SUPREME COURT OF NOVA SCOTIA
Citation: *Jaskolka v. Penney*, 2015 NSSC 156

Date: 2015-05-26
Docket: S.H. No. 425042
Registry: Halifax

Between:

Alan Jaskolka, Bonnie Jaskolka, Bryan Jaskolka, Klee Rogers

Applicants

v.

Brian Penney, Small Fortunes Inc.

Respondents

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 16, 2015, in Halifax, Nova Scotia
Oral Decision:	April 16, 2015, in Halifax, NS
Counsel:	Nicholas Mott for the Applicant Michael Tweel for the Respondent

By the Court:

Background

[1] The plaintiffs lent $260,000 to the defendant, Mr. Penney. Small Fortunes Inc. was to guarantee the debt – Exhibit "A", Jaskolka affidavit sworn to July 28, 2014. The debt was further secured by a mortgage dated May 1, 2012, which shows Mr. Penney as the mortgagor and Small Fortunes as the guarantor. This mortgage was secured, by property at Unit 509, 53 Bedros Lane, Halifax Regional Municipality [PID numbers 40331456 and 41025420] – Exhibit "B", Jaskolka affidavit sworn to July 28, 2014.

[2] A second mortgage, which contained boilerplate language identical to the above-noted mortgage, and also dated May 1, 2012, showed Small Fortunes Inc. as the mortgagor. Mr. Penny guaranteed the debt – and is shown as such on the mortgage. This mortgage was secured by properties in the Beaver Bank Road, HRM area – PID number 41267675 [Smoky Drive Sackville] – Exhibit "R", Jaskolka affidavit sworn March 23, 2015.

[3] The Beaver Bank mortgage went into default. The plaintiffs commenced an action [Hfx No. 417117] and sought an order of foreclosure, sale and possession

of the Beaver Bank Road property. On August 7, 2013, an order for foreclosure, sale and possession of that property was granted, which settled the amount owing [$260,000 at the rate of 12% a year] at $272,861.62. That order noted in part:

1. [12% interest a year from August 7, 2013] up to

    a. 15 days after the date of sale by public auction, if the mortgagee purchases the property; or

    b. 15 days after the day the balance of the purchase price is paid to the sheriff or any other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;

Together with any other charges and protective disbursements, as approved by the court, and costs to be taxed.

…

7. The plaintiffs shall have judgment for the mortgage debt against the defendants… effective as of the date payment of sale proceeds is made to the plaintiffs or, if no payment is to be made, 15 days after the day of the sale. Interest is to be calculated under the Interest on Judgments Act afterwards. Enforcement of the judgment is stayed

until the plaintiffs establish that there is a deficiency and the court determines the amount of the deficiency.

8. On or after a motion for confirmation of the sale, the plaintiffs may make a motion to assess the amount of any deficiency.

[4] The Beaver Bank property was sold on September 6, 2013 for $200,000, after competitive bidding to the plaintiffs. A copy of the sheriff's file on the public auction reveals that there were 30 separate bids preceding the top bid of $200,000. On November 14, 2013, a notice of new counsel was filed which replaced Glenn Hodge, with Nicholas Mott . The Sheriff's report dated September 11, 2013 was confirmed by order of the prothonotary on November 20, 2013. On March 5, 2014, the plaintiffs filed a notice of motion moving for "an order for assessment of deficiency", which was to be heard April 23, 2014. By letter dated April 22, 2014, plaintiff's counsel requested that the matter be adjourned without date "as the plaintiff has not finalized the evidence in support of its claim".

[5] No further documentation has been filed to date in support of this motion. At law therefore, the default judgment existed as of 15 days after the date of sale of the lands by public auction viz. 15 days after September 6, 2013 –Rule 72.12 (3)

(a). Moreover, ss.4 makes it clear that "the amount of the default judgment must be assessed by a judge". Furthermore, ss. 6 reads:

> The judgment extinguishes six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed.

[6] Applying the principles of statutory interpretation to Rule 72.13(6), arguably one could conclude that since no motion for an assessment of the amount of the deficiency has been filed and perfected (or any reasonable basis given for not doing so), that the default judgment is therefore extinguished by operation of law. Even if so concluding would be wrong, it must be recalled that the summary judgment order here is in relation to only the Bedros Lane mortgage/statement of claim Hfx. No. 425042. Therefore, only the costs associated with that property/mortgage should be considered in the calculation. Here, the plaintiffs are relying on the mortgage as a means to recover the judgment monies owing to them. They are properly entitled to claim the principal and interest owing on the common debt, but only the costs and expenses relatable to the Bedros Lane property.

[7] On March 5, 2014, the plaintiffs filed a statement of claim [Hfx. No. 425042] alleging as against the defendants that in relation to the 53 Bedros Lane mortgage, they had defaulted on payments due, and consequently claimed against them $161,311.16 as of February 13, 2014, and $166.57 interest for a total of

$161,177.73. The plaintiffs also claimed other charges and expenses, interest on any amount of the arrears from the date of payment or payments being due until the date of judgment, costs, and order for foreclosure sale and possession, and judgment for a deficiency if any.

[8] On June 8, 2014, the defendants filed a statement of defence. In essence, they argued that no funds were advanced, no monies were owing, and it was an abuse of process for the plaintiffs as they had already commenced an action - Hfx. No. 417117.

[9] The plaintiffs sought summary judgment on evidence pursuant to Rule 13.04. Justice Hood granted the motion on November 5, 2014. In her written decision, 2014 NSSC 400, she stated:

> Accordingly, I grant summary judgment and order the quantum to be assessed pursuant to Rule 13.05(2).
>
> I will say that I do, however have some concerns about the interest rate: the difference between the 5% on the deficiency judgment which could be granted in the first action and the 12% rate in the mortgage now being foreclosed. That issue is not for me but will be addressed in the assessment.
>
> As well, in an action to foreclose on this property there is a question of whether it is appropriate to consider the costs related to the mortgagee's purchase and subsequent resale of the Beaver Bank Road property. The question in this case is what is owed on the mortgage on Bedros Lane. Neither of these issues are before me and will be left to be dealt with hereinafter.

[10] No formal order was taken out – it appears that Hood, J. ordered an assessment of the damages before another judge pursuant to Rule 13.05(2); consequently Rule 70.02(2) is triggered.

The motion herein for determination of damages

[11] On March 10, 2015, the plaintiffs filed a motion "for a determination of damages" pursuant to Rule 13.05. On April 10, 2015, the defendants filed a notice of contest [Chambers application]". In its "grounds of contest", the defendants state:

> The defendants say that your application should be adjourned or allowed in part to permit the assessment of the deficiency under Hfx. No. 417117 pursuant to Civil Procedure Rule 72 and the practice memorandum for foreclosure procedures prior to any assessment under the mortgage sought to be foreclosed and Hfx. No. 425042.

[12] I note that the plaintiff filed a motion under *Civil Procedure Rule* 22 and 23. No notice of contest is available in response to such motions.

[13] In para.114 of their brief, the defendants state:

> It is submitted that the plaintiffs have delayed proceeding with the assessment under the first action as they are:
>
> a. Trying to avoid the application of the *Civil Procedure Rule* 72.13(1)(c) [and have this court deduct only the $185,000 received on sale to a third party after the mortgagee's bid of $200,000 at the sheriff's sale];

> b. Trying to obtain a 12% interest rate instead of a 5% interest rate that would apply on the first action deficiency judgment;
>
> c. Trying to force the defendants to pay the amount demanded or be faced with a foreclosure under the Bedros mortgage which involves paying out a much larger amount due to the first mortgage held by the Bank of Montréal having to be paid out as the Bedros mortgage is a second mortgage;
>
> d. Trying to obtain a duplication of the charges and costs under the Beaver Bank mortgage by seeking the same charges and costs again under the Bedros mortgage.

[14] The Bedros mortgage can be found at Exhibit B, Brian Penny affidavit sworn to October 14, 2014; Exhibit B of the July 28, 2014 sworn Brian Jaskolka affidavit.

[15] The defendants argue that the deficiency should first be assessed under the Beaver Bank mortgage and an order for deficiency judgment issued, before attention is turned to the Bedros Lane mortgage. The defendants state they have advised the plaintiff that they intend to pay the full amount of the deficiency judgment under the Beaver Bank mortgage once it has been assessed by the court.

[16] The key question is whether the August 7, 2013 Beaver Bank property order for foreclosure possession and sale should be dealt with first, before an assessment of the damages pursuant to the November 5, 2014 summary judgment order of Justice Hood regarding the Bedros Lane property should be considered?

[17] In their brief of April 10, 2015, the defendants request "an adjournment of the assessment in this matter until the court has first assessed the deficiency, if any, under the Beaverbank management and issued and order for deficiency judgment in Hfx. No. 417117." – para. 8.

[18] Therefore, the court first has to address the defendants' request for an adjournment of this motion.

Whether to grant an adjournment or not?

[19] Rule 1.01 reads: these rules are for the just, speedy, and inexpensive determination of every proceeding. Rule 22.18 governs the adjournment of motions, and reads in part:

> … [2] a motion for permission to withdraw or adjourn the motion may be made under Rule 28 – emergency motion, or such other Rules in part 6 – motion, as a judge permits.

[20] Adjournments of hearings are governed by general principles, since they are primarily fact driven decisions.

[21] Ultimately, the key question is whether it is in the interests of justice or not to adjourn a matter, with due consideration to the consequences upon the parties of doing so, and not doing so.

[22] Here the defendants argue an adjournment of this motion is appropriate in order to permit, and perhaps require, the plaintiffs to move forward the deficiency judgment motion which has been requested to be adjourned without date by the plaintiff on April 22, 2014 one day before the motion was to be heard by the Court. I note that the letter submitted to the court on April 22, 2014, containing the rationale of the adjournment read in part:

> In chambers, I will ask that the motion be adjourned without date as the plaintiff has not finalized the evidence in support of its claim. I have spoken with counsel for the respondents, Mr. Michael Tweel and he is aware that an adjournment will be sought.

[23] The voice recording of what happened in chambers, presided over by Justice Moir on April 23, 2014, confirms that Mr. Mott appeared and advised the court he was merely confirming the contents of his letter of April 22, 2014 and requested the matter be adjourned without date. Justice Moir made no inquiries of him, and made no decision other than to confirm, what to his mind must of been a routine request made with consent for an adjournment, to allow the plaintiff to obtain the evidence required in support of its claim.

[24] Our Court of Appeal has confirmed that adjournments granted by the court may be made conditional: *Armoyan v. Armoyan*, 2013 NSCA 99 at paras. 172 – 180 per Fichaud J.A. There the court stated:

(a) Standard of Review

172 In *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105, this Court described the appellate standard of review to a judge's decision whether to adjourn:

[5] This court applies a deferential standard to a trial judge's decision whether to grant or deny an adjournment. In *Abbott v. Sharpe*, 2007 NSCA 6, para. 74, Justice Saunders for the court said:

A trial judge's right to supervise and control the trial includes a wide discretion to grant or refuse adjournments. The exercise of that discretion is owed considerable deference on appeal unless it can be shown that the judge erred in principle or that the judge did not exercise his or her discretion judicially. *Webber v. Canada Permanent Trust Co.* (1976), 18 N.S.R. (2d) 631 (N.S.C.A.), and *Moore v. Economical Mutual Insurance Co.* [1999] N.S.J. No. 250 (N.S.C.A.)

In *Moore*, cited in the passage from *Abbott*, Justice Cromwell said:

33 The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

To similar effect: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras 27-29. In *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636, at para 41, Justice LeBel defined:

... the principle of deference to discretionary decisions: an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision. ...

173 In this case, Justice Campbell held that the adjournment should be granted, apart from any issue related to conditions. He ruled, correctly in my view:

With or without the consent of the counsel for Mr. Armoyan, I would have concluded that those circumstances [related to Ms. Armoyan's counsel] will justify the adjournment.

...

So, the adjournment is granted. The next question is whether or not there should be conditions attached to that.

174 The judge then considered, as a stand alone issue, whether to add a condition that restrained Ms. Armoyan from proceeding in Florida.

175 Conditions for adjournments are, of course, subject to appellate review for error of principle. For instance, in *Moore v. Darlington*, 2012 NSCA 68, this Court said, as to a judge's condition for an adjournment:

[55] If the application judge were prepared to grant the adjournment on the condition that Mr. Moore would not be permitted to file any further material, it was incumbent on her to explain why such a restriction was necessary to

> balance the interests of the parties. If such a condition were going to be imposed the test as set out in Rule 5.11 (supra) had to be addressed. It was not. Rule 5.11 provides ...
>
> [56] The judge took none of those factors into consideration in imposing the condition on Mr. Moore. Again, in failing to do so she erred in principle.
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> ...
>
> [58] There was no evidentiary basis upon which the judge could have exercised her discretion in attaching such a condition to the granting of an adjournment or, alternatively, if there were merit to imposing the condition, it is not apparent from the record or her reasons.
>
> [59] I am satisfied the application judge erred in principle in failing to balance the respective interest of the parties in her consideration of the adjournment request.
>
> See also *Caterpillar*, para 16.
>
> **176** The question on this appeal is whether the judge committed an appealable error, under this Court's standard of review, by attaching Condition #2 that restrained Ms. Armoyan's advancement of the Florida proceeding.
>
> ...
>
> **179** Justice Campbell made it clear that he would grant the adjournment whether or not there were conditions (above, paras 169-70). So the restraint on advancement of the Florida proceedings was not a *sine qua non* of the adjournment. Rather, the restraint effectively was an interim injunction that accompanied the adjournment. It doesn't matter that the restraint is styled self-effacingly as a mere "condition" of adjournment. A wolf in sheep's clothing has the same teeth.
>
> **180** In my view, the judge erred in principle, procedurally and substantively.

[25] Thus, adjournments may be made with conditions provided the condition is a *sine qua non* of the adjournment.

Conclusion

[26] I conclude that an adjournment of the motion to assess damages pursuant to Rule 13.05(2) in relation to S.H. No. 425042 [the Bedros Lane mortgage/property] should be granted in the circumstances of this case.

[27] The purpose of the adjournment is to permit, and require, the plaintiffs to perfect their motion for a deficiency judgment in S.H. No. 417117, before any further proceeding takes place pursuant to the motion under Rule 13.05(2) in S.H. No. 425042.

[28] Therefore, I will grant the adjournment sought by the defendants: without date, *viz. sine die*, on condition that the motion herein for an assessment of damages not be permitted to proceed until the motion for a deficiency judgment in S.H. No. 417117 has been perfected and heard/decided by the court and the applicable appeal period has expired.

[29] Moreover, as Justice Bryson said for the court in *MacKean v. Royal & Sun Alliance Insurance Company of Canada*, 2015 NSCA 33:

> [48] In *Garner v. Bank of Nova Scotia*, 2014 NSSC 63, Associate Chief Justice Smith endorsed the comments in *Hryniak* and amplified them:
>
> 34 During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7. In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada.

> It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see para. 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see para. 28). While these comments were made in the context of a summary Judgment motion, in my view, they are applicable to all civil cases in Canada. [Emphasis added]
>
> [49] I agree. The principles of accessibility, proportionality, timeliness, and affordability are applicable to all civil cases in Canada.
>
> [50] It could be objected that the comments of the Supreme Court in *Hryniak* relate simply to procedure – they do not extend to substantive areas of law such as means of proof. The response to that is that proof of liability is entirely dispensed with in cases of default judgment. Not only is liability presumed against the defendant, the plaintiff need lead absolutely no evidence to establish liability. In cases involving a claim for a liquidated amount, there would be no proof of that amount either. Upon default, the court would simply issue an execution order in the amount claimed.
>
> [51] So there is nothing wrong in principle with a simpler, quicker, less expensive and proportional basis for assessing damages in undefended cases such as this one, where the damage claimed is based on a settlement whose calculation depends on what is legally recoverable from the defaulting third party.

[30] S.H. No. 417117, was an uncontested proceeding. The court has taken its time, its resources, and determined that the plaintiffs are entitled to recover what monies they can from the debt that is owing, which amount has been established or settled as of August 7, 2013, by way of an order for foreclosure sale and possession, which has been effected by the sale of the property to the plaintiffs and from them onto a third party. That sale was confirmed by the prothonotary. A date was set for an assessment of the deficiency judgment.

[31] It would be contrary to the interests of justice, and the intent of our *Civil Procedure Rules*, to allow the plaintiffs to seek an assessment of damages in S.H. No. 425042, before finalizing the deficiency judgment in S.H. No. 417117.

[32] There is no compelling demonstrable evidence of prejudice to the plaintiffs in so proceeding. The defendants point out that in not so proceeding, and proceeding to hear the assessment of damages in action S.H. No. 425042, the court may be permitting the plaintiffs advantages that bring into question the fairness of so proceeding.

Order

[33] The assessment of damages pursuant to Rule 13.05(2) ordered by Justice Hood after granting summary judgment on evidence to the plaintiffs herein, shall be adjourned without date, and on condition that the motion not proceed until the motion for a deficiency judgment in S.H. No. 417117 has been perfected and heard/decided by the court and the applicable appeal period has expired.

[34] I direct the plaintiff to draft the order to reflect my decision, to be consented to as to form by defendants counsel.

[35] There will be no order as to costs.

Rosinski, J.