that judgment first be obtained. Indeed, it appears to contemplate just the opposite. However, if judgment is obtained then

> the further remedy of enforcement under the Collateral Mortgage is still available to the judgment creditor. In most cases, the creditor need only establish that all conditions precedent to enforcement have been taken. Once this has been done, the Court may consider the application for an order for foreclosure, sale and possession.
>
> [26] In the present application I am satisfied that the Bank has satisfied all conditions precedent for enforcement of their security. A proper demand for payment has been made to Mr. Behner. He has not responded and is therefore in default. *Res judicata* has no application in this situation. The two matters are separate and distinct in that they involve two separate guarantees, albeit both arising out of the same debt. Since there is no evidence of bad faith on the part of the Bank the order for foreclosure, sale and possession should be granted.

[16] The appellants submit that the motions judge erred in relying on *Bonang* as he did. They acknowledge that, had the Bank taken action against both the 2002 and 2008 guarantees at the same time and obtained judgment, they could not successfully contest its foreclosure application. The appellants agree with the result in *Bonang*. However, they emphasize that that decision dealt with a judgment pursuant to one promissory note secured by a collateral mortgage, and the subsequent enforcement of that mortgage. According to the appellants, the reasoning in *Bonang* does not apply here where two guarantees were given to the Bank, judgment was obtained on one, and the mortgage sought to be enforced was secured on the other. As well, they argue that the motions judge erred in finding that *res judicata* had no application in this situation and in holding that the Bank was not barred or estopped from seeking an order for foreclosure against the Property.

[17] In their first ground of appeal, the appellants submit that unless and until the Bank obtains a judgment on the 2002 guarantee and thus a ruling as to its validity, it cannot enforce the mortgage collateral to that guarantee. They urge that they would otherwise be deprived of any opportunity to claim defenses such as *non est factum*, duress and fraud in regard to the 2002 guarantee and its security. The appellants also point out that, according to the wording of the collateral mortgage, it was given "as security for the performance by the Mortgagor of the Mortgagor's obligation to the Mortgagee under the Guarantee" and that its first recital defines and limits the "Guarantee" to Mr. Behner's 2002 guarantee. Finally, it is their view that, where the Bank has obtained judgment pursuant to his 2008 guarantee

for the full amount owed by Trax, the Bank is not entitled to anything further pursuant to the 2002 guarantee.

[18] With respect, I am unable to agree with the appellants' position. It is clear from the wording of the 2002 guarantee that Mr. Behner signed a continuing guarantee, one which secures all present and future debts and liabilities of Trax to the Bank, and one which expressly is not released until all of those debts and liabilities are paid and released. It is undisputed that Trax remains indebted to the Bank in an amount well beyond the $100,000 secured by the 2002 guarantee. As a matter of contract law then, Mr. Behner's guarantee obligations under the 2002 guarantee have not ended.

[19] The appellants are correct that the wording of the collateral mortgage defines the "Guarantee" secured as the 2002 guarantee. However, this limitation in no way advances their argument. The wording of that document expressly provides that the guarantee obligation continues until Trax has paid the Bank in full, a condition which has yet to be met. The two guarantees Mr. Behner executed did not secure different debts. Rather, both secured the same debt, namely, all present and future debts and liabilities of Trax to the Bank.

[20] The record does not show whether or not Ms. Stephenson knew of the 2008 guarantee. It is apparent that she was aware of the collateral mortgage on the Property she now owns which secured the 2002 guarantee. Not only did she sign that mortgage as spouse and releasor, but she also placed additional mortgages against the Property in favour of the Bank and signed postponement agreements pertaining to that collateral mortgage. The absence of an action for judgment on the 2002 guarantee does not mean that Ms. Stephenson and Mr. Behner were precluded from contesting the validity of that collateral mortgage, or that he was precluded from contesting the validity of his 2002 guarantee. They had the opportunity to do so in responding to the Bank's application for an order for foreclosure.

[21] Finally, the appellants submit the judgment the Bank obtained pursuant to the 2008 guarantee for the full amount owed by Trax means that it cannot obtain any funds to pay down that judgment by enforcing the mortgage collateral to the 2002 guarantee. But this argument ignores the express wording of those guarantees. Each specified that it is "in addition to and not in substitution" for any

other guarantee held by the Bank. The 2008 guarantee did not terminate the 2002 guarantee; nor was the earlier subsumed into the latter. Moreover, each guarantee specified that it remains in full force and effect until all the debts and obligations of Trax secured by it are paid and released. The two guarantees secured the same indebtedness and that indebtedness has yet to be satisfied.

[22] I would dismiss the first ground of appeal. The motions judge did not err in law in granting the order for foreclosure without first determining that the Bank was entitled to judgment on the 2002 guarantee. Where that guarantee was a continuing guarantee which secured indebtedness established by a successful action on another guarantee and still not paid in full, the principles in *Bonang* apply. There being no evidence of it acting in bad faith, the Bank is not precluded from pursuing its remedies under the collateral mortgage given to secure the 2002 guarantee and the indebtedness of Trax to the Bank.

[23] I will consider the appellants' second and third grounds of appeal together. The appellants argue that the motions judge erred in holding that the doctrine of *res judicata* did not apply and that the Bank was not barred or estopped from seeking foreclosure against property pledged as collateral security to a personal guarantee. In my view, the motions judge made no error which would attract appellate intervention.

[24] The Bank obtained judgment against Mr. Behner pursuant to his 2008 guarantee. It is not seeking a further judgment pursuant to his 2002 guarantee. Rather, the Bank is seeking only to enforce the collateral security it was given in respect of Mr. Behner's obligations as guarantor of the indebtedness of Trax.

[25] In *Kameka v. Williams*, 2009 NSCA 107, 282 N.S.R. (2d) 376 (CA), Beveridge, J.A. reviewed the law pertaining to the doctrine of *res judicata*. He stated:

> [13] Detailed statements can be found of the constituent elements necessary to establish that the doctrine of *res judicata* is applicable (see for example George Spencer Bower and Sir Alexander Turner, *The Doctrine of Res Judicata*, 2nd ed. (London: Butterworths, 1969) at para. 19). These were compressed by the Alberta Court of Appeal in *420093 B.C. Ltd. v. Bank of Montreal*, [1995] A.J. No. 862 where O'Leary J.A. wrote:

> [18] A prior judicial decision will not raise an estoppel by *res judicata*, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject-matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

> [14] Once a *res judicata* has been established, its effects must be considered. Where there have been previous proceedings between the parties or their privies, it is open to either or both of the litigants to claim that any subsequent proceedings are governed in whole or in part by the decision from the previous proceeding. Every judicial decision that meets the criteria of *res judicata* operates both as an estoppel, preventing any party from disputing matters already determined, and as a merger. In the latter case, no further claim may be brought upon the same cause of action (G. Spencer Bower and Turner, *ibid*., at para. 2-4). This is sometimes referred to as cause of action estoppel (see *Thoday v. Thoday*, [1964] 1 All E.R. 341 per Diplock L.J. at p. 352).

[26] The facts here do not satisfy the three constituent elements necessary to establish *res judicata*. There has been a prior final decision by a court of competent jurisdiction in regard to Mr. Behner's liability as guarantor of Trax's obligations to the Bank. However, the action on the 2008 guarantee did not determine the same cause of action as that advanced in the application for foreclosure of the collateral mortgage on the Property. The subject matter of the proceedings is not the same. Nor are the parties the same. Ms. Stevenson was not a party to the action on the 2008 guarantee as she is not personally liable for the Trax debt. However, as the holder of the equity of redemption in the Property, she is a party to the application to foreclose the collateral mortgage.

[27] I would dismiss the appellants' second and third ground of appeal. The appellants have not established a *res judicata* which would operate as an estoppel barring the Bank from proceeding with its foreclosure action.

[28] I would dismiss the appeal and order the appellants to pay the Bank costs of $1,000 plus disbursements as taxed or agreed.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.