

NOVA SCOTIA COURT OF APPEAL

Citation: Ofume v. CIBC Mortgages Inc., 2003 NSCA 75

Date: 20030626

Docket: CA 202013

Registry: Halifax

Between: Phillip Chukwuma Ofume and Maureen Ngozi Ofume

Appellant

v.

CIBC Mortgages Inc.

Respondent

Judge: Justice Elizabeth Roscoe

Application Heard: June 26, 2003 in Halifax, Nova Scotia in Chambers

Written Decision: June 27, 2003 (rendered orally June 26, 2003)

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

Decision:

[1] This is an application by the appellants, Dr. Philip Ofume and Maureen Ofume, for a stay of execution of an Interlocutory Order made by Justice John Murphy in a foreclosure action in the Supreme Court.

[2] The appellants brought an application before Justice Murphy for an order compelling the respondent Bank to accept payments on the mortgage subject to the foreclosure proceeding. Justice Murphy denied the application but ordered that the appellants could make the monthly payments into court if they wished to do so, on a without prejudice basis. The order provides:

IT IS HEREBY ORDERED that should the Defendants wish to make payments to the Plaintiff with respect to a mortgage on the property known as 8 Edwin Ford Court, Bedford, Nova Scotia, which is the subject of the proceedings before the Supreme Court of Nova Scotia in court file number SH No. 194319, they may do so by making their cash payment to the Supreme Court of Nova Scotia at the Court Administration Office of The Law Courts located at 2nd floor, 1815 Upper Water Street, Halifax, Nova Scotia during regular business hours between 8:30 am and 4:30 pm daily from Monday to Friday;

IT IS FURTHER ORDERED that any cash payments received from the Defendants by the Supreme Court will be receipted to the Defendants at the time the payment is made and will be held in an interest bearing trust account to the credit of court file SH No. 194319;

AND IT IS FURTHER ORDERED that any cash payments received by the Supreme Court pursuant to this present court Order cannot be paid out of court without a further Supreme Court Order specially directing payment of these funds;

AND IT IS FURTHER ORDERED that this Order does not in any manner whatsoever affect on [*sic*]the determination of the merits of the court action in this court file;

[3] On the stay application Dr. Ofume has filed an affidavit alleging misconduct, deception, conspiracy, cruelty and racism by the Bank, its counsel and many other unidentified people who are not parties to the foreclosure action, and numerous errors by Justice Murphy. The notice of appeal is similar in tone and content.

[4] As I advised the applicant during the oral argument on the application, a stay of Justice Murphy's order would not, in my view, accomplish anything - there is really nothing to stay, since the application before Justice Murphy was dismissed. If the order allowing the appellants to pay the money into court is stayed, they would be back in the position they were before the order was made, of not being able to make any payments on the mortgage. What the appellant is really seeking, in my view, is an order directing the Bank to accept the payments on the mortgage pending the hearing of the appeal in this Court, in effect a mandatory injunction, or an order allowing the appeal on an interim basis. Those, in my view, are not remedies which can be granted by a single judge of this Court in Chambers.

[5] If I am in error with respect to the availability of injunctive or interim relief at this stage in the proceeding, the applicable test would be that established in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341. On an application for a stay of execution pursuant to **Civil Procedure Rule 62.10**, the appellant must meet either the primary test, by satisfying the court that there is an arguable issue raised on the appeal, that the appellant will suffer irreparable harm if the stay is not granted, and that the balance of convenience between the parties favours the granting of the stay. Or, failing that, the appellant must satisfy the secondary test, that there are exceptional circumstances which would make it fit and just that the stay be granted.

[6] The applicant has not met any of the parts of the **Fulton** test. He has not raised an arguable issue, or proved that he will suffer irreparable harm if the stay is not granted, or shown that the balance of convenience favours the granting of a stay. Nor has the applicant demonstrated any exceptional circumstances which would make it fit or just that a stay be granted as required in the secondary test.

[7] The application for a stay is dismissed with costs payable to the respondent in the amount of \$500.00, payable forthwith.

Roscoe, J.A.