

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Agate Developments Ltd. v. United Gulf Developments Ltd., 2008 NSSC 144

Date: 20080521

Docket: S.H. 279612

Registry: Halifax

Between:

Agate Developments Limited

Applicant/Plaintiff
(Defendant by Counterclaim)

- and -

United Gulf Developments Limited

Respondent/Defendant
(Plaintiff by Counterclaim)

Judge: Associate Chief Justice Deborah K. Smith

Heard: April 14th, 2008 in Halifax, Nova Scotia

Oral Decision: April 25th, 2008

Written Decision: May 21st, 2008

Counsel: James D. MacNeil, Esq. for Agate Developments Limited

Navid Saberi, Esq. (self-represented) for United Gulf
Developments Limited

By the Court:

[1] This matter involves an application by Agate Developments Limited (“Agate”) for partial summary judgment pursuant to Civil Procedure Rule 13.

[2] According to the evidence of Jack Osmond (the President of Agate), in October of 2002, United Gulf Developments Limited (“United Gulf”) entered into an Agreement of Purchase and Sale with Agate with respect to property located on the Ketch Harbour Road in Bear Cove, Nova Scotia. The purchase price for the property was \$2,100,000.00. The agreement provided for a \$100,000.00 deposit with the balance of the purchase price being secured by a vendor take back mortgage. The said mortgage was signed on behalf of United Gulf Developments Limited on November 15th, 2002. The mortgage provided, *inter alia*, for four annual instalments in the amount of \$500,000.00 each commencing on the 15th day of November, 2003 and continuing on the 15th day of November in each year thereafter to and including the 15th day of November, 2006. No interest was payable on the principal balance except in the event of default in the payment of any instalment and then such instalment was to bear interest at a rate of one percent (1%) per month until such instalment was paid.

[3] As part of the Agreement of Purchase and Sale referred to previously, after the third mortgage instalment was paid, Agate was to convey to United Gulf, without further consideration, one water lot from either phase 1 or phase 2 of the remaining lands of Agate. If the market value of the said lot exceeded \$250,000.00 United Gulf had the option of paying the difference between the value of the lot and \$250,000.00 or, not taking the lot and deducting \$250,000.00 from the final instalment due on the mortgage.

[4] All parties agree that United Gulf paid the first three instalments under the mortgage in the amount of \$500,000.00 each. All parties also agree that United Gulf elected not to take possession of the water lot referred to in the previous paragraph, thereby reducing the final instalment under the said mortgage by \$250,000.00. Accordingly, the final mortgage payment due from United Gulf to Agate on November 15th, 2006 was in the amount of \$250,000.00.

[5] By letter dated November 1st, 2006 United Gulf requested a 90 day extension for the final mortgage payment. Jack Osmond, on behalf of Agate, acknowledges that the parties agreed to extend the deadline for this final payment to February 15th, 2007.

[6] In the affidavit filed by Navid Saberi (the President of United Gulf) in response to this application, he states that on or about February 14th, 2007 United Gulf contacted Agate's solicitor in an attempt to pay out the mortgage. Mr. Saberi states that an agreement was reached that the balance owing in relation to the mortgage was \$257,711.64 and that payment in this amount was required to release the debt. This amount included the principal payment of \$250,000.00 plus interest and fees calculated up to February 15th, 2007. Mr. Saberi has attached to his affidavit a letter from Thomas O. Boyne, Q.C. (counsel for Agate) confirming that as of February 15th, 2007 the balance due on the mortgage (including principal, interest and the fee to release the mortgage) was \$257,711.64. In this letter, Mr. Boyne indicated that upon receipt of a certified cheque or bank draft in that amount a release would be forwarded for the mortgage.

[7] In the Defence filed by United Gulf to this action it is stated at paragraphs 5 and 6:

“5. The Defendant states it was then contacted on February 15, 2007 and informed by the Plaintiff's solicitor not to forward payment in the amount previously agreed to and that further correspondence would be forthcoming regarding the release of the mortgage.

6. The Plaintiff issued a demand to the Defendant on March 2, 2007 indicating that \$345,224.50 was now required to release the mortgage. The Defendant disputes this calculation.”

[8] Both parties acknowledge that the final instalment owing under the mortgage on November 15th, 2006 in the amount of \$250,000.00 has not been paid.

[9] On April 11th, 2007 Agate filed an Originating Notice (Action) and Statement of Claim against United Gulf claiming, *inter alia*, the principal balance of the mortgage in the amount of \$250,000.00 along with interest on the said balance. In addition, Agate claimed the sum of \$60,760.55 pursuant to clause 1(o) of the Agreement of Purchase and Sale referred to previously. This clause deals with Halifax Regional Municipality subdivision by-laws and regulations relating to the land in question and, in particular, requirements relating to parkland (the “parkland issue”). I will not repeat clause 1(o) for the purpose of this decision. Suffice it to say that Agate takes the position that United Gulf owes it an additional \$60,760.55 in relation to the parkland issue. Agate has also claimed for interest, charges and expenses incurred in connection with the lands and mortgage as well as costs. The full particulars of Agate’s claims are set out in the Originating Notice (Action) and Statement of Claim filed with the Court.

[10] A Defence and Counterclaim were filed by United Gulf on May 23rd, 2007. I do not intend to review the entire Defence in this decision. It speaks for itself. To summarize, United Gulf says that on or about February 14th, 2007 an agreement was reached that the mortgage balance was \$257,711.64 and that payment of that amount was required to release the debt. In paragraph 11 of United Gulf's Defence it is stated:

“As to the whole of the Plaintiff's claim [the] Defendant states that it has been in a position to pay out the Plaintiff's mortgage since February 14, 2007 on the terms agreed to on February 15, 2007. The Defendant denies that the Plaintiff is entitled to any additional amounts in excess of \$257,711.64 under the terms of the mortgage and further denies that the Plaintiff is entitled to any additional damages whatsoever.”

[11] In addition, United Gulf denies owing Agate any funds in relation to the Parkland issue. It refers to an agreement that it says the parties reached which allowed Agate to use a portion of the lands in question for “free” and, in return, it is suggested that Agate waived the payment of the \$60,760.55. In the affidavit filed by Mr. Saberi in response to this application he also suggests that United Gulf was entitled to decide whether land or the \$60,760.55 was to be given to the Halifax Regional Municipality and that Agate, through its actions, arbitrarily decided the issue and, therefore, it is not entitled to reimbursement of these funds.

[12] Further, United Gulf says that Agate has allowed an affiliated corporation, Affinity Contracting, to use United Gulf's land without its consent and alleges trespass in this regard. United Gulf claims set-off with respect to any amount claimed by Agate (under the mortgage or otherwise) in an amount equal to monthly commercial rent plus applicable taxes and interest on that portion of the mortgaged lands which Agate has allegedly used or has allowed Affinity Contracting to use, without consent. In the Counterclaim filed by United Gulf, a claim is made for an Order requiring Agate to provide a release of the mortgage upon satisfaction of the terms of settlement allegedly agreed to on February 15th, 2007 subject to any set-off ordered by the court.

[13] In this application, Agate seeks partial summary judgment in relation to the final mortgage payment due under the mortgage on November 15th, 2006 as well as interest on the said payment. It says that the remaining issues can be dealt with at trial.

[14] United Gulf acknowledges that the final mortgage payment has not been made but claims set-off with respect to any amount claimed by the Plaintiff under the

mortgage or otherwise. It takes the position that there are many disputed facts in this case and many arguable issues to be heard at trial and requests that the Court dismiss the partial summary judgment application until all issues can be fully dealt with.

[15] As indicated previously, this application is brought pursuant to Civil Procedure Rule 13. Civil Procedure Rule 13.01 provides as follows:

Application for a summary judgment

13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:

- (a) there is no arguable issue to be tried with respect to the claim or **any part thereof;**
- (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
- (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[Emphasis added]

[16] Civil Procedure Rule 13.02 provides:

Disposal of application

13.02. On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,

- (a) give such directions as may be required for the examination of any party or witness, or for the production of any books or document or copy thereof, or for the making of any further inquiries;
- (b) grant judgment for any party on the claim **or any part thereof**;
- (c) impose terms upon the plaintiff, including in particular a stay of execution of any judgment until the determination of the defendant's counterclaim or third party proceeding;
- (d) allow the defendant to defend the claim or part thereof, either unconditionally or on terms relating to giving security, time, the mode of trial, or otherwise;
- (e) where the defence is to amount only, order an assessment of the amount or reference or accounting to determine the amount;
- (f) give directions as to the trial or hearing of the claim or part thereof;
- (g) with the consent of all the parties, dispose of the proceeding finally in a summary manner, with or without pleadings or affidavits and without appeal;
- (h) where the claim is for the delivery up of a specific article, order the delivery up of the article;

(i) where the claim is for the possession of land on the ground of forfeiture for non-payment of rent, grant relief against the forfeiture;

(j) award costs;

(k) grant any other order or judgment as it thinks just.

[Emphasis added]

[17] Civil Procedure Rule 13.03 deals with a party's right to continue with the remainder of a proceeding when partial summary judgment has been granted. It provides:

Right to continue with residue of proceeding

13.03. Where a party obtains judgment under rule 13.02, the plaintiff may continue the proceeding in respect of any remaining part of the claim or any other claim or against any other defendant.

[18] The test for summary judgment is well established in this province. In **D.E. & Son Fisheries Ltd. v. Goreham** 2003 NSCA 93 Cromwell, J. A. set out the test (at

¶2) as follows:

“Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried: *Bank of Nova Scotia v. Dombrowski*

(1977), 23 N.S.R. (2d) 532 (S.C.A.D.) at 537; *Oceanus Marine Inc. v. Saunders*, (1996), 153 N.S.R. (2d) 267 (C.A.) at para. 15.....”

[19] In order to prove its claim clearly the Plaintiff must show that there is no genuine issue of material fact requiring trial [see **Guarantee Co. of North America v. Gordon Capital Corp. et al.**, [1999] S.C.J. No. 60 at ¶27.] As stated by our Court of Appeal in **Toronto-Dominion Bank v. Lienaux**, [1995] N.S.J. No. 147 (at ¶9) the burden on a Respondent to show an arguable issue is not a heavy one.

[20] As indicated previously, Agate seeks partial summary judgment in relation to the final mortgage payment due under the mortgage as well as interest on the said payment. It is necessary, in my view, to deal with these two issues separately. I will deal first with the final mortgage payment in the amount of \$250,000.00.

[21] After reviewing the documents filed in relation to this application, I am satisfied that there is no genuine issue of material fact requiring trial in relation to the final mortgage payment in the amount of \$250,000.00. United Gulf acknowledges that the mortgage provides for this payment and further acknowledges that this payment has not been made. In paragraph 11 of United Gulf’s Defence it states that it has been in a position to pay out the mortgage since February 14th, 2007 on the terms allegedly

agreed to on February 15th, 2007. In addition, Agate has filed with the Court excerpts of discovery evidence given by Mr. Saberi in relation to this action. I refer to the following evidence given by Mr. Saberi on October 10th, 2007:

Q. Now you understand that the last mortgage payment of \$250,000 was due November of 2006?

A. Correct.

.....

Q. And sitting here today, that last payment still has not actually been paid, correct?

A. Because we were notified by Mr. Tom Boyne not to send the money.

.....

Q. Okay. Have you ever paid the amount you were prepared to pay?

A. No, because we were told not to pay it but we have always been ready and willing to do that. And actually the money is sitting in an account to be paid.

Q. And how much are you ready to pay?

A. The amount that was forwarded by Mr. Clarke – or Mr.

Q. Boyne?

A. Tom Boyne to us which, I showed you the letter.

Q. His February 15th, letter?

A. Correct.

.....

[22] Later in Mr. Saberi's discovery examination the following was stated:

Q. Okay, that's fine but you've told me that you dispute the calculation because you've asked for vacant possession of the land.

A. I believe that the money that is due and is payable is the amount of the \$250,000 plus that delay of 90 day period that's due.

[23] While there is a dispute as to whether Agate is entitled to *more* than \$257,711.64 – there is no *prima facie* dispute that \$257,711.64 is owing from United Gulf to Agate. I fully appreciate that a set-off is being claimed in relation to these funds. The issue of set-off will be dealt with later in my decision.

[24] I am further satisfied that United Gulf has not set up a bona fide defence or raised an issue against the claim for the final mortgage payment which ought to be tried. Accordingly, in relation to the final \$250,000.00 payment under the mortgage the test for summary judgment has, in my view, been satisfied.

[25] The issue is not as clear in relation to Agate's claim for interest.

[26] Agate seeks summary judgment for the interest which it says is owing under the mortgage. In particular, it seeks interest at a rate of 1% per month on the \$250,000.00 payment referred to above, from November 15th, 2006 (the date the payment was originally due) to the date that judgment is granted.

[27] I am satisfied from the evidence before me that there is no genuine issue of material fact requiring trial in relation to the issue of interest for the period November 15th, 2006 to February 15th, 2007. Further, I find that United Gulf has not set up a bona fide defence or raised an issue against this claim for interest which ought to be tried. However, in my view, there are genuine issues of material fact requiring trial in relation to the claim for interest for the period February 16th, 2007 to the date that judgment is granted.

[28] Mr. Saberi has provided affidavit evidence in which he states that on or about February 14th, 2007 an agreement was reached “determining that [the] balance of the mortgage [including interest] was \$257,711.64 and that payment of this amount was required to release the debt.” As indicated previously, he has attached to his affidavit a copy of a letter from Agate’s solicitor dated February 15th, 2007 that confirms that the balance due on the mortgage as of that date was \$257,711.64 and states that upon receipt of a certified cheque or bank draft in that amount a release would be provided. According to Mr. Saberi’s discovery evidence filed in support of this application, United Gulf was then notified by Agate’s solicitor not to send the money. At ¶6 of the Defence filed by United Gulf it is stated that on March 2nd, 2007 Agate issued a demand to United Gulf indicating that \$345,224.50 was now required to release the mortgage. In the Defence to Counterclaim filed with the court, Agate denies each and every one of United Gulf’s allegations.

[29] There is a dispute between the parties as to whether an agreement was reached in February of 2007 that the balance owing in relation to the mortgage (including interest) was \$257,711.64. There is also a dispute about whether or not United Gulf was told by Agate’s solicitor not to forward the payment which is said to have been

previously agreed to and whether Agate then indicated that they would have to be paid \$345,224.50 in order to release the mortgage. While not specifically articulated in this manner (United Gulf is self-represented by its president - Mr. Saberi) it appears that United Gulf takes the position that these facts estop Agate from collecting interest beyond February 15th, 2007.

[30] I am satisfied that in relation to the issue of whether interest should be paid beyond February 15th, 2007 there are genuine issues of material fact which, in my view, are appropriately left for trial. Once I am satisfied that there is a genuine issue of material fact to be determined at trial, I need not go on to deal with the second part of the test on a summary judgment application. As stated by Roscoe, J.A. in **Milbury v. Nova Scotia (Attorney General)** 2007 NSCA 52 at ¶19:

“If the applicant does not establish that there is no genuine issue of fact, it is not necessary to go to the second step. There is no onus on the responding party if the applicant does not succeed on the first prong of the test. If there are genuine issues of fact, the application should be dismissed.”

[31] Accordingly, I am not prepared to grant partial summary judgement in relation to the interest claim for the period February 16th, 2007 to the date of judgment. That matter will be left for trial.

[32] That takes me to the issue of set-off. As indicated previously, United Gulf is claiming a set-off with respect to any amount claimed by Agate (under the mortgage or otherwise) in an amount equal to monthly commercial rent plus applicable taxes and interest on that portion of the mortgaged lands which it is alleged Agate has used or has allowed Affinity Contracting to use without consent.

[33] Civil Procedure Rule 14.20 deals with a defence of set-off and provides:

Defence of set-off

14.20. Where a claim by a party to a sum of money, whether the amount is ascertained or not, is relied on as a defence to the whole or part of a claim made by an opposing party, it may be included in a defence and set-off against the claim, whether or not it is also added as a counterclaim. [E. 18/17]

[34] In this case, United Gulf has also filed a Counterclaim seeking, *inter alia*, that Agate “be ordered to provide a release of the mortgage upon satisfaction of the terms of settlement as agreed to on February 15, 2007 subject to any set-off ordered by the court.”

[35] The issue before me is whether I should deny the application for partial summary judgment or at least stay execution of the summary judgment [see C.P.R. 13.02(c)] pending a determination of whether United Gulf has a valid claim for set-off against Agate.

[36] The issue of set-off in the context of a summary judgment application was dealt with by Davison, J. in **Singer v. Sommex Maritime Ltd.**, [1996] N.S.J. No. 34.

At ¶14 his Lordship stated:

“.....The Supreme Court of Canada dealt with set-off in *Telford et al. v. Holt et al.* (1987), 41 D.L.R. (4th) 385; [1987] 2 S.C.R. 193. A right of set-off may arise by agreement, at law or in equity.....Before there can be a set-off at law there must be present two conditions. The conditions are that both obligations must be debts and the debts must be ‘mutual cross obligations’.....”

[37] In this case, there was no agreement for a set-off between Agate and United Gulf. In addition, in my view, set-off at law does not apply to the circumstances of this case as both obligations are not debts. I refer in this regard to the Nova Scotia Court of Appeal decision in **Pick O’ Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.**, [1995] N.S.J. No. 481 where the Court was dealing with the issue of what constitutes a liquidated demand and stated at ¶38:

“¶38 Similarly, these words are defined in The Supreme Court Practice, 1988, Volume 1, p. 35 as follows:

‘A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. **If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a ‘debt or liquidated demand’, but constitutes ‘damages’.**”

[Emphasis Added]

[38] In this case, United Gulf’s claim for an amount equal to monthly commercial rent plus applicable taxes and interest is a claim for damages – not a debt.

[39] That leaves the issue of equitable set-off. Set-off in equity does not require mutuality nor do the cross obligations need to be debts [see **Singer v. Sommex Maritime Ltd.**, *supra*, at ¶15]. In **Singer**, *supra*, Davison, J. referred to the following principles which were set out by the British Columbia Court of Appeal in **Coba Industries Ltd. v. Millie’s Holdings (Canada) Ltd. et al.** (1985), 20 D.L.R. (4th) at pp. 696-697:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary’s demands: *Rawson et al. v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451.

2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: *British Anzani*.
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: *Federal Commerce & Navigation Ltd*.
4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549; *British Anzani*.
5. Unliquidated claims are on the same footing as liquidated claims: the *Newfoundland* case.

[40] In **Coba**, *supra*, the court was dealing with a foreclosure proceeding in relation to a vendor take back mortgage. The purchaser of real property agreed to give a mortgage back to the vendor on the understanding that the property would be leased with the lease payments paying for the mortgage. The vendor agreed to guarantee the lease. Subsequently, the vendor assigned the mortgage. Thereafter, the vendor failed to perform his obligations under the lease and the mortgage fell into arrears. The assignee brought foreclosure proceedings under the mortgage and the purchaser sought to set-off the delinquent lease payments due from the vendor against the amount owing on the mortgage. The chambers judge found that the claims were sufficiently proximate to give rise to an equitable set-off. On appeal, the court noted

the need to ascertain whether “the cross-claim flows out of and is inseparably connected with the dealings and transactions that give rise to the claim, and if the cross-claim goes to the very root of the claim in such a way that it would be manifestly unjust to allow the plaintiff to enforce his claim without taking into account the cross-claim.” The Court of Appeal in that case was satisfied that there was a fundamental connection between the lease payments and the mortgage payments and therefore concluded that equitable set-off applied.

[41] In the case at Bar, I am not satisfied that United Gulf’s claim for set-off goes to the very root of the claim being advanced in this application for partial summary judgment in such a way that it would be manifestly unjust to allow Agate to enforce this part of its claim without taking the Counterclaim into account. In my view, the causes of action, which may be connected, are not so closely related that Agate should be denied its right to partial summary judgment until the claim for set-off is determined. United Gulf’s Counterclaim is a separate action which may proceed to trial notwithstanding that a partial summary judgment has been granted (see C.P.R. 16.03(a).)

[42] An Order will issue granting to Agate partial summary judgment in the amount of \$257,711.64. This represents the final mortgage payment in the amount of

\$250,000.00 plus interest for the period November 15th, 2006 to and including February 15th, 2007 as well as the fee to release the mortgage. Since there is an issue as to whether additional interest is owing under the mortgage it would not be appropriate to order a full release of the mortgage at this time. Upon receipt of the sum of \$257,711.64, Agate shall provide to United Gulf a partial release of mortgage releasing all principal payments under the mortgage as well as any interest owing in relation to those principal payments for the period November 15th, 2006 to February 15th, 2007.

[43] I want to insure that United Gulf is not unreasonably prevented from dealing with this property due to the fact that a full release of mortgage will not be given at this time. I say this as they will have paid all principal payments under the mortgage but the mortgage will not be fully released. United Gulf may want to consider paying the contested interest payment into court and applying for a full release of mortgage at that time. Alternatively, it may want to propose that some other form of security be given in relation to the interest issue – other than the mortgage. I hereby reserve the right to deal with any such issues.

[44] Agate has been largely successful in relation to this application. United Gulf shall pay costs to Agate in the amount of \$1,100.00 such costs to be payable forthwith.

Deborah K. Smith
Associate Chief Justice