SUPREME COURT OF NOVA SCOTIA
Citation: *Armshore Investments Ltd. v. Goode*, 2017 NSSC 130

Date: 2017-05-17
Docket: Hfx No. 432615
Registry: Halifax

Between:

Armshore Investments Limited

Plaintiff

v.

John Douglas Goode

Defendant

DECISION

Judge:	The Honourable Justice Arthur LeBlanc
Heard:	December 7, 2016, in Halifax, Nova Scotia
Final Written Submissions:	May 2, 2017
Counsel:	Theresa Graham, for the Plaintiff John O'Neill, for the Defendant

By the Court:

Introduction

[1] This is an application for a deficiency judgment pursuant to *Civil Procedure Rule* 72.12.

[2] The defendant says Armshore should not be permitted to claim a deficiency after purchasing at the sheriff's sale and later transferring its interest to its principal, Stephen Lockyer, before the property was resold. Mr. Lockyer's evidence was that he attended the sheriff's sale with his solicitor, intending to buy the property in his own name, but his solicitor mistakenly informed the presiding official that the purchaser was Armshore.

Background

[3] In 2012, the defendant, Mr. Goode, and his wife Sandra Goode, decided to sell their home in Halifax and move to Seabright, where they owned a cottage on Duggers Lane. Their intention was to live in the cottage full-time. They also decided to buy a second Seabright property, on Umlah Road, which was adjacent to their existing cottage property.

[4] The defendant paid $220,000 for the property. An agreement of purchase and sale was concluded on February 3, 2012, but the defendant had difficulty with financing. Through the intervention of Blois Colpitts, a lawyer who lived next door to Mr. Goode and his wife in Seabright (where they already had a cottage lot), Mr. Goode obtained private financing for the full purchase price from the plaintiff Armshore Investments, with interest at eight percent. Repayment would be interest-only for a one-year term, or payable at any time without penalty. Mr. Goode paid $7500 plus HST to have the mortgage placed. The purchase closed on March 30, 2012.

[5] Mr. Goode's evidence was that at the time he negotiated the purchase he received an appraisal report prepared by Kempton Appraisals, dated November 19, 2009, valuing the property at $315,000. The appraisal suggested that removing a dilapidated cottage that was on the property would increase the value, which he did. Mr. Goode stated that he razed the cottage, as recommended.

[6] After having difficulty selling the Halifax property, the defendant later found it necessary to list the Seabright property for sale through Prudential Property

Specialists, with real estate agent Patricia Roberts. The property was first listed for $289,000, then dropped to $239,000. (These figures are taken from Mr. Goode's affidavit. They do not precisely match those in Stephen Lockyer's affidavit, on behalf of Armshore.) Mr. Goode was unable to dispose of the property.

[7] Mr. Goode defaulted on the mortgage, and Armshore commenced an application for an order for foreclosure and sale under Civil Procedure Rule 72. Mr. Goode did not defend the claim. Armshore obtained an order for foreclosure and sale in the amount of $245,241.71 on December 19, 2014. Interest would accrue on the amount of $220,000 at a rate of eight percent *per annum*. The sheriff's sale took place on March 9, 2015. Armshore bought the property for $7344.93. The entire amount was applied to sheriff's fees, outstanding taxes and water and sewer charges, as the Amended Sheriff's Report, dated June 29, 2015, indicates at Schedule A:

DISBURSEMENTS:	
Service	$83.45
Commission	$2,576.60
HST:	$386.49
Tax Certificate:	$4,298.39
TOTAL:	$7,344.93

[8] The sale was confirmed by court order on August 5, 2015.

[9] In April 2015, Stephen Lockyer, acting as Armshore's director and officer, listed the property for sale with a real estate agent for $180,000. The plaintiff says there were offers in the range of $85,000, and none over $100,000.

[10] When Armshore initially listed the property for sale, Mr. Lockyer worked with a real estate agent, Patricia Roberts (who had previously listed the property for the defendant), who compared the property to certain other oceanfront properties in the area of St. Margaret's Bay that had been listed or sold in the previous two years, and provided a market analysis. Most of the comparator properties had sold for less than $100,000. Ms. Roberts recommended a listing price of $100,000 for an immediate sale, and $180,000 for a later sale in the summer.

[11] Mr. Lockyer was informed on May 6, 2015, that one potential buyer lost interest because the shoreline was not deep enough to accommodate a boat; he

rejected Ms. Roberts's suggestion to reduce the asking price, however. On May 30, 2015, she informed him that there had been no interest since May 13, 2015. She told him that most of the people interested had indicated that the listing price was too high and that the property lacked privacy.

[12] On June 15, 2015, Ms. Roberts prepared a second market analysis, which indicated that there were 193 vacant lots in the vicinity of St. Margaret's Bay, Prospect, and Queensland. She found that seven lots had sold since January 1, 2015, at an average price of $80,571. Her analysis also indicated that only two of the seven lots had sold for over $100,000. Accordingly, she suggested a new list price of $100,000. Instead, Mr. Lockyer agreed to reduce the price to $130,000 as of June 23, 2015. On July 3, 2015, Ms. Roberts informed him that there had been little interest, except for one potential buyer, who found it necessary to contact the municipality to inquire about septic requirements. There was an offer to purchase for $50,000, which Mr. Lockyer rejected. In July 2015, another potential buyer visited the property; on July 27, 2015, Ms. Roberts informed Mr. Lockyer that that this person was prepared to offer $85,000, which Mr. Lockyer rejected.

[13] As noted earlier, the sheriff's sale was confirmed by order of this court on August 5, 2015. Armshore subsequently transferred the property by quit claim deed to its President and Director, Stephen Lockyer, on October 6, 2015. In completing the request to change the registered interest, Mr. Lockyer's counsel indicated that no deed transfer tax was payable.

[14] Mr. Lockyer sold the property to Shawn Plancke and Samantha McGuiness for $105,000, by agreement of purchase and sale dated August 9, 2015. (They had originally offered $85,000). The sale closed on October 30, 2015. Mr. Lockyer netted $98,741.90 after closing costs and taxes.

[15] The details of the deficiency claim – in a total amount of $173,760.02 plus costs – are set out as follows in the plaintiff's brief dated November 24, 2015:

Amount Claimed	
Principal Debt (from Foreclosure Order)	$245,241.71
Interest on $220,000.00 at 8.00%	
from December 1, 2014 to March 24, 2015	$5,497.08
Taxed Costs	$3,761.58
Total Claimed	$254,500.37

Amount Realized	
Net sale proceeds (from sale to 3P)	$98,741.90
Less: Sheriff's Fees (from Report)	$3,046.54
Less: Property taxes (from Report)	$4,298.39
Net Amount Realized	$91,396.97

Deficiency	
Total Amount Claimed	$254,500.37
Less: Net Amount Realized	$91,396.97
Remainder	$162,703.40
Plus: Interest on $220,000 at 8.00%	
from March 24, 2015 to October 30, 2015	$10,656.62
TOTAL	$173,760.02

[16] The plaintiff says the fair market value at the time of the sale was $105,000, and seeks a deficiency judgment of $173,760.02. The defendant disputes the use of the resale price as the basis for calculating the deficiency.

Applicable rules

[17] *Civil Procedure Rules* 72.11, 72.12, and 72.13 govern applications for deficiency judgments. The general parameters are set out at *Rule* 72.11, which provides, in part:

> 72.11 (1) A statement of claim or notice of application for foreclosure, sale, and possession may include a claim against a person who is liable for the amount, if any, by which the mortgage debt exceeds the amount realized from the sale.
>
> (2) A mortgagee who claims a deficiency judgment may have default judgment for the deficiency against the party claimed to be liable for the mortgage debt, unless the party claimed against files a notice of defence or contest, or attends at the hearing of the application for an order for foreclosure, sale, and possession and obtains permission to contest the claim.
>
> (3) The effective date of the default judgment is fifteen days after the applicable of the following dates:
>
> > (a) the date of a sale by public auction, if the mortgagee purchases the property;

> (b) the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;
>
> (c) the date of closing, if the sale is by approved agreement.
>
> (4) The amount of the default judgment must be assessed by a judge.
>
> (5) Interest is calculated in accordance with the mortgage until the effective date of judgment and in accordance with the *Interest on Judgments Act* afterwards.

[18] The filing of the motion for assessment of a deficiency is governed by *Rule* 72.12, which sets the deadline for a mortgagee to file a notice of motion to assess the amount of the deficiency. The calculation of the deficiency is governed by *Rule* 72.13, which provides, in part:

> 72.13(1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:
>
> (a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the mortgagee;
>
> (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee is both reasonable and greater than the bid;
>
> (c) the amount bid by, or on behalf of, the mortgagee, if the property is sold by public auction to the mortgagee and the resale price or the value of the property is less than the bid;
>
> (d) the value of the property, in all other circumstances.

Can Armshore claim a deficiency judgment?

[19] The *Civil Procedure Rules* permit a "mortgagee" to "claim foreclosure, sale, and possession by filing a notice of action or application": Rule 72.02. Additionally, *Rule* 72 specifically permits a mortgagee to apply for a deficiency judgment: see *Rules* 72.11(2) and 72.12(1). There is no indication that anyone other than a mortgagee can recover a deficiency judgment. Mr. Lockyer, who ultimately sold the property, is not a mortgagee and is not a named plaintiff. He is only the transferee of the property from the mortgagee, who bought it at the sale. On the other hand, can Armshore seek a deficiency judgment after disposing of the

property to Mr. Lockyer, in what amounts to a non-arm's length transfer, for which no specific terms are in evidence?

[20] The plaintiff says Mr. Lockyer effectively paid for the property at the sheriff's sale, despite the allegedly erroneous designation of Armshore as the purchaser. Plaintiff's counsel offers the example of the ability of CMHC to obtain a deficiency judgment on an insured mortgage, despite not being the mortgagee. I would note that in such situations it is customary for the mortgage-holder to seek a deficiency judgment and seek reimbursement for the deficiency pursuant to the guarantee. Further, the court cannot simply lift the corporate veil simply because the corporation is a closely-held one, or an error has been made.

[21] I believe that this situation likely falls within the range of circumstances contemplated by *Rule* 72.13(1)(d). As such, the plaintiff company, as mortgagee, should be able to claim a deficiency judgment despite having transferred its interest to its director. As deficiency judgments are governed by equitable principles, the courts retain a discretion to refuse a deficiency judgment in situations where it would be unfair or unreasonable to the parties to grant the deficiency judgment. These principles were recently reviewed by Moir J. in *Toronto-Dominion Bank v. MacLean*, 2016 NSSC 221, [2016] N.S.J. No. 327.

[22] I do not see any reason why it would be unfair to the defendant to grant the plaintiff a deficiency judgment, so long as the amount itself is fair and reasonable based on the circumstances of the case. The defendant does not dispute that the "reasonable resale price" can underpin a calculation of a deficiency judgment. However, the defendant maintains that in this case the selling price was inadequate and the plaintiff did not make reasonable efforts to sell the property.

[23] There is no direct evidence as to the amount, if any, that Mr. Lockyer paid to Armshore when the property was transferred to him. Accordingly, it is submitted, it is impossible to determine whether the plaintiff suffered financial loss. The only specific evidence the plaintiff points to on this point is the Request to Change the Registered Interests, which indicates that "[t]here is no deed transfer tax payable on this transfer, or the parcel is located in a municipality that does not collect deed transfer tax." Counsel for the plaintiff also submits that I should assume that a quit-claim deed would be for zero value, which I am not willing to do without evidence. She further points to Mr. Lockyer's evidence that at the time of the sale he intended to purchase the property in his own name, and notes that counsel for the defendant did not pursue the question of what consideration, if any, passed to

Armshore on cross-examination. This is true, but it is the plaintiff's burden to establish entitlement to a deficiency judgment. It is also noteworthy that the affidavits filed on behalf of the plaintiff do not mention this intermediary transfer.

[24] On the question of how the value of the property should be determined, the defendant cites *Royal Bank of Canada v. Marjen Investments Ltd.* (1998), 164 N.S.R. (2d) 293, [1998] N.S.J. No. 4 (C.A.), where the court said:

> 31 The Court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (per Hart, J.A. in *Adshade, supra*). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the Court to look to objective evidence of value (per Hallett, J.A. in *Nova Scotia Savings and Loan v. MacKay, supra*). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in *Offman, supra*, the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property. [Emphasis added.]

[25] One problem with using the ultimate sale price as the measure of the value of the property here is that, as Mr. Goode points out, it was not the mortgagee selling the property. Further, the defendant submits that that the 2015 resale price of $105,000 should not be automatically accepted as fair and reasonable indicator of value given that he paid $220,000 in 2012.

[26] The defendant says that Mr. Lockyer's account of the sale process – in which Ms. Roberts suggested a listing price of $100,000 for a quick sale and $180,000 for a later summer sale, leading to the acceptance of the $105,000 offer in August 2015 – is not sufficient to set out all the relevant circumstances. There was, he notes, no affidavit from the listing agent, Ms. Roberts, who had also listed the property for him not long before. He suggests that the difference between the listing prices for Armshore and the much higher listing prices she placed on his behalf call for explanation; he submits that there is a question as to "why Armshore would engage a realtor who hadn't already been able to sell the property", adding

that “common sense suggests that given the losses involved, Armshore would have been requesting additional realtors for their opinions.” Further, there is no evidence of Armshore obtaining an appraisal before the sale. In summary, the defendant says the evidence does not establish that the amount sought is fair and reasonable. He suggests that Armshore would only meet its burden of proof by “fully disclosing all relevant circumstances surrounding the sale…”

[27] Armshore replies that it has produced evidence establishing that the property was listed for more than four months and that several lower offers were considered and rejected. Moreover, the defendant’s own evidence was that he had listed the property at higher prices and was unable to sell it. Moreover, the defendant has not suggested an alternative value. Essentially, the basis for the defendant’s argument that the application for a deficiency judgment should be dismissed is that he paid more for the property several years earlier than it resold for. I am not convinced that this is a sufficient basis to find that that the evidence provided by the plaintiff does not establish that the price was fair and reasonable.

[28] I have concluded that a just and reasonable basis for calculating the deficiency judgment is the 2015 resale price of $105,000. On the evidence before the court at the time of the hearing, this figure was the most convincing. Subsequent to the hearing, I requested that Armshore obtain an appraisal valuing the property as of the date of sale, in August 2015. While the defendant objected to this procedure after the event (though not when the request was made), I have considered it, and I am satisfied that it was within the court’s general discretion over evidence to make such a request. While the appraisal was not submitted as an attachment to an affidavit, I am satisfied that it was appropriate to excuse strict compliance pursuant to *Civil Procedure Rule* 2. All that being said, the appraisal set the value at $100,000 – nearly identical to the sale price. Accordingly, the essential effect was to support the use of the sale price as the basis for calculating the deficiency.

[29] Accordingly, I allow the deficiency judgment in the amount claimed in its briefs dated November 24, 2015, and November 25, 2016, based on the resale price of $105,000, with the following qualifications: (1) I disallow interest for the period between July 21, 2015, when plaintiff’s previous counsel erroneously filed an *ex parte* motion for an order confirming the sheriff’s sale, and August 5, 2015, when the sale was confirmed; and (2) any interest for time periods after March 24, 2015, shall be at a rate of five percent, in accordance with *Civil Procedure Rules* 72.11(3) and (5).

[30] The plaintiff may provide an order consented to as to form no later than May 23, 2017. If the parties are unable to agree on the form of the order, they may each provide a draft order reflecting the findings of the decision by May 23, 2017, and I will provide a final version.

[31] The plaintiff shall have costs on the application in the amount of $1000, including costs previously awarded on account of the adjournment in November 2016.

LeBlanc, J.