

SUPREME COURT OF NOVA SCOTIA

Citation: Royal Bank of Canada v. Moffat, 2013 NSSC 111

Date: 20130321

Docket: Hfx No. 408843

Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Paul Alexander Richard Moffat and Nancy Lynn Everson

Defendants

v.

N/A

Defendant-Guarantor

Judge: The Honourable Justice Michael J. Wood

Heard: February 27 and March 20, 2013 (in Chambers), in
Halifax, Nova Scotia

Written Decision: March 21, 2013

Counsel: John S. Fitzpatrick, Q.C. and Joshua J. Santimaw, for the
Plaintiff
Edward Gores, Q.C., for the Attorney General of Nova
Scotia
Stephen Kingston, proposed Auctioneer
Glenn Hodge, Watching Brief

By the Court:

[1] This motion came before me in Special Chambers, seeking an order for foreclosure, sale and possession on behalf of the plaintiff, Royal Bank of Canada. The motion was routine with the exception that the plaintiff sought to have the foreclosure sale conducted by Mr. Stephen Kingston, rather than the sheriff. Mr. Kingston is a lawyer with many years experience in foreclosure sales.

[2] The reason given for using Mr. Kingston's services was that the cost would be less than half of the amount charged by the sheriff pursuant to the *Costs and Fees Act*. It was suggested to me during the hearing that the plaintiff and other financial institutions are considering requesting appointment of non-sheriffs to conduct other foreclosure sales. For this reason, I decided to issue a written decision on this motion.

[3] In addition to Mr. Santimaw and Mr. Fitzpatrick, Q.C., who appeared on behalf of the Bank, I received submissions from Mr. Kingston, as well as Mr. Edward Gores, Q.C. Mr. Gores appeared in response to notification being given to the Attorney General. Although he took no position on the motion, Mr. Gores' submissions with respect to the public interest in the conduct of foreclosure sales and the nature of the role performed by sheriffs were very helpful.

SHERIFF CONDUCTED FORECLOSURE SALES

[4] In Nova Scotia, foreclosure sales are almost always conducted by sheriffs. They are judicial officers and are governed by a number of policies and procedures in carrying out their duties. Their role is to provide a fair and unbiased sale process.

[5] Sheriffs also perform a wide range of other functions. They provide courthouse security, transportation of persons in custody and are responsible for enforcement of many different types of court orders. It is obvious that they are an important component of the Nova Scotia judicial system.

[6] The standard procedure for sheriff's sales is incorporated in Practice Memorandum No. 1. This document contains the basic process for the sale. In addition, the Nova Scotia Department of Justice has developed Standard

Operational and Administrative Policies and Procedures for Sheriff Services. This includes guidelines for the conduct of sheriff's sales. These policies and procedures were referred to in my decision in *iNova Credit Union v. Giamac Inc.*, 2012 NSSC 431 at para. 20.

[7] It is clear that the rules governing sheriffs require them to conduct foreclosure sales in a manner that is professional and ensure that all potential bidders have an equal opportunity to purchase the property. They have a duty to both the judgment debtor and creditor, as well as members of the public, to ensure that the highest possible price is obtained.

[8] As noted in the *iNova* decision, sheriffs also have a degree of discretion in how they will conduct the sale. For example, in the circumstances which gave rise to the *iNova* decision, the sheriff was called upon to decide whether a bidder could participate by telephone and whether the highest bidder should be given a reasonable opportunity to obtain a certified cheque for the required deposit. On that latter issue, I described the sheriff's discretion as follows:

[33] It is clear that the sheriff has a discretion in deciding how to deal with a bidder who does not have their deposit. They must act reasonably in exercising that discretion. It goes without saying that there is no automatic right to be given time to obtain a certified cheque or bank draft if a bidder attends the sale without one. In my view, the range of reasonable options available to a sheriff in this situation runs from outright rejection of the bid, to giving a period of time in order to obtain some or all of the deposit funds.

[9] When exercising their discretion, sheriffs must act with a high degree of professionalism and neutrality. They must fairly balance the competing interests of all parties in deciding how to proceed. These tenets must be preserved if the court is to permit a foreclosure sale to be conducted by a non-sheriff.

[10] If any party is dissatisfied with the conduct of the sale, they may make an application to court to set aside the result. Fortunately, there are very few examples of such proceedings being undertaken and even fewer where the sale was set aside. This is a testament to the quality of the work being done by sheriffs in Nova Scotia in conducting judicial sales.

CONDUCT OF FORECLOSURE SALES BY NON-SHERIFFS

[11] *Civil Procedure Rule 72* governs foreclosures and contemplates the possibility that the court might appoint somebody other than the sheriff to conduct the sale. *Rule 72.08(3)* provides as follows:

(3) The sheriff, the sheriff's nominee, **or another person appointed by a judge** to conduct a sale by public auction or to complete a sale by approved agreement must do so in accordance with the terms of the order, the court's instructions or directions, and the advertisement of a sale by auction or the terms of an approved agreement. **(emphasis added)**

[12] In addition, Practice Memorandum No. 1 incorporates the Standard Procedure for Sheriff's Sale by Public Auction which provides in part:

1. Upon receipt from a plaintiff or plaintiff's solicitor of a certified copy of an order for foreclosure, sale, and possession, six copies of the description of the lands to be sold and six copies of the notice of public auction, the sheriff, deputy sheriff, or **person authorized by court order** shall proceed to sell the lands and any chattels included in the order by public auction, commencing at the time and place specified in the notice ... **(emphasis added)**

[13] Counsel for the Bank was unable to refer me to any reported decision where appointment of a non-sheriff was made, but argued that the *Civil Procedure Rules* clearly indicate that foreclosure sales should not be the exclusive domain of sheriffs.

[14] I agree with the plaintiff that the Court has jurisdiction to appoint someone other than a sheriff to conduct a sale, but the rule is silent on the circumstances in which this should occur. The default position should be sale by sheriff and a party who wishes a different process must convince the court that there is an appropriate reason for doing so. Reducing the sale costs which will ultimately be paid by the mortgagor may be such a reason.

[15] Appointment of a non-sheriff should only be permitted where the Court is satisfied that the sale process will conform with the standards and procedures followed by sheriffs. There is a public interest in a consistency of practice with respect to judicial sales of property that should leave no possibility that a

foreclosure sale conducted by a non-sheriff might result in a different outcome than one conducted by a sheriff. Counsel for the plaintiff agreed in principle with that philosophy.

[16] It is also important for the neutrality of the person conducting the sale to be preserved. Although it is not raised on this motion, there could be a concern if any individual became associated with a particular lending institution and was seen to be retained to conduct most of their sales. This could lead to a perception that they might favour the institution if conflicts arose as to how the sale should proceed.

[17] There are two aspects to the appointment process raised by this motion. The first is the qualifications of the proposed appointee, and the second is the administrative sale procedures to be followed. With respect to the appointee, the court must be satisfied of the following:

- 1) They are willing to accept the appointment and abide by the terms of the order, including any directions with respect to the conduct of the sale.
- 2) They must be of high ethical standards and have no interest in the subject matter of the proceeding. In other words, they must be unbiased and appear to be unbiased. Usually this will require that they be an officer of the court such as a lawyer or bankruptcy trustee.
- 3) They must have sufficient knowledge and experience with respect to judicial sales.
- 4) They must be insured in the event that a claim is made concerning their conduct of the sale.
- 5) Their fee should be fixed so that parties know in advance of the sale what it will be.

[18] With respect to the conduct of the sale, the procedures followed should match those used by the sheriff. This will require compliance with the Standard Procedures for Sheriff's Sale set out in Practice Memorandum No. 1, as well as

some additional requirements consistent with the sort of guidelines provided in the Standard Operational and Administrative Policies and Procedures.

THE REQUEST TO APPOINT STEPHEN KINGSTON TO CONDUCT THE SHERIFF'S SALE

[19] In support of its motion, the Bank filed an affidavit from Mr. Kingston which confirmed the following:

- He is a partner with the Halifax office of McInnes Cooper, and has been a practicing member of the Nova Scotia Barristers' Society since 1986.
- For more than twenty years, a substantial portion of his practice has consisted of representing lenders in enforcing mortgage security. He has attended hundreds of foreclosure sales and is familiar with the procedures governing their conduct.
- He confirms his agreement to conduct the public auction in this case for a fee of \$1,000.00 inclusive of H.S.T. and disbursements. In the event of a postponement, his fee will be \$125.00 and for cancellation \$500.00 plus H.S.T.
- His firm has arranged special liability insurance coverage in the amount of Two Million Dollars.
- His firm has not represented any of the parties to this proceeding.

[20] In addition, the plaintiff has proposed the following specific procedures, which would apply to Mr. Kingston's conduct of the sale and which are based upon the Sheriff's Services Standard Operational and Administrative Policies and Procedures.

- To be in possession of a certified true copy of the original court Order of Foreclosure held by the Prothonotary directing the sale of land or property at a public auction;

- To ensure that the Notice of Public Auction is posted in the Prothonotary's Office in the district where the lands are located at least fifteen (15) days before the sale;
- To ensure the Plaintiff provides the auctioneer with a tax certificate from the municipality in which the property is located, and to assure:
 - (a) Any fees charged by the municipality for the tax certificate is reimbursed from the proceeds of any sale
 - (b) Any outstanding property taxes charged by the municipality is reimbursed from the proceeds of the sale
- To ensure taxes paid out of the proceeds of sale have been levied up to the date of the sale;
- To perform the Foreclosure Sale in a manner that exhibits understanding, diplomacy and professionalism;
- To read aloud all particulars from the advertisement for sale including the abbreviated description of the property at the time of the sale;
- To ensure all potential bidders have equal opportunity to bid on the land or property;
- To act in accordance with his duty to the mortgagor(s), mortgagee and to members of the public bidding at the sale, and to ensure the land or property is sold to the highest bidder;
- To open the public bidding by first announcing the minimum bid required is not greater than the sum of the auctioneer's fees and outstanding municipal property taxes;
- To announce or ask the public if persons attending the Foreclosure Sale have any questions pertaining to the sale, and respond to questions open and directly;

- To notify the public attending the sale the land or property is to be sold to the highest bidder;
- To patiently deal with a stop or pause in public bidding, and to ensure no further bidding is attainable by:
 - (a) Stating, “Do I have any further bids?” (then pause)
 - (b) Then state, “Is there any advance on \$_____?” (then pause)
 - (c) Then state, “I have \$_____ going once” (then pause)
 - (d) Then state, “I have \$_____ going twice” (then pause)
 - (e) Then state, “For the third and last time” (then pause) “Are there any further bids?” (then pause)
 - (f) Then state, “Sold to _____ for \$_____”
- To have the successful bidder sign an Acknowledgment of Purchase immediately following the sale, and to:
 - (a) Collect 10% of the purchase price at the time of the sale, as per the terms under the Notice of Public Auction
OR;
 - (b) If the lawyer for the Plaintiff is the successful bidder, he/she is only obligated to pay the total costs of auctioneer’s fees and outstanding municipal taxes regardless of the sale bid, and the sale is not subject to HST
OR;
 - (c) If the successful bidder is a third party, who is a HST registrant, that person may elect to undertake to remit the tax directly, and the auctioneer is to require a HST registrant affidavit be filed with the office of counsel for the Plaintiff;

- To execute the Foreclosure Deed when the full amount of the bid from the purchaser has been received;
- To ensure the disbursements as outlined in the Foreclosure Report are paid out and/or disbursed according to the Order of Foreclosure;
- To credit any surplus funds after disbursements are made to the Prothonotary;
- To collect the balance of the purchase price of the land or property sold at the public auction, not later than 20 days following the date of sale;
- To ensure any deposit is forfeited if the purchaser fails to pay the balance of the purchase price from the sale within 20 days;
- To apply any forfeited funds from a Foreclosure Sale in order of:
 - (a) First, credited to payment of auctioneer's fees
 - (b) Secondly, credited to payment of any outstanding municipal property taxes
 - (c) Thirdly, credited to payment of the plaintiff's claim
- To facilitate an extension of time for the purchaser to pay the balance of the purchase price if the Plaintiff provides consent in writing to the office of the auctioneer;
- To hold another Foreclosure Sale after the first sale has defaulted provided the Plaintiff provides the auctioneer with a new notice specifying the new time and place for the second sale;
- To make a public announcement at the time and place of the Foreclosure Sale as to the postponement of the sale to a specific time and place.

[21] Based upon the affidavits filed and submissions of counsel, I am satisfied that Mr. Kingston is an appropriate person to conduct the foreclosure sale in this proceeding. He has extensive experience with respect to foreclosure sales in Nova Scotia, and meets the requirements for high ethical standards and impartiality. In light of his fee, the costs of the sale will be approximately \$1,800.00 less than if the sheriff performed this service. This will ultimately represent a saving to the defendants and is sufficient justification for appointment of Mr. Kingston in this case.

Wood, J.