SUPREME COURT OF NOVA SCOTIA
Citation: *CIBC Mortgages Inc. v. Dima Estate*, 2019 NSSC 61

Date: 20190214
Docket: Hfx No. 484099
Registry: Halifax

Between:

CIBC Mortgages Inc.

Plaintiff

v.

The Public Trustee, as personal representative of the Estate of Mihai Dima

Defendant

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: February 8, 2019, in Halifax, Nova Scotia

Counsel: Nicholas Mott, for the Plaintiff

By the Court:

[1] CIBC Mortgages Inc. applied in General Chambers for an Order for Foreclosure under Nova Scotia Civil Procedure Rule 72. The motion is different from most mortgage enforcement proceedings. CIBC as mortgagee, is not seeking an Order for Foreclosure, Sale and Possession. Instead CIBC wants to proceed by what is referred to as absolute or simple foreclosure.

[2] The first step is the granting of an Order for Foreclosure. That order declares that the mortgage being foreclosed is in default. The mortgagee then must give at least 15 days' notice to the Defendant and to subsequent encumbrancers of a hearing at which a second order, the Confirmatory Order is sought. The Confirmatory Order confirms the possession of the property by the mortgagee. There is no process of a public auction and sale.

[3] The question is whether simple foreclosure is legally available as a remedy in Nova Scotia.

[4] Simple foreclosure has been granted several times in this province. There are no reported decisions that address the reasons why the remedy was used.

The Mortgage

[5] The mortgage in this case was dated August 30, 2011. It was recorded at the Land Registration Office for Halifax County. The original principal amount was $181,980.75. It mortgaged the lands of Mihai Dima at 113 Feruz Crescent in Halifax. As of January 7, 2019, the mortgage was 4 months in arrears. The principal balance was then $156,298.14. Mr. Dima died in September 2018. The Public Trustee was appointed as personal representative of his estate on November 5, 2018.

[6] CIBC served the Public Trustee with a Notice of Action and Statement of Claim on January 18, 2019. No defence was filed. The Public Trustee has waived the 15-day period for filing of a defence.

[7] Nicholas Mott, as solicitor for CIBC, filed an Affidavit of Counsel attaching a copy of the parcel register, as of January 31, 2019, for the lands being foreclosed, the Certificate of Mr. Mott with regard to the title to the property, and a Bill of Costs. The encumbrances on the title are the mortgage in favour of CIBC, a subsequent mortgage in favour of CitiFinancial Canada East Corporation in the

amount of $20,530.87, a judgment for $14,739.99 in favour of the Royal Bank and a judgment of $9,906.70 in favour of Capital One Bank.

Foreclosure or Foreclosure, Sale and Possession

[8] Foreclosure means different things in different jurisdictions.

[9] In New Brunswick, for example, the word is used to describe an extrajudicial sale under the powers contained in a mortgage or the statutory power of sale under the *Property Act*.[1] In Prince Edward Island the mortgagee relies on the power of sale set out in the mortgage.[2] Similarly in Newfoundland and Labrador the power of sale remedy is most commonly used.[3] Professor Joseph Roach, in *The Canadian Law of Mortgages*[4] notes that in Nova Scotia the order of foreclosure includes not only a declaration that the equity of redemption will be foreclosed unless the debt is paid within the stipulated time, but an order that the property be sold for the payment of the debt if the mortgagor fails to exercise the right to redeem. In Nova Scotia the process was referred to as foreclosure and sale and is now called foreclosure, sale and possession.

[10] The process for foreclosure and sale, as it developed in Nova Scotia, is different from the process in the rest of Canada. An order for foreclosure, sale and possession in Nova Scotia contains provisions for the sale of the property at auction. The mortgagee may and usually does bid at the auction. A feature of the Nova Scotia practice, described as "anomalous" in *Falconbridge on Mortgages*[5] is that even though the mortgagee has taken the land absolutely by the purchase at the sheriff's sale or auction, the mortgagee can still claim to recover the deficiency.

[11] In other provinces simple, strict or pure foreclosure is routinely used to extinguish the equity of redemption. The judicial sale is not part of the process.

[12] The Nova Scotia order for foreclosure, sale and possession, as distinct from the foreclosure processes in other provinces, is a function of historical

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[1] R.S.N.B. 1973, c. P-19
[2] *Federal Business Development Bank v. Group Plus One Ltd*., [1985] P.E.I.J. No. 27, Nfld. & P.E.I.R. 267, at 268 (P.E.I.C.A.); "The time honoured practice in this Province, the matter of mortgage sales, has been by way of proceeding under the power of sale provisions contained in the document itself, as provided for in the statutory Short Forms of Indentures provisions."
[3] *Judicature Act*, R.S.N.L. 1990, c. J-4
[4] LexisNexis 2010, p. 136
[5] Rayner and McLaren, Canada Law Book Limited, (1977) 524

developments. Those historical developments are relevant to the issue of whether simple foreclosure is a remedy that is available here. The distinctions between law and equity and the courts that dealt with them may actually make a difference in this case.

Law and Equity

[13] Under the pure-form common law mortgage the legal title to the property was conveyed as security, to the mortgagee. The mortgagor had a contractual right to redeem the property that was secured by the mortgage. Under common law the date for repayment was strictly enforced. If the mortgagor failed to make the payment on the date required, he would lose the right to redeem the property forever. That harsh result would apply even if the amount that was owing was very small or if the delay was minor.

[14] Equity stepped in. The courts of equity, despite the reputation they got from works like Dickens' *Bleak House,* tried to mitigate some of the harshness of the common law. That is where the concept of an equitable right to redeem, or the equity of redemption, came from. The mortgage was then treated as a form of security only and the rights that remained after the mortgage was granted were protected by equity, in the Courts of Chancery. Mortgagors could redeem their properties even after the strict time had passed for payment. But some limits had to be imposed. The mortgagee had to have some ability to enforce the security of the mortgage. The procedure for terminating the mortgagor's equity of redemption was developed. That is what foreclosure is. The equity of redemption is an equitable concept and its extinguishment is a matter for equity as well.

[15] In *Pew v. Zinck*, 1951 CarswellNS 11, (1950-1951) 27 M.P.R. 1, Chief Justice Ilsley provided a summary of the development of the procedure in actions for foreclosure in Nova Scotia. At first the English procedure was followed. The English Chancery Court procedure was to have the mortgagee file a Bill of Foreclosure in the Court of Chancery. Anyone interested in the equity of redemption, such as the mortgagor and subsequent encumbrancers, would have to receive notice and be joined in the Bill of Foreclosure. The court would set a date for payment and if payment was not made, the court would be left to the common law legal rights. That would mean that the mortgagee would take possession.

[16] That procedure was replaced by the procedure used in the Irish Court of Chancery. Foreclosure, as an equitable remedy, was granted by the Chancery Court in Nova Scotia. The process was similar to the foreclosure and sale process used in

Nova Scotia today. It appears to have been cumbersome in its application. In 1833 *An Act for the More Easy Redemption and Foreclosure of Mortgages*[6] was passed. Ironically, Chief Justice Ilsely points out that this was no doubt partly because of dissatisfaction with the expense and delays in the Court of Chancery. The act conferred jurisdiction on the Supreme Court, a common law court, to grant orders for foreclosure and sale in certain forms of action. It was an adoption of a 1734 English statute. But the English statute did not confer on the English common law courts the right to order a sale. The 1833 legislation brought together foreclosure and sale in the Supreme Court. So, the Chancery Court used the standard English procedure, similar to simple foreclosure, later started doing both foreclosure and sale and in 1833 the jurisdiction was granted to the Supreme Court. Eventually, the Supreme Court acquired the equitable jurisdiction of the Court of Chancery and that is why the original English foreclosure process becomes relevant again.

[17] In a 1983 article entitled, "Foreclosure and Sale in Nova Scotia" prepared for the 1983 Bar Refresher, A.G.H. Fordham Q.C. of the Office of the Legislative Counsel reviewed the history of process in Nova Scotia and in England. He noted that the equitable jurisdiction in the Nova Scotia Supreme Court to order foreclosure would have passed from the old Court of Chancery. In 1884, when Chancery Court was abolished in Nova Scotia, equitable jurisdiction was conferred on the Supreme Court of Nova Scotia. The *Judicature Act* continues that.

[18] The Court of Chancery in England could not order a sale in a foreclosure proceeding but only a foreclosure.[7] It required enabling legislation in order to do that. In Nova Scotia however, from early times, the Court of Chancery was ordering both foreclosure and sale. Earlier however, it was granting foreclosure orders and not orders for foreclosure and sale.

[19] Mr. Fordham asked, rhetorically, whether the Nova Scotia Supreme Court still had authority to order foreclosure, instead of foreclosure and sale. In other words, was the remedy of simple foreclosure still available because the Nova Scotia Supreme Court continued to have the jurisdiction in equity that was used to grant the remedy in the first place before the Irish Chancery procedure was adopted?

> It will be recalled that in the very early days the Court of Chancery in Nova Scotia had, apparently, jurisdiction to decree strict foreclosure and simply changed its

[6] Stats. N.S. 1833, c.19
[7] *James v. Bayley* (1855) 51 E.R. 1161, *Cox v. Tool* 52 E.R. 588

> practice to order foreclosure and sale, and that the legislation, just discussed, has transferred the jurisdiction of the old Court of Chancery to the Nova Scotia Supreme Court. It may very well be that this equitable jurisdiction to order strict foreclosure still exists, although it has not been used for very many years.[8]

[20] Mr. Fordham noted that the Civil Procedure Rules apparently recognized this. Rule 12.04 then described the material to be submitted to the Court for "foreclosure or foreclosure and sale".

[21] The *Judicature Act* refers at s. 42 to "an order for foreclosure or foreclosure and sale". That suggests that the two orders are different. There can then be a foreclosure order without a provision for a sale which must mean a foreclosure order that has the effect of vesting the property in the mortgagee.

[22] The simple foreclosure remedy is referred in the current Civil Procedure Rules at Rule 72.15.

> This Rule 72 does not preclude a party from obtaining, in an action or on an application, an order foreclosing interests in the equity of redemption of property other than by foreclosure, sale, or possession, such as by another kind of sale by the court, by simple foreclosure, or by receivership to enforce a mortgage or other charge.

[23] The Rules do appear to contemplate the process proposed by CIBC.

[24] Justice Moir of this court has described the process involved in simple foreclosure in two 2016 cases.[9] In neither one was simple foreclosure and its availability a central issue. The cases dealt with the requirement for notice to subsequent encumbrancers.

[25] As noted in Mr. Fordham's article and Chief Justice Ilsley's opinion in *Pew*, the jurisdictions of equity and common law were brought together in the Nova Scotia Supreme Court in 1884. The court still has that broad equitable and common law jurisdiction. The equitable remedy of simple foreclosure fell into disuse as rules were developed to define the process for foreclosure, sale and possession. The court has not lost the equitable jurisdiction that it has inherited from the English Court of Chancery and the Nova Scotia Court of Chancery and Court of Equity.

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[8] Fordham, at p. 4

[9] *Royal Bank of Canada v. Robertson* 2016 NSSC 176, at para. 24, *Toronto-Dominion Bank v. MacLean* 2016 NSSC 221, at para. 30

[26] That position may not be accepted by everyone. Professor Roach in *The Canadian Law of Mortgages* says that in Nova Scotia an action for strict or pure foreclosure "is not available to the mortgagee, as the only procedure to dispose of real property for nonpayment of mortgage debt is the judicial sale, often referred to as foreclosure and sale".[10] Professor Roach refers to a passage from Justice Hart in *Central Trust Co. v. Adshade*.

> In this province the law developed differently from that of England and Ontario and followed a practice originating in Ireland… The bill, after setting forth the mortgage, alleges what sum is due to plaintiff [mortgagee] for principal and interest. It then claims payment of such sum, and, in default, prays a foreclosure, and 'that a sale of the said premises may be made, and that out of the proceeds of such sale the amount due' should be paid to the plaintiff [mortgagee].[11]

[27] Professor Roach says that it follows from this passage that upon non-payment of the debt, the mortgagee may obtain an order similar to an interlocutory judgment, formally called a judgment *nisi*. Under that judgment if the mortgagor does not exercise the right to redeem within the prescribed delay, the property is sold pursuant to an order of the court. The proceeds are used to pay the mortgage debt and the surplus is paid to the mortgagor. If there is a deficiency the mortgagee can undertake to recover the amount still owing by means of a personal action on the covenant in the mortgage.

[28] That does summarize accurately the foreclosure and sale process that is almost always used in Nova Scotia. It does not mean that the Nova Scotia Supreme Court does not still have the jurisdiction as a court of equity, inherited from the Court of Chancery, to order a simple foreclosure.

Simple Foreclosure

[29] The mortgage in this case contains a provision that sets out the availability of the simple foreclosure remedy in the event of default.

> **10.3 Enforcing our rights**
>
> If you do not make one or more payments when required or if you do not meet one or more of your other obligations under the mortgage, we may enforce our rights by taking certain actions. We have the right to take one of more of these actions at the same time or in any order we choose. These actions include:

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[10] Roach, Joseph E., at p. 136

[11] [1983] N.S.J. No. 56, 60 N.S.R. (2d) 414, 128 A.P.R. 414 (N.S.C.A.), at paras. 17-18 quoting *Kenny v. Chisholm* (1883) 19 N.S.R. 497, at 503 (N.S.C.A.)

…

- **Foreclosure or sale.** We may take court proceedings to foreclosure your right, title and equity of redemption to your property. If we obtain a final order of foreclosure from the court, your property will belong to us. …

[30] CIBC in this case pleaded both simple foreclosure and foreclosure, sale and possession as alternative remedies in the Statement of Claim.

[31] The process is not a recent invention. It is not inconsistent with the process that is widely used in other jurisdictions in Canada.

[32] The court, as the inheritor of the equitable jurisdiction of Chancery Court in dealing with foreclosure, must consider the implications of any procedure for the rights of borrowers.

> It seems that a borrower was such a favourite with courts of equity.[12]

[33] A simple or absolute foreclosure remains under the supervision of the court. The rights of the borrower are protected, as they are in other provinces.

[34] The rights of subsequent encumbrancers are not sacrificed to expediency. They are notified and have the opportunity to present, defend or contest the proceeding when the confirmatory order is sought.

[35] Practically, in many if not most cases, when a sale is ordered, the property is bought by the mortgagor for the amount of the balance owning. This process omits that step while respecting the rights of both the mortgagor and the subsequent encumbrancers.

[36] I will grant the Order for Foreclosure sought by CIBC.

Campbell, J.

[12] *Salt v. Marquess of Northampton*, [1892] A.C.1 (H.L.), at 19, per Lord Russell