SUPREME COURT OF NOVA SCOTIA
Citation: Concentra Financial Services Association v. Broussard, 2011 NSSC 332

Date: 20110809
Docket: Hfx 346662
Registry: Halifax

Between:

Concentra Financial Services Association

Plaintiff

v.

Roger Clarence Broussard and Wilma D. Broussard

Defendants

Reasons for DECISION

Judge: The Honourable Justice Patrick J. Duncan

Heard: July 12, 2011, in Halifax, Nova Scotia

Final Written Submissions: August 3, 2011

Written Decision: August 31, following an Order of August 9, 2011

Counsel: Stephen Kingston, Q.C. for the plaintiff

Roger and Wilma Broussard, not represented, defendants

By the Court:

[1] The defendants executed a mortgage in favour of the plaintiff on April 28, 2008. The plaintiff filed a Notice of Action on April 6, 2011 claiming $207,854.48 then outstanding together with associated interest, charges, expenses and costs.

[2] A defence to the action was not filed and on July 7, 2011 the plaintiff moved for an order for foreclosure, sale and possession. The matter came on for hearing in Chambers on July 12, 2011. No one appeared for the defendants. At that time I advised counsel for the plaintiff that I had two concerns with the motion:

1. That there was an error of $1,179.80 in the calculation of the debt ; and

2. That the mortgage did not contain a specific provision that provided for foreclosure as a remedy on default.

[3] I was satisfied that in all other respects the plaintiff had satisfied the requirements necessary to obtain the order sought.

[4] Counsel for the plaintiff requested an opportunity to provide written submissions on these points, which he did. After receiving that submission and

further reviewing the matter I granted the order in chambers on August 9, 2011 with reasons to follow.

[5] The plaintiff acknowledged that the quantum of the claim was incorrect and the order was issued in the lower amount to reflect that fact.

[6] As to the second issue, the plaintiff cites **Falconbridge on Mortgages**, 5th ed, loose-leaf (Walter M. Traub, ed.) (Aurora, ON: Canada Law Book, 2003) (at August 8, 2011) §24:10-24:30 for the proposition that a mortgagee is entitled to foreclosure upon breach of the condition for defeasance, even though the mortgage is silent on the availability of this remedy.

[7] In *Atlantic Trust Co. v. Bezanson* (1975) 20 NSR (2d) 425 (NSSCTD), at para. 15, the Court cited similar passages from an earlier edition of **Falconbridge on Mortgages** and concluded:

> Insofar as this Province is concerned the principal is due upon default by virtue of the acceleration clause. The mortgagee is entitled to bring an action for foreclosure.

[8] In this matter, the mortgage contains an acceleration clause.

[9] The common law right to foreclosure upon default can be traced to early case law. An oft quoted case is *Cameron v. McRae* (1852), 3 Gr 311, 1852 CarswellOnt 20 at para 3, where the Court of Chancery of Upper Canada held:

> Where the mortgagee has not disabled himself from calling in his principal, in that case any default on the part of the mortgagor, in payment either of interest or principal, is a breach of the condition, which makes the estate of the mortgagee absolute at law, and entitles him as a necessary consequence to file a bill for the foreclosure of the mortgagor's equity of redemption.

[10] This line of authority was followed in Nova Scotia in *Farmer's Loan & Trust Co. v. Nova Scotia Central Railway* (1892) 24 NSR 542 (NSSC), at para. 13, where Ritchie J stated:

> It is, I think, quite clear from the cases cited that a mortgage can be foreclosed, in default of payment of the interest, although the principal is not due, unless there is a provision in the mortgage taking away the mortgagee's right in this respect.

[11] Even in the absence of an acceleration clause, a mortgagee may have an immediate right to seek foreclosure upon default (*see*, *Fenton and Montreal Trust Co. v. Zinck* (1962) 33 DLR (2d) 299 (NSSC)).

[12] Although there are ways that a mortgagee can lose the right to foreclose or have their action barred, there is no evidence before me upon which such a conclusion would be justified. *See* generally, **Falconbridge on Mortgages, §24:40.**

CONCLUSION

[13] In Nova Scotia, a mortgagee has a common law entitlement to foreclosure upon default in payment of interest or principal, so long as the mortgagee has not disabled himself from calling in his principle. Therefore, a mortgagee may seek foreclosure even though the mortgage does not contain a specific provision expressly providing for foreclosure as a remedy on default.

[14] I conclude therefore that the plaintiff mortgagee, having done nothing to disable itself from calling in its principal, has the right to foreclose, even though the mortgage does not contain a specific provision expressly providing for this remedy.

[15] The Order for foreclosure, possession and sale has been issued accordingly.

Duncan J.