NOVA SCOTIA COURT OF APPEAL

Citation: *Baypoint Holdings Ltd. v. Royal Bank of Canada*, 2018 NSCA 17

Date: 20180221
Docket: CA 460374/464441
Registry: Halifax

Between:

Baypoint Holdings Limited, and
John T. Early, III

Appellants

v.

Royal Bank of Canada

Respondent

Judges:	Fichaud, Oland and Farrar, JJ.A.
Appeal Heard:	January 24, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs to the Royal Bank of Canada in the amount of $5,000 inclusive of disbursements per reasons for judgment of Farrar, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	John T. Early, III, self represented on behalf of himself and Baypoint Holdings Limited Joshua Santimaw and Geoffrey J. Franklin, for the respondent

Reasons for judgment:

Background

[1] On October 5, 2011, the Royal Bank of Canada (RBC) extended a loan to Baypoint Holdings Limited in the amount of $1.233M. As security for the loan, RBC took a mortgage over real property owned by Baypoint located at 115 Hirtle Cove Road in Oakland, Nova Scotia. The amounts payable pursuant to the mortgage were personally guaranteed by John T. Early, III, Baypoint's principal.

[2] At that time, Baypoint maintained two bank accounts with RBC. One, a Canadian dollar cash account; and the other, a US dollar cash account. Between October 2011 and November 2012, RBC withdrew regular monthly mortgage payments from the Canadian dollar account.

[3] In November 2012, RBC was alerted to suspicious activity in Baypoint's Canadian dollar account. It appeared that the account was being used for cheque kiting, a form of cheque fraud where the customer exploits the delay in clearing funds between financial institutions to temporarily and artificially inflate the destination account balance.

[4] Upon discovering this activity, RBC froze both of Baypoint's accounts and stopped collecting mortgage payments.

[5] Two financial institutions, the Bank of Montreal and Wells Fargo, made claims against the Baypoint funds held on deposit at RBC. On December 12, 2012, Wells Fargo started an action against RBC, Baypoint, Mr. Early and several other companies that were controlled by Mr. Early alleging the funds were the proceeds of an illegal cheque kiting scheme.

[6] RBC subsequently moved for interpleader relief to pay the funds into court in the Wells Fargo action. By Order of Justice Arthur W.D. Pickup dated February 6, 2014, RBC paid the balance of the funds held in both accounts into court: $93,970.76 US and $824 Canadian.

[7] Also, on February 6, 2014, RBC commenced an action against Baypoint and Mr. Early for the amounts owing under the mortgage and, in default of the payment of those amounts, an order for foreclosure, sale and possession of the property.

[8] On April 15, Mr. Early, on behalf of himself and Baypoint, filed a Notice of Defence denying the mortgage was in default. Subsequently, on April 28, Mr. Early, again on behalf of himself and Baypoint, filed a Notice of Defence and Counterclaim. The defence is the same as that filed on April 15, the counterclaim is for damages to Mr. Early's loss of reputation and losses to his business. Baypoint did not file a counterclaim.

[9] By Notice of Motion dated August 5, 2016, RBC moved for summary judgment on evidence. In support of its motion it filed the affidavit of Brian Higgins, a senior manager with RBC.

[10] The motion was heard on December 15, 2016. At the conclusion of the hearing Justice Jamie Campbell rendered an oral decision allowing RBC's motion. The Order granting summary judgment was issued January 11, 2017 (Summary Judgment Order).

[11] On February 10, 2017, Mr. Early, on behalf of himself and Baypoint, filed a Notice of Appeal from the Summary Judgment Order citing 28 grounds of appeal (CA No. 460374).

[12] On May 3, 2017, Justice Campbell issued an Order for Foreclosure, Sale and Possession of the property (Foreclosure Order).

[13] On June 8, 2017, the appellants appealed the Foreclosure Order. The gist of that appeal is the Chambers judge erred in granting the Foreclosure Order when all issues between the parties had not been adjudicated. As an alternative, the appellants sought to stay the Foreclosure Order pending the resolution of the Counterclaim of the Defendants (CA No. 464441).

[14] On August 10, 2017, RBC filed a motion to have the Foreclosure Order appeal dismissed on the basis the appellants had not applied for leave to appeal. By Order dated September 25, 2017, Justice Elizabeth Van den Eynden allowed the appellants to file an Amended Notice of Appeal seeking leave to appeal on or before September 28, 2017. She further ordered that the two appeals (CA No. 460374 and CA No. 464441) would be heard together.

[15] On September 20, 2017, the appellants filed an Amended Notice of Application for Leave to Appeal and Notice of Appeal. Unlike the original Notice of Appeal filed in CA No. 464441, in the Amended Notice, the appellants did not

seek to have the Foreclosure Order stayed. However, in its factum and oral argument the appellants asked us to do so.

[16] For the reasons that follow, I would dismiss the Summary Judgment Order appeal. I would deny leave in the Foreclosure Order appeal. I would also decline to stay the Foreclosure Order. Finally, I would award costs to RBC in the amount of $5,000 inclusive of disbursements.

(Note: It is arguable that leave was required in the summary judgment appeal. However, neither party addressed it in their facta or oral arguments. Therefore, I will not comment further on it. This decision should not be interpreted as suggesting that where there is summary judgment in a foreclosure proceeding – which is appealed – that leave to appeal is not required. That issue is for another day.)

Issues

[17] Despite the multitude of issues raised by the appellants in their Notices of Appeal and factum, this appeal comes down to the following:

1. Did the motions judge misapply the test for summary judgment (Summary Judgment Order Appeal)?
2. Did the motions judge commit an error of law by dismissing the appellants' motion to strike the affidavit of Brian Higgins (Summary Judgment Order Appeal)?
3. Should leave to appeal be granted in the Foreclosure Appeal?
4. Should the Foreclosure Order be stayed pending the disposition of the Counterclaim?

Standard of Review

[18] Issue #1 – With respect to this issue, I adopt the statement of Saunders, J.A. in *Burton Canada Company v. Coady*, 2013 NSCA 95:

> [19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless

> wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. [citations omitted]

[19] Issue #2 – Mr. Early contends that Mr. Higgins' affidavit was inadmissible. The admissibility of evidence is a question of law invoking the Rules of evidence and an interpretation of the *Civil Procedure Rules*. This issue attracts a correctness standard (see: *Canadian Imperial Bank of Commerce v. CNH Capital Ltd.*, 2013 NSCA 35, ¶37).

[20] Issue #3 – I, again, refer to Saunders, J.A. in *Burton* where he set out the test for leave to appeal:

> [18] … The question of whether leave to appeal ought to be granted is one of first instance. The well- known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [citations omitted]

[21] Issue #4 – A stay of the Foreclosure Order was not sought before the judge below, for good reason – it was not yet in existence. The Foreclosure Order was only issued after the summary judgment motion was successful. As this constitutes a new issue on appeal, there is no deference owed as it is a decision in the first instance.

Analysis

Issue #1 Did the motions judge misapply the test for summary judgment?

[22] RBC moved for summary judgment on evidence under Rule 13.04. It provides:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[23] *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 interpreted the Rule to pose five sequential questions:

1. Does the challenged pleading disclose a "genuine issue of material fact, either pure or mixed with a question of law"?
2. Does the challenged proceeding require the determination of a question of law, either pure, or mixed with a question of fact?
3. Does the challenged pleading have a real chance of success?
4. Did the judge exercise the "discretion" to fully determine the issue of law?
5. If the motion under Rule 13.04 is dismissed, should the action be converted to an application, and if not, what direction should govern the conduct of the action? (¶34-42)

[24] The judge correctly identified *Shannex* as the appropriate test and asked himself the first question:

> The first is whether the pleadings "disclose a 'genuine issue of material fact', either pure or mixed with a question of law?" If the answer is yes, the matter is not one for summary judgement. "A material fact is one that would affect the result." The moving party has to show that there's no genuine issue of material fact. In this case, Mr. Early has filed affidavits asserting many facts. They set out, in detail, his view of how these things happened. What cannot be denied, however, is the fact that there's a mortgage and that it hasn't been paid. He can set out the reasons why it hasn't been paid, and he blames RBC for that, but the fact is the mortgage has not been paid.
>
> [Emphasis added]

[25] Earlier in his decision, the motions judge said the following:

> It is not disputed that RBC advanced funds to Baypoint Holdings on the mortgage. It is not disputed that the terms required repayment of those funds. It is abundantly clear that the payments have not actually been made since about December of 2012.

[26] In these two passages of the decision, the judge answered the first question from *Shannex* with a resounding "no". He then moved on to the second and third questions and said the following:

> The second question to be asked is whether the pleadings require a determination of a question of law. The question of law that arises is whether the facts and evidence put forward by Mr. Early are material in the sense that they raise a defence to the default of the mortgage. If there's only, if there is only a question of law remaining, the court moves to the third question, and that is whether there is really a chance of success. Is there, then, a real chance that Mr. Early will succeed with his assertions about the actions of RBC essentially forcing him into default? In my view, there is not. His assertions pertain to his claim that RBC should not have frozen his accounts. He says he had enough money to pay the mortgage if RBC had only agreed with him and taken it. That is not a defence to the default of the mortgage. It may, as I've said, be a separate claim, but it doesn't change the essential fact that the mortgage was issued, funded, and not paid.
>
> At that point, there is no requirement to go on to the further two questions set out by the Court of Appeal.
>
> In this case, the material facts are not in question. There is debate about what is material to the defence, and I've concluded that there is no reasonable chance of success in arguing that the evidence proposed to be put forward is

> material to the foreclosure action. The motion for summary judgement on the evidence is, then, granted.
>
> [Emphasis added]

[27] The appellants argued before us, and before the motions judge, that despite not having made the required monthly payments to RBC, they nevertheless complied with the terms of the mortgage by maintaining an account with ample funds on deposit and by instructing RBC to debit those funds to pay the mortgage. In their factum the appellants say:

> "[87] Yet Justice Campbell never defined what constitutes payment. He refused to look to the mortgage contract.
>
> [88] The mortgage contract defines payment, by the borrower maintaining a designated account in a Canadian banking institution, keeping enough funds necessary on the given day each month to facilitate a pre-authorized debit from RBC to satisfy the monthly payment on that day.
>
> [89] The borrower satisfied the mortgage contract's requirements and in so doing 'paid' its mortgage."

[28] The appellants advanced the same position to the motions judge:

> We argue, in what he's put forward within the four corners of that document, that we did everything we had to do to comply. We had money there. We authorized the bank to take it. The bank was supposed to take it, and they didn't do it, okay? So, in his own submission, that's our framework. That's our guideline.

[29] The appellants asked the motions judge (and this Court) to find that RBC froze Baypoint's accounts at its own peril, when it ought to have continued to debit the funds to pay the mortgage, notwithstanding the concerns about fraudulent account activity, and the claims made by other financial institutions against the funds.

[30] The appellants' argument arises from a selective reading of the mortgage document. They cite Section 5 which provides as follows:

> **SECTION 5 – BANK ACCOUNT FOR PAYMENTS**
>
> (1) You promise to have a deposit account at a Canadian financial institution and authorize us to withdraw from that account automatically for each payment when it is due.

> (2) You will keep enough funds in the account to make each payment. You will not cancel your authorization to withdraw, or close the account without our consent.
>
> (3) If your financial institution refuses the pre-authorized withdrawal, we will charge you for the fee your financial institution charges us. This may include situations where you do not have enough money in your account, or you closed your account.

[31] With respect, this provides for the method of payment, not the requirement for payment. The requirement for payment is contained in Section 4 of the mortgage which provides:

> **SECTION 4 – YOUR REGULAR PAYMENTS**
>
> (1) You promise to repay the Principal Amount and interest to us on the payment dates set out in Section 2.4(3) above or another payment frequency that you select starting with the First Payment Date until and including the Last Payment Date. Your payments will be for the amounts set out in Section 2.4(7) above. You promise to pay the Outstanding Amount on the Balance Due Date. We may, if you ask us to, agree to change your payment date or payment frequency.
>
> …
>
> (4) All payments must be in Canadian dollars.

[32] The motions judge rejected that argument for reasons with which I agree:

> … When a bank becomes aware of suspicious activity, it owes a duty to those to potentially affected by that activity to take steps to stop the transactions and verify their legitimacy. RBC was obligated to freeze the accounts, and could not properly debit the accounts to cover the mortgage payments due to it at the expense of others.

[33] As the judge found, there was no dispute that the payments had not been made since December of 2012, and the reality was that no funds could be removed from the account once the suspicious activity was found. Mr. Early knew that. He took no steps to ensure that the regular monthly payments would be made.

[34] The motions judge clearly identified the appropriate test and then properly applied the test to the facts before him. The facts which the trial judge had before him were:

1. RBC advanced funds to Baypoint Holdings on the mortgage;

2. the terms of the mortgage required repayment of those funds; and
3. the payments had not been made since December of 2012.

[35] Having regard to the terms of the mortgage it was clear there was a default in payment. The motions judge committed no error in granting summary judgment.

Other Defences

[36] In their factum, the appellants say that the judge erred in failing to address the other defences raised on the pleadings:

1. failure of enforceability of the mortgage for lack of consideration (appellants' factum, ¶3);
2. failure of enforceability of the mortgage as a result of breach of commercial contract on the part of RBC (appellants' factum, ¶3);
3. failure of the personal guarantee of John T. Early, III for lack of consideration from RBC (appellants' factum, ¶3);
4. unenforceability of the mortgage due to it being Mr. Early's matrimonial home (appellants' factum, ¶48).

[37] Mr. Early filed five affidavits from himself, and one from his wife on the motion. The affidavits do not disclose facts which support the allegations Mr. Early now makes in his factum in support of these defences.

[38] With respect to there being a lack of consideration for the mortgage, it is not pleaded in the defence. Nor was it argued before the motions judge.

[39] Perhaps more importantly, there is ample evidence on the record and before the motions judge that funds for the mortgage had been advanced and received by Baypoint. There is nothing in the evidence which provides support for this defence even if it were pleaded.

[40] With respect to the unenforceability of the mortgage as a result of RBC's breach of contract – if the appellants are referring to freezing of the funds in Baypoint's accounts – I have already addressed this issue earlier in these reasons. Further, as was pointed out by the judge below, the freezing of the accounts may be subject to a separate action but it is not a defence to the foreclosure action. If

they are not referring to the freezing of the accounts, neither the evidence nor the appellants' arguments disclose any other potential breach.

[41] Mr. Early did plead in his defence that there was a lack of consideration for his personal guarantee. However, the affidavit evidence falls short of establishing that there was any form of collateral contract, the terms of the collateral contract or why it would be legally enforceable. No argument on this point was made before the motions judge.

[42] Further, the record plainly establishes there was consideration for the guarantee – the loan of $1.233M advanced by RBC to Baypoint.

[43] Finally, the lack of enforceability for the mortgage because the property was a matrimonial home was raised and argued before the motions judge. Mr. Early argued that foreclosure should be avoided because he made a wrong statement about the property not being able to be considered a matrimonial home. In my view, the motions judge appropriately rejected the argument saying:

> [Mr. Early] says the property was a matrimonial home and his wife, Lydia Early, didn't sign the mortgage. The mortgage is not in the name of Mr. and Mrs. Early, or even of Mr. Early himself. It is a mortgage taken out by the company. The only right that anyone would have to reside there would be if the company granted them that right. Mr. Early himself signed a statement, included in the mortgage, that the shares of the company do not entitle anyone to live in the home. RBC has and had the right to rely on Mr. Early's signed statement. He cannot avoid foreclosure on the property owned by his company by asserting that he made a statement that he now says was wrong.
>
> [Emphasis added]

[44] The appellants arguments on all these points fail. I would dismiss this ground of appeal.

Issue #2 Did the motions judge commit an error of law by dismissing the appellants' motion to strike the affidavit of Brian Higgins?

[45] Mr. Early argued before the motions judge that the Higgins' affidavit was irrelevant. It is difficult to understand why he asserted the affidavit was irrelevant and ought to have been struck.

[46] Mr. Higgins' affidavit focuses on two issues: the particulars of the mortgage and payment history; and, on the sequence of events leading RBC to freeze the appellants' accounts when it detected suspicious activity.

[47] I fail to see any basis upon which a credible argument could be made that Mr. Higgins' affidavit was inadmissible as irrelevant. The motions judge correctly rejected that argument and in so doing he did not commit any error.

Issue#3 Should leave to appeal be granted in the Foreclosure Appeal?

[48] The appellants seek leave to appeal and, if leave to appeal is granted, to appeal the Foreclosure Order.

[49] In the Notice of Application for Leave to Appeal there are eight proposed grounds of appeal. Six of those grounds of appeal relate to the motions judge having determined the amount owing under the mortgage before the determination of the "Defendants" right of set-off or as a result of his lack of consideration of the other defences raised in the Defence.

[50] I have already addressed the other defences above. With respect to the argument that there may be a set-off, it does not raise an arguable issue for the following reasons:

1. Set-off is not pleaded in the Defence;
2. There is no counterclaim on behalf of Baypoint, therefore, if there was any set-off it could not go to reduce the amount of the mortgage; and
3. The mortgage, by its wording, precludes any set-off (see ¶57 *infra*).

[51] This is by no means all of the reasons why set-off is not available to the appellants, but it provides sufficient reasons for the purposes of dealing with their leave application.

[52] There are two other grounds of appeal; one alleges that the motions judge erred by setting the amount due on an *ex parte* motion and not requiring a hearing with testimony from the defendants.

[53] The appellants' Defence had been struck and, therefore, there was no longer a defence to the proceeding. In an action where there is no defence, it was open to the appellants, pursuant to Rule 31, to make an *ex parte* application in relation to the Foreclosure Order. This ground of appeal does not raise an arguable issue.

[54] Mr. Early's final ground of appeal is that the motions judge erred in failing to protect the "equitable rights of the defendants while sitting as a court of equity". Neither his factum nor his arguments elaborates on what he means by that. I am unable to discern any arguable issue from that ground of appeal.

[55] For these reasons, I would not grant leave to appeal on the Foreclosure Order appeal.

Issue #4 Should the Foreclosure Order be stayed pending the disposition of the counterclaim in the proceeding?

[56] As the Foreclosure Order was made after the Summary Judgment order, I am prepared to entertain Mr. Early's argument that it should be stayed pending a determination of any claim of set-off which the appellants may have against the RBC. However, with respect, Mr. Early's argument on this point is totally lacking in merit.

[57] The terms of the mortgage specifically address set-off:

> **13.3 No Deductions**
>
> You promise that all payments that you make to us or that we ask you to make will be made in full without any set-off or counterclaim and without any deductions or withholdings whatsoever. You promise that you will not cancel, offset or reduce any payments that you make.

[Emphasis added]

[58] Further, the property is owned by Baypoint. The counterclaim is made by Mr. Early for his losses as a result of the actions of the Royal Bank of Canada. There is no counterclaim or other claim which has been put forward on behalf of Baypoint.

[59] Finally, I have already determined there is no arguable issue in that appeal. However, even if there were, Mr. Early has not provided any evidence to suggest that he would suffer irreparable harm or that the balance of convenience favours him which is required on a stay application. Nor are the circumstances here such that it would be fit and just to grant a stay (see *Purdy v. Fulton Insurance Agencies Ltd.*, [1990] N.S.J. No. 361 (C.A.)).

[60] As a result, I would decline to grant a stay.

Conclusion

[61] Leave to appeal in the Foreclosure Order appeal (C.A. No. 464441) is denied. The appeal of the Summary Judgment (C.A. No. 460374) is dismissed with costs payable to the Royal Bank of Canada in the amount of $5,000 inclusive of disbursements payable by the appellants, jointly and severally.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Oland, J.A.