SUPREME COURT OF NOVA SCOTIA

Citation: *Royal Bank of Canada v. Kafrouny*, 2014 NSSC 153

Date: 20140429
Docket: Hfx No. 412769
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

Dr. Arzy Kafrouny and Trevor G. Wise

Defendants

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 29, 2014, in Halifax, Nova Scotia

Counsel: Joshua Santimaw, for the Plaintiff
No one appearing for the Defendant, Dr. Kafrouny

By the Court:

Introduction

[1] Pursuant to the Order for foreclosure sale and possession of Justice Robertson dated June 26, 2013, the property herein was sold to the Bank on August 19, 2013 for $3771.86, it being the highest bidder at the sale.

[2] Most recently, by amended notice of motion filed February 17, 2014, properly served upon Dr. Azry Kafrouny only, against whom the Bank is proceeding with this motion, the Bank moved for an Order for assessment of deficiency pursuant to *Civil Procedure Rule* 72.12.

[3] The matter came before me on April 29, 2014. In support of the motion I had the benefit of affidavits from: Joshua Santimaw (counsel – regarding the Plaintiff's costs and disbursements); Kate Reynolds (branch manager of the Bank – regarding the total claimed deficiency owing herein, that is $46,832.89 as of December 20, 2013); and Colleen MacDonald (property manager of Veranova Properties Limited – regarding protective disbursement expenses).

Protective Disbursements again in the Spotlight

[4] Numerous judges of this Court have had issues with the form and content of the affidavits submitted by representatives on behalf of Veranova Properties Limited, particularly in the last six months. Many have repeatedly made their concerns known to counsel in Chambers. Some refinements to counsels' materials for the Court have been consequently made by counsel. To be clear however, I speak only for myself herein.

[5] I have made counsel aware of some of my concerns during my week in Chambers in January 2014 – see, for example: *Bank of Nova Scotia v. David A. Sullivan*, Hfx No. 409185, January 22, 2014; and *Royal Bank of Canada v. Zinck*, Hfx No. 408250.

[6] In the case at Bar, I conclude that the affidavit of Colleen MacDonald (which is typical of those provided by Veranova staff) sworn December 20, 2013 is deficient. Moreover it is deficient to the extent that the entire affidavit should be struck – Rule 39 and particularly 39.04.

[7] A review of Ms. MacDonald's affidavit shows that it is deficient in the following ways: although she swears that "I have personal knowledge of the evidence sworn in this affidavit except where otherwise stated to be based on

information and belief . . . [and] I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source"; her affidavit in contrast contains inadmissible hearsay statements, and for which she in any event, gives no source, and does not state that she verily believes such source to be credible – see Rules 39.02(2) and 22.15(3).

[8] Rule 39.02(2) permits hearsay under Rule 5.13; Rule 22.15; or under a rule of evidence or legislation. Only Rule 22.15 or a rule of evidence are applicable here. Affidavits are just a written form of direct evidence otherwise provided by *viva voce* testimony.

[9] Hearsay generally involves, within the testimony of a witness, the witness repeating, for the truth of its contents, what the witness was told or became aware of out-of-court, by a first-hand observer or source of information. I recognize that hearsay may also come from documentation. Such documentation, if it meets the test for the *Ares v. Venner* criteria i.e., under s. 23 of the *Evidence Act* RSNS 1989 c. 154 made in the usual and ordinary course of business; or if fairly characterized as necessary and reliable; and its probative value outweighs its prejudicial effect on the fair trial process, may be admissible as an exception to the hearsay rule. I do not consider this a case in which I should permit hearsay as contemplated by Rule

22.15(2)(d).As will become clear, the documentation in this case falls below the admissibility bar in my opinion.

[10] For example:

i. In the case at Bar, Ms. MacDonald states at para. 5:

> "Attached hereto and marked as exhibit "A" is a true copy of the property condition report upon the plaintiff taking possession of the property dated May 10, 2013."

The attached property condition report is completely typewritten and unsigned; it does not identify who is the source of the information contained in the "securing report and environmental checklist". It does not contain any indication of the credentials of the person who visited the site, and presumably created the report.

I note that often such reports contain "recommendations" as to what needs to be repaired or attended to, such as "environmental" matters. In such cases particularly the credentials of the person giving the opinion are required in order for a court to assess the weight to give to that opinion.

ii. At para. 6 Ms. MacDonald states: "Veranova incurred the following protective disbursement expenses which were incurred

> as a routine measure taken to add necessary protective measures for the property, a copy of the costs to date are attached hereto…".

[11] What follows thereafter are Exhibits B through to K. Examples of some of the typical costs that Veranova passes on to the Bank are reflected in many of these exhibits.

[12] Troubling examples abound: see, for example, Exhibit D – "oil tank inspection with labour break down" – $143.75. The only record in support of that expense is a meagre invoice printed December 9, 2013 for a purported service date of May 21, 2013 referencing invoice number "2455715" for the property in question, which contains under "job description":

> Repairs property interior
> Oil tank inspection $125 plus HST for a total $143.75.
>
> [no signature]

[13] On a separate page of Exhibit D, typewritten support for the expense incurred is proffered as follows:

> Repairs: inspect oil tank: one man at four hours at $25 per hour plus $25 materials.
>
> [no signature]

[14] Exhibit E – "install dehumidifier" – $488.75. The only record in support of that expense is an invoice printed December 3, 2013 for service June 15, 2013 under invoice number "2438495" for the property in question under which "job description" we find:

> Repairs property interior – install dehumidifier
>
> Supply and install self draining dehumidifier in basement – one man at four hours at $25 per hour plus $325 materials – $425 plus HST – total $488.75
>
> [no signature]

[15] Exhibit F – "scrub and shine, interior garbage removal and dispose of paint cans, oil, propane, etc." The only record in support of that expense is an invoice printed December 9, 2013 for service September 6, 2013 under invoice number "25103485" and under which " job description" we find:

> Cleaning
>
> Scrub and shine – to clean all sinks and plumbing fixtures, wipe counters, drawers, cupboards etc. Mop floors and vacuum to broom clean condition. Material and labor included – two men at 6.26 hours at $25 per hour plus $50 materials – $363
>
> Interior garbage removal
>
> To remove and dispose of all scattered debris throughout interior including basement and storeroom. *Dumpster and dump fee extra*– two men at 4.36 hours at $25 per hour +0 materials – $218
>
> Environmental issues
>
> To remove and dispose items which include paint cans, oil/lubricants, propane tanks and solvents –*dumpster and dump fee extra*– two men at 3.34 hours at $25 per hour +0 materials – $167
>
> Subtotal – $748 plus $112.20 HST for total $860.20.
>
> [no signature]

[16] Exhibit H – "furnace repair with labor break down" – $569.25. The only record in support of that expense is an invoice printed December 3, 2013 for service September 9, 2013 under invoice number "2509655" and under which "job description" we find:

> Furnace repair – $495
> Plus HST $74.25 for invoice total $569.25
> [no signature]

[17] On a separate page, in typewritten form, we find the following which is the only purported explanation: "repairs: furnace is not working – an internal contaminant gage has broken: one man at 3.8 hours at $25 per hour plus $400 materials".

[18] These evidentiary deficiencies must be seen in the context of the prerequisites to make claims for "protective disbursements". The claim must be pleaded in the Statement of Claim, and it must be based on sufficient wording to substantiate the claim in the mortgage document – see for example Chief Justice MacDonald's comments in *Bank of Nova Scotia v. Allen*, 2010 NSCA 47 at para. 13.

[19] Nevertheless, such disbursements must also be demonstrably established by evidence to be for the purpose of protecting the property; that is so long as "expenditures were properly and reasonably incurred to realize the best possible price so as to minimize a claim for deficiency against the mortgagor… 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." – Bateman, JA in *Royal Bank Canada v. Marjen Investments Limited* (1998) 164 NSR (2d) 293.

[20] Rule 72.13(2) expressly addresses such claims:

> . . .
>
> (2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:
>
> (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;
>
> (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;
>
> (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[21] This Court also has a Practice Memorandum in relation to foreclosures. Section 3 deals with motions for deficiency judgment or distribution of surplus. Clause 3.3 reads:

> . . . particulars of protective disbursements and taxable disbursements **are to be set out in an affidavit and must include sufficient detail to show work done or material provided, the necessity of the work or material, the necessity of other kinds of charges and the recoverability of the charges.**

[22] Practice Memorandum No. 1, Clause 3.5 reads:

> The Court will only allow those items which: (a) are authorized by the mortgage; (b) were **necessarily expended** for the purpose of preserving and protecting the property; and (c) are **demonstrated by evidence to have been necessary and reasonable, the specifics of which are set out in an affidavit** of the mortgagee or its officer… The affidavit in support of the motion for deficiency judgment should contain the following… evidence supporting protective disbursements as set out in para. 3.5 and a calculation of the amount of the deficiency.

[23] Clause 3.7 (commentary on protective disbursements) reads:

> A claim for a protective disbursement must be supported by evidence and explained in a chambers memorandum… The affidavit on behalf of the mortgagee **must contain sufficient detail so that court can ascertain whether the disbursement is within the wording of the mortgage, whether the expenditure was necessary and whether the amount was reasonable**. The following comments describe experiences of chamber judges in recent years with the intention that this may provide some guidance as to claims that will likely be unsuccessful, claims that will require sound explanation and claims the amount of which will be closely scrutinized…
>
> (d) – housesitting – plaintiffs may expect close scrutiny of the cost and necessity, including frequency, of charges from mowing, snow removal cleaning, maintenance repairs and inspections…. are not generally allowed unless the cost is, **by evidence, tied to specific services and justified**.
>
> …
>
> (f) – costs associated with environmental concerns – in order for the cost of an environmental assessment or any remedial work to be allowed, there must be **evidence establishing the need for the assessment or remedial work**. The need to replace an oil tank must be proved before the cost of replacing the tank is allowed.
>
> (g) – improvements – the need for and cost of making improvements, such as replacing a chimney or furnace or rebuilding a deck, will be closely scrutinized. There will be a presumption that an improvement made after appraisal increases the property's value and its cost will not be usually included in a deficiency judgment."

[24] Clause 3.8 (documentation) reads:

> The documentation required on all motions is:
>
> … (b) affidavit by or on behalf of the mortgagee –… (2) a listing of any protective disbursements claimed… **Information must be provided to demonstrate the necessity for incurring the protective disbursements**… .
>
> [my emphasis throughout]

[25] I am left to wonder among other things: who are the persons doing this work for Veranova? Do these presumably skilled tradespeople, and unskilled workers, all receive $25 per hour? Are these persons employees of Veranova or subcontractors? Do they travel to the property location or reside there? If they travel, are they paid for travel and at what rates? Are these persons who make repairs/recommendations regarding furnaces; environmental matters, etc. qualified to do so? Why are all the amounts for materials given as rounded amounts: $25 (Exhibit D); $325 (Exhibit E); $50 (Exhibit F); $400 (Exhibit I)?

Conclusion

[26] As these examples demonstrate, in the case at Bar Ms. MacDonald's affidavit is woefully deficient when measured against the requirements and guidance provided by the *Civil Procedure Rules*, the Practice Memorandum, and the associated jurisprudence regarding the form and content of affidavits.

[27] I conclude that it is just that I strike the entire affidavit pursuant to Rule 39.04. I direct that the affidavit be so endorsed by the Prothonotary.

Rosinski, J.