IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Meadowland Development Co. Ltd. v. Smith & Pine Breeze Estates Ltd.
2003 NSSC 255

Date: 20031222
Docket: S.H. 202961;
S.H. 202963
Registry: Halifax

Between:

Meadowland Development Company Limited

Plaintiff

v.

Darrin Smith, Trustee for Pine Breeze Estates Ltd, of Port Dover, Ontario and **Pine Breeze Estates Limited**, a body corporate

Defendants

And Between:

Meadowland Development Company Limited

Plaintiff

v.

Pine Breeze Estates Ltd., a body corporate, Darrin Smith of Port Dover, Ontario, as Trustee of certain lands for Pine Breeze Estates Ltd, and Fern Redmond, of Halifax Regional Municipality, Nova Scotia, as Trustee of certain lands for Pine Breeze Estates Limited.

Defendants

Judge:	The Honourable Justice Donald M. Hall
Heard:	December 11, 2003, in Halifax, Nova Scotia
Counsel:	Jonathan T. Kenyon, Esq., counsel for the applicant R. Barry Ward, Esq., for the plaintiff

By the Court:

[1] Ivan Smith Holdings Limited, herein referred to as the applicant, has applied for leave to intervene and be joined as a party defendant in two foreclosure proceedings instituted by Meadowland Development Company Limited, herein referred to as the plaintiff. The issue is whether the applicant has an interest in the subject matter of the proceedings so as to bring it within the provisions of **Civil Procedure Rule** 8.01.

[2] The applicant apparently is owed a significant sum of money by the defendant, Pine Breeze Estates Limited, herein referred to as Pine Breeze, and has obtained an order for judgment against Pine Breeze with damages to be assessed. It appears that the subject matter of that proceeding arose out of, at least in part, an agreement between the applicant and Pine Breeze, which was in evidence as Exhibit 1 in this application. The agreement provided that in consideration of the applicant lending $100,000.00 to Pine Breeze, the latter would pay to the applicant thirty-three percent of the net proceeds of sale of timber cut from Pine Breeze's lands, which included lands that are subject to these two mortgage foreclosure

actions. Apparently timber was cut but the proceeds were not paid to the applicant in accordance with the agreement.

[3] Pine Breeze is in receivership. A defence to the foreclosure actions has been filed by one of the defendants but not by Pine Breeze itself, although Mr. Ward advises that counsel has been retained and defences will be filed by it.

[4] The two mortgage foreclosure actions were commenced June 24, 2003.

[5] The application for leave to be joined as a party defendant is opposed by the plaintiff in both of the foreclosure proceedings.

[6] On behalf of the applicant, Mr. Kenyon maintains that the applicant has an interest in the subject matter of the proceedings as a judgment creditor and subsequent encumbrancer. He submitted, as well, that his client is concerned that there may be some underhanded dealings between the plaintiff and Pine Breeze in the works that would deprive the applicant of recovery of its claim and that it wants to protect its interest in the land in question. Mr. Kenyon also contended

that there would be no prejudice to the plaintiff if leave is granted to intervene as requested. He submits, therefore, that leave should be granted.

[7] Mr. Ward, on the other hand, on behalf of the plaintiff, argued that the applicant does not have a legal interest in the subject matter but merely a commercial interest, which he says is not the nature of the interest envisaged by the rule. He further submitted that rule 5.13(4) applied so that the applicant has no right to intervene until after the order for foreclosure and sale has been granted. As well, he contends that the rule must be considered in light of s. 9 of the **Sale of Land Under Execution Act**.

[8] Mr. Ward relied substantially on the decision of Lord Devlin in **Amon v. Raphael Tuck & Sons Ltd.** [1956] 1 All E.R. 273. That case was concerned with the application of the English rules, in particular order 16, rule 11. This rule is significantly different from our rule 8.01. In particular, it includes the following which is foreign to our rule:

> ". . . any parties whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to involve the court effectually and completely, to adjudicate upon and settle all the questions involved in the cause matter, be added."

[9] **Civil Procedure Rule** 8.01 is as follows:

> (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,
>
> > (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;
> >
> > (b) his claim or defence and the proceeding have a question of law or fact in common;
> >
> > (c) he has a right to intervene under an enactment or rule.
>
> (2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.
>
> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

[10] In my respectful view the comments of Lord Devlin are of no assistance in this application, particularly since our rule does not require that an applicant's participation is necessary in order "to adjudicate upon and settle all the questions involved in the cause or matter".

[11] I am also of the view that rule 5.5.13(4) has no application here. As Mr. Kenyon pointed out that rule simply clarifies the fact that plaintiffs in foreclosure proceedings no longer have to make beneficiaries and subsequent encumbrancers defendants in foreclosure proceedings as was formerly the case. The rule does not, in my opinion, operate so as to prohibit an applicant from applying to intervene at any stage of a foreclosure proceeding.

[12] The question is whether the applicant has an interest in the subject matter of the proceeding, in this instance the property which is sought to be sold under the foreclosure proceedings. "Interest" is defined in part in **Dictionary of Canadian Law,** Dukelow and Nuse as follows: "something which a person has in a thing when that person has advantages, duties, liabilities, losses or rights connected with it, whether ascertained or potential, present or future."

[13] It seems to me that the applicant comes within this definition and has an interest in the property that is the subject of the foreclosure proceedings as a result of its judgment against Pine Breeze. If it cannot be said that the interlocutory judgment operates as a subsequent encumbrance at this time, certainly it is in the

process of becoming such. I do not accept Mr. Ward's proposition that the interlocutory judgment is nothing more than a caveat and thus of no effect. The interlocutory judgment resulted from an adjudication by a court of competent jurisdiction, which is not the case with respect to a caveat.

[14] Furthermore, the applicant has an interest in ensuring that any potential surplus proceeds from the foreclosure sales are not swallowed up in improper charges or claims so as to defeat its claim against Pine Breeze.

[15] I am satisfied that the applicant does indeed have a very significant legal interest in the outcome of the mortgage foreclosure proceedings. I am also satisfied that the plaintiff would not suffer any prejudice that could not be compensated for in costs if the applicant is granted leave as requested.

[16] Accordingly, leave is granted to the applicant to intervene in both proceedings and to be joined as a party defendant. I will hear the parties further with respect to costs if they are unable to agree.

Donald M. Hall, J.