

SUPREME COURT OF NOVA SCOTIA

Citation: First National Financial Corporation v. Raynard, 2011 NSSC 205

Date: 20110527

Docket: SY No. 318254

Registry: Yarmouth

Between:

First National Financial Corporation

Applicant

v.

Jeffrey J. Raynard

Respondent

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: April 27, 2011, in Yarmouth, Nova Scotia

Written Decision: June 3, 2011

Counsel: Stephen Kingston, for the Applicant
Respondent – no appearance

By the Court:

[1] This is a motion pursuant to rule 3.03(1)(c) for an order abridging the time for filing the notice of motion for assessment of a deficiency judgment.

Background

[2] The plaintiff commenced legal proceedings to recover from the defendant the amount outstanding on a mortgage held by the plaintiff, and alternatively, to obtain an order for foreclosure and sale of the mortgaged land and premises pursuant to Civil Procedure Rule 72. The defendant did not file a Statement of Defence and upon an Order for Foreclosure and Sale being granted, a Sheriff's sale was held on June 10, 2010. The plaintiff was the purchaser at the sale and then re-sold the land and premises on December 16, 2010. Shortly before the re-sale, the plaintiff's law firm sought instructions from the plaintiff with reference to a possible motion for deficiency judgment.

[3] On February 9, 2011 the plaintiff indicated its intention to pursue a claim for a deficiency. In the course of the preparation of the documents to seek such a deficiency counsel realized that the limitation date for filing of a motion seeking a

deficiency was January 2, 2011, namely, 6 months after the effective date of the default judgment, rather a period computed from the date of the re-sale. The motion to file for a deficiency judgment was filed March 15, 2011.

The Civil Procedure Rules

[4] Civil Procedure Rule 72.12 requires that if the sale of foreclosed property is by public auction, a mortgagee who seeks an assessment of the deficiency must file a notice of motion to assess the amount of the deficiency within six months after the effective date of the default judgment.

[5] Rule 72.11(3) provides that the effective date of the default judgment is 15 days after the applicable of the following dates:

- (a) The date of the sale by public auction, if the mortgagee purchases the property;
- (b) The day the balance of the purchase price is paid to the Sheriff or other person conducting the sale the public option, if the person other than the mortgagee purchases the property;
- (c) The date of closing, if the sale is by approved agreement.

[6] As the plaintiff purchased the property at public auction on June 10, 2010, the effective date referred to in Rule 72.11(3)(a) was July 2, 2010. When applying the provisions of the Rule, the relevant limitation period in respect of this motion was January 2, 2011.

[7] Although there has been no jurisprudence reported in respect of Rule 72.12, this Rule is essentially the same as 1972 Rule 47.10(3) which provided as follows:

47.10(3) An application for deficiency judgment shall be made to the Court within six (6) months from the date of the Sheriff's sale, on ten (10) days notice.

[8] The old Rule was modified to the extent that the current rule provides additional time beyond the six months when one factors in that the date of default judgment is 15 days after the date of sale by public auction.

[9] In support of the motion, counsel acting for the plaintiff at the time of the initial foreclosure proceedings averred in his affidavit as to the reason why the motion for deficiency was not filed within the required time period.

[10] Counsel acting on behalf of the plaintiff on the motion to extend the time limit (different counsel than that who acted on behalf of the plaintiff in the foreclosure proceedings) submitted that the date was inadvertently missed because of a misreading of the relevant rule in the previous lawyer's office. The error was not caught until after the limitation period had passed.

The Law and Conclusion

[11] The law on deficiency judgments is clear: a request for an abridgment of time will not be granted, to permit late notice of motion for assessment of a deficiency judgment, unless the plaintiff can provide a reasonable excuse for missing the limitation.

[12] I refer to the decision of our Court of Appeal in *Royal Bank v. Phillips* (1994), 133 N.S.R. (2d) 232. At para. 7, Hallett J. stated as follows:

A deficiency judgment following a mortgage foreclosure of residential property imposes an onerous burden on a mortgagor guarantor because they would reasonably assume, at the time the loan was made and the mortgage security given, that the value of the home would exceed the loan. When this assumption is not borne out they become potentially liable for a debt that was not reasonably expected. As well, the mortgagee, in an ordinary residential mortgage transaction, would have decided at the time the loan was made that the security would be sufficient to cover the loan in the event of a default. In circumstances where it does not the mortgagee must apply for deficiency judgment within the time allowed by the Rules unless there is a reasonable excuse for failing to do so.

[13] The plaintiff submits a number of cases for the proposition that "inadvertence" can amount to a reasonable excuse that justifies the motion for abridgment of the time in the Rules. Among the authorities cited, the plaintiff referred to the case of *Cummings v. Nova Scotia (Minister of Community Services)*,

2011 NSCA 2 for the proposition that the "reasonable excuse" requirement on an abridgment of time motion is lessened where the applicant can demonstrate merits in their case. However, most of the authorities referred to by the plaintiffs are instances where the default judgment was being overturned where the defendant provided some explanation for not filing a timely defence. There are indeed some cases that do suggest that inadvertence can ground a motion for abridgment of time. However, the cases cited by the plaintiff in respect of inadvertence deals with circumstances of default judgments being set aside where the defendant provided some explanation for not filing a timely defence, but in no instance are the cases in support of inadvertence either in failing to have knowledge of a particular limitation limit or in misinterpreting what I believe is a clear provision in the Rules.

[14] It is important to attempt to understand what is the apparent inadvertence in this case. If the inadvertence is on account of the failure to appreciate that the time limit ran from the effective date of the judgment and ended six months from that date, then I cannot accept that such omission can amount to a reasonable excuse as contemplated by the binding case law. It can be reasonably stated that lack of

knowledge of a limitation period is not a reasonable excuse for not having taken a necessary step in the proceeding.

[15] I refer to the decision of *Milbury v. Nova Scotia (Attorney General)*, 2007 NSCA 52, where the Nova Scotia Court of Appeal explained that the discoverability rule, which delays the start of the limitation period until the relevant facts are discovered, does not apply where the facts were known, but the plaintiff was ignorant of the law. At para. 27, the Court stated:

It is the discovery of the facts giving rise to a cause of action that starts the time running, not the discovery of the applicable law. Ignorance of the law does not postpone the starting of the time period. See *Coutanche v. Napoleon Delicatessen*, [2004] O. J. No. 2746 (Ontario Court of Appeal) and *Hill v. South Alberta Land Registration District* (1993), 135 A.R. 266 (Alberta C.A.).

[16] Applying this dictum to the limitation period in Rule 72 makes sound policy sense. If ignorance of the law were a legitimate excuse for an abridgment of time motion in the deficiency judgment context then it can be fairly be anticipated that any time the limitation period is missed, ignorance of the law will be pled as a reasonable excuse. Ignorance of the law or failure to read the Rules is not a reasonable excuse. I also find that misinterpreting what appears to be a clear and straightforward Rule would not, in my respectful view, be a reasonable excuse.

[17] I have also considered whether the provisions of the *Limitation of Actions Act* provide some guidance as to whether I should grant the motion to extend the time. In 1982, the Act was amended permitting the court to disallow a defence based on the time limitation and to allow the action to proceed if it appeared to the court to be equitable. In making this determination, the Court must balance the prejudice of the parties. The statute contains a list of factors the court ought to consider coming to its decision.

[18] The amendments to the Act that I addressed above, allowing for bringing of an action after a limitation has expired, were proclaimed into law in 1982. However, the jurisprudence of the Court of Appeal comes after these amendments became law and the Court of Appeal in *Philips* did not consider these factors in determining whether there was a reasonable excuse.

[19] I agree that inadvertence can ground reasonable excuse for a motion for abridgment of time in the Rules. However, in the context of a limitation period, and more specifically deficiency judgments, the Court should assess and consider reasonable excuse having in mind the words of the Court of Appeal.

[20] It is my respectful conclusion that that the misreading of a clearly-worded rule until after the limitation period has lapsed is not a reasonable excuse. With the greatest of deference, ignorance of the law does not prevent the limitation period from running.

[21] I therefore deny the motion to abridge the time period.

Leblanc, J.

