IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Bank of Montreal v. LeBlanc, 2015 NSSM 47

Claim: SCY No.423853
Registry: Yarmouth

Between:

BANK OF MONTREAL, a body corporate

Claimant

– and –

TIMOTHY JOHN LEBLANC and KEVIN FIGUERA MAIO

Defendants

Adjudicator: Andrew S. Nickerson, QC

Heard: November 16, 2015

Decision: November 27, 2015

Appearances: Sarah Belong, for the Claimant,
The Defendants, self-represented

[1] This case involves the Claimant seeking a deficiency judgment with respect to a conditional sales contract of a motor vehicle which was repossessed.

[2] Tina Sweeney-Doucette testified on behalf of the Claimant. She is a financial services officer at the Yarmouth branch of the Bank of Montreal. She says that she met Mr. Maio at the branch but does not know Mr. LeBlanc. She says that Mr. Maio got behind in his payments but came into the branch to straighten things out. Beyond that, this witness was unable to provide any detailed evidence with respect to the bank's interactions with either of the Defendants. Her evidence consisted mostly of presenting and interpreting the bank's records in this matter.

[3] Ms. Sweeney-Doucette testified that the records (Exhibit 1 Tab H) showed that in May of 2011, the bank received some NSF cheques, but the way the bank records read that after that, beginning in July of 2011, payments were made directly at the bank. It appears that by August of 2011 there was an amount of $1,632.59 showing past due. The records show that this was cleared up by the end of September. By February of 2012 the Defendants were again past due by the amount of $410.74. By May 31, 2012 the account was again no longer in arrears. Beginning in August of 2012 the account was past due in the amount of $411.11. By January 30, 2013, the amount past due was $825.18. In

February of 2013, no payments were made and the amount rose to $1,646.66 past due. The statement for April 30, 2013 shows a past due amount of $2,467.40.

[4] The first of the bank statements are addressed to both of the Defendants at 79 Golden Glow Lane, Arcadia. The statement for March 31, 2011 was changed to 142 Lakeside Road RR5 Yarmouth, Nova Scotia. The address changes again on August 31, 2011 to 79 Goden Blow Lane Yarmouth, Nova Scotia. The November 30, 2012 statement is addressed to 5 Barnard Stn. Main B Yarmouth NS. The January 31, 2013 statement is addressed to 53 Barnard Stn. Main B Yarmouth NS. Then, beginning August 31, 2013, the address is changed again to 79 Golden Glow Lane, Arcadia. Ms. Sweeney Doucette stated in cross examination that the bank would only change addresses on the bank statements at the request of the customer. While I do not doubt Ms. Sweeney-Doucette's integrity and honesty, I believe she is mistaken in this regard. The somewhat random and clearly erroneous changes of addresses are not consistent with the statement. I find that the bank was careless in the way they addressed the statements. Neither does the bank seem to have been careful in making sure they understood which address belonged to which individual. I find that this was the likely cause of the problems with the notice I will discuss below.

[5] Exhibit 1 Tab I is a notice sent by registered mail to Mr. Maio and Tab J is the same notice sent to Mr. LeBlanc. Both notices are dated April 18, 2013. These notices contained the information required by section 60 of the Personal Property Security Act. On the first page of each exhibit, there is a registered mailing receipt, but this receipt in each case does not indicate the date on which the registered mail was sent. Each exhibit has a second page which purports to be the tracking receipt from Canada Post. In the case of the notice purported to be sent to Mr. Maio the "signatory name" is stated as "asset" in what purports to be the signature clearly and obviously does not match with the signature of Mr. Maio on the loan documents (Exhibit 1 Tabs A & B). Likewise with respect to Mr. LeBlanc the "signatory name" is stated as "D Kim" and again what purports to be the signature clearly and obviously does not match with Mr. LeBlanc's signature (Exhibit 1 Tab B). The delivery date stated in these Canada post documents in respect of Mr. Maio is May 17, 2013, and in respect of Mr. LeBlanc is May 13, 2013.

[6] Exhibit 1 Tab K purports to be an appraisal done on behalf of the Bank of Montreal of the vehicle in question and states that the actual cash value of the vehicle would be $12,000 as at the date of repossession. This document is unsigned. Ms. Sweeney-Doucette testified that this was a document kept by the bank in the usual course of its business. She did however testify that this was done by an outside agency for the bank. As such, I am not sure that it can be considered to be a record of the bank and admissible as such. However, I applied the principled exception to the hearsay rule as modified in

respect to Small Claims Court in accordance with the case of **Towle v. Samad, 2013 NSSC 260** and ruled that it is admissible as being sufficiently reliable. I mean reliable in the sense that it was a document that could be admitted into evidence, but do not mean reliable in the sense that it does not have to be weighed as any other evidence.

[7] The Claimant also introduced a number of photographs of the vehicle alleged to be repossessed taken after the vehicle was repossessed. While these may be records kept in the course of the appraisal they certainly are not records kept in the ordinary course of banking. I am satisfied that they are photographs of the vehicle in question because the VIN number matches, the odometer reading is the same as the appraisal and the Defendants did not take issue that this was the vehicle in question. I admit them in evidence on the same principled exception. These photographs do not give me any context in terms of the time when they were taken. They are of no help to me in determining the contents of the vehicle at the time it was repossessed.

[8] Tab L is a document from the disposal company engaged by the Bank of Montreal, which states that the price obtained for the vehicle was $10,400. After removing some kind of unspecified charges the credit that shows up on the bank statements is $10,153.00.

[9] The Bank of Montreal submits Exhibit 4 which purports to be an e-mail from the company which repossessed and disposed of vehicle. I ruled at the hearing that I could not accept this e-mail for the truth of the statements contained in it because it was in effect "double hearsay" as the author of the e-mail was simply quoting something that someone else said. However, this document does indicate that there was some nature of personal property in the vehicle at the time it was repossessed. Since this was presented by the bank, who asserted the accuracy of the statements, I consider it to be an admission against interest and acknowledgment by the bank that there were in fact some contents in the vehicle. Even if I had admitted it the contents of the e-mail would not change my analysis or my decision.

[10] The bank's Statement of Claim, claims the amount of $21,456.87 plus interest at the rate of 6.97% from January 28, 2014 and a per diem interest rate of $4.03 to the date of judgment and the cost of this action.

[11] Mr. LeBlanc stated that he was approached by Mr. Maio in 2009 when he wanted to buy a Nissan truck. Mr. Maio was a friend of Mr. LeBlanc's son and he considered Mr. Maio to be a reliable person. Mr. Maio had $15,000 to put down on the vehicle which he placed in a joint savings account at RBC. A Mr. McKinnon from the automobile dealership had assured Mr. LeBlanc that Mr. Maio would be able to

carry the loan on his own within a year and that the $15,000 would be sufficient to take care of one and a half years of payments.

[12] Mr. LeBlanc got a call from the Bank of Montreal in June of 2011, at which time Mr. LeBlanc said that he didn't believe he had a loan with the Bank of Montreal. The bank called back in July and mentioned Mr. Maio's name. Mr. LeBlanc asked why his name was still on the contract. He contacted Mr. Maio through his son, who assured him that the matter would be taken care of and he heard nothing further until he got notice of this action.

[13] Mr. LeBlanc testified as to the notice at Exhibit 1 Tab J. He said had never seen that document until it was presented to him in court. He unequivocally stated that it was not his signature on the registered mail receipt. He also said that he does not know a “D Kim”.

[14] Mr. Maio testified that he was a good friend of Mr. LeBlanc’s son. When he went to the Nissan dealer to buy a truck he was told that he didn't have sufficient credit and would require co-signer. He therefore approached Mr. LeBlanc, who initially said no, but after being assured that he would only need to be co-signer for one year and that the $15,000 was placed at RBC, Mr. LeBlanc agreed to do so.

[15] Mr. Maio acknowledges that in April of 2011 there were some NSF checks which had been on automatic payment from the RBC. He went into the Bank of Montreal to straighten it out and did so. Thereafter he made payments directly to the Bank of Montreal. He says he kept putting in payments as required. In July 2011 he got a call from the Bank of Montreal stating he was in arrears. He went into the bank and found the arrears were $1,221.48 which he immediately rectified. He says he got another call in September of 2011 and again immediately went into the bank, spoke to the staff and brought the past due amount to zero.

[16] Mr. Maio says that thereafter he continued to make payments as he understood he was supposed to. The records reveal that he was paying $820 monthly. I find as a fact that Mr. Maio honestly believed that this was the correct amount to pay each month. I also find, however, that as Mr. Maio acknowledged on the witness stand that when one makes biweekly payments, there will be some months with three payments as opposed to two. Mr. Maio continued to make these $820 payments believing that he was fully paid up when in fact he was not. This appears to be the real cause of the difficulty. Mr. Maio says that he had the money to pay and was willing to pay all along and I accept that.

[17] Nevertheless I find as a fact that he was indeed overdue and in arrears on his payments at the time the bank sought to repossess.

[18] Mr. Maio denies receiving the registered mail notice and states the signature on the Canada Post receipt is not his and he does not understand the significance of the recipient being stated as "asset".

[19] Mr. Maio testified that he did not realize he was behind, had not received any notice, and was very surprised when the repossession people showed up at his address. He said that he made various attempts to call the Bank of Montreal and wanted to straighten it out. He says when he initially spoke to the bank he was told they had no record of him owning a vehicle. He said that he managed to figure out the account number and give it to the collection account manager at the Bank of Montreal. He says he continued to call the account manager for weeks and left voicemails and messages but never received a return call. He tried contacting other people at the Bank of Montreal who told him that the account manager was the only one who could deal with the matter. He says that somebody gave him the phone number for "driver's abstract" which he called and was told that they had no record of him. My conclusion is this would have been the Department of Transportation.

[20] Mr. Maio heard nothing further until July of 2013, when Mr. LeBlanc contacted him because he had received a letter from the Bank of Montreal. Mr. Maio called this individual and asked why the vehicle had been repossessed and why no one had called or spoken to him. He did not receive an answer.

[21] Mr. Maio acknowledged that his address is 53 Barnard Street.

[22] Mr. Maio acknowledged that the vehicle had some damage but suggested that it was worth considerably more than what the bank obtained for it.

[23] Mr. Maio testified that he was about to move to another province and as a result, a significant number of his belongings were in the vehicle. He says he never received these belongings. On this basis he puts forward his counterclaim, which is contained in Exhibit 3 and totals the value of $10,380.70. Mr. Maio states that these were the amounts which he paid for the items. Exhibit 3 reads as follows:

Bag full of flares	800
2 inflatable jackets	798
Oil gears	200
Clothes/hangars	2310
tools	900
tool box	800
electric rust box	800
camping chairs	75
2 propane torches	100
satellite radio	100
manual winch	60

rope (3 coils)	600
Chrome accessories	100
Jumper cables	50
1000 watt converter	1200
Knives	300
Hatchet	25
fishing gloves	200
	$9,418

[24] To this total he adds HST of 15% ($1,412.70) for a total of $10,830.70. I accept Mr. Maio's explanation that he was about to move as a reasonable explanation as to why he had goods of such value in the vehicle. In addition many of these were items that would be expected to be needed in his work and it is not unreasonable for them to be in his vehicle.

[25] I found Ms. Sweeney-Doucettete and Mr. LeBlanc to be credible witnesses. However, both of these witnesses are quite limited in what they are able to testify to. In large measure with respect to the Bank of Montreal, I have to rely on the written documentation, and in large measure with respect to Mr. LeBlanc I have to rely on what Mr. Maio had to say.

[26] While he clearly misunderstood the way the payment schedule worked, I found Mr. Maio to be attempting to tell the truth to the best of his ability and I do accept that the contents he stated were in fact in the vehicle. Except where I specifically state that I do not accept his evidence (and that is generally because I am not satisfied of his means of knowledge), I consider his evidence to be essentially reliable and I accept it as truthful and reasonably accurate.

ISSUES

[27] The issues I must resolve are:

1. Did the Bank of Montreal comply with the notice requirements set out in section 60 of the Personal Property Security Act?
2. If the Bank of Montreal breached the notice requirements of the Personal Property Security Act are they precluded from deficiency judgment?
3. If the Bank of Montreal breached the notice requirements of the Personal Property Security Act is the Bank of Montreal liable in damages for losses of the Defendants?
4. If the Bank Montreal is so liable, what is the measure of damages?
5. Should the counterclaim be allowed and if so in what amount?

LAW AND ANALYSIS

[28] This case presents regrettable circumstances that arose from the inattention of both parties. The events were set in motion by Mr. Maio's inattention to and misunderstanding of the exact terms of payment which resulted in his default. However that does not relieve the bank from the duty to proceed in the manner prescribed by law. My analysis will show that the bank failed to comply with the provisions of the Personal Property Security Act. This seems to have arisen from the bank's inattention to the addresses of the Defendants, poor communication with the Defendants, lack of attention to the details of the required service of notices to the Defendants and lack of care in dealing with the contents of the vehicle on repossession. More care on the part of both parties would likely have resolved this matter without the need of resolution by this court. The result is the unfortunate circumstances in respect of which I must now analyze and determine the legal consequences.

[29] I must consider the law as it relates to the duties of a secured party when repossessing personal property. That is set out in the Personal Property Security Act as follows:

Disposal of collateral by secured party

60 **(1)** In subsections (2), (7) and (15), "secured party" includes a receiver.

(2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repair, processing or preparation for disposition.

(3) The proceeds of the disposition of collateral shall be applied consecutively to

(a) the reasonable expenses of seizing, repossessing, hold- ing, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligations secured by the secu- rity interest of the party making the disposition.

(4) Any surplus proceeds of the disposition of collateral shall be dealt with in accordance with Section 61.

(5) Collateral may be disposed of

(a) by private sale; (b) by public sale, including public auction or closed ten- der;

(c) as a whole or in commercial units or parts; or

(d) if the security agreement so provides, by lease.

(6) Where the security agreement so provides, the payment for the collateral being disposed of may be deferred.

(7) The secured party may delay disposition of the collateral, in whole or in part.

(8) Not less than twenty days before disposition of the collateral, the secured party shall give a notice to

(a) the debtor and any other person who is known by the secured party to be an owner of the collateral;

(b) each creditor or person with a security interest in the collateral whose security interest is subordinate to that of the secured party and

(i) who has registered, before the notice of disposition is given to the debtor, a financing statement that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are pre- scribed as serial numbered goods, or

(ii) whose security interest was perfected by pos- session when the secured party seized or repossessed the col- lateral;

(c) each judgment creditor whose interest in the collateral is subordinate to that of the secured party and who has registered, before the notice of disposition is given to the debtor, a notice of judgment that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are prescribed as serial numbered goods; and

(d) any other person with an interest in the collateral who has given a written notice to the secured party of that person's interest in the collateral before the notice of disposition is given to the debtor.

(9) A notice pursuant to subsection (8) shall contain

(a) a description of the collateral;

(b) a statement of the amount required to satisfy the obligation secured by the security interest;

(c) a statement of the sum actually in arrears, exclusive of the operation of an acceleration clause in the security agreement;

(d) a brief description of any default, other than non-payment, including the term of the security agreement, the breach of which constituted the default;

(e) a statement of the amount of the expenses referred to in clause (3)(a) or, where the amount has not been determined, a reason- able estimate;

(f) a statement that any person entitled to receive the notice may redeem the collateral on payment of the amount due under clauses (b) and (e);

(g) a statement that the debtor may reinstate the security agreement on payment of the sum actually in arrears exclusive of the operation of an acceleration clause in the security agreement, the cur- ing of any other default and payment of the amount of the expenses due under clause (3)(a);

(h) a statement that the collateral will be disposed of and the debtor may be liable for a deficiency unless the collateral is redeemed or the security agreement is reinstated; and

(i) a statement of the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted, or the date after which any private disposition of the collateral is to be made.

[My emphasis]

[30] That neither the name of the recipient, nor the signature on the registered mailing receipts, match either of the Defendants' name or signature is clear and incontrovertible. For this reason I cannot find that the registered mailing receipts establish service of the required notice.

[31] That is not the end of the matter. The Claimant may still succeed if it can rely on the provisions as to service by registered mail which read:

Manner of giving notice or demand

70 (1) A verification statement pursuant to subsection 44(11) and a notice or a demand given pursuant to this Act, other than a demand pursuant to Section 19, may be given to

(a) an individual, by leaving it with the individual or by sending it by registered mail addressed to

(i) the individual by name at the individual's residence, or

(ii) where the individual is the sole proprietor of a business, the individual by name at the address of the business;

(2) A notice or demand sent by registered mail is deemed to be given

(a) when the addressee actually receives the notice or demand; or

(b) except when postal services are not functioning, on the expiry of ten days after the date of registration,

[31] I am, in respect of both Defendants, faced with clear evidence that an attempt at service by registered mail was made. Both notices were sent to 53 Barnard Street. The only evidence I have indicates that is Mr. Maio's address. The evidence I have is that 53 Barnard Street is not and never has been Mr. LeBlanc's address. This harkens back to my earlier comments as to the looseness of the address records kept by the bank. That clearly establishes failure of notice to Mr. LeBlanc.

[32] Applicable to both Defendants, the Claimant urges me that I should accept that service was good because the Notice was dated April 18 and that should be the presumed date of mailing. However there is no evidence of the actual date of mailing. The Ontario Court of Justice (General Division) was faced with the exact same question in **Bank of Nova Scotia v. Antoine [1998] O.J. No. 1603.** Justice H. Spiegel said:

> 9 Noticeably absent from the exhibits attached to the affidavits of Ms. O'Brien and Ms. McLaughlin was the post office registration receipt or any other documentary evidence as to when the letter to the defendant or her daughter was registered.
>
> …….
>
> 13 Since there is no evidence that Ms. Redhead or the defendant received actual notice of the sale the Claimant must rely on the provisions of s. 68(2) and 68(4) of the Act. In order to satisfy the requirements of these subsections, the Claimant must prove that the notice was sent by registered mail, and that the registration took place at least 10 days before the date that notice was required to be given. In this case the sale was made on or about November 29 th , 1995. The Claimant would have to establish that the registration of the registered mail took place no later than them November 4 th , 1995 (ie. 10 days for deemed service and 15 days' notice of sale). Neither the affidavit of Ms. McLaughlin or Ms. O'Brien or any of the exhibits attached thereto refers to the date of registration, nor do they refer to the date on which the notice was sent by registered mail. While the notice itself is dated October 25 th , 1995, in my view, this falls short of establishing that it sent by registered mail on this date. I may say at this point that I agree with the objections raised by the defendant to Paragraph 8 of

> the affidavit of Ms. McLaughlin. It clearly offends Rule 39.01(4) and should be disregarded. *[my emphasis]*

[24] I find the reasoning of Spiegel J. to be persuasive. I find that the Claimant has not met the burden of proving that the statutorily required notice was served.

[35] Now I must assess the consequences of such breach of the statute. Section 67 (5) reads:

> 67 (5) In an action for a deficiency, the debtor may raise as a defence the failure of the secured party to comply with obligations in Section 18, 19, 60 or 61, but non-compliance limits the right to the deficiency only to the extent that it has affected the debtor's ability to protect the debtor's interest in the collateral or has made the accurate determination of the deficiency impracticable.

[35] I therefore hold that if the Defendants have a remedy for the breach of the notice provisions it must be found in the damages that flow from such breach as described in the statute. They are not entitled to claim that the bank has forfeited a deficiency by their default of notice.

[37] Section 6 of the Schedule A Terms and Conditions of the Conditional Sales Contract (Exhibit 1 Tab B) states the repossession and sale will be done "in accordance with the applicable legislation". I believe that the damages prescribed by the Personal Property Security Act legislation are not "general damages" which the Small Claims Act limits to $100 in any event. However this clause makes it abundantly clear that those damages flow from the contract by referencing the legislation. I therefore have the jurisdiction to assess those damages.

[38] I have accepted the evidence of the Defendant Maio that he had the financial ability to pay out the loan and it is a reasonable inference that the Defendant LeBlanc could have done so as his credit supported a much larger loan in the first instance. These assertions were not challenged in cross-examination and I have no evidence to the contrary. This leads me to conclude that if proper notice had been given that the Defendants could and would have paid out the loan in the amount of $30,315.32 claimed in the purported notice (Exhibit 1 Tabs I & J)

[39] This conclusion must imply that the Claimant cannot claim interest from the date of its breach. Had the Defendants had notice and a proper opportunity to pay out the loan the Claimant would have no claim for interest. I consider this to also flow from the statutory breach that "affected the debtor's ability to protect the debtor's interest in the collateral". By the same logic I also rule that the repossession costs are not claimable as they also flow from the notice breach.

[40] The Defendant Maio says that the vehicle was worth more than the $10,400 received for it (Exhibit 1 Tab K) but produced no further evidence. The Claimant's own estimate of value was $12,000 (Exhibit 1 Tab K). The Personal Property Security Act states that:

> **66 (2)** All rights and obligations arising under this Act, any other applicable law or a security agreement shall be exercised and discharged in good faith and in a commercially reasonable manner.

[41] I am provided no evidence as to how the sale was conducted, what advertising was done or why the sale price was $1,600 less than the Claimant's own estimate. I have no basis to determine if the sale took place in a "commercially reasonable manner". I have read some cases which place the burden of proof on a defendant when challenging that a sale took place not in a "commercially reasonable manner", but these were cases where the secured party had provided evidence of how the sale had taken place. It seems to me the burden of proof can only shift to the Defendant when the secured party has at least put forward evidence of how the sale took place. Surely the Claimant must bear the burden of producing at least some reasonable *prima facie* evidence that they complied with the statute in this regard before the Defendant is called on to justify that the procedure was not commercially reasonable. I therefore am prepared to rule that the amount that should be applied to the debt is $12,000 as that is the best estimate of value that I have.

[42] As to the Claimant's claim I am prepared to award the sum of $18,315.32 ($30,315.32 which is the amount owing on the statement of repossession less $12,000). I award no interest and no repossession costs.

[43] As to the counterclaim, I also am of the view that this flows from the improper notice. It also can equally well stand on its own as a separate tort.

[44] I have accepted that the goods that Mr. Maio says were in the vehicle were in fact in the vehicle. His evidence was that the values he used were his acquisition cost of the items. The fundamental principle of damages is that damages are only awarded to compensate for actual loss and not to improve the position of the party claiming. Simply put as that applies to this case, one cannot get new goods for used goods.

[45] This is perhaps the most difficult part of this decision since I must, in effect, apply deprecation to Mr. Maio's goods without the benefit of having seen them. That also flows from the notice breach. What I have done is applied deprecations that I consider reasonable given the nature of the description. Clothes lose value quickly and I have applied an 80% depreciation there. The few goods that I am reasonably confident are durable and would last for a considerable period of time I have applied a 25% deprecation. The others I have applied a 50% deprecation as the best estimate of an overall and normal deprecation.

[46 I acknowledge that this is an arbitrary process but I do not have much choice. I cannot award Mr. Maio replacement cost and I cannot deny his counterclaim in light of my factual findings. Mr. Maio is clearly entitled to something and this is the best estimate I can make.

	Purchase price	Depreciation	Value
Bag full of flares	800	25%	600.00
2 inflatable jackets	798	80%	159.60
Oil gears	200	50%	100.00
Clothes/hangars	2,310	80%	462.00
Tools	900	25%	675.00
Tool box	800	25%	600.00
Electric rust box	800	50%	400.00
Camping chairs	75	50%	37.50
2 propane torches	100	25%	75.00
Satellite radio	100	50%	50.00
Manual winch	60	50%	30.00
Rope (3 coils)	600	25%	450.00
Chrome accessories	100	50%	50.00
Jumper cables	50	50%	25.00
1000 watt converter	1,200	50%	600.00
Knives	300	50%	150.00
Hatchet	25	50%	12.50
Fishing gloves	200	80%	40.00
	$ 9,418		$ 4,516.60
	$ 1,413		$ 677.49
	$ 10,831		$ 5,194.09

[47] I therefor allow $5,194.09 on the counterclaim. No interest is awarded on this amount.

[48] In summary I allow the claim in the amount of $18,315.32 and the counterclaim in the amount of $5,194.09. The result is, after set off, that I award judgement to the Bank of Montreal in the amount of $13,121.23.

[49] I award no costs to either party.

Andrew S Nickerson Q.C. Adjudicator