SUPREME COURT OF NOVA SCOTIA
Citation: *CIBC Mortgages Inc. v. MacLean*, 2017 NSSC 106

Date: 2017-04-18
Docket: Hfx. No. 445046
Registry: Halifax

Between:

CIBC Mortgages Inc., a body corporate

Plaintiff

v.

Shauna MacLean

Defendant

Decision

Judge:	The Honourable Justice Moir
Heard:	April 13, 2017, in Halifax, Nova Scotia
Oral Decision:	April 13, 2017
Transcribed & Edited:	April 18, 2017
Counsel:	Nicholas Mott, for the Plaintiff Defendant not appearing

Moir, J. (Orally):

[1] Rule 72.12(2) requires service, usually personal service, on a motion for assessment of a deficiency after a foreclosure sale. The notice of motion and supporting affidavits are to be served on a defendant even though the defendant has not filed a defence or a demand of notice.

[2] When the defendant mortgagor cannot be located, or is evading service of the motion documents, the plaintiff mortgagee who wants to preserve the deficiency judgement makes a motion for substituted service and sets the motion for assessment after the approved substitutes have been effected. In this case, the plaintiff proposes a more efficient and less costly approach.

[3] CIBC obtained a default order for foreclosure and sale. It bought the mortgage property at the foreclosure auction for taxes and expenses. The mortgage debt at that time was $118, 364.85.

[4] The mortgagees sold the property to arms-length third party for $95,000. An appraisal, opinions of realtors, and evidence of a brief period on the open market show the sale price to be reasonable in the circumstances. Allowing for judgement interest, further expenses, and costs, the deficiency is $39,982.76.

[5] The defendant is not here today. She was not personally served and there is no order for substituted service. The plaintiff presents evidence that it cannot locate Ms. MacLean personally. The evidence fully supports such a finding. Indeed, it would be open to the court to find evasion.

[6] Instead of effecting personal service, and instead of seeking an order for substituted service, the plaintiff sent the motion documents to an email address established as Ms. MacLean's, to a Facebook account established to be hers, and by mail to a possible employer. The plaintiff proposes that the court accept this as sufficient service.

[7] A mortgagee obtains a default judgement for an unquantified deficiency in the order for foreclosure and sale. An assessment is required if the mortgagee wishes to pursue the judgement remedy after the foreclosure auction. Rule 72.12(1) provides for the assessment.

[8] Rule 72.12(2) concerns notice for the assessment. Although it fails to use the word, it is about the assessment. It reads:

> A mortgagee who makes a motion for a deficiency judgement against a party who has not designated an address for delivery must, unless a judge orders otherwise, given notice of the motion to the party in the same way a party is notified of a proceeding under Rule 31 – Notice, as if the notice of motion were an originating document.

[9] The phrase “unless a judge orders otherwise” allows a judge to override the Rule 31- Notice provisions for personal service and substitute service.

[10] What is required for an exception to personal and substituted service under Rule 72.12(2)? The description is expressed as broadly as can be. In my opinion, the discretion should be exercised in at least three kinds of situations:

1. When substituted service would be ordered and the plaintiff has used reasonable substitutes as a judge would order;
2. When the defendant’s use of social media with a private message component or of an email address is so well established and current that the court is confident documents sent there will be received by the defendant; and,
3. When the defendant provides a method of delivery and states a preference for that kind of delivery over personal service.

[11] If the plaintiff establishes the same findings as would support an order for substituted service, why require two motions and separate appearances? What needs to be established has been codified in Rule 31.10 and it provides examples of the efforts that need to be made to support the motion. That Rule supersedes *Investors Group Trust Company v. Ulan*, [1991] N.S. J. 246 (Goodfellows, J.) in several ways

[12] The Rule provides modern examples of efforts that may underlay a finding that the defendant cannot be located for personal service or a finding of evasion, and it treats those two situations distinctly.

[13] The Rule does not support the requirement that the substitutes are "likely to bring the matter to the attention of the person to be served" or a finding that the substitutes make it "reasonably possible that the proceedings will be brought to the attention of the defendant's knowledge", para. 17 of *Ulan*. Rule 31.10(4) about substitutes in cases where the defendant cannot be located and Rule 31.10(5) about evasion are consistent with the words of Justice Jessup quoted at par. 15 of *Ulan*: "…in such manner as presents the best possibility of notice of the proceedings to the respondent."

[14] The order should provide the best we can for giving notice, but the best will sometimes not meet the thresholds of "likely" or "reasonably possible". To require that would work an injustice in cases were a remedy is necessary but the chances of successful notice are remote. Cases for *in rem* remedies come to mind, but there are others.

[15] On the second kind of situation, Rule 31.10(2)(e) gives as an example of efforts when the defendant cannot be located, "performing searches on the internet". This example is less than ten years old, but already it is outdated in failing to capture all that is now available for locating a person's place of communication or their place of residence or employment through efforts on the

internet. Also, Rule 31.10(4) says nothing specific on social media as a source for substitutes.

[16] Electronic communications of all sorts provide fertile territory for substitutes. As long as identity, regular use, and current use are proven these substitutes may be nearly as effective as personal service, without the embarrassment.

[17] On the third kind, a person who chooses a method of receiving information from a mortgagee provides much reason to use the chosen method rather than personal service. Depending on the clarity of the choice, the frequency of its use, and its currency, respecting the choice may be nearly as effective as personal service but without the embarrassment.

[18] The evidence in this case brings us well within the bounds of both the first and the second situations I have described. As I said, the affidavits prove the amount of the deficiency. Therefore, the order is granted.

Moir, J.