IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *First West Credit Union v. 687830 B.C. Ltd.,* 2012 BCSC 908

Date: 20120621
Docket: H090874
Registry: Vancouver

Between:

First West Credit Union
(formerly Envision Credit Union)

Petitioner

And

687830 B.C. Ltd., Michael Lawrence Harris, Deborah Lee Harris, 672648 B.C. Ltd., Ready Realty Ltd. and Euro-Canadian Mortgage Corp.

Respondents

Before: The Honourable Madam Justice Stromberg-Stein

Reasons for Judgment

Counsel for the Petitioner:	Frank G. Potts Bradley Martyniuk
Counsel for the Respondents:	Robert J. Ellis
Place and Date of Hearing:	Vancouver, B.C. May 4, 2012
Place and Date of Judgment:	Vancouver, B.C. June 21, 2012

Background

[1] The petitioner, First West Credit Union, formerly Envision Credit Union ("First West"), brought foreclosure proceedings against the respondents, 687830 B.C. Ltd., 672648 B.C. Ltd., Ready Realty Ltd., Euro-Canadian Mortgage Corp., Deborah Harris, and Michael Harris. Mr. Harris, a realtor, is the principal of the corporate respondents and the spouse of Mrs. Harris.

[2] This matter has a convoluted history and I have adopted some of the parties' materials in attempting to summarize the relevant facts.

[3] First West issued four loans pursuant to four commercial promissory notes, executed by 687830 B.C. Ltd. (the "commercial loans"). Three of the commercial loans were executed on December 15, 2005, and one on October 5, 2007. On December 15, 2005, the indebtedness of 687830 B.C. Ltd. to First West was secured by a mortgage and assignment of rents up to $1,000,000, plus interest ("Mortgage No. 1") on a mixed-use commercial and residential property in Mission, B.C., referred to as "Lot D" (the "commercial property").

[4] On December 2, 2005, Mr. and Mrs. Harris each executed a promissory note in favor of First West for $625,250, plus interest. They executed a mortgage and assignment of rents in favour of First West on December 14, 2005, on property described as "Lot 33" and "Lot A" ("Mortgage No. 3"), as security for all indebtedness owed to First West up to $1,250,000.

[5] On October 4, 2007, another mortgage was executed in favour of First West on Lot D as security for all indebtedness owed to First West up to $500,000 ("Mortgage No. 2"). Mr. and Mrs. Harris, Ready Realty Ltd. and 672648 B.C. Ltd. each executed an indemnity agreement agreeing to pay First West all of the debt of 687830 B.C. Ltd.

[6] On October 4, 2007, Mr. and Mrs. Harris each provided an indemnity agreement to First West for all indebtedness of 687830 B.C. Ltd. for an unlimited amount. They executed a line of credit loan agreement on October 11, 2007, which

they promised to pay on demand to First West to the limit of $580,000, with interest. On the same day, they executed a mortgage in favour of First West on their residential property in Mission, referred to as "Lot 10" (the "residential property"), as security for repayment of all indebtedness owed to First West up to $1,305,000, plus interest ("Mortgage No. 4").

[7] Clause 10 of Mortgage No. 4 contains an indemnity clause that defines "indebtedness":

> For the purposes of this Mortgage, the term "Indebtedness" means the aggregate of all present and future indebtedness and liabilities of the Mortgagor to the Credit Union (direct or indirect, absolute or contingent, matured or not, wheresoever and howsoever incurred, whether incurred as principal or surety, whether incurred alone or with another or others and whether arising from dealings between the Credit Union and the Mortgagor or from other dealings or proceedings by which the Credit Union may become a creditor of the Mortgagor) including without limitation the outstanding balance of the Total Amount Secured from time to time, and all other present or future Indebtedness and liabilities of the Mortgagor to the Credit Union payable under or by virtue of this Mortgage.

[8] On May 25, 2009, the petitioner demanded the respondents repay the full amounts owing on the various loans. Mr. and Mrs. Harris defaulted on payment of the amounts due under the promissory note and line of credit. In June 2009, 687830 B.C. Ltd. defaulted on their commercial loans which amounted to $1,022,162.35.

[9] On June 22, 2009, First West commenced foreclosure proceedings. The Petition sought:

i. declarations of mortgages and defaults; personal judgments;

ii. a declaration that the amount required to redeem Lot D, Lot 33, Lot A and Lot 10, as at May 12, 2009 was the total owing plus interest; and

iii. a redemption period of one day.

[10] On July 9, 2009, the parties entered into a forbearance agreement which acknowledged the indebtedness to the petitioner, acknowledged the default in payment of the indebtedness to the petitioner, and acknowledged the Harris' indemnity agreements to pay the debts of 687830 B.C. Ltd. The forbearance

agreement allowed Mr. and Mrs. Harris to sell the Lot 33 property, with the proceeds to be paid to First West. First West agreed Mr. and Mrs. Harris would not be required to make payments on account of the indebtedness on their line of credit for six months. If they defaulted on the payments, the agreement stipulated the parties would consent to the Order Nisi containing terms "the petitioner would be entitled to a declaration that [First West] holds a valid and subsisting security against the Commercial Property [Lot D], the Lakeside Property (sic) [Lot 10] and the Vernon Property [Lot A] which secures all indebtedness owed to the Credit Union"; and the redemption period would be 60 days.

[11] Mr. and Mrs. Harris defaulted on the payments stipulated in the forbearance agreement.

[12] At the application for Order Nisi before Master Tokarek on January 14, 2011, Mr. and Mrs. Harris represented themselves. They had not filed an appearance or response to the Petition. They did not dispute the mortgages were in default or the amounts owing on the respective mortgages. However, in contravention of the terms of the forbearance agreement, Mr. Harris sought additional time to redeem the properties, indicating he was seeking alternate refinancing from a private lender.

[13] In the course of the Order Nisi hearing, Mr. Harris raised several additional issues, including whether the respondents had been served with the petition, the appraisal amount of the commercial property, and whether the mortgages on the commercial property and the residential property were "tied together" (*inter alia*), or separate. This latter issue is the nub of the current dispute.

[14] Master Tokarek, with the consent of the parties, granted an Order Nisi with a redemption period of six months. In granting the Order Nisi, he expressly refused to decide or comment on the issue of whether the mortgages were *inter alia* because this determination was outside his jurisdiction. Master Tokarek and Mr. and Mrs. Harris had the following exchange:

> The Court: ...because it's -- you owe the money, so it's just a question of how many times he has to -- what he has to do to get that money, and so

> just an order nisi with respect to this, but I'm making no comment about whether that is *inter alia* or is not *inter alia*. I don't know anything about that. The only issue is whether you get two months or six months. You're getting six months. Judgment is adjourned for one month, and then you've got to sort everything else out with him.
>
> Ms. Harris: Okay.
>
> The Court: Okay. I don't know if its *inter alia* or not, and I'm not making any comment about that. If it is, you have yourself a bit of a problem.
>
> Ms. Harris: Right.
>
> Mr. Harris: Thank you, Your Honour.

[15] Master Tokarek made the Order Nisi, in the following terms:

> i. First West is entitled to mortgages charging the Lot 10 and Lot D properties;
>
> ii. The respondents have made default under Mortgage No. 4 and Mortgages No. 1 and No. 2;
>
> iii. The amounts due and owing to First West by the respondents for Lot 10 is $590,836.38, plus interest; and for the Lot D mortgages $1,015,121.25, plus interest;
>
> iv. The last date for redemption is July 14, 2011; and
>
> v. First West is at liberty to apply for further accounting of what monies have become due and owing to them pursuant to the terms and conditions of the mortgage.

There is no dispute the amount to redeem and amount of judgment can be different.

[16] The Master adjourned the application for personal judgment against Mr. and Mrs. Harris until February 15, 2011, to allow them to obtain refinancing. Refinancing did not occur and First West proceeded with the application for personal judgments against Mr. and Mrs. Harris, to which they consented. First West was granted personal judgments against Mr. and Mrs. Harris in the amount of $1,605,957.50. First West agreed to refrain from executing the judgment for 90 days at the request of Mr. Harris who again represented the respondents were attempting to refinance.

[17] On August 12, 2011, Mr. Justice Burnyeat granted the petitioner an Order for Conduct of Sale of the Commercial Property on the condition the Order not be entered until September 2, 2011, to permit Mr. Harris an opportunity to obtain refinancing. The Order was entered on September 6, 2011.

[18] Subsequently, there were ongoing discussions between the parties about repayment of the debt, some of which were through the first lawyer Mr. Harris retained.

[19] On December 8, 2011, without the consent of First West as required by the terms of the mortgage, and purportedly relying on the Order Nisi, Mr. Harris granted a second mortgage on the residential property to Reliable Mortgages Investment Co. in the amount of $1,180,000. Mr. Harris retained new counsel who tendered $619,550.31 to counsel for First West, supposedly representing the Lot 10 mortgage redemption amount "pursuant to the Order Nisi", and requested First West discharge the Lot 10 mortgage. First West refused to accept the payment, indicating it was insufficient to discharge the debt. On December 19, 2011, counsel for First West garnished the funds held by Mr. Harris' lawyer.

[20] Pursuant to the Order for Conduct of Sale, the realtor on behalf of First West has marketed the property unsuccessfully. Two offers were received in 2011; both were reduced upon inspection of the property. One offer, initially for $1,095,000, was reduced after inspection to $600,000 with a condition for vacant possession of the residential units. The other offer of $1,000,000 contained conditions to upgrade the building to code and provide vacant possession of the residential units. The most recent offer in March 2012 was for $600,000.

[21] First West provided evidence of disrepair, neglect, ongoing drug transactions and criminal activity, including violence, with multiple police attendances at the commercial property. The realtor has been met with hostility from the residential tenants and is concerned for his safety. Mr. Harris has been uncooperative with the receiver manager, Boale, Wood & Company, appointed according to the terms of the instrument of security provided by 687830 B.C. Ltd. He has refused to turn over the books and records and he continues to collect rents. Two commercial leases are renewable at the end of May 2012.

[22] The respondents make a number of allegations with respect to the petitioner's conduct of sale of the commercial property. The respondents maintain First City has

failed to keep the respondents informed of its marketing efforts and has failed to properly market the property. Mr. Harris agrees the property is a slum but complains First West wants to gentrify a slum building. The respondents obtained an appraisal for $1.53 million and evaluation for $1.46 million. These are offered in support of demonstrating equity in the property but are of little assistance in determining the market value of the commercial property. The respondents assert the commercial property is worth approximately $1,560,000, the petitioner is owed approximately $1,100,000, and the respondents wish to market the commercial property and sell it to pay out the petitioner. Mr. Harris maintains there is substantial equity in both properties, and seeks to vacate the existing order for sale and extend the redemption period on the commercial property.

[23] First West obtained an appraisal of the commercial property on March 6, 2012, indicating a value of $655,000, which seems to accord with market value. The best estimate of the property value is the market. The property attracts a criminal element with ongoing police problems. It is in disrepair as evidenced in an inspection report prepared for one of the potential purchasers. The property has been actively but unsuccessfully marketed, including by Mr. Harris at one time. The best offer to date is $600,000, or $1 million if there is vacant possession and substantial repairs are undertaken to bring the building up to code.

[24] It is clear that Mr. Harris cannot discharge the respondents' debt despite his repeated representations he needed time to obtain refinancing. He remains intent on delaying the inevitable.

Orders Sought By Respondents

[25] The respondents seek a number of orders. First and foremost is that upon delivery to counsel for the petitioner of the sum of $613,550.31, the petitioner discharge the residential mortgage on Lot 10. Further, the respondents seek:

i. to set aside the Garnishing Order after Judgment issued December 19, 2011;

ii. to extend the redemption period to June 14, 2012;

iii. to vacate the right of the petitioner to list the Commercial Property, with liberty to the petitioner to reapply for an Order for Conduct of Sale after June 14, 2012;

iv. to stay the Assignment of Rents granted to the petitioner to collect the rents from Lot D pending further court order; and

v. to order the petitioner is not entitled to costs, pursuant to Rule 21-7(10).

[26] The respondents' application to consolidate British Columbia Supreme Court, Vancouver Registry, Action SI 18909 with this action, Action H090874, was adjourned generally by consent.

Orders Sought By Petitioner

[27] First West opposes the respondents' application, claiming the necessary funds have not been tendered by Mr. Harris to discharge the mortgage, and seeks a number of orders. The petitioner seeks to amend the January 14 Order Nisi of Foreclosure to set the redemption amount owing on the two mortgages together at $1,605,957.63, with interest from January 14, 2011 at a daily rate of $227.77 until payment is received. In the alternative, the petitioner seeks an accounting and a declaration of the redemption amount. In oral argument, the petitioner's first position seems to have been to have the Order Nisi declared a nullity.

[28] In a separate application, framed as to be heard at the same time as the petitioner's amended Petition, the petitioner seeks the appointment of Boale, Wood & Company, Insolvency Consultants and Trustee in Bankruptcy, as Receiver and Manager without bond or security.

[29] What is unclear is whether the proceeding before me was the hearing of the amended Petition. In the circumstances, I intend to proceed on the basis I was hearing the undefended amended Petition. There has never been an appearance or a response filed in respect of the Petition. Therefore I intend to resolve the redemption amount which is at the heart of this matter.

Issues

[30] The issues are:

i. What is the effect of the Order Nisi made by Master Tokarek on January 14, 2011?

ii. How should the redemption amount be determined?

Discussion

[31] The Order of Master Tokarek which purports to be an Order Nisi contains an error on its face. Master Tokarek, in extending the time for redemption, did not set a redemption amount. His order specifies what amounts were due under each mortgage, but he expressly refused to decide the issue of whether the mortgages were *inter alia*. Therefore, the redemption amount for each property was not determined. For Lot 10, the redemption amount could be $590,836.38, plus interest as described in the Order, or it could be the total of the amounts for Lot 10 and Lot D, plus interest. Since the redemption amount is still in issue, setting the redemption period was of no use to the parties.

[32] It is unfortunate that this was not clearer in the actual Order, which was drafted by counsel for First West, but from reading the transcript of proceedings before the Master, both parties were well aware that this key and pivotal issue was left to be decided. The Master indicated the parties should settle the redemption amount in some way after the hearing. The Master told Mr. Harris, “You’re getting six months. Judgment is adjourned for one month, and then you’ve got to sort everything else out with him” (Emphasis added). Since this issue was outside the jurisdiction of the Master, having regard to judicial economies, it would have been prudent to have referred the matter to the trial list to determine the issue in a summary trial. However, the Master was live to the fact the respondents had not entered an appearance. There is provision in the Order that, “The Petitioner be at liberty to apply for a further accounting of what monies have become due and owing to the Petitioner pursuant to the terms and conditions of the Mortgage herein...”

[33] Since an Order Nisi is a final order, it cannot, outside special circumstances, simply be amended by a Supreme Court judge. In *Canada Trustco Mortgage Company v. Rao*, 2002 BCSC 1052, Madam Justice Garson applied the "slip rule" under former Rule 41(24), now Rule 13-1(17), to correct an error made in an order nisi. Rule 41(24) stated:

> (24) The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission or may amend an order to provide for any matter which should have been but was not adjudicated upon.

[34] The circumstances here are different than in those cases where the "slip rule" has been applied. The error in the Order Nisi here was not an arithmetical error; nor did the court overlook evidence before it. Master Tokarek identified the key issue that remained to be decided and could not resolve it because he lacked jurisdiction.

[35] Neither, in my view, is it necessary to declare the Order Nisi a nullity. In *Century Services Inc. v. LeRoy*, 2010 BCSC 328, Goepel J. stated:

> [26] In foreclosure proceedings, the order nisi is a final order. Subject to certain limited exceptions, except by way of appeal, no court or judge has power to rehear, review, alter or vary a judgment or order after it has been entered: *Bank of Montreal v. Singh* (1979), 18 B.C.L.R. 149 (C.A.).
>
> [27] While the May 13 Order has the nomenclature of an order nisi, it has left open for future determination the amount due under the Guarantee. The May 13 Order by its terms is not final. It is not dispositive of the rights of the parties.
>
> [28] The May 13 Order contemplates the court making a further order concerning the amounts necessary to redeem. The amount necessary to redeem is not an ancillary or minor matter. The fundamental purpose of the order nisi is to determine that amount. Until the amount owing under the Guarantee is determined, Ms. LeRoy does not know how much she must pay to redeem the property.
>
> [29] In these circumstances, it remains open to the court to determine the amount owing. To that end, I have the jurisdiction to hear the respective motions of both parties and either summarily determine the amount or, alternatively, refer the matter to the trial list.

[36] In my view, the most practical and commercially reasonable solution in this case is to determine the issue on the basis of the applications and materials before

me. It is unfortunate that counsel did not bring this issue to the attention of the Master during the Order Nisi hearing, and that Mr. Harris has granted another mortgage on Lot 10 after the Order Nisi. Though unrepresented, Mr. Harris seemingly is a savvy player in the real estate industry and was aware that the *inter alia* issue was undecided when he did so, and, I note, did so contrary to the terms of the mortgage. He cannot now complain of prejudice.

Summary and Conclusion

[37] First West is the holder of mortgage securities granted by 687830 B.C. Ltd., charging a mixed-use retail and residential building as well as a mortgage charging the Harris residence. The mortgages are in default. Foreclosure proceedings were commenced by Petition on June 22, 2009. The respondents did not file an appearance or response to the Petition. An Order Nisi of foreclosure was granted January 14, 2011, setting a redemption period but not a redemption amount because Mr. Harris, contrary to the indemnity agreements and forbearance agreement he and his wife executed, disputed the mortgages were inter alia. Personal judgment against Mr. and Mrs. Harris was granted February 15, 2011. There has been delay in bringing matters to a conclusion due to ongoing promises by Mr. Harris of refinancing and repaying the debt owing. On August 12, 2011, the petitioner obtained an order for conduct of sale of the commercial building but has been unsuccessful in selling it as it is in urgent need of repairs and improvements to improve its safety conditions and market value. Mr. Harris tendered funds to discharge the residential mortgage only. The petitioner refused to accept the funds, maintaining the total amount owing was on the two mortgages. The petitioner's position is correct. The mortgages are *inter alia*. In the forbearance agreement, the following terms were agreed to:

> i. As security for the indebtedness owed, the Harrises and 687830 B.C. Ltd. have granted mortgages to the Credit Union which are registered against the Harris Residence, Lakefront Property, Vernon Property and Commercial Property.
>
> i. The Harrises have executed Indemnity Agreements under the term of which they have guaranteed payment to the Credit Union of the debts of 687830 B.C. Ltd.

ii. 687830 B.C. Ltd. has executed an Indemnity Agreement under the terms of which has guaranteed the indebtedness of the Harrises to the Credit Union.

iii. In event of default of any of the terms and conditions of the forbearance agreement, the respondents will consent to an Order Nisi including a declaration that the Credit Union holds a valid and subsisting security against the Commercial Property, Lakeside Property [Lot 10] and Vernon Property [Lot A] which secures all indebtedness owed to the Credit Union.

[38] Further, the indemnity agreement in Mortgage No. 4 states that the mortgage is to cover all present and future indebtedness owed to the Credit Union.

[39] Mr. Harris suggests that when he was granting Mortgage No. 4, Malcolm McTavish of the Credit Union told him the mortgage secured only the line of credit and not the promissory notes. However, Mr. McTavish is now deceased and there is no evidence of this discussion which is contrary to all the written agreements. Thus, admission of any such statement would offend the parol evidence rule: *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*., [1993] 2 S.C.R. 316.

[40] On the basis of the indemnity agreements and forbearance agreement the redemption amount is the total indebtedness plus interest on the two mortgages. The respondents must tender the total amount owing to discharge the mortgages. If the parties cannot agree on the amount, I direct the matter be referred to the Registrar forthwith.

Appointment of Receiver and Manager

[41] I granted the application of the petitioner for an order pursuant to s. 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, as amended (the "*LEA*"), and Rule 10-2 of the *Supreme Court Civil Rules*, appointing Boale, Wood & Company Ltd. as Receiver and Manager without security, of the commercial property.

[42] There is no dispute the petitioner is the holder of mortgage security granted by the registered owner, 687830 B.C. Ltd. There is no dispute the mortgage security

granted to the petitioner is in default of the two mortgages granted by 687830 B.C. Ltd. to the petitioner.

[43] On August 12, 2011, the Order for Conduct of Sale of the commercial property was granted to the petitioner. A receiver was appointed pursuant to the terms of the mortgage. The petitioner sought to have a court appointed receiver. The lands and premises are in urgent need of repairs and improvements in order to improve the safety conditions and market value of the lands and premises.

[44] Where the mortgage agreement provides for a receiver in the event of default, as in this case, there are conflicting authorities on whether the appointment of a receiver is automatic except in rare circumstances, or whether the applicant must show it is just and convenient to appoint a receiver.

[45] In *United Savings Credit Union v. F & R Brokers Inc. et al*, 2003 BCSC 640, Burnyeat J., after discussing the evolution of the English practice and subsequent Canadian law, concluded, at para. 15:

> I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.

[46] However, in *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277, Madam Justice D.M. Smith concluded, at para. 47:

> It is well-established that the party seeking an appointment of a receiver by the court must satisfy the court that it is just and convenient to do so: see *Korion Investments Corp. v. Vancouver Trade Mart Inc.*, [1993] B.C.J. No. 2352 (S.C.).

[47] Mr. Justice Willcock, in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477, discussed this schism in the law in B.C. and concluded, based on the reasoning in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527, that the appointment of receiver must be shown to be just and convenient.

[48] Subsequently, Mr. Justice Burnyeat, in *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BSC 437, stated, at para. 16:

> From the Reasons, it is clear that the decision in *United Savings Credit Union* and the decisions relied upon in that decision were not drawn to the attention of the Court in *Maple Trade*. The decision in *United Savings Credit Union* was considered by the Court in *Textron*, but the Court relied on the decision in *Maple Trade* which had not considered the decision. While I am able to distinguish the decisions in *Textron* and *Maple Trade* on the basis that they dealt with applications for the appointment of a receiver prior to judgment being obtained, I find no need to do so as I am satisfied that neither decision correctly states the law in British Columbia.

[49] No matter what line of authority is followed, the appointment of a receiver is appropriate in this case. The petitioner has tried to work with Mr. Harris. There is a forbearance agreement evidencing these attempts. Mr. Harris transferred his interest in property to his wife without knowledge of the petitioner; he has been uncooperative with the listing agent in providing access to the property; he has continued to collect rents without accounting to the receiver; and he has refused to turn over the books and records for the commercial building. There is an apparent wasting of the commercial property as the building lacks proper maintenance and heat. There are electrical and fire hazards, and an allegation of insect infestation. As such, I made the order for a court appointed receiver at the end of counsels' submissions and reserved on the other matters.

"Stromberg-Stein J."