

SUPREME COURT OF NOVA SCOTIA

Citation: *Bank of Montreal v. Thompson*, 2018 NSSC 103

Date: 20180316

Docket: Hfx No. 448262

Registry: Halifax

Between:

Bank of Montreal

Plaintiff

v.

Stephen C. Thompson and Megan E. Thompson
also known as Megan E. Conrad of 24 Forest View Drive,
Rural Route 1, Bridgewater, County of Lunenburg, Nova
Scotia, B4V 2V9;

Defendants

DEFICIENCY APPLICATION AND ABRIDGEMENT OF TIME

Judge: The Honourable Justice Christa M. Brothers

Heard: March 2, 2018, in Halifax, Nova Scotia

**Final Written
Submissions:** March 9, 2018

**Written Release
of Decision** April 27, 2018 (**Orally: March 16, 2018**)

Counsel: Quy Linh, for the plaintiff
Stephen C. Thompson and Megan E. Thompson,
self-represented defendants, not present

Brothers, J.: (Orally)

Overview

[1] The Bank of Montreal (“BOM”) has brought a motion seeking the following relief:

1. An order pursuant to Rule 2.03(1)(c) abridging the time for filing a notice of motion for assessment of deficiency judgment; and
2. An order pursuant to Rule 72.12 for an assessment of deficiency and a deficiency judgement. In the originally filed motion on September 26, 2017, the plaintiff sought deficiency against Stephen C. Thompson and Megan E. Thompson; and
3. On February 7, 2018, a new notice of motion was filed for deficiency, naming only the defendant, Megan E. Thompson, also known as Megan E. Conrad.

[2] At the commencement of this motion, I raised the issue of timeliness and whether this court, given the motion was not filed within the time requirements of Civil Procedure Rule 72.12, could and should abridge the time and allow the motion to proceed.

[3] Counsel made representations on the issue during the motion and I provided counsel with a further opportunity to brief the issue and provide me with additional submissions and case law as to the reason for the delay in filing and whether there was a reasonable excuse and an exceptional circumstance to justify extending the time for filing the motion documents. I have received and reviewed those supplemental submissions and thank counsel for those.

Background

[4] A history of the proceeding is necessary.

[5] The BOM moved for an order for foreclosure, sale and possession against the defendants and were successful in obtaining an order from Justice Glen G. McDougall on October 25, 2016.

[6] The amount due to the plaintiffs on the mortgage was settled at \$132,640.82 with interest on \$117,600 at a rate of 6.04%.

[7] The Sheriff's Sale took place on December 8, 2016. The BOM was the successful bidder.

[8] Civil Procedure Rule 72.11 deals with deficiency judgements and provides:

Deficiency judgment

72.11 (1) A statement of claim or notice of application for foreclosure, sale, and possession may include a claim against a person who is liable for the amount, if any, by which the mortgage debt exceeds the amount realized from the sale.

(2) A mortgagee who claims a deficiency judgment may have default judgment for the deficiency against the party claimed to be liable for the mortgage debt, unless the party claimed against files a notice of defence or contest, or attends at the hearing of the application for an order for foreclosure, sale, and possession and obtains permission to contest the claim.

(3) The effective date of the default judgment is fifteen days after the applicable of the following dates:

- (a) the date of a sale by public auction, if the mortgagee purchases the property;
- (b) the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;
- (c) the date of closing, if the sale is by approved agreement.

(4) The amount of the default judgment must be assessed by a judge.

(5) Interest is calculated in accordance with the mortgage until the effective date of judgment and in accordance with the *Interest on Judgments Act* afterwards.

(6) The judgment extinguishes six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed.

[9] Civil Procedure Rule 72.12 deals with motions for an assessment of a deficiency and provides:

Motion for assessment of deficiency

72.12 (1) A mortgagee who seeks an assessment of a deficiency must file a notice of motion to assess the amount of the deficiency before one of the following deadlines:

- (a) six months after the effective date of the default judgment, if the sale is by public auction;

(b) ten days after the day of the closing of a sale by approved agreement.

(2) A mortgagee who makes a motion for a deficiency judgment against a party who has not designated an address for delivery must, unless a judge orders otherwise, give notice of the motion to the party in the same way a party is notified of a proceeding under Rule 31 - Notice, as if the notice of motion were an originating document.

(3) The notice must be delivered no less than ten days before the day the motion is to be heard, unless a judge orders otherwise.

[10] Counsel for BOM listed the following dates and chronology as relevant for the court when considering an extension of time to bring this motion seeking deficiency judgment. I will review those dates as referred to by counsel:

- December 8, 2016: Sheriff's Sale took place and BOM was the successful bidder at the sale.
- January 19, 2017: The Sheriff's Deed and Sheriff's Report were sent to the sheriff for execution.
- January 24, 2017: The clean up and work on the property was completed.
- February 9, 2017: BOM obtained a name of an agent and sought a current market analysis.
- February 10, 2017: The Order for Foreclosure was registered.
- February 22, 2017: The Sheriff's Deed was registered.
- February 27, 2017: The agent advised BOM that they were not interested in selling the property. Another agent was sought.
- March 28, 2017: An agent, who was willing to list the property, was located.
- April 6, 2017: A current market analysis was received. It was compared to the appraisal. There was a 10% differential. The agent and appraiser were asked to review their figures to get to the true value of the property.
- April 11, 2017: The property was listed for sale.
- May 23, 2017: The listing price was reduced.

- June 5, 2017: An offer was received. Counsel did not apply for deficiency judgment and advised BOM was waiting to sell the property.
- June 5, 2017: A counter-offer was made and a buyer accepted the counter offer.
- June 16, 2017: The buyer was waiting for financing approval.
- June 29, 2017: The original scheduled closing date. An issue concerning the septic system arose and the buyers requested a reduction in price. A counter offer was made and accepted by the buyers.
- July 7, 2017: The sale of the property was completed.
- September 12, 2017: BMO made a motion to confirm the Sheriff's Sale pursuant to Rule 72. There is no explanation for why this motion confirming the sale was taken nine months after the sale.
- September 25, 2017: The Sheriff's Sale, report and all proceedings were ratified and confirmed by the Prothonotary. There is no explanation for the delay between the sale and ratification.

Law and Analysis

[11] Pursuant to Civil Procedure Rule 72.12(1)(a), a mortgagee is required to file a notice of motion to assess the amount of the deficiency judgment within six months after the effective date. The effective date, according to Civil Procedure Rule 72.11(3)(a) is fifteen days after “the date of sale by public auction, if the mortgagee purchases the property.”

[12] In this case, BMO had until June 23, 2018, to file its motion seeking a deficiency judgment. I rely on *Scotia Mortgage Corporation v. Chalmers*, 2011 NSSC 339, for the computation of time. The effective date of the judgment was December 23, 2016. Saturdays, Sundays, and holidays are included in the 15-day period used to calculate the effective date of default judgment.

[13] BMO did not file its notice of motion to assess the amount of deficiency until September 26, 2017, just over three months after the deadline for filing. The notice scheduled a hearing of the motion for October 12, 2017.

[14] The motion did not proceed on October 12, 2017. Instead, BOM brought a motion seeking substituted service. An order for substituted service was granted by Muise, J. in relation to one of the two defendants, Megan E. Thompson. Substituted service of this motion for deficiency was to be effected by:

1. Inserting a notice in the *Chronicle Herald* newspaper; and
2. By inserting a notice on Megan E. Thompson's Facebook account.

[15] A new notice of motion seeking an abridgment of time and an order pursuant to Rule 72 entering deficiency judgment was filed on February 7, 2018, almost eight months after the date the notice and motion materials were required to be filed under Rule 72.12(1)(a). I refer to *Royal Bank Canada v. Christanson*, 2016 NSSC 70 where Wood, J. stated:

[2] The Courts in Nova Scotia have consistently held that the six month time period for filing the motion for deficiency judgment should not be extended without proper justification. . . .

Law on extension of time for filing for deficiency

[16] In *Royal Bank of Canada v. Phillips*, 1994 NSCA 100, the court upheld a lower court decision refusing to extend the time to apply for a deficiency judgement. The court stated:

[7] A deficiency judgment following a mortgage foreclosure of residential property imposes an onerous burden on a mortgagor or guarantor because they would reasonably assume, at the time the loan was made and the mortgage security given, that the value of the home would exceed the loan. When this assumption is not borne out they become potentially liable for a debt that was not reasonably expected. As well, the mortgagee, in an ordinary residential mortgage transaction, would have decided at the time the loan was made that the security would be sufficient to cover the loan in the event of a default. In circumstances where it does not the mortgagee must apply for a deficiency judgment within the time allowed by the Rules unless there is a reasonable excuse for failing to do so. In this case, the delays in the taxation do not in themselves justify the long delay in applying for the extension of time and the deficiency judgment. The appellant has not put forward a reasonable excuse for failing to apply within the 6-month period. I would not interfere with the Chambers Judge's exercise of discretion in refusing to extend the time. The appeal is dismissed with costs in the amount of \$500 plus disbursements.

[17] Edwards, J. followed this reasoning in *Inrich Business Development Centre Ltd. v. LeBlanc*, [1997] CarswellNS 393 (S.C.), [1997] N.S.J. No.183, and concluded that there is a discretion to extend the deadline in the former Civil Procedure Rule 47.10(3) if the plaintiff demonstrates a reasonable excuse for having missed the six-month deadline. However, even then the court held it would be the exceptional circumstance or rare occasion when the court would allow a late-filed deficiency judgement.

[18] In this matter, the Sheriff's Sale was conducted on June 6, 1996, and the six-month deadline to apply for deficiency expired January 6, 1997. The application was brought almost two months late, on February 27, 1997. The court was not satisfied that there was an exceptional circumstance that called for an extension of time. The court discussed why the motion would not be permitted:

[13] Counsel for the Plaintiff argues that the deficiency application at this stage would not prejudice the Defendants. He points out that the application was brought in a relatively short time after the six-month deadline. I view the question of prejudice as secondary to the first hurdle the Plaintiff must clear, that is, whether exceptional circumstances exist to justify an extension. The Plaintiff in this case has not cleared that first hurdle. The late application was occasioned by his lack of diligence. Even if CPR 3.03 would permit me to ignore the mandatory provision of 47.10(3), which is not here being decided, there has been no reasonable excuse and no exceptional circumstance demonstrated. I would therefore not permit the deficiency application.

[19] LeBlanc, J. applied the same principles to the "new rules" as previously applied in earlier cases to the *Civil Procedure Rules (1972)*. In *First National Financial Corporation v. Raynard*, 2011 NSSC 205, Leblanc, J. stated:

[11] The law on deficiency judgments is clear: a request for an abridgment of time will not be granted, to permit late notice of motion for assessment of a deficiency judgment, unless the plaintiff can provide a reasonable excuse for missing the limitation.

[20] In *Royal Bank of Canada v. Christanson*, *supra*, Wood, J. stated:

[6] It is clear from these authorities that mortgagors should not be left in limbo for an extended period of time. They are entitled to know that their bank is seeking a deficiency judgment against them and in what amount. Being notified of a court hearing to assess a deficiency judgment months or years after the property has been sold could be prejudicial. As a result, lenders must provide

some justification for an extension of the six month period for bringing the deficiency motion.

[21] Before me, BOM argues the reasonable excuse is that the sale of the subject property took longer than expected and the closing was not until after the expiry of the six-month time period in Rule 72.12. Counsel candidly admits he could not locate any case law supporting a request for an extension of time to file a deficiency application due to the date of the sale of the property.

[22] The case law does not support the plaintiff's motion.

[23] The fact is the sale of foreclosed properties regularly takes longer than the deadline set for in Rule 72.12(1)(a). Regularly, mortgagees bring motions for deficiency where properties are bought by them at a sale and have not yet been sold to a third party. In those cases, the mortgagee files the motion and proves any deficiency through appraisal reports and information about the efforts to sell the property.

[24] The fact the property was not sold to a third party prior to the deadline under Rule 72.12(1)(a) is not an exceptional circumstance.

[25] Furthermore, the sale of the property closed on July 7, 2017. There is no explanation given for the delay in filing the motion between July 7, 2017, and September 26, 2017. The delay of two and a half months was not explained and no excuse has been offered in oral argument, in written briefs filed prior to the motion, or in supplemental submissions received on March 9, 2018. Consequently, I dismiss the motion as being out of time.

Service of Motion Materials

[26] I will address a second issue, that is service of the documents.

[27] Rule 72.12(2) requires service, usually personal service, for a motion for assessment of deficiency after a foreclosure sale. Both the notice of motion and any supporting affidavits are to be served on the defendant. This requirement was discussed in *CIBC Mortgages Inc. v. MacLean*, 2017 NSSC 106, and in *Royal Bank of Canada v. Christanson*, *supra*.

[28] In the circumstances and based on the evidence before me, I have serious concerns about the service of the motion documents on Ms. Megan Thompson. The affidavit of counsel filed February 7, 2018, says that a notice was inserted in

the Chronicle Herald on October 12, 2017. The insert in the newspaper was attached to the Affidavit at Exhibit “A.” This notice does not make any reference to this motion for deficiency, but instead refers to a notice of application and the requirement to file a defence in 15 days. This appears on its face to be an error. There is no mention of the motion for deficiency to take place on March 2, 2018.

[29] Furthermore, the private Facebook message as attached at Exhibit “B” does not show that the notice of this motion was provided to the defendant.

[30] Based on the above, if I had been persuaded this was an exceptional circumstance sufficient to extend the time to file the motion for deficiency, I would find service was not effected, as there is no evidence of service on the defendant Ms. Thompson.

Justice Christa M. Brothers