

SUPREME COURT OF NOVA SCOTIA

Citation: iNOVA Credit Union Ltd. v. Giamac Inc., 2012 NSSC 400

Date: 20121120

Docket: Hfx No. 382080

Registry: Halifax

Between:

iNOVA Credit Union Limited

Plaintiff

v.

Giamac Inc.

Defendant

and

Gerald Giovannetti

Defendant/Guarantor

Judge:

The Honourable Justice Peter P. Rosinski

Heard:

October 17, 2012, in Halifax, Nova Scotia

**Final Written
Submissions:**

Gavin D. F. MacDonald - October 18, 2012

Lloyd R. Robbins - October 31, 2012

Blair Mitchell - October 31, 2012

Paul B. Miller - November 1, 2012

Counsel:

Lloyd R. Robbins, for iNOVA Credit Union Limited
Paul B. Miller, for Giamac Inc. and Gerald Giovannetti
Blair Mitchell, for Edward Webber
Gavin MacDonald, for Fred Smithers
Richard Arab, for the Attorney General of the Province
of Nova Scotia

By the Court:

Introduction

[1] Six participants; four motions moved; three separate moving parties; all motions granted - and no clear winners or losers - what should this Court order respecting costs awards under *Civil Procedure Rule 77*?

[2] Given that the court time required was limited and the lack of clear authority to assist decision making, in my opinion, doing justice between the parties involved is albeit roughly, yet fairly achieved by having all the parties bear their own costs.

[3] I shall explain this in more detail below.

Background

[4] iNOVA foreclosed on a property owned by Giamac Inc., hereinafter referred to as “Giamac”. Gerald Giovannetti was the guarantor of a loan from iNOVA to Giamac. At the Sheriff’s sale, Mr. Giovannetti bid on the property as an agent for Alfred Smithers. Mr. Giovannetti had the highest bid and the attendant Sheriff conducting the sale permitted him to be absent to retrieve a cheque for the purchase price. He did not return within a sufficiently short time period to the satisfaction of the Sheriff. The Sheriff thus sold the property to the next highest bidder: Edward Webber.

[5] On July 31, 2012, Mr. Giovannetti moved for an order:

1. Causing Mr. Webber to be added to the proceedings pursuant to *Civil Procedure Rule 35*;
2. Setting aside the foreclosure sale held on July 10, 2012;
3. That the property be sold by auction on a rescheduled date; and
4. Such other relief as the Court deems just.

[6] The motion was drafted for Mr. Giovannetti by Eliza Maynes, legal counsel. On September 27, Mr. Giovanetti filed a notice of intention to act on one's own and noted that he had discharged his counsel on September 25.

[7] That same day he filed a draft amended notice of motion requesting that Giamac be included as a mover of the motion.

[8] On September 28, Alfred Smithers moved "for an order adding him as party to the proceeding."

[9] On October 1, the Attorney General for the Province of Nova Scotia moved "for an order for intervener status in this proceeding."

[10] On October 16, Paul B. Miller filed a notice of new counsel regarding his retainer on October 15 by Mr. Giovannetti and Giamac.

[11] Thus, on October 17, I had four motions before me:

1. Mr. Giovannetti sought an order adding Giamac as a moving party to his motions filed July 31, August 7 and September 27 [amending the July 31 motion]. All counsel present agreed to this;
2. The Province sought intervener status, as it had responsibility for the conduct of the Sheriff's sale - all counsel present agreed to this;
3. Mr. Giovannetti and Giamac sought to have Mr. Webber "added to the proceedings pursuant to *Civil Procedure Rule 35*"; and
4. Mr. Smithers sought an order "adding him as party to the proceeding."

[12] Initial submissions from counsel lasted one-half hour. After recesses, I returned to indicate that, in my opinion, it was not appropriate that Mr. Webber or Mr. Smithers be added as a party (Defendant or "other party" status) to the foreclosure proceedings, although perhaps they could be added as interveners.

[13] Generally, counsel appeared to appreciate that both Mr. Webber and Mr. Smithers had a significant interest in the outcome of the motion to set aside the foreclosure sale, but some were concerned that allowing Mr. Webber and Mr. Smithers to participate should only be done if they were thereby exposed to costs consequences related to their participation.

[14] Counsel requested time to review my preliminary conclusion among themselves and ultimately suggested a consented to form of order (now on file reduced to writing) which reads in part:

- (1) Alfred Smithers and Edward Webber be added as parties to the motion to participate fully in the motion;
- (2) Pursuant to the Rule 22.11(6), Edward Webber and Alfred Smithers shall be subject to the Civil Procedure Rules as parties to the motion to the same extent as if they were parties to the proceeding;
- (3) The style of cause for this proceeding is changed to the following:

2012

Hfx No. 382080

Supreme Court of Nova Scotia

Between:

iNova Credit Union

Plaintiff

and

Giamac Inc.

Defendant

and

Gerald Giovannetti

Defendant/Guarantor

and

Attorney General of the Province of Nova Scotia

Intervener

and

Alfred Smithers and Edward Webber

Parties to the Motion

- (4) Giamac Inc. Be and is hereby added as a moving party to the motion to set aside the Sheriff Sale of July 10, 2012; and
- (5) The parties are at liberty to address, in written submissions, the issue of costs from the motions to join Mr. Webber and Mr. Smithers as parties to this proceeding. Each party is to make their respective submissions, if any, on or before the close of business on October 31, 2012.

[15] While the style of cause is unorthodox in that it allows Messrs. Webber and Smithers to act as parties to the proceeding, yet their interest arises only consequent to the foreclosure sale itself and is more precisely related to the motions filed by Mr. Giovannetti, it is, in my view, in the interests of justice to permit the (consented to as to form) order to stand and I therefore authorized it.

Mr. Giovannetti's motion to add Mr. Webber "to the proceedings pursuant to Civil Procedure Rule 35"

[16] Generally, counsel asserted that Mr. Webber and Mr. Smithers should be treated equally insofar as being granted standing. Similarly, counsel were not as concerned about in what capacity Mr. Webber and Mr. Smithers were granted standing, as long as there would be the attendant cost consequences as if they were a party.

[17] Oddly, Mr. Giovannetti, as the mover of the motion to join Mr. Webber, was acting as the agent for Mr. Smithers at the foreclosure sale.

[18] Ultimately, Mr. Giovannetti was successful in his motion, and sought costs in the cause of the motion to set aside the foreclosure or, alternatively, that each party should bear their own costs.

[19] Mr. Webber sought \$750.00 costs from Mr. Giovannetti in spite of Mr. Giovannetti's success in having Mr. Webber joined.

[20] iNOVA sought \$750.00 costs towards its attendance, which was necessitated by Mr. Giovannetti's failure to initially include Giamac, Mr. Smithers and Mr. Webber in its motion to have the Sheriff's sale overturned.

[21] Mr. Smithers took the position in his October 18 letter that "the issue of costs arising from the motions heard on October 17th should be deferred and assessed by the judge hearing the motion to set aside the foreclosure sale."

[22] *Rule 77* contemplates that the successful party will generally be awarded costs as against the unsuccessful party. However, the *Rule* is also more fundamentally oriented toward costs awards effecting a proper degree of justice as between the parties.

[23] In relation to Mr. Giovannetti's motion to add Mr. Webber, in spite of his "success," Mr. Giovannetti created the circumstances of necessity according to his own logic which required the motion to be made. In this light, one could see Mr. Giovannetti's original motion as being in need of "correction." On the other hand, the circumstances here are unusual and the case law presents no specific guidance as to whether Mr. Smithers and Mr. Webber should have standing, and in what capacity.

[24] iNOVA was perhaps the only party at the hearing that was there only to respond, in that it was not seeking by motion or submissions, to have the court order a specific outcome on its behalf.

Mr. Smithers' motion "for an order adding him as party to the proceeding"

[25] Mr. Smithers took the position that he could be added as an "other party." He wished to have the ability to request substantive relief and therefore sought this

“other party” status. He provided no specific existing authority to allow such standing to be granted.

[26] Some of the other counsel noted that there appeared to be no precedent for this “other party” status, but to reiterate, they generally shared the view that Mr. Webber and Mr. Smithers should be treated equally in the circumstances. Therefore, if Mr. Webber had standing, Mr. Smithers should have standing as well.

Conclusion

[27] The circumstances herein are unusual. Thus, it could be said that the relevant parties were headed into uncharted territory when deciding how to frame a suitable motion and their supporting arguments.

[28] As noted above, iNOVA is the only party that was present in a truly responding capacity. It took reasonable positions and it was caused expense in some respects unnecessarily as a result of the actions of Mr. Giovannetti and Mr. Smithers, who were ultimately successful in their motions.

[29] While some may be inclined to award costs as against Mr. Giovannetti, in spite of his success given the circumstances here, in my opinion, all the parties should bear their own legal costs regarding all motions dealt with on October 17, 2012.

J.