

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** CIBC Mortgages Inc. v. Touchie, 2011 NSSC 228

**Date:** 20110630

**Docket:** Hfx. No. 342933

**Registry:** Halifax

**Between:**

CIBC Mortgages Inc.

Plaintiff

v.

Colin W. Touchie and L. Clare Foley

Defendants

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**D E C I S I O N**

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**Judge:** The Honourable Justice Suzanne M. Hood

**Heard:** In Chambers in Halifax, Nova Scotia on May 24, 2011  
Final written submissions: May 26, 2011

**Written Decision:** June 30, 2011

**Counsel:** Gavin D.F. MacDonald for the Plaintiff, CIBC Mortgages Inc.  
Kevin A. MacDonald for Colin W. Touchie and L. Clare Foley

**By the Court:**

[1] The Defendants had a mortgage with CIBC Mortgages Inc. The Mortgage was not registered at the Registry of Deeds. Subsequently, defendants executed a mortgage with another lender which was recorded. The defendants have subsequently declared bankruptcy.

[2] The Plaintiff, CIBC Mortgages Inc. (hereinafter referred to as “the Bank”) seeks to lift the stay under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (“BIA”). Section 69.4 of the *Act* states:

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

Material prejudice may be found where there is a debt that survives the bankruptcy.

[3] The Bank relies on s. 178(1)(d) and (e) of the *Act*:

178. (1) An order of discharge does not release the bankrupt from

...

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim; . . .

If one of these sections apply, the debt will not be discharged and the discharge will not be a defence to the Bank's action.

[4] The test for deciding whether to lift a stay is set out in *Ma v. Toronto Dominion Bank*, 2001 24 C.B.R. (4<sup>th</sup>) 68 (Ont. C.A.) at para. 2, quoting from *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), which decision was affirmed at 40 C.B.R. (3d) 77 (Ont. C.A.):

In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued.

Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.

[5] In *Jenkins, Re*, 2005 NSSC 234, Reg. Cregan said that a *prima facie* case sets too high a standard.

[6] I am not to consider the merits or require that the plaintiff establish a *prima facie* case. I look instead at the pleadings. The pleadings state in para. 3 that the defendants as mortgagors entered into a mortgage with the Bank. Certain provisions of the mortgage are quoted in para. 5 including:

2 (a) ... you charge your entire interest in the property to us; ...

to secure repayment of the loan amount and to ensure that you perform all of your obligations under the mortgage.

13. Certain Promises You Make To Us

(a) You certify and agree with us that:

...

(vii) You will take any action necessary to protect your title to the property and you will not in any way interfere with our interest in the property.

[7] The Notice of Action also states that the defendants defaulted in payments under the mortgage. It also says:

9. The Defendants owed the Plaintiff a fiduciary duty not to interfere with the Plaintiff's mortgage interest in the Property, and not to take any action or fail to take any action that might prejudice the Plaintiff's position as first mortgagee.

10. The Defendants knew at all material times that the market value of the Property could support the Mortgage or the CitiFinancial Mortgage, but not both.

11. The Defendants breached their duty to the Plaintiff when they took out another mortgage on the Property from CitiFinancial and failed to bring the existence of the Mortgage and the debt owing thereunder to the attention of CitiFinancial.

12. The Defendants allowed CitiFinancial to advance under its mortgage, all the while knowing that in doing so one of the two mortgage lenders (the Plaintiff or CitiFinancial) would be effectively unsecured by the Property.

13. The Plaintiff states that the Defendants failed to properly advise CitiFinancial of the Mortgage and fraudulently withheld this information, as it turns out, to the detriment of the Plaintiff. The Defendants withheld this information to allow them to obtain a further mortgage over the property (with CitiFinancial), again by fraudulent means, thereby interfering directly with and prejudicing the interests of the Plaintiff.

14. The Plaintiff relies on the provisions of the Mortgage that state the Defendants must not interfere with the Plaintiff's interest in the Property and state

that the Defendants breached this provision and that their fraudulent actions resulted in losses to the Plaintiff and amount to deceit.

15. Based on the above, the Plaintiff claims that the Defendants breached the Mortgage when they failed to make monthly payments pursuant to the Mortgage. In addition, the Defendants acted fraudulently in taking out the CitiFinancial mortgage and because of this the Plaintiff lost its security interest in the Property. As a result, the Plaintiff has suffered losses by way of deceit and breach of contract.

16. The Plaintiff states that the Defendants are jointly and severally liable for any and all damages arising from their respective breaches of contract and for deceit and fraud and claim against the Defendants as follows:

- (a) Special damages incurred as a result of the breach under the Mortgage for the principal amount left owing on the Mortgage - \$204,130.93;
- (b) Special damages for interest due and payable under the terms of the Mortgage in the amount to be determined;
- (c) Pre-judgment interest;
- (d) Costs and disbursements; and
- (e) Such further and other relief this Honourable Court deems just.

[8] The issue then is whether s. 178(1)(d) or (e) applies. I will deal with the latter first.

[9] I agree with counsel for the defendants that there is no possibility that a court could conclude that the defendants incurred the subject debt by false pretenses or fraudulent representations. That subsection speaks as of the date the debt was acquired. There is nothing in the pleadings to allege that at the time the mortgage was obtained there were any false pretenses or fraudulent misrepresentations by the defendants.

[10] I will now turn to s. 178 (1) (d) which, in my view, is more problematic. I do not accept the distinction made by counsel for the defendants between acting in a fiduciary capacity and having a fiduciary relationship. It is my view that if one has a fiduciary relationship and acts in furtherance of it, those acts are done in a fiduciary capacity.

[11] Cases have been cited where courts have concluded that there was no fiduciary relationship between a bank and its customers. But each relationship may be looked at on its own circumstances. There may be circumstances where such a relationship could exist.

[12] In *Hodgkinson v. Simms* [1994] 3 S.C.R. 377, LaForest, J. quoted at para. 30, the three characteristics attributed to a fiduciary relationship from *Frame v. Smith*, [1987] 2 S.C.R. 99:

- (1) scope for the exercise of some discretion or power;
- (2) that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and
- (3) a peculiar vulnerability to the exercise of that discretion or power.

[13] It is not for me at this stage to make a ruling on the merits or even to consider whether there is a *prima facie* case. The threshold is much lower.

[14] In my view, there are sound reasons for granting relief against the stay pursuant to the *Bankruptcy and Insolvency Act*. At trial, a court could conclude that, in the particular circumstances of this case, the defendants owed a fiduciary duty to the Bank. The Court could conclude that the characteristics of a fiduciary relationship existed in this case. In such circumstances a court could conclude that this debt survives the bankruptcy.



[15] It is not, in my view, plain and obvious at this early stage and, after a review of the pleadings, that the claim will fail. The claim sets out provisions of the mortgage and alleges they were breached. It also alleges a fiduciary duty based upon the mortgage provisions.

[16] It would be materially prejudicial to the Bank in these circumstances not to lift the stay so that these allegations can be tested.

[17] Accordingly, I conclude the stay should be lifted.

Hood, J.