SUPREME COURT OF NOVA SCOTIA
Citation: *Kays v. N.A. Brown Holdings Limited*, 2014 NSSC 260

Date: 20140709
Docket: *Halifax*, No. 410476
Registry: Halifax

Between:

Kathy Rakhel Kays

Applicant

v.

N.A. Brown Holdings Limited

Respondent

DECISION

Judge:	The Honourable Justice James L. Chipman
Heard:	May 27 and 30, 2014, in Halifax, Nova Scotia
Decision:	July 9, 2014
Counsel:	Richard A. Bureau and Sean Kaulback, for the Applicant Joshua J. Santimaw, Meghan Russell and Douglas Schipilow, for the Respondent

By the Court:

Introduction and Background

[1] The Defendant/Applicant, Kathy Rahkel Kays ("Kays") makes a Motion for a redemption order and to settle the amount of mortgage debt, take accounts, make inquiries, tax costs and order conveyances. Kays relies on Civil Procedure Rule ("CPR") 72.16(1), 72.16(2) and unjust enrichment.

[2] In support of the Motion Kays relies on her affidavit sworn March 20, 2014. She also relies on her counsel's cross examination of Norman A. Brown ("Brown") the President of the Plaintiff/Respondent, who deposed an affidavit dated May 20, 2014.

[3] Counsel's research, along with my own research, confirms that the CPR under which this Motion is brought has before now not been judicially considered. In the result, I have reviewed a number of cases, *infra*, which, while obviously not directly considering CPR 72.16(1) and (2), provide guidance in determining my ultimate disposition.

[4] CPR 72.16 states:

> **Redemption**
>
> **72.16 (1)** A mortgagor or the other person entitled to redeem mortgaged property may claim a redemption order by starting an action or application, or by making the claim in an action or application brought to foreclose the equity.
>
> **(2)** A judge who determines a claim for redemption may take accounts, make inquiries, tax costs, settle the amount of the mortgage debt, order conveyances, and direct a party to take any necessary step to give effect to a conveyance.

[5] Kays is clearly a mortgagor entitled to redeem mortgaged property, in this case a collateral mortgage in respect of 3229 Beresford Road, Halifax, Nova Scotia (PID 00058321), (the "Collateral Mortgage").

[6] With respect to the litigation background, the Plaintiff/Respondent N.A. Brown Holdings Limited ("N.A. Brown") applied for an Order for Foreclosure, Sale and Possession by Notice of Action on December 20, 2012 (Hfx No. 410476).

Kays filed her Defence on February 21, 2013. On the same date, February 21, 2013, Kays filed a Notice of Action (Hfx No. 412624) naming Brown as a Defendant seeking $50,000 for services rendered and in the alternative for unjust enrichment. Pleadings have closed on both Hfx Nos. 410476 and 412624; there have been no other developments until the within Motion.

Position of Kays

[7] By way of this Motion, Kays asks for a redemption order in respect of Hfx No. 410476 and that N.A. Brown's demand (as set out in the Notice of Action) for $80,000 plus interest be taxed, accounted for and set off in accordance with CPR 72.16. In her written submission, Kays claims four amounts should be set off against the outstanding Collateral Mortgage balance:

- Living expenses — $40,835.00
- Regular employment — $75,000.00
- Additional employment — $45,167.78
- Payments on promissory note — $1,500.00 (already credited on the Collateral Mortgage payout amount)

[8] In the alternative, if none of her claims are accepted, Kays asks that she receive an unjust enrichment set off.

[9] In oral submissions, Kays' counsel suggested Rule 72.16 is precisely crafted to deal with situations such as what is before the Court on this Motion. With reference to the affidavit evidence (and his cross-examination of Mr. Brown), Mr. Bureau fashioned the argument that the Collateral Mortgage must be read to include:

1) a May 21, 2008 "Letter of Interest" signed by Kays;
2) a February 5, 2009 Promissory Note signed by Kays; and
3) a July 10, 2009 letter to Kays signed by Brown.

[10] Kays placed particular emphasis on the last item noting the key part of the text of the letter reads:

> As we have discussed on several occasions, on behalf of N A Brown Holdings Limited money was invested into the property at 3229 Beresford Road. This amount of $80,000.00 plus 3% interest will be repaid by yearly deductions from this amount based on services provided by Kathy Kays for business consulting to

> N A Brown Holdings limited, Halifax Tire Shack (2002) Limited and Norman Brown, since 2002.
>
> It was also noted that a monthly cost of living expense, back dated to 2006, of $1,000.00 would be deducted from this outstanding amount because this was Mr. Browns contribution to the household expenses. It was also said that this mortgage would not be registered against the property until all Ms. Kays financial ducks were in a row, particularly because of a 2005 bankruptcy due to the death of her mother in 2005.

[11] With the above in mind, Kays asserts that there is "enough evidence here" to prove what is stated in her pre Motion brief:

> The fourth amount to be set-off is for monthly living expenses which the Plaintiff agreed to pay the Defendant. As can be seen in Exhibit "C" in the Affidavit of Kathy Kays, the Plaintiff admitted to owing $1,000.00 per month while cohabiting with the Defendant back dated to 2006. As the Plaintiff lived with the Defendant from October 2006 to November 2010, or 50 months, the Defendant claims that the Plaintiff owes her $50,000.00. The Plaintiff has paid $9,165.00 in the form of 10 monthly payments of $916.50, towards the living expenses, so the Defendant submits that the $50,000.00 in living expenses should be reduced to $40,835.00

[12] Kays went on to point out the $1,500.00 payment on the promissory note is an appropriate set off but then acknowledged the other items claimed - "$75,000.00 regular employment and $45,167.78 additional employment", along with any unjust enrichment claims – should be left to be determined at trial.

Position of N.A. Brown

[13] N.A. Brown opposes the Motion by noting that $89,365.60 is due and owing on the Collateral Mortgage and should be the amount Kays has to pay to N.A. Brown to redeem the property in question.

[14] N.A. Brown goes on to argue as follows at p. 5, para. 25 of their brief:

> We respectfully submit that this Honourable Court should adhere to the jurisprudence and *Nova Scotia Civil Procedure Rules* regarding summary judgment in determining any claim for damages and set-off in a motion for a redemption order, particularly, when a relationship has broken down and credibility will have to be addressed.

[15] They continue at p.8, paras. 30 and 31:

> The Defendant is seeking this Honourable Court to summarily determine damages and then set that amount off the Collateral Mortgage amount, so as to provide a figure that the Defendant can pay to redeem the Property.
>
> With respect, the redemption motion constituted before this Honourable Court is not the proper hearing to determine damages, assess credibility, and make findings of fact. Essentially, the Defendant is seeking to have this proceeding tried.

[16] In oral argument N.A. Brown's counsel pointed to evidentiary issues by noting several of Brown's affidavit assertions, "were not touched in cross". For example, he drew the Court's attention to paras. 32 and 35 of Brown's affidavit:

> 32. The Defendant has utilized by personal credit card on numerous occasions without my express permission and generated charges in the amount of $25,000 plus interest.
>
> …
>
> 35. The Defendant borrowed the amount of $10,400 from me for education and vehicle expenses. This amount remains outstanding.

[17] Having reviewed the record, I agree Mr. Bureau's limited cross-examination of Brown did not disturb these assertions.

[18] Mr. Santimaw went on to point out that there is a letter subsequent to the July 10, 2009 letter dated April 10, 2011and signed by Kays, found at Tab K of Brown's affidavit, which reads in part:

> This letter is to confirm our discussions on April 10th 2011 regarding past financial events and work related experiences. We both have helped each other and there should not be a one up-man-ship about who did what for whom. From today's date forward we will not longer be talking about the past and its financial and work related events; they are in the past. We will however start talking about today's events and experiences to build future events. This means there will be no more ranting about how much I did for you and what your owe me, instead it will be about mutual appreciation and respect for what we have done for each other.

[19] Accordingly, N.A. Brown says this later letter may well supersede any earlier correspondence allegedly altering the Collateral Mortgage. More generally, he says that this area is yet another example demonstrating why the Motion is flawed as the body of evidence is simply too uncertain to allow the redemption order sought.

Disposition

[20] In my view, N.A. Brown has correctly characterized the situation before the Court. I say this with reference to the authorities and the evidence marshalled on this Application. The affidavits of Kays and Brown, along with his cross-examination and redirect examination, is the only evidence the Court has to consider. On the basis of the totality of this evidence, I have no hesitation in finding that Kays has failed to prove the claimed set off, namely the living expenses, regular and additional employment claims. Furthermore, she has not persuaded me of her alternative position that there has been an unjust enrichment. In my view these claims will require a fulsome hearing whereby the Court will have the benefit of the parties' – and likely other relevant witnesses' – testimony so that credibility may be properly assessed and findings of fact made.

[21] In terms of authorities, in coming to my conclusion I am mindful of **Freedom International Brokerage Company v. Anastakis,** [2006] O.J. No. 3664, where Justice Belobaba considered a motion for partial summary judgment on an employee share-purchase loan. At paras. 4, 5 and 6, His Lordship noted:

> 4. In my view, the plaintiff is entitled to a partial summary judgment on the promissory note in the amount of $38,984. The only defence to this note is the set-off, but the case law is clear that the law of equitable set-off does not apply to promissory notes or other bills of exchange: *Iraco v. Staiman Steel Ltd.,* (1986) 54 O.R. (2d) 488, aff'd (1987) 62 O.R. (2d) 129; *Elgrichi v. Hornstein*, [2003] O.J. No. 1308. Nor is a counter-claim for unliquidated damages a valid defence on a promissory note: *Iraco, infra*.
>
> 5. However, I am unable to grant summary judgment for the balance owing on the loan because the indebtedness is based on an oral repayment agreement rather than a promissory note. In these circumstances, equitable set-off is a substantive defence: see, in general, *Canada Trustco Mortgage Co. v. Pierce Estate,* [2005] O.J. No. 1886.
>
> 6. Counsel for Freedom Brokerage does not dispute the law as stated above, but submits that there is no basis on the evidence before me for either the unpaid bonus or constructive dismissal claims and thus no genuine issues for trial. I do not agree. It is apparent from the affidavits filed by Mr. Anastakis that there is real disagreement about the nature and calculation of the bonuses, whether they were paid, and whether Anastakis resigned or was wrongly dismissed. In my view, there are material facts in dispute that will require a trial for their determination. I cannot therefore do more than grant summary judgment on the promissory note.

[22] It is apparent that the majority of Kays' damages/set-off claim is unliquidated. As with the situation in **Freedom International**, *supra*, "there are material facts in dispute that will require a trial for their determination."

[23] In **Royal Bank of Canada v. Rizkalla**, [1984] B.C.J. No. 2747, the British Columbia Supreme Court considered a petition of a mortgage for an order *nisi* and a personal judgment under the mortgage. McLaughlin, J.'s comments at paras. 11-14 are instructive:

> 11 … It is not disputed that the money was loaned, nor that it is repayable, together with interest. Nor is it denied that the contracts which the mortgagors signed gave the bank an equitable mortgage on their home in the amount of their indebtedness.
>
> 12 The so-called "defences" raised by the mortgagors reduce, in essence, to the contention that the amount which they owe the bank would have been less had the bank not taken the steps of which they complain. **This allegation is not a defence, but an independent claim for damages – a claim founded not upon the contracts upon which the bank bases its claim (the promissory notes and mortgage agreement) but upon a separate contract of assignment of a security.** [My emphasis added]
>
> 13 I conclude that the issues raised by mortgagors do not disclose a defence to the petitioner's claim and consequently do not afford sufficient grounds for an order that that claim be set down for trial.
>
> 14 … The length of the redemption period in a foreclosure action is in the discretion of the court, to be determined according to the equities between the parties in all the circumstances of the case. Should further time be required, an application for an extension of the redemption period may be brought. I would also order a stay of execution of the personal judgments against the mortgagors during the redemption period which I have fixed: Citadel Life Assur. Co. v. Abacus Cities Ltd., B.C.S.C., Vancouver No. H822964, 15th March 1983; Zonailo v. Cypco Hldg. Ltd., B.C.S.C., Vancouver No. H824050, 18th March 1983 (not yet reported).

[24] I liken Kays' case to what Justice McLaughlin (as she then was) considered when she noted what I have above emphasized.

[25] Finally, I draw reference to the Nova Scotia case of **Agate Developments Ltd. v. United Gulf Developments Ltd.,** 2008 NSSC 144 and Associate Chief Justice Smith's treatment of set off at paras. 37 and 38:

> 37 In this case, there was no agreement for a set-off between Agate and United Gulf. In addition, in my view, set-off at law does not apply to the circumstances

of this case as both obligations are not debts. I refer in this regard to the Nova Scotia Court of Appeal decision in **Pick O' Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.**, [1995] N.S.J. No. 481 where the Court was dealing with the issue of what constitutes a liquidated demand and stated at para. 38:

> 38 Similarly, these words are defined in The Supreme Court Practice, 1988, Volume 1, p. 35 as follows:
>
> > A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. **If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not "a debt or liquidated demand", but constitutes "damages"**. [Emphasis Added]

38 In this case, United Gulf's claim for an amount equal to monthly commercial rent plus applicable taxes and interest is a claim for damages - not a debt.

[26] Smith, A.C.J. then discussed equitable set off and found as follows:

> 41 In the case at Bar, I am not satisfied that United Gulf's claim for set-off goes to the very root of the claim being advanced in this application for partial summary judgment in such a way that it would be manifestly unjust to allow Agate to enforce this part of its claim without taking the Counterclaim into account. In my view, the causes of action, which may be connected, are not so closely related that Agate should be denied its right to partial summary judgment until the claim for set-off is determined. United Gulf's Counterclaim is a separate action which may proceed to trial notwithstanding that a partial summary judgment has been granted (see C.P.R. 16.03(a).)

[27] I believe the within case is analogous as I find Kays' set off claim does not go to the very root of the Collateral Mortgage. The claim therefore does not fit within Rule 76.12 and a redemption order shall not be granted.

[28] In the result, I dismiss the Application with costs of $2,000 (inclusive of disbursements) forthwith payable to N.A. Brown.

Chipman, J.