Docket: CA 164128
Date: 20001205

NOVA SCOTIA COURT OF APPEAL

[Cite as: Silver v. Federal Business Development Bank, 2000 NSCA 138]

Roscoe, Bateman and Oland, JJ.A.

BETWEEN:

ROBERT SILVER and DEANNA SILVER

Appellants

- and -

FEDERAL BUSINESS DEVELOPMENT BANK

Respondent

REASONS FOR JUDGMENT

Counsel: Blair H. Mitchell for the Appellants
Thomas W. Jarmyn and Tammy C. MacKenzie for the Respondent
Appeal Heard: November 24, 2000
Judgment Delivered: December 5, 2000

THE COURT: The appeal is dismissed with costs as per reasons for judgment of Roscoe, J.A.; Bateman and Oland, JJ.A., concurring.

ROSCOE, J.A.:

[1] This is an appeal from a Chambers decision of Justice Suzanne Hood, in which she dismissed the appellants' application to reopen a foreclosure action five years after the matter had concluded. The decision under appeal is reported at (2000), 183 N.S.R. (2d) 102.

[2] The appellants submit that newly discovered evidence is relevant to the amount of the respondent's deficiency judgment against them and that pursuant to **Civil Procedure Rule** 15.08 the matter should be reopened. The Rule provides:

> 15.08. Where a party is entitled to:
>
> (a) maintain a proceeding for the reversal or variation of an order upon the ground of a matter arising or discovered subsequent to the making of the order; . . .
>
> He may apply in the proceeding for the relief claimed.

[3] The background to the foreclosure action and the deficiency judgment is contained in this court's decision reported at (1995), 144 N.S.R.(2d) 161. In that decision, the fair market value of the property was found to be $480,000, which resulted in a deficiency judgment against the appellants in the amount of $80,809. The evidence that the appellants rely on to support their application to reopen the foreclosure action consists of documents disclosed to them by the respondent in the course of another proceeding, specifically:

1) documents indicating that after it purchased the property at the sheriff's sale, the respondent placed fire insurance coverage on the building in the amount of $705,000;

2) a document entitled "Tips Concerning Sheriff's Sale", which provides advice to employees of the respondent;

3) a letter from a real estate company, dated one month before the sheriff's sale, offering their marketing services to the respondent in relation to the property;

4) a memo indicating that two and one-half months before the sale, a person

telephoned the respondent to express an interest in purchasing the property and that the person was advised to contact the appellants, who were at that time still the owners;

5) a letter from the respondent's counsel to an accountant a few days before the sheriff's sale, indicating that if the accountant's client is interested in the property, he should name his price, and an offer could be prepared;

6) a page of handwritten notes with figures and two names, one being the accountant noted in item 5.

[4] In addition to this evidence, which was dealt with by Justice Hood, the appellant has applied to admit new evidence on the hearing of the appeal, consisting of:

1) an appraisal report dated May 4, 1995 by Jill Brogan for the Department of Municipal Affairs, assessing the value of the property at $396,200 for the year 1993;

2) the decision and order of the Nova Scotia Utility and Review Board dated September 8, 1995, on an appeal from an assessment by the appellants herein, determining the value of the property to be $370,000.

[5] In the decision under appeal, Justice Hood applied a test for the admission of new evidence as stated in **Dawi v. Armstrong** (1992), 17 C.P.C. (3d) 196 (Ont. Gen.Div.):

> In summary therefore, the new evidence must meet the following three criteria:
>
> 1 It must be such as to have an important influence on the decision of whether or not there is a triable issue;
>
> 2 It must be apparently credible; and
>
> 3 It must be such as it could not have been obtained by reasonable diligence before summary judgment.

[6] Justice Hood found that although the evidence was credible and that there was

no lack of due diligence on the part of the appellants or their counsel at the time of the deficiency application, the proposed new evidence "would not have been important influences on the decisions" of the Chambers judge who determined the amount of the deficiency judgment and of this court when it later decreased the amount on appeal.

[7] The test applied by Hood, J. was that adopted by the Ontario Court on an application to set aside a summary judgment in **Dawi**. There the summary judgment was granted by a Master on the basis that there was no triable issue. Because it was a summary proceeding, it did not have the same requirements for finality as would a judgment granted after a trial; nor would there have been a complete trial record available for the purposes of determining the relevance of the new evidence. Other cases referred to by counsel for the appellant, for example, **Varette v. Sainsbury**, [1928] 1 D.L.R. 273 (S.C.C.), are likewise not specifically applicable since they concern the test that should be applied when new evidence is sought to be introduced on an appeal.

[8] In my view, although all the tests are similar, the test on an application pursuant to **Rule** 15.08 to reopen an action that has been completed, on the basis of newly discovered evidence, should be as stated in **Evans v. Smith**, [1955] 2 D.L.R. 156 (N.S.S.C.(A.D.)). In that case, an appeal from a dismissal of an action in trespass had been dismissed two years earlier, but no order had been filed by the

appellants. Upon discovering evidence of an error in the records at the Registry of Deeds, the appellants brought an application to reopen the appeal. Currie J., writing for the court, indicated that in those circumstances the appellants would have to prove that despite the exercise of reasonable diligence, the error was not discovered before the trial, and that the new evidence would have to be "practically conclusive of the issue" in their favour.

[9] The "practically conclusive" test is similar to that applied by the British Columbia Court of Appeal in **D.K. Investments Ltd. v. S.W.S. Investments Ltd.,** [1990] B.C.J. No. 629 (Q.L.), where Southin, J.A. examined the old English jurisprudence and as to the issue of materiality of the evidence on applications to reopen finalized cases, adopted the following statement of law from **Hungate v. Gascoyne** (1846), 2 Ph. 25; 41 E.R. 850:

> . . . the question on applications of this kind was not merely whether the evidence was material, but whether, looking at the case made on the other side and the whole mass of evidence adduced on the former hearing, what was now brought forward would have been likely to have altered the judgment which the Court then came to; and being clearly of the opinion that that was not the case in the present instance, he must discharge the Vice Chancellor's order.

[10] The fact that the **Nova Scotia Civil Procedure Rules** specifically refer to an application of this type in **Rule** 15.08 should not, in my view, diminish the materiality expected of the new evidence. The import of the **Rule** is that it allows the application to be made in the original proceeding. Otherwise, a new action would be

required. In order to succeed on an application of this nature pursuant to **Rule** 15.08(a), where all appeals and other statutory variation proceedings have been exhausted, in my view, the applicant must prove that:

> 1) the matter or evidence arising or discovered subsequent to the original order, is such that it was not previously capable of being obtained or discovered by the exercise of reasonable diligence;
>
> 2) the new evidence is apparently credible; and
>
> 3) when examined with the complete record of the previous proceeding, the new evidence is such that it would be practically conclusive of the issue in favour of the applicant,
>
> provided that, in a case of obvious and substantial injustice, if the second and third requirements are met, the necessity to prove due diligence, should not be applied as strictly.

[11] In this case, Justice Hood applied a less stringent test and found that the new evidence before her would not have had an important influence on the decision. I agree. In addition, the new evidence submitted on this appeal, even if we assume without deciding that it meets the usual test for admission on the appeal, (see **Thies v. Thies** (1992), 110 N.S.R. (2d) 177) does not satisfy the level of materiality necessary to reopen the foreclosure action. It is obvious that the original Chambers judge and this court on appeal relied substantially on the Turner Drake appraisal in fixing the fair market value of the property, and less so on the tax assessment. Since the fair market value as found on appeal was $480,000, the values assigned by the Brogan report and the Utility and Review Board, which are much lower, could not

reasonably have had a beneficial effect for the appellants. In fact, as noted by respondent's counsel, if the Brogan report had been admitted as new evidence before this court on the original appeal, it would have tended to support the lower valuation as found by the original Chambers judge. Of all the material before Hood, J., the only item of any possible significance is that respecting the fire insurance coverage and it likewise, when viewed in light of all the evidence, is in the circumstances, not even relevant to the question of fair market value. In conclusion, the totality of the new evidence presented by the appellants, when examined together with all the original evidence is not practically conclusive of the issue in the appellant's favour.

[12] For these reasons, I would dismiss the appeal with costs to the respondent in the amount of $2,000.00 plus disbursements.

Roscoe, J.A.

Concurred in:

Bateman, J.A.
Oland, J.A.