Court of Queen's Bench of Alberta

Citation: Scotia Mortgage Corporation v. Lewandowski, 2011 ABQB 822

Date: 20111230
Docket: 0801 10142
Registry: Calgary

Between:

Scotia Mortgage Corporation

Plaintiffs

- and -

John W. Lewandowski and Clayton Moniz

Defendants

- and -

Jameel Damji, Rahima Athari, Clayton Moniz, Harris N. Hanson and Harris N. Hanson operating as Hanson & Associates

Third Parties

Memorandum of Decision
of
J.B. Hanebury, Master in Chambers

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[1] Mr. Lewandowski was duped in a mortgage fraud. The perpetrators have disappeared and the lender is seeking summary judgment for the sum outstanding under the mortgage. Mr. Lewandowski argues that there is a genuine issue for trial as he provided the mortgage to the rogues on the basis that it was only to be used in certain circumstances and they ignored his

instructions. He relies on a 1911 Supreme Court of Canada decision in support of his argument that the Bank cannot pursue him on his covenant to pay.

FACTS

[2] Mr. Lewandowski and his family wanted to buy a house. His brother told him that he had worked with Jameel Damji and Rahima Athari, who had a house to sell. He said that they seemed to be forthright and honest. Apparently, he was very wrong.

[3] Mr. Damji and Ms. Athari advised Mr. Lewandowski that they were interested in selling their house. They said that their associate, Clayton Moniz was looking for an investment opportunity and would be interested in buying the house with Mr. Lewandowski and paying half of the mortgage. Mr. Lewandowski could live in the house and when it was sold the profits would be shared.

[4] The Scotia Mortgage Corporation filed an affidavit attaching certain documents from its file. From these documents it appears that the offer to purchase the house was signed in July, 2006, with a closing date of Sept. 25, 2006. Mr. Lewandowski provided employment and financial information dated July and August, 2006, as did Mr. Moniz. The documentation indicates that the mortgage was approved in mid-August, 2006, and was to be funded in September, 2006. However, it is uncertain if the mortgage was actually approved in mid-August as some of the financial information covered the period to the end of August, 2006.

[5] The lender's mortgage documentation indicates that some documents, such as the Cost of Borrowing Disclosure statement and the Personal Credit Agreement, were signed on September 22, 2006, although the latter is dated mid-August, 2006. The CMHC certificate of insurance is dated September, 22, 2006. However, the mortgage is dated as signed in October, 2006, but without a specific date. The mortgage states that the commencement date of the term of the mortgage is December 22, 2006. The certificate of title indicates that the mortgage was registered on December 8, 2006. In short, it is unclear exactly how this transaction evolved.

[6] Mr. Lewandowski's recall of the dates of events is not specific. He says that "at some time" he was taken to the offices of Hanson and Company by Mr. Damji where a number of documents were placed in front of him for signature. He was advised by Mr. Damji and Ms. Athari that Mr. Hanson was their lawyer. He did not see Mr. Hanson but signed a number of documents that had been laid out prior to his arrival.

[7] He states that he did not read the documents for a number of reasons, including the fact that he was not familiar with them and he assumed they were "routine documents required for the purchase of a home". As well, he thought his interests would be protected by Mr. Damji and Ms. Athari. He says he also didn't read them as Mr. Damji told him that "no use would be made of these documents until Moniz was approved for the mortgage loan because I was given to understand that we both had to qualify." He also states that he was told by Mr. Damji, and he

believed, “that the signing of the documents was in the nature of a dry run to demonstrate to the lenders that I was serious in proceeding with the purchase.”

[8] He says that about a month later he was advised by Mr. Damji and Ms. Athari that “the transaction had fallen through because Moniz was unable to qualify for the mortgage as a result of which the purchase and mortgage would not proceed.” He says that he simply forgot about the matter and went on with his life. In 2008 this action was started against him for non-payment of the mortgage.

ANALYSIS

[9] The lender says it has proven the debt and it is entitled to judgment for the difference between the value of the property and the amount outstanding under the mortgage.

[10] There are three arguments frequently used by borrowers seeking to avoid summary judgment for the monies owing under an insured mortgage.

[11] Firstly, borrowers argue that the lender is limited to a remedy against the land alone: *Law of Property Act*, R.S.A. 2000, c. l_7, s. 44 (4.1). Mr. Lewandowski did not raise this argument for he had signed a disclosure statement indicating that the premium for insurance for a high ratio mortgage was being paid.

[12] Secondly, borrowers argue that they should not be liable as they were misled by the lender’s agent: ***Bank v. Khosla***, 2010 ABQB 652. Mr. Lewandowski did not raise this argument as he specifically swears that at no time has he “ever had personal or written communication with the Plaintiff or with any of its agents, employees or representatives before or after the granting of the mortgage loan.”

[13] Thirdly, borrowers argue *non est factum*, that the documents they were signing were documents different than what they thought they were signing. Mr. Lewandowski initially raised *non est factum* as a defence and said that he was signing the documents as a “dry run”.

[14] However, Mr. Lewandowski did not vigorously pursue this argument. He is literate, educated and can read but chose not to review the documents he was signing. The argument of *non est factum* is insufficient to raise a genuine issue for trial: ***First National Financial GP Corp. v. Akhtari,*** 2010 ABQB 320; ***Marvco Color Research Ltd. v. Harris***, [1982] 2 SCR 774.

[15] The primary argument relied upon by Mr. Lewandowski appears not to have been previously considered by the courts in the context of a mortgage. Mr. Lewandowski argued that he gave the signed documents to Mr. Damji and Ms. Akhtari on the condition that they only be used if Mr. Moniz was approved for the mortgage loan, and once he had given a further authorization. He says that they were used contrary to those conditions and therefore without his permission. As a result, he says, the lender cannot hold him, the principal, liable for the unauthorized and fraudulent acts of his agents: ***Ray v. Willson***, [1911] 45 S.C.R. 401.

[16] The classic statement of the liability of a principal for the acts of his agent is found in *Fridman's Law of Agency* (7th ed.) G.H.L. Fridman, (1996: Butterworths Toronto), p. 315:

> **The general rule**. A principal is jointly and severally liable with his agent for any tort committed by the agent while acting within the scope of his authority and the authority exercised by the agent may be either actual or apparent, ie. it may be express, implied, usual, or ostensible.

[17] While that is the general rule, the courts have struggled on many occasions with how to apply this rule in situations where the both the principal and the third party have been duped by an unscrupulous agent.[1]

[18] Mr. Lewandowski relies on ***Ray v. Willson*** to argue that he should not suffer for the fraudulent acts of Mr. Damji and Ms. Athari .

[19] In that case Mr. Willson signed several promissory notes with blank spaces for the names and amounts and delivered them to his agent. He instructed the agent to issue them when, and if, it became necessary to procure funds for certain repairs. The agent filled in one of the blank forms for $1000.00, making it a note payable on demand. Mr. Ray became a holder in due course.

[20] The majority of the Court, with apparent reluctance, found that the holder in due course could not rely on the note. Their reasoning makes it clear that they had some concerns with the findings set out in the decisions of the lower courts. They noted that the lower courts had found that the agent was merely a custodian and could not use the note without further instructions. Some members of the lower courts also found that Mr. Ray suspected the *bona fides* of the holder of the note.

[21] The Supreme Court[2] held that the maker provided the blank notes to his agent to retain in his custody and there was no authority to fill them in without further instructions. As a result the notes never became negotiable instruments as Mr. Willson never issued them nor authorized any one else to issue them as negotiable instruments.

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[1]An example of this can be found in ***Armagas Ltd. v. Mundogas S.A.,*** [1986] 1 A.C. 717 (H.L.) which considered liability in the case of the fraud of an employee. The Court referenced a 1787 decision, ***Lickbarrow v. Mason*** (1787) 2 Durn & E. 63, atp p. 70, where it was held "[t]hat, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." The House of Lords found that such broad statements should "be confined within the limits that justice truly requires."

[2]By way of a number of the judges in the majority as the decision was not unanimous and event the majority took different routes to the same result.

[22] That conclusion is the one relied upon by Mr. Lewandowski to support his argument that he should not be liable on the mortgage he signed as he provided it to the rogues conditionally.

[23] Before considering this argument it is useful to review the case that the Court in ***Willson*** relied upon, ***Prosser v. Smith,*** [1907] 2 K.B. 735, and subsequent cases that have considered these two cases.

[24] In ***Prosser v. Smith*** the defendant was leaving the country and signed two forms of promissory notes with the details left blank. He gave them to his agent, telling him to keep them and if he sent instructions, the agent was to fill them in and use them to raise money to make certain payments. The agent filled them in fraudulently, making them payable to Mr. Smith who, in turn, discounted them in good faith. The agent misappropriated the proceeds.

[25] The court found that as Mr Prosser had entrusted the blank notes to his agent as a custodian only, and not with the intention that they be issued, the documents had never been delivered by Mr. Prosser with the intention that they might be converted into complete notes. Delivery with that intention was essential to give the agent the power to give a good title to a third party while defrauding the maker.

[26] Similarly, a maker who left a blank promissory note for the premium with an insurance agent to be used only if he passed a medical examination was not liable when the agent filled in and transferred the note when the maker decided not to go ahead with the policy. The court relied on ***Prosser*** and found that the agent had no right to fill in the note as it was given to him as a mere custodian to be used only once the medical examination had been successfully completed: ***Hubbert v. Home Bank of Canada,*** [1910] O.J. No. 197 (Ont. H.C. Div. Ct.), (leave to appeal ref'd).

[27] A person who left share certificates with a company endorsed in blank to be used only if a purchase of the company's shares proceeded was found liable when they were pledged by the company to a bank as security. The Court found that the plaintiff had executed the transfer of the shares which made them negotiable and the Bank had, in good faith, accepted them. At para. 18 of the decision, McPhillips J.A. noted that the transaction was an ordinary banking transaction and "[i]t would be impossible to have stable banking conditions if it were possible to succeed upon the facts of the present case [as] every security held by a bank would be capable of being challenged upon the plea that although regular upon its face and in a form negotiable...[it is] valueless." ***Patrick v. Royal Bank of Canada****,* [1931] 2 W.W.R. 257 (B.C.C.A.).

[28] The president of a company left with the company accountant blank promissory notes signed and endorsed by him for use in the company's business. On a number of occasions the accountant had filled in the notes according to instructions and given them to a creditor. The court required the company to honour a note that was issued by the accountant to the creditor without instructions. The court found that the note was not given to the accountant merely as a

custodian, as in ***Prosser***, but as an agent with the intention of the president that the accountant issue the note: ***Bank of Montreal v. Plan,*** [1935] O.J. 29 (Ont. C.A.)

[29] A note that a salesman filled in and used without authority was not binding on its maker when he had given the note in blank to the salesman and instructed him to fill it in only if the there was a default in payments. The court found that no use was to be made of the note without further instructions: ***Frontier Finance Ltd. v. Hynes*** [1957] O.J. No. 535.

[30] The Alberta Supreme Court considered the issue in ***Imperial Investment Corp. v. Mazur*** [1961] 37 W.W.R. 395. In that case the maker was held liable for a note that was linked to a sham conditional sales contract designed to obtain funding for someone who had been refused financing. The note was subsequently completed and purchased by the plaintiff.

[31] The Court found that the party making the note knew that the documents he was signing were "finance papers" that would be used by the seller of the vehicle to obtain funds from the plaintiff. The court found that s. 31 of the *Bills of Exchange Act*[3] applied which provides that the payee or any holder of a promissory note signed in blank or not completely filled in, has a prima facie authority to fill it in so as to make it a complete negotiable instrument.

[32] The Court differentiated the facts in this case from those found in the case law outlined above. In each of those cases, said the Court, a specific limitation on the authority of the person to whom the note was delivered was found. That restriction was communicated by instructions negativing or limiting the right to fill up and negotiate the note. Essentially, in those cases, the prima facie authority to complete the note found in s. 31 of the *Act* has been overridden. The note was given to a bare custodian with no authority to use or complete it.

[33] In the case before it, said the court, it was established that the maker of the note gave no instructions, and he understood the use to be made of the papers. The court found that while he may have trusted the party to whom he gave the note to protect him and may, or may not have known of the technicalities of negotiation of a promissory note, he knew that the papers with his name on them were being put out to raise money on the security of his name and he put no specific limitation on the authority to use the note for that purpose. Therefore, he was liable on the note.

[34] In an Ontario case, the maker of a note was badgered into buying a water softener and signed an incomplete promissory note believing it would only be relied upon after a satisfactory

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[3]Now R.S.C. 1985, c. B-4, and s. 30. "Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates, in the absence of evidence to the contrary, as an authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser, and, in like manner, when a bill is wanting in any material particular, the person in possession of it has, in the absence of evidence to the contrary, the authority to fill up the omission in any way he thinks fit.".

trial use of the equipment. The court found that the circumstances for the use of the note did not arise and therefore the action of the salesman in releasing the note for subsequent negotiation to the plaintiff was fraudulent and the document never, in fact, became a promissory note: ***Commercial Acceptance Corporation Ltd. v. Paris,*** [1964] 2 O.R. 337 (Ont. D.C.).

[35] At paragraph 26 the Court considered the prior case law and commented that in many instances the promissory note was an incomplete instrument which was completed and delivered without authority. This was not sufficient to constitute a valid delivery "with the result that the defence of want of delivery was a real defence available to the maker even against a holder in due course".

[36] A business was found liable for cheques given to a sales agent with only the amount filled in. He was told him to get the rest filled in by the cheque-writing machine at the company office, but instead filled them in himself, changing the amount on one. The cheques were then negotiated. The business argued that the negotiation of the cheques was subject to two conditions: their completion at the office and the delivery of the goods. The court was critical of the reasoning in ***Ray and Willson.*** It distinguished ***Prosser*** and ***Hubbert and Home Bank***, finding that in those cases there was no intention at the time the notes were provided that they be used as negotiable instruments. Here, said the court, the cheques were delivered with the intention that they would be negotiated and the business was liable: ***Rapid Discount Corp. Ltd. v. Thomas E. Hiscott Ltd. et al.,*** [1977] O.J. No. 2208 (Ont. H.C.).

[37] An accommodation party of a note argued her guarantee was not to be relied upon until she was informed that she had been accepted as a guarantor. At that point, she said, she could decide if she would be a guarantor or not. The court found that she provided her signature as an accommodation party unconditionally with the intention that it would be used as a basis for a loan. While she may have expected to be notified of the approval of the loan, the documentation was not provided subject to that condition: ***Bank of Nova Scotia v. Hogg,*** [1979] 24 O.R. (2d) 494 (Ont. Co.Ct.)

[38] The last case in Alberta to consider the earlier case law is ***Royal Bank v. Young,*** [1985] 62 A.R. 107 (ABQB). In that case the defendant endorsed two notes in blank to be used for the accommodation of a company owned by the defendant and Peter Petrasuk. The defendant alleged that he had signed the notes with Mr. Petrasuk and given them to him for the possible re-financing of their company and they were not to be used unless needed. He said that his further permission was to be obtained before the notes were to be used.

[39] Unbeknown to the defendant Mr. Petrasuk had arranged with the Bank to use the notes to finance his campaign to become the mayor of Calgary.

[40] The court accepted the evidence of the defendant that he gave the notes to Mr. Petrasuk on certain conditions and those conditions were breached. It dismissed the Bank's claim.

[41] These cases show the struggle the courts face when deciding who, of two innocent parties, should bear a loss caused by a rogue. All of these cases involved promissory notes, most of which were executed in blank and provided to another party with explicit instructions as to when they could be completed and negotiated. No case extends the law found in these decisions to a mortgage. However, that is not fatal to Mr. Lewandowski, as the goal of a summary judgment application is not to maintain the legal status quo, but merely to assess whether there is a genuine issue for trial.

[42] Assuming that this line of reasoning could apply to a mortgage, does it raise a genuine issue for trial on the facts before this court?[4] In other words, is there an issue that the lender cannot rely on the mortgage because the rogues were under conditions as to its use and breached those conditions?

[43] Mr. Lewandowski alleges two conditions were in place. The first was that the documents would not be relied upon unless Mr. Moniz qualified for the mortgage.

[44] This condition was met. Mr. Moniz did qualify for the mortgage and his name is on it.

[45] The second condition alleged is that the documents would not be used at all until he either gave some final approval to proceed or signed further documents.

[46] In support of the imposition of this condition Mr. Lewandowski points to his evidence where he says that he thought he was signing “routine documents for the purchase of a home” and he was told, and he believed “that the signing of the documents was in the nature of a dry run to demonstrate to the lenders that I was serious in proceeding with the purchase.”

[47] This evidence does not support the imposition of a condition by Mr. Lewandowski on Mr. Damji and Ms. Athari. He does not say that he imposed any condition or limitation on the use of the documents if Mr. Moniz qualified. He does not say that he thought he would have an opportunity to change his mind once Mr. Moniz had qualified. He does not say that further documents were to be executed. The documents were, as he acknowledges, for the purchase of a house. He does not indicate that the documents were used for anything other than what he intended them to be used for, the purchase of a house: ***Imperial Investment Corp. v. Mazur*** (supra); ***Bank of Nova Scotia v. Hogg*** (supra). The evidence does not support the imposition of the condition he alleges.

[48] The defences raised by Mr. Lewandowski do not raise a genuine issue for trial.

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[4]It could be argued that most of the case law refers to financial documents that were incomplete at the time of execution by the defendant and can therefore be distinguished. However, for the purpose of this decision it is not necessary to decide that point. Furthermore, the documents executed by Mr. Lewandowski may not yet have been executed by Mr. Moniz, ie. they may have required completion.

[49] However, during the course of argument, the Court asked the parties to address the question of the effect of a possible further limitation on the use of the mortgage documentation. When Mr. Lewandowski was falsely advised that Mr. Moniz did not qualify for the mortgage, did he implicitly withdraw from Mr. Damji and Ms. Athari the authority to use the documents? If he did so, were the documents used by them after that date? If so, did that raise an issue as to whether Mr. Lewandowski was liable under the mortgage?

[50] The parties were not able to address that question. No cross examinations had been done on the affidavits and from the evidence put before the Court it could not be ascertained when the mortgage was actually signed, when Mr. Lewandowski was advised that the deal would not be proceeding and when it was used by Mr. Damji and Ms. Athari to obtain funding from the Bank.

[51] While the Court could allow the application for summary judgment and leave Mr. Lewandowski to consider his appeal rights, two Rules of Court suggest another option. First, as of six months ago rule 6.14 allows the introduction of new evidence on appeal. Secondly, the foundational rules, specifically 1.2 (1) and (2), provide that the purpose of the rules "is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost effective way" and should be used "to identify the real issues in dispute...[and] to facilitate the quickest means of resolving a claim at the least expense."

[52] In my view, the better approach in this case is to adjourn this application while the parties further ascertain the facts, and, if necessary, amend the pleadings. The matter may be brought back before me within six months for a determination of whether a genuine issue for trial exists. Should that not occur, the application is allowed and the plaintiff is entitled to its costs.

Heard on the 15th day of December, 2011.
Dated at the City of Calgary, Alberta this 30th day of December, 2011.

J.B. Hanebury
M.C.C.Q.B.A.

Appearances:

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