Cite as: Adams-Mood v. Toronto Dominion Bank, 1996 NSSC 24

1996 **S.H. No. 126043**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

MYRNA ADAMS-MOOD

PLAINTIFF

- and -

THE TORONTO-DOMINION BANK

DEFENDANT

D E C I S I O N

HEARD:	**Before the Honourable Justice Walter R.E. Goodfellow, at Halifax, Nova Scotia on December 10, 1996, in chambers**
DECISION:	**December 12, 1996 (Orally)**
DATE OF WRITTEN RELEASE:	**December 18, 1996**
COUNSEL:	**Dufferin R. Harper, counsel for the Applicant/Defendant and Cynthia L. Isenor, Articled Clerk** **Lisa Teryl, counsel for the Respondent/Plaintiff**

GOODFELLOW, J.: **(Orally)**

1. APPLICATION

This is an application by the Toronto Dominion Bank to strike the Originating Notice (Action) and Statement of Claim filed by Myrna Adams-Mood on the 12th of March 1996.

This application was filed the 20th of November 1996 and a notice provided to Ms. Myrna Adams-Mood's solicitor.

On the opening of the application, her solicitor sought leave to file an affidavit and to call *viva voce* evidence. The court enquired as to the nature of the evidence and was advised the affidavit was an employee of the Central Trust predecessor on the mortgage foreclosed by the Toronto Dominion Bank and apparently that employee expresses an opinion of some reservation as to the level of understanding by Ms. Myrna Adams-Mood when she signed the mortgage. The *viva voce* evidence was to be Ms. Adams-Mood's explanation on how she was unable to obtain this evidence until now.

I concluded that it would not be appropriate to grant leave to allow this evidence at the very last minute and in any event, it was hardly "conclusive" or

particularly helpful to have an expression of an opinion and not some concrete evidence that might be relevant and have weight.

2. CIVIL PROCEDURE RULES

14.25 **(1)** The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

- **(a)** it discloses no reasonable cause of action or defence;
- **(d)** it is otherwise an abuse of process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

3. BACKGROUND

The Toronto Dominion Bank commenced a foreclosure action the 12th of November 1993, over three years ago, served the Originating Notice and Statement of Claim upon Garey Mood on the 29th of November 1993 and Myrna Mood on the

10th of December 1993.

It would appear the Moods were approximately eleven months in arrears on the mortgage payments at that time, a period that provided ample opportunity to deal with the arrears if the capacity and the will to do so so existed.

Ms. Myrna Adams-Mood and Garey Mood filed a defence on the foreclosure action on December 14th, 1993, which reads as follows:

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Defence (and this one is the typed version of what I take to be filed personally by Mrs. Adams-Mood.)

1. I Myrna Louise Adams-Mood agree that I/we indirectly owe these monies.

2. The fact is that we do owe this money and the other fact being that an Acct allowed Bank Loans to be left in our Sales each year. With our paying back to Rev Can each year until we are broke.

3. That there is no support in law to this, when one owes a debt they owe a debt. In our case there is a lawsuit pending against the account who has allowed, or someone in his office allowed our loans to stay in Sales and us paying back to Rev Can

> **each year monies that we did not owe. I am 52 years old, back in college in Dartmouth for (1) one year. We want to keep our home!! We've lost so much. We only would ask that it be delayed further pending the out come of law suit with Mr. Hiltz Accounting Firm."**

This represents an unequivocal acknowledgment by Myrna Adams-Mood that the indebtedness covered by the mortgage and claimed in the foreclosure action was owed. Ms. Adams-Mood raised no question as to the execution, validity and entitlement of the Toronto Dominion Bank as mortgagee to foreclose the mortgage.

The defence sought merely a delay because the Moods wished to pursue their lawsuit against their accountant, whom they blamed for their financial troubles.

Counsel advised that when the accountant filed a defence to their action the Moods had decided not to pursue it, although it may not have been discontinued. The intent not to pursue the accountant remains.

Counsel further advise the court that Ms. Adams-Mood has two separate lawsuits outstanding against two different solicitors to whom she alleges

responsibility for the foreclosure, et cetera, of the home.

The order for foreclosure and sale was granted February the 10th, 1994 and Ms. Myrna Adams-Mood filed an assignment in bankruptcy February 28th, 1995. In her signed Statement of Affairs filed in her bankruptcy, she acknowledges the foreclosure and recites substantial indebtedness to innumerable creditors. She recites in her Statement of Affairs under "Pertinent Information Relating to the Affairs of Bankrupt", the following in paragraph (8):

> **"Owned and operated as sole proprietor**
> **The Berry Shack, Yarmouth, NS**
>
> **Owned and operated as sole proprietor**
> **The Steak & Burger Take-Out, Yarmouth, NS**
>
> **Owned and operated as sole proprietor**
> **Fancy's, Yarmouth, NS"**

And 9(c) reference to the foreclosure:

> **"Foreclosure Toronto-Dominion Bank, Yarmouth, East Kempville property and Hants County property. Sheriff's sale scheduled for March 22nd and March 23rd, 1995.**
>
> **Two businesses - The Berry Shack and Steak &**

House in Yarmouth, Toronto Dominion, Yarmouth sold in Sheriff's sale."

Ms. Myrna Adams-Mood commenced this action the 15th of March 1996. Her Statement of Claim filed by her solicitor, acknowledges she signed the mortgage as a co-mortgagor. She seeks damages alleging negligence on the part of the Toronto Dominion Bank in not advising her to seek independent legal advice, in not doing a credit check on her husband and that the Toronto Dominion Bank took possession of her house and sold assets for less than market value.

No application for deficiency has been advanced by the Toronto Dominion Bank and I suspect it is because of her bankruptcy.

Toronto Dominion Bank takes the position that the foreclosure action involved a determination of the validity of the mortgage and as such is *res judicata*. The bank takes the position that the foreclosure action also involved a determination of the validity of the mortgage and that the issues of negligence in this action revolve around the validity of the mortgage.

Res judicata appears to encompass two types of estoppel: (1) cause of

action estoppel and (ii) issue estoppel. Cause of action estoppel involves a subsequent action in which the same question is being asked as between the parties as was determined in a previous action. Issue estoppel involves a question in a subsequent action which is different from a previous action but some point or issue of fact forming a necessary ingredient of the subsequent action has been decided between the parties in a previous action.

The distinction noted above was approved by the Supreme Court of Canada in **Angle v. Minister of National Revenue** [1975] 2 S.C.R. 248. In that case, Dickson, J., as he then was, stated at page 254:

> **"The second species of estoppel *per rem judicata* is known as issue estoppel, a phrase coined by Higgins, J. of the High Court of Australia in *Hoystead v. Federal Commissioner* of *Taxation* at p. 561.**
>
> > **I fully recognize the distinction between the doctrine *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication and the doctrine of estoppel where the cause of action being different at some point or issue of fact has already been decided (I may call it issue estoppel).**

> **The distinction between issue estoppel and cause of action estoppel appears to have been the law of Nova Scotia since at least 1920, as stated in *Fenerty v. City of Halifax*, (1919-20), 53 N.S.R. 457 (C.A.). The doctrine of *res judicata* is founded on public policy. In that case, Ritchie, J.A., extended the application of *res judicata* to apply not only to the issues that were previously dealt with, but also to all other issues the parties had an opportunity of raising in the previous action. Ritchie, E.J stated at page 463:**
>
>> **"The doctrine of *res judicata* is founded on public policy so that there may be an end of litigation and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising."**

As I said, the negligence alleged by the plaintiff is an issue which could have been raised in the previous foreclosure action between the parties. It goes to the root of the mortgage validity.

Kanary v. MacLean (1992) 115 N.S.R. (2d) 306, (S.C.) is among the most

recent cases which adopted the principles of **Fenerty**. In **Kanary**, the court reaffirmed that an issue which has already been determined should not be relitigated and cannot be raised in subsequent proceedings, including issues which should have been raised in the previous litigation.

A. CAUSE OF ACTION ESTOPPEL

In the case of **Bayhold Financial Corp. Ltd. v. Clarkson Co. Ltd. and Scouler & Scouler** (1990) 99 N.S.R. (2d) 91 (S.C.) this was a case which also looked at the validity of a mortgage. The court held that since the validity of the mortgage was resolved in a prior foreclosure action, to which both parties were privy, the receiver who failed to challenge validity was estopped from now raising the issue. Kelly, J.A., at page 120:

> **"In the foreclosure action, there was no dispute or trial of issues before the court. The validity of the mortgages was not challenged in pleadings or before the court by Clarkson at that time. However, it is abundantly clear that the validity of the Bayhold Mortgage was a matter directly in issue in which the court had to be satisfied with before issuing the**

> **foreclosure order or the subsequent confirmatory order."**

Further at page 121:

> **"In the matter before us Clarkson was quite conscious that it had a possible defence to the foreclosure action based on the validity of the security, and not only decided not to raise the matter on the foreclosure action, but deliberately determined not to raise it at that time. I am therefore of the opinion the validity of the Bayhold security is *res judicata* or subject to issue estoppel in this action."**

The negligence alleged by Ms. Myrna Adams-Mood directly attacks the validity of the mortgage which was foreclosed by order of this court after notice was served personally upon Ms. Adams-Mood and a defence filed.

I conclude, in these circumstances, the validity of the mortgage was finalized in the foreclosure action and therefore she is estopped from attacking what has already been finalized.

As to that part of her Statement of Claim alleging a failure by the Toronto Dominion Bank to obtain fair market value, quite possibly what, if any, claim exists in this regard, may rest in the trustee in bankruptcy. Any such claim would be, in all probability, within the foreclosure action and not a separate cause of action. I have already noted that no application for deficiency against Ms. Adams-Mood has been presented.

Alternatively, but not necessary to my disposition of the application, I would conclude that issue estoppel also applies and that no special circumstances exist. The fact that Ms. Adams-Mood now feels she should not be bound by the mortgage she signed as a co-mortgagor and that an employee of the company has some reservation as to her understanding of the time would not in all the circumstances constitute "exceptional" circumstances". There are not "new facts" that could not have been uncovered by reasonable diligence in the first action. Ms. Adams-Mood did not raise as much as a whisper that she failed to understand what was transpiring or was coerced into signing the mortgage. Had she done so at the time in her defence then it is reasonable to assume the evidence now advanced by affidavit would have with reasonable diligence come to light at that time. If it is of any comfort to her, I doubt if such evidence would have been anywhere near sufficient in light of her business experience and capacity, etcetera.

CONCLUSION

The appellant has met the onus upon it of establishing the action is "obviously unsustainable". **Sherman v. Giles** (1994) 134 N.S.R. (2d) 52 (C.A.). Applying the principles stated by our Court of Appeal, the Originating Notice and Statement of Claim are struck pursuant to **Civil Procedure Rule 14.25(d)**.

COSTS

This is a fairly extensive chambers application. There is no basis why costs should not follow the event. I will tax costs, inclusive of disbursements, in the amount of $950.00. I will await an order from counsel, please.

J.

Halifax, Nova Scotia