

SUPREME COURT OF NOVA SCOTIA
Citation: *Brown v. MacGillivray*, 2023 NSSC 297

Date: 20230310
Docket: 511074
Registry: Sydney

Between:

Stephen and Brenda Brown

Plaintiffs

v.

William MacGillivray

Defendant

Decision

Judge: The Honourable Justice Patrick J. Murray

Written Decision: March 10, 2023

Counsel: Harvey McPhee KC and Kelly O'Brien for the Plaintiff's,
Mr. and Mrs. Brown
William MacGillivray, self-represented

By the Court:

Introduction¹

[1] The Plaintiffs, Stephen Brown and Brenda Brown, have filed a Motion seeking an Order for Simple Foreclosure or in the alternative, an Order for Foreclosure, Sale and Possession.

[2] The Notice of Action and Statement of Claim was filed on December 3, 2021, and served upon the Defendant, William MacGillivray on December 10, 2021. Mr. MacGillivray filed a Defence to the Action on January 7, 2022.

[3] The Defence filed by Mr. MacGillivray was accompanied by an affidavit, sworn January 21, 2022. In his Defence the Defendant says the Plaintiffs are not entitled to the relief claimed, which is inclusive of interest.

[4] The affidavit filed by the Defendant makes numerous claims in connection with the property owned by him, located at 3457 Eskasoni Road. Mr. MacGillivray originally mortgaged this property to the TD Bank by mortgage dated January 7, 2013.

[5] The Defendant went into default on the mortgage with the TD Bank, which resulted in the Bank commencing foreclosure against Mr. MacGillivray. In a separate proceeding (Hfx. No. 494758) TD obtained an Order that the mortgage was in default and an Order for Foreclosure, Sale and possession dated the 19th day of July 2021.

[6] Prior to the property being sold, TD reached an agreement with the Plaintiffs to assign the mortgage to them. The affidavit of the Plaintiff, Stephen Brown, filed December 3, 2021, provides the following with respect to their standing as Plaintiffs.

3. **THAT** pursuant to the Assignment, the Toronto-Dominion Bank assigned to me and Mrs. Brown its interest with respect to a Mortgage between the Toronto-Dominion Bank

¹ In placing these reasons in Decision format several edits have been made to correct grammar and punctuation. Paragraph 15 the word “orders” shall read “order(s)”. Paragraph 16 the year “2022” shall read “2021”. Paragraph 85 the date “July 19th” shall read “July 19, 2021”. Paragraph 89 the word “mortgage” shall read “mortgagee”. Paragraph 90 the word “of” shall read “or”. No further reasons have been supplemented.

as Mortgagee and the Defendant herein, William MacGillivray [hereinafter referred to as “Mr. MacGillivray”], as Mortgagor, and this Mortgage was dated January 7, 2013 and registered in the Cape Breton County Land Registration Office on January 30, 2013 as Document No. 102399749 [hereinafter referred to as the “Mortgage”];

5. **THAT** the Mortgage pertains to real property owned by Mr. MacGillivray that is located at 3457 Eskasoni Road, Islandview, in the Cape Breton Regional Municipality, Province of Nova Scotia, which bears PID 15616501 and is hereinafter referred to as the “Property”;

7. **THAT** prior to the execution of the Mortgage, Mr. MacGillivray had entered into a right of First Refusal to Purchase Agreement with Mrs. Brown and myself, which Agreement was dated September 21, 2012 and registered in the Cape Breton County Land Registration Office on October 5, 2012 as Document No. 101694678 [hereinafter referred to as the “Agreement”];

[7] This matter has proceeded on a contested basis. Mr. MacGillivray is a self-represented litigant. The Plaintiffs submit that the Defendant has been in default of the mortgage “for years”, and that they are entitled to an Order for Simple Foreclosure.

[8] Mr. MacGillivray argues that he is not in default since Mr. and Mrs. Brown were assigned the mortgage, stating he has not received the appropriate documentation that would allow him to pay out the mortgage. The Defendant further argues, (among others) that the Plaintiffs have not complied with Civil Procedure Rule 72 on Mortgages with respect to the Order sought by them.

[9] In the Statement of Claim, Mr. and Mrs. Brown, claimed the relief sought in paragraphs 11 and 12. Paragraph 12 reads:

12. The plaintiffs Stephen Brown and Brenda Brown claim an Order for simple foreclosure or, alternatively, foreclosure, sale and possession against each defendant who has a right of redemption, or any other interest, in the lands.

Background

[10] The following background is provided by the Plaintiffs in their brief:

1. The Plaintiffs, Stephen and Brenda Brown, own a property known as PID 15616493 shown as lot 3A on the subdivision plan of the lands of John Campbell, Robert Campbell, Archibald Campbell and Lauren Marshall record at the Land Registration Office as document no. 75619800 on June 4, 2004 (the “Brown Property”). The Defendant, William MacGillivray, owns the MacGillivray Property. On September 21, 2012, the

Browns entered into a Right of First Refusal to Purchase Agreement with the Defendant, William MacGillivray, relating to the Brown Property and the MacGillivray Property.

2. Thereafter, William MacGillivray mortgaged the MacGillivray Property. The mortgage between the Toronto-Dominion Bank and William MacGillivray was executed on January 7, 2013. William MacGillivray defaulted on the mortgage on or about September 2019. The Toronto-Dominion Bank obtained an Order for Foreclosure, Sale and Possession with respect to the MacGillivray Property on July 19, 2021. As holders of a right of first refusal pursuant to the Right of First Refusal to Purchase Agreement executed on September 21, 2012, the Browns received notice of the Order for Foreclosure, Sale and Possession in July 2021. The Browns negotiated an Agreement.

Issues

1. Is the Defendant, William MacGillivray, in default of the mortgage held by the Plaintiffs?
2. Are the Plaintiffs entitled to an Order for Simple Foreclosure, or alternatively, an Order for Foreclosure, Sale and Possession?

Analysis

[11] In this analysis it will be more expedient to address both issues together, although I will clearly set out my decision on each in my conclusion.

[12] In addition to the pleadings, substantial affidavit evidence has been filed by the parties.

[13] The original Notice of Motion was filed by the Plaintiffs at the same time as the action commenced. Because a Defence had been filed no Default Order was issued, as would have been the case in the absence of a Defence. A draft order and brief were filed by the Plaintiffs on December 10, 2021.

[14] With that initial filing, the Plaintiffs former Counsel, Mr. Morgan, filed the affidavit of Mr. Brown, and his own affidavit of solicitor. These affidavits contained a number of exhibits setting out the details of the mortgage documentation and the assignment to the Plaintiffs, the Statement of Account, the total amount claimed and the statement by Mr. and Mrs. Brown that no payments had been received by them since the mortgage was assigned to them.

[15] The Court raised certain preliminary issues with the parties. In particular, the Court requested status of the previous order(s) issued by Justice Gabriel and the basis for the Plaintiffs seeking an Order for Simple Foreclosure.

[16] Following hearings in Court before myself on December 13, 2021, and January 31, 2022, the motion was scheduled for hearing on March 7, 2022.

[17] Several appearances followed before Justice Gogan. The hearing on March 7, 2022, was adjourned as the solicitor's affidavit setting out the particulars of the fees and mortgage calculations were not filed prior to the hearing date, a brief having been filed on March 4, 2022.

[18] For this decision, I am not going to detail every filing and appearance. The next hearing date set for May 30, 2022, was adjourned for reasons related to Covid-19. The Defendant advised that he had not received a copy of the documents which were to be filed by the Plaintiffs' Counsel. Mr. Morgan was instructed to ensure the filings were made and copies provided.

[19] There were subsequent filing issues which resulted in the scheduled date of June 13, 2022, not proceeding. Once again, supplementary documents were filed only that day. The matter was set over for a hearing on October 31, 2022.

[20] The parties were instructed on June 13, 2022, to file written submissions to narrow the issues. At that point it appeared that the remaining issue was a determination of the amount necessary to redeem the property.

[21] On July 11, 2022, a Notice of New Counsel was filed by Harvey M. McPhee, KC.

[22] Prior to the hearing of October 31, 2022, Plaintiffs' Counsel filed (on October 21, 2022) an updated affidavit of Mr. Brown, the affidavit of counsel, a brief and an Affidavit of Service of Steven Mailman, confirming that personal service of the originating documents upon the Defendant, including the Originating Notice, Statement of Claim and the Notice of Motion, had occurred on December 10, 2021.

[23] At the hearing on October 31, 2022, the Court heard submissions from the parties on whether an Order for Foreclosure should be granted to the Plaintiffs. Mr. MacGillivray had filed a supplemental affidavit the same day and made oral

submissions. No request for cross examination on the affidavits was made by either party.

[24] Following the hearing the Court requested written submissions from both parties on the following issues:

1. What impact, if any, does the Order for Foreclosure, Sale and Possession, issued by Justice D. Timothy Gabriel on July 19, 2021, in the since discontinued action brought by the Toronto-Dominion Bank against William MacGillivary with respect to the mortgage which forms the subject of the present action have on this Court's ability to grant either an initial order for foreclosure or an order for foreclosure, sale and possession?
2. What impact, if any, do the Notice of Defence and Statement of Defence filed by the Defendant, Mr. MacGillivary, have on the Court's ability to grant an initial order for foreclosure or an order for foreclosure, sale and possession?

[25] Filing dates for these written submissions on these issues, the Plaintiffs to submit by November 6, 2022, and Mr. MacGillivary's submissions were due by November 15, 2022. The parties acknowledged these dates and agreed to exchange briefs.

[26] The Plaintiffs filed their brief on November 7, 2022. None was filed by the Defendant by the deadline set. A document dated November 15, 2022, was received by the Court on December 5, 2022. Contrary to what has been indicated thereon the Court did not receive it by email.

[27] In their brief the Plaintiffs submitted that where a Defence is filed in a foreclosure action, the Defence must be determined in favour of the Plaintiffs, before an initial foreclosure order or order for foreclosure, sale and possession can be granted. Rule 72.16(1)(e) which states that a judge may grant an initial foreclosure order when (inter alia) "(e) no Defendant has defended the proceeding, or a defence has been determined in favour of the plaintiff". Civil Procedure Rule 72.07(1) provides further authorization in this regard.

[28] The Plaintiffs, Mr. and Mrs. Brown, proceeded to file a motion on November 7, 2022, seeking an Order setting aside the Statement of Defence filed and granting summary judgment in favour of the Plaintiffs.

[29] The Notice of Motion made pursuant to Rule 13.03(3) was served on the Defendant on November 8, 2022, as confirmed by the Affidavit of Service filed

with the Court on that date. Service was effected by the chosen method of delivery agreed to (via email) and confirmed by Mr. MacGillivray in Court, on the record.

[30] The return date for the Motion was November 21, 2021. Ms. O'Brien appeared for the Plaintiffs. The Defendant did not appear. Ms. O'Brien informed the Court that service was confirmed by further correspondence received from Mr. MacGillivray on November 8, 2022. Ms. O'Brien informed the Court he was advised on three separate occasions of the hearing date for the motion.

[31] Having summarized the procedural history in this matter, I will now turn to address the motion to strike the Defence, and the Motion for an Order for Foreclosure made by the Plaintiffs.

Decision

[32] Mr. MacGillivray has filed several documents with the Court. A Statement of Defence on January 7, 2022, with an affidavit the Defence sworn January 21, 2022 (an unsigned copy was filed on January 7th); an affidavit filed October 31, 2022, and a Brief filed December 5, 2022.

[33] Having reviewed and considered the oral submission on October 31, 2022, I shall address these on their merits.

The Defence – January 7, 2022

[34] In the Statement of Claim the Plaintiffs allege:

9. Since the Toronto-Dominion Bank obtained an Order for Foreclosure, Sale and Possession as against the Defendant William MacGillivray as described above, the Defendant William MacGillivray has made no further payments to the Toronto-Dominion Bank or to the Plaintiffs Stephen Brown and Brenda Brown toward satisfaction of the amount owing by the Defendant William MacGillivray with respect to the Debt owed pursuant to the Mortgage.

10. The following was due and owing on the Mortgage as of December 3, 2012.

- (a) Principal balance:
\$118,231.81 paid by Plaintiffs to Toronto-Dominion Bank on September 24, 2021 inclusive of interest as of September 24, 2021.
- (b) Interest
\$834.40, based upon per diem interest of \$11.92 for seventy days from September 24, 2021 to December 3, 2021
- (c) Taxes

- N/a
- (d) Protective disbursements
N/a
- (e) Other – Legal Fees
\$7,500.00.

[35] In his statement of Defence, Mr. MacGillivray admits (in paragraph 2) a number of the claims including paragraphs 9 and 10(a) above. The Defendant denies the address listed for him in the Statement of Claim (paragraph 2) and makes a general denial of the remedies claimed by the Plaintiff (paragraph 11).

[36] In terms of admissions, the Defendant admits the particulars of the mortgage (paragraph 5). While he denies the claim for interest in (10(b)), he does not deny the “total outstanding amount” in clause 10 of \$126,566.21.

[37] The Defendant, being self-represented, filed an affidavit with his Defence. As such it is an improper pleading. Pleadings are intended to contain relevant and material facts, and not evidence. (Rule 38) The Court has, however, reviewed the affidavit.

[38] In this affidavit, Mr. MacGillivray refers to his dealing with the original mortgagee TD Bank:

7. I spoke to Mr. Doug Schipilow on September 7th, 2021, and followed up with an email to him on September 14th regarding the total payout agreed upon between myself and TD Bank. Mr. Schipilow informed me the following day on September 15, 2021, that his client (TD Bank) decided to go with the Brown’s offer and indicated that by the end of the day (September 15th) the transaction should be completed. I have included the email correspondence above, (Exhibit “B”).

[39] It is obvious that the substance of this paragraph contains hearsay evidence. In it, however, the Defendant acknowledges the Bank’s decision to assign the mortgage to the Plaintiffs.

[40] In other paragraphs of his affidavit, the Defendant states his reasons for non-payment:

10. ... Since I was not made aware of their successful assignment until December 10, 2021, I was not given any details to date including the following: payments obligations, to whom payments should be made to, payment amounts, and documents pertaining to the Assignment from TD Bank. There has been no communication or reference to any demands for payment until court “Notice of Action” documents received on December 20, 2021.

11. ... I also stated that I did not believe the request Darren Morgan has made for interest and legal costs were warranted since I was unaware of the situation until December – the Brown’s through their unsolicited actions had interfered with my payout agreement with TD Bank prior to October 7, 2021 – solely for the purpose of buying the property outright or forcing a simple foreclosure procedure as seen in the existing court documents. I have included a copy of my email offer to Mr. Morgan dated December 24, 2021, (Exhibit “C”).

[41] These paragraphs take on the flavour of a plea and submission. Notwithstanding, Mr. MacGillivray acknowledged that he became aware of the assignment on September 15, 2021.

[42] In his rebuttal affidavit sworn March 1, 2022, the Mortgagee, Mr. Brown, stated:

8. **THAT** Mr. MacGillivray wrote to our solicitor in e-mail correspondence dated September 3, 2021, in which he confirmed that he had an arrangement in place with the Toronto-Dominion Bank to address his default under the Mortgage, whereby he was to pay \$30,000.00 to the Toronto-Dominion Bank by September 7, 2021, and then the balance of the Mortgage to be paid out by October 7, 2021. A copy of this e-mail is attached as Exhibit “A” to this my Rebuttal Affidavit;

9. **THAT** Mr. MacGillivray did not make the required \$30,000.00 payment to the Toronto-Dominion Bank by September 7, 2021, as he had agreed to do, nor did he make the payment of the balance owed to the Toronto-Dominion Bank by October 7, 2021, as he had also agreed to do;

[43] In his rebuttal affidavit, Mr. Brown states that Mr. MacGillivray’s affidavit “confirms” his default with respect to the TD Bank, stated that the default has not been remedied, and that he “continues to be in ongoing default under the Mortgage as of the present date”.

Summary Judgment on Pleadings

[44] Summary judgment on the Pleadings must be granted if, assuming the facts stated in the pleadings can be proven, the judge is satisfied the Defence discloses no basis for a defence or contest. (Civil Procedure Rule 13.03(1)(a))

[45] In his Defence, the Defendant admits the particulars of the mortgage, and that he is in default. Does therefore, his denial of the interest claimed form a basis for defence or contest?

[46] In applying the test, the Court assumes the facts stated in the pleadings can be proven. With respect to the claim for interest, the Defendant has not pleaded facts, but rather makes a general denial of the claim for interest. In admitting the particulars of the mortgage, the Defendant has acknowledged paragraph 5(f) of the Statement of Claim that interest is chargeable under the mortgage. His denial amounts to a bald assertion that there is no basis for the claim for interest.

[47] In a motion for summary judgment on the pleadings the Court is not expected to consider the affidavits. In this case, I have referred to the affidavit of the Defendant attached to the Defence to provide some context to it, given the fact that Mr. MacGillivray is self-represented. (See *Eisener v. Cragg*, 2012 NSSC 290)

[48] The Plaintiffs submit that even if the contents of the affidavit were included in the statement of Defence, this does not change the fact that Mr. MacGillivray has admitted the particulars of the mortgage and that it is in default. I concur.

[49] The pleading, as a whole, does not disclose a reasonable cause of action. In a foreclosure proceeding the Plaintiff(s) must justify a claim for interest and the period claimed even in the absence of a Defence.

[50] Whether or not the affidavit of the Defendant is considered (or that of the mortgagee), I am satisfied on a balance of probabilities that the Defence filed by Mr. MacGillivray discloses no basis for defence or contest.

[51] Summary Judgement on the pleadings is therefore granted to the Plaintiffs.

2. Should the Court Grant an Order for Simple Foreclosure?

[52] Having found that the Defendant is in default of payment, the Court will now consider whether the Plaintiffs are entitled to the relief claimed.

[53] As earlier explained, this has been a lengthy process. Throughout the Defendant has raised certain issues, which the Court is obliged to address in considering whether to grant an order for foreclosure.

The Previous Orders

[54] The Court raised the issue of whether the Orders of Justice Gabriel impacted this proceeding. Submissions were made by the parties in this respect on October 31, 2022.

[55] I have considered the submission of the Plaintiffs of November 7, 2022, and the submission of the Defendant of November 15, 2022.

[56] The Plaintiffs submit the Court has the authority under its inherent jurisdiction to control its own processes. Further, they submit that an Order for Foreclosure, is not a final order.

[57] The Court was advised by the Plaintiff, following its inquiry, that the previous foreclosure action had been discontinued. A copy of the discontinuance of that action (Hfx. No. 494758) was filed on December 10, 2021.

[58] The Defendant, in his submission, has stated his agreement that TD Bank had no interest in pursuing their order for foreclosure, “since the debt has been resolved”. The Defendant, however, takes issue with the “new proceeding”, stating it has not been in compliance with Civil Procedure Rule 72, and specifically Rule 72.05. I will later address this issue in this decision.

[59] The Court is satisfied that Rule 9.07(1) confirms that a discontinuance of a proceeding, does not give rise to a defence in a subsequent proceeding, “for the same or essentially the same cause”.

[60] The Court is also satisfied this provides a complete answer to its inquiry and does not present a bar for the Court to issue a further Order in this proceeding.

Civil Procedure Rule 72.05

[61] The Defendant argues the threshold standards in this rule have not been met. Specifically, he submits the Plaintiffs have not provided him with the opportunity to resolve the matter with TD Bank, prior to the assignment.

[62] The Defendant further asserts that he has not been provided with a breakdown of the total amount owed. In his affidavit filed October 31, 2022, the Defendant states he requested this in December 2021, but was not provided same.

[63] There is ample affidavit and other evidence that the Defendant was provided with the information set out in Rule 72.05, including a statement of account, and a statement from the mortgagee that the statement is true. This includes a summary of the statement of account that contains the total of the charges (or credits) that reconcile with the amount claimed. In these circumstances the Plaintiff’s filed the affidavit of Fida El Timani, Accounts Manager, sworn on May 12, 2021, containing the history of payments made to the TD Bank by the Defendant.

[64] In the affidavit of the mortgagee filed October 21, 2022, these charges are shown in Exhibit “B”. Apart from the principal, the only claim is interest for which the dates for accrual are shown.

[65] In his affidavit filed October 21, 2022, Plaintiffs’ Counsel attached a letter of demand to the Defendant dated July 12, 2022, containing the outstanding balance, “as set out in Mr. Morgan’s emailed correspondence to you of July 5, 2022”.

[66] As far back as October 21, 2021, the Defendant was notified of the outstanding principal to pay out the TD Bank together with the per diem interest that was payable and legal fees. At that time the outstanding balance was \$125,413.20.

[67] More recently, at the hearing of October 31, 2022, the Plaintiffs’ Counsel indicated on the record that his clients were prepared to “receive payment if the Defendant is so inclined”.

[68] At that hearing Mr. MacGillivray submitted there was never demand other than the October 21, 2021, letter.

[69] The affidavits of the mortgagee and Counsel of October 21st were served upon Mr. MacGillivray on the 24th of October 2022, a week prior to the hearing, as confirmed on the record by Plaintiffs’ Counsel, and by affidavit of Meghan MacLeod filed on October 24, 2022.

[70] In their brief filed with the Court on October 21, 2022, the Plaintiffs provided the following summary of documentation filed with the Court, pursuant to Rule 72.05.

- Proof that the Defendant has been notified in Accordance with Rule 31 – Notice (Affidavit of Service sworn by Stephen Mailman on December 10, 2021);
- Proof of the Mortgage Instrument (Exhibit A of the Affidavit of Stephen Brown sworn October 20, 2022);
- Certificate of Harvey M. McPhee, KC, abstracting the registered and recorded instruments affecting title to the mortgage property starting with a warranty deed into the mortgagor;
- Affidavit of Stephen Brown sworn October 20, 2022, including confirmation that the grounds stated in the statement of claim are true;
- A Summary Statement of Account signed by Stephen Brown, Statement of Account and evidence that the statement is true; and

- Order for Foreclosure.

[71] I am satisfied on the evidence that the Plaintiffs have met the requirements of Rule 72.05.

Should an Order for Simple Foreclosure be issued?

[72] In foreclosure actions the right of the borrower to redeem the mortgage is of central importance. This is commonly referred to as the “equity of redemption”.

[73] Historically, an Order for Foreclosure, Sale and Possession provided the opportunity for the market value of the property to be achieved through a sale at auction, thereby maximizing the return for the mortgagee, and the mortgagor (of the equity) from property “put up” as collateral (the mortgaged property) for the loan advanced to the mortgagor by the mortgagee, lender.

[74] In the event of a sale, there may be a surplus, a deficit (or neither). Alternatively, the mortgagee lender, normally a Bank, may “buy in” or be the successful bidder at the sale. Without a doubt, the lender will make its decision based on the value of the property compared with/to the amount owed or more accurately, the “settled” amount due to the Plaintiff in the Order for Foreclosure.

[75] In this case, the Order sought by the mortgage, Mr. and Mrs. Brown, would result in title to the mortgaged property being transferred to them as mortgagee. The Defendant and other encumbrancers would be given notice of the Plaintiffs intention to obtain a final order.

[76] Courts of equity have guarded against the potential for prejudice to the borrower. Courts are expected to interpret the rules contextually having regard to the circumstances in the case before it to achieve a balance between the rights of the lender and those of the borrower.

[77] It is trite to say that because something can be done (that is lawfully permitted to be done), does not always mean it should be done. Similarly, because it is something that is often done, should not mean it will be done, unless the circumstances warrant.

[78] It is not disputed that the lender will often end up purchasing the property at the sale by auction, pursuant to the Foreclosure Order.

[79] Justice Campbell’s decision in *CIBC Mortgages Inc. v. Dima Estate*, 2019 NSSC 61, is the most instructive, providing as it does, a thorough canvassing of the law, including from a historical context, demonstrating that “simple foreclosure” is available as a remedy in Nova Scotia.

[80] Rule 72.15 of the Nova Scotia Civil Procedure Rules, titled “simple foreclosure” provides that a judge may grant an initial order for foreclosure, setting out the terms under which foreclosure occurs, including provisions for the hearing of a motion for a final order. The same rule also provides that a judge may grant the final order giving effect to the foreclosure.

[81] Justice MacDougall’s decision in *Project Forest Lakes Pte Ltd v. Terra Firma Development Corp Ltd*, 2021 NSSC 350, is also instructive, explaining as it does what “simple foreclosure” means, as a remedy contained in Civil Procedure Rule 72.15. His Lordship stated as follows:

Simple foreclosure vests the title of the foreclosed property in the mortgagee in complete satisfaction of the mortgagor’s debts, and the mortgagee is not obliged to sell or otherwise obtain value from the property. It is theirs outright. There is therefore no accounting for whether the property obtained exceeds the debt owed, and other interested parties have no chance to obtain any surplus. Similarly, if the property value falls short of the debt owed, then the mortgagee cannot seek a deficiency judgment.

[82] It is not disputed that in this case Mr. MacGillivray has continually expressed a desire to “redeem” the mortgage by paying out what is owed. It is also not disputed that he has to date, not made any payment into Court, or retain Counsel to assist him in doing this, with respect to the substantial amount owing to the Plaintiffs. He has recently stated he has made an “offer”.

[83] In such circumstances, to grant an order that removes from the process the potential sale to third parties, poses a significant risk of prejudice to Mr. MacGillivray notwithstanding his intentions. It is well accepted that the best indication of market value is a willing buyer and a willing seller, who are at arm’s length.

[84] The Court must be placed in a position of knowing whether “foregoing the sale” is equitable. In *Project Forest*, MacDougall, J., discussed the importance of having evidence of the market value of the mortgaged property, in order for the Court to entertain the option of simple foreclosure versus foreclosure, sale and possession.

[85] There is little or no evidence of market value before me in this motion. The Court is aware of the amount due in the previous Foreclosure Order issued on July 19, 2021 (\$106,011.29). The Court is further aware, through documents filed, that the residence itself was insured for \$200,000. approximately.

[86] While there is no expert evidence from a real estate appraiser, the Court is aware that the property contains frontage on the Bras d’Or Lakes and that the amount claimed while higher is not appreciably higher than the original mortgage amount (\$118,231.81). Payments were made by the Defendant beginning in 2013.

[87] It must be said that this has been a lengthy process and if the Court felt that a simple foreclosure was warranted, it would not hesitate to grant same. Doing so would perhaps be more expedient for the Plaintiffs at this point.

[88] For these reasons however, I find that the appropriate remedy in these circumstances is an Order for Foreclosure, Sale and Possession.

[89] In reaching this conclusion I have considered clause 5.01(f) of the mortgage and find it avails the mortgagee of the remedy of foreclosure, but makes no distinction between simple foreclosure and foreclosure, sale and possession. In my view either of the orders sought would be authorized under the mortgage.

[90] The mortgagees will be entitled to interest under the mortgage. I find on the facts that the actions or their actions to protect their interest did not amount to interference as alleged by the Defendant. This leaves for consideration the “settled” amount to be placed in the Order granted.

Costs

[91] The Plaintiffs have submitted a Bill of Costs in this matter totaling \$22,218.49 for services rendered to the Plaintiffs between August 4, 2021, to March 4, 2022 (MacKenzie Morgan Law Inc.) and from July 4, 2022, to October 20, 2022 (Sampson McPhee).

[92] A breakdown of these accounts are as follows:

| Plaintiffs’ Bill of Costs | |
|---------------------------|----------------|
| Account | Amount Claimed |
| | |

| | |
|--|-------------|
| MacKenzie Morgan Law Inc – October 20, 2021 | \$5,859.55 |
| MacKenzie Morgan Law Inc – December 20, 2021 | \$3,139.82 |
| MacKenzie Morgan Law Inc – February 3, 2022 | \$3,732.70 |
| MacKenzie Morgan Law Inc – March 7, 2022 | \$2,922.91 |
| Sampson McPhee – October 19, 2022 | \$6,563.51 |
| Total | \$22,218.49 |

[93] Rule 77 deals with costs. As Counsel has stated, costs are discretionary. The ultimate decision of the Court is to render a decision that will “do justice” between the parties.

[94] Tariff F of Rule 77 is meant to deal with “uncontested” foreclosure proceedings. This proceeding is contested. The Bill of Costs submitted is substantial. This matter involved a total of seven (7) appearances in Chambers. Adjournments were required in some cases due to the untimely filing of documents, on both sides.

[95] Chambers appearances are usually dealt with under Tariff C. For more than an hour but less than a half day the range is \$750 - \$1,000. For more than a half day but less than a full day, the range is \$1,000. - \$2,000. For one day or more the range of costs is \$2,000. per day.

[96] From this it can be inferred that the costs incurred in this matter are substantial. Rule 77.13 addresses Counsel fees and disbursements. It states that Counsel is entitled to reasonable compensation and recovery of reasonable and necessary disbursements.

[97] In this case, the Plaintiffs seek to add the Bill of Costs amount to the amount claimed (to be recovered) under the mortgage. In short, the costs will be added to the amount foreclosed upon.

[98] Practice Memorandum No. 1 deals with costs in foreclosure procedures. Section 3.8 reads:

3.8 Costs

Reference is made to Civil Procedure Rule 77 – Tariff E

Upon this motion, counsel will submit a bill of costs covering all services and disbursements which are directly connected with the foreclosure proceeding, and be prepared to substantiate each item claimed as a disbursement. The Court will at this time tax the bill of costs by awarding an all-inclusive amount covering the Action for Foreclosure, Sale and Possession, together with disbursements as substantiated. Alternatively, the Court may order disbursements to be taxed.

The Court will not approve disbursements which are in any way artificial. For example: legal accounts searching or sub-searching title, attendance fees, office overhead charges and fees paid to another solicitor for work which is normally covered in the award of costs.

[99] In my view, deciding a reasonable and just amount requires an assessment of whether the services are directly connected with the foreclosure proceeding.

[100] In respect of the accounts submitted by Mr. MacKenzie Morgan Law Inc., I have reviewed the fees and disbursements with respect to the account rendered on October 20, 2021, I find that all except for the (October 14th, 2021) charge relate to Plaintiffs' discussions with the TD Bank.

[101] While these services were "related" to the foreclosure, the assignment of the mortgage does not relate directly to the default of the mortgage by the mortgagor, Mr. MacGillivray. The Plaintiffs' involvement in the assignment, is not recoverable from the Defendant.

[102] In the result, that particular invoice will incur a substantial reduction. Exercising my discretion, I find that the following amounts shall be allowed as costs in this lengthy and contentious proceeding.

| Plaintiff's Bill of Costs | |
|--|----------------|
| Account | Amount Granted |
| MacKenzie Morgan Law Inc – October 20, 2021 | \$718.76 |
| MacKenzie Morgan Law Inc – December 20, 2021 | \$3,044.05 |
| MacKenzie Morgan Law Inc – February 3, 2022 | \$3,631.16 |

| | |
|--|-------------|
| MacKenzie Morgan Law Inc – March 7, 2022 | \$2,944.00 |
| Sampson McPhee – October 19, 2022 | \$6,517.76 |
| Total | \$16,855.73 |

The Amount to be Contained in the Order

[103] In schedule “B” of the Mr. Brown’s affidavit filed October 21, 2022, the amount claimed is set at \$124,275.86. Plaintiffs’ Counsel is directed to update that amount with interest and provide for same in a draft order for Foreclosure, Sale and Possession together with the cost amount allowed of \$16,855.73.

[104] This decision, in the Courts view, preserves the respective rights of the Plaintiffs and Defendant.

[105] The Court will await receipt of the draft order from Plaintiffs’ Counsel.

Murray, J.