SUPREME COURT OF NOVA SCOTIA
Citation: *101252 P.E.I Inc. v. Brekka*, 2013 NSSC 390

Date: 20131219
Docket: Hfx No. 413840/413842
Registry: Halifax

Between:

101252 P.E.I Inc.

Plaintiff

v.

Betty Ann Brekka

Defendant

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	December 11 and 19, 2013, in Halifax, Nova Scotia
Written Decision:	January 22, 2014
Counsel:	Ezra Van Gelder and Nicholas Mott, for the Plaintiff
	Richard Bureau and Sean Kaulback (Articled Clerk), for the Defendant

By the Court:

Introduction

[1] The defendant, Betty Ann Brekka, was the owner of two residential rental properties located at 6 and 8 McIntosh Street, Halifax, Nova Scotia which properties she held for investment purposes.

[2] On May 11, 2012 the defendant executed two mortgages, one in relation to each property, in favor of Capital Direct Atlantic Incorporated, a Nova Scotia registered company. At that time, the plaintiff, 101252 PEI Inc. (PEI Co), was not registered in Nova Scotia nor was it conducting any business in Nova Scotia. It was not involved in the formation of the mortgage contracts.

[3] On July 6, 2012, Capital Direct assigned its interest in the mortgages to the plaintiff. The contracts of assignment were executed in Prince Edward Island. The plaintiff is registered to do business in that province. The assignments were registered in Nova Scotia. No argument has been raised to suggest a lack of notice to the mortgagor of these assignments.

[4] As a result of default of payment by the defendant, the plaintiff initiated two actions to foreclose on the mortgages. The Court file number 413840 pertains to the property at 8 McIntosh and file number 413842 pertains to 6 McIntosh.

[5] On May 1, 2013 PEI Co brought motions seeking orders of foreclosure, sale and possession which orders were granted by this Court on May 9, 2013. Public auctions for the sale of the properties were initially scheduled to take place on June 13, 2013. By agreement between the plaintiff and the defendant, the auctions were postponed until July 12, 2013 at which time they proceeded. PEI Co purchased both properties, paying $5,901.27 for 8 McIntosh Street and $5,911.24 for 6 McIntosh Street.

[6] The plaintiff engaged a real estate broker in Prince Edward Island to assist in finding a prospective purchaser for the properties. That resulted in an agreement of purchase and sale being entered into at Dartmouth, Nova Scotia, on July 17, 2013 as between the plaintiff and an arm's length third party purchaser. Those

agreements have not closed and it has been suggested that the corporate purchaser has claimed creditor protection. As such, there may be some uncertainty as to whether or not the sale will close.

[7] There are now competing motions before the court. The plaintiff moves for an order confirming the Sheriff's sales of the two properties. In support of the motions, reliance is placed upon **Civil Procedure Rule 72.10**, together with affidavit evidence, attaching the usual documentation associated with such motions.

[8] The defendant submits that the plaintiff is not in compliance with section 17(1) of the **Corporations Registration Act** R.S.N.S. 1989, c. 101, as amended, in that it is not registered to do business in Nova Scotia. She seeks an order declaring the two actions null and void. She expects that the plaintiff will ultimately have to re-commence the actions after it registers in Nova Scotia.

[9] The defendant acknowledges that if her argument is unsuccessful there are no substantive or procedural defects that would form a basis upon which to deny the motions to confirm the Sheriff's sales.

Position of the Defendant

[10] The defendant acknowledges her default. She says that she thought she had a deal in place to redeem the properties but that the plaintiff denied it. That matter was litigated, but unsuccessfully for the defendant. The decision of Wood J, reported at 2013 NSSC 289 is on appeal but has not been heard yet.

[11] The defendant submits that Section 17(1) of the **Corporations Registration Act** prohibits the plaintiff, as an unregistered corporation carrying on business in Nova Scotia, from commencing or continuing the current actions. Any suggestion that this defect is remediable should be rejected because land is unique and a mortgagee should be held to a high standard of compliance with procedural and substantive requirements of the law before being permitted to foreclose the interests of the mortgagor. She also claims that she will suffer serious prejudice unless the actions are declared to be null and void.

Position of the plaintiff

[12] The plaintiff submits that it does not need to be registered in Nova Scotia in order to enforce the mortgage. It says that when the facts of this case are seen in the context of proper statutory interpretation, section 17(1) does not have the effect suggested by the defendant. It argues that an unregistered corporate assignee is not precluded from suing on a contract made by a registered corporate assignor where the contract was entered into without the assignee's involvement.

[13] The plaintiff submits, in the alternative, that if the defendant is correct and section 17(1) does bar the actions, then the plaintiff says that it is a defect that can be remedied by adding or substituting Capital Direct, the original mortgagee and assignor as a named plaintiff.

Analysis

Issue 1*: Is the plaintiff, as an unregistered corporate assignee, precluded from suing on a contract made by a registered corporate assignor where the contract was entered into without the assignee's involvement?*

[14] Section 17(1) of the **Corporations Registration Act** states:

> Restriction on bringing court action
>
> 17 (1) Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force, provided, however, that this Section shall not apply to any company incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of an Act of the Legislature.

[15] The interpretation and application of this section has been considered in a number of cases including *Shore v. Cantwell and Cantwell* (1975), 21 N.S.R. (2d) 288; *Allto-Imports and Fairbanks* (1988), 84 NSR (2d) 380; *C.B.M. Contracting & Developing Ltd. v. Johnstone* (1980) 39 N.S.R. (2d) 156; *I.A.C. Limited v. Donald E. Hirtle Transport Limited and Hirtle and J.P. Trailer Leasing Inc. and Proulx (Third Parties)* (1977), 27 N.S.R. (2d) 416 (N.S.S.C.T.D.), affirmed at (1978), 29 N.S.R. (2d) 482 (N.S.S.C.A.D.); *Kaeser Compressors Inc. v. Bent* (2006), 247 N.S.R. (2d) 359: and *Jacobsen v.1358751 NSL* 2008 NSCA 45.

[16] I have reviewed these decisions; however, counsel have not directed me to a case that has the same facts as those presented in this matter.

[17] Capital Direct, the mortgagee and assignor, was registered in Nova Scotia at the time it entered into the mortgages with the defendant. It continues to be registered in this province. If it were named as a plaintiff, then the defendant has no sustainable argument under the **Corporations Registration Act**.

[18] PEI Co, the assignee of the mortgages, is not and has not been a registrant in Nova Scotia. The question posed is whether that precludes it from commencing and maintaining these actions in Nova Scotia.

[19] The Assignments of Mortgage each include the following paragraph:

> … The Assignor does hereby assign and set over unto the Assignee the Mortgage and Assignment of Leases and/or Rents more particularly described in Schedule "A" attached hereto… and also the outstanding principal sum and interest thereon now owing, together with all monies that may hereafter become due or owing in respect of the Mortgage, and the full benefit of all powers and of all covenants and provisos in the Mortgage, and also full power and authority to use the name of the Assignor, its successors and assigns, to enforce the performance of the covenants and other matters and things in the Mortgage.
>
> (Emphasis added)

[20] The plaintiff says that historically, the assignee of a legal chose in action could not sue in its own name; absent an order from a Court of Equity, it had to bring the action in the name of the assignor. PEI Co points to section 43(5) of the **Judicature Act** RSNS 1989, c. 240, as changing the common law to allow an assignee of the legal chose in action to sue in its own name so long as the defendant to the action had been given written notice of the assignment. That section reads:

> (5) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this subsection had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and

> other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[21] In my view, this provision statutorily affirms the legal rights of an assignee to, among other things, pursue legal remedies in its own name if it so chooses. It does not excuse the assignee, once it elects to seek a remedy in its own name, from complying with statutory requirements necessary to the commencement or maintenance of an action. I do not accept that in electing to commence an action in its own name that PEI Co can simply rely upon the status of the assignor as at the time of the formation of the contract to found compliance by PEI Co with the registration requirements of section 17(1) of the **CRA**.

[22] The defendant relies on the authority of *Island Seafoods, LLC v. R. & L. Fisheries Ltd.*, 2012 NSSC 348 in support of its position that failure to register is fatal to the maintenance of these actions. In that case, the plaintiff was a foreign corporation without a registered office Nova Scotia. It filed an action on September 28, 2011. After being notified of the issue of being a non-registrant in Nova Scotia, it registered on June 15, 2012. The contract in question was made in whole or in part in Nova Scotia and the business was done in Nova Scotia. The issue for resolution was whether the subsequent registration cured the lack of registration as at the time the action was commenced.

[23] After a review of a number of authorities, the court held:

> [23]… Commencing an action is a one-time event. The party seeking to commence the action is either registered, or is not registered, at the time. It is thus either authorized, or not authorized, to commence the action.
>
> [24] This interpretation gives effect to the wording of section 17(1).
>
> [25] Unless and until the corporation is registered, it cannot bring an action. So if it is not, at the time, it can wait until it is registered to bring the action.
>
> [26] Unless and until the Corporation is registered, it cannot maintain an action. So if it is not registered, it cannot proceed further, without the-with the action until it does become registered and can proceed further with the action.
>
> [27] …

> [28] To allow the commencement of an action with the registration to be cured by subsequent registration would retroactively forgive a contravention of the penal provision of the Act.

[24] PEI Co. says that the application of the prohibition is qualified by the following language in s. 17(1) which stipulates the type of contract which is intended to be captured by the provision as one:

> … made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force,

[25] When the mortgage was "made", in this case, the plaintiff was a stranger to the contract. It was not doing business in Nova Scotia and therefore it cannot be said that the contract at the time of its formation was "in connection with any part of its business" in Nova Scotia. The plaintiff distinguishes this case on its facts from *Island Seafoods* and, in particular, notes that case did not concern the assignment of a chose in action. It is true that in the *Island Seafoods* case the plaintiff was the original contractor and was not a registrant at the time of the making of the contract. It differs from this case where the original contractor was a registrant at the making of the contracts.

[26] I am not convinced that the qualification exempts the plaintiff from being a registrant in order to take its actions on the mortgages. I tend to agree with the plaintiff's interpretation insofar as it relates to the status of the plaintiff at the time of the formation of the contract. It is arguable then that an action commenced by an unregistered assignee immediately upon obtaining the assignment of the mortgage and before conducting any business in furtherance of its terms might not be subject to the prohibition, since at the point of formation it had no connection to a business done or being carried out by it in Nova Scotia.

[27] By the time these actions were filed, the management of the mortgage provisions had continued for several months after the assignment. The plaintiff collected mortgage payments under a Nova Scotia contract for a Nova Scotia property from a Nova Scotia resident. In time, the mortgagee went into possession under the terms of the mortgage and operated and maintained the business of the income properties. The mortgage therefore was a contract that, once assigned, became connected to the business of the plaintiff in Nova Scotia. It would seem

contrary to the intention of the legislation that the assignee could commence an action in such circumstances.

[28] I conclude that the plaintiff, as a non-registrant in Nova Scotia, has not met the pre-conditions set out in section 17(1) of the **Corporations Registration Act** and therefore could not have commenced or maintained these actions in its own name. I turn now to the remedy.

Issue 2: *What is the appropriate remedy in view of the plaintiff's non-compliance with section 17(1) of the **CRA**?*

[29] The plaintiff submits that the appropriate remedy is found in **Civil Procedure Rule 35.06** the relevant parts of which state:

> 35.06 (1) No proceeding is defeated by reason of a wrong person having been joined as a party or a right person having not been joined, unless an order removing or adding a party would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period.
>
> (2) A judge may make an order removing or adding a party to prevent the defeat of a proceeding, unless doing so would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period.
>
> (3) No proceeding is defeated by reason of a party having been wrongly named, unless both of the following apply:
>
> > (a) because of the misnaming, the misnamed party was unaware of the proceeding;
> >
> > (b) the correction will cause serious prejudice that cannot be compensated in costs, and would not have been suffered if the party had been properly named originally.
>
> (4) A judge may correct the name of a party to prevent the defeat of a proceeding.
>
> (5) A corrected proceeding continues as if the correction had been made originally.
>
> (6) A proceeding may be stayed if a judge is satisfied that one of the following deficiencies applies, and the stay ends when the deficiency is rectified:

> (a) a party was joined by mistake;
>
> (b) a person who is a necessary party is not a party;
>
> (c) a person was misnamed when the person was joined as a party.

[30] Counsel for the plaintiff submits that Capital Direct should be added as a party to avoid the defeat of the proceeding. It is argued that there is no serious prejudice to the defendant that is caused by such a result but that there is significant prejudice to the plaintiff if the proceeding is defeated.

[31] The defendant seeks the nullification of the entirety of the proceedings to date. She proposes that the plaintiff must register under the **CRA** and then re-commence its actions. She would probably not object to the view that the assignor could be joined or substituted as a plaintiff but only in the new originating documents.

[32] Counsel for Ms. Brekka acknowledges that there is no defence to the allegation of default. In response to suggestions that forcing the plaintiff to repeat the entire process would be a waste of resources for the court and the parties, he submits that those concerns are outweighed by the prejudice that his client will suffer. In particular he says:

> i. The plaintiff is at fault for failing to comply with the obligation set out in section 17(1) of the **Corporations Registration Act;**
>
> ii. To permit the plaintiff to continue the actions would undermine the "penal sanctions" intended by that section;
>
> iii. That land is unique and therefore the court should set a high standard for compliance by a mortgagee with the substantive and procedural requirements to obtain foreclosure;
>
> iv. That the defendant now has the will and ability to redeem the properties and this is likely her last opportunity to get her properties back.

[33] The mortgages are valid. The plaintiff has a valid assignment that gives it the legal right to enforce the terms of the mortgages. No defences to the actions have been filed and it has been admitted that the defendant is in default of her obligations under the mortgages. Are these circumstances that justify the defeat of the two proceedings?

[34] Capital Direct is contractually bound to permit its name to be used by the plaintiff to enforce the covenants contained in the mortgages. If the plaintiff had sued in the name of Capital Direct then the motion to confirm the sale of the properties would be granted.

[35] If the plaintiff had registered under the Nova Scotia **CRA** at any time prior to commencement of the actions, then the motion to confirm the sale of the properties would be granted.

[36] Requiring the plaintiff to recommence the proceedings will incur significant cost and delay, without any guarantee that the plaintiff will recover the increased costs. The court's resources will also be engaged to repeat the proceedings.

[37] The fault, as the defendant argues, rests with the plaintiff but its error, in these circumstances, would not merit such significant consequences unless there is serious prejudice to the defendant that cannot be compensated with costs.

[38] The defendant has filed an affidavit which says that Atlantic Signature Mortgages & Loan Inc. provided her with mortgage funding approval for these properties on July 19, 2013. She states her intention to "buy back my properties for the outstanding mortgage balance plus the applicable interest, costs and other fees or at the foreclosure sales." She attached a copy of the "approval".

[39] The document tendered is entitled "Mortgage Commitment". It is not signed and it is not dated. It purports to be an offer to provide a first mortgage to the defendant in the amount of $1.3 million with interest at 12% per annum with a one-year term commencing August 1, 2013. It intends to encumber six different properties. While it refers to 6 McIntosh St, it does not mention 8 McIntosh St. There are a number of pre-conditions to advancing the funds. A failure to meet those conditions to the satisfaction of the lender provides grounds to withdraw the lending commitment.

[40] I find that this evidence does not give any confidence that the defendant will one day be able to redeem the properties if her objection is successful. In fact I would say it is speculative to say that, based on this document, the defendant will be able to find the necessary funds.

[41] That land is unique is often a consideration in property disputes, but in this case the properties are for investment purposes and are residential rental buildings. Having regard to the remaining circumstances, I give this factor little weight.

[42] The defendant's argument that the "penal sanctions" of the Act are undermined if the plaintiff is permitted to continue the action is, in my opinion, not a significant concern here. The true penal sanction for doing business in the province while not registered is found in section 13(1) of the **CRA**. That provision continues to be available for consideration by the proper authorities.

[43] The objectives of section 17(1) for commencing or maintaining an action are met when, as here, the non-registrant is forced into compliance by ensuring that the proceeding is advanced by a registered corporation where it is necessary to do so. The concern for controlling non-registered corporate plaintiffs is further mitigated by the fact that the assignor was properly registered and that the plaintiff has the authority to use the assignor's name to enforce the mortgage terms.

[44] Returning to the *Island Seafoods* decision, I note that Justice Muise contemplated such a situation. He said:

> [31] There may be cases where to insist on the penalty would work an unfairness on the corporate plaintiff that would be out of proportion with the importance of the sanction, that is the sanctioning of non-registration, and in those cases there might be situations where relief from such a penalty would be appropriate; but, in my view, the case before me is not one of those situations.

[45] In my view, this case is one of those where defeating the proceedings would be disproportionate to the harm intended to be deterred. While it may be arguable that the proceedings could be saved by PEI Co registering, I conclude that the more appropriate resolution is to require that Capital Direct be added as a plaintiff. This has been made necessary by the fact that their assignee is not registered. As I have noted, the Assignment gives legal authority to the plaintiff to

use the Capital Direct name. Counsel for the plaintiff advises that they also act for Capital Direct and that the necessary changes to add that company as a plaintiff can be made forthwith.

[46] Therefore I order that pursuant to **Rule 35.06(2)** Capital Direct Atlantic Incorporated be added as a plaintiff. I will hear the parties as to the appropriate way in which to change the style of cause.

[DISCUSSSION AS TO STYLE OF CAUSE]

[47] The style of cause is amended by naming Capital Direct Atlantic Inc. as the plaintiff in these proceedings, and any reference to 101252 PEI Inc. shall be read as if Capital Direct Atlantic Inc. had originally been named as the plaintiff.

Motions to confirm sales

[48] I have reviewed the affidavit evidence of Shawna Bowlby and am satisfied that pursuant to the orders of foreclosure, sale and possession, notices of public auction were sent to all appropriate persons and were published in compliance with the orders. I have reviewed the Sheriff's reports of sales of the mortgaged properties and the certificates of taxation. I confirm the Sheriff's reports and all proceedings are ratified and confirmed, subject only to execution of the amendment of the style of cause to include Capital Direct as plaintiff.

Duncan J.