SUPREME COURT OF NOVA SCOTIA

Citation: Farm Credit Canada v. Wolfridge Farm Ltd., 2015 NSSC 240

Date: 2015-08-19
Docket: Hfx No. 429150
Registry: Halifax

Between:

Farm Credit Canada

Plaintiff/Respondent

v.

Wolfridge Farm Limited, John Early and Lydia Early

Defendants/Applicants

Judge:	The Honourable Justice James L. Chipman
Heard:	August 5, 2015, in Halifax, Nova Scotia
Oral Decision:	August 7, 2015
Counsel:	Jeffrey P. Flinn and Gavin D.F. MacDonald, for the Plaintiff/Respondent John T. Early III, self-represented, Defendant/Applicant

Orally by the Court:

[1] On February 23, 2015, Justice Moir granted an Order for Foreclosure, Sale and Possession in favour of the Plaintiff, Farm Credit Canada ("FCC"), against the Defendants Wolfridge Farm Limited ("WFL"), John Early and Lydia Early in Halifax under Court file Hfx No. 429150 (the "Order").

[2] On March 3, 2015, Wanda West, a foreclosure paralegal at the law firm representing FCC, notified Lydia Early and John Early by ordinary mail and by email to John Early that pursuant to the Order the property located at 1299 Ridge Road, Wolfville Ridge, Kings County, Nova Scotia (the "horse farm") would be sold at a public auction pursuant to the Order on March 27, 2015 at the Kentville Court House.

[3] On March 11, 2015, John Early emailed FCC counsel Jeffrey Flinn and Nicholas Mott with WFL's Notice of Chapter 11 Bankruptcy Case Meeting of Creditors.

[4] On March 17, 2015, Mr. Flinn notified Mr. Early that despite receiving WFL's Notice of Chapter 11 Bankruptcy Case Meeting of Creditors, FCC would continue to proceed with the foreclosure action and the sale of the horse farm, scheduled for March 27, 2015.

[5] On March 27, 2015, Lydia Early attended the public auction held at the Kentville Court House. Ms. Early was the highest bidder at the auction with a bid of $95,000 plus HST. Ms. Early paid a ten percent deposit in the amount of $10,925 to the court appointed auctioneer, Martin Jones. Ms. Early was given 15 business days, until April 22, 2015, to pay the remaining 90 percent of her March 27, 2015 winning bid; however, Mr. Jones did not receive any further funds from Ms. Early and, as a result, the sale to Ms. Early was terminated.

[6] WFL scheduled its motion to recognize its Chapter 11 United States Bankruptcy Code proceeding as a foreign main proceeding in regular Chambers on April 24, 2015. On April 24, Justice Moir scheduled WFL's motion for a one day hearing before Justice LeBlanc on May 6, 2015. Gavin MacDonald, on behalf of FCC, undertook that although FCC could schedule another foreclosure sale of the horse farm, it would not do so until after Justice LeBlanc heard WFL's motion on May 6th.

[7] Justice LeBlanc heard the Motion on May 6th and reserved decision. Again Mr. MacDonald undertook that even though FCC could have scheduled another foreclosure sale of the horse farm, it would not do so until after Justice LeBlanc rendered his decision.

[8] On June 5, 2015, Justice LeBlanc's decision was released (*Wolfridge Farm Ltd. (Re)*, 2015 NSSC 168) and he found that WFL's Chapter 11 United States Bankruptcy Code proceeding was not to be recognized as a foreign main proceeding, which would have had the effect of automatically staying FCC's foreclosure proceedings pursuant to s. 271 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*").

[9] Mr. Flinn notified Paul Radford, Q.C., (WFL counsel in respect of the Chapter 11 Proceeding and matter before LeBlanc J.) John Early and Lydia Early on June 17, 2015 that the horse farm was scheduled to be sold at a public auction at noon at the Kentville Court House on August 7, 2015.

[10] On July 9, 2015, the Court received a four page letter dated July 8th from Mr. Early on his own behalf and as "designated foreign representative for WFL". The reference line of Mr. Early's letter stated, "Brief Supporting Defendants' Motion to Cancel Foreclosure Sale Scheduled for August 7, 2015". FCC counsel responded with a letter addressed to the Court on July 9th.

[11] On July 15, 2015, the Prothonotary wrote to Mr. Early, with a copy to FCC counsel, as follows:

> I acknowledge receipt of your correspondence to the Court dated 8 July 2015. Justice A. David MacAdam has reviewed the same and has directed that you should make a motion in Chambers which would entail filing a Notice of Motion, Affidavit, and draft Order. Presumably, your letter of July 8, 2015 will serve as your brief.
>
> Please do not hesitate to contact me if you have further questions.
>
> Yours truly,
>
> Donna L. Davis

[12] On July 23, 2015, two of the three Defendants, WFL and John Early, filed a Notice of Motion moving for an Order cancelling the foreclosure sale scheduled for August 7, 2015. The moving party relied on the following:

1. Principles of natural justice;
2. Nova Scotia Rules of Civil Procedure 8.10, Judgement by Sharp Practice;
3. Nova Scotia Rules of Civil Procedure 8.09, Setting Aside Default Judgment; and
4. Nova Scotia Rules of Civil Procedure 23, Chambers Motion.

[13] As for evidence, WFL and John Early filed an affidavit of Mr. Early, sworn July 8, 2015. Accompanying the Notice was his letter of July 8th, as well as a proposed form of Order. The matter was then scheduled for August 5, 2015 at 2:00 p.m.

[14] FCC responded with a brief, Book of Authorities, and affidavit of Nicholas Mott, sworn July 27, 2015. These materials were filed with the Court on July 28th.

[15] On July 31, 2015, Mr. Early filed a letter to the Prothonotary, two page brief and an affidavit he deposed July 30, 2015, attaching four exhibits. Among other matters raised by Mr. Early, it was his position that the Application required a full Chambers day.

[16] On August 4, 2015, all three of the Defendants/Applicants filed a Notice of Motion moving for an Order to set aside the default judgment issued February 23, 2015. The moving party relied on the same three *Civil Procedure Rules* quoted from the earlier Notice as well as the same stated "principles of natural justice" as set out in the July 23rd Notice.

[17] As for the evidence, "the evidence in support of the Motion is as follows: Affidavits of John T. Early III and Lydia B. Early sworn on August 4, 2015 and filed with this Notice/Affidavit of John T. Early III sworn on July 8, 2015 already filed in this proceeding/Supplemental Affidavits of John T. Early III and Lydia B. Early to be sworn and filed before the deadline."

[18] On August 4, 2015, I asked the Clerk of the Court to write counsel advising that the within matter would proceed as scheduled. Her email was met with this August 4th email response from Mr. Early:

> Thank you for your email but I am a bit confused. I was always under the impression that the hearing was proceeding as scheduled and as such do not understand the confirmation email.
>
> Thank you,

> John Early.

[19] From Mr. Flinn, also on August 4th:

> Thank you for your email.

[20] Having reviewed the documentation filed with the Court, I am of the emphatic view that the two Notices are virtually identical. The practical effect of both Notices is the same; i.e., to have the foreclosure sale scheduled for noontime today cancelled. Accordingly, and as indicated to Mr. Early during the course of his oral argument, I have decided to treat the Notices as one and the same and adjudicate both through this my decision.

[21] In the result, I have instructed scheduling not to set a future date for the Defendants' August 4, 2015 filing, given my ruling that the Order sought has the same practical result as the one proposed on July 23, 2015. Indeed, this issue was first brought to the Court's attention on July 9th (through Mr. Early's letter dated July 8, 2015).

[22] In addition to the filed materials previously recited, yesterday both Mr. Early and counsel for FCC took the Court up on my invitation to file any further materials in advance of this morning's decision. Out of an abundance of caution, I wanted the parties to have the opportunity to submit any documentation they felt would be of assistance to their respective cases and, at the same time, be responsive to my decision articulated in Court on August 5th, to treat the two motions as one. In the result, yesterday from Mr. Early I received a nine page brief followed by a letter and attachments. From Mr. Flinn, the Court received a letter enclosing a two page proposed Order. I should add that I also received from Mr. Flinn at the outset of his remarks at the hearing four cases, which he also provided to Mr. Early.

[23] Having reviewed the totality of the material, I reiterate my view that it was prudent to hear the motions together. Indeed, I find absolutely no merit in Mr. Early's argument that Mr. Flinn's responding materials "argue a motion that is not before the Court at this point." In fact, I find the FCC documentation is completely responsive to both Notices of Motion and on point. Indeed, the Court is most comfortable with the issues as framed by Mr. Flinn as follows:

> 1. Should FCC's Order for Foreclosure, Sale and Possession issued by the Honourable Justice Gerald R.P. Moir on February 23, 2015 be set aside, pursuant to Rule 8.09 and 8.10?

> 2. Should this Honourable Court use its inherent jurisdiction to vary the terms of FCC's Order for Foreclosure, Sale and Possession?

[24] Furthermore, I find the law as articulated at pages 5 and 6 of the FCC brief to be an accurate statement of the basis for the three part test which the Applicants must satisfy in order to set aside the default judgment.

[25] In *Cat Lumber Inc. v. East Coast Kilns Inc.*, [1997] N.S.J. No. 126 (S.C.) the defendant brought an application to set aside a default judgment obtained by the plaintiff. Seven months had elapsed between the date of the original default judgment and the filing of the application to set aside, or four months if calculated from the time an amended default judgment was served on the defendant. Despite an arguable defence, the defendant could not explain the inordinate and wilful delay in bringing the application to set aside, thus the application was dismissed.

[26] Justice Cacchione writing for this Court in *Cat Lumber, supra*, explained at paragraph 9 the test to set aside a default judgment:

> The law is clear that in order to set aside a default judgment the applicant must show by affidavit facts which would indicate that he had a good defence to the action on the merits, not necessarily one that would succeed at trial, but at least that there is a substantial issue to be tried between the parties and that the applicant had reasons for not filing a defence.

[27] Justice Edwards in *Bank of Nova Scotia v. Howes*, 2012 NSSC 60 confirmed the two part test to set aside a default judgment pursuant to Rule 8.09. Justice Edwards stated at paragraph 3:

> To succeed, Mr. Howes must show that (a) he has a fairly arguable defence or that there is a serious issue to be tried, and (b) he has a reasonable excuse for failing to file a defence [see *Temple v. Riley* 2001 NSCA 36].

[28] In *Bank of Nova Scotia, supra*, the defendant obtained a line of credit and credit card from the plaintiff. The defendant defaulted on the line of credit and credit card. The plaintiff commenced an action and the parties exchanged correspondence; however, despite having ample opportunity the defendant did not file a defence and the Bank of Nova Scotia obtained a default judgment. Justice Edwards dismissed the defendant's motion to set aside the default judgment on the basis that the defendant failed to meet both parts of the two part test.

[29] *Taylor Made Golf Co. v. 1110314 Ontario Inc.*, [1998] F.C.J. No. 681 and *Molson Canada 2005 v. Beauchamp*, 2010 FC 1109 confirm the test to set aside a default judgment is a tri-partite test where the defendant must satisfy the Court that:

1. The Defendant(s) has a reasonable explanation for his failure to file a Statement of Defence;
2. The Defendant(s) has a *prima facie* defence to the merits of the claim; and
3. The Defendant(s) moved promptly to set aside the default judgment.

[30] In this case I find the Defendants do not satisfy the Court on any of the three parts of the test. With respect to the Defendants' failure to file their defence, they have no reasonable explanation for this failure. In Mr. Early's first affidavit, he produces FCC's counsel's January 8, 2015 email as Exhibit B. Mr. Mott's email reads as follows:

> Dear John,
>
> Happy New Year and all the best for 2015.
>
> On a very different tack, when we last spoke you indicated that you expected to have filed a Defence to FCC's action by the end of November. I have not yet received this document and would be grateful if you would provide me with a copy if one has been filed. If you have not yet filed your Defence, please let me have a copy of the filed document no later than January 23. If I do not have it by that date, my instructions are to seek a default judgment without further notice in accordance with Civil Procedure Rule 31.12.
>
> Kind regards,
>
> Nick

[31] In his affidavit sworn July 8, 2015, Mr. Early acknowledges at paragraph 8 that Mr. Mott "did send" the email to "John Early on January 8, 2015". Mr. Early goes on in the next paragraph of his affidavit to say "this email was never seen by me until after default judgment had been entered on February 23, 2015". If this statement is true, then Mr. Early has no one to blame but himself. During oral submissions, I quizzed Mr. Early about how it was that he did not read Mr. Mott's email until after February 23, 2015. Suffice it to say, I am not satisfied with his explanations which, on balance, I find to be incredible. For one thing, it was Mr. Early who initiated email correspondence with Mr. Mott. It is therefore hard to

reconcile his explanation that 20-30% of the emails he receives are not read by him.

[32] In any event, as was pointed out by Mr. Flinn, the Court's focus must be on the evidence before it, and this comes by way of the filed affidavits. There is nothing in the affidavits of Mr. Early, Ms. Early or Mr. Mott that allows me to conclude Mr. Early has a reasonable explanation for not reading Mr. Mott's January 8, 2015 email on time.

[33] I would add that Mr. Early's brief of yesterday does nothing to alter my view. Indeed, nothing is proffered by the Applicants to rebut the fact that it was Mr. Early who chose to email Mr. Mott on October 6, 2014, stating among other things as follows:

> In any case, I wanted to give you written notice that John T. Early III, Lydia B. Early III and Wolfridge Farm Limited will defend the lawsuit brought against them by Farm Credit Canada.

Following this is Mr. Mott's email of the next day and then the penultimate January 8th email. On fair reading and in context, I am of the view that *Rule* 31.12 requirements were thus met.

[34] With respect to the second aspect of the three part test, I find the Defendants do not have a defence to the merits of FCC's claim. By way of background (uncontroverted evidence through Mr. Mott's affidavit), on October 25, 2001, FCC agreed to lend funds to WFL in the amount of $87,000 to purchase the horse farm. John Early and Lydia Early guaranteed payment to FCC of all debts and liabilities of WFL to a limit of $87,000 with interest at 18% per annum. FCC's loan to WFL to purchase the horse farm was secured by way of a continuing collateral mortgage on the horse farm dated November 9, 2001. WFL defaulted on the terms of its collateral mortgage with FCC when it failed to pay the Municipality of the County of Kings tax office property taxes owing on the horse farm for 2011, 2012 and 2013. WFL's failure to pay these property taxes was a clear default under the terms of FCC's collateral mortgage.

[35] In February 2014, FCC paid the Municipality of the County of Kings $4,186.78 to prevent the horse farm from being sold at a public auction scheduled for March 5, 2014.

[36] As for the final part of the test, I do not find that the Defendants moved promptly in their attempt to set aside the default judgment. After all, on March 3, 2015, Ms. West (then of the Cox & Palmer law firm, counsel to FCC) emailed Mr. Early, notifying him of the public auction scheduled for March 27, 2015. On March 6, 2015, Mr. Early first surfaced with his allegations of sharp practice, which I find to be completely unfounded. But Mr. Early did nothing to directly set aside the default judgment until he faxed his letter to "the Honourable Justice in Chambers" on July 9, 2015. The first Notice was then filed on July 23, 2015, approximately five months after the Order.

[37] I would add that I have reviewed the cases handed up by Mr. Flinn and I see absolutely no basis on the evidence marshalled in the matter that a case for a stay has been made. I refer to Justice Fichaud's decision in *Wolfridge Farm Ltd. v. Bonang*, 2014 NSCA 70 and, in particular, paragraphs 20, 25 and 33:

> [20] The test remains that stated by Justice Hallett in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341 (C.A.), paras 28-30, under the former Rule 62.10(2). The stay applicant must show that either (1) there is an arguable appeal, and denial of the stay would cause him irreparable harm and the balance of convenience favours the stay applicant, or (2) there are exceptional circumstances making it just that a stay be granted.
>
> …
>
> [25] The non-payment of annual taxes is a default under this mortgage. As the trial judge determined, under the mortgage that default entitled the Bonangs to foreclose.
>
> …
>
> [33] As stated in *Halifax (Regional Municipality) v. Casey*, 2011 NSCA 69:
>
> > [41] An applicant for a stay must prove irreparable harm by evidence. General conclusory statements are insufficient. *Myatt v. Myatt*, 2004 NSCA 124, para 10, and cases there cited; *Gill v. Hurst*, 2010 NSCA 104, para 12. …
>
> To similar effect: *C.B. v. T.M.*, 2012 NSCA 75, para 13; *Sydney Steel Corporation v. MacQueen*, 2012 NSCA 78, para 20.

[38] In the matter before me, there is simply no affidavit evidence to prove irreparable harm, none whatsoever.

[39] Having dismissed the Defendants' application on the basis that they have failed on all three parts of the test, and having concluded that a stay is not warranted, I confirm that today's foreclosure sale shall proceed at 12:00 noon in Kentville.

[40] Furthermore, having regard to the history of this protracted matter and considering what took place in another recent proceeding, *Bonang v. Wolfridge Farm Ltd.*, 2015 NSSC 167, I am prepared to exercise my inherent jurisdiction to amend the Order in the manner requested by FCC. In particular, I will sign an Order embodying these paras.:

1. In the event that the property located at 1299 Ridge Road, Wolfville Ridge, Kings Count, Nova Scotia, PID # 55190854 (the "Horse Farm") is sold at a public auction and the Defendants, Wolfridge Farm Ltd., John Early and Lydia Early, or any company, entity, trust or person not at arm's length to the Defendants is declared the highest bidder but fails to complete the sale transaction within 15 business days following the date of the public auction, the next highest bidder which is not one of the Defendants or any company, entity, trust or person not at arm's length to the Defendants shall be declared the successful bidder for the amount of their highest bid at the public auction.
2. In the event that the highest bidder who is at arm's length to the Defendants is declared the successful bidder the Auctioneer will contact the successful bidder by ordinary mail and the successful bidder will have 15 business days from the date of the Auctioneer's letter to pay their highest bid amount to the Auctioneer to complete the sale transaction.
3. The term "arm's length" used throughout this Order is used within the meaning of the *Income Tax Act*, R.S.C., 1985, C.1 (5th Supp.).
4. The Auctioneer who conducts the public auction of the Horse Farm will read out and explain the terms of this Order prior to the public auction and request the phone numbers and mailing addresses of all potential bidders present at the public auction.

[41] With respect to costs, I received oral submissions from FCC seeking significant amounts in the range of perhaps $40,000 to $70,000. In my view, the matter will require much more in the way of briefing and possibly legal accounts to review before such a significant costs award may be considered.

[42] Make no mistake about it, I am awarding costs to the successful party, FCC, but at this time I am going to reserve on this aspect of my decision. There are other issues to be considered. For example, query whether Justice LeBlanc would be better situated to hear costs submissions on the matter pertaining to *Wolfridge Farm Ltd. (Re)*, 2015 NSSC 168.

[43] In the final analysis, if FCC wishes to pursue costs in this matter, I will invite written submissions from FCC on or before September 11, 2015. In this scenario, I will ask for the Defendants to submit their responding submissions on or before September 25, 2015. I commend to all parties, among other decisions, recent ones of this Honourable Court in respect of costs in foreclosure proceedings, and I name just two of last year:

> *Xceed Mortgage Corporation v. Jesty,* 2014 NSSC 51
> *Ackerman v. Deckman Trust*, 2014 NSSC 335

Chipman, J.