

SUPREME COURT OF NOVA SCOTIA

Citation: Bank of Montreal v. Hoyt, 2017 NSSC 218

Date: 20170815

Docket: Hfx No.: 409780

Registry: Halifax

Between:

Bank of Montreal, one of the chartered banks of Canada

Plaintiff

v.

Randall C. Hoyt and Tammy L. Hoyt

Defendants

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: December 15, 2016, in Halifax, Nova Scotia

Written Decision: August 15, 2017

Counsel: I. Andrew Rankin and Jennifer L. Keliher, for the plaintiff
Adam D. Crane, for the defendants

By the Court:

[1] The plaintiff, Bank of Montreal (“BMO”), foreclosed on property owned by the defendants, Randall C. Hoyt and Tammy L. Hoyt. An order for foreclosure, sale and possession was granted by the Honourable Justice Simon J. MacDonald of this Court on May 14, 2013.

[2] The order settled the amount owed by the defendants at \$1,497,642.69 with interest on \$1,402,297.17 at the rate of 3.000% per annum from May 14, 2013 up to:

- (a) Fifteen days after the sale by public auction, if the mortgagee purchases the property; or
- (b) Fifteen days after 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.

[3] The order also included a clause providing the plaintiff with the opportunity to bring a motion to assess a deficiency should the need arise.

[4] The property, located at 446 Ketch Harbour Road, Bear Cove, Nova Scotia was purchased at public auction by the plaintiff, BMO. The winning bid was for \$900,000.00.

[5] Pursuant to *Civil Procedure Rule* 72.12(1)(a), a mortgagee is required to file a notice of motion to assess the amount of a deficiency judgment within six months after the effective date. The effective date, according to *Rule* 72.11(3)(a), is fifteen days after “the date of sale by public auction, if the mortgagee purchases the property.”

[6] In the case of the matter before the Court, BMO had until January 12, 2014 to file its notice of motion. BMO has never filed such motion and now asks the court “to extend the time period in which to file and service [sic] its notice of motion for assessment of deficiency judgment against the defendants, ...” relying on *Rules* 2.02, 2.03, 72.11 and 72.12.

[7] The rules pertaining to deficiency judgment assessments are well known. It is not uncommon for such motions to be advanced based on appraisals in those instances where the mortgagee has bought in at the public auction but has not been able to sell the property to a willing third party purchaser within the six-month period. Before the expiration of the six-month deadline, BMO was not in a position to assess a deficiency as all available market valuations estimated the property to be worth considerably more than the approximately \$1.498 Million settled amount. On June 5, 2013, only about three weeks prior to the sheriff's sale on June 27, 2013, BMO obtained an appraisal that estimated the property's worth at \$1,900,000.00.

[8] Between the time of the initial market appraisal and the date the six-month deadline for filing a motion to assess a deficiency judgment expired on January 19, 2014, BMO obtained a Comparative Market Analysis ("CMA"). It suggested the property be listed for sale at \$1,900,000.00 and would likely sell for between \$1,400,000.00 and \$1,600,000.00. This should have alerted BMO to the possibility of a deficiency yet nothing was done to preserve the opportunity to file a motion to have it assessed or to extend the period for filing.

[9] Despite BMO's efforts to market the property, it did not sell until February 6, 2015. The sale price was \$1,075,000.00 with net sale proceeds amounting to \$998,924.87.

[10] Counsel for BMO have created a table listing the events and the dates relevant to this motion which is reproduced here:

Date	Event
May 13 [sic, 14], 2013	BMO granted its Order for Foreclosure, Sale and Possession.
June 5, 2013	Appraisal report estimates the market value of the Property at \$1,900,000.00.
June 27, 2013	Property sold at public auction. BMO is the successful purchaser.
July 19, 2013	Effective date of default judgment following the sale by public auction.
August 13, 2013	Comparative Market Analysis ("CMA") completed of Property, realtor suggests list price of \$1,900,000.00 with a likely selling price between \$1,400,000.00 AND \$1,600,000.00

August 14, 2013	BMO lists Property for sale for \$1,899,900.00.
October 7, 2013	BMO reduces the list price for the Property to \$1,850,000.00.
November 20, 2013	BMO reduces the list price for the Property to \$1,799,000.00.
January 19, 2014	Six-month deadline to file notice of motion to assess deficiency judgment.
May 2, 2014	BMO reduces the list price for the Property to \$1,688,900.00.
October 6, 2014	Second appraisal report estimates the market value to the Property at \$1,125,000.00.
October 17, 2014	BMO agrees to sell the Property for \$1,100,000.00
February 6, 2015	Sale of the Property closes for a price of \$1,075,000.00 with net sale proceeds of \$998,924.87.

[11] Although the CMA that BMO relied upon hinted at a likely sale price of somewhere between \$1,400,000.00 and \$1,600,000.00, it was not until a second appraisal was obtained on October 6, 2014 that the value of the property was thought to be significantly lower than the original estimate of \$1,900,000.00. This was well beyond the six-month deadline for filing a motion to assess a deficiency which had expired on January 19, 2014.

[12] The exact amount of the deficiency could not be calculated until the sale took place on February 6, 2015. Instead of filing a motion to extend the six-month deadline, BMO, instead, commenced an action in debt by filing a Notice of Action for Debt and Statement of Claim against the defendants on March 11, 2016.

[13] By then, nearly thirty-four months had elapsed since the order for foreclosure, sale and possession had been granted on May 14, 2013. It was also nearly fourteen months beyond the deadline for filing a motion to assess the deficiency.

[14] The action for debt was eventually discontinued. Counsel for the plaintiff then filed this motion to extend the time in which to file a motion to assess a deficiency. The Notice of Motion was filed on September 26, 2016. By then more than thirty-two months had elapsed since the expiration of the six-month deadline after the effective date of the default judgment as stipulated in *Rule 72.12(1)(a)*.

APPLICABLE RULES:

[15] The relevant Civil Procedure Rules bearing on this motion are as follows:

Deficiency judgment

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.

(6) The judgment extinguishes six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed.

Motion for assessment of deficiency

72.12 (1) A mortgagee who seeks an assessment of a deficiency must file a notice of motion to assess the amount of the deficiency before one of the following deadlines:

- (a) six months after the effective date of the default judgment, if the sale is by public auction;
- (b) ten days after the day of the closing of a sale by approved agreement.

(2) A mortgagee who makes a motion for a deficiency judgment against a party who has not designated an address for delivery must, unless a judge orders otherwise, give 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.

(3) The notice must be delivered no less than ten days before the day the motion is to be heard, unless a judge orders otherwise.

Calculation of deficiency

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.

(2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:

- (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;

- (b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;
- (c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[16] Counsel for BMO has also urged the Court to use its general discretionary powers embodied in *Rules 2.02* and *2.03* which provide:

Irregularity or mistake

2.02 (1) A failure to comply with these Rules is an irregularity and does not invalidate a proceeding or a step, document, or order in a proceeding.

- (2) A judge may do any of the following in response to an irregularity:
 - (a) excuse compliance under Rule 2.03;
 - (b) permit an amendment or grant other relief to correct the irregularity;
 - (c) set aside all or part of a proceeding, step, document, or order, if it is necessary to do so in the interest of justice.

(3) It is not in the interest of justice to set aside a proceeding, step, document, or order on a motion made after an undue delay by the party who makes the motion or after that party takes a fresh step in the proceeding knowing about the irregularity.

General judicial discretions

2.03 (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:

- (a) give directions for the conduct of a proceeding before the trial or hearing;
- (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
- (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

(2) A judge who exercises the general discretion to excuse compliance with a Rule must consider doing each of the following:

- (a) order a new period in which a person must do something, if the person is excused from doing the thing within a period set by a Rule;
- (b) require an excused person to do anything in substitution for compliance;
- (c) order an excused person to indemnify another person for expenses that result from a failure to comply with a Rule.

EXISTING JURISPRUDENCE:

[17] In the case of *Royal Bank of Canada v. Christanson*, 2016 NSSC 70 (“Christanson”), the Honourable Justice Michael J. Wood of this Court, at paras 2 to 5, reviewed the case law and laid out what a party would have to establish in order to be granted an extension to file a motion to assess a deficiency judgment:

2 The Courts in Nova Scotia have consistently held that the six month time period for filing the motion for deficiency judgment should not be extended without proper justification. For example, in *Royal Bank of Canada v. Phillips*, [1994] N.S.J. No. 261, 1994 NSCA 100, the Court of Appeal upheld a decision not to extend the time in which to apply for a deficiency judgment for the following reasons:

A deficiency judgment following a mortgage foreclosure of residential property imposes an onerous burden on a mortgagor or guarantor because they would reasonably assume, at the time the loan was made and the mortgage security given, that the value of the home would exceed the loan. When this assumption is not borne out they become potentially liable for a debt that was not reasonably expected. As well, the mortgagee, in an ordinary residential mortgage transaction, would have decided at the time the loan was made that the security would be sufficient to cover the loan in the event of a default. In circumstances where it does not the mortgagee must apply for a deficiency judgment within the time allowed by the Rules unless there is a reasonable excuse for failing to do so. In this case the delays in the taxation do not in themselves justify the long delay in applying for the extension of time and the deficiency judgment. The appellant has not put forward a reasonable excuse for failing to apply

within the 6-month period. I would not interfere with the Chambers Judge's exercise of discretion in refusing to extend the time. The appeal is dismissed with costs in the amount of \$500 plus disbursements.

3 This authority was followed by the Honourable Justice Frank C. Edwards in *Inrich Business Development Centre Limited v. LeBlanc*, 1997 CanLII 1297 (NSSC) where he stated:

With the Rule change, the issue remains whether CPR 3.03 leaves a residual discretion with the Court to extend the time limit in CPR 47.10(3). If so, that discretion would only be exercised where the Plaintiff first shows that there exists a reasonable excuse for having missed the six month deadline. Even then, the combined effect of the change in Rule 47.10(3) and the discretion in CPR 3.03 would be that the Court would only extend the six month period in exceptional circumstances. Put another way, it would be a rare occasion where the Court would permit a late deficiency application.

There are very good reasons for the adoption of a strict approach. As mentioned, late applications were frequent. Proceedings were thus unnecessarily protracted. Mortgagors were kept in financial limbo where there was little or no justification for the delay. On the Other hand, it is difficult to contemplate a situation where the six month time limit will present a hardship for the mortgagee.

4 These decisions dealt with the provisions of the *Nova Scotia Civil Procedure Rules (1972)* however the Honourable Justice Arthur J. LeBlanc applied the same principles to the current Rules in *First National Financial Corporation v. Raynard* 2011 NSSC 205 where he said (at paragraph 11):

The law on deficiency judgments is clear: a request for an abridgment of time will not be granted, to permit late notice of motion for assessment of a deficiency judgment, unless the plaintiff can provide a reasonable excuse for missing the limitation.

5 Justice LeBlanc goes on to say that in the context of deficiency judgments the assessment of what amounts to a reasonable excuse should take into account the sentiment of the Court of Appeal in *Royal Bank v. Phillips*.

[18] The issue in *Christanson* dealt with artificial extensions of a motion to assess a deficiency resulting from repeated adjournments but, nonetheless, the summary of the law remains relevant to the matter before this Court.

[19] Counsel for BMO argues that this case is distinguishable from previous deficiency cases decided by Nova Scotia courts since the landmark case of *Royal Bank v. Phillips*, 1994 NSCA 100 (“*Phillips*”).

[20] In *Phillips*, the mortgagee bought-in at the sheriff’s sale. The property was resold less than two months later. Due to significant, unexplained delays in having the mortgagee’s costs taxed, the application for assessment of a deficiency was not filed until more than a year after the sheriff’s sale. The Chambers judge held, and the Court of Appeal affirmed, that the mortgagee had not tendered evidence to establish a reasonable excuse for the delay and the request for an abridgement of time was denied.

DISCUSSION:

[21] There can be no denying that the property at 446 Ketch Harbour Road, Bear Cove, Nova Scotia was not your typical residential property. As such, it presented certain resale challenges. But, it was not so unique that market comparables could not be identified. Indeed, BMO retained experienced real estate appraisers and realtors to value the property and attract interested buyers. BMO owned the property by virtue of being the successful, high-bidder at the sheriff’s sale. BMO and its professional advisors controlled the process. The defendants were no longer in the picture. There is no evidence suggesting that they did anything to delay or impair the bank’s efforts to sell the property.

[22] Affidavit evidence, filed in support of the motion, attempts to point out the unique challenges encountered by BMO and its real estate agents in trying to sell the property. Much of the market analysis relied on historical data that was readily available to BMO when it first acquired the property at the sheriff’s sale.

[23] The Honourable Justice Frank C. Edwards, in the case of *Inrich Business Development Centre Limited v. LeBlanc*, [1997] NSJ 183 (NSSC), stated this, at para. 9:

9 With the Rule change, the issue remains whether CPR 3.03 leaves a residual discretion with the Court to extend the time limit in CPR 47.10(3). If so, that discretion would only be exercised where the Plaintiff first shows that there exists

a reasonable excuse for having missed the six month deadline. Even then, the combined effect of the change in Rule 47.10(3) and the discretion in CPR 3.03 would be that the Court would only extend the six month period in exceptional circumstances. Put another way, it would be a rare occasion where the Court would permit a late deficiency application.

[24] Although this decision pre-dates the latest overhaul of the *Civil Procedure Rules* in 2009, Justice Arthur J. LeBlanc applied the same principles in his decision in *First National Financial Corporation v. Raynard, supra* (quoted by Wood, J. in *Christanson, supra*). Unless the plaintiff can provide a reasonable excuse for missing the limitation period, the motion to extend the time should be denied.

[25] I am not satisfied that a reasonable excuse has been provided to explain the plaintiff's failure to seek an extension in the thirteen-month period between the time when the limitation expired (on January 19, 2014) and the property finally sold (on February 6, 2015).

[26] Although, the plaintiff first pursued an action for debt by filing a Notice of Action for Debt on March 11, 2016, the motion that is now before the Court was not commenced until September 26, 2016. There is virtually no evidence to explain why it took an additional nineteen months for this to happen.

RESULT:

[27] I am not satisfied that the plaintiff, Bank of Montreal, has provided a reasonable excuse for failing to file notice of motion to assess a deficiency within the six-month limitation period set out in *Civil Procedure Rule 72.12(1)(a)*. Consequently, the motion is dismissed with costs to be determined.

[28] I will leave it to counsel to try to agree on costs failing which they are invited to file further written submissions within thirty days of the date of release of this decision.

Glen G. McDougall, J