IN THE SUPREME COURT OF NOVA SCOTIA
**Citation:** Household Realty Corporation v. Gudger, 2005 NSSC 88

**Date:** 20050420
**Docket:** SH227913
**Registry:** Halifax

**Between:**

Household Realty Corporation Limited,
Plaintiff

v.

Laurie Gudger
Defendant

-and

Marie Gudger
Defendant-Guarantor

**Judge:** The Honourable Justice Charles E. Haliburton

**Heard:** March 24, 2005, in Halifax, Nova Scotia

**Written Decision:** April 20, 2005

**Counsel:** Andrew S. Wolfson, for the Plaintiff
Blair Mitchell, for the Defendants

**By the Court:**

[1] In this proceeding the Plaintiff seeks to foreclose a mortgage executed by the Defendants, pursuant to an Originating Notice filed August 10, 2004. There is no proof of service contained in the file, nonetheless a Defence to the claim was filed on October 27th. The Defence was a simple denial.

[2] Evidently negotiations between the Plaintiff and the Defendant took place with respect to this proceeding. On March 9, 2005 an Interlocutory Notice (Application Inter Partes) was filed on behalf of the Plaintiff for an Order to strike out the Defence pursuant to Civil Procedure Rule 14.25 and Summary Judgment pursuant to Rule 13. The Defendant responded on March 14, 2005 with an Interlocutory Notice (Application Inter Partes) to extend time under CPR 3.03 and to amend the Defence pursuant to Rule 15.

[3] I am satisfied that the Order Extending Time can be granted without seriously impairing the rights of the Plaintiff and in the circumstances I find it appropriate to do so. The Order Extending Time pursuant to Civil Procedure Rule 3.03 is therefore granted and the Defendants will have leave to amend the Defence and Counter-Claim.

[4] The Statement of Claim for Foreclosure is in the usual form. The Amended Defence and Counter-Claim are in a form which supplements the earlier simple “traverse and denial” and raises the following additional issues:

> 1. “ The Defendant tendered payment for any amount due herein on the Plaintiff, and such tendered payment was refused.”
>
> 2. “The Defendant says that his ability to read is impaired and pleads *non est factum*.”
>
> 3. “The Defendant, in any event, pleads the defence of set off.”

[5] The Counter-Claim goes on to make allegations which raise the following issues:

> 1. “The Defendant represented . . . that a form of disability insurance . . . would cover the mortgage payment in the event of the disability from work of the (male) defendant.”
>
> 2. “That in the event no disability coverage is available . . . the Defendant has relied on the Plaintiff to his determent and claims damages and set off for negligent representation or for breach of collateral contract or for breach of contract.”

[6] Together with the proposed Amended Defence and Counter-Claim the Defendants filed an Affidavit of the Defendant Laurie Gudger together with a Medical Orthopaedic Report of Dr. Eric B. Howatt and copies of various correspondence exchanged between counsel. On March 22, 2005 the Plaintiff responded with an Affidavit from the manager of the HFC Office in

question and documentation relating to the mortgage and the disability insurance.

## THE APPLICATION FOR SUMMARY JUDGMENT

[7] The position of the Plaintiff is fully set out in Mr. Zatzman's letter of March 21, 2005 and reiterated by Mr. Wolfson on his appearance in chambers. The points made are:

> 1. The Defendants acknowledge that they signed the mortgage document and have failed to make the required payments.
>
> 2. While the disability insurance coverage provided payment of the mortgage payments for a 24 month period, that time has expired and arrears are now accruing.
>
> 3. The disability insurance was to cover monthly mortgage payments for principle and interest only and not municipal taxes which had been paid by the Plaintiff under the terms of the mortgage and are now claimed in conjunction with the foreclosure. The failure to pay the municipal taxes constitutes a default regardless of the insurance issue. (I note that this statement of claim does not make specific reference to a claim for taxes.)

[8] The Defendants for their part make the following points:

> 1. Three payments made in accordance with the affidavit of Mr. Gudger were returned by the Plaintiff. Those payments, it is said, were sufficient to cover the municipal taxes.
>
> 2. On an application under Rules 13.01 and 14.25 the Court will not make findings of fact requiring the assessment of credibility between competing affidavits.

**CIVIL PROCEDURE RULE 13.01/14.25**

[9] I have taken liberties in paraphrasing the positions of the parties as described above. It seems to me that the real issue here is whether the Defence and Counterclaim are, on their face, absolutely without merit and what use is to be made of the affidavits filed by the respective parties.

[10] I have had the benefit of reading various cases. Mr. Zatzman has offered the case of *Royal Bank of Canada vs. Sweeney*, 2003 NSCA 115. On my reading of that case the Court was dealing with conflicting positions with respect to the applicable law with little if any conflict relating to facts. With respect to the striking of pleadings I have had an opportunity to review *Hapi Feet Promotions Inc. et al vs. Martin*, Edwards J. 2004 NSSC 198 where the learned Judge reviewed some of the principles to be distilled from the cases. I find the following quotes from that case helpful. "Summary Judgment (will be considered) only where the moving party establishes that 'there is no genuine issue of **material fact** requiring trial,' and that that threshold having been met by the applicant, the respondent fails to, 'establish his claim as being one with a real chance of success'."

[11] Edwards J. Went on to say the appropriate test "as set out in *Guarantee Co. Of North America v. Gordon Capital Corp* [1999] 3 SCR 423 . . . is satisfied

when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court."

[12] The Ontario Court of Appeal considered a similar application in *Aguonie v. Galion*, ONT CA [1998] 38 O.R. (3d) 161; 156 D.L.R. ($4^{TH}$) 222 dealing with a similar rule of their court where it was concluded that Summary Judgment could be granted "only where the result may be safely predicted without a trial (a question of law may be determined by the motions Judge 'where he or she is satisfied that the only genuine issue for trial is a question of law')".

[13] In summary, if the allegations of fact contained in the Statement of Defence and Counterclaim are capable of proof at trial, and if they would establish a defence in law, then it is not for the chambers Judge on an Interlocutory Application such as this to make findings of fact based on conflicting affidavits which would preclude a party from having an opportunity for trial.

[14] On the face of the pleadings there are genuine issues to be tried. The application to strike is therefore denied. No costs to either party will be allowed on these applications.

Haliburton J.