1990 S.H. No. 74308

IN THE SUPREME COURT OF NOVA SCOTIA

TRIAL DIVISION

BETWEEN:

PRENOR TRUST COMPANY OF CANADA, a body corporate (formerly Atlantic Trust Company of Canada

PLAINTIFF

- and -

S.B. GUPTA INVESTMENTS LIMITED, a body corporate, and SHAM B. GUPTA

DEFENDANTS

HEARD: At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy, in Chambers, on December 20, 1990.

DECISION: January 7, 1991

COUNSEL: Wayne R. Marryatt, Counsel for the Plaintiff

Robert McCleave, Solicitor for the Defendants

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GRUCHY, J.

This matter has come before me by means of two opposing applications: the plaintiff by notice dated December 10, 1990, has applied for summary judgment pursuant to Civil Procedure Rule 13; the defendants have by notice filed December 17, 1990, applied for "an order to amend the statement of defence". The applications were heard on December 20th.

The originating notice and statement of claim in this matter were dated September 14, 1990, and is a claim for foreclosure of a mortgage dated April 28, 1989. The statement of claim alleges that the defendant S.B. Gupta Investments Limited mortgaged certain property to the plaintiff, which mortgage was guaranteed by the defendant Sham B. Gupta. The statement of claim further alleges default by the corporate

defendant and sets forth the details of such default. The plaintiff claimed the payment of the mortgage or, in default, foreclosure and sale and possession of the property mortgaged.

By demand for particulars dated October 15, 1990, the defendants requested certain information concerning the identification of the plaintiff and details of the various amounts advanced and/or paid.

On October 31, 1990, the plaintiff replied to the demand for particulars, explaining that the plaintiff's corporate name had changed from Atlantic Trust Company of Canada to Prenor Trust Company of Canada and, accordingly, no assignments of mortgage were required in the circumstances. The reply further set forth the various amounts advanced pursuant to the mortgage and appended a calculation of the arrears of the mortgage.

On November 9, 1990, the defendants filed a defence which defence is set forth in full as follows:

> "1. The Defendants, S.B. Gupta Investments Limited and Sham B. Gupta, deny each and every allegation in the Statement of Claim and put the Plaintiff to strict proof thereof.
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> 2. The Defendants plead and rely upon the principle of non est factum.
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> 3. In the alternative, if the Defendants or either of them are found to have an obligation under an alleged mortgage, which is not admitted but denied, the Defendants state that the calculations of the Plaintiff as contained in the Statement of Claim and Reply to Demand for Particulars are in error and more particularly that there are no arrears and therefore no default of the said mortgage.
>
> 4. The Defendants, S.B. Gupta Investments Limited and Sham B. Gupta, therefore seek dismissal of this action with costs."

On December 10, 1990, the plaintiff applied for summary judgment pursuant to Civil Procedure Rule 13 and for an order for foreclosure and sale. That application was

supported by the affidavit of the plaintiff's solicitor which essentially set forth that the action was commenced to foreclose the equity of redemption of the defendants, attached a certificate of title showing that the plaintiff, subject only to certain leases, holds a first mortgage against the property in question, that being the mortgage sought to be foreclosed herein. The certificate of title further shows that there are a number of subsequent encumbrances. With the application for summary judgment was also the affidavit of one Fred Mack, the mortgage development officer of the plaintiff which sets forth the calculations of the arrears of the mortgage, appends the original mortgage and sets forth a statement of the account of the mortgage in full, including all amounts advanced and received.

The defendants made no direct reply to the application for summary judgment, but applied for leave to amend the defence filed herein by adding thereto the following paragraphs:

> "4. The Defendants state, in the alternative, that the Plaintiff is aware that it will likely acquire title to the property at a foreclosure sale, but might then have to wait several months to resell the property at favourable terms. The Defendants further state that foreclosure and sale at this time is an excessive remedy, being wasteful of equity or potential equity in the property, being unreasonably harmful to the interests of both Defendants and all subsequent encumbrancers, and not being reasonable mitigation of the Plaintiff's losses under all of the circumstances.
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> 5. The Defendants state, also in the alternative, that the Plaintiff, who is virtually guaranteed of recovering any monies owed with interest in time, stands to profit from being able to bid on the property now at a foreclosure sale at a low price and then sell it later when market conditions improve. This recovery would be disproportionate to any losses flowing from the alleged mortgage agreement. The Defendants state the Plaintiff owes a duty to both Defendants not to take advantage of its position to take control of the property, and that the Plaintiff is in breach of that duty in a tortous manner.

6. The Defendants repeat all of the above and state that the actions of the Plaintiff are and will cause the Defendants considerable damage, which the Defendants claim as a set off against any claim with which the Plaintiff might be successful.

7. The Defendants therefore seek dismissal of this action with costs, or in the alternative, that this Honourable Court invoke its jurisdiction under the Judicature Act or under other principles of law or equity to address the concerns of the Defendants as set out above. The Defendants further claim damages as set out above."

With the application for leave to amend the defence was the affidavit of the defendant's solicitor in support of the application. That affidavit reads in full as follows:

"1. THAT I am the solicitor for Sham Gupta and S.B. Gupta Investments Limited and have personal knowledge of all matters deposed to herein except as otherwise indicated.

2. THAT THIS Affidavit is submitted in support of an application for leave to amend the Defendants' Statement of Defence.

3. THAT as the issues involved in such an application do not lend themselves to provision of information in an Affidavit, there is not much that I believe that I can set out for the court that would be of assistance. I intend to make a submission to the effect that the Defendants should be allowed to advance the Defence contained in the draft Amended Statement of Defence. I had not thought of such a Defence when I originally filed the Statement of Defence in this matter.

4. THAT it will be my further submission that any prejudice to the Plaintiff can be readily compensated by an award of costs on this application."

I will deal with the matter by addressing each of the following in the order listed:

1. Defence;
2. Application to amend defence; and
3. Application for summary judgment.

pleading [illegible] Civil Procedure Rules] is relevant to evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits.

14.05 A party by his pleading may raise any point of law."

The defence, as filed, does not comply with Rule 14. That Rule 14.04 is virtually the same as the English Order 18, Rule 7. In Nova Scotia, as in England, the Rule sets forth the guiding principles of pleadings. It is clear "...that pleadings should be statements in a summary form, and should state, and state only, the material facts relied on, and not the evidence by which they are to be proved".

See the Supreme Court Practice, 1988, p. 268:

"It is clear that the principles to be followed in any pleading is that it should state:

1. Material facts, not law;
2. Material facts, not evidence;
3. Material facts only;
4. All material facts; and
5. In a summary form"

Paragraph 1 of the defence is often referred to as the "rolled-up plea". I will say more concerning that plea below.

Paragraphs 2 and 3 of the defence do not comply with Rule 14. Paragraph 2, in particular, pleads what is described

as a principle of law, without setting forth any facts upon which the defendant relies. During the defendants' submission to me, counsel stated that he had not recived instructions to rely upon that plea. Paragraph 3 of the defence simply alleges error on the part of the plaintiff and makes no attempt to set forth the defendant's version of the facts. I therefore order that paragraphs 2 and 3 of the defence be struck.

2. Amended Defence - The amendments sought appear to be speculations on the part of the defendants as to what will occur at and after the foreclosure sale. No facts whatsoever are alleged or set forth as will justify such a defence. They do not comply with Rule 14.04 and, accordingly, I dismiss the application for leave to amend the defence.

I have to comment as well on the affidavit in support of the application to amend the defence. The statement that "...there is not much that I believe that I can set out for the court that would be of assistance" is not a factual allegation upon which I should allow an amendment. The stated intention to make a submission to the court would simply result in the avoidance of setting forth the real objective of the amendments in an acceptable manner. The statement that counsel had not "thought of such a Defence when (he) originally filed the Statement of Defence in this matter" speaks loudly against both the defence and the proposed amendments. That statement, when combined with the apparent change in position regarding non est factum, leads one to the conclusion that the intention of the defendants is to delay this proceeding. When the substance of the amendment is considered, it is clear that the defendants are concerned about the market conditions in which a foreclosure sale will be held. That is not a factor for consideration by this Court.

3. Application for summary judgment - Rules 13.01 and 13.02 read as follows:

"13.01 Where a defendant has filed a defence or appeared on a hearing under an originating notice, the plaintiff may, on the ground that the defendant has no defence to a claim in the originating notice or a part thereof except to the amount of any damages claimed, apply to the court for judgment against the defendant.

13.02 On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,

...

(b) grant judgment for the plaintiff on the claim or any part thereof;"

MacDonald, J.A. in the case of **Bank of Nova Scotia and Robert Simpson Eastern Limited v. Dombrowski**, 23 N.S.R. (2d) 532, had the following to say about Rule 13:

" Rule 13 has its antecedents in Order 14 of the English Supreme Court Rules. As stated in the **Supreme Court Practice** (1976), Vol. 1, at p.136 the purpose of O.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly, and if the defendant is unable to set up a **bona fide** defence, or raise an issue against the claim which ought to be tried. **Roberts v. Plant**, [1895] 1 Q.B. 597 (C.A.); **Robertson & Co. v. Lynes**, [1894] 2 Q.B. 577; **Dane v. Mortgage Ins. Corpn.**, [1894] 1 Q.B. 54 (C.A.); **Edwards v. Davis**, 4 T.L.R. 385. The defendant is bound to show that he has some reasonable ground of defence to the action.

In **Anglo-Italian Bank v. Wells (and Davies)**, 38 L.T. 197, at p.199 Jessel, M.R., said that O.14 'is intended to prevent a man clearly entitled to money from being delayed, where there is no fairly arguable defence to be brought forward'.

In **Carl B. Potter Ltd. v. Antil Canada Ltd. and the Mercantile Bank of Canada** (1976), 15 N.S.R.(2d) 408; 14 A.P.R. 408, additional authorities with respect to the principles to be applied in an application for summary judgment were reviewed by my brother Cooper.

The issue may, I believe, be summarized as being whether there is a fair issue to be tried, based on some reasonable ground of defence."

I also refer to **Brown v. Trynor and Boyd**, 37 N.S.R. (2d) 139. In that case a summary judgment was refused. That case, however, involved a defence wherein misrepresentation on the part of the plaintiff was alleged and the Trial Division concluded that a fairly arguable defence had been raised.

In the case of **Carl B. Potter Ltd. v. Anil Canada Ltd. and Mercantile Bank of Canada**, 15 N.S.R. (2d) 408, the matter of summary judgments was considered. In that case the Court found that a fairly arguable defence existed and no summary judgment was permitted. Rule 13 was, however, considered by Cooper, J.A., as follows:

> "8 We were referred to authorities which set out what an applicant under our Rule 13 and corresponding rules in other jurisdictions must establish to obtain summary judgment. It is stated in **The Supreme Court Practice 1973**, vol. 1 at p. 132 that:
>
> > The purpose of O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a **bona fide** defence, or raise an issue against the claim which ought to be tried **Roberts v. Plant**, [1895] 1 Q.B. 597, C.A.; **Robinson & Co. v. Lynes**, [1894] 2 Q.B. 577; **Dane v. Mortgage Ins. Corpn.**, [1894] 1 Q.B. 54, C.A.; **Nassau Steam Press v. Tyler**, 70 L.T. 376; **Edwards v. Davis**, 4 T:L.R. 385, C.A.).
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> > 'When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff' (per Jessel, M.R., **Anglo-Italian Bank v. Wells**, 38 L.T., p. 201, C.A.).
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> 9 In **Royal Bank of Canada v. Malouf**, [1932] 2 W.W.R. 526 (Sask. C.A.) Martin, J.A., said at p.529:
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> > It is well settled that the provisions of Rule 127 are not to be used to strike out a defence, unless it is very clear that the defendant has no substantial defence to submit to the Court; but when a Judge is satisfied, not only that there is no defence, but no fairly arguable point to

> be presented on behalf of the defendant, it is his duty to give effect to the Rule and to allow the plaintiff to enter judgment for his claim: **Anglo-Italian Bank v. Wells** (1878) 38 L.T. 197, at 200; **Ontario Bank v. Bourke** (1885) 10 P.R. 561; **Velie v. Hemstreet** (1909) 2 Sask. L.R. 296, 11 W.L.R. 297. Morover, in order to resist an application under the Rule, it is not sufficient for the defendant to say he has a good defence on the merits; the defence must be disclosed, and sufficient facts must appear to show that there is a **bonafide** defence, or at least, as stated by Jessel, M.R., in **Anglo-Italian Bank v. Wells, supra**, 'a fairly arguable point to be argued on behalf of the defendant:'...

10 The matter was also dealt with by the Ontario Court of Appeal in **Featherstonhaugh v. Featherstonhaugh**, [1939] 2 D.L.R. 262, where at p.268 Robertson, C.J.O., said:

> The defendant is to show the nature of his defence, and to disclose such facts as may be deemed sufficient to entitle him to defend, and it is upon his success or failure in doing so that the fate of the motion must turn. In a sense the usual rule is reversed for this special purpose, and the burden of proof, such as it is, lies upon the defendant and not upon the plaintiff."

As I have indicated above, paragraphs 2 and 3 of the defence are not acceptable pleadings. Paragraph 1 is the "rolled-up plea". The late greatly respected County Court Judge, Peter J. O'Hearn, addressed the matter of that plea in **Master Charge v. Price** (1977), 42 N.S.R. (2d), 244, and considered, when dealing with a plea virtually identical to paragraph 1 of this defence, (at p.48) that such plea "...simply constitutes a denial, in fact, of whatever was pleaded and not a denial of the legality or sufficiency in law of the contract and not a pleading of any matter in justification, or excuse, or otherwise, nor can any statutory defence be raised under it...Paragraph 1 of the defence therefore appears to me to disclose a reasonable defence within the meaning of C.P.R. 14.25 (1)(a)."

have not made any attempt to counter those statements. It is clear from a reading of Rule 13 and of the cases above cited, an onus rests upon the defendants to bring forth sufficient facts upon which I could conclude that a bona fide defence or an issue exists which ought to be tried. The defendants have not made any attempt to discharge such onus.

I can only conclude that there is no fairly arguable point to be tried. I therefore grant the plaintiff summary judgment herein, with costs. I fix costs for both the application for summary judgment and for the defendants' application for leave to amend the defence in the total sum of $350.00.

It appears from the amendments of the defence sought that the defendants are concerned about the course of the sale of the property. In view of that concern, I order that the plaintiff may proceed, but as if it had received a demand of notice pursuant to Rule 12.07.

J

Halifax, N.S.
January 7, 1991