Date: 2011 06 27
Docket: S-1-CV-2008000219

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADA MORTGAGE AND HOUSING CORPORATION

Plaintiff

- and -

THEODORE STUDER

Defendant

MEMORANDUM OF JUDGMENT

[1] The plaintiff moves for summary judgment; the defendant seeks a dismissal of the action for delay. For the reasons that follow, the plaintiff's application is granted and the defendant's application is dismissed.

History of the Litigation:

[2] This action seeks judgment against the defendant in the sum of $1,635,359.49 plus interest based on a judgment obtained in Ontario in 2000. It is an action on the judgment and not an application for registration under the *Reciprocal Enforcement of Judgments Act*, R.S.N.W.T. 1988. That Act, while providing a convenient procedure for registering a judgment from another jurisdiction, specifically preserves, in s.9, the right of a judgment creditor to bring an action on the judgment instead of proceeding under the Act.

[3] The defendant was a real estate developer in Ontario who operated through a corporation called Walkerton East View Estates Limited. In 1995, the company allegedly went into default on its obligations under a mortgage to the Toronto Dominion Bank. On November 3, 1995, Walkerton sued the bank alleging

unlawful repudiation of a mortgage renewal agreement. The bank defended and filed a counterclaim against Walkerton. Also named as a defendant to the counterclaim was this defendant, Mr. Studer, who had guaranteed the mortgage obligations of Walkerton. A reply and defence to counterclaim was filed by a firm of solicitors in Brantford, Ontario, on behalf of both Walkerton and Studer.

[4] On February 29, 2000, an Order was granted in the Ontario Superior Court of Justice dismissing the original claim filed by Walkerton, striking the defence to counterclaim, and allowing the bank to amend its counterclaim. That Order made reference to "hearing the submissions of" counsel for the plaintiff by counterclaim and counsel "appearing" for the "defendant by counterclaim although having no instructions to respond". The order is also endorsed as "approved as to form and content" by the solicitors for Walkerton East View Estates Limited, the same firm that filed the reply and defence to counterclaim 4 years earlier on behalf of Walkerton and Studer.

[5] An affidavit of service dated March 21, 2000, attests to service of the amended counterclaim on the defendant's solicitors by fax on that date. The Ontario Rules of Civil Procedure provide, in Rule 16.01(4), that any document not required to be served personally, i.e., documents other than an originating process, may be served on a party's solicitor of record and, by Rule 16.05(1)(d), such service may be effected by fax.

[6] On May 5, 2000, default judgment was entered against both Walkerton and Studer, by Mr. Justice J.C. Kent of the Ontario Superior Court of Justice, for the sum of $1,880,152.30 plus interest and costs. Enforcement proceedings were taken. The bank assigned the judgment to the present plaintiff on September 28, 2000. The property in question was sold in 2005 and the sale proceeds applied to the outstanding debt.

[7] On August 27, 2008, the plaintiff filed its statement of claim in this court pleading the Ontario judgment. The defendant filed a statement of defence alleging that (a) he was not properly served or served at all with the amended counterclaim; (b) the original mortgage indebtedness was not in default; (c) the plaintiff has not suffered a loss; and, (d) the plaintiff failed to obtain the best price for the subject property and thus failed to mitigate its damages. It should be noted that, although the defendant is now representing himself, he had the assistance of

lawyers previously since his statement of defence was filed by one lawyer and his current motion was filed by another lawyer.

[8] The plaintiff's motion for summary judgment was filed on March 29, 2011 (the plaintiff also changed solicitors after filing the statement of claim). The defendant filed his motion to dismiss for delay on April 14, 2011.

Motion to Dismiss for Delay:

[9] I will address the defendant's application first.

[10] The defendant relies on Rule 327(1) of the Rules of the Supreme Court. This rule sets out both a discretionary and a non-discretionary power for the court to dismiss actions on the grounds of delay:

> 327 (1) A party may at any time apply to te Court for a determination that there has been delay on the part of another party in an action or proceeding and, where the Court so determines, the Court
>
> (a) may, with or without terms, dismiss the action or proceeding for want of prosecution or give directions for the speedy determination of the action or proceeding; or
>
> (b) shall dismiss so much of the action or proceeding as relates to the applicant, where for five years or more years no step has been taken that materially advances the action or proceeding.

[11] The defendant relied principally on subrule (b) which makes dismissal mandatory where no step has been taken for five or more years. He argues that the expression "action or proceeding" used in the rule should encompass both the Ontario proceedings and the current one in this jurisdiction. The original action in Ontario was, of course, commenced over 15 years ago.

[12] The difficulty with this argument is that Rule 327(1) applies only to actions commenced and proceedings taken in the Supreme Court of the Northwest Territories: see Rule 2. The defendant relies on a line from the judgment of the Court of Appeal in *Guinan et al* v. *Northwestel Inc. et al*, 2001 NWTCA 4, where the majority wrote (at para. 3): "... we are of the view that a Chambers judge must review the conduct of the action as a whole when assessing whether there was

inordinate delay ...". This line, however, must be kept in context. When the Court of Appeal speaks of the "action" it is referring only to the one action that is before it. All the circumstances and steps in that action must be considered. But, there is no authority allowing a court to examine another action in another jurisdiction for purposes of determining whether there has been delay.

[13] The defendant, however, says that even if the mandatory rule does not apply, there has been inordinate delay in this action. The period under consideration is the time when nothing was apparently done to materially advance the case, that being from the filing of the statement of defence on November 10, 2008, to the filing of the plaintiff's motion on March 29, 2011, a period of 28 months. The only things on the court record for that time period are (i) a Notice of Change of Solicitors for the plaintiff filed on June 11, 2009; (ii) a Notice of Change of Solicitors for the defendant filed August 16, 2010; and, (iii) various affidavits of service.

[14] Considering the changes of legal representation on both sides, I do not find the delay to be either inordinate or inexcusable. I think it is understandable that it would have taken some time for the new solicitors for the plaintiff to gather the information necessary to carry on this litigation. It would have been helpful to have a detailed affidavit from those solicitors to explain what exactly was done during that time period, as opposed to relying merely on submissions and the court record. But, in all of the circumstances, I am not satisfied there has been delay justifying a dismissal of the action.

[15] The defendant's application is therefore dismissed.

Motion for Summary Judgment:

[16] The plaintiff's motion is governed by Rules 174 and 176:

> 174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.
>
> ...

> 176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondant may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> (2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

[17] These rules are intended to remove from the trial system those matters in which there is no genuine issue for trial. In this case, the plaintiff bears the evidentiary burden of showing that there is no such issue. If the plaintiff satisfies this burden, the defendant must either refute or counter the plaintiff's evidence, or risk summary judgment. The court is required to take a hard look at the evidence and self-serving affidavits which merely assert defences without supporting evidence are not sufficient: *Canada* v. *Lameman*, [2008] 1 S.C.R. 372 (at paras. 10-11); *Kila Enterprises Ltd.* v. *Commissioner*, 2010 NWTSC 06 (at paras. 7-8); *Rozin* v. *Ilitchev*, [2003] O.J. No. 3158 (C.A.).

[18] The defendant submitted that there is obviously a need for a trial in this case. He claims that he did not receive notice of the amended counterclaim or the default judgment (although he acknowledges that he knew there was a judgment against him since he was contacted by collection agents). He points out that the issues surrounding the original mortgage default have never been addressed before a judge. He says that there has never been a proper accounting of the debt or the plaintiff's management of the property in question. And, he claims that the plaintiff failed to mitigate its damages.

[19] The plaintiff argues that there is no defence to the claim since it is based on a judgment issued by the Ontario court which had jurisdiction over the defendant and the subject matter of the litigation. It has not been appealed. Therefore, based on the principles of comity, order and fairness, as articulated by the Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, this court should recognize and enforce the Ontario judgment.

[20] As a result of the decision in *Morguard*, it is now a well-settled principle that the test for recognizing a judgment rendered by a court of another jurisdiction is whether there was a “real and substantial connection” between that court and either

the defendant or the subject-matter of the litigation. That real and substantial connection is the overriding factor in the determination of jurisdiction.

[21] What *Morguard* held was that, if the court of one province had jurisdiction, then the resulting judgment should be recognized by the court of another province or territory in Canada. Recognition means that the judgment will be accepted as a conclusive resolution of the dispute between the parties, so that the dispute need not be relitigated in the recognizing jurisdiction. In other words, the merits of the action are not to be considered. The judgment is final. And this applies equally to default judgments as well as judgments after trial (*Morguard* itself was an action on a default judgment).

[22] Here, the defendant does not dispute that the Ontario courts had jurisdiction over him and the subject - matter of the litigation. When the Ontario litigation was commenced, he was a resident of Ontario, he carried on business in Ontario, and the property that was the subject of the mortgage, and the defendant's guarantee, is located in Ontario. Thus, there was a real and substantial connection to that province. Indeed, it was the defendant who commenced litigation in the first place. He chose the forum. Based on these facts, the Ontario judgment is deemed to be conclusive unless the defendant can show that there is a triable issue.

[23] What can that issue be since the defendant is precluded from arguing the merits of the case? The only recourse is to the common law defences of fraud, lack of natural justice and public policy. As noted in *Beals* v. *Saldanha*, [2003] 3 S.C.R. 416 (at para. 41), these defences pre-date *Morguard* and were developed by the common law courts to guard against potential unfairness when applying the test for recognizing and enforcing foreign judgments. But they are narrow in scope.

[24] *Beals* was a case of a true foreign judgment, i.e., a judgment by a non-Canadian court being recognized by a Canadian court. The Supreme Court in *Beals*, however, adopted the *Morguard* principles. Its discussion of the common law defences, therefore, can be applied as well to an intra-Canadian recognition case, such as the present one.

[25] The applicable principles respecting the fraud defence were summarized by Major J. in *Beals* (at para. 51):

> ... fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.

[26] In that decision, Major J. also confirmed that these principles are equally applicable to default judgments (at para. 53):

> ... the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment.

[27] Here, there is no evidence of fraud going to jurisdiction. According to the Ontario Rules of Civil Procedure, Rule 19.02(1), a defendant who is noted in default is deemed to admit the truth of all allegations of fact in a claim. The defendant has not put forth any evidence that was not previously discoverable nor could not have been litigated should he have chosen to defend the counterclaim.

[28] The second possible defence is lack of natural justice. The judgment in *Beals* makes clear that this defence does not relate to the merits of the case (at paras. 64-65):

> The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment ...
>
> In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend.

[29] The defendant's claim that he did not receive notice of the counterclaim would fall into this category. And it is really the only issue that could be capable of avoiding summary judgment.

[30] In his submissions, the defendant claimed that he stopped paying his lawyers — the same firm representing both he and his company — in 1996. He could not say how it was that those lawyers appeared on the motion in February, 2000, that resulted in the dismissal of Walkerton's statement of claim and the amendment of the bank's counterclaim. He attests that he was not living in Ontario in 2000 (he cannot recall where he was) and that he moved to the Northwest Territories in 2001.

[31] The court record, however, reveals that the defendant's lawyers appeared on the motion (even though, as noted in the formal Order, they had no instructions to respond). And, the court record shows that service of the amended counterclaim was effected on the defendant's solicitors of record in compliance with Ontario procedural rules. There is no evidence as to what steps, if any, the defendant's lawyers took after that. But, the judge who entered default judgment was satisfied as to service.

[32] It seems to me that it would have been a relatively easy step for the defendant to have obtained evidence from his Ontario lawyers as to what they did or did not do in this sequence of events. Simply saying now that he did not receive the counterclaim is a very convenient excuse but an insufficient one when on the face of it proper service was effected on the defendant's then solicitors of record. And, in my view, the fact that the defendant is now representing himself is no excuse for failing to put before this court evidence that should be readily available. The defendant was represented by counsel in this jurisdiction when the plaintiff's motion was served and his own motion was filed.

[33] It may be that the defendant has some recourse against his former lawyers in Ontario. I make no comment on that. But, I am satisfied that there was no breach of natural justice in the Ontario proceedings.

[34] It is also noteworthy that the defendant acknowledges that he became aware of the judgment because he had dealings with collection agents. He says that this occurred in 2001. The defendant could have taken steps then to address the

judgment, perhaps by trying to set it aside. But, no steps were taken. He took no steps until the statement of claim was filed in this jurisdiction.

[35] The final possible defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of law. As noted in *Beals* (at para. 71), this defence is "directed at the concept of repugnant laws and not repugnant facts". This defence has no application to this case. The judgment is based on a straightforward debt action. The fact that the defendant is facing a claim for a very large amount is not in and of itself a question of policy.

[36] The Ontario court had jurisdiction to issue the judgment against the defendant. The defendant is precluded from relitigating the merits of the case. And, none of the common law defences to recognition apply. Therefore, there is no genuine issue for trial in this jurisdiction.

[37] Summary judgment will be granted against the defendant in the sum of $1,635,354.94, plus interest at the rate of 7% per annum from February 19, 2011, to the date of payment. The plaintiff shall also have its costs on a party-and-party basis in accordance with the Rules of Court.

Additional Relief Requested:

[38] In his application, the defendant also sought alternative relief. His notice of motion, drafted by his then solicitor, sought a dismissal of the action for delay. I have already dismissed that application. But, it also sought two alternative items of relief should summary judgment be granted.

[39] First, the defendant asked that the judgment be set aside. Presumably this refers to the Ontario judgment. This can only be done by the Ontario court that granted the judgment.

[40] Second, the defendant seeks a stay of execution. His notice makes reference to Rule 183:

> 183. Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a

> counterclaim, cross-claim or third party claim, the Court may order the judgment be stayed on such terms as it considers just.

[41] As far as this Northwest Territories action is concerned, there is no other issue to be determined. With respect to a stay of execution generally, there is no general stay of the effect of a judgment. The party who wants a stay must apply and meet a tri-partite test: (a) there must be a *prima facie* or serious triable issue for an appeal; (b) irreparable harm to the applicant; and (c) the balance of convenience favours a stay. Suffice it to say there is no foundation in the evidence before me with respect to any part of this test.

[42] Therefore, all other items of relief sought by the defendant are also dismissed.

J.Z. Vertes
J.S.C.

Dated this 27th day of June, 2011.

TO: Denis Lefebvre,
Counsel for the Plaintiff

Theodore Studer,
Representing himself

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