<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Canadian Imperial Bank of Commerce v. Rideout*, 2018 NSSC 9

Date: 20180208
Docket: Hfx No. 420439
Registry: Halifax

Between:

Canadian Imperial Bank of Commerce, a body corporate
Plaintiff/Applicant

v.

Neil Llewellyn Rideout
Defendant/Respondent

Motion for Summary Judgment
Foreclosure, Sale and Possession

Judge:	The Honourable Justice M. Heather Robertson
Heard:	December 4, 2017, in Halifax, Nova Scotia
Final Written Submissions:	December 7 and 8, 2017
Decision	February 8, 2018
Counsel:	Jeffrey P. Flinn and Sandy Jenkins, articled clerk, for the plaintiff/applicant Jeremy Gay, for the defendant/respondent

Robertson, J.:

[1] Canadian Imperial Bank of Commerce (“CIBC”) makes a motion requesting:

> (a) An Order seeking summary judgment on the evidence under *Nova Scotia Civil Procedure Rule* 13 dismissing the Defendant’s Defence to CIBC’s action in Hfx No. 420439; and
>
> (b) An Order for Foreclosure, Sale and Possession pursuant to *Civil Procedure Rule* 72 in relation to the property located at 736 Maple Street, New Waterford, Nova Scotia, PID 15477524 (the “Property”).
>
> CIBC’s claim arises from the Defendant’s default under the terms of CIBC’s personal line of credit agreement (the “PLC Loan”) and a collateral mortgage (the “Mortgage”) which is registered against the Defendant’s Property and secures the PLC Loan.
>
> CIBC requests an Order for Foreclosure, Sale and Possession in relation to the Property in the amount of $42,806.86 together with associated interest, charges, expenses and costs.

[2] CIBC filed the following affidavits:

- Affidavits of Jennifer Mulrooney, Assistant Branch Manager at the CIBC Dartmouth Crossing location, sworn to on October 24, 2017 and November 29, 2017;
- Affidavits of Joseph R. Wall, proposed foreclosure auctioneer, sworn to on July 13, 2017 and October 26, 2017;
- Affidavits of Jeffrey P. Flinn, sworn to on October 24, 2017 and November 29, 2017; and
- Affidavit of Cheryl Cull, sworn to on October 19, 2017.

[3] The defendant Neil Llewellyn Rideout has filed an affidavit sworn to on November 8, 2017.

[4] The defendant Neil Rideout defended the Notice of Action and Statement of Claim issued by CIBC on October 28, 2013 by entering a defence filed September 29, 2015.

[5] CIBC says the defendant cannot succeed in his defence and relies on the evidence of the Personal Line of Credit Agreement ("PLC") terms and collateral mortgage terms in evidence before the court.

Summary Judgment on Evidence:

[6] Counsel for CIBC has succinctly stated the Rule and recent case law:

> Procedurally, under Rule 13.05, a defendant may bring a motion for summary judgment any time after pleadings close and before a date assignment conference is requested. This motion is brought within the prescribed timeframe.
>
> Substantively, under Rule 13.04, where a judge is satisfied that there is no genuine issue of material fact, and where the claim or defence does not require determination of a question of law, then the judge must grant summary judgment. There is no discretion provided under Rule 13.04. Rule 13.04, as recently amended, states:
>
> > 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
> >
> > > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> > >
> > > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
> >
> > (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
> >
> > (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
> >
> > (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
> >
> > (5) 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.

> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> > (a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

Prior to the recent amendment to Rule 13, the leading case on summary judgment was Saunders J.A.'s decision in *Burton Canada Company v. Coady*, 2013 NSCA 95 ("*Burton*") (Tab 1). *Burton* confirmed a two-part test for summary judgment, and provided significant guidance on the application of Rule 13.

The amended Rule 13 was then considered by Chipman J. in *Quadrangle Holdings Ltd. v. Coady Estate,* 2016 NSSC 106 ("*Quadrangle*") (Tab 2). The Court in *Quadrangle* confirmed that there is no discretion in the operation of Rule 13.04(1). A judge must grant summary judgment where this is no dispute of material fact and no outstanding question of law or, ostensibly, where the judge exercises the discretion in Rule 13.04(6) to determine that question of law [*Quadrangle*, Tab 2, at para 20].

Chipman, J. in *Quadrangle* also stated that, as a result of the recent amendment, there is no longer a two-part test as outlined in *Burton*. The Court in *Quadrangle* confirmed, however, that the analytical framework remains essentially the same as outlined in *Burton* [*Quadrangle*, Tab 2, at para 18].

His Lordship repeated these comments in *Drysdale v. Bev & Lynn Trucking Ltd*., 2016 NSSC 109 at para 9 [Tab 3] which was a judgement [sic] delivered on the same date as *Quadrangle*.

Most recently, this interpretation of the amended Rule 13 was reaffirmed in *Martin Marietta Materials Canada Ltd. v. Beaver Marine Ltd*., 2016 NSSC 226 at para 11 [Tab 4] (see also *Martin Marietta Materials Canada Ltd. v. Beaver Marine Ltd.*, 2016 NSSC 225 at para 102 [Tab 5]):

> 11 This new Rule does away with the two-part test that had existed previously (*Quadrangle Holdings v. Coady Estate* 2016 NSSC 106 (N.S. S.C.); *Drysdale v. Bev & Lynn Trucking* 2016 NSSC 109 (N.S. S.C.)). The burden remains on the applicant: if that party can satisfy the court that there is no genuine issue of material fact for trial, and no question of law requiring determination, the court must grant summary judgment. In response, <u>the opposing party is expected to put their "best foot forward" in showing what that material fact could be, or what that question of law could be.</u>
>
> [Emphasis added.]

Notably in *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.,* 2017 NSCA 61 [Tab 6], the Nova Scotia Court of Appeal determined that the

> Honourable Justice who granted summary judgment in *Marietta Materials Canada Ltd. v. Beaver Marine Ltd.*, 2016 NSSC 226 [Tab 4], erred in weighing the evidence in granting summary judgment.

[7] CIBC submits that there is no genuine issue of material fact requiring trial and there is no question of law to be determined.

[8] The defendant counsel resisting this application saying there is a genuine issue of material fact for trial i.e., the manner in which the bank handled his client's account and took funds from the client's PLC account to service a credit card debt, forcing the collateral mortgage into arrears, then closed the PLC account and refused payment of arrears, before any demand in writing was actually made.

[9] These events took place while Mr. Rideout was overseas between October 2012 and late December 2012. (They are chronicled in his affidavit before the court.)

[10] Mr. Rideout made arrangements with Saratoga Oceanic Development Group Incorporated ("SODGI"), a company with which he was associated, to have them deposit funds into his chequing account to pay the minimum monthly payments on the PLC.

[11] Mr. Rideout then left for Belize City in early January 2013 and returned on March 25, 2013.

[12] He subsequently contacted an associated at SODGI to be told there was enough money in his chequing account with CIBC to cover three months' interest and other charges on the PLC "at around Christmas time."

[13] Upon his return home, he discovered on his voicemail a number of calls from CIBC advising that his payments on his PLC had not been paid.

[14] He called CIBC on April 5, 2013 and was told that funds in his chequing account with CIBC had been removed and applied on his credit card accounts with CIBC, the particulars of which are documented at Exhibit B and Exhibit C of the rebuttal affidavit of Jennifer Mulrooney dated November 29, 2017.

[15] The issue before me relates to CIBC's rights under the PLC agreement, the personal borrowing agreement and the card holder agreement associated with Mr. Rideout's CIBC Aerogold Visa accounts held by him from October 23, 2009 and February 17, 2009.

[16] These agreements are referred to in the affidavit of Jennifer Mulrooney sworn to on October 24, 2017.

[17] She acknowledges that the CIBC personal account agreement issued to Mr. Rideout when he opened his CIBC chequing account cannot be found nor the CIBC credit card agreements. Filed as Exhibit I (Personal Account Agreement) and Exhibit J (CIBC Cardholder Agreement) of her affidavit are standard form copies of these two agreements. She states, however that in her 20-years' experience with CIBC, this agreement must be signed before the customer can open a personal deposit account or be in receipt of a credit card.

[18] Mr. Rideout's error was to be absent from the country for many months and not monitor his PLC or monitor his chequing account or the outstanding amounts owing on his CIBC Aerogold Visas. He failed to communicate with CIBC until April 5, 2013, when CIBC had then taken the position that his PLC agreement would be revoked and sent to collections and on to the legal department.

[19] In a phone conference on April 5, 2013, the CIBC verbally made a demand on Mr. Rideout. On April 9, 2013, the bank revoked his PLC due to his failure to make six minimum monthly payments.

[20] The failure to make minimum monthly payments due under the loan are itemized in para. 14 of Ms. Mulrooney's October 24, 2017 affidavit, as being on the following dates: October 3, 2011; November 2011; February 1, 2012; February 1, 2013; March 1, 2013; and April 1, 2013.

[21] The written demand for payment of the loan in full was dated May 16, 2013 and another on July 22, 2013. (See Cheryl Cull's affidavit, October 19, 2017, Exhibit 1.)

[22] Mr. Rideout says that he had the ability to pay the outstanding balance of minimum charges up to April 1, 2013, had CIBC not refused to accept payment and closed his PLC account in April, before the written demand was actually made on Mr. Rideout.

[23] Mr. Rideout paid CIBC $57,000 on the PLC account after being served with CIBC's notice of action and statement of claim on October 28, 2013.

[24] He says he is now in the position to pay one thousand dollars per month on the outstanding balance until the claim is paid in full.

[25] He does not want his property foreclosed upon. His balance on one of his CIBC Aerogold Accounts was in the amount of $749.41 as of November 28, 2017 and on the other account $31,959.58 as of November 28, 2017.

[26] Mr. Rideout claims that he had not entered into the personal account agreement or credit card holder agreements referenced in the affidavits of Jennifer Mulrooney. I think this very unlikely and accept the evidence of Ms. Mulrooney respecting bank practice of entering into such agreements before bank accounts can be opened or cards issued. In any event, I am left with no doubt that Mr. Rideout received as he acknowledged, the personal banking agreement booklet, which contains all of the terms referenced in greater detail herein, which indeed he acknowledged receipt of in writing.

[27] Mr. Rideout has selectively chosen to rely on certain specific clauses of his collateral mortgage and personal banking agreements while ignoring others, that give the bank the power to manage this demand facility and call it in at their sole discretion.

[28] A very relevant and similar case addressing a PLC agreement secured by a collateral mortgage was that of *Canadian Imperial Bank of Canada v. Hurlburt*, 2008 NSSC 408. Warner J. considered whether the "second chance" rule could be afforded by s. 42 of the *Judicature Act* to stop a foreclosure of a collateral mortgage.

[29] Like Mr. Rideout, Ms. Hurlburt agreed that the bank was obliged to continue the PLC so long as the customer made the minimum monthly interest payments. The exercise of s. 42 would be an equitable remedy intended to deal with the harsh reality of the demand and foreclosure of her property and in the light of her having stopped payment.

[30] At paras. 32-35, Warner J. dismissed the argument respecting continued monthly minimum payments and entitlement to a continuation of the PLC:

> [32] Counsel's second submission is that the mortgagor was not in default. When the bank misapplied her November 2005 interest payment, she "was acting in a prudent manner by not making any other payments under [sic] the bank had the first payment credited properly".
>
> [33] In oral argument, he expanded on this by submitting that as long as the customer paid the minimum payment (interest only) set out in the monthly PLC account statement, she was entitled to continuation of the use of the line of credit

> for so long as she wanted; that is, she was not in default so long as she paid the monthly minimum, and the PLC had no term.
>
> [34] There is no merit to the second argument. This argument quite simply ignores the plain language of both the PLC agreement and collateral mortgage. The agreement and mortgage did not have a term, but were, in simple plain language, payable on demand. Nothing in either document suggests, or permits an inference, that the right claimed by counsel in oral argument - the customers' right to continued use of the Line of Credit so long as she paid the interest, is a possible interpretation of the Agreement or mortgage.
>
> [35] The bank made demand on the customer for payment of the full Indebtedness on April 7, 2006. The customer did not pay. Seven months later, the bank commenced this foreclosure action.

And at para. 40 he concluded:

> [40] It is unreasonable for the mortgagor in this case to expect entitlement to the continuation of the line of credit so long as she made the minimum interest payment on each monthly statement. Such is contrary to the PLC agreement and mortgage, both of which are written clearly and in plain language and provide for the Indebtedness to be paid on demand.

[31] Mr. Gay on behalf of Mr. Rideout argues that the *Hurlburt* case can be distinguished as it was a "mortgage payable on demand" as distinct from his client's facility. He relies on cls. 5.1 and 5.6 of the collateral mortgage (Exhibit D to the Jennifer Mulrooney affidavit dated October 24, 2017.

> 5.1 Demand for Payment
>
> You will pay us the debt when we demand that it be paid. We will not demand repayment of the debt unless:
>
> - we have the right to demand repayment under this mortgage or any agreement, or
> - you are in default on this mortgage or any agreement.
>
> Any demand for repayment of the debt will be done inwriting. We will either deliver this notice to you personally, or mail it to you by first class mail to the most recent address we have on file for you. It will considered to be received by you on the earlier of the following dates:
>
> - the date it is delivered to you, or
> - the fifth day after we mail it.
>
> 5.6 Demand to repay the total debt

> We may require you to repay the total debt immediately if one of the following events occurs:
>
> - you do not make any payment as required by this mortgage or any agreement;
> - you do not meet one of your obligations under this mortgage or any agreement;
> - you do not make a payment required for money borrowed from someone other that us;
> - any statement that you make or you have made to us relating to your property, this mortgage, any agreement, the debt, or your financial situation is not true at the time it is made;
> - a lien or a notice of lien is registered against your property without our prior written consent;
> - you sell, transfer, lease or mortgage your property;
> - you allow your property to become vacant or you abandon your property;
> - the use of any part of your property changes without our prior written consent; . . .

[32] Even this agreement makes reference to the customer's obligations under other agreements:

> 5.5 Missed Payments
>
> If you do not make a payment as required by this mortgage or any agreement, we are not obligated to accept subsequent payments.

[33] CIBC also relied upon *Canadian Imperial Bank of Commerce v. Partners Management Development Inc*., 2016 NSSC 2. Justice Duncan found that CIBC's earlier acceptance of some late payments did not cure subsequent defaults and late payments. In any event the bank had the right to demand payment at any time – paras. 35-38 and 41).

> [35] Mr. Early says that even if payments were due on the 1st of the month, that the plaintiff had, by its course of conduct over the three years of the loan administration accepted payments made after the first of the month and without declaring a default. He is accurate in this. The plaintiff says that his failure to pay on the 1st of each month was evidence of a default even before the Bank closed

> the PLC and that, in any event, the Bank could have demanded payment at any time. This is also accurate.
>
> [36] I add to this that paragraph 8.7 of Schedule B to the Collateral Mortgage (to be discussed in more detail later) says:
>
> > In some cases, we may not enforce our rights on a particular default by you. However, by doing so, we are not forgiving any other existing default by you, or any other defaults by you in the future.
>
> [37] The course of the Bank's conduct in accepting payments after the due date did not change the fundamental terms of the contract: that payments were due on the first of the month, that failure to pay constituted a breach of the loan agreement, and that the Bank had the contractual right to make demand for payment in full even if the loan payments were made in accordance with the agreement. see, PBApp; see also, PBAg, Part 1, para. 8
>
> [38] In this case, the loan was clearly in default by November 2012. No payment was made on the PLC account in the month of October. No matter whether the payment due date was the 1st (the Bank's position) or the 8th to the10th (historical dates on which Mr. Early made payments) there was no legal excuse for failing to make a payment in that month. The payment made on November 1 could not "cure" (to use Mr. Early's word) his default. The amount paid was only enough to cover the amount owing as of October 1. He was in default for the month of November when he failed to pay the full amount owing. No further payments were made on the account.
>
> [41] As to Issues 2 and 3, I conclude that Mr. Early was in default of payment as of October 2, 2012 when he failed to pay the "Minimum Payment Due" on October 1, 2012, which I find to be the "Payment Due Date". Notwithstanding his payment of November 1, the account continued to be in default from October 2, 2012 onward as Mr. Early did not make sufficient payments to bring the account current in any month after September 2012. As such he was in breach of his contractual obligations to the plaintiff.

[34] CIBC also relied upon *Grand Mortgage Investment Corporation v. Publicover*, 2015 NSSC 5 and *Xceed Mortgage Corporation. v. Jesty*, 2013 NSSC 385, cases where the summary judgment was ordered where no genuine issue of material fact could be established.

[35] As in the *Hurlburt* and *Early* cases, the documents Mr. Rideout signed and/or acknowledged receipt of actually speak for themselves. Found as Exhibits to Ms. Mulrooney's affidavit of October 24, 2017, they are in Exhibits A and B.

[36] In Exhibit A – CIBC Personal Borrowing Application clearly states:

> If you are approved for and we make this line of credit available to you, you agree to pay the total amount owing under the line of credit to CIBC on demand, and until demand is made, to make the Minimum Payment each month required by the terms of this Application."

[37] In this document, Mr. Rideout also acknowledges having received a copy of the application and the CIBC booklet "Personal Borrowing Agreement." The Personal Borrowing Agreement contains provisions regarding his obligation to make regular payments, the bank's right to make a demand for full payment at any time at their sole discretion, the bank's right to convert any outstanding balance of the PLC to a conventional loan, the bank's right to amend the PLC and borrowing agreement without notice and the bank's right to suspend or terminate the PLC without notice and at their sole discretion (whether in default or not). Again, in the agreement the bank stated the demand nature of the facility and the right to do so at their option and sole discretion.

[38] Further, in Exhibit D, the Consumer General Collateral Mortgage and schedule of terms and conditions sets out the demand nature of the payments to be made under the mortgage at Clause 5.

[39] Demand for the debt need not be written under the terms of the personal borrowing agreement (Exhibit B, Clause 8). However, to realize in the collateral mortgage the demand must be in writing, on the plain words of the document and this was done.

[40] I find that the bank had the right to demand payment in full under the terms of the PLC personal banking agreement and the collateral mortgage. Mr. Rideout's default was under the terms of his PLC and borrowing agreement. The bank chose to make the demand for full payment of the loan in April 2013 after Mr. Rideout was in default in his minimum monthly payments. It is also clear that by the terms of the borrowing agreement booklet, which he acknowledged receipt of in the PLC application, refers to the bank's right to ". . . debit any account you have with us for the amount of any payment or any other liability you owe us under this agreement . . ." (Exhibit B – Mulrooney affidavit, October 24, 2017, (Part V, Clause 5).

[41] The applicant has further relied on the common law right of set off in three older cases: *Royal Trust Co. v. Molsons Bank*, 1912 CarswellOnt 844; *Sutcliffe & Sons Ltd., Re*, 1933 CarswellOnt 22; and *Salter & Arnold Ltd. v. Dominion Bank*, 1924 CarswellMan 6.

[42] Mr. Gay addressed these cases in a supplemental brief dated December 7, 2017. He argued as follow:

> It is submitted that the relationship between the parties with regard to account 77-18039 is not simply of debtor to creditor. This account is subject to the condition that amounts in it are to be deducted for payment of the Minimum Payments on the PLC. Monies paid to this account are not a loan to the Plaintiff but are designated for payment on the PLC.

[43] He argued the bank was not within its rights to apply any of the funds in this account to credit card accounts in arrears. I disagree.

[44] The bank had the right to make the demand for payment in full under the mortgages or any other agreement. It did so following the plain language of the personal banking agreement (Exhibit B – Jennifer Mulrooney Affidavit dated October 24, 2017 at p. 7, cl. 8) and the terms of the collateral mortgage (Exhibit D of the same affidavit pp. 21-22).

[45] I am satisfied that the applicant has demonstrated that there is no genuine issue of material fact to be tried and no question of law requiring further determination by the court.

[46] It is appropriate for me to grant summary judgment pursuant to Rule 13 dismissing the defendant's defence to this action.

[47] I also accept that the applicant has provided all of the required particulars of quantification of the debt owed by Mr. Rideout as set forth in the affidavit of Jeffrey P. Flinn sworn to November 29, 2017 and accompanying Exhibits A– D.

[48] I will grant the foreclosure order requested.

[49] I will hear from the parties on costs in the event they are unable to reach an agreement.

Justice M. Heather Robertson