

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Bank of Nova Scotia v. Francis, 2013 NSSC 115

**Date:** 20130326

**Docket:** Hfx No. 355523

**Registry:** Halifax

**Between:**

The Bank of Nova Scotia

Plaintiff

v.

Blair G. Francis and Brenda Lee Metzger

Defendants

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** March 5, 2013, in Halifax, Nova Scotia

**Counsel:** Stephen Kingston, for the Bank of Nova Scotia  
Brenda Metzger, on her own behalf

**By the Court:**

[1] The Bank of Nova Scotia moves for an Order for Deficiency Judgment.

[2] Notice of Motion was served on both defendants. Only one of the defendants appeared to voice opposition to the amount being sought by the plaintiff.

**THE DEFENDANT, METZGER'S POSITION REGARDING PERSONAL LIABILITY:**

[3] Many of the arguments advanced by the defendant had more to do with her former partner's attempts to frustrate her efforts to sell the property in order to avoid foreclosure than the amount claimed for deficiency.

[4] While sympathetic to the defendant's plight and the predicament she finds herself in as a single mother trying to raise two young children with little, if any,

financial support from the children's father, she cannot avoid joint and several liability for the legitimate amounts claimed for protective disbursements by the plaintiff.

[5] Her case cries out for equitable relief but such relief cannot come at the expense of the mortgage lender. If there is to be any redress it will have to be against the other defendant.

[6] The defendants are contractually bound under the mortgage to be jointly and severally liable for the amount of any deficiency that might exist after foreclosure has taken place. In G.H.L. Fridman, *Restitution*, 2<sup>nd</sup> ed (Scarborough, Ontario: Carswell, 1992) at p. 229, the author states the general principle regarding the nature of liability among co-obligors as follows:

*Prima facie*, since no one is primarily or ultimately liable for the discharge of the common demand, all contributing parties must bear the loss equally. This *prima facie* rule will be displaced whenever the liability of the co-obligors is not equal in quantum.

[7] As previously stated the defendant Metzger's frustrated efforts to improve the property to ready it for sale in order to avoid foreclosure proceedings do not hinder the plaintiff's contractual right to seek a deficiency judgment against the two original mortgagors. Compassion and empathy notwithstanding, the Bank of Nova Scotia's right to pursue reimbursement for its losses against either, or both, of the defendants is recognized in law.

**THE BANK OF NOVA SCOTIA'S CLAIM:**

[8] The Bank of Nova Scotia (the "Bank") obtained a default Foreclosure Order on May 15, 2012.

[9] The Order settled the debt owing on the mortgage at \$152,822.26 as of May 15, 2012 with interest accruing thereafter at the rate of 5.00% per annum.

[10] The Bank bought in at the Sheriff's sale on June 22, 2012 for \$2,942.13. Subsequently, its' costs were taxed at \$4,445.23.

[11] Prior to the Sheriff's sale, the Bank obtained an appraisal of the property which estimated the fair market value at \$138,000.00 as of May 29, 2012.

[12] The Bank retained Veranova Properties Limited "(Veranova)" as its property manager on or about June 9, 2011. Veranova took possession of the property on October 21, 2011. It continued to remain in possession up to the date of the hearing of this Motion.

[13] I do not propose to list all of the protective disbursements incurred by Veranova which are now being claimed by the Bank but there are a couple that are being disputed by Ms. Metzger which I will refer to.

**BRENDA METZGER'S POSITION:**

[14] Ms. Metzger does not believe she should be responsible for the cost to remove debris left behind by the tenant that she rented the house to herself when she was still in control of the property. She feels it should be the Bank's responsibility since the tenant remained in possession after Ms. Metzger washed her hands of the property after becoming resigned to the fact that foreclosure was inevitable. Apparently the tenant remained in possession for several months without paying rent to either Ms. Metzger or the Bank. The clean-up costs amounted to \$1,805.50. There was also a charge to removed mould from a closet that amounted to \$74.75.

[15] Ms. Metzger also challenged the electric power bills that added up to \$2,058.18. The house is heated by electricity. Ms. Metzger's main bone of contention was that she did not spend as much for electricity during the time that she occupied the house along with her two children. She did not provide any evidence to show that electricity rates remained constant throughout the period of her occupation and after when the Bank took over possession during the relevant period.

[16] During oral submissions, Ms. Metzger also questioned the amount charged for cutting the grass, \$362.25.

[17] All of these charges are legitimate protective disbursements that are necessary to preserve the property and are therefore allowed as part of the overall claim for deficiency. Furthermore, the tenant was not put in possession of the property by the Bank. The Bank inherited the tenant when they assumed possession of the property

after foreclosure proceedings were commenced. It was Ms. Metzger who arranged to rent the property and she must bear responsibility for the condition of the property and the resulting expenses incurred to clean up the debris left behind by the tenant who she put in possession.

[18] Ms. Metzger also challenged the appraisal commissioned by the Bank just prior to the Sheriff's sale. In support of her position that the property was worth more than the \$138,000.00 suggested by the Bank's appraiser, Ms. Metzger provided an unsigned letter from a Remax Real Estate Agent dated December 20, 2012 that stated:

I completed an evaluation of Brenda Metzger's home located at 6 Thomas Street in Berwick in 2010. The value I found at that time was in the \$160,000 range.

[19] Ignoring the fact that the letter was unsigned and the obvious hearsay nature of the letter, the suggested value of the property was not determined by a formal appraisal nor is there anything to establish the qualifications of the person who purports to offer it. It is of no assistance to the Court leaving the only evidence of value to be the amount reflected in the Bank's appraiser's report.

**COURT'S RULING:**

[20] After considering the amount claimed by the Bank of Nova Scotia and considering the defendant, Brenda Lee Metzger's written and oral submission, I have concluded that the total amount claimed by the Bank against both defendants should be reduced from \$31,623.34 to \$31,000.00 plus costs of \$500.00 for a total of \$31,500.00 with interest after judgment according to the *Interest on Judgments Act*. I have reduced the amount charged for inspections from \$1,604.25 to \$980.91 to arrive at the \$31,000.00 deficiency judgment amount.

[21] I would ask counsel for the Bank of Nova Scotia to submit a revised Order to reflect this decision.

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McDougall, J.