
CANADA / JUDGMENT

696591 B.C. Ltd. v. Madden

2014 BCCA 517

COURT

British Columbia Court of Appeal

DECIDED

10 November 2014

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2014 BCCA 517 696591 B.C. Ltd. v. Madden

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

696591 B.C. Ltd. v. Madden,

2014 BCCA 517

Date: 20141110

Docket: CA042026

Between:

696591 B.C. Ltd.

Appellant

(Plaintiff)

And

Lorene Sandra Madden, Jason Madden, Coastal Community Credit Union,

and Tenant or Occupier of Subject Property

Respondents

(Defendants)

Corrected Judgment: The front page of the judgment was corrected on
January 14, 2015.

Before:

The Honourable Mr. Justice Groberman

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia,
dated June 30, 2014 (696591 B.C. Ltd. v. Madden, Vancouver Docket H121187).

Oral Reasons for Judgment

Counsel for the Appellant:

P.J. Roberts

Counsel for the Respondent:

P.G. Guy

Place and Date of Hearing:

Vancouver, British Columbia

November 10, 2014

Place and Date of Judgment:

Vancouver, British Columbia

November 10, 2014

Summary

A chambers judge dismissed an application for judgment on summary trial under Rule 9-7 of the Supreme Court Civil Rules, finding that the case was not suitable for determination under that rule. The applicant applied for directions as to whether leave was required to appeal the decision, and, if it was, for leave to appeal. Held: Leave is required, and is denied. A decision that a matter is not suitable for disposition on a summary trial is an order under Rule 9-7(11), even if made without a formal application under that subrule. It is not an order under Rule 9-7(15) - only orders granting judgment on an issue or generally come within that subrule. Orders under Rule 9-7(11) are "limited appeal orders", so leave to appeal is required. The order in this case was based on the judge's conclusion that it would be unjust to decide the issue in isolation from matters raised in a related proceeding. The decision was discretionary, and unlikely to be interfered with on appeal.

[1] GROBERMAN, J.A.: This is an application for directions that leave to appeal is not necessary, or alternatively, for leave to appeal, in respect of a refusal by a Supreme Court chambers judge to grant an order nisi of foreclosure on a summary trial application under Rule 9(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

[2] Rule 9(7) includes the following provisions:

- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
 - (b) dismiss the summary trial application on the ground that
 - (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
 - (ii) the summary trial application will not assist the efficient resolution of the proceeding.
- (15) On the hearing of a summary trial application, the court may
 - (a) grant judgment in favour of any party either on an issue or generally unless:
 - (i) the court is unable on the whole of the evidence before the court on the application to find the facts necessary to decide the issues of fact or law or;
 - (ii) the court is of the opinion that it would be unjust to decide the issue on the application.
- [3] Under Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001 orders made under Rule 9-7(11) of the Supreme Court Civil Rules are "limited appeal orders", and an appeal may be taken from them only with leave. On the other hand, orders under Rule 9-7(15) are appealable as of right.
- [4] Counsel for the appellant initially took the position that the order made in the Supreme Court was an order under Rule 9-7(15), and sought a direction that leave to appeal was not required. In the course of argument, however, counsel did not press the issue strongly. Counsel for the respondent contends that the judge's decision was, in fact, made under Rule 9-7(11).
- [5] It is obvious that where a party brings a formal application to dismiss a summary trial application under Rule 9-7(11), an order granting that relief is an order made under that subrule. It seems to me that where a party defends an application under Rule 9-7 by raising the issue of suitability, the raising of such a defence will amount to an informal application under Rule 9-7(11). Therefore, if the summary trial application is dismissed on the basis that the issues are unsuitable for summary determination, the order will be an order made under Rule 9-7(11), and leave will be required to appeal the order.
- [6] Indeed, I would go further, and suggest that even if the issue of suitability is raised of the chamber's judge's own motion, a determination that the issues raised by a summary trial application are not suitable for summary disposition will be an order under Rule 9-7(11). Only orders actually granting judgment in favour of a party (either on an issue or generally) are properly characterized as being made under rule 9-7(15).

- [7] In the case before me, the respondents successfully contended on the summary trial application that the matter was unsuitable for summary disposition. The order dismissing the summary trial application is properly characterized as having been made under Rule 9-7(11), and an appeal can only be brought with leave.
- [8] I turn, then, to the application for leave to appeal. On the summary trial application, the appellant sought an order nisi of foreclosure. The mortgage in question covered several properties, and the mortgagors were members of two groups, which I will describe as the Madden group and the English group. Jason Madden was not a mortgagee, but was a covenantor under the mortgage. The original mortgagee was at arms-length from both the Madden group and the English Group.
- [9] The mortgage fell into arrears when the Maddens ceased paying the interest on them. In order to protect their interests, the mortgagees from the English group caused the appellant, a numbered company related to the English group, to purchase an assignment of the mortgage from the original mortgagee. The numbered company then sought an order of foreclosure against the Maddens.
- [10] In the foreclosure action, the company did not seek recovery of the entire outstanding mortgage amount. Rather, it claimed only half of the amount, apparently on the basis that as between the Maddens and the English Group, the Maddens were only responsible for one-half of the debt.
- [11] The Maddens' position, as I understand it, is that as between them and the English Group, they are not responsible for any of the amounts owing or are, at most, responsible for one-third of it rather than one-half of it.
- [12] The judge appears to have dismissed the application for an order nisi on two bases. In paragraph 11 of his judgment, he indicated doubt as to the covenantor's liability under the mortgage. Counsel for the appellant has taken me clause 15 of the Standard Mortgage Terms, and has argued strongly that there can be no doubt as to the covenantor's liability. If that were the only issue on this appeal, it seems to me that it would be strongly arguable, and I would grant leave. It is not, however, the only issue that arises.
- [13] Much of the brief judgment of the summary trial judge is devoted to the question of the proportionate liability of the English group and the Maddens. On the face of it, that might be characterized as an error on the part of the judge, because the issues before him were not issues between the Maddens and the English Group but rather issues between the appellant - the assignee of the mortgage - and the Maddens.

- [14] There is no suggestion that the original mortgagee could not have pursued foreclosure against the Maddens alone, or that it was precluded from getting an order against them for any amount up to and including the full amount of the mortgage debt. No argument was presented at the summary trial suggesting that 696591 B.C. Ltd. was disentitled from making the same sort of application. On the face of it, the legal case of the appellant was, at the very least, a strong one.
- [15] The summary trial judge's concerns appear to have arisen out of disputed evidence between the Maddens and the English group, and out of his recognition that the appellant is effectively an emanation of the English group.
- [16] In my view, while the judge did not explicitly or fully articulate his concerns in his reasons for judgment, it is apparent that he considered it unjust to decide the foreclosure issue in isolation from the other issues that exist between the Maddens and the English Group. His reference to the proportionate liability of the two groups and his reference to the consolidation of actions for the purposes of trial convince me his concerns lay in the justice of determining the foreclosure issue before the other issues between the Madden group and the English group.
- [17] I turn now to the question of whether leave should be granted. The first question that must be addressed is the significance of the issues on appeal to practice. Counsel for the appellant argues that the judge's finding that there was an arguable case that the covenant might not be enforceable is of significance to practice. In my view, reading the judgment, the way that the judge expressed himself was sufficiently vague that it can have no effect on mortgage practice in general. The judge referred, without any specificity, to evidence that might exist and to unspecified provisions of the Standard Mortgage covenants. The reasons are skeletal, and it is highly unlikely that they could be cited as authority for any proposition in future applications for foreclosure orders.
- [18] The other point that might be of significance to practice is the question of when a judge is required to make determinations on a summary trial. As counsel has pointed out, however, that issue has been addressed by this Court on numerous occasions. There is no pressing need, in my view, to provide this Court with another opportunity to address the issue.
- [19] I am not convinced that this case is one that is significant to the practice. That is, of course, not determinative of the issue of leave.
- [20] The second question is whether the points in issue are of significance to the action itself. I am satisfied that they are. The legal issues that would be addressed on appeal could, in large part, resolve at least the foreclosure action.
- [21] Further, the trial of the foreclosure matter is now to take place at the same time as another trial between the Madden group and the English group. That litigation is scheduled to go to trial in the Spring of 2016. Thus, the order under appeal entails a significant delay in the resolution of the foreclosure action.

- [22] The third question is that of the prima facie merit of the appeal. To the extent that the judge's determination is characterized as having been based on a conclusion that there was insufficient evidence to determine the issues between the parties on the foreclosure application, I consider that this is an appeal with a great deal of merit.
- [23] On the other hand, if the chambers judge's reasons are interpreted as having found that it would be unfair to make a determination on the mortgage separately from determinations of the respective liabilities of the English group and the Maddens, there is little likelihood that a division of this Court would interfere with the decision below. I say that because a decision of that sort is a discretionary one. Further, there is some basis, on the evidence before the Court, to support a conclusion that it would be unfair to allow the foreclosure to go ahead before the relative liabilities of the English group and the Maddens is determined.
- [24] The final issue on a leave application is that of whether the appeal will unduly hinder the progress of the action. This, to my mind, is a neutral factor in this case. The existence of the appeal is likely to create some difficulties for the ongoing litigation. On the other hand, given the length of time before trial in the other litigation, it is quite likely that an appeal could be heard and determined in a manner that would allow the trial to proceed (if necessary) on all issues without difficulties. So, while I conclude that the progress of the action might be hindered by the existence of an appeal, I cannot conclude that any such hindrance would be undue.
- [25] The result is that the significance of the issues to the action favour granting leave, while the merits do not - assuming, as I do, that the trial judge's reasons for dismissing the application were reasons concerned with fairness to all of the parties.
- [26] It seems to me that the judge's apparent view that the foreclosure matter should be decided at the same time as the other issues between the two groups is one that was within his discretion. In the circumstances, the order sought to be appealed is not one that is likely to be interfered with on appeal. There is limited prejudice to the plaintiff in allowing the order to stand and requiring the trial to proceed in the ordinary course. For those reasons, I am dismissing the application for leave.

"The Honourable Mr. Justice Groberman"

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