

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Patton v, Smithfield Estates Inc., 2015 NSSC 147

**Date:** 051515

**Docket:** *Truro*, No. Tru No. 416334

**Registry:** Truro

**Between:**

Mark E. Patton and Carol Kostynksi

Plaintiffs

v.

Smithfield Estates Inc, Sarah Robinson, Jennifer  
Robinson and Patrick O'Neil

Defendants

*and*

TCT Mortgage Group Inc.

Third Party

**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** January 21, 2015, in Truro, Nova Scotia

**Decision:** January 21, 2015

**Written Release** May 15 , 2015

**of decision:**

**Counsel:** Geoffrey Franklin/Joshua Santimaw, for the Plaintiff, Carol Kostynski  
Mark Patton, Self-represented  
Jonathan Saumier, for the Defendants, Smithfield Estates Inc,  
Sarah Robinson and Jennifer Robinson;  
Andrew Fraser for Third Party, TCT Mortgage Group Inc.

**By the Court:**

[1] Smithfield Estates Inc. (Smithfield) mortgaged lands at Liscomb Mills, Guysborough County, Nova Scotia to Mark E. Patton and Carol Kostynski. Sarah Robinson, Jennifer Robinson and Patrick O'Neil guaranteed the Mortgage.

[2] Smithfield Estates Inc. had approached TCT Mortgage Group Inc. (TCT) to arrange a mortgage. TCT had arranged for Mr. Patton and Ms. Kostynski to be the mortgagees.

[3] The mortgage dated April 3, 2009 was in the principal amount of \$120,000.00 with simple interest at 12% per annum with interest payable monthly in the amount of \$1,200.00. The mortgage matured April 3, 2010 at which time the balance of the principal and interest was payable. The Mortgage gave the mortgagor the option to renew the mortgage for an additional two terms of twelve months. The mortgage was renewed for two years resulting in it maturing April 3, 2012.

[4] In the spring of 2012 Smithfield was attempting to arrange new financing. In September 2012 it became clear Smithfield was unable to arrange new financing. Deanne Turner an employee of TCT Mortgage Group Inc. dealing with the mortgage contacted Harold Grant a mortgage broker to attempt to arrange new financing for Smithfield. Mr. Grant was unable to arrange new financing.

[5] In June 2013 Mr. Patton and Ms. Kostynski commenced action to foreclose the mortgage. Smithfield Estates Inc, Sarah Robinson and Jennifer Robinson filed a defence and claimed against TCT Mortgage Group Inc. as a third party.

[6] Mr. Patton and Ms. Kostynski moved for an Order for summary judgment against the defendants pursuant to Civil Procedure Rule 13.04. Then TCT Mortgage Group Inc. moved for summary judgment on evidence against the defendants pursuant to Rule 13.04.

[7] Both Mr. Patton and Ms. Kostynski state they are not seeking interest for the three month period September 2012 to and including November 2012.

[8] The test for summary judgment is well known. Saunders, J.A., in giving the court's judgment in *Burton Canada Company v Coady* 2013 NSCA 95 stated at paragraphs 27 and 28:

[27] In *Guarantee* the Supreme Court enunciated the test for summary judgment. But because the Courts clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:

27. The appropriate test to be applied on a motion for summary judgment 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. See *Hercules Managements Ltd. v. Ernst and Young*, [1997] 2 S.C.R. 165, at para 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* [1998], 164 D.L.R. (4<sup>th</sup>) 257 (Ont. C.A.), at pp 267-68; *Irving Ungerman Ltd v Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51, Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real change of success." (*Hercules, supra, at para. 15*)

28. That statement was affirmed by the Supreme Court of Canada in *Canada (Attorney General) v Lameman*, 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:

[11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v Ontario Jockey Club* (1995), 21 O.R (3d) 547 (C.A.); *Tucson Properties Ltd v Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B.(Master)), at pp 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co., v Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4<sup>th</sup>) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried; *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen Div.), at p 434; *Goudie v Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.

And at paragraph 33:

First, the judge's statement suggests a blurring of the two distinct stages of inquiry on a summary judgment motion. In the first stage of an analysis the judge's sole focus is on the *disputed* facts. The "undisputed facts" are

irrelevant in the first stage of the analysis. Second, a judge is not to undertake any kind of quantitative or qualitative analysis of the *amount* of facts when deciding whether to grant summary judgment. The court does not enter into an inquiry as to the “sufficiency” of the facts, whether they are disputed or otherwise. With respect, the test is only whether there are *any* material facts in dispute. If there are then a judge must conclude that summary judgment is not available and that a trial is required to resolve the dispute.

[9] The defendants submit there are genuine issues of material fact in dispute which require trial.

[10] In their affidavits Phil Robinson and Sarah Robinson, president of Smithfield Estates Inc. deposed as follows:

“ Sometime between September 28, 2012 and October 7, 2012, I was advised by Deanette Turner via telephone conference that Harold Grant required updated financial projections in order to seek out alternative financing, and that Smithfield was not required to keep making its monthly interest payments on the TCT mortgage until Harold Grant secured alternative financing which would pay the TCT mortgage.

During this telephone conference, Deanette Turner requested that Smithfield prepare an update to its two-year financial projections to show interest payments for September, October and November, 2012 as deferred and included in the payout statement from the new lender(s) that Harold Grant would source.

Based on this telephone conference, it was my understanding that Harold Grant would be provided 90 days to secure replacement financing. Deanette Turner and I agreed that under the circumstances, TCT would allow Smithfield a hiatus from interest payments until the end of November 2012.”

[11] The defendants’ counsel in written submissions stated:

“12. Around that time, between September 28, 2012 and October 7, 2012, Sarah Robinson and Phil Robinson had a telephone conversation with TCT; Deanette Turner in which Ms. Turner advised the Robinson, of 2 things:

1. That Harold Grant would require updated two-year financial projections from Smithfield in order to seek out alternate financing and that Smithfield was not required to make its monthly interest payments until Harold Grant secured alternate financing to payout the Mortgage; and
2. That Smithfield should prepare its updated two-year financial projections to show the monthly interest payments for September, October and November 2012 as being deferred and included in the new payout statement provided to

the new lender that Harold Grant would source.

13. Smithfield relied on this representation and prepared its two-year financial projections as requested by Deanette Turner. Smithfield further relied on this representation and stopped making its monthly interest payments as of September 2012.

14. There were no discussion between TCT and the defendants as to what would happen if Mr. Grant was not successful in securing new financing within the promised 90 days. The 90-day period ended in November 2012, and the defendants received a demand letter from the plaintiffs' lawyer on January 4, 2013."

[12] In oral argument counsel for the defendants submitted no interest payments were due on the mortgage until Mr. Grant secured alternate financing.

[13] As mentioned earlier Mr. Patton and Ms. Kostynski are not seeking interest for the months of September, October and November 2012. Therefore interest for these months is irrelevant to the issues between the parties. Mr. Robinson and Sarah Robinson in their affidavits explained what they understood from the conversation with Ms. Turner, that is, interest payments for September to November 2012 were deferred and there was a hiatus from interest payments from the end of November 2012. The third party denies Ms. Turner made such representations, but that is not an issue of material fact as the plaintiffs are not claiming interest for the three months.

[14] Likewise the issue of whether TCT Mortgage Group Inc. was an agent for the plaintiff, which is in dispute, is not a material fact as whether TCT was or was not an agent is not material as the representations, if made, were explained by Mr. Robinson and Sarah Robinson as relating to interest for the months of September to November 2012 which is no longer claimed.

[15] There are no issues of material fact in dispute.

[16] The next issue is whether the defendants have shown its claim has a real chance of success.

[17] In an e-mail from Deanette Turner to Sarah Robinson dated September 27, 2012 Ms. Turner wrote:

"Subject Re: Smithfield Estates – Financing

Hello Sarah

We are also beyond disappointed at this stage. I am not even sure what to say at this point as I know the mortgagees really want to be paid out and move on. They have been with these projects long enough.

Could you send me all the new appraisals and doc's that you would have provided to Kevin. I have one last chance with someone. Please provide the information on the Guarantor that you have also added to the mix. The amount that RBC was "going" to fund, where the funds were all going etc... The more details the better, the quicker the better. If I could have this by first thing tomorrow morning as I have asked this guy to come in tomorrow morning."

Deanette

[18] On October 2, 2012 Sarah Robinson sent an e-mail to Harold Grant stating:

" Subject: Smithfield Estates – file status

Hi Harold,

Please get in touch if you have any questions about the information I sent you yesterday. My Dad (Phil) is working with our accountant (Dan) to provide you with financial statements for Smithfield and an updated financial projection for Smithfield Estates as our last projection was based on starting a build of a spec cottage in spring of 2012 – which didn't happen so we need to adjust the dates.

Regarding the potential guarantor; John Renouf – John would like to have a brief chat with you before filling out the application, etc. We have shared your contact details with him.

I am in the office for the rest of the day if you have any questions. We are working as quickly as possible to provide you with all the information required to build the executive summary."

Best,

Sarah

Sarah Robinson

[19] Smithfield sent two years of its projections to Mr. Grant on October 9, 2014.

[20] On October 31, 2012 the following e-mail exchange took place between Don Roper of TCT Mortgage Group Inc. and Phil Robinson:

Phil Robinson to Don Roper;

“Subject: Re: Meeting Info

Don

I guess we misunderstood what you meant by “material progress”. We assumed that John Renouf providing his net worth statement was important for Harold’s dealings with lenders. This is what you have been telling us.

As to my misunderstanding your messages re the meeting if you revisit your emails of Oct 23 and 25 you will appreciate when we did not hear from you this past Monday the Thursday meeting was not going to happen.

As mentioned Harold is not keeping us in the loop. He is reporting exclusively to TCT.

It is troubling that you have not provided the mortgagees with a copy of Sarah’s recent letter and the other financial info we believe is highly relevant. We requested that you provide this information to each party a few days prior to meeting. This would give investors an opportunity to discuss the situation with their advisors if they wished before the meeting.

You say that there is no document governing the relationship other than mortgages. TCT earns fees for its efforts which I assume the borrower pays for the benefit of all concerned. We are asking you for a copy of that document. There must be some agreement between the individual lenders that sets out how decisions get made, voting etc. We are asking for a copy of that document.

You engaged Harold Grant and we were not party to those discussions. We assume this action was taken with the knowledge and consent of the investors. Ever since we heard from RBC we have been going along with what you advised was best.

Our plan is to attend a meeting with the investors make sure they are fully informed and understand the situation and their options. After three years working together we feel such a meeting should take place.”

Phil Robinson

Quoting Don Roper

“Phil, the meeting was not postponed. As I indicated to you the other day, the only reason for a postponement would come if Harold had obtained an acceptable offer for you, which he advised he has not yet been able to do (as of 2 p.m. today).

I would recommend that you either reschedule your meeting back to tomorrow, or at the latest Friday. The trigger date is November 2, 2012, as the loans fall 3 payments past due.

The only documents that govern the relationships between the 2 borrowers is the mortgage document, which I believe you have a copy of. The 2 deals are mutually exclusive, which is why there are 2 meetings planned.

With your permission, the web site information has been provided the lenders. The other information from Smithfield will be provided to the lenders prior to the meeting.

The 2 lenders choosing not to attend had no interest to hear your plan, unless it included paying the interest up to date and keeping it up to date.

They just want their monthly interest.

Please advise

DON R.”

Don Roper

[21] On November 5, 2012 Don Roper e-mailed Phil Robinson stating:

“Subject: FW: Meeting Info

Phil, on behalf of the lenders, this is a very disappointing stance.

In the absence of a meeting this week, please forward immediately, by overnight courier, the arrears of \$10,500 (\$3500 per month for 3 months); The lenders want



their payments and not prepared to wait any further without receipt of their overdue payments.

Payment will be construed as a sign of good faith on the party of Smithfield's to the lenders, and a highly negative signal if not paid.

If the payments are not received by Thursday, the lenders will commence foreclosure action against Smithfield.

Given your confidence in the broker, payment should not be an issue.

Should have any questions, or if the position of the lenders remains unclear, you should call me to discuss ASAP, 506 384 1828

DON R."

Don Roper

[22] The defendants have not shown their defence has a real chance of success. During the fall of 2012 TCT Mortgage Group was demanding and attempting to collect interest from Smithfield Estates.

[23] Mark E. Patton and Carol Kostynski's motion for summary judgment is allowed. TCT Mortgage Group Inc's motion for summary judgment, is also allowed.

[24] I will hear the parties on the issues of costs.

Coughlan, J.