

NOVA SCOTIA COURT OF APPEAL

Citation: *Ofume v. CIBC Mortgages Inc.*, 2003 NSCA 117

Date: 20031104

Docket: CA 209470

Registry: Halifax

Between:

Phillip Chukwuma Ofume and Maureen Ngozi Ofume

Applicants/Appellants

v.

CIBC Mortgages Inc.

Respondent

Judge: Glube, C.J.N.S. (in Chambers)

Application Heard: October 30, 2003, in Halifax, Nova Scotia

Held: Stay application is dismissed with costs to the respondent in the amount of \$500.00 to be paid forthwith.

Counsel: Dr. Phillip Ofume, in person
John A. Keith, for the respondent

Decision: (in Chambers)

[1] Phillip Ofume, PhD, identifying himself in the filed documentation as “Representative for the Defendants”, filed a notice of appeal from the order of Associate Chief Justice Michael MacDonald dated October 23, 2003 which granted an order for foreclosure, sale and possession in an action between CIBC Mortgage Corporation, plaintiff, and the defendants (now appellants) Phillip Chukwuma Ofume and Maureen Ngozi Ofume. At the same time, Dr. Ofume applied to stay the execution of the entire order, i.e., foreclosure, sale, possession of the property, advertisement, etc.

[2] At the conclusion of the hearing, I fixed the filing dates and the date for the appeal, but dismissed the application for a stay with reasons to follow. These are the reasons.

[3] The history of this case is somewhat convoluted, mainly as a result of numerous appeals by the Ofumes. Counsel for CIBC provided a helpful summary of the background to this case.

[4] On March 31, 1999, the appellants entered into a mortgage with CIBC for property known as 8 Edwin Ford Court, Bedford, Nova Scotia. The principal amount of the mortgage was \$133,059.38, with interest at 6.35% per annum calculated half-yearly and not in advance. By a statement of claim issued September 1, 2000, CIBC commenced foreclosure proceedings against the Ofumes. Minutes of settlement dated December 22, 2001 resolved the original dispute. The parties entered into a new mortgage with a term of one year from December 24, 2001 to December 24, 2002, with a fixed closed interest rate of 4.6%. The Ofumes subsequently challenged the validity of this new mortgage, alleging fraud, forgery, conspiracy and racism.

[5] By Supreme Court order dated February 21, 2002, Justice G. MacDougall confirmed the settlement agreement and this new mortgage. The Ofumes appealed. CIBC applied to quash the notice of appeal, and on September 27, 2002, the application to quash was granted by this court on the basis that the appeal was “absolutely unsustainable and of no merit whatsoever.” Costs were awarded to CIBC in the amount of \$1,000.00 including disbursements. The Ofumes sought leave to appeal to the Supreme Court of Canada and by order dated April 28, 2003, the application for leave to appeal was ordered “...dismissed as abandoned.”

(Although Mr. Ofume said verbally in court that the matter is still before the Supreme Court of Canada, counsel for CIBC had no knowledge of that allegation nor was there any written documentation provided to the court.)

[6] The new mortgage expired on December 24, 2002 and in spite of requests by CIBC, the debt was not repaid nor were arrangements made for repayment.

[7] An originating notice and statement of claim was issued on February 19, 2003 (S.H. No. 104319). CIBC sought to foreclose the new mortgage.

[8] Although the Ofumes had been advised that the new mortgage was not renewed, since the expiry date of December 24, 2002 they periodically dropped off payments to CIBC. The money was returned on March 28, 2003 and the Ofumes were asked to cease making payments on a mortgage which had expired.

[9] On May 28, 2003, Nova Scotia Supreme Court Justice J. Murphy dismissed an application by the Ofumes to compel CIBC to accept mortgage payments, however, he did establish a mechanism for payments to be made to the court. No payments have been made into court. The Ofumes appealed that decision. On June 27, 2003, Roscoe, J.A. dismissed an application for a stay pending appeal and awarded costs of \$500.00 payable forthwith. On July 22, 2003, Cromwell, J.A. ordered that the appeal book and the appellants' factum be filed on or before September 12, 2003 and in default the appeal was dismissed. As the Ofumes did not comply with this order, the appeal of Justice Murphy's order was dismissed by Bateman, J.A. on October 8, 2003.

[10] Although the Ofumes had been told the mortgage was not being renewed and that no statement or representation by CIBC would be deemed binding or effective unless it was first directed to counsel for CIBC for review, the Ofumes obtained a computer-generated letter purporting to renew the new mortgage for a six month period expiring on June 24, 2003. By an order of Goodfellow, J. dated August 12, 2002, the statement of claim in the action was amended to seek alternative relief in the event that the new mortgage had been renewed for that six month period. The Ofumes have not filed a defence to the amended statement of claim. They did try to appeal this order. They filed a notice of appeal on August 29, 2003, after the period of appeal for an interlocutory order had expired. On September 2, 2003, they brought an application seeking directions for this purported appeal. By an order of Hamilton, J.A. dated September 4, 2003, the

Ofumes were given until September 18, 2003 to bring an application to extend the time to appeal. Following a hearing on that date, an order dated October 23, 2003 by Bateman, J.A. stated: "...the appellants' application for an extension of time to file a notice of appeal is dismissed, as is the appeal, without costs." (Emphasis added)

[11] CIBC brought a notice of application for summary judgment dated October 10, 2003, returnable October 23, 2003, and, as previously stated, the order was granted by MacDonald, A.C.J. with costs of \$1200.00 inclusive of disbursements.

[12] Mr. Ofume listed 7 grounds of appeal with up to 10 subheadings under the several grounds. However, on the stay application he essentially argued the following:

1. that there could be no foreclosure because he had never been in default of his payments;
2. that his wife had not been served with the notice of the application for summary judgment and as she was a separate person there was no valid hearing;
3. that there was no valid existing originating notice at the time of the application and order for summary judgment as at the time, the amendment of Goodfellow, J.'s decision was under appeal.

[13] Interjected throughout his oral argument and prominent in his written argument are allegations of fraud, forgery, falsification, conspiracy, racism and he has added conspiracy of this court to assist the position of CIBC. He provided no facts in any affidavit to back up these allegations and they appear to be completely unfounded.

[14] At the beginning of the hearing, I explained to Dr. Ofume the test to be applied to a stay application as found in **Fulton Insurance Agencies Ltd. v. Purdy** (1991), 100 N.S.R. (2d) 341 (C.A.), where Hallett, J.A. stated:

- [29] (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to,

or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:

[30] (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[15] It should be noted as stated by Freeman, J.A. in **Amirault v. Westminer Canada Ltd.**, [1993] N.S.J. No. 329 (C.A.) that:

[8] ... Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the court it is required in the interests of justice.

[16] As to the first aspect of the **Fulton** test, I seriously question whether or not there is any arguable issue raised on this appeal.

[17] The mortgage has been accepted as legitimate by the order of Justice MacDougall and appeals have been dismissed or deemed abandoned. Although Mr. Ofume argues that the mortgage still exists, without deciding that point, at the most it appears to have been extended for only 6 months beyond December 2002 which caused CIBC to amend its statement of claim to cover that possibility. Any suggestion that this is a 24 year mortgage because the amortization period is shown as 24 years on the computer generated correspondence is not a reasonable conclusion. In my opinion, the mortgage contract between the parties ended either December 24, 2002 or June 24, 2003. Payments have not been made since December 24, 2002 in spite of the arrangement put in place by Justice Murphy.

[18] As for the argument that Mrs. Ofume was not served, there is an affidavit of service in the file. Also, as noted previously, Dr. Ofume filed the notice of appeal as the "Representative for the Defendants" and the document starts off with "TAKE NOTICE that the Appellants/Defendants Dr. Phillip Ofume and Mrs. Maureen Ofume (Blacks) apply for leave to appeal and if granted will appeal...".

Dr. Ofume has always appeared on behalf of both of the appellants in the numerous hearings dealing with the mortgage(s) on this property.

[19] As to whether or not there was a valid originating notice, no stay was granted to say there was none and the appeal of Justice Goodfellow's decision has been dismissed. He granted an order amending the statement of claim. As no new defence was filed, the Ofumes are taken to be relying upon their original defence in answer to the amended pleading which was served on them. (**C.P.R.** 15.05(2))

[20] Counsel for CIBC suggested the only argument the appellants might have is that summary judgment can only be applied for after the close of pleading. (**C.P.R.** 13.01) Generally, pleadings are closed upon the filing and service of the defence. (**C.P.R.** 14.23(1)) In order to find that the pleadings had not closed, the court would have to find that Dr. Ofume's argument overrides **C.P.R.** 15.02(2). I would suggest that this would not be a logical result and could allow people to avoid summary judgment by refusing to file a defence. In my opinion this is not an arguable issue.

[21] To summarize, I am unable to agree that Dr. Ofume has an arguable issue. (It should be noted that during the hearing of the stay application, it became apparent that CIBC had not realized that one of the documents filed by Dr. Ofume was actually a notice of appeal.)

[22] If I am wrong and there is an arguable issue, the main argument by Dr. Ofume made on the basis of irreparable harm (**Fulton**) is that if the stay is not granted, he and his 5 children will be forced out on the street and they will all die; that no one will rent to him anywhere else; and that CIBC has destroyed his credit rating. These arguments are insufficient to justify a stay. Every foreclosure of a residential property raises the spectre of a person being evicted from their property. There is no suggestion that this is in any way a unique property. Also, if the Ofumes prove to be successful on appeal, CIBC has sufficient resources to cover any monetary loss they might suffer.

[23] Finally, on the third part of the **Fulton** test, although it might appear that the balance of convenience somewhat favours the Ofumes, it should be noted they have not made mortgage payments into court as they are entitled to do, they have been living mortgage free for 10 months, and they have not paid the costs awarded against them in the several applications previously referred to.

[24] I find they have not satisfied the court on the first ground.

[25] As to the alternative ground of exceptional circumstances, none have been shown to the court in this application. Although the Ofumes have made a number of allegations, they are without proof and have no basis in fact. I am not satisfied that a stay is required in this case in the interests of justice.

[26] Thus, at the conclusion of the hearing the stay application was dismissed. I award costs of \$500.00 against the Ofumes to be paid forthwith.

[27] At the conclusion of the hearing, I listed various material that should be included in the appeal book. Although the submissions by the parties before MacDonald, A.C.J. are not necessary, his decision is, as well as the originating notice, the defence, the amended originating notice and statement of claim, the affidavit of Suzie Sherrer on behalf of CIBC, Phillip Ofume and the affidavit of service filed by Lynda MacKenzie with exhibits attached. If there are any further documents which either party feel should be included, I would ask the parties to notify me so that I can decide whether or not they are necessary.

[28] As previously advised, the appeal book is to be filed by November 28, 2003, the appellants' factum by December 12, 2003, and the respondent's factum by January 13, 2004. The appeal is to be heard at 2:00 p.m. on February 13, 2004.

Glube, C.J.N.S.