SUPREME COURT OF NOVA SCOTIA

Citation: *First National Financial GP Corporation v. Maritime Residential Housing Development Ltd.*, 2013 NSSC 219

Date: 201300709
Docket: Hfx No. 393909
Registry: Halifax

Between:

First National Financial GP Corporation

Plaintiff

v.

Maritime Residential Housing Development Ltd.

Defendant

v.

Michael MacDonald

Defendant-Guarantor

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	June 20, 2013, in Halifax, Nova Scotia
Counsel:	Rebecca L. Hiltz LeBlanc, for the Plaintiff Michael MacDonald, self represented, for the Defendant

By the Court:

[1] This is a motion by First National Financial GP Corporation against Maritime Residential Housing Development Ltd. and Michael MacDonald seeking an order for the following relief:

i. summary judgment on the pleadings and a dismissal of the action.

ii. summary judgment on the evidence and a dismissal of the action; and/or

iii. dismissal of the defence and counterclaim on the basis that it an abuse of process.

Background Facts

[2] This action was commenced by First National as a foreclosure action relating to three commercial properties located on Hawthorne Street in Antigonish, Nova Scotia.

[3] The defendants, Michael MacDonald and Maritime Residential Housing Development Ltd., filed a notice of defence and counterclaim which appears to allege that First National has deprived both parties of the benefit of mortgage loan insurance arising from a policy between First National and Canada Mortgage and Housing Corporation. I note the defendants are not parties to this alleged insurance agreement.

[4] At para. 7 of the statement of defence, the defendant states:

> 7. I claim the plaintiff is coveting my property, money, in its bearing of false witness in order to steal as the so-called arrears the plaintiff claim are being paid by the *Canada Mortgage and Housing Corporation* insurance policy.

[5] In the counterclaim filed by Mr. MacDonald and his company, there are numerous allegations, including the following:

i. That CMHC operates by virtue of the oath of secrecy pursuant to s. 13 as a ‘secret society’.

ii. That the appropriate legislation to be relied upon, among others, is "the Pentateuch from Elizabeth Windsor's King James scripture".

[6] In their counterclaim the defendants seek damages in the amount of $1,531,390.00 (as provided for in "Exodus 21:24").

[7] Further at para. 27 of the counterclaim it states:

> 27. In the absence of the return of My original wet ink signature *Promissory Note* I claim remedy of the value of My *Promissory Note* at Ten Times the face value or; $765,695.00 X 10 ($7,656,950.00 X 2 = $15,313,900.00 *Exodus 21:24).*

[8] As well, it is notable that the counterclaim contains Mr. MacDonald's signature, accompanied by what appears to be green ink thumb prints.

[9] The defendants' claims can be summarized as follows:

i. CMHC approved an insurance policy to the defendants' "financers", which insured against the defendant's default on the mortgage loan;

ii. the defendants failed to make monthly payments on the mortgage loan;

iii. no mortgage arrears resulted from the defendants' failure, however, as any arrears were paid out under the policy of mortgage loan insurance provided to First National by CMHC; and

iv. First National, or its agent(s), continuously and wrongly insisted that the defendants pay these arrears, effectively seeking to achieve some sort of double compensation.

[10] First National submits that the defendants cannot sustain their pleadings based on mortgage loan insurance to which they are not parties, and in respect to which they had no dealings whatsoever. Specifically, First National argues that:

i. the statement of counterclaim discloses no cause of action against First National and, therefore, this action should be summarily dismissed pursuant to Rules 1.01, 13.01(1) and 3.03;

ii. the defence and counterclaim should be dismissed on the basis of summary judgment on evidence pursuant to Rules 1.01, 13.01 and 13.04; and

iii. the defence and counterclaim are an abuse of process and should be dismissed or permanently stayed pursuant to Rules 1.01, 88.01 and 88.02.

[11] Interestingly, the defendants have advanced a statement of defence and counterclaim denying any knowledge of a "mortgage" and at the same time admitting the alleged guarantee of the amount secured. In the counterclaim, the defendants acknowledge that there was a mortgage and funds advanced.

[12] During the hearing Mr. MacDonald made "OPCA" like arguments described in *Meads v. Meads* 2012 ABQB 571. These arguments made no logical nor legal sense and were not helpful to the determination of this matter.

Issues

[13] The issues are as follows:

i. Should summary judgment be granted on the pleadings?

ii. Should summary judgment be granted on the evidence?

ii. Should this action be dismissed as an abuse of the court's process?

Discussion

i. Should summary judgment be granted on the pleadings?

[14] First National moves for summary judgment on the pleadings pursuant to Rule 13.01. The general purpose of summary judgment is set out at Rule 13.01(1).

> (1) This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.

[15] First National submits that the statement of defence fails to show a sustainable defence to the allegations in the statement of claim and that the counterclaim discloses no cause of action against First National. I agree.

[16] *Civil Procedure Rule* 13.03(1) provides that a judge must set aside a pleading where it discloses no cause of action, or otherwise makes a claim that is clearly unsustainable when the pleadings are read on their own. Rules 13.03(1) and (2) provide, in part:

> 13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> ...
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
>
> ...
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> ...
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

[17] The Nova Scotia Court of Appeal considered the test for striking a claim for failing to disclose a cause of action in *Nova Scotia (Attorney General) v. MacQueen,* 2007 NSCA 33:

> 7 The applications to strike were made after the statement of claim was filed and before any defences were filed. No party took issue with the test to be applied by the judge on an application to strike. The judge stated:

> [12] The parties are not in dispute as to the burden resting on the defendants with respect to their respective applications to strike portions of the plaintiffs' statement of claim. Each of the defendants acknowledges the onus on them is to establish it is "plain and obvious" the plaintiffs' statement of claim discloses no reasonable cause of action, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; 117 N.R. 321. Also acknowledged by the defendants is that a court, in considering an application to strike, is to assume the facts contained in the statement of claim are true and then to assess whether, assuming those facts to be true, a claim may be made out. The applications will only succeed if, on the facts as pleaded, the action is "obviously unsustainable". Also, in considering applications to strike, counsel for Ispat references *Vladi Private Islands Ltd. v. Haase et* al. (1990), 96 N.S.R. (2d) 323, 253 A.P.R. 323 (C.A.), where at p. 325, Macdonald, [J.A.] on behalf of the court, commented:
>
> > "... it is not the court's function to try the issues but rather to decide if there are issues to be tried."

8 All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable". This test was recently approved by this Court in *Mabey v. Mabey*, (2005) 230 N.S.R. (2d) 272:

> [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323; 253 A.P.R. 323 (C.A.). An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; 117 N.R. 321.

[18] In a motion for summary judgment on pleadings, the court must proceed on the assumption that the facts in the pleadings are true and assess whether the claim can be made out.

[19] The counterclaim alleges that the defendants applied for and obtained a mortgage loan from First National and failed to meet their financial obligations to First National under the mortgage loan, and that the account fell into arrears. The main thrust of the counterclaim is the allegation that First National, or its agents, continuously and wrongly insisted that the defendants pay these arrears effectively seeking to achieve some sort of double compensation from the defendants. That is, they allege that the monies the plaintiff received under a policy of insurance provided to First National by CMHC should somehow wipe out the arrears of the defendants.

[20] Assuming these facts to be true, I am satisfied that the counterclaim discloses no cause of action. Similarly the defence is unsustainable because it contradicts the facts alleged in the counterclaim by denying the very existence of the mortgage, and further contradicts the admissions contained in the counterclaim that the mortgage was in default. I am satisfied that the counterclaim and defence should be struck. I so order.

[21] In the event that I am wrong on my conclusion that the counterclaim and defence should be struck on the basis of summary judgment on the pleadings, I will go on to determine whether summary judgment should be granted on the evidence.

Should summary judgment be granted on the evidence?

[22] Summary judgment on evidence is provided for in *Civil Procedure Rule* 13.04, which states:

> Summary judgment on evidence
>
> 13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[23] The test for summary judgment on the evidence in Nova Scotia is well settled. The test is as follows:

i. The moving party must show there is no genuine issue of material fact that would require a trial.

ii. Once the moving party satisfies the initial burden, the onus shifts to the respondent to establish, on facts and evidence that are not in dispute, that his or her claim or defence has a real chance of success.

[24] I am satisfied that there is no genuine issue of material fact for trial in this matter. First National has provided evidence by way of affidavit from Rebecca L. Hiltz, which incorporates affidavits of Diane Dawe, Daniel Gionet and Ryan Pacquet in accordance with *Civil Procedure Rule* 39.07(b). It appears that the following facts are not in dispute:

i. In or about March 2009, the defendants applied to First National for a mortgage loan.

ii. The defendants' mortgage application was approved in the same month and funds were advanced to the defendants.

iii. As part of the approval process, First National submitted an application for mortgage loan insurance to CMHC naming First National as the mortgagee/lender, Maritime Residential as mortgagor/borrower and Michael MacDonald as guarantor.

iv. CMHC approved the application for mortgage loan insurance.

v. CMHC was the insurer and First National was the insured with respect to the mortgage loan insurance, pursuant to the corresponding certificate of insurance.

vi. In its statement of claim, First National alleges that the defendants defaulted on their mortgage obligations.

vii. In their statement of counterclaim, the defendants acknowledge their failure to comply with their mortgage obligations.

[25] Those being the undisputed facts, the only issue is whether First National is entitled to an order for foreclosure, sale and possession, as a result of the defendants' default on the mortgage. This is a question of law. There being no genuine issue of material fact, it is necessary for the court to apply the law and decide the issue: Rule 13.04(5).

[26] The onus is on the defendants to establish on facts and evidence that are not in dispute, that their defence and counterclaim has a real chance of success.

[27] Maritime Residential Housing Development Ltd., nor Michael MacDonald filed any affidavit evidence.

[28] As I have indicated, Mr. MacDonald in oral argument provided no logical or legal arguments to suggest that his defence and counterclaim has any chance of success.

[29] The main argument of the defendants is that First National insisted that they pay arrears owing on the mortgage loan for the purpose of obtaining some sort of double recovery. Pursuant to privity of contact, only a signatory to a contract may sue upon it, and the plaintiff submits that this doctrine precludes the plaintiff from

relying on the mortgage loan insurance provided by CMHC to First National. I agree. There being no privity, the defendants are unable to pursue their legal argument on that basis. Therefore, I am satisfied that Mr. MacDonald and his company have no reasonable chance of success and summary judgment is granted on the evidence.

[30] Having found that summary judgment should be ordered on the pleadings or on the evidence, it is not necessary that I proceed further to the third issue. However, in the event I am wrong on these first two issues, I will deal with the allegation by the plaintiff that the defence and the counterclaim is an abuse of process that it/they such that the action should be dismissed.

Is the defence an abuse of the court's process such that this action should be dismissed?

[31] This motion for dismissal was brought pursuant to Rules 1.01and 88 of the *Nova Scotia Civil Procedure Rules,* which provide, in part, as follows:

> **Object of these Rules**
>
> 1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.
>
> **Scope of Rule 88**
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> 88.01 (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
>
> (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
>
> (3) This Rule provides procedure for controlling abuse.
>
> **Remedies for abuse**
>
> 88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) an order striking or amending a pleading;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

(2) A person who wishes to make a motion under section 45B of the *Judicature Act* may do so by motion in an allegedly vexatious proceeding or a proceeding allegedly conducted in a vexatious manner, or by application if there is no such outstanding proceeding.

[32] First National seeks a dismissal of the defendant's counterclaim for damages on the basis that the defendants' approach to this litigation and representations to the court amount to an abuse of process, such that a dismissal is just and proper.

[33] First National submits that the defendants clearly plan to frame the entire action as an "Organized Pseudo Commercial Argument" and are, therefore, "OPCA" litigants. In a recent decision from the Alberta Court of Queen's Bench in *Meads v. Meads, supra,* Rooke ACJ, described OPCA litigants. In *Meads*, *supra,* the court defined and identified characteristic features of OPCA materials, court conduct and litigation strategies, many of which are evident in this proceeding, including Mr. MacDonald used his fingerprints as part of his signature; referred to unknown legal documents such as the "Pentateuch from

Elizabeth Windsor's King James Scripture"; alleged that CMHC operates as a "secret society"; and made various reference to CMHC's connection (or lack thereof) to Elizabeth Windsor" or the "Queen of England", or was the so-called enactment made on her behalf and the like.

[34] In oral argument Mr. MacDonald talked about the concept of an individual having two aspects, one being a person and one being a corporate entity. He talked about "agent to the real person". He made demands of First National to produce certain documents. He made references to Admiralty Law versus Contract Law and talked about Cannon Law and refers to Canada as a corporation.

[35] I agree with the plaintiff that the defence and counterclaim amount to an attempt to frustrate the plaintiff's attempts at foreclosure. It is interesting to note that there was a parallel proceeding on or about April 30, 2012, when Maritime Residential and MacDonald commenced an action in Antigonish, Nova Scotia, against a number of named individuals allegedly connected to First National GP Corporation, including Karen Kinsley, President of CMHC and CMHC itself. A review of the pleadings attached to the affidavit of Rebecca L. Hiltz LeBlanc, reveals that the two proceedings are substantially identical.

[36] The Honourable Justice N. Scaravelli found that the plaintiff were litigants as described in the case of *Meads v. Meads, supra.* I am also satisfied in this proceeding, that the defendant is a litigant as described in the case of *Meads v. Meads, supra.*

[37] Based on the similarities of the proceeding in the Halifax and Antigonish matters, this action constitutes an abuse of process insofar as the decision has already been made. As well, I am satisfied that the manner in which the defendants have proceeded is no more than an attempt to defeat or delay the foreclosure. Accordingly, the defence and counterclaim are dismissed.

Costs

[38] Costs to First National Financial GP Corporation in the amount of $900.00. The sum of $450.00 being assessed against Maritime Residential Housing

Developments Ltd and in the amount of $450.00 assessed against Michael MacDonald.

Pickup, J.