SUPREME COURT OF NOVA SCOTIA
Citation: *AG(NS) v. Ernst*, 2024 NSSC 121

Date: 20240322
Docket: 515206
Registry: Sydney

Between:

Attorney General of Nova Scotia Representing His Majesty the King in Right of the Province of Nova Scotia

Plaintiff

and

Sandra Mary Ernst, Kenneth Todd Ingraham and George Lester Ernst (aka George Lester Ernest)

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	September 20, 2023
Final Submission:	October 13, 2023
Counsel:	Caitlin Menczel-O'Neill, for the Plaintiff Sandra Mary Ernst, Defendant, Self-represented

By the Court:

[1] In 2019, Housing Nova Scotia (HNS) approved two loans to the Defendants to complete upgrades and repairs to the residential property located at 44 Jackson Drive, North Sydney, Nova Scotia.

[2] Both loans were forgivable provide that the Defendants did not breach any of the terms or conditions under which they were made. The terms included two conditions as follows:

> (i) that the Defendants would continue to own and occupy the residence.
>
> (ii) that if the residence was sold, transferred or disposed of, the unpaid balance would become due and payable. This would essentially be the amount of the unearned forgiveness.

[3] The Plaintiff, the Attorney General of Nova Scotia (AGNS), represents the Minister of Municipal Affairs and Housing through its delegated agency, Housing Nova Scotia.

[4] The AGNS has filed a Motion for Summary Judgement in the pleadings pursuant to Civil Procedure Rule 13.03, which is attached as Appendix "A".

[5] The Plaintiff submits the Defence filed by the Defendant, Sandra Ernst, discloses no basis for a defence or contest.

[6] The Defendant, Ms. Ernst, contests the motion, stating in her Response to the Motion that she is seeking to have the motion:

> 1. Stayed until the determination of any other of them.
> 2. Shared with a common timetable.

[7] While it is not entirely clear, it appears that Ms. Ernst is referring to "two or more proceedings" having a common question of law or fact, and that the relief claimed, "arises out of the same transaction or occurrence".

[8] The Defendant cites Rule 6.01, but the source of this "rule of law" is unclear. It is neither Rule 6 of the current Civil Procedure Rules of Nova Scotia (2009) or the previous version of the Rules (1972).

[9] In her Amended Response (filed August 2, 2022), the Defendant added the following to her Grounds of Response:

> The defendants rely on the evidence disclosed in Case No. 516516, in the following rule of law, once again referring to a situation where "two or more proceedings are pending in court.

[10] In her Statement of Defence, Ms. Ernst admits to certain facts in the Statement of Claim and denies others. She neither admits or denies the facts in paragraphs 11 and 12, based on insufficient knowledge.

[11] In paragraph 5 of the Defence, Ms. Ernst states, "I live at 46 Jackson Drive, and I have lived at and used 44 Jackson Drive as a mailing address".

[12] Ms. Ernst was self represented at the summary judgement hearing held September 20, 2023. The Court sought clarification from her in terms of her defence and response to the motion.

[13] The gist of her response to the Summary Judgement Motion is that the outcome of the proceeding in 516516 would be determinative of this proceeding (Hfx. No. 515206) and certainly key to the outcome of this motion by the AGNS.

[14] Ms. Ernst asked that the court "postpone any judgement in this matter until the facts are made available from the primary rendering", referring to the contested foreclosure action by CIBC against Sandra Ernst and her brother, George Ernst (Hfx. No. 516516) respecting to the ownership the buildings and property located at 44 Jackson Drive, North Sydney.

[15] The particulars of the loans are contained the Statement of Claim, at paragraph 6, repeated below:

> 6. On or about April 1st and September 26, 2019, the three Defendants were approved for two loans to complete necessary repairs and upgrades (repairs included: doors, windows, smoke alarms, chimney, handrails, furnace, and oil tank) to the property situated at 44 Jackson Drive, North Sydney, Cape Breton Regional Municipality, Province of Nova Scotia ("Property"):
>
> (a) A loan in the amount of $5,623.50, under the Investment in Affordable Housing (IAH) Homeowner Program (Case ID/Loan 341131/0000030010730), was secured by a Promissory Note dated April 1, 2019, and signed by the three Defendants on April 9, 2019. The Defendants agreed to pay the sum of $5,623.50, together with

appliable interest thereon at the rate of 4.250%, to be compounded semi-annually, not in advance.

(b) Under the terms of the Promissory Note, the loan amount of $5,623.50 was to be forgiven in equal installments on a monthly basis, for no more than 24 months, with forgiveness commencing on written notification from the Plaintiff provided that the Defendants did not breach of any of the terms of the Promissory Note.

(c) Repair work was completed in May of 2019 and the loan was finalized with the interest adjustment date of June 1, 2019.

(d) A second loan in the amount of $12,376.50, under the National Housing Strategy (NHS), Homeowner Residential Rehabilitation Assistance Program (Homeowner RRAP) (Case ID/Loan # 2480690/000003002695), was secured by a Promissory Note dated September 26, 2019, and signed by the three Defendants on October 3, 2019. The Defendants agreed to pay the sum of $12,376.50, with interest at the rate of 1.800%, to be compounded semi-annually, not in advance.

(e) Under the terms of the second Promissory Note, the loan amount of $12,376.50 was to be forgiven in equal installments on a monthly basis, for no more than 48 months, with forgiveness commencing on written notification from the Plaintiff provided that the Defendants did not breach any of the terms of the Promissory Note.

(f) Additional repair work was completed in April of 2020 and the loan was finalized with the interest adjustment date of May 1, 2020.

[16] The terms and conditions of the loans are contained in the Statement of Claim:

7. Both of the aforesaid Promissory Notes included the following terms and conditions:

(a) The Defendants must continue to "*own and occupy the property* for which this loan is made until the forgivable and/or repayable loan is earned or repaid in full".

(b) In the event the Property is *sold, transferred or otherwise disposed* of, any unearned loan forgiveness or unpaid loan balance shall become due and payable immediately together with interest accrued thereon. (***Emphasis***)

[17] In paragraph 2 of the Defence, Ms. Ernst admits the facts contained in paragraphs 1 to 7, and paragraph 9. In paragraph 3, she neither admits of denies paragraphs 11,12. These refer to demand letters forwarded to the Defendant, George Lester Ernst, on July 12, 2021, and November 5, 2021.

[18] In the defence, Ms. Ernst admitted to paragraph 9 of the Claim that the Plaintiff made attempts to have the defendants enter into a payment arrangement for their unearned balances, which the Defendants were not prepared to do.

[19] In paragraph 4 of the Defence, Ms. Ernst denies "all other allegations of fact".

[20] Neither of the Defendants Mr. Ernst or Mr. Ingraham filed a Defence.

[21] In paragraph 8 of the Statement of Claim the AGNS asserts that:

> 8. On or about September 2020, it was discovered by the Plaintiff that the Defendants were no longer living in the property at 44 Jackson Drive, and Sandra Mary Ernst and George Lester Ernst no longer owned the subject property. Canadian Imperial Bank of Commerce (CIBC) had foreclosed on the property: A confirmatory order was issued by the Supreme Court of Nova Scotia on September 9, 2020, vesting possession of the property in the Canadian Imperial Bank of Commerce. The Court subsequently issued a judgement on behalf of CIBC on December 14, 2020 (Hfx No 494040). As a result of the Defendant's failure to comply with the terms and conditions of the loans, the unforgiveable principal balance together with interest immediately became due and payable.

[22] Included in paragraph 8 of the Statement of Claim is the allegation that "a Confirmatory Order was issued by the Supreme Court of Nova Scotia on September 9, 2020, vesting possession of the property in the Canadian Imperial Bank of Commerce".

[23] The AGNS maintains that the Defence and grounds of contest are clearly unsustainable when the pleading is read on its own. The Plaintiff says this is an action in debt, it is not a foreclosure action.

[24] The AGNS, in its submission, argues that as of September 2020 the Defendants were no longer living at 44 Jackson Drive, and that Sandra and George Ernst no longer owned the property. These are plainly two conditions of the loans.

[25] The Plaintiff submits the Statement of Defence does not plead any express or implied terms of Ms. Ernst's loan agreement that would disclose a material dispute, or that she and the other named Defendants continued to live in and own

the property at 44 Jackson Drive. Instead, the AGNS says what is included in the Defence is an equivocal statement that, "I live at 46 Jackson Drive, and I have lived at and used 44 Jackson Drive as a mailing address". (Paragraph 5)

[26] In its questioning the Defendant at the hearing, the Court attempted to clarify Ms. Ernst's position on the motion and in her pleading. In my respectful view, the Defendant's response was vague and confusing. Ms. Ernst agreed with the Court that where she lived, and when she lived there, ought not to be confusing.

[27] Because this motion is for summary judgement on the pleadings, it must be based solely on the pleadings (Rule13.03), and not on evidence, the latter being governed by Rule 13.04.

[28] The crux of the Defendant's position on the motion seems to be that the issues in the other proceeding, the foreclosure proceeding, need to be addressed, in order to remove any confusion as to the ownership and occupation of 44 Jackson Drive.

[29] Because the Plaintiff is seeking to rely on the confirmatory foreclosure order issued by this Court on September 9, 2020, as marking a clear breach of the loan agreements with HNS, the Court requested (at the conclusion of the Motion on September 20, 2023) that the parties provide post hearing submissions on whether this Court can rely on the Order in the foreclosure proceeding, in this motion.

[30] The submissions were requested by September 27, 2023, from the Plaintiff and October 4, 2023, from the Defendant, Ms. Ernst.

[31] The Plaintiff filed a legal memorandum on September 25,2023 as requested by the Court. The Defendant did not file a submission as requested.

[32] In its extensive memorandum, the AGNS reproduced the September 9, 2020, Order of Justice Darlene Jamieson, a portion of which reads:

> 7. It is not customary to reproduce the contents of a judicial order in the body of the pleadings. However, the Plaintiff has now obtained a copy of the Order at issue, the recitals of which indicate that the Honourable Justice Darlene Jamieson of this Court did review and grant a Motion Application confirming the Foreclosure of the Defendant's property on September 9, 2020 and the transfer of possession and all interest in that property to CIBC. The recitals of this Court document ordered that:
>
> **"IT IS HEREBY ORDERED** that the Order for Foreclosure issued August 13, 2020, and all subsequent proceedings herein are hereby ratified and confirmed.

> **IT IS FURTHER ORDERED** that the Plaintiff shall be *vested with possession of the lands of the Defendants* foreclosed in this proceeding: and that *all interest and equity of redemption of the Defendants* and all persons claiming through the Defendants in such lands as forever barred and foreclosed". (*emphasis added*)

[33] In addition, the Plaintiff's brief included a summary of the law with respect to the ability of a Court to rely upon orders previously granted:

> 8. The Plaintiff is entitled to rely on an Order of the Nova Scotia Supreme Court, such as the Confirmatory Order of Foreclosure at issue ("the Order"), as a public record and a valid decision of the Court in bringing this Motion. Court orders are public record and a valid decision of the Court in bringing this Motion. Court orders are public records in the control and possession of this Honourable Court. They are not contestable evidence which require proving through pre-trial preparation and the trial process itself. The Plaintiff relies upon the caselaw enclosed with these submissions at Tabs 3 to 9 in support of this position, which is briefly canvassed below.

[34] The Plaintiff cited two of the leading cases (***R v. Wilson***, [1983] SCR 594, and ***R v. Bird***, 2019 S.C.C. 7) in its brief stating further:

> 14. It has been a long-entrenched principle of civil and criminal litigation in Canada that all orders made by courts with lawful jurisdiction must be obeyed unless they are set aside by proper application. In the recurring words of the Supreme Court of Canada from as early as 1983 (in the landmark decision of *R v Wilson*) to as recently as 2019 (in the case of *R v Bird*):
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed.
> >
> > And,
> >
> > [W]ith limited exceptions, an order issued by a court must be obeyed unless it is set aside in a proceeding taken for that purpose ([*R v Consolidated Maybrun Mines Ltd*] [1998] 1 S.C.R 706, [1998] S.C.J. No. 32, at paras. 2-3; *R v Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at p. 349; *Garland v Consumers' Gas Co.,* 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 71.)

[35] On October 6, 2023, Ms. Ernst sent an email to Plaintiff's Counsel enclosing a "Notice of Rendering", stating "Since there has been a judgement that supports my claim, I have attached the intended draft for your awareness."

[36] Specifically, the "Notice of Rendering" that Ms. Ernst was unable to file due to an inability to obtain "directions on the correct formatting" stated *inter alia*:

> 1. Breach of contract on the grounds of entitlement and occupancy have been found to be unfounded and should be dismissed.
>
> 2. Supreme Court of Nova Scotia rendering in case number 516516 confirms occupancy and titled held.

[37] While the Court is entitled to disregard this document that was not filed in the time frame directed, and indeed only submitted through opposing Counsel, I find it is relevant in terms of the Defendant's position of this Motion.

[38] Having read the decision of the Honourable Jamie S. Campbell, there are a number of findings that are relevant to this motion. I have summarized several in point form below:

> [1] In 2019 CIBC started a simple foreclosure action against Sandra May Ernst and her brother George Lester Ernst, the owners of a property located at 44 Jackson Drive in North Sydney. The Order for Foreclosure was issued on August 13, 2020, and on September 9, 2020, a Confirmatory Order was issued confirming that CIBC had taken title to the property.
>
> …
>
> [3] Ms. Ernst and Mr. Ingraham say that they are living, not at 44 Jackson Drive, but at 46 Jackson Drive, which became 46 Jackson Drive only after the foreclosure. That living space, which is about 20 feet by 20 feet, is located for the most part on the adjoining lot, which Ms. Ernst owns with her brother, and which was not part of the foreclosure.
>
> …
>
> [17] Sandra Ernst was party to the mortgage. She gave her address as being 44 Jackson Drive and then, as now, she was residing in the space later identified as 46 Jackson Drive. She explained that 44 Jackson Drive was her mailing address, but not where she lived. In each of her documents signed as part of the mortgage application process Ms. Ernst noted that her address given in response to request for a street name and number was 44 Jackson Drive. That was the same address given for Ms. Ernst's father, Lester Ernst, who was then living in the original house.
>
> …
>
> [22] Civic number 46 was not assigned until October 2020, after the foreclosure order had already been issued on August 13, 2020, and after the confirming order was issued on September 9, 2020. Because CIBC used the simple foreclosure process, CIBC acquired title in fee simple to the lands set out in the legal description attached to the mortgage. It was only then that Ms. Ernst made arrangements to have a civic number assigned to the "West addition" located on the remaining lands.

…

> [32] Ms. Ernst gave her address as being 44 Jackson Drive. She says that was where she got her mail even though she lived in the property now designated with civic number 46. She was one of the mortgagors. She was getting a mortgage over 44 Jackson Drive and said that her address 44 Jackson Drive. She claims that she was actually living in adjoining and attached property that then had no civic number but was not 44 Jackson Drive, which she gave as her address. She said nothing to CIBC to clarify a situation that would be very different from how it appeared….

[39] In terms of the pleadings, when the Defence filed by Ms. Ernst is considered in the context of the Order of Justice Jamieson, and the decision of Justice Campbell, the word that comes to mind is "obfuscation".

[40] In her Defence, Ms. Ernst admitted to the terms of these loans that were granted in 2019, when according to the findings of the learned justices, the only civic number that existed was 44 Jackson Drive, the building upon which the upgrades and repairs were completed.

[41] These findings further confirm that civic No. 46 Jackson Drive was created only after the foreclosure proceeding had been finalized and the Order issued September 9, 2020, which read "the Plaintiff shall be *vested with possession* of the lands of the Defendant in this foreclosure proceeding". (*Emphasis added*)

[42] In his decision, Justice Campbell concluded the mortgage entered into in 2015, was for 44 Jackson Drive, which included all of the building, and not only part of it. (See paragraph 33).

[43] The AGNS provided caselaw that explained the underlying reasoning for the general rule precluding collateral attacks on court orders, citing ***R v. Irwin***, 2020 ONCA 776**,** at paragraph 24:

> The rule protects the integrity of the justice system by prohibiting a party from avoiding the consequences of an order issued against it by proceeding in another forum.

[44] I find this reasoning to be applicable in the case before me.

Decision

[45] The test for summary judgement on the pleadings was recently confirmed in ***Howe v. Rees***, 2024 NSCA 16, where the Court of Appeal stated at paragraphs 46, 47, and 48:

> [46] The high threshold for dismissing claims under *Rule* 13.03 was recognized in *Walsh v. Atlantic Lottery Corporation*, 2015 NSCA 16 where MacDonald C.J.N.S. held:
>
> > [7] Justice LeBlanc was well aware of the heavy burden faced by the Government. It would have to establish that, assuming every alleged fact to be correct, the claim still would have no chance of success. He observed:
> >
> > [16] Summary judgment on the pleadings should not be granted lightly. A party whose action is summarily dismissed under Rule 13.03 will be denied his or her day in court. The harsh nature of the remedy demands that the applicant meet a heavy burden. I must be satisfied, even after assuming that all allegations contained in the pleadings are true without the need to call evidence, that the claim "is certain to fail", or is "absolutely unsustainable" or "discloses no reasonable cause of action": *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at para. 17, *Cragg v. Eisener*, 2012 NSCA 101 at para. 9.
>
> [47] Similarly, in *Cragg v. Eisener*, 2012 NSCA 101, Saunders J.A. wrote:
>
> > [9] The approach taken when deciding a motion for summary judgment "on the pleadings" is different. There, the judge's inquiry is limited to an examination of the pleadings. No evidence on the motion is permitted. The "test" is drawn from language found in the jurisprudence involving motions to strike out pleadings. In other words, to grant summary judgment on the pleadings, the judge must be satisfied that the claim (or defence, as the case may be) "is certain to fail" or "is absolutely unsustainable" or "discloses no cause of action or basis for a defence". […]
> >
> > [Citations omitted.]
>
> [48] In order to grant Mr. Larkin's motion for summary judgment, the motion judge would have to be satisfied Mr. Howe's action was "absolutely unsustainable" or "discloses no reasonable cause of action". He did so after embarking on an inquiry about the limitation period for all of the actions, including malicious prosecution. In order to grant Mr. Larkin's motion for summary judgment, the motion judge would have to be satisfied Mr. Howe's action was "absolutely unsustainable" or "discloses no reasonable cause of action". He did so after embarking on an inquiry about the limitation period for all of the actions, including malicious prosecution.

[46] Summary Judgement must be granted if the claim or defence, as the case may be, is certain to fail or discloses no cause of action or basis for a defence or contest or the claim or defence is absolutely unsustainable.

[47] I find the Confirmatory Order issued on September 9, 2020, is an official public record of the Court based on the authorities referred to above. I concur with the Plaintiff that it is not a record to be treated as evidence in the ordinary course of a proceeding and may be considered on this motion.

[48] That Order makes clear that possession and title to 44 Jackson Drive was effectively transferred to CIBC, contrary to the terms of the Promissory Notes signed by the Defendant, Ms. Ernst, in this matter. The terms of the contract required that both title and occupation be maintained by the Defendant borrowers.

[49] Having taken a step back to review the pleadings in the context of the record before me, I am unable to identify a defence that is sustainable.

[50] The simple denial or non admission of the claim does not, in these circumstances, provide a basis for a defence or contest. The Defence filed by Ms. Ernst is destined to fail.

[51] It is fundamental in the law of real property that, when a mortgage is granted, legal title is transferred from the mortgagor (borrower) to the mortgagee (the lender). What the borrower, in this case Ms. Ernst, retains is the equity of redemption, meaning the right to "redeem" the property by paying out the mortgage. When the equity of redemption is foreclosed upon, all of the right title, and interest in the property, vests in the mortgagee or the successful bidder at the foreclosure sale, as the case may be. While this is trite law it bears repeating here.

[52] Based on the pleadings, including the denial of the allegations in paragraph 8 of the Statement of Claim by the Defendant, I find there is merit to the Plaintiff's summary judgement motion. I find the record does allow for a fair resolution of the issue (breach of contract) in a summary way. (***Hyrniak v. Mauldin***, 2014 SCC 7)

[53] The denial in the Defence that the Confirmatory Order vested possession of the property on September 9, 2020, in CIBC, is completely without merit.

[54] The Defence in paragraph 5 is a further attempt by the Defendant to use an address that was created *after* the loans were granted by the AGNS in 2019.

[55] Contrary to Ms. Ernst's position in the "Notice of Rendering", the decision of Justice Campbell does not support her "claim". On the contrary, it supports the claim of the Plaintiff AGNS.

Conclusion

[56] Summary Judgement is granted to the Plaintiff, pursuant to Rule 13.03(1)(a).

[57] Judgement in the amount of $13,714.10 plus a per diem rate of $0.63 after the calculation date of April 22, 2022, to today's date, is entered against the Defendant, Sandra Ernst.

[58] I will hear from the parties on the matter of costs.

Murray, J.

APPENDIX "A"

RULE 13.03 Summary judgment on pleadings

(1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

(a) it discloses no cause of action or basis for a defence or contest;

(b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

(2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:

(a) judgment for the party making a claim, when the statement of defence is set aside wholly;

(b) dismissal of the proceeding, when the statement of claim is set aside wholly;

(c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;

(d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

(4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

(5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:

(a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination.

(b) the outcome of the motion depends entirely on the answer to the question.