NOVA SCOTIA COURT OF APPEAL
Citation: *Sweeney v. Royal Bank of Canada*, 2003 NSCA 115

Date: 20031024
Docket: CA 195746
Registry: Halifax

Between:

Jack W. Sweeney and Judy Ann Smith

Appellants

v.

Royal Bank of Canada

Respondent

Judges:	Glube, C.J.N.S.; Cromwell and Hamilton, JJ.A.
Appeal Heard:	October 3, 2003, in Halifax, Nova Scotia
Held:	**Appeal dismissed per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Hamilton, J.A. concurring.**
Counsel:	appellants in person Steven Zatzman, for the respondent

Reasons for judgment:

[1] Jack W. Sweeney and Judy Ann Smith are the defendants in a foreclosure action brought by the respondent Bank. They filed an amended defence and counterclaim. The Bank applied in Supreme Court Chambers for summary judgment. The Chambers judge, Wright, J., found in favour of the Bank, ruling that the defence disclosed no *bona fide* defence and that the counterclaim disclosed no *bona fide* cause of action. Mr. Sweeney and Ms. Smith appeal.

[2] The background facts are these.

[3] The subject property was mortgaged to the Royal Bank in 1998 when Mr. Sweeney was the sole owner of the property. The mortgage was insured for disability with the Royal Bank's HomeProtector Plan administered by Canada Life. Mr. Sweeney had a stroke in 1999 that left him disabled and the mortgage fell into arrears. According to Canada Life, his claim on the insurance was not submitted within the 150 day time limit for claims and lacked supporting medical evidence. (Canada Life says that Mr. Sweeney's last day worked was September 17, 1999 but that the claim was not received until nearly a year later, in August of 2000.)

[4] The Bank commenced foreclosure proceedings and Mr. Sweeney did not defend. This proceeding led eventually to a foreclosure sale at which the Bank purchased the property in March of 2001.

[5] In March, Mr. Sweeney obtained the legal services of Mr. Dell Wickens, a solicitor, and with his help, Canada Life in June of 2001 approved Mr. Sweeney's claim and paid the Royal Bank sufficient funds to cover the mortgage payments that would have fallen due to the end of May, 2001. The record indicates that Mr. Sweeney was notified by Canada Life in early June, 2001 that this payment had been made to the Royal Bank.

[6] As noted, by the time this payment was made by the insurer, the mortgage had been foreclosed and the property sold at auction. However, the Bank had not sought or obtained possession of the property and it appears that Mr. Sweeney continued to reside there.

[7] In light of the insurer's payment of the arrears, the Bank proposed, in effect, to undo the foreclosure in exchange for Mr. Sweeney taking out a new mortgage

for the amount owing under the foreclosed mortgage taking the payments received from the insurance into account. The Bank offered to cover all the expenses of the reconveyance and of placing the new mortgage. This offer was accepted by Mr. Wickens on behalf of his client, Mr. Sweeney, in June of 2001. It is clear in the correspondence that Mr. Sweeney was to open a bank account at the Yarmouth branch for payment of the mortgage. Although this agreement was reached in June of 2001, there was a delay of several months in getting the new mortgage signed and registered.

[8] There were various matters to resolve. Mr. Sweeney requested that the property be conveyed to him and Ms. Smith. The Bank agreed. Mr. Sweeney needed to, and did, receive credit for mortgage payments he had made during the period subsequently covered by insurance. The insurance coverage was continuing for 24 months. When Mr. Sweeney did not reactivate his bank account as requested by the Bank, it unilaterally reopened the account for purposes of depositing the insurance payments and applied those funds against the indebtedness that would be owed once the new mortgage to which Mr. Sweeney had agreed was put in place.

[9] The disability insurance payments ended in October of 2001 and there were taxes outstanding. Correspondence from Mr. Wickens reported that Mr. Sweeney paid the taxes on December 19 and that he deposited $400 to “his account” to cover the payment that would have fallen due at the end of November.

[10] Finally, the transaction closed in December of 2001 with Mr. Sweeney and Ms. Smith signing a new mortgage and taking title as joint tenants. Of course, there was no advance of mortgage funds as the consideration for the mortgage was the reconveyance of title to the property by the Bank to Mr. Sweeney and Ms. Smith subject to a mortgage for the amount still owed. It appears that the Bank had not obtained a deficiency judgment following the sale and did not do so, presumably because of the agreement to restore the property to Mr. Sweeney following the insurer’s acceptance of his claim.

[11] The new mortgage fell into arrears and the Bank started foreclosure proceedings in June of 2002.

[12] The appellants defended the action by filing a defence and counterclaim which alleged that the new mortgage had never been approved, that the action had

been started in the wrong justice centre contrary to the **Land Actions Venue Act**, R.S.N.S. 1989, c. 247 (the "**Act**") and claimed damages for " harassment, inconvenience, extra stress etc." As the result of the Bank's application to strike the defence and counterclaim, the appellants were given leave to amend their pleading. They filed an amended defence and counterclaim in October of 2002. In response, the Bank brought an application for summary judgment which lead to the order of Wright, J. now on appeal.

[13] The amended defence, in essence, raises two defences: first, that the action was commenced in the wrong justice centre; and, second, that no funds were advanced so that no money is owing. The counterclaim alleges that the Bank's action is false, scandalous, frivolous or vexatious, an abuse of the process of the court and claims damages for the Bank's "illegal activities" and for harassment, inconvenience and extra stress.

[14] To succeed on its summary judgment application, the Bank had to prove its case and, in addition, the court had to conclude that the defence and counterclaim did not raise "an arguable issue to be tried" as set out in **Civil Procedure Rule 13.01**. The judge concluded that the Bank had discharged its onus and that neither the defence nor the counterclaim raised an arguable issue to be tried.

[15] While the Notice of Appeal lists over 20 grounds of appeal, the appellants' factum lists six issues as follows:

1. Whether a Supreme Court Justice can ignore the Land Actions Venue Act and by doing so create unnecessary hardship on the Defendants by forcing them to defend themselves in another Justice Centre.

2. Whether a Supreme Court Justice is allowed to help the Royal Bank and or its Lawyers cover up Illegal Activities.

3. Whether a Supreme Court Justice was right to rule that a lawyer/client privilege ends when a lawyer quits one side and goes to work for the other side.

4. Whether a Supreme Court Justice can rule that part of the Civil Procedure Rules applies to a Case and another part does not just so the Plaintiff's mistakes are hidden.

5. Whether a Supreme Court Justice is allowed to decide a case without checking anything and accepting one side's evidence over the other just because that side had lawyers.

6. Whether a Supreme Court Justice is allowed to decide a case when he clearly knows nothing about the subject.

[16] The submissions on appeal essentially raise again the issues addressed by Wright, J. and add allegations of bias and incompetence against the judge. These latter claims have absolutely no foundation in the record and should be dismissed. It is also argued in the materials that the former mortgage was not valid. However, that mortgage was foreclosed and Mr. Sweeney did not defend that foreclosure. It is too late to challenge it now. In any event, I can see no legal basis for the appellants' position on this point.

[17] The appellants submit at paragraphs 14, 21 and 25 of their factum that s. 2 of the **Act** means that the action should have been commenced in the justice centre in which the lands lie (i.e., Yarmouth County) and not in Halifax. Implicit in this submission is that the Bank's alleged failure to comply with the **Act** somehow renders the foreclosure proceeding null and void or at least affords an arguable defence.

[18] I reject this submission. The **Act** deals with place of trial, not with the place of commencement of the action or the hearing of interlocutory applications. The **Act** specifies that certain types of actions "shall be ... tried", unless otherwise ordered, in the justice centre where the land is located. Even if the **Act** applies to this action (on which I need not offer a firm view in this case), it has no bearing on where the action is commenced or where interlocutory proceedings, as opposed to the trial of the action, must be held. In any event, even if this submission were correct (and I think it is not), it does not afford a defence to the claim.

[19] The appellants say that they, as poor people, should not have to come to Halifax to defend themselves. However, under **Civil Procedure Rule 37.03**, the court has a discretion to order that the hearing of an application shall be at some place other than that named in it. There is nothing in the record to suggest that the appellants made any request for such an order.

[20] In paragraph 16 of the factum, the appellants say that the Bank illegally took mortgage insurance payments after the mortgage had been foreclosed and the property sold at auction. This submission has no merit. The arrangement was clearly part of an agreement between Mr. Sweeney and the Bank to undo the foreclosure and these payments were credited to Mr. Sweeney as part of that agreement. What Mr. Sweeney now wants to call "illegal activities" were in fact part of his agreement with the Bank which allowed him to remain in possession of his property. He was well aware that these payments had been made to the Bank, and received credit for them, when he signed the new mortgage.

[21] The factum next refers to issues relating to a car loan. It appears that this debt was also insured by the disability insurance . It was specifically mentioned in the correspondence at the time of closing and it appears the insurance proceeds were applied to the judgment debt. There is no evidence of any "illegal activity" in this regard.

[22] Next it is said that the reactivation of the bank account was an illegal activity. This submission has no merit. The reactivation of the account was something Mr. Sweeney was to do as part of the arrangement to undo the foreclosure. That is clear in the correspondence. In any case, there is no evidence that the reactivation of the account caused any financial loss to Mr. Sweeney and it would certainly not in any way invalidate the mortgage. Mr. Sweeney was apparently aware of this reactivation before the closing of the transaction, but proceeded to sign the new mortgage in any event.

[23] Next it is submitted, at paragraph 20 of the factum, that there was no new mortgage because the defendants never signed the bank's approval of mortgage and statement of disclosure form. I agree with what was said by Wright, J. at para. 22 of his reasons:

> [22] ...It is completely untenable for the defendants to argue that the absence of such a form might somehow defeat the bank's claim in this proceeding, and that there is no enforceable agreement against them, when they executed the replacement mortgage of December 18, 2001 with the benefit of independent legal advice as they did.

[24] At paragraph 22 and 23, the appellants take issue with the judge's acceptance of certain affidavit evidence and with refusal to allow them to cross-

examine the deponent of other affidavits, Mr. Wolfson. Findings of fact will only be interfered with on appeal if there is some palpable and overriding error. I can see none here. The ruling concerning cross-examination was within the discretion of the judge and could be interfered with on appeal only on the ground that he made an error in principle or that his order gave rise to a manifest injustice. In my view, no such ground has been made out by the appellants.

[25] It is submitted that Mr. Zatzman and Mr. Wolfson were somehow in conflict with the Bar's ethical principles. There is no basis in law or fact for this submission. As the judge noted at para. 9 of his reasons, Mr. Wolfson's affidavits were based primarily on information and belief from the material and instructions received from the Bank and he ruled that there was nothing material to be gained by permitting cross-examination on them. I see no error in the judge's ruling to this effect.

[26] Next it is said that Mr. Wickens was in conflict of interest by filing an affidavit at the behest of the Bank. This submission has no merit. As the judge noted, this affidavit was received only after the appellants argued in open court that at the time they signed the mortgage document on December 18, 2001, they held the belief that they were simply signing a mortgage application rather than an actual mortgage document. This allegation by the appellants placed the advice they had received in issue. The judge was careful to ensure that Mr. Wickens' affidavit protected solicitor and client privilege as much as possible and yet responded to this allegation by the appellants.

[27] Contrary to the appellants' submissions, Wright, J. was not obliged to wait to issue his decision for closing arguments from the successful party nor to delay the issuance of his order pending an appeal.

[28] I would dismiss the appeal and order the appellants, jointly and severally, to pay the respondent the costs of the appeal fixed at 40% of the costs awarded by Wright, J. (which have yet to be taxed) plus disbursements in this Court.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Hamilton, J.A.