SUPREME COURT OF NOVA SCOTIA
Citation: Scotia Mortgage Corporation v. Berkers, 2016 NSSC 12

Date: 2016-01-08
Docket: Halifax, No. 440325
Registry: Halifax

Between:

Scotia Mortgage Corporation

Plaintiff

v.

Dale Leo Berkers; Grant Thornton Limited, in its capacity as Trustee in Bankruptcy for Kimberley Anne Marchand (also known as Kimberley Anne Berkers); and PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy for Dale Leo Berkers

Defendants

DECISION

Judge:	The Honourable Justice Gerald R.P. Moir
Heard:	July 30, 2015, in Halifax, Nova Scotia
Final Written Submissions:	October 16, 2015
Counsel:	Stephen Kingston, for the Plaintiff Defendants not appearing

Moir, J.:

[1] *Introduction*. A secured creditor moved for an order for foreclosure and sale and for continuation of its claim on the mortgage debt against one of the mortgagors, who had made an assignment in bankruptcy. The continuing claim for a deficiency judgment despite the bankruptcy is based on a line of cases followed by Justice Nathanson in *CIBC Mortgage Corp. v. Coleski*, 1998 N.S.J. 3366(S.C.). The time has come for reviewing the reasoning in *Coleski* and the line of cases underlying it.

[2] I am grateful to Mr. Kingston for a thorough and balanced presentation on behalf of Scotia Mortgage. I have, however, come to the conclusion that it is not entitled to claim a deficiency judgement.

[3] *Facts*. Dale Berkers and Kimberley Berkers bought a home on Kaye Street in Halifax in 1996. They got mortgage financing from Scotia Mortgage Corporation in 2010, and executed and recorded a mortgage for $246,565.

[4] The mortgage contains standard terms, but they are in the excellent plain language adopted by Scotia Mortgage Corporation many years ago. Clause 2

includes "you grant and mortgage your property to us… as security for repayment of your loan…". Clause 1 includes:

> You may, of course, continue to remain in possession of your property. However, if you default in any of your obligations to us under this mortgage, we have the right to take immediate possession.

The Berkers agreed to repay the loan in blended monthly payments amortized over many years, but with a term ending on March 30, 2015.

[5] Clause 3E of the mortgage provides "If you sell, transfer, mortgage or charge your property, we may, at our option, require you to pay all the money that you owe us immediately…". I emphasize the word "transfer", which would include a transfer by assignment in bankruptcy.

[6] Mr. Berkers filed an assignment in bankruptcy in July, 2012. He continued to make monthly payments to Scotia Mortgage. It did not prove a claim in bankruptcy or exercise its right to demand the full amount of the mortgage debt.

[7] Mr. Berkers was discharged from bankruptcy in April, 2014. The loan fell into arrears for the first time in August. (Ms. Berkers, now Marchand, made an assignment in bankruptcy in November, but no claim is made against her.)

[8] *Issue*. Whether a bankrupt's continuing to make payments and remaining in possession overcome the provisions of the *Bankruptcy and Insolvency Act* for discharge of debts provable in bankruptcy?

[9] *Caselaw*. While our decisions do not bind other judges of this court, the need for certainty demands respect for the persuasive value of each other's reasoning. I would follow Justice Nathanson's decision in *Coleski*, unless convinced it is wrong. With deep respect for my late colleague, his reasoning on the point I have to decide is wrong.

[10] *Coleski* was an oral decision. The Coleskies mortgaged their home to CIBC Mortgage Corporation in 1994. A few months later they made assignments in bankruptcy. They continued to make the mortgage payments during their bankruptcies and after discharge, until the mortgage fell into arrears in May of 1998.

[11] CIBC sued for foreclosure and sale, obtained a default order, and realized on the mortgage through a sheriff's sale. It realized less than the mortgage debt. Justice Nathanson heard the mortgagee's application for a deficiency judgment. It was opposed by the mortgagors, who argued their bankruptcies discharged their personal liabilities on the mortgage debt.

[12] Justice Nathanson was referred to *Seaboard Acceptance Corp v. Moen*, [1986] B.C.J. 87 (C.A.); *Manulife Bank of Canada v. Planting*, [1996] O.J. 4594 (C.J.); and, *Manulife Bank of Canada v. Scalisi*, [1998] O.J. 774 (C.A.), which endorsed *Planting*. Justice Nathanson reviewed *Seaboard* and *Planting* at paras.7 to 10 of *Coleski* and concluded at para.12:

> Although one of the cases relied upon has a slightly different fact situation, I believe that the principle enunciated in them should be applied to the present fact situation, and hold that the mortgage debt and right to a deficiency have not been released by virtue of the discharges from bankruptcy.

[13] *Seaboard Acceptance Corp. v. Moen* was also an oral decision. Ms. Moen leased a vehicle from Seaboard and promised to make monthly payments to it. A year and a half later, she made an assignment in bankruptcy. She did not disclose her liability to Seaboard and the trustee did not give notice to it. Ms. Moen was discharged and the lease fell into arrears four months later. Seaboard sued for the balance of lease payments.

[14] Justice Carrothers spoke for the court. He said at para.16:

> In my opinion, the proper view is that the contract continued throughout the bankruptcy and continued after the discharge from bankruptcy; it was never terminated in accordance with its provisions for termination, and the fact that there might have been a claim provable in bankruptcy, or that a claim provable in bankruptcy might have been made, does not affect the fact that the contract itself continued and continued to regulate the relationship of the parties after the discharge from bankruptcy.

There was no novation but "merely a continuation of the contract, and a continued abiding by the terms of the contract that had been made between the parties.": para.17.

[15] *Manulife Bank of Canada v. Planting* involved a mortgage and a promissory note. The Plantings made an assignment in bankruptcy in 1992 but they continued to make payments until 1995. It appears that the mortgagee was aware of the bankruptcy and the payments were made so the Plantings could remain in their home. Justice Howden referred to *Seaboard* and concluded at para.21:

> … where the secured creditor did not prove a claim in the bankruptcy and where the debtors continued to possess the security and pay interest on the debt owing to the plaintiff and its assignor throughout the bankruptcy period, the debtors are not released from their debt or any portion thereof.

[16] The mortgagee in *Coleski* had submitted (para.6):

> … when an individual assigns himself into bankruptcy, but retains the benefit of a contract and continues to fulfill his obligations under it subsequent to the bankruptcy, that individual will continue to be liable for all the terms and conditions of the contract subsequent to his discharge from bankruptcy.

This is the principle Justice Nathanson adopts in para.12.

[17] *Criticism of Seaboard*. Registrar Cregan wrote at para.31 of *Re. Young*, 2004 NSSC 147:

> This is a case of a secured creditor seeking to enforce its right to a deficiency judgment. The point is commented on in *Houlden & Morawetz Bankruptcy and*

> *Insolvency Law of Canada, Third Edition,* at page 6-148. These commentators in effect say that the personal obligation to pay a secured debt is wiped out by the bankruptcy, unless there is some new consideration given after the arrangement. In this case the mortgagors being able to continue to live in the house would be the continuing new consideration.

In *Young*, a trustee attempted to enforce a pre-bankruptcy agreement in which the bankrupt promised to pay the trustee's fees. Registrar Cregan held, "No new consideration was given." (para.32).

[18] The criticism to which Registrar Cregan refers continues in *Houlden, Morawetz, and Sarra* (4th ed.) at pp.6-288. Reference is made to *Seaboard*, *Planting*, *Coleski*, and a decision of the Alberta Queen's Bench. Then the authors write:

> With respect, it is submitted that, although the security is not affected by a discharge, the debt is extinguished by s.178(2): *Pelyea v. Canada Packers Employees Credit Union Ltd.*, 13 C.B.R. (N.S.) 284, [1970] 2 O.R. 384, 11 D.L.R. (3d) 35 (C.A.); *Burton v. Toronto-Dominion Bank*, 22 C.B.R. (N.S.) 207, [1976] I.L.R. 1-779 (Ont. S.C.). Accordingly, unless there is new consideration advanced by the secured creditor subsequent to the date of bankruptcy, the creditor should not be entitled to judgement against the bankrupt for the debt.

Reference is then made to the writings of Professors Jamara M. Buckwald and Jacob Zeigel on this subject.

[19] *Rejection of Seaboard*. In my opinion there are two fundamental flaws in the *Seaboard* line of thinking. It fails to disclose a principle of law to support the conclusion that liability under a "continuing contract" is treated differently in

bankruptcy from other kinds of liability. It also fails to give effect to the plain meaning of s.178(2).

[20] Liability after bankruptcy under a pre-bankruptcy contract could be established under known principles, such as novation or estoppel, on proof of facts additional to those in *Seaboard*, *Planting*, *Scalisi*, or *Coleski*, but the scant facts of continued payments under a mortgage or lease and continued possession do not establish any principle for continuing liability of which I am aware. One is reminded of the notion that acknowledgment of a debt after a prescription period starts the period running again, but outside that field continuing benefit and continuing performance do not, of themselves, found continuing liability.

[21] The adoption of such a broad approach to what is, in fact, a revival of liability serves no interest, especially in the field of residential mortgages. The mortgagee, who usually gets notice of the bankruptcy, is usually pleased to take monthly payments. The mortgagor may be content to make the payments in order to stay in a home, at least for the time being. If the mortgagee wants something more, such as a revival of personal liability, it can propose a new contract based on forbearance. There is no need for revival by operation of law.

[22] The unfounded nature of the holding in *Seaboard* is underscored by its one-sidedness. No one suggests that the mortgagee is precluded from exercising its rights to possession or foreclosure for breach of the covenant against transfers. That would require a new contract or proof of estoppel. That two way street of contract or estoppel is also the place for reviving personal liability.

[23] The words of s.178(2) of the *Bankruptcy and Insolvency Act* are so plain. It is "subject to subsection (1)", which prescribes debts that survive bankruptcy. A "continuing contract" as found in *Seaboard* is not one of the s.178(1) debts. So these plain words of s.178(2) apply: "an order of discharge releases the bankrupt from all claims provable in bankruptcy".

[24] These plain words fit perfectly with the general purposes of the *Bankruptcy and Insolvency Act*. Those purposes are to rehabilitate insolvent persons and to distribute their property among creditors in an orderly and fair manner. See *Houlden, Morawetz, and Sarra*, part A4.

[25] The simple words of s.178(2) are also an essential part of the scheme of the *Bankruptcy and Insolvency Act*, which begins with a stay of proceedings against the bankrupt and, for individuals, ends with a discharge.

[26] The words of s.178(1) preclude a special exemption for so-called "continuing contracts".

[27] *Conclusion*. I will grant the order for foreclosure and sale sought by Scotia Mortgage Corporation, but without the term permitting a deficiency judgment.

Moir, J.