SUPREME COURT OF NOVA SCOTIA
Citation: ***Co-operative Trust Company v Morin***, 2012 NSSC 78

Date: 20120221
Docket: Ken No 297802
Registry: Kentville

Between:

Co-operative Trust Company of Canada,
In Trust for **Constance Huyer RRSP No 9901785**

Plaintiff

v.

Susan Ruth Morin (formerly known as **Susan Ruth Lawrence**)
and **Dana Scott Morin**

Defendants

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	February 13, 2012 at Kentville, Nova Scotia
Counsel:	**James White**, counsel for the Plaintiff **Tim Peacock**, counsel for the Defendants

By the Court:

[1] This is a foreclosure action commenced by Originating Notice dated the 20th day of June, 2008. The Plaintiff seeks to foreclose a Mortgage dated the 12th day of July, 2000, in the face amount of $50,000.00 bearing interest at 7%. It alleges the outstanding balance to be $70,743.47, including accumulated arrears of interest.

[2] The action has been defended. An Amended Statement of Defence was filed on December 14, 2011. The essence of the Defence is reflected in paragraphs 5, 10 , 11, 12, 16(a) and 18(a) of this pleading, which state respectively:

> 5. The Defendants signed the mortgage, which forms the subject of these proceedings, the particulars are set out in the Statement of Claim, upon certain representations and promises made by the Plaintiff Constance Huyer and/or her spouse David Upton, who at all materials times hereto acted as an agent for Huyer.
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> 10. Huyer and Upton were aware there was insufficient equity in the property to secure a second mortgage. Huyer and Upton were also aware that the Defendants did not have the financial wherewithal to personally make the mortgage payments.
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> 11. Huyer and Upton assured the Defendants that the company would make the mortgage payments. All payments shown on Exhibit B of the Affidavit of Huyer dated July 12, 2010, were made by the company.
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> 12. On or about the 21st of June, 2000, prior to the execution of the Mortgage, Upton represented in writing that when a CEDIF grant was realized, this second mortgage would be the first thing to be paid out. In the same correspondence, Upton advised that in the event that the money advanced on the Mortgage was not repaid by the Company, that the Defendants would only be liable to repay in an orderly fashion 50% of the principal balance.
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> 16 a) The Defendants further say that as a result of the promises and assurances made by Huyer and/or Upton, that the Plaintiffs are estopped from enforcing the terms of the mortgage.
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> 18 a) Reflecting the essence of a subsequent agreement between David Upton and Dana Morin, the Defendants further say that as a result of the promises and assurances made by Huyer and/or Upton, that the Plaintiffs are not estopped from enforcing the terms of the mortgage. In the further alternative, the Defendants state that any liability, which is denied and not admitted, they may be found to have under terms of the mortgage, was satisfied in full as per the terms of an agreement made in writing on or about the 6th day of December 2001, between Upton and the Defendant Dana Morin.

Evidence

[3] The Mortgage dated July 12, 2000, was made between Susan Ruth Lawrence (now Morin) (hereinafter referred to as "Susan") and Dana Scott Morin (hereinafter referred to as "Dana"), as Mortgagors, in favour of Co-operative Trust Company of Canada in trust for

Constance Huyer RRSP No. 9901785 as Mortgagee. The Mortgage is in a standard form securing the amount of $50,000.00 at an interest rate of 7% with monthly payments of $384.66 with the balance payable after five years. It secured property at Falmouth in the Municipality of the District of Hants West. The property was registered in the names of the Susan and Dana. The property securing the Mortgage is their family home.

[4] The execution of the Mortgage took place at the office of TMC Law and in the presence of Garth Gordon Q.C., who in fact acted on behalf of Constance Huyer (hereinafter called "Constance"). There is on file an Affidavit of Mr. Gordon who testified at this hearing. The essence of his evidence is that he was instructed to put this Mortgage in place. He had forwarded a copy of the draft Mortgage to the Mortgagors with a recommendation that they obtain independent legal advice and have the Mortgage executed to return to his office so that he could disburse the funds.

[5] His evidence was that on July 12, the funds were in hand and that David Upton (hereinafter called "David"), the life partner of Constance, telephoned to say that the parties were coming in to sign. Susan and Dana arrived, apparently without having consulted a lawyer and they insisted on going ahead. He hand wrote a memo to be signed by Susan, in which she waived Independent Legal Advice and the two of them signed a Direction to Pay the Proceeds from the Mortgage over to Production Schoolhouse ("PSH"), which he did.

[6] Mr. Gordon did not perceive any reluctance on the part of Susan to execute the Mortgage and he was furnished with a void cheque on the Morin's account to accommodate an automatic debit. When asked if he sensed any fear or trepidation on the part of Susan, Mr. Gordon responded that what he had sensed was that they wanted to sign the Mortgage and "get on their way".

[7] David Upton described the circumstances leading up to the granting of the Mortgage. In 2000 he was employed by the Kings-Hants Development Authority, with the object of generating commerce in the area. That organization was approached by Dana, who had an idea for a media centre and teaching facility, which he hoped to start up and operate in Windsor. David undertook to assist him with the development of a business plan. David initiated the creation of a CEDIF intended to raise the capital that would be needed. It would attract investors who would benefit from certain tax credits allowed under Provincial and Federal rules. The goal of this funding effort was to raise one million dollars.

[8] David became "excited" about the prospect of the venture conceived by Dana and wanted to be personally involved. The two men apparently very quickly began to move forward with this plan as partners. Dana had the idea and experience in this particular field but no money. David had business experience and some money. As a result, beginning about May or June, Dana became the manager/President of PSH Inc. He rented an office, hired staff and began ordering equipment on the strength of $25,000 advanced by David. By late June the CEDIF had been set up and funding was anticipated, but in the meantime, they had "burned through" David's cash. They were out of money.

[9] This was the environment in which it was agreed that the RRSP of Constance, to the extent of $50,000 would be loaned to Dana and Susan, on the strength of this Mortgage on their property. The money would fund the operations of PSH until the CEDIF funds arrived. When the CEDIF (Hants Ventures) funds did arrive, it was a disappointing $400,000 and the venture had no money to repay the Mortgage and thus the $50,000 was not returned to the RRSP as had been contemplated.

[10] With the hope that better days were coming, PSH acquired property, went into business and continued until sometime in mid-2001. Beginning January 1st of that year, David resigned his position with the Development Authority and spent full-time working with Dana at PSH. At some point before December 3, 2001, Dana was no longer actively working as a partner in the Venture; they had expended all their financial resources and David was left in charge; continuing to hope that he could make the venture a success in spite of what were now very substantial payables.

[11] Ultimately David and Constance were forced into bankruptcy because of the obligations they had assumed on behalf of PSH. Rental properties they had acquired over the years were sold. A substantial claim from Revenue Canada for employee deductions remained outstanding. The only remaining asset of either of them was the RRSP owned by Constance, which was protected from bankruptcy.

[12] The evidence offered by Dana and Susan does not differ in any significant way from that of David and Constance.

[13] Dana Morin told us that he presented a vision for the training program and, with David, came up with projections for the costs of staff and equipment as well as revenue. He testified that the decisions about how their venture would be operated were jointly made. With respect to funding the venture, he said that he had no money but that he was "expected to invest". His role was to hire teachers and develop the curriculum that would be taught in their school related to "digital information, graphics, etc."

[14] The Mortgage, he said, was put in place when they needed funds. It was David who suggested the possibility of taking a mortgage on their home and they agreed to the Mortgage which was to be a loan to the corporation, not an investment. It was to be repaid from the CEDIF funds.

[15] When the CEDIF funds came into the venture, it had not raised the "necessary amount of money and so" he said, of the Mortgage, "we decided to let it ride. We needed the money for other things."

[16] Dana said their relationship was a partnership in which he and David were equal. Decisions on purchases and operations were jointly made. With respect to what happened when the venture failed, Dana testified that he transferred his shares to David under an agreement they reached in December 2001.

[17] He conveyed his interest in PSH inc. to David in exchange for a release from liabilities. The Mortgage remained outstanding. There were occasional notices being received from the corporate Plaintiff about the overdue payments. Dana and Susan were concerned about the threat of foreclosure with six children in the house. In 2006, they did attempt to refinance themselves and had a mortgage approved by a bank for $105,000. It is not clear whether the intent was to make a settlement on the Mortgage claim of $40,000, as alleged by Plaintiff's counsel, or not. Dana now denies that was the case, but it became academic in any event. When the lender was made aware that this Mortgage was a prior charge on the property and refused to advance the funds.

[18] Susan Lawrence-Morin testified about the execution of the Mortgage and her understanding that it would be in place for only a very short time, one or two months. She talked about the demands for payments, which were made after 2001, when David assured her that he would look after it. She said Constance was not involved, it was always David.

[19] Susan spoke about being uncomfortable with executing a mortgage because she had had previous difficulties recovering title to her property. She spoke of the emotional strain of having this hanging over her head for 12 years and that she believed when David filed for bankruptcy that would wipe out all of the losses from the venture. Apparently she based this on the agreement signed by Dana and David on or about December 7, 2001, under which David had agreed to assume all of the liabilities.

Findings of Fact

[20] The venture PSH was based on a partnership of Dana and David. At the beginning of the digital age, Dana had experience in teaching and was understood to have some knowledge of the technology then coming to prominence. The prospect of creating a school to equip their students for this new age, and to profit from this emerging field was exciting. Dana had the concept and the experience in the field; David believed he could raise the money and provide business / organizational backup. In this context, the two couples became very close and a sense of optimism prevailed.

[21] In order to get their joint venture off the ground, they needed some short term money. One way to access that was to lend money from Constance's RRSP to Dana and Susan and take a mortgage in security.

[22] Susan required some persuasion because of her past history. In an e-mail on June 21, 2000, David wrote to her because Dana had asked him to "explain the mortgage of $50,000". David explained the RRSP requirements and the fact that he and Constance had already invested $63,000 in the venture. David makes a promise: "If things don't work out then between us, we would have $75,000 lost, worst case scenario. That money could then be split between us, $37,500 each. Constance and I would eat half the loss and you and Dana could pay back the other half over time by monthly payments on the mortgage."

[23] It is clear that Susan had to be persuaded to place a charge on her home. It seems likely that the lawyer did perceive some reluctance on her part at the time, since he did have her, and not Dana, sign the waiver of independent advice. Nonetheless it is equally clear that she understood the implications of executing the mortgage. Her testimony reflected the evidence of an intelligent person. She knew that Dana would never get this project off the ground by himself. She had concerns but, like Dana, David and Constance, she wanted the project to succeed and was obviously aware that the money was needed.

[24] Over time it became clear that the business of PSH was failing. As the venture progressed through 2001, David became convinced that Dana's management style of the day-to-day operations of the company could not be sustained and that the direction of the venture had to be changed. He proposed to Dana that he would buy or sell and, in a letter dated December 3, 2001, sets out the number of debts totaling $82,300 owed by Dana to the company and to Constance.

[25] This letter is an offer to take over those debts if Dana would relinquish his position and essentially all of his interest in the venture. David offers to withdraw himself and release the venture to Dana if he could recover the $150,000 he and Constance had incurred in relation to his investment in the company.

[26] Discussions culminated on December 7, 2001, with an agreement between David and Dana in which Dana assigned his interest in the venture to David, and David undertook to assume various debts, including **"the arrears and future payments on the second mortgage to Constance Huyer. Dana Morin and Sue Morin will be released from the Mortgage once Revenue Canada has been paid arrears and penalties owed on outstanding charges up to November 30, 2001."**

[27] David was not able to save the venture nor was he able to fulfill the terms of that agreement because of his bankruptcy aggravated by the bankruptcy of his wife.

[28] From the beginning to the end it was the men who were making the arrangements about PSH, its' operations and financing. The women agreed to join in their commitments because of the initial enthusiasm they all shared, and perhaps out of love for and loyalty to their respective husbands.

The Position of the Parties

[29] It is the position of the Defendants that there was an agreement by and among the parties that when the CEDIF funds were advanced, the Mortgage would be paid out from those advances and their family home would be freed from that obligation.

[30] In the alternative they say that in December 2001, a negotiated settlement was reached between the parties including an agreement by David to assume responsibility for the Mortgage debt.

[31] The Plaintiff's position, simply stated, is that the Mortgage itself represents the contract between the parties and by its terms, Dana and Susan promised to pay out the loan of $50,000 over a period of time. They failed to do so and accordingly the debt, with interest, is now payable.

Issues

[32] After hearing the parties, I conclude the issues which I am obliged to decide are:

1. The grantors of the Mortgage did not have Independent Legal Advice before executing the document. Should the Mortgage be voided on that account?

2. The Mortgage contract is complete on its face. Is parole evidence to be permitted to affect its terms or to result in a discharge of that Mortgage?

3. What is the effect, if any, of the agreement reached between Dana Morin and David Upton in December of 2001, which purported to transfer all liabilities to David?

Independent advice

[33] I am referred to a case ***Batdorf v MacLean***, 2010 NSSC 462, Bourgeois, J., where, at paragraph 26 Bourgeois refers to the decision of ***Bank of Montreal v Courtney***, 2005 NSCA 153, in which Oland, J.A. quoted with approval these comments:

> Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence. ...

[34] As observed earlier, Susan is an intelligent and articulate person. She had serious reservations about signing the Mortgage in question because of her past difficulties with gaining clear title to the property. There is no doubt she was under pressure to execute the document because the short term survival of her husband's new business depended on obtaining this financing.

[35] The document itself had been in the possession of Dana and Susan for some days before it was signed. Its terms were certainly clear and known. Further, the importance of the loan, including the way it was to be obtain as well as the source of the funds were all things known to her at the time she signed the document.

[36] Dana does not make any similar plea with respect to independent advice and he was a tenant in common with Susan.

[37] I am satisfied that Susan Morin-Lawrence did understand the importance of the Mortgage document she signed as well as the potential consequences for her interest in the property in the event of default.

Parole Evidence

[38] With respect to parole evidence, I am referred to a decision of Warner J. in ***Kings County v Berwick***, 2010 NSSC 128, and other sources. The judge observed that "… contracts are not made in a vacuum, and cannot be properly interpreted without knowledge of the genesis and aim of the transaction." This approach does not negate the parole evidence rule, but rather described circumstances in which the rule does not apply.

[39] The parties were content to introduce a substantial amount of evidence surrounding the execution of this Mortgage document. Indeed, the entirety of the evidence advanced by both parties was devoted to explaining the circumstances surrounding the execution of the document, what representations were made with respect to its necessity and what its potential effect would be. Neither party sought to exclude any of this evidence; indeed both specifically rely on it to justify their respective arguments. The evidence adduced is relevant and persuasive of the parties understanding at the time of signing.

[40] I have been provided with a Judgment from the Court of Appeal in British Columbia, ***Guelpa Construction Ltd. v Daponte***, 1998 CanLII 5939 (BC CA), where the defendants contested the effectiveness of a mortgage in circumstances very similar to the present. In that case, like here, one partner in a partnership relationship provided the funds so the other partner could invest and took as security the other partner's real property. Parole evidence was admitted in that case to explain the circumstances and what representations were made as well as why the mortgage was executed.

[41] McEachern, CJBC, in delivering the judgment quotes from the appellants factum as follows:

> The question which the learned trial judge should have addressed was whether there was some clear and unequivocal promise or representation relied upon by the Dapontes which induced them to act to their detriment.

[42] Referring to that comment, the Chief Justice writes:

> In my judgment, the finding of the trial judge … is clear to the effect that no such clear and unequivocal promise or representation was established.

[43] I interpret those words to be an acceptance of the proposition that a defence to the written contract as contained in its four corners, may be established where the Court is able to find that there was some "clear and unequivocal promise or representation" which was acted upon, thus prompting the responding party to enter into the written contract.

[44] It happens that in this case there was such clear and unequivocal undertaking on the part of David, who purported to speak for his life partner Constance, to explain what the mortgage arrangement was all about and/or was going to be.

[45] David wrote to Susan by e-mail June 21, 2000, the following: "Dana asked me to get in touch with you and explain the mortgage of $50,000." He then discussed the fact that it was feasible for Constance to take her money out of her RRSP and receive a mortgage from Susan and Dana. He further observed that he and Constance had already invested a substantial amount. He went on to state: "The way I see it, if we give you the mortgage and things don't work out with the business in the next few months then between us we would have $75,000 lost **(worst case scenario).** The money could then be split between us, $37,500 each. Constance and I would eat half the loss and you and Dana would pay back the other half over time by monthly payments on the mortgage. … If the CEDIF comes through, the first thing paid off would be the mortgage (by August 1st at the latest)."

[46] The Morins also claim as a defence the concept of estoppel, arising from the promises and assurances made by David, both in relation to the mortgage and in relation to the agreement of December 2001.

[47] Warner J. discussed estoppel in ***Kings County*** *v* ***Berwick*** *supra*:

> When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the court will give the other such remedy as the equity of the case demands.

[48] I am satisfied, on the basis of the evidence I have heard, and hearing from both parties, as well as considering the context in which the Mortgage loan was advanced in June and July of 2000, that, (at least in the case of Susan Morin-Lawrence) the Mortgagors relied on an undertaking given by David Upton, who they believed to have superior business acumen that the maximum claim for which they could become liable under the Mortgage was $37,500. I am prepared to accept that this limitation of her potential liability was an undertaking without which Susan would not have agreed to sign the mortgage.

Effect of December Agreement

[49] On December 7, 2001, David Upton and Dana Morin signed an agreement, which was intended to terminate the partnership relationship between the two men and, constitute David as the sole owner of PSH Inc. and indemnify Dana and Susan from the liabilities they had incurred as a result of their participation in the enterprise.

[50] The context once again alters the strict terms of this agreement. At that stage in the history of PSH the company had incurred losses which were probably well in excess of $700,000

after 18 months of operations. In his e-mail of December 3rd, by which he initiated this agreement, David commented "I would prefer not to take on this mess". Their company had run out of money and credit and was heavily in debt. This communication offered to buy or to sell. It was impossible for Dana to buy. David expressed some hope. He hoped that he could reorganize or reorient the business, and relieve Dana of his obligations as the subsequent agreement undertook to do. In the event, he found it impossible to do so. The agreement was the product of wishful thinking on the part of both men.

[51] The defendants argue that Constance is stopped from enforcing the terms of the mortgage because by this agreement David undertook to assume it. I would make two observations with respect to this agreement: The first being that Constance, the beneficial owner of the mortgage was not a party to the agreement. The second observation would be that the concept of estoppel finds its root in fairness and equity. When reaching this agreement Dana was fully aware of the adverse if not desperate circumstances the PHS and David were facing.

[52] The evidence leads me to conclude that it was simply impossible for David to meet the terms of the undertaking he had given. The parties knew he was making an effort to salvage the enterprise and its fulfillment depended upon his success. He did not succeed. Perhaps success was not then impossible, but it was clearly unlikely. This fact was clearly within the knowledge of Dana his former partner. That being the case I conclude that it would be unfair and inequitable to hold David liable to fulfill a promise made in the circumstances described.

[53] That promise in any event would not have been binding upon Constance, who was not party to it, but who is the beneficial owner of the mortgage. Likewise, the rights of the corporate plaintiff, the nominal owner of the mortgage could not be affected by arrangements made between the two men.

[54] I therefore conclude that the mortgage granted by David and Susan to the Co-operative Trust Company of Canada for the benefit of Constance Huyer is binding and enforceable to the extent all $37,500 together with interest at 7% from December 1, 2001 to date. I choose that date because it is the time when the "worst-case scenario" imagined by David became reality.

[55] Judgement will be entered against the Defendants accordingly.

J