**SUPREME COURT OF NOVA SCOTIA**
**Citation: Jaskolka v. Penney**, 2014 NSSC 400

**Date:** 20141105
**Docket:** Hfx No. 425042
**Registry:** Halifax

**Between:**

Alan Jaskolka, Bonnie Jaskolka,
Bryan Jaskolka and Klee Rogers

Applicants/Plaintiffs

v.

Brian Penney and Small Fortunes Inc., a body corporate

Respondents/Defendants

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| **Judge:** | The Honourable Justice Suzanne M. Hood |
| **Heard:** | October 22, 2014, in Halifax, Nova Scotia |
| **Oral Decision:** | November 5, 2014 |
| **Written Decision:** | November 12, 2014 |
| **Counsel:** | Nicholas Mott, for the Applicants/Plaintiffs<br>K. Michael Tweel, for the Defendants/Respondents |

**By the Court:**

[1] The plaintiffs seek summary judgment on the evidence and an Order for Foreclosure, Sale and Possession. The issue is whether summary judgment should be granted.

[2] Canadian Lending Inc. approved a loan to Brian Penney further to a Construction Mortgage Loan Commitment. The Loan Commitment was for $260,000.00 to be secured by a first mortgage on a Beaverbank Road property and, as additional security, a second mortgage on two other properties and a third mortgage on another.

[3] The Loan Commitment was assigned to the plaintiffs in this proceeding. There was default on the mortgages and the plaintiffs first foreclosed on the Beaverbank Road property, obtaining a judgment settled as $272,861.62, plus interest, on August 7, 2013.

[4] The property was bid in at the foreclosure sale by the plaintiffs for a price of $200,000.00 but they subsequently sold it for only $185,000.00. There were also costs to the plaintiffs leading up to, and on, the sale of the property resulting in a

net to the plaintiffs of $157,630.38, according to the affidavit of Shannon Gale, a property paralegal with the law firm of plaintiffs' counsel.

[5] The plaintiffs filed a Motion for Deficiency on the sale of the Beaverbank Road property. It was to be heard in April of 2014, but was adjourned. A draft affidavit, unsworn, was sent to the defendants for that matter. It showed a deficiency of $123,700.58 was being claimed on the Beaverbank Road mortgage at that time.

[6] The deficiency motion has not yet been rescheduled.

[7] The plaintiffs, on March 3, 2014, commenced this foreclosure and sale action claiming $161,477.73 was still owing on the original $260,000.00 debt. They seek to sell only one of the properties secured by that mortgage – Unit 509, 53 Bedros Lane, Halifax, Nova Scotia.

[8] The defendants have filed a defence to the foreclosure and sale action. They say no funds were advanced by the plaintiffs. They also say that the amount claimed is not owing. In the alternative, they say there has been no breach of the mortgage. They also say this action is an abuse of process because the plaintiffs had already commenced the previous foreclosure and sale action.

[9] Rule 13.01 provides:

> (1) This Rule allows a party to move for summary judgment on pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.
>
> (2) A frivolous, vexatious, scandalous, or otherwise abusive pleading may be dealt with under Rule 88 - Abuse of Process.

[10] In *Coady v. Burton*, 2013 NSCA 95, Saunders, J.A. set out in detail the principles for summary judgment. He said, in part, at para. 87:

> 1. Summary judgment engages a two-stage analysis.
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> 2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

[11] Therefore, I must first be satisfied that there are no material facts in dispute. In *Coady*, *supra*, Justice Saunders defined a material fact in para. 87 and he said:

> 8. … A "material" fact is a fact that is essential to the claim or defence.

[12] In this case I must be satisfied that the mortgage is in default and that there is reason to grant the foreclosure and sale motion.

[13] Although the defendants say no funds were advanced, I cannot conclude there is any dispute about that fact. The advance of $260,000.00 was secured not only by a mortgage on this property and others, but by a mortgage on the Beaverbank Road property. The existence of the foreclosure and sale Order on the

Beaverbank Road property is predicated on the advance of the money. I am, therefore, satisfied that there is no material dispute of fact that the funds were advanced.

[14] The defendants also say there has been no breach of this mortgage. However, payments were required to be made. I am satisfied that there is no material dispute of fact that this mortgage, as well as the Beaverbank Road mortgage, is in default. There is no material dispute of fact with respect to breach of this mortgage. It secured the same unpaid debt as the Beaverbank Road property did.

[15] The third thing the defendants say is that the amount claimed is not correct. The question is whether that is a material dispute of fact. Rule 13.05 provides:

> (1) A judge hearing a motion for summary judgment on evidence must grant judgment for an amount to be determined, if the only genuine issue for trial is the amount to be paid on the claim.
>
> (2) The judge may determine the amount, or order an assessment, accounting or reference.

[16] I consider whether the quantum is essential to the claim; that is, whether it is a material fact. In my view, what is essential is a finding that the mortgage is in default. Rule 13.05 permits an assessment of the amount owing on the mortgage

which is in default. A question of quantum therefore does not prevent me from granting an Order for summary judgment if it is otherwise proper to do so.

[17] Accordingly, I move to the second stage of the two-stage analysis. I refer again to Justice Saunders' decision in *Coady, supra*, at para 87 where he continued:

> 3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

[18] In that same paragraph Saunders, J.A. defined "a real chance of success" as follows:

> 8. … A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.

[19] In considering whether the defendants have a real chance of success, I must determine whether the abuse of process argument, a question of law, is reasonable in that it is an arguable and realistic position. As Saunders, J.A. said in *Coady, supra*, at para 87:

> 12. Where, however, there are *no* material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[20] The defendants cite Rule 88 with respect to abuse of process. It provides in part:

> **88.01 Scope of Rule 88**
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> (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
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> (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
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> (3) This Rule provides procedure for controlling abuse.
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> **88.02 Remedies for abuse**
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> (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:
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> (a) an order for dismissal or judgment;
>
> ….
>
> (e) an order striking or amending a pleading;

[21] The defendants say the Court should control its processes to ensure there is an end to litigation and that no one is vexed twice by the same cause (quoting from D.J. Lange, *The Doctrine of Res Judicata in Canada* (2000), as quoted in *Toronto (City) v. C.U.P.E*, [2003] 3 S.C.R. 77 at p. 103).

[22] An abuse of process can occur when a cause of action or an issue has already been decided by the Courts. In such a case the principle of *res judicata* applies.

[23] The defendants refer to *Toronto (City) v. C.U.P.E., supra*, where Justice Arbour defined issue estoppel at para. 23:

> 23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.).

[24] I therefore must determine if the issue has already been litigated in another proceeding where the decision is final and the parties are the same. It is true the parties are the same and the prior decision is final. The question is whether the issue has already been litigated.

[25] The issue in a foreclosure action is whether there has been default under the mortgage in question; in that case, the Beaverbank Road mortgage. The issue does not relate back to the Commitment Letter. The Commitment Letter provided that funds were to be advanced upon execution of the mortgages. The mortgages were executed and funds were advanced based upon that security. This is unlike the situation in *Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc.*, 2013 NSCA 76, where no funds were advanced and the

Commitment Letter itself was the source of the litigation. Here the issue is whether there has been default under the mortgage on 53 Bedros Lane.

[26] The defendants also say the action should be struck because of cause of action estoppel. Cromwell, J.A. (as he was then) in *Hoque v. Montreal Trust Co. of Canada*, [1997] N.S.J. No. 430(C.A.), was quoted in *Can-Euro, supra*, at para. 31. In *Hoque*, he referred to *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, where Justice Dickson (as he then was) said:

> … The first, 'cause of action estoppel', precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. …

[27] The defendants rely on the *Can-Euro* decision where the plaintiff had sought to refinance its property but the lender had a number of conditions for Can-Euro to fulfill. An action was commenced by Can-Euro for specific performance ordering the lender to advance the funds. The Court concluded the lender had no liability to Can Euro and, approximately one year after the unsuccessful appeal by Can Euro of that decision, Can Euro commenced a new action against the lender. It related to the same Commitment Letter but was framed in breach of duty of good faith, breach of contract or unjust enrichment and other claims. These claim were struck and the decision was appealed.

[28] Fichaud, J.A. in the appeal decision quotes from the decision of Pickup, J. at para. 28, quoting from paras. 21 to 23 of Pickup J.'s decision:

> [21] Can-Euro says it attempted to borrow $12,500,000.00 from Industrial Alliance at two different times:
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> …
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> [22] Can-Euro says that these are two separate and distinct events and that each borrowing failed for different reasons unconnected to the other. In other words, Can-Euro argues that these are mutually exclusive claims. They say that the first claim was an action for specific performance and equitable remedy. They say the second attempt at borrowing during the week of May 26, 2008 also failed, but for different reasons. They say that the problem with the second borrowing was that Industrial Alliance would not set an interest rate even after Can-Euro was ready, willing and able to close as of May 26, 2008.
>
> [23] Can-Euro submits that the present notice of action deals only with the second borrowing attempt which is a separate and distinct cause of action. They say that as a result this action is not *res judicata*.

[29] Fichaud, J.A. agreed with Pickup, J. and dismissed the appeal. He concluded that the earlier action and the 2010 action both arose from the same transaction and all the obligations of the lender arose from the Commitment Letter. He concluded in para. 33:

> 33 Can-Euro's 2010 Action derives from the same transaction that was subject to the 2009 NSSC Decision. There was no temporal bright line between May 19 and the week of May 23, as Can-Euro suggests. Rather, there was a factual continuum through the entire period. The May 19 date had been extended to May 23, the conditions for closing on May 23 were not satisfied, and the parties did not agree to a further extension of the interest rate after May 23. The contractual obligations derived from the Commitment Letter. The question posed by the 2010 Action is whether these facts give Can-Euro a cause of action against Industrial Alliance. In my view, under *Hoque's* principles, the causes of action in

> the 2010 Action either were raised or should have been raised in Can-Euro's claim that culminated in the 2009 NSSC Decision.

[30] The defendants also refer to *Scanwood Canada Ltd. (Re)*, 2011 NSSC 495 where, at para. 10, I quoted from *Grandview v. Doering*, [1976] 2 S.C.R. 621 (S.C.C.), which in turn quoted from *Fenerty v. The City of Halifax* (1920), 50 D.L.R. 435 (N.S.S.C.):

> …The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. It is clear that the plaintiff must go forward in the first suit with his evidence; he will not be permitted in the event of failure to proceed with a second suit on the ground that he has additional evidence. In order to be at liberty to proceed with a second suit he must be prepared to say: "I will shew you this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been ascertained by me before."

[31] The defendants also refer me to *Comeau v. Breau* (1994), 145 N.B.R. (2d) 329 (C.A.), in which the issue was whether there was a new cause of action in tort separate from the previous one in contract. Ryan, J.A. said on p. 1 of his decision:

> …What is the same in this case is the "cause of action", that is, the combination of facts which gave rise to the right of action pursued by Comeau against the others in the first action .

He continued on p. 4 of his decision:

> In a cause of action estoppel, there must be a completely different cause of action asserted in order to avoid the rule. More simply put, were the facts upon which the Breaus were found liable to Comeau for the wrongful retaking of the restaurant business substantially the same and in issue in the intended second suit?

> The answer is "yes". The facts constituting the cause of action in this case remain the same whether the action is founded in contract or in tort although the remedy might well be different.

[32] In this case the cause of action is a foreclosure on a mortgage at 53 Bedros Lane in Halifax. In the earlier action the cause of action was foreclosure on the Beaverbank Road property. The fact underlying this action is default of the Bedros Lane mortgage. The fact underlying the Beaverbank Road foreclosure action was default on that mortgage. Because these are separate mortgages they were separate defaults. Therefore these are separate causes of action.

[33] The defendants also rely generally on the principle of abuse of process which can be separate from a question of *res judicata*. In *Toronto (City) v. C.U.P.E., Local 79, supra*, Justice Arbour discussed the concept. She said in paras. 35 and 36:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" …, and as "oppressive treatment" … McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

Justice Arbour continued in para. 36:

> 36 The doctrine of abuse of process is used in a variety of legal contexts. …

She continued in para. 38:

> 38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one.

[34] The defendants give as an example of abuse of process, the words of Goudge, J.A. at para. 56 *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) which was cited at para. 37 in *Toronto (City) v. C.U.P.E., Local 79, supra,* where he said:

> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[35] I have the inherent jurisdiction to prevent abuse of the Court's processes. The test is whether the proceedings are vexatious or oppressive and violate the fundamental principles of justice. I have greater flexibility in making such a determination than by strictly applying the principles of *res judicata*

[36] In *Toronto-Dominion Bank v. Stevens*, 2011 NSSC 343, Rosinski, J. commented on the role of the Court in foreclosure proceedings at paras. 23, 24, 26 and 67 where he quoted from a number of decisions. I summarize these roles as follows:

1. To ensure that the mortgagee recovers no more than is "just and reasonable";
2. To act as a watchdog over the process, especially where the defendants do not appear to defend;
3. To protect the mortgagors' interest, again, where the mortgagors do not appear on the hearing of the matter;
4. To oversee the price paid by third parties or a fair market value, when the mortgagee buys the property at public auction, to ensure the mortgagee's conduct is acceptable.

[37] In my view, with this role in mind, there are protections to the defendants which would prevent any unfairness to them and which will make the proceeding one which is in accordance with the fundamental principles of justice. I am mindful that the individual defendant is a business person who freely entered into

an arrangement whereby he and the company granted more than one mortgage to secure a loan of $260,000.00. They then defaulted on their repayment obligations.

[38] The defendants say it is unfair to them for the plaintiffs to proceed to a second foreclosure action when they have not had the Court adjudicate on the deficiency owing in the first foreclosure action.

[39] The plaintiffs now propose in the alternative that summary judgment be granted with the amount to be assessed. If that is done, the amount owing can then be determined by the Court. Any unfairness to the defendants can be addressed in that process.

[40] As Rosinski, J. said in *Toronto-Dominion Bank v. Stevens, supra,* at para. 41:

> There is no deadline otherwise imposed upon mortgagees once they have filed their Notice of Motion within the 6 months of the effective date of default judgment, other than the court's supervision of progress of the motion.

[41] The Court cannot order the plaintiffs to bring the deficiency motion; however, the amount owing on this mortgage can be determined pursuant to Rule 13.05, to which I have previously referred.

[42] The defendants say the plaintiff should have brought both foreclosure and sale motions at the same time. The plaintiffs concede they could have done so but say they are not obligated to do so.

[43] Since there are two separate mortgages, I questioned both counsel about what the Court would consider the amount outstanding on whichever matter was dealt with second, if the full amount owing was found to be the settled amount in the first action. Having received no answer to that question I conclude this proposition does not assist the defendants. I do not conclude there is any obligation on the part of the plaintiffs to have brought both actions at the same time. Both mortgages stood as primary security for the debt of $260,000.00. It was therefore open to the plaintiffs to choose which mortgage to foreclose on first.

[44] The Practice Memorandum with respect to foreclosures, in the case of a collateral mortgage, contemplates in paragraph 4.5 that a lender may first sue for the amount owing and then move to foreclose on the collateral mortgage and sell the property. A lender who takes two mortgages as principal security for a debt should, in my view, be in no worse position than a lender who has a debt instrument with a mortgage as collateral security.

[45] In *Bank of Montreal v. Behner*, 2010 NSCA 54, at para 15, the motions judge was quoted at para. 25 of his decision where he had said:

> [25] Bonang does not require that judgment first be obtained. Indeed, it appears to contemplate just the opposite. However, if judgment is obtained then the further remedy of enforcement under the Collateral Mortgage is still available to the judgment creditor.

[46] In *Behner, supra,* the defendant Behner had executed two loan guarantees to the bank. The first was for $100,000.00 secured by a collateral mortgage. The second, some years later, was for a maximum amount of $2,000,000.00 without any collateral security. A demand was made to the principal debtor, Trax Construction Limited ("Trax"), for an outstanding amount of $1.1 million dollars. Demands were also made to the defendant Behner pursuant to both guarantees and there was a notice to enforce security with respect to the collateral mortgage.

[47] An action was commenced only on the unsecured guarantee and judgment obtained for $1.85 million dollars. Shortly thereafter, the bank commenced action seeking an order for foreclosure and sale under the collateral mortgage.

[48] The defendants in that case said the bank was barred from foreclosing by the principle of *res judicata*, having already obtained a judgment under one of the two guarantees for the full amount owing.

[49] Oland, J.A. concluded the action for foreclosure and sale could proceed. She said in para. 18 of her decision:

> 18 It is clear from the wording of the 2002 guarantee that Mr. Behner signed a continuing guarantee, one which secures all present and future debts and liabilities of Trax to the Bank, and one which expressly is not released until *all* of those debts and liabilities are paid and released. It is undisputed that Trax remains indebted to the Bank in an amount well beyond the $100,000 secured by the 2002 guarantee. As a matter of contract law then, Mr. Behner's guarantee obligations under the 2002 guarantee have not ended.

She continued at para. 19:

> 19 …The two guarantees Mr. Behner executed did not secure different debts. Rather, both secured the same debt, namely, all present and future debts and liabilities of Trax to the Bank.

She concluded at para. 21:

> 21 …, each guarantee specified that it remains in full force and effect until all the debts and obligations of Trax secured by it are paid and released. The two guarantees secured the same indebtedness and that indebtedness has yet to be satisfied.

[50] The same principles, in my view, apply here. Although one mortgage has been foreclosed upon, there is nothing to prevent the plaintiffs from foreclosing on another valid mortgage securing the same debt, a debt which has not been satisfied in full. There are separate contractual obligations pursuant to the Bedros mortgage

which are not affected by the plaintiffs having foreclosed on the Beaverbank Road mortgage. The issue will be to determine what is owing on the Bedros mortgage.

[51] I am therefore not satisfied that the defendants have a real chance of success with their defences. As I have said, there is no question that funds were advanced or that the mortgage was breached. The disputed quantum, I have concluded, is not sufficient reason to deny the summary judgment motion. Nor have the issues or causes of action already been litigated. The cause of action in this case is default on the mortgage on the Bedros Lane property. The cause of action in the first proceeding was default on the Beaverbank Road mortgage.

[52] Nor is the same issue to be decided for the same reason. The amount due on the Beaverbank Road mortgage default has been set. The amount due on the Bedros Lane property is in issue. In fact, by the defendants' own argument the amount owing is very much in issue. They say they have been given three or four different amounts owing which vary from the amount claimed in this action.

[53] I therefore conclude the summary judgment motion should be granted. The plaintiffs have met their obligation to establish there are no material facts in dispute and the defendants have not satisfied me that any of their defences have a real chance of success.

[54] Accordingly, I grant summary judgment and order the quantum to be assessed pursuant to Rule 13.05(2).

[55] I will say that I do, however, have some concerns about the interest rate: the difference between the 5 percent rate on the deficiency judgment which could be granted in the first action and the 12 percent rate in the mortgage now being foreclosed. That issue is not for me but will be addressed in the assessment.

[56] As well, in an action to foreclose on this property there is a question of whether it is appropriate to consider the costs related to the mortgagee's purchase and subsequent resale of the Beaverbank Road property. The question in this case is what is owed on the mortgage on Bedros Lane. Neither of these issues are before me and will be left to be dealt with hereinafter.

[57] After hearing from the parties with respect to costs, I order that both parties bear their own costs.

Hood, J.