**NOVA SCOTIA COURT OF APPEAL**
**Citation:** ***Cragg v. Eisener***, 2012 NSCA 101

**Date:** 20120927
**Docket:** CA 377951
**Registry:** Halifax

**Between:**

Edward Gillmor Cragg

Appellant

v.

Randy Eisener

Respondent

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| **Judges:** | Saunders, Fichaud and Bryson, JJ.A. |
| **Appeal Heard:** | September 21, 2012, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed per reasons for judgment of Saunders, J.A.; Fichaud and Bryson, JJ.A. concurring. |
| **Counsel:** | Keith MacKay, for the appellant<br>Stanley W. MacDonald, Q.C., for the respondent |

**Reasons for Judgment:**

[1] After hearing counsels' submissions we recessed and then returned to court to announce our unanimous decision that the appeal was dismissed with reasons to follow. These are our reasons.

[2] To succeed in today's appeal the appellant must expose a legal error in the judge's reasons or persuade us that her decision to grant summary judgment leads to a patent injustice. Respectfully we do not think that either door to appellate intervention has been opened. While we would grant leave to appeal, we are unanimously of the opinion that the appeal ought to be dismissed.

[3] The case involves a lawsuit over a mortgage entered into in October 2009 which secured a loan of $450,000. The lender Mr. Eisener claimed he had loaned the money to the borrower Mr. Cragg, secured by a short-term "construction mortgage" Cragg arranged to finance work on his property. The agreement was intended to provide short-term financing until Cragg was able to arrange re-financing for a longer term with a different lender.

[4] The mortgage was due to be paid in May 2010. It went into default. Eisener sued claiming approximately $475,000 made up of the principal balance then outstanding, together with interest and taxes. Cragg defended the action essentially claiming that Eisener had breached or repudiated the agreement by acting in bad faith and failing to advance funds in a timely manner, by reason of which Cragg said he sustained losses which might form the basis of a counterclaim and should, in any event, be set off against any monies owing to Eisener.

[5] Eisener brought a motion claiming summary judgment against Cragg on the mortgage pursuant to **Civil Procedure Rule** 13. The matter came before Nova Scotia Supreme Court Justice Suzanne M. Hood. In a decision now reported at 2012 NSSC 290, Hood, J. granted the motion and ordered :

> "summary judgment is granted to the Plaintiff in an amount to be determined by application to chambers for foreclosure, sale and possession of the property".

[6] At the hearing Cragg's lawyer (not his counsel on appeal) raised a number of technical and procedural objections. He objected to the content of Eisener's notice of motion and affidavit filed in support. Justice Hood found that any such irregularities could be excused under **Civil Procedure Rule** 2.2. On appeal to this Court, Cragg has not appealed that ruling.

[7] Cragg never challenged the essential facts asserted by Eisener and never advanced the argument that summary judgment should be denied because there were material facts in dispute. Instead he asked Justice Hood for an adjournment so as to permit his late filing of an affidavit and also to allow his counsel's cross-examination of Eisener on his own affidavit. Justice Hood refused. She found that Cragg's submissions were addressed in his pre-hearing brief, and that Eisener was unopposed to their tardy introduction. In any event, Hood, J. found that Cragg's affidavit was not necessary, given that summary judgment could be granted on the basis of the pleadings alone. Justice Hood found that Cragg's allegations of bad faith were not relevant to the issue of whether the principal balance of $350,000 was owed on the mortgage, or whether Eisener was entitled to foreclosure. She was satisfied that summary judgment could be granted on the basis of either the pleadings alone or, upon the evidence presented. Her reasons, while brief, were complete and clearly disposed of all of the issues before her. It is enough for me to quote the operative portions of Justice Hood's decision:

> [12] Mr. Mitchell also says the Notice of Motion is irregular because it does not state which type of summary judgment motion is being brought. However, it is clear to me that, since an affidavit was filed, the intent must have been that it be a motion for summary judgment on evidence since summary judgment on pleadings does not permit affidavits to be considered.
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> [13] I conclude that the summary judgment motion should be granted. The affidavit of Mr. Eisener sets out enough information to satisfy me that there is no question of material fact requiring trial. The mortgage funds of $350,000 were advanced and have not been re-paid. The interest is set out in the mortgage.

[14] I then look at the defence which has been filed. It does not deny the advance of $350,000 was made. It refers to further advances which are not relevant to the issue of whether the $350,000 is in fact owing.

[15] The Defence also says the Plaintiff named is not the proper Plaintiff, but the mortgage states that Randy Eisener is the mortgagee. The offer to finance refers to him as well.

[16] Therefore, the Defendant has not satisfied me that his defence shows that he has a real chance of success in defending the foreclosure action.

[17] If there are issues with respect to damages suffered by the Defendant because of failure to advance further funds, those issues are not before me. They are not in the Statement of Claim, nor is there a counter-claim for set-off with respect to these items. There could be. They could be the subject of a separate action, but that is not the subject of an action which is before me today.

[18] On the other hand, even if the motion is in fact a motion for summary judgment on the pleadings which means I should ignore the affidavits, I conclude that summary judgment on pleadings should be granted.

[19] The Statement of Claim refers to the funds being advanced, not re-paid, and the interest claimed. Therefore, the claim is made out. The defence filed does not on its face deny these things. Therefore, I am not satisfied there is an arguable issue for trial.

> [20] For both these reasons, I grant summary judgment to the Plaintiff on this matter.

[8] While the law on summary judgment is well settled, it may be useful to summarize the principles that apply. **CPR** 13 allows a party to move for summary judgment either "on the pleadings" or "on the evidence". While the objective is the same, the process used to get there is different. Motions brought "on the evidence" invite a two-stage inquiry. The first stage obliges the moving party to show that there are no material facts requiring a trial to sort out. If and only if the moving party passes this first threshold does the responding party have to put its "best foot forward", with evidence, to show that its defence (or claim, as the case may be) has a real prospect for success. If the responding party fails to satisfy this second stage inquiry, the judge must grant summary judgment.

[9] The approach taken when deciding a motion for summary judgment "on the pleadings" is different. There, the judge's inquiry is limited to an examination of the pleadings. No evidence on the motion is permitted. The "test" is drawn from language found in the jurisprudence involving motions to strike out pleadings. In other words, to grant summary judgment on the pleadings, the judge must be satisfied that the claim (or defence, as the case may be) "is certain to fail" or "is absolutely unsustainable" or "discloses no cause of action or basis for a defence". See for example **Hercules Managements Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165; **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423; **Maritime Travel Inc. v. Go Travel Direct.com Inc.**, 2007 NSCA 11; **Nova Scotia (Attorney General) v. Brill**, 2010 NSCA 69; **AMCI Export Corporation v. Nova Scotia Power Incorporation**, 2010 NSCA 41; **2420188 Nova Scotia Ltd. v. Hiltz**, 2011 NSCA 74; and **AFG Glass Centre v. Roofing Connection**, 2010 NSSC 108.

[10] Reading Justice Hood's decision it is obvious to us that she understood the law and applied it properly.

[11] Based on the record before her it was certainly open to Justice Hood to conclude, as she did, that Eisener was entitled to summary judgment on the basis of either the evidence, or the pleadings.

[12] After carefully considering the evidence she found that Eisener had satisfied the requirement that there was no question of material fact requiring trial, and that Cragg had failed to demonstrate that he had any genuine prospect for success in defending the foreclosure action.

[13] Further, in terms of the pleadings alone, Justice Hood had good reason to find that all of the material elements of the claim had been established and that the defence, such as it was, was certain to fail.

[14] There is nothing in the record which suggests to us that the judge erred in her application of the law, or the exercise of her discretion.

[15] Finally, whether to grant an adjournment so as to permit Cragg to file a late affidavit or to conduct cross-examination of Eisener, was also a matter that fell squarely within Justice Hood's discretion. We have said many times that a trial judge's right to supervise and control proceedings includes a broad authority to grant or refuse adjournments. See for example, **Sharpe v. Abbott**, 2007 NSCA 7. The exercise of that discretion is accorded considerable deference on appeal. We will not intervene unless it can be shown that the judge erred in principle, or that the judge did not exercise his or her discretion judicially. We see nothing of the sort. Justice Hood instructed herself as to the object of the **Civil Procedure Rules** which is to achieve the just, speedy and inexpensive determination of every proceeding. Given the history of this dispute, the judge obviously felt that to delay the matter yet again would not do justice between the parties. She concluded that it would not be necessary to adjourn the motion because all of Cragg's arguments were before the court in the form of the prehearing brief filed by his lawyer, and which Eisener was willing to have admitted, even though it was filed late. As the transcript makes clear, Justice Hood was prepared to revisit the question if necessary after considering the motion and counsels' submissions. In the circumstances this was undoubtedly a fair and measured response to the situation.

[16] For all of these reasons the appeal is dismissed with costs of $1,000 inclusive of disbursements payable to the respondent.

Saunders, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.