

SUPREME COURT OF NOVA SCOTIA

Citation: *Credit Union Atlantic Limited v. Donkin*, 2020 NSSC 264

Date: 20200929

Docket: Hfx 475357

Registry: Halifax

Between:

Credit Union Atlantic Limited

Plaintiff

v.

Scott Douglas Donkin

Defendant

DECISION

RE: MOTION FOR DEFICIENCY JUDGMENT

Judge: The Honourable Justice Jamie Campbell

Heard: August 12, 2020, in Halifax, Nova Scotia

Counsel: Richard Bureau and Ryan Christen, for the Plaintiff
Craig Arsenault, for the Defendant

[1] This matter was heard as a motion for deficiency judgment on August 12, 2020. The parties filed post hearing briefs, the last of which was received on September 23, 2020.

[2] Credit Union Atlantic foreclosed on five properties owned by Scott Donkin. After sale of the properties CUA has claimed a deficiency in the amount of \$61,814. Mr. Donkin disputes the amount and says that there should have been a surplus.

[3] The parties agree that the balance due as of the foreclosure sale was \$789,598.34 and that the taxed costs were \$3,277.81. CUA claims that the gross expenses were \$55,614.37 and from that would be deducted \$24,882.03 for expenses claimed that did not have supporting invoices. To that point the balance was \$823,608.49. Mr. Donkin's counsel says that they have "difficulty accepting" CUA's gross expenses and believe that the plaintiff has failed to prove and justify those expenses. On that issue Mr. Donkin's argument provides no further detail as to why there should be a difficulty in accepting the gross expenses as claimed by CUA.

[4] A major dispute is about the amount that was realized on the sale of the properties. The properties were sold, and the net proceeds were \$773,815.29. That leaves a deficiency of \$49,793.20. To that CUA adds \$7,887.88 reflecting interest at 4.9% on balance of the mortgage from September 28, 2018 to December 14, 2018, the date of sale and a further \$4,132.92 as interest on the deficiency of \$49,793.20 from December 14 to the date of the hearing of this motion, on August 12, 2020.

[5] The total deficiency according to their calculations is then \$61,814. That is the amount that CUA claims.

[6] Mr. Donkin says that the properties were worth far more than the sale price. As of May 2017, they were valued at over \$1,116,500. In November 2018 they were assessed at \$1,060,000. If that value were used instead of a deficiency there would be a surplus. He says that CUA sold the properties at fire sale prices.

[7] Mr. Donkin also says that CUA did not collect rents from the properties. The properties were taken under the control of CUA on November 15, 2018 and they were listed for sale 6 months after the foreclosure. Mr. Donkin says that the only evidence of an attempt to collect rents from the tenants of the buildings was a letter

requesting payment and there is no proof that all of the tenants received the letter. CUA did not make any applications to the Director of Residential Tenancies.

[8] Mr. Donkin relies on *Civil Procedure Rule 72.13*. That rule sets out the procedure for calculating a deficiency. A judge can calculate the deficiency by subtracting one of several amounts from the outstanding principal, interest, judgment interest, reasonable charges authorized by the mortgage, and costs. Each of the amounts refers to the sale of the property at a public auction. Subsection 72.13(b) is the one which Mr. Donkin specifically cites. He says that the amount deducted should be the amount realized on the sale “and the resale price received by the mortgagee is both reasonable and greater than the bid”. He says that the resale price was not reasonable and that the amount that CUA accepted was not only unreasonable but that they were grossly negligent in accepting it. If the amount were not reasonable, then the recourse would be subsection 72.13(1)(d) which says that the amount should be the “value of the property in all other circumstances”.

Property Values

[9] There are five properties involved. They were appraised by Greg Lockyer on behalf of Scott Donkin in May 2017. The appraisals then were as set out below:

- 10 Clement Street: \$282,500
- 12 Clement Street: \$280,000
- 50A Main Avenue: \$207,000
- 50B Main Avenue: \$192,000
- 33A Lucien Drive: \$155,000

[10] The total appraised value of the 5 properties was, at that time, \$1,116,500. Those were the appraisals that were used to get the mortgage in the first place. The CUA mortgage was signed on June 26, 2017 for \$750,000. At the time there was a blanket mortgage in place with a private lender, Doreen Bower. That was for \$800,000. When Mr. Donkin sought financing from CUA, the arrangement was that the CUA mortgage would take priority over the private mortgage. A postponement agreement was signed to place the Bower mortgage security behind the CUA mortgage.

[11] The rents that would ordinarily be collected based on the leases for the 5 properties would total \$7,250 each month.

[12] CUA foreclosed on the properties when no payments at all were made on the mortgage. The notice of action was filed in April 2018. The Order for Foreclosure Sale and Possession was issued on September 28, 2018. At that stage CUA was required to start arranging to secure the properties and have them made ready for sale. On November 15, 2018, CUA through their solicitor wrote to Mr. Donkin to say that if any tenants contacted him about paying rent, he was to direct them to his law firm. The lawyers also wrote to the tenants to say that all future rents should be paid to CUA through them. The only rent that CUA received was in May 2019 from one of the tenants in the amount of \$1,295.

[13] After the foreclosure, “drive by” appraisals were done. The values for those appraisals, done in November 2018, were different to those obtained from the appraisals in May 2017 done by the same appraiser. Also, 50 Main Avenue was appraised as one property rather than as 50A and 50B.

- 33A Lucien Drive: \$150,000 to \$165,000
- 50 Main Avenue: \$195,000 to \$210,000
- 10 Clement Street: \$250,000 to \$270,000
- 12 Clement Street: \$250,000 to \$280,000

[14] The foreclosure sale took place on December 14, 2018. CUA was the highest bidder at the public auction and bought the properties for a total of \$625,000.

[15] CUA, having acquired the properties, like most lenders, became focused on selling them. That involves determining the most favourable listing price having regard to the costs of doing repairs and maintenance and the monthly costs of having possession of those properties. The mortgagee could spend a significant amount of money improving a property to make it more attractive for sale. That involves taking a risk that the improvements will result in a greater increase in the sale price than both the costs to do those repairs and the costs of maintaining the property while the work is being done. Some repairs just have to be done in order to be able to sell a property. The mortgagee is then left holding the property and making the repairs before listing the property for sale.

[16] These properties were a mess. A fine had been issued to Mr. Donkin for unsightly premises on December 2, 2018. In January 2019, an Order to Remedy Residential Occupancy Conditions was received from the Halifax Regional Municipality with respect to 50B Main Avenue. The list of repairs had to be completed before there could be any disposition of the property. The other properties were in a decrepit state as well.

[17] CUA had appraisals done by Fennell and Associates. The written appraisals were done in February and March of 2019. They were not “drive by” appraisals but were full appraisals taking into account the inside and outside conditions of the properties. The conditions inside these buildings, both as described and as seen in the photographs, are appalling. The buildings were in such a condition that a real estate agent could not properly list them for sale.

- 10 Clement Street: \$175,000
- 12 Clement Street: \$185,000
- 50A Main Avenue: \$172,000
- 50B Main Avenue: \$172,000
- 33A Lucien Drive: \$140,000

[18] So, as of early 2019, CUA had 5 properties that were in a deplorable state and with a fair market value of \$844,000. The value on a “forced sale” was established as being \$750,000. The forced sale value takes into account the fact that buyers know when properties are being sold under conditions that are not “normal”. The seller is not in a position to hold onto the properties indefinitely or even in the longer term. The force sale value reflects that market reality.

[19] Mr. Donkin has not provided any evidence to dispute the Fennell and Associates conclusion about the value of those properties. He said that the condition of the properties had deteriorated while under the control of CUA. There is no evidence to support that contention. That is his firmly held belief, but there was no evidence put forward on the motion to show that the condition of the properties at the time of the foreclosure was substantially better than it was at the time of the appraisals in early 2019. The kinds of concerns raised about the properties were not the kinds of things that could be attributed to tenants wreaking havoc on the properties as the end of the tenancy drew close. These were long-term problems.

[20] CUA had to decide about the extent to which repairs would be done and what would be required to get the properties listed for sale. They relied on the Fennell and Associates appraisals. Again, there was no evidence to dispute the accuracy of those appraisals.

Rent Collection

[21] CUA were obliged to make efforts to collect rents. Mr. Donkin said that they did not try hard enough. He says that they should have taken the tenants to the Residential Tenancies Board.

[22] The duty owed to a mortgagor by the mortgagee is not to act as a prudent owner. The standard is one of either negligence or gross negligence, as noted in *Bridgewater Bank v. Viner*, 2019 NSSC 363. The mortgagee is in a position with respect to sale of a property that is not at all like that of an owner. Mortgagees are faced with calculating the risk of incurring the expenses involved in maintaining a property for an extended time against the potential that by testing the market longer a higher price might be obtained. With regard to rent collection the mortgagee must, of course, account for any rents collected.

[23] Becoming a commercial landlord in the short-term is another matter. Letters were sent to the tenants of these buildings indicating that rent should be paid to CUA. One tenant paid rent. Others just left. Some may have been in arrears of rent at the time of the foreclosure. The mortgagee is obliged to collect the rents and inform the tenants of their obligations to pay rent. Requiring mortgagees to actively pursue tenants for the collection of outstanding rent would impose a potentially significant cost. The mortgagee would then become involved with the process under the *Residential Tenancies Act*, RSNS 1989, c. 401. The cost of collection efforts could be substantial, and the results may not justify that expenditure. The time involved in the process may be longer than the period that the mortgagee would anticipate owning the property. The mortgagee could also potentially face arguments put forward by tenants about substandard rental accommodations.

[24] CUA was not negligent in fulfilling its obligation to collect rent. That obligation should be assessed having regard to the state of the rental properties themselves. Given the condition of these properties it would be reasonable to question whether collection of rent might present costs and delays beyond those that might be anticipated for reasonably maintained rental units.

Sales

[25] When the properties were listed for sale, the list prices were in each case greater than the amount of the 2019 appraisals though substantially less than the amounts of the 2018 appraisals. Offers to buy four of the properties were received within 25 days and all four were sold during the month of August. Lucien Drive was on the market for 121 days until an offer was received in October 2019.

[26] In total the properties were sold, and the proceeds of sale were \$827,100. With the deduction of legal fees and real estate commission the net was \$773,815.29. That amount was \$70,184.71 under the appraised values from earlier in 2019. It was not an unreasonable price.

[27] While the plaintiff in a claim for deficiency has an obligation to act reasonably in obtaining a reasonable price for the properties that are the subjects of a foreclosure, it is not obliged to seek the optimal return while incurring significant risk. Mortgagees do not anticipate and should not be required to anticipate a long-term relationship with the property. Sometimes, in order to sell it, they must expend money to have it brought up to a standard that will permit it to be sold. They are not obliged to act like an owner who may decide to hold onto a property until the market recovers or who calculates that by making substantial improvements, they may realize an even more substantial profit. They must act reasonably, as mortgagees, considering the nature of their relationship to the property and the mortgagor who may be called upon to pay the deficiency.

[28] CUA in this case sought an appraisal of the properties. That appraisal was based on the current condition of the properties. There was no evidence that the appraisal was substantially less than the value in late 2018 because CUA failed to protect the properties.

Conclusion

[29] The amount realized from the sale of the properties was reasonable having regard to all the circumstances. The balance due at foreclosure was \$789,589.54. Taxed costs were \$3,277.81. Gross expenses were \$55,614.37 and from that should be deducted \$24,882.03 for expenses not supported by receipts. The amount owing was then \$823,608.49. The net proceeds of sale were \$773,815.29 leaving a deficiency of \$49,793.20. To that must be added interest from September 28, 2018 to December 14, 2018 at \$7,887.88 and interest from December 14, 2018 to

August 12, 2020, the date of hearing, at \$4,132.92. The total deficiency is then \$61,814.

[30] The actions of CUA as mortgagee in this case were reasonable. The prices obtained for the properties were reasonable in the circumstances and the efforts to collect rents were also reasonable.

[31] The amount of the deficiency is set at \$61,814.

[32] Costs under Tariff C for a motion of one-half day would be in the amount of \$1,000. Costs in that amount are awarded to the successful party, Credit Union Atlantic.

Campbell, J.