

SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Kamstra*, 2022 NSSC 5

Date: 20220114

Docket: Halifax, Hfx No. 480309

Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Petra G.A. Kamstra and Alain Francois Morin

Defendants

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: September 16, 2021 in Halifax, Nova Scotia

Written
Decision: January 14, 2022

Counsel: Joshua Santimaw and Luke Godin, for the Plaintiff
Dr. Alain Morin, the Defendant

By the Court:

BACKGROUND

[1] This proceeding arises from the Royal Bank of Canada's ("RBC") motion for an order for an assessment of deficiency pursuant to *Civil Procedure Rule 72.12*. On December 11, 2018 Justice Rosinski issued an Order for Foreclosure, Sale and Possession. The amount due on a credit line was settled at \$13,771.43 with interest on \$13,458.29 at the rate of 3.95% a year from December 11, 2018. The amount due on a mortgage loan was settled at \$182,526.75 with interest on \$179,151.84 at a rate of 2.94% a year from December 11, 2018.

[2] In 2009 RBC extended credit to the Defendants which was secured by their property at 3418 Highway #1, Aylesford East, Nova Scotia. On February 13, 2017 Mr. Morin signed a Quit Claim Deed in favour of Ms. Kamstra. It is apparent that up until that time the loan obligations were in good standing. It appears from the file that Mr. Morin moved to Alberta leaving the Nova Scotia property, and its attendant financial obligations, in the care of Ms. Kamstra. Obviously, the trust Mr. Morin placed in Ms. Kamstra was not honoured and the loan and mortgage fell into arrears.

[3] RBC filed its Notice of Action on September 13, 2018 when the Defendants were 6 months in arrears. A demand for payment went unheeded. As of May 11, 2018, the Defendants were in arrears in the total amount of \$192,908.74.

[4] The sale of the subject property was scheduled for February 8, 2019. The foreclosure report contained the following:

The said lands and premises were sold by me at public auction held on February 8, 2019 at the hour of 12:00 p.m. at the Kentville Justice Centre, 87 Cornwallis Street, Kentville, NS B4N 2E5, after having been exposed for sale for some time and knocked down to Royal Bank of Canada for the price of Nine Thousand Dollars (\$9,000.00), being the highest bidder at the sale.

This number was required to pay the auctioneer's fees and the property taxes. RBC then took steps to put the property on the open market.

[5] The first step was to commission an appraisal to determine value as of July 19, 2019. The appraisal demonstrated that "as is", the property had a value of \$130,000.00 and "as if cleaned" the property had a value of \$145,000.00. Subsequently, a comparative market analysis was conducted. That process determined that the fair market value of the property was \$139,000.00 with a likely selling range of \$130,000.00 to \$135,000.00. The analyst's report indicated "this home requires extensive repairs and upgrading". The following deficiencies were noted:

- Home needs to be sterilized
- Bathrooms need to be scrubbed
- Deck needs removing
- Holes in kitchen flooring
- Windows are old and not efficient
- Roof shingles will need replacing

A review of the photos in this original appraisal indicate the property was severely run down. Garbage was strewn about and the home look uninhabitable.

[6] On August 14, 2019 a seller brokerage agreement was entered into between RBC and Royal La Page with a listing price of \$143,000.00. The prospective purchaser made an offer of \$122,000.00. On August 25, 2019 RBC made a counter offer for \$130,000.00 which was accepted. The transaction closed as scheduled.

[7] The following Statement of Adjustments reflects the terms of this transaction:

File No. 119900.1410	Date: October 9th, 2019
Transaction: Royal Bank of Canada	To: Ryan & Maria Heikoop
<u>Property located at: 3418 Highway #1, Aylesford East, Kings County, NS</u>	
COST OF PROPERTY TO PURCHASE:	
Purchase Price	\$130,000.00
Taxes Paid in Advance	
Condo Fees or Lot Rent Paid in Advance	_____

TOTAL COSTS		\$130,000.00
CREDITS TO PURCHASER:		
Deposit		\$500.00
Taxes - \$1,270.52	/366 192	\$666.50
Condo	/31	\$ 0.00
Lot Rent	/31	\$ 0.00
Interest on Arrears of Taxes		<u>\$ 38.05</u>
TOTAL CREDITS		<u>\$1,204.55</u>
BALANCE DUE TO VENDOR		\$128,795.45

RBC's claim against the Defendants as of May 11, 2018 was \$192,908.74. On the sale RBC realized \$128,795.45. This left a shortfall of \$64,113.29.

[8] On August 16, 2019 RBC filed a Notice of Motion in which it sought an Order for Deficiency. It was scheduled to be heard on September 17, 2019. On that date RBC requested an adjournment as Mr. Morin indicated he wished to contest the claim and Ms. Kamstra had not been served. This motion was adjourned until November 29, 2019, then March 26, 2020 and it was finally heard on September 16, 2021. During this period of time Mr. Morin raised several issues that he wanted resolved before the motion was heard. In correspondence dated September 12, 2019 Mr. Morin stated his position on the motion:

1. You failed to serve the Notice of Motion and failed to file the affidavit of service with your motion;
2. You failed to inform the court that the RBC appraised the property for at least \$266,000 in 2012, and, given that prices went up quite substantially, you failed to explain to the Court the reason for the extraordinary discrepancy of over \$120,000 between the appraisal you filed with your motion and the appraisal RBC obtained to extend the mortgage;

3. You failed to inform the court that the RBC made no effort whatsoever to sell the property and to recover the amounts outstanding from the sale of the property even though your own recitation of the law makes it clear that the RBC "must make reasonable efforts to dispose of the property at the best price that can be obtained at the earliest possible time" (clearly, no efforts do not amount to "reasonable efforts");
4. You failed to file any affidavit sworn by the RBC to support the RBC's position, in violation of the practice directions; and
5. The appraisal you obtained months after the sale at the auction was "extraordinary low, unreasonable, and also fatally flawed" (I note that the appraisal author herself – Rebekah E. Wetmore – stated clearly that the BoyneClarke, who commissioned the appraisal, "did not require a report [appraisal] prepared to the standard appropriate for court purposes or for arbitration" yet you are now using precisely for purposes for which the appraisal report as not prepared for.)

Mr. Morin argued that RBC was not entitled to any deficiency judgement whatsoever and invited it to withdraw the motion. Given these submissions, RBC requested a half-day contested chambers hearing. Due to the COVID-19 pandemic that half day was adjourned until September 16, 2021.

[9] RBC's claim for deficiency was calculated as follows:

Balance as of Foreclosure Sale	\$196,298.18
Interest on Credit Line \$13,458.29 from December 11, 2018 to March 4, 2019 (83 days @ 3.95%)	\$120.88
Interest on Mortgage \$179,151.84 from December 11, 2018 to March 4, 2019 (83 days @ 2.94%)	\$1,197.72
Interest on Credit Line \$13,458.29 from March 5, 2019 to September 4, 2019 (183 days @ 5.00%)	\$337.50
Interest on Mortgage \$179,151.84 from March 5, 2019 to September 4, 2019 (183 days @ 5.00%)	\$4,491.07

SUBTOTAL

\$202,445.35

Plus Auctioneer's Fees and Taxes
Plus Taxes Costs (Exhibit "C")

\$1,229.84
\$3,910.05

Less Appraisal
TOTAL DEFICIENCY

\$145,000.00
\$62,585.24

It is of some note that this figure does not include protective disbursements and that RBC utilized the appraisal (\$145,000.00) instead of the sale price of the property (\$130,000.00) to arrive at a figure more favourable to the Defendants.

[10] *Civil Procedure Rule 72.12* addresses a motion for Assessment of Deficiency as follows:

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;

The public auction occurred on February 8, 2019. The effective date is March 4, 2019 which is 15 days after the public auction. The six-month limitation fell on September 4, 2019. This motion was filed on August 14, 2019. As such, RBC is in compliance with the limitation period.

[11] After a review of the rule, practice memorandum and case law, I am satisfied that RBC's motion for deficiency is in compliance with the 6 month limitation. However, Mr. Morin has raised a number of other issues which I will now address.

FAILURE TO SERVE

[12] A review of the file correspondence satisfies me that Mr. Morin agreed that he would accept service by email. He stated he would consider the service requirement met once he confirmed receipt. I have an email from RBC counsel to Mr. Morin dated March 6, 2020 in which the following appears:

Dear Mr. Morin

Please find attached the following in relation to the March 26, 2020 hearing to assess the deficiency:

1. Supplementary affidavit of Mr. Godin;
2. Affidavit of Rene Saulnier;
3. Book of Authorities;
4. Brief of the Plaintiff.

Regards
Luke

This email was attached to a sworn affidavit. It was sent in advance of March 26, 2020, a date that had to be adjourned as a result of COVID-19 pressures.

[13] Mr. Morin, in a document dated September 16, 2019, raised the issue of service as follows:

The RBC counsel – Mr. Godin – failed to serve the Notice of Motion he filed on August 16, 2019, and scheduled for September 17, 2019 at 9:30AM. He served it on me only on Friday, September 13, 2019, only after repeated requests.

Mr. Godin emailed me on September 13, 2019 that he would be adjourning the motion so that the RBC can file additional materials and so that I can file materials.

However, when I asked Mr. Godin what his intentions were in not serving me and wanting to file additional materials, he did not reply to these questions.

The September 17, 2019 date was adjourned to accommodate Mr. Morin's stated intention to challenge the motion. Even if the documents were served late for the September 17, 2019 date, they were in Mr. Morin's possession long before the actual hearing on September 16, 2021. Between those two dates much information flowed between RBC and Mr. Morin in an effort to move the file along. There is no merit on the issue of service.

THE 2012 APPRAISAL

[14] Mr. Morin argues that RBC failed to alert the Court to a 2012 appraisal that valued the subject property at \$266,000.00. He states in his September 17, 2019 response brief:

The RBC claims that the amount owing on the mortgage, associated line of credit and interest is \$202,445.35. Accordingly, the value of the Property exceeds the amount claimed by the RBC by more than \$60,000 relative to the R&J \$266,000 Appraisal. However, since that time, the property values in the area – Kings County - have increased substantially leaving even greater equity in the Property.

The RBC did not disclose the existence of the R&J \$266,000 Appraisal and failed to offer any explanation whatsoever for the extraordinary discrepancy between the R&J \$266,000 Appraisal and the \$145,000 (hearsay) Wetmore Appraisal the RBC uses to calculate the deficiency.

In these circumstances, Mr. Morin requests that the Court sets the value of the Property to \$126,000 based on the RBC's own appraisal of the Property made at the time of the RBC extended the conventional Mortgage to the Defendants, and dismisses the RBC's motion.

It is not uncommon that an appraisal at purchase will be greater in value than the appraisal at foreclosure. I know of no authority requiring a mortgagee to file the earlier appraisal with the Court.

[15] In this particular case the drop in value can be explained by comparing the two appraisals. The following appears in the 2012 Appraisal:

The exterior of the home has been completely renovated with wood cedar shingles. The interior of the home is in various stages of renovation. The main level has a large addition of a family room with a wood stove for alternative heating. There is a pass through area that was a bath, however it has been totally gutted with the exception of removing a neo-angle shower stall. There is a new bathroom with the toilet and sink installed and an old fashioned claw foot tub that will be installed. The kitchen is a country style with a huge centre island and various cabinets around the perimeter. The dining room is large and still has the original plaster walls and ceiling. The upper level of the home has been totally renovated. There are 3 good size bedrooms and 2 small bedrooms. The second level bath has a corner whirlpool tub. The trim in the home is mostly pine board with solid wood doors. The home has softwood floors throughout most of the home and high ceilings with some exposed beams.

Mr. Morin signed off on the property in 2017. Ms. Kamstra became the only title holder. Not only did she fail to make the mortgage payments but she allowed the property to deteriorate. In a March 21, 2019 property manager report the author stated, "There are people boarding here but do not pay any rent". I find no merit in this argument.

RBC's EFFORTS TO SELL

[16] Mr. Morin states that RBC made no effort to sell the property for over six months. In *Royal Bank of Canada v. Marjen Investments Ltd.*, 1998 NSCA 37 the Court stated at paragraph 59:

. . . where the mortgagee has purchased at the Sheriff's Sale . . . It goes without saying that the mortgagee must manage the property prudently and make reasonable efforts to dispose of the property at the best price that can be obtained at the earliest possible time. . . .

I am satisfied that RBC were diligent in its' efforts to sell the property. A great deal of maintenance was required and the tenants had to be evicted before it could be seriously marketed. I find no merit in this argument.

THE 2018 APPRAISAL

[17] Mr. Morin alleges the 2018 appraisal was "extraordinarily low, unreasonable and also fatally flawed". I see no merit in this argument. The author was fully qualified and the appraisal reflected what she saw on the ground. I refer to *Royal Bank of Canada v. Marjen Investments Ltd.*, *supra*, at paragraph 28:

The primary purpose of the appraisal reports, on an application for a deficiency, is to assist the Court in fixing a fair value when the mortgagee has purchased the property at the Sheriff's sale, often for a nominal amount, and has not resold it. Where the property has been resold, an appraisal report provides the Court with a hypothetical value to which to compare the price actually realized. If there is little difference, the inquiry into the reasonableness of the resale price is simplified.

Where, however, there is a significant difference in the two values, the Court will more closely scrutinize the circumstances surrounding the resale.

I am satisfied that the 2018 appraisal reflected the real value of the property at that time. Also, the best indicator of value is the market and I am satisfied that the market reflected what appeared in the appraisal. I find no merit in this argument.

[18] Mr. Morin filed several affidavits and briefs from September 16, 2019 until March 26, 2020. He raised various issues in addition to those issues addressed above. I will attempt to define and respond to them.

MS. KAMSTRA'S OBLIGATIONS

[19] Mr. Morin executed the Quit Claim Deed in 2017. He feels that such should have released him from his mortgage obligations. He blames this on poor legal advice. Mr. Morin's obligations to RBC are legal. It is unfortunate that Ms. Kamstra is not in a position to participate in addressing this deficiency.

THE SEPTEMBER 16, 2019 ADJOURNMENT

[20] In a letter to Mr. Godin and Justice Rosinski, dated December 31, 2019, Mr. Morin stated:

RBC obtained the Order of Honourable Justice Peter Rosinski issued on September 16, 2019 which was obtained *ex parte* without notice to myself, and which, according to Mr. Godin, makes recitations of facts that never happened.

It is of note that in advance of the September 17, 2019 date, Mr. Morin was complaining about late service and advised RBC's counsel that he would be contesting this motion. In the face of these statements, counsel properly advised the court that the matter would not be proceeding as scheduled and that a "Special Chambers" slot would be required. Mr. Morin seems to think something nefarious was going on when, in fact, the adjournment was prompted by his stated intention to contest the matter. There is no merit to this argument.

CONCLUSION

[21] I am satisfied that this Motion for Deficiency was conducted in compliance with the Rules, the practice memorandum and the jurisprudence. I grant RBC a deficiency of \$62,585.24. If the parties cannot agree on costs, I will accept written submissions within 30 days of this decision.

Coady, J.