
CANADA / JUDGMENT

0976944 B.C. Ltd. v. Turner

2015 BCSC 337

COURT

Supreme Court of British Columbia

DECIDED

5 March 2015

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2015 BCSC 337 0976944 B.C. Ltd. v. Turner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0976944 B.C. Ltd. v. Turner,

2015 BCSC 337

Date: 20150305

Docket: H110112

Registry: Vancouver

Between:

0976944 B.C. Ltd.

Petitioner

And

Nigel Patrick Turner,

Howard A. Mickelson Law Corporation,

Stein Gudmundseth, and Andrew Gay

Respondents

Before: Master MacNaughton

Reasons for Judgment

Counsel for the Petitioner:

Andrew Bury

Counsel for Howard A. Mickelson Law Corporation, Stein Gudmundseth, and Andrew Gay:

Janet L. Gartner

Appearing on his own behalf:

Nigel P. Turner

Place and Date of Hearing:

Vancouver, B.C.

February 16, 2015

Place and Date of Judgment:

Vancouver, B.C.

March 05, 2015

[1] This is an application for an Order Absolute in a foreclosure proceeding.

The parties and their positions

[2] Nigel Patrick Turner is the registered owner of a lakefront property located at 16195/16211 Sunshine Coast Highway, Ruby Lake, B.C. (the "Property"). Two dwellings are located on the Property, one of which is a carriage house over a large garage and the other, a large and as yet unfinished log house.

[3] 0976944 B.C. Ltd. ("0976") is the assignee of a first mortgage registered against the Property. Until August 2013, North Shore Credit Union (the "CU") held the mortgage. The CU transferred the mortgage to 0976, its subsidiary.

[4] In this foreclosure proceeding, 0976 seeks an absolute order of foreclosure.

[5] The respondents, Howard A. Mickelson Law Corporation, Stein Gudmunseth and Andrew Gay (collectively "GM Law") have a registered second mortgage against the Property for outstanding legal fees owed to them in relation to another matter. GM Law's mortgage was registered on October 7, 2010.

[6] GM Law and Mr. Turner oppose the granting of an order absolute.

The history of these foreclosure proceedings

[7] The CU mortgage fell into default in 2010. Justice N. Brown granted the CU an order nisi on March 21, 2011. The six-month redemption period expired on September 21, 2011. In March 2011, the amount owing under the mortgage was \$1,125,440.12 with interest at 6.5% and a per diem interest rate of \$195.04. The amount owing under the mortgage as of mid-January 2015 exceeds \$1.43 million.

- [8] There has never been a court order extending the redemption period.
- [9] On September 26, 2011, Mater Tokarek granted the CU an order for conduct of sale of the Property to take effect on and after October 27, 2011. Based on then available appraisal evidence, in January 2012, the CU listed the Property for sale with Royal LePage Sussex ("RLS") for \$2,475,000. In consultation with RLS, the CU reduced the listing price to \$1,765,000. That was the listing price in May 2013 when the listing was terminated for the reasons explained below. The CU was unable to sell the Property during that more than 15-month period even at the reduced price.
- [10] In May 2013, the BC Homeowner Protection Office ("HPO") demanded that the CU cease all attempts to list or sell the Property until home warranty insurance was in place for both dwellings on the Property. The Homeowner Protection Act, S.B.C.1998 c. 31, as it relates to this matter, prohibits an owner/builder from selling or offering to sell a new home without home warranty insurance. Because no home warranty insurance was in place with respect to the log house, the CU terminated the listing.
- [11] As contemplated under the Act, the CU applied to the HPO for an exemption for the requirement for home warranty insurance but its request was denied. There is no dispute that, to date, no home warranty insurance is in place for the log house which remains incomplete. Warranty insurance is in place for the carriage house.
- [12] On September 30, 2013, I granted an order substituting 0976 as the petitioner herein and amending the style of cause.
- [13] Because it was unable to sell the Property, 0976 applied for an order absolute on January 13, 2014. That application was opposed by Mr. Turner and was adjourned generally by Master Scarth based on Mr. Turner's representations as to the near state of completion of the log house on the Property and his filed January 3, 2014 affidavit which indicated that he was in the process of obtaining home warranty insurance for the log house.
- [14] On October 31, 2014, the Crown in Right of British Columbia registered a lien against the Property for unpaid taxes.
- [15] On January 12, 2015 (the letter is misdated 2014), RLS, the CU's former listing agents, provided a letter outlining the then state of the market in the Pender Harbour/Egmont area, and for the Sunshine Coast as a whole, for oceanfront and lakefront properties in the \$1.4-\$3.0 million dollar range. They indicated that there had been no lakefront properties sold in that price range in the Pender Harbour/Egmont area in 2014. In that price range, three such properties sold on the whole of the Sunshine Coast.

- [16] RLS advised that on March 2, 2014, following the termination of the CU's listing, Mr. Turner listed the Property for \$2.501 million. RLS indicated that Mr. Turner was marketing the Property with the completed carriage house listed as the only dwelling on it. The copy of the listing which is attached to Mr. Turner's affidavit confirms that the log house does not form part of the listing.
- [17] RLS opines that the Property would sell for a price between \$1.55 to \$2.5 million depending on the extent and quality of the finishing work in the log house since the termination of their listing in May 2013. No one from RLS had visited the Property since the termination of their listing agreement.
- [18] A January 27, 2015 assessment of the Property, which was concluded after the assessor visited the Property, set its assessed value at \$2.804 million. As a result, Mr. Turner has increased the list price for the property to that appraised value.

The arguments of GM Law and Mr. Turner

- [19] GM Law opposes an order absolute on the basis that it is owed more than \$400,000 by Mr. Turner and, if the Property were to sell at the high end of the range suggested by RLS, there would be sufficient equity to pay both mortgages.
- [20] GM Law submits that the most recent BC Assessment valued the Property at \$2.804 million and a September 2011 appraisal obtained by the CU valued it at \$2.4 million when the log home was only 75% complete. Mr. Turner's most recent affidavit puts the state of completion of the log house at 95%. Therefore, it submits that the Property is worth more than \$2.4 million.
- [21] In addition, Mr. Turner's current listing realtor has said that the Property has the best chance of selling in the summer and the recent decrease in interest rates will stimulate interest in the Property.
- [22] Both GM Law and Mr. Turner submit that if order absolute is granted, there is a potential windfall to the Petitioner. GM Law will lose its security for Mr. Turner's debt and Mr. Turner will lose any equity he may have in the Property.

Conclusion

- [23] For the reasons which follow, I have concluded that 0976 is entitled to an order absolute.

Reasons

- [24] This mortgage has been in default since 2010 and, despite order nisi being granted on March 21, 2011 with a six month redemption period, no payments have been made with respect to the mortgage and it has never been redeemed. No application has been made for an extension of the redemption period by either Mr. Turner or GM Law.

- [25] The Property is unique and has a more limited market. Not all buyers are interested in a large log house. For the 15 months during which the CU had the property listed, even at a price of \$1.765 million, the Property did not sell. Clearly the September 2011 appraisal was incorrect. Although listed by Mr. Turner on March 2, 2014 for \$2.501 million, the Property did not sell. The price has now been increased to \$2.804 million. The Property was listed over two summer seasons during these two separate listing periods without the summer interest predicted by the current listing agent.
- [26] Counsel for 0967 submitted that Mr. Turner had no intention of selling the Property and that the listing was "bogus". While I cannot, on the evidence before me, reach the conclusion that the listing is bogus, an increase in the listing price after no interest at a lower price does not suggest that Mr. Turner is making a serious effort to sell the Property to address the mortgage default and it cannot go unnoted that he has had the use of the Property since 2010 without significant cost to him.
- [27] The effect of declining to make an order absolute would be to de facto extend the redemption period for this mortgage once again. Mr. Turner has had an effective redemption period of over four years.
- [28] I accept the submission of 0976's counsel that, in the circumstances of this case, it is appropriate to consider the parties' positions in light of the test for an extension of a redemption period. As reaffirmed by the Court of Appeal in *Canada Permanent Mortgage Corp. v. Dan-Al Construction Co. Ltd. et al.*, [1982] B.C.J. No. 2339, the court may extend a redemption period when it is satisfied that the property has sufficient value, by way of security, for the amount outstanding under the mortgage and that there is a reasonable prospect that the property will be redeemed in the extended period (at paras. 9-11).
- [29] It is clear that Mr. Turner could not meet the test for an extension of the redemption period. There is real doubt as to the equity in the Property. What is known for certain is that at a list price of \$1.765 in May of 2013, the property did not sell. RLS suggests a range in value of between \$1.55 to \$2.5 million depending on the extent and quality of finishing. Mr. Turner had the property listed at \$2.501 and it did not sell from the spring of 2014 until January 2015 when the price was increased. Earlier appraisals add little useful information.
- [30] Even if I were satisfied that there is sufficient equity in the Property to pay the amount outstanding to 0976, there is no possibility of the mortgage being redeemed in any extended redemption period. I reach that conclusion based on these circumstances: Mr. Turner has not redeemed the mortgage in the almost five years since he first defaulted; he has not paid the taxes on the Property and it is at risk of a tax sale as evidenced by the tax lien filed against title; in his affidavit sworn on February 11, 2015, he indicates that he could not afford to pay for the home warranty insurance nor can he afford the approximately \$56,000 in materials he estimates are necessary to complete the log home; and, finally, he says that he has no financial ability to pay the debt he owes GM Law.

- [31] Mr. Turner has had the use of the Property without paying his mortgage since 2010 and has been a party to these foreclosure proceedings since the petition was filed on January 27, 2011. He has had four years in which to deal with this matter. The log house remains unfinished and no occupancy permit has been issued with respect to it.
- [32] As an owner/builder of a new home, unless he intended to live in it for ten years, Mr. Turner was required to register with the HPO. He did not do so. According to his February 11, 2015 affidavit, from November 2013 to January 2014, he had discussions with the HPO seeking an undue hardship exemption to permit him to sell the Property. He indicates that his application to sell was granted "on condition that [he enrolled] the Log House in a policy of home warranty insurance prior to selling or offering to sell the [it]." The HPO's approval was conditional and Mr. Turner has not met the conditions. Despite that, and in an effort to avoid the requirements of the Act, and the conditions required of him by the HPO, Mr. Turner has listed the Property by offering only the land and the carriage house for sale. He says that the Property "of course includes the Log House, which a purchaser would receive along with the Property, but which is not offered as part of the sale." Any prospective purchaser, in what is already a limited pool of prospective purchasers, is likely to be very wary of such a sale.
- [33] Mr. Turner is no further ahead than when he appeared before Master Scarth to oppose 0976's first application for an order absolute. He still has no home warranty insurance on the log house and there is no occupancy permit for it.
- [34] Lastly, although it is true that GM Law will lose the security it has for Mr. Turner's outstanding legal fees, it registered its mortgage as a second mortgage after Mr. Turner was in default of his obligations under the CU mortgage. It has been a party to this petition from the outset. It has known of the risk to its security for more than four years but has taken no steps to redeem the mortgage, seek conduct of sale, or fund Mr. Turner to complete the log home or obtain home warranty insurance for it.
- [35] In all these circumstances, 0976 is entitled to the relief it seeks and I grant the order absolute.

"Master MacNaughton"

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