SUPREME COURT OF NOVA SCOTIA
Citation: *HarbourEdge v. CanSport*, 2020 NSSC 383

Date: 20201223
Docket: Halifax, No. 467712
Registry: Halifax

Between:

HarbourEdge Mortgage Investment Corporation

Plaintiff/Defendant

v.

Can*Sport Incorporated and Lee Adamski

Defendants/Plaintiff

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	June 22, 2020, in Halifax, Nova Scotia
Written Decision:	December 23, 2020
Counsel:	Robert G. MacKeigan, Q.C. and Sara L. Scott, for the Plaintiff/Defendant Chris Robinson, for the Defendants/Plaintiff

By the Court:

Overview

[1] Can*Sport Incorporated ("CanSport") and Lee Adamski, the Defendants/Plaintiff by counterclaim (the Applicants on this motion) move for an Order pursuant to section 28 of the *Real Property Act*, R.S.N.S., c. 385, s. 1 (the "*RPA*") discharging the mortgage held by the Plaintiff, HarbourEdge Mortgage Investment Corporation ("HarbourEdge"), over the lands owned by the Defendant, CanSport, upon the payment by CanSport into court or directly to HarbourEdge, an amount of $2.6 million or, in the alternative, displacing the HarbourEdge mortgage from first priority to second priority upon such payment.

[2] There are limits on the discretionary nature of section 28 of the *RPA* and, therefore, HarbourEdge submits that the Applicants' motion should be denied for the following reasons:

> (a) The amount of the payment is not the "amount due" under the mortgage;
> (b) The counterclaim for damages makes the amount owing under the mortgage in dispute, necessitating a full trial on the merits; and
> (c) All of the risk and responsibility has been shifted to HarbourEdge, while other options remained open for the Applicants to resolve this matter.

[3] The Court finds that the amount due under the mortgage is in dispute and a balancing of the equities favours not discharging the mortgage. To grant the Applicants' motion would, in essence, shift the burden of the risk back on to HarbourEdge, the mortgagee.

[4] The Applicants' motion is denied. The Applicants' request to have HarbourEdge's security (the mortgage) discharged or placed subordinate to another priority is contrary to the jurisprudence and goes beyond what s. 28 of the *RPA* was intended to do.

Facts

[5] HarbourEdge is in the business of lending money to fund developments and other commercial projects. HarbourEdge entered into a financing arrangement with

CanSport for the construction of a multi-sport and multi-pad ice surface development in Bedford, Nova Scotia (the "Project").

[6] On November 24, 2014, HarbourEdge extended funding to CanSport by way of a Commitment Letter to formalize their loan agreement (the "Commitment Letter"). In addition, CanSport and Mr. Adamski signed a promissory note in favour of HarbourEdge on behalf of CanSport in the principal amount of $11,000,372, with an interest rate of 12% per annum (the "Loan").

[7] Under the terms of the Commitment Letter, HarbourEdge was to advance funds to CanSport through three facilities. The purpose of the funding under each facility was as follows:

(a) Facility 1 - to finance land, acquisition and closing costs;
(b) Facility 2 - to finance site works, soft costs and construction deposits; and
(c) Facility 3 - to finance hard construction costs of the multi-sports complex.

[8] On January 8, 2015 Mr. Adamski, on behalf of CanSport, secured the loan by executing a collateral mortgage (the "Mortgage"). The Mortgage provided for a fixed charge on the property located at 41 Verdi Drive in Bedford, bearing PID No. 41395831 (the "Property").

[9] HarbourEdge advanced the full amount of funding under Facility 1.

[10] The Commitment Letter set out the conditions precedent for the advance of funding under Facility 2, being:

Facility 2

1. Borrower to provide the lender with copies of firm prelease agreements totaling no less than $1,000,000 per annum.

2. Borrower to provide the lender with existing copies of the following:

(a) Site plan agreement.
(b) Detailed engineering estimates re: site servicing.
(c) Storm water management plan.
(d) Municipal approval to supply municipal water and wastewater services.

(e) Any other documentation or approvals deemed reasonably relevant by the lender.

[11] The Commitment Letter set out the conditions precedent for funding to be advanced under Facility 3, being:

Facility 3

1. Borrower to provide the lender with a detailed budget, including hard construction cost estimates, site servicing costs estimates and detailed soft cost estimates in form and content satisfactory to the lender and in an amount not to exceed $11,732,000.00.
2. Borrower to provide the lender with fixed price contracts from all sub trades and material suppliers and consultants to support the budget estimate of $11,732,000.00.
3. Borrower to provide the lender with evidence in form and content satisfactory to the lender, of firm naming rights and or sponsorship contracts in an amount of no less than $1,000,000.00 prior to the drawdown of facility 3 funds.
4. Borrower to provide the lender with existing copies of the following:

   (a) Copy of the building permit.

   (b) Municipally approved and architect stamped "approved for Constructions Drawings".

5. Any other documentation or approvals deemed reasonably relevant by the lender.

[12] Between June 3, 2015 and August 2, 2016, funding of approximately $900,000 was advanced by HarbourEdge to CanSport under Facility 2.

[13] In late 2015 and early 2016, HarbourEdge became concerned about the progress and status of the Project. The term of the Commitment Letter had an expiration of December 31, 2016, by which time the construction of the Project

was to be completed, the facility occupied and all of the amounts owing to HarbourEdge repaid.

[14] On August 19, 2016, CanSport made a request to HarbourEdge for a progress payment to be made for Harbour Construction Company Limited ("HCCL") for its work completed up to and including April 29, 2016. The draw amounts for HCCL were provided on September 27, 2016.

[15] On November 1, 2016, HarbourEdge learned that a lien had been filed by HCCL on September 30, 2016 and registered against the Property. CanSport never informed HarbourEdge that the lien had been filed.

[16] For various reasons, the Project was delayed and could not be completed by the deadline of December 31, 2016. As a result, HarbourEdge made the decision to terminate the advancement of any further funding to CanSport and decided that the Loan would not be renewed. This decision was communicated to CanSport in November of 2016.

[17] In December of 2016, CanSport acknowledged HarbourEdge's decision and, on March 7, 2017, CanSport paid its last interest payment to HarbourEdge.

[18] HarbourEdge issued and served demands on CanSport on March 7, 2017, including attaching Notices of Intention to Enforce Security (the "Demands"). The Demands as of that date were for $2,478,132.12, with additional interest accrued thereafter at a rate of 12% per annum, calculated monthly.

[19] On August 31, 2017, HarbourEdge commenced legal action against CanSport and Mr. Adamski. The amount of indebtedness on that date was $2,646,011.73 with accrued interest. Between the time of the Demands and the legal action, CanSport was unable to obtain financing although it made representations to HarbourEdge that financing was being sought.

[20] On December 6, 2017 CanSport filed an amended counterclaim against HarbourEdge for damages caused by its alleged breach of the Commitment Letter.

[21] On December 4, 2019 CanSport entered into a letter of intent with Legacy Global Funding Inc. ("Legacy") for a loan. The loan included an amount of $2,650,000 to buy out the Mortgage held by HarbourEdge. Legacy will not finalize the loan agreement and start advancing any funds until the HarbourEdge Mortgage is discharged or moved into second priority to Legacy's mortgage.

[22] On February 12, 2020, CanSport made an offer to HarbourEdge in the amount of $2,646,011 in exchange for a discharge of the Mortgage; however, the offer also provided that the litigation between the parties would continue. HarbourEdge rejected the offer.

Issue

[23] Whether the Court should intervene with the contractual loan agreement between the parties to discharge or subordinate HarbourEdge's Mortgage under s. 28 of the *RPA*?

Analysis

Ontario Legislation compared to Nova Scotia

[24] Section 12(3) of the *Mortgages Act,* R.S.O. 1990, c M.40 contains substantially the same language as section 28(2) of the *RPA* and reads:

> Where mortgagee cannot be found
>
> (3) When a mortgagor or any person entitled to pay off a mortgage desires to do so and the mortgagee, or one of several mortgagees, cannot be found or when a sole mortgagee or the last surviving mortgagee is dead and no probate of his or her will has been granted or letters of administration issued, or where from any other cause a proper discharge cannot be obtained, or cannot be obtained without undue delay, the court may permit payment into court of the amount due upon the mortgage and may make an order discharging the mortgage.

[25] The unifying characteristic in the Ontario caselaw regarding section 12(3) of the *Mortgages Act*, *supra*, is the need for judicial discretion and equity in consideration of all of the relevant evidence: *Meadow Ridge Estates Inc. v. Moscowitz Capital Mortgages Fund II Inc.*, 2016 NSSC 261, at para. 28 ("*Meadow Ridge*"). Justice Trotter refused to exercise this judicial discretion in *Fernicola (In Trust) v. Creview Development Inc.*, [2008] OJ No. 4112 ("*Fernicola*") where the amount owing was in dispute and the mortgagor had not established the relative equities of the case favoured a discharge. He stated at paras. 6 and 7:

> …
>
> The specific language of s. 12(3) refers to "a mortgagor or any person entitled to pay off a mortgage" who "desires to do so." It does not refer to a mortgagor who is unable to obtain a discharge because he/she refuses to pay the amount said to be owed, which is the situation in this case.

I doubt that s. 12(3) is meant to furnish a discharge to a mortgagor on the mere demonstration that a discharge is not forthcoming because of a dispute as to the amount owed. While the section protects the mortgagee by substituting one form of security (the mortgage) for another (payment into court), it also has the effect of depriving the mortgagee of actual payment on the mortgage while a court sorts out the dispute in the meantime. …This, in my view entails a consideration of all of the circumstances. In a case like this, in addition to establishing that a timely discharge is not forthcoming because of a dispute as to the amount owed, the mortgagor must also demonstrate that the relative equities of the case favour making an order under s. 12(3).

Section 28 of the RPA

[26] Section 28 reads:

…

28(2) If release or discharge cannot be obtained
Where the holder of an encumbrance cannot be found or is dead and there is no duly authorized personal representative available to act or where from any other cause a proper release or discharge of the encumbrance cannot be obtained or cannot be obtained without undue delay or expense, the court may, upon application,

(a) where there is money owing upon the encumbrance,

(i) permit payment into court of the amount due and order a release or discharge of the encumbrance, or

(ii) where by the terms of the encumbrance the money is payable by instalments, some of which is not yet due, appoint a trust company or the Public Trustee to receive the payments due under the encumbrance and authorize the trustee to give a release or discharge of the encumbrance upon fulfillment of the terms of the encumbrance; or

(b) where all money due on the encumbrance has been paid to the person entitled to receive the money or where in any other case it appears that all the money due on the encumbrance has been paid, order the release or discharge of the encumbrance.

…

28(4) Where questionable amount due
Where the amount admitted to be due upon an encumbrance appears to be open to question, the Court may, as a condition of making the order, require payment into court of a sum in excess of the amount admitted to be due or may order the giving of such other security as it deems appropriate.

…

> 28(6) Effect of order of release or discharge
> An order releasing or discharging an encumbrance and any release or discharge authorized by that order is as good, valid and effective as if the holder of the encumbrance had executed a discharge or release of the encumbrance.

[27] There is little judicial consideration of section 28 of the *RPA*. Justice Chipman, in *Meadow Ridge*, reviewed various decisions from Ontario considering the analogous legislation of the *Mortgages Act*, *supra* (section 12(3)) and summarized situations where the requested relief was denied:

> 1. where there is a perception that the applicants' intention to pay into court is to ensure execution if they win the overall case (paragraphs 31 and 33);
>
> 2. where the mortgagor is seeking a Mareva-type injunction (paragraph 32); and
>
> 3. where the mortgagors refuse to pay the amount due on the mortgage arising from claims against the mortgagee (paragraph 34).

[28] In *Meadow Ridge,* a refusal by the mortgagor to pay the amount due was discussed at paras. 41 and 42:

> (41) Similarly, in *Fairview Mall*, Justice Potts stated as follows at para. 9:
>
> It is the applicant's action in refusing to pay that has caused the inability or delay in receiving a discharge. These do not seem to me to be appropriate circumstances in which to grant an order discharging the mortgage under sbs.11(3) [now 12(3)] of the *Mortgages Act*.
>
> (42) As outlined above, this case was distinctive in that the Applicants only wanted to pay into court $1 million of their $11 million mortgage, the value of their damages claim. However, the principle that the cause of delay cannot be the Applicant's simple refusal to pay the amount due was cited by Justice Epstein (as she then was) in *Country Meadow Estates (No 2) Inc v. Citibank Canada*, 1994 CarswellOnt 729, [1994] O.J. No. 1835 (Ont. Gen. Div.). In that case, the mortgagor failed to accept the bank's offer to end the mortgage agreement, and later attempted to pay the money into court to have the mortgage released.

[29] The Court, in *Meadow Ridge*, further clarified that while the amount of damages was in dispute, the amount due in the mortgage was also in dispute, at para. 44:

> [44] The Applicants' Notice of Application primarily outlines their claims for damages, asking that they be set off against any amounts due pursuant to the

> mortgage. While the issues are framed in damages, it is implicit that the amount of the mortgage is also in dispute. This was also explicitly set out in the Applicants' brief and oral argument as the reason for lack of payment. In my view, the existence of the damage claims weigh in favour of the Respondent's argument that the payment would essentially operate as a Mareva-style injunction, a purpose that has not been accepted by the Ontario courts.

[30] The nature of the dispute is relevant and, in *Meadow Ridge* at para. 45, Justice Chipman conducted a review of *Schrittwieser v. Morris*, 1987 CarswellOnt 692, 47 R.P.R. 185 and *Metroview Investment Corp. v. Araujo*, 2000 CarswellOnt 2183, two Ontario cases where the request to discharge the mortgage was granted. However, these cases involved allegations of fraudulent misrepresentation, breach of fiduciary duty, and unconscionable transaction or applicants who were immigrants who did not speak English. None of these "special equitable circumstances" are before me.

[31] *Meadow Ridge* also addressed the urgency, necessity of the request, and fairness arguments around s. 28 of the *RPA* at paragraphs 47 to 49:

> [47] Courts have also considered the urgency and necessity of the request. In *Fernicola*, Justice Trotter rejected that the discharge was urgent simply because the mortgagor wished to sell the lots with clear title (see para. 11). In this case, it is clear the Appellants have been able to secure alternative financing for their project. While the disputed mortgage continues to be in first position, again, it is open to the Applicants to obtain a discharge from Moskowitz.
>
> [48] Finally, the relative unfairness to the parties is a significant factor. In my view, the prejudice faced by the Applicants should be measured, not based on the prejudice that the registered mortgage is causing, but the prejudice that would exist if they were made to pay the amounts directly to the Respondent. As they are capable of paying that amount into court, there should be no financial prejudice to the Applicants. As well, there is no evidence to suggest that there would be any difficulty executing any resulting damages or overpayment against the Respondent following judgment. The Applicants would arguably be in the same position whether they paid the money into court or to the Respondent. By way of contrast, the mortgagee faces prejudice in that they are deprived of these funds in the interim, which would not be the case if the Applicants paid them directly. As well, while the security continues in the funds as they are held by the court, they will have lost an important aspect of the security, which is an incentive to have the payment returned as quickly as possible.
>
> [49] In my view the overriding purpose of s. 28(2) of the *RPA* is to provide a remedy to an equitably disadvantaged mortgagor. The *RPA* should not be interpreted to provide commercial convenience to a mortgagor at the expense of and contrary to the expectations of the mortgagee. Accordingly, it is my

> determination that the circumstances of this case lack a compelling equitable justification to grant this discretionary remedy.

[32] The Applicants submit that *Civil Procedure Rule* ("*CPR*") 46 and section 28 of the *RPA* provides the Court with the jurisdiction and authority to grant the discharge of HarbourEdge's mortgage. They argue that the Court in exercising its equitable discretion under section 28 will find that the "equities firmly favour CanSport and militate in favour of the discharge of the mortgage."

[33] I am not persuaded by this argument because the Applicants are unable to satisfy me that they have met the requirements under section 28(2)(a)(i) of the *RPA*, being "permit payment into court of the amount due …" under the mortgage.

[34] In *Equitable Bank v. Mundulai*, 2016 ONSC 5526, the Defendants sought an order discharging the mortgage under section 12(3) of the *Mortgages Act*, *supra*. In order to obtain the discharge, the Court found that the Defendants would have to pay the amount owing of $136,740, which included the principal balance, accrued interest, late payment interest, costs of the motion and interest that had accrued in the 34 days since the motion on summary judgment was heard. If the defendants refused to pay that amount, the action would proceed and the mortgage would not be discharged (see paras. 28 to 33).

[35] The Applicants have shown no indication that they are willing to pay the amount owing under the mortgage. They are prepared to pay an amount of approximately $2.6 million, which is what they offered to pay directly to HarbourEdge for the full amount owing under the Mortgage. Based on the evidence before me, that amount is significantly less than the amount due under the mortgage, as per the reasoning in *Equitable Bank*.

[36] The Applicants argue that the amount due under the mortgage when "the equities and fairness between the parties is assessed, is $2,411,998.00" and this is the amount required to be paid into court in order to discharge the Mortgage. The Applicants argue that this was approximately the amount owing on December 15, 2017 when "CanSport formally accepted the repudiation letter…".

[37] The parties are unable to agree on the amount due and, on the evidence before me, the Applicants are seeking to pay a lesser amount -- the amount they allege was due in 2017. The amount due is clearly a factual dispute that is better left to be determined at trial but, for the purposes of this motion, this unresolved issue is fatal to the Applicants' request for an Order to discharge the mortgage (see

Fernicola, *supra*, at paras. 6 and 7 and *Meadow Ridge*, *supra*, at paras. 35, 41 and 42).

[38] In addition, CanSport has counterclaimed against HarbourEdge claiming damages as a result of the alleged breach of contract which potentially could affect the amount due on the Mortgage.

[39] Ultimately, there are too many facts in dispute between the parties that need to be addressed at trial such as the effect of the counterclaim on the amount due under the Mortgage, and whether CanSport met the conditions precedent for funding under the facility agreements and whether those conditions were required to be maintained. I conclude that section 28 of the *RPA* is not meant to grant the relief sought by the Applicants. The Applicants are asking the Court to reduce the amount due under the Mortgage with numerous facts in dispute and without a full evidentiary record.

[40] I find that the Applicants have failed to demonstrate what the amount due is under the mortgage pursuant to section 28(2) of the *RPA*. I agree with HarbourEdge's submission that, if I were to grant the relief requested by the Applicants, it would "put all the responsibility and risk on HarbourEdge ..." and I am not prepared to do that in these circumstances.

[41] The second argument put forth by the Applicants is that, once the Court goes through a balancing of the equities, the results will favour the Applicants and weigh in favour of discharging the mortgage. I am not convinced this is the case, particularly when the Court is being asked by the Applicants to use disputed facts in balancing the equities between the parties. This factor weighs in favour of the Court not discharging the Mortgage.

[42] The Applicants are unwilling to pay the amount due on the Mortgage into Court or to HarbourEdge directly. The Applicants gloss over this in their submissions relating to the equities argument. They fail or refuse to discuss the prejudice to HarbourEdge if their security were discharged on the basis of a reduced payment and CanSport were allowed to pursue its counterclaim at the same time. This is the type of prejudice towards the mortgagee addressed in *Meadow Ridge*, *supra*, at paras. 48 and 49 and is another factor in favour of not discharging the Mortgage.

[43] The Applicants raise the issues of delay and the availability of funds for the Court to consider in the balancing of the equities. In terms of delay, the Applicants

say that HarbourEdge has been "sitting on its hands" and has not been advancing the litigation by filing for a date assignment conference or filing other documents under the *CPR;* however, it was also within the Applicants' power to take some of these procedural steps to move the litigation forward. This factor weighs in favour of neither party. Regarding the availability of funds, CanSport has had a significant amount of time to obtain further financing, even though CanSport submits that it was unable to obtain financing because HarbourEdge's mortgage holds a first priority. CanSport submits that it has now obtained that financing with Legacy; however, there is still no financing in place. The evidence is that Legacy's financing is conditional on HarbourEdge's Mortgage being discharged or displaced, and Legacy has also requested further information from CanSport. There is no guarantee that Legacy will accept the information put forth by CanSport and provide financing. This factor weighs in HarbourEdge's favour.

[44] In considering the equities, I find in HarbourEdge's favour. The "*RPA* should not be interpreted to provide commercial convenience to a mortgagor at the expense of and contrary to the expectations of the mortgagee." (see *Meadow Ridge, supra,* at para. 50).

[45] Finally, the Applicants sought an alternative relief where the Court would issue an Order subordinating HarbourEdge's Mortgage behind Legacy's. The Applicants did not provide any authority which would allow the Court to arbitrarily change the priority position of HarbourEdge's security. In any event, after reviewing section 28 of the *RPA*, I find nothing in the language nor do I believe it appropriate for the Court to grant this alternative relief.

Conclusion

[46] The Applicants' application must fail because: 1) the amount sought to be paid into court is less than the amount due, and 2) a balancing of the equities favours not discharging the mortgage.

[47] The Applicants' motion is denied with costs to HarbourEdge. If the parties are unable to agree to costs, I will receive written submissions within 45 days of the date of this decision.

[48] I would ask counsel for HarbourEdge to prepare the Order.

Bodurtha, J.