
CANADA / JUDGMENT

Crystal Properties Inc. v. Proudfoot

2018 BCSC 1881

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1881 Crystal Properties Inc. v. Proudfoot

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Crystal Properties Inc. v. Proudfoot,

2018 BCSC 1881

Date: 20181031

Docket: H27828

Registry: Cranbrook

Between:

Crystal Properties Inc.

Petitioner

And

Glenn Cameron Proudfoot

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Petitioner:

J. Williams

(January 22, 2018 only)

S.H. Stephens

(June 22, 2018 only)

Counsel for the Respondent:

A. Bird

Places and Dates of Hearing:

Cranbrook, B.C.

January 22, 2018

New Westminster, B.C.

June 22, 2018

Place and Date of Judgment:

Cranbrook, B.C.

October 31, 2018

I. Introduction

- [1] In this foreclosure proceeding, the respondent argues that there are triable issues that warrant an order referring this matter to the trial list. The petitioner maintains that the petitioner's allegations are not of a nature that requires them to be determined within these foreclosure proceedings and, in any event, they do not constitute bona fide triable issues.
- [2] The petitioner seeks an order nisi of foreclosure with a one-day redemption period. The respondent seeks an order that the matter be converted to an action and be resolved by trial.

II. Facts

- [3] Mr. Proudfoot is the registered and beneficial owner of two East Kootenay properties, described in the petition, which are located near Grasmere, British Columbia. Together, the properties are known as "Disappearing Ranche". They consist of 320 acres of ranch land and forest, along with a ranch house, log cabin, barn and metal-clad hay shed. Mr. Proudfoot resides on the property.
- [4] Mr. Proudfoot mortgaged the properties to the petitioner in December 2016 by way of a first and second mortgage. The first mortgage secures the principal amount of \$1,400,000 and the second mortgage secures the principal amount of \$168,235.24.
- [5] The first mortgage is in default due to the respondent's failure to pay the required monthly payments of \$8,750 since June 30, 2017. The second mortgage did not provide for monthly payments but it is in default due to non-payment following a demand.
- [6] As of June 22, 2018 the amount owing under the first mortgage is \$1,510,815.66 and the amount owing under the second mortgage is \$199,927.95.

- [7] The properties have been listed for sale for some time. Between June and December 2017 the listing price ranged from \$2.2 million to \$1.9 million.

A. Petitioner's Case

- [8] The petitioner's case is very straightforward. Two mortgages were granted by the respondent, they are in default, the parties and subject property are both identified and certain, amounts are owing by the respondent and those amounts are secured by the mortgages. The petitioner emphasizes that none of those facts are contested.

B. Respondent's Case

- [9] The respondent's case is much more complicated as it refers to various prior financial dealings, over a number of years, with other parties that have at least some connection to the petitioner. I will summarize this more extended background.
- [10] Mr. Proudfoot is a businessman and rancher and at all material times was the president of Lance Exploration Corp. ("Lance Exploration"), a privately-owned petroleum exploration company incorporated under the laws of Alberta.
- [11] As of 2011, Mr. Proudfoot owned the subject properties free and clear of financial encumbrances, except for one mortgage in the amount of about \$112,000. Lance Exploration was a start-up company and for that reason Mr. Proudfoot did not draw any salary from it until March 2016. Accordingly, he made the decision to mortgage the properties to raise capital to both improve the ranch and to provide funds for living expenses while his company got on its feet.
- [12] Mr. Proudfoot arranged mortgage financing through Harvey Wipp, a registered sub-broker for Alpine Credits Limited ("Alpine"). Alpine is a mortgage broker and lender. Mr. Proudfoot knew Mr. Wipp through personal connections.
- [13] Mr. Proudfoot borrowed money from or through Alpine in four transactions, secured by mortgages, that took place between August 2011 and March 2014. The principal amounts were \$382,545, \$78,300, \$500,645 and \$340,846, for a total of \$1,302,336. Brokerage fees and lender fees totalling about \$108,000 were charged against the advances, and so the net total amount advanced was less than the total principal by that amount.
- [14] I digress for a moment to address one factual point. Both the petitioner and respondent referred to the four prior mortgages as the "Alpine mortgages" and indicated that Alpine Credits Limited was the lender. However, for the second of the four mortgages (the principal amount of which was \$78,300), the Form B mortgage filed in the Kamloops Land Title Office shows the petitioner, Crystal Properties Inc. ("Crystal Properties"), as lender. Muddying the waters further is the fact that the accompanying certificate of independent legal advice for this mortgage lists Alpine as the lender. Neither party noted these points or addressed them in their initial submissions.

- [15] For that reason, I issued a memorandum to counsel inviting further submissions on the point, and both counsel responded with brief written submissions.
- [16] Despite the fact that one of the four prior mortgages was in fact registered in the name of Crystal Properties, I will continue to refer to those mortgages as the "Alpine Mortgages", which is how both parties referred to them.
- [17] To return to the narrative, Mr. Proudfoot obtained independent legal advice for each of the mortgage loans, as evidenced by certificates to that effect.
- [18] The four Alpine mortgages were periodically renewed. Renewal fees totalling \$25,348 were paid.
- [19] In 2015, the mortgages were again up for renewal. Mr. Proudfoot deposed that Kurt Wipp (the son of Harvey Wipp), the president of Alpine, refused to renew the mortgages unless Mr. Proudfoot transferred to Harvey Wipp 32,500 shares in Lance Exploration. In a later affidavit Mr. Proudfoot deposed that it was Harvey Wipp who demanded the transfer of shares. Harvey Wipp deposed that it was Mr. Proudfoot who proposed that he provide shares as consideration for further loan extensions. I need not resolve these evidentiary conflicts or inconsistencies as they are not material to the issues before me.
- [20] In any event, Mr. Proudfoot and Harvey Wipp signed a document entitled "Commercial Agreement" dated August 15, 2015, which documented the agreement to extend the loans in return for the transfer of Lance Exploration shares to Harvey Wipp. Mr. Proudfoot acknowledges that he entered into this agreement, but he says despite the "Commercial Agreement" description within the document, the funds advanced from the four earlier mortgages were only used for personal purposes.
- [21] The Lance Exploration shares were to be held in trust for Harvey Wipp until such time as the transfer could be effected, namely after Lance Exploration's second private equity offering.
- [22] Mr. Proudfoot provided the shares and the share transfer was effected on December 31, 2015. To carry out the transaction, Lance Exploration cancelled 32,500 shares held by Mr. Proudfoot and reissued the same number of shares to Harvey Wipp.
- [23] As a result of the agreement and subsequent share transfer, Alpine extended the terms of the four Alpine Mortgages to October 31, 2016.
- [24] In October 2016, Harvey Wipp, on behalf of Alpine, refused to extend the four Alpine Mortgages or to arrange other mortgage financing for Mr. Proudfoot unless Mr. Proudfoot arranged for someone to purchase the 32,500 shares in Lance Exploration, held by Harvey Wipp, for the price of \$6.00 per share. Mr. Proudfoot found a buyer for the 32,500 shares and so the shares were sold to that buyer for the total price of \$195,000.
- [25] As a result of these arrangements, two mortgage loans were provided by Crystal Properties (the "Crystal Mortgages"). These are the mortgages that form the subject of this foreclosure proceeding. Mr. Proudfoot characterizes these as the financing arranged by Alpine to pay

out and replace the four Alpine Mortgages. Harvey Wipp characterizes these as mortgages made pursuant to a commercial agreement between Mr. Proudfoot and himself, as evidenced by a written agreement dated October 15, 2016 (naming as parties, Mr. Wipp and Mr. Proudfoot), an arrangement that resulted in much lower interest rates on the loans and other benefits to Mr. Proudfoot.

[26] The Crystal Mortgages are both dated December 13, 2016 and they charge both of the properties. Crystal Properties is the lender. As noted earlier, the first mortgage is in the principal amount of \$1,400,000 and the second mortgage is in the principal amount of \$168,235.24.

[27] Harvey Wipp is the sole director, president and secretary of Crystal Properties. Mr. Proudfoot deposes that at no time did Harvey Wipp or Alpine disclose that Harvey Wipp was in any way connected with Crystal Properties or that he had any direct or indirect interest in the Crystal Mortgages.

III. Positions of the Parties

A. Respondent

[28] Because of the nature of the arguments, it is convenient to start with the submissions of the respondent.

[29] The respondent submits that this matter should be converted to an action because there are set-offs available to him by reason of the lender's various breaches of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA]. He maintains the various loan transactions in question were "consumer transactions" and, as such, are subject to the provisions of the BPCPA.

[30] The respondent submits that the transactions involving the Lance Exploration shares offended the BPCPA in several respects:

- a) sections 4 and 5 of the BPCPA prohibit the charging of a fee for an extension of credit unless the fee is deducted from the advance. The demand for shares and subsequent sale of the shares violated these provisions because the value of the shares was not deducted from the advance;
- b) the share transactions did not comply with the statutory requirement to disclose the cost of credit, as there was no value ascribed to the shares at the time that they were demanded or transferred and so the fee was not properly disclosed as required;
- c) the transactions in question constituted "unconscionable acts or practices", for reasons that include the following:
 - i. the total of all interest charged, plus the \$133,679 in fees and the \$195,000 in shares, results in an effective interest rate much higher than the actual interest rate;

- ii. the interest rates themselves (three mortgages at 12.5%, and one at 9.5%) grossly exceeded the interest rates otherwise available;
 - iii. Alpine charged both broker and lender fees even though Alpine acted in both capacities;
 - iv. the lender and brokerage fees are far in excess of any costs relating to the administration of the mortgages; and
 - v. Alpine failed to disclose its interest with respect to the Crystal Mortgages.
- [31] The respondent submits that in each case, Alpine has the burden of disproving that there was an unconscionable act as the BPCPA places the burden of proof on the "supplier". The remedies for these breaches, the respondent argues, are set out in ss. 104 and 105 of the BPCPA, with these sections providing for both rights of compensation and a right of set-off against any debt.
- [32] The respondent notes that Harvey Wipp admits that he held the "beneficial interest" in the four Alpine Mortgages after Alpine transferred it to him. Similarly, the evidence indicates Mr. Wipp "beneficially owns" the Crystal Mortgages. Accordingly, the party lending the current monies is the same party who took the compensation in the form of the shares and thus the parties are the same for BPCPA set-off and compensation purposes.
- [33] In his supplemental submissions, the respondent says the fact that one of the prior mortgages was registered in the name of Crystal Properties bolsters his argument that Mr. Wipp is the "beneficial holder" of all of the mortgages. In registering it in the name of Crystal Properties, Mr. Wipp failed to make similar changes to the related mortgage documents, thus demonstrating that he simply used whatever corporate vehicle of his that was convenient at the time. This forms an additional basis on which the matter ought to be converted to an action.
- [34] If Mr. Wipp beneficially owns the Crystal Mortgages, then he is the credit grantor (in addition to being the mortgage broker) and is liable under section 105 of the BPCPA, and he is the person against whom there is a statutory and equitable right of set-off. The respondent submits he is entitled to offset his liability under the Crystal Mortgages by the amount of Mr. Wipp's liability under the BPCPA.

B. Petitioner

- [35] The petitioner notes that the claims asserted by the respondent do not go to the root of the mortgages or of the foreclosure. A foreclosure may be converted to an action only where there is a bona fide triable issue relating to the basis of the foreclosure itself. Simply having a claim against the foreclosing mortgagee is insufficient.
- [36] Here, there is no challenge to the validity of the mortgages, the acts of default, or the amounts owing under the mortgages, and so there is no basis on which this matter ought to be referred to trial.

- [37] The petitioner also notes that the respondent's claims are not against Crystal Properties, but instead those claims are against Alpine and Harvey Wipp. Furthermore, they concern prior mortgages, not the present ones. These claims may be advanced in separate proceedings but they are not a basis on which to order this foreclosure proceeding to trial.
- [38] Alternatively, even if the court concludes the claims in question are of a type that ought to be heard in the foreclosure proceedings, they do not raise bona fide triable issues because:
- a) Crystal Properties itself is not the subject of any claims. The respondent can only succeed by arguing that Crystal Properties is, in essence, Harvey Wipp or, in other words, by piercing the corporate veil. Even a company with a sole shareholder is a legally distinct entity, and its separate nature will not be ignored in anything but the most extreme circumstances (effectively, fraud). Those circumstances are not present here;
 - b) the BPCPA does not apply here because the Crystal Properties mortgages were not "consumer transactions" under that act. Here, the mortgage loans were entered into between sophisticated businesspersons for the purpose of paying out and consolidating prior debt. The only contemporary documentary evidence indicates clearly that the transaction was being carried out for business purposes;
 - c) the allegations of unconscionability are without merit. Mr. Proudfoot is a sophisticated businessman who received independent legal advice. There is no air of reality to his claims of unconscionability; and
 - d) the respondent's allegations concerning the share transaction are similarly without merit. They are based on the claim that he was somehow deceived or not informed about the value of the shares, yet of all people Mr. Proudfoot was singularly well-situated to know, or to have an accurate opinion on, the value of those shares. He cannot have been deceived or suffered any loss through a lack of disclosure.
- [39] On the matter of the further matter raised by the Court in its memorandum, the petitioner notes that since the prior Crystal Properties mortgage was paid out by the subject mortgages, nothing turns on the fact that it was registered with Crystal Properties named as mortgagee. As with the other three prior mortgages, it is not the subject of these foreclosure proceedings and claims in relation to it do not meet the requisite level of going to the root or foundation of the foreclosure.
- [40] The petitioner submits that the petitioner's argument about Mr. Wipp's supposed "beneficial ownership" of the mortgages does not give rise to any contested issue. Although he is the sole shareholder and director of Crystal Properties, and might be said to have an indirect interest in the Crystal Mortgages, he and his company are, at law, separate legal entities. Furthermore, he merely worked as a sub-broker for Alpine. Nothing untoward or of any relevance arises from the fact that he arranged prior mortgages with Alpine and Crystal Properties.

IV. Discussion

A. General Principles

- [41] The parties agree that to grant an order nisi, the court must be satisfied there is no genuine issue for trial with respect to the petitioner's claim: *Home Hardware Stores Limited v. R Home Supply Centre Ltd.*, 2015 BCCA 500 [Home Hardware]. The onus of demonstrating the absence of a bona fide triable issue falls on the petitioner, although the authorities indicate that a party alleging a bona fide defence must establish some evidentiary basis for that defence: *Freshwest Equities Trading Corp. v. Dosanjh*, 2015 BCSC 952, at para. 37.
- [42] Cross-claims advanced by way of equitable set-off can be a defence in foreclosure proceedings provided they raise a triable issue, but only if those claims "go to the root" of the foreclosure action: *Home Hardware*, at paras. 10 and 16.
- [43] The threshold for determining whether a claim for an equitable set-off should result in a foreclosure being referred to trial was discussed in *Cam-Net Communications v. Vancouver Telephone Co. Ltd.*, 1999 BCCA 751, where the court said:
- [33] The law recognizes a distinction between what may be termed abatement and equitable set-off. The former, a product of the common law, applies to cases in which a defendant can show that as a result of the plaintiff's breach, the goods, services, or work provided by the plaintiff are diminished in value. The latter, a product of equity, refers to cases in which a defendant raises a cross-claim which goes directly to impeach the plaintiff's demands, i.e., which is so closely connected with the plaintiff's claim that it would be unjust to allow the plaintiff to enforce payment without taking into account the cross-claim. The latter involves damages other than a diminution of the value of the goods or services provided.
- [Emphasis added.]
- [44] In *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (C.A.) at 35-36 [Coba Industries], the Court of Appeal summarized the applicable principles as follows:
1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
 4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
 5. Unliquidated claims are on the same footing as liquidated claims.

[Citations omitted.]

- [45] Whether or not a cross-claim is sufficiently connected with a foreclosing party's claim has been the subject of many decisions, several of which were cited by the parties.
- [46] In *Home Hardware*, a hardware dealer defaulted on agreed terms of payment with its supplier, the amounts being secured by a mortgage, but the dealer alleged the supplier breached the contract in several ways, including interfering with refinancing efforts and suppliers, incorrectly counting inventory which led to concerns over record falsification, and conducting itself oppressively and prejudicially towards the debtor's interests. The court considered whether the claimed set-off "went directly to impeach" the petitioner's demands (para. 11). The chambers judge found there was "not a sufficiently close connection between the relief sought by [the dealer] in the cross-claim to make it equitable or unjust for [the supplier] to obtain relief before the cross-claim [was] resolved": *Home Hardware*, at para. 19. The Court of Appeal upheld the chambers judge's decision.
- [47] In *McCordic v. Hidden Rock Drilling Ltd.*, 2006 BCSC 1428 [McCordic], the respondent opposed the petitioner's application for an order nisi of foreclosure on the basis that the petitioner owed the respondent amounts exceeding the secured amount as a result of two promissory notes. Those notes were alleged to relate to mineral claims on the same property. The court concluded that the respondent had not shown a claim that met the test of "a close connection going to the root of the mortgage" (at para. 15). In coming to this conclusion, the court noted the alleged promissory notes pre-dated the mortgage by two years and related to a very different interest in the lands.
- [48] In *Fairmont Hot Springs Resort Ltd. v. Linwood Homes Ltd.*, 2013 BCSC 589, a respondent in a foreclosure proceeding alleged that it had claims against the petitioner that exceeded the mortgage amount. The court concluded there was no bona fide triable issue raised by the respondent because the claim of the respondent did not go to the validity of the mortgage, the ability of the mortgagee to pursue foreclosure, or the amount due and owing under the mortgage (at para 8).
- [49] In *Coba Industries*, a purchaser of property granted a mortgage back to the vendor, and the vendor agreed to lease the premises for a three-year term. The result was that the respondents were to make monthly mortgage payments of about \$5,000 to the vendor and the vendor was to make monthly lease payments of about \$10,000 to the respondents. The vendor then assigned the mortgage to the petitioner. The vendor subsequently defaulted on the lease payments. The respondents stopped payments on the mortgage, informing the petitioner that they would not pay until they received payments on the lease. The Court of Appeal concluded that the evidence in the case showed a "fundamental connection" between the lease payments and the mortgage payments in that "it was at the heart of any liability on the part of [the respondents] that [the vendor] provide and assure payments under the leases sufficient to satisfy [the mortgage] payments". The court upheld the chambers judge's decision that found equitable set-off was available to the respondents.

- [50] In 1026238 B.C. Ltd. v Pastula, 2016 BCSC 1812, owners of a farm borrowed monies for farm purposes and to finance a subdivision application by which individual lots would be created for resale. The owners defaulted on their payments. The lender brought foreclosure proceedings and obtained an order nisi, which included personal judgment against the respondents. The lender subsequently assigned its interest in the mortgage and foreclosure to the petitioner. In a later application for an order absolute the court declared that the foreclosure petition had been void from the outset because original lender had failed to adhere to the notice provisions of the Farm Debt Management Act, S.C. 1997, c. 21 [FDMA].
- [51] The petitioner commenced a further foreclosure proceeding after giving proper notice under the FDMA. In that proceeding, the respondent owners claimed a right of set-off of equitable damages. Among other claims, they alleged the petitioner had fraudulently withheld appraisals from the court in the first foreclosure proceeding and, as well, it had wrongfully slandered title to a property against which the earlier judgment had been registered. They also alleged that the petitioner and the original lender had breached duties owed to them by withdrawing support of the respondents' subdivision efforts.
- [52] On appeal from a master's foreclosure order, Mr. Justice Armstrong held that certain of the claims were not established even assuming the allegations were true. More importantly, for present purposes, he concluded that the respondents' allegations of a breach of a duty of good faith were "not so rooted in the contract to constitute an equitable set-off" (at para. 92). He also held it was not manifestly unjust to require the respondents to pay the debt because the respondents' claim did not go to the very root of the petitioner's claim (at para. 93).

B. Application of Principles

- [53] I begin the analysis by summarizing the claims of the respondent, which allege various breaches of the BPCPA and the Mortgage Brokers Act, R.S.B.C. 1996, c. 313. These are as follows:
- a) the transfer and subsequent sale of the Lance Exploration shares contravened the BPCPA because: (1) these transactions did not comply with the statutory requirement that credit extension fees be deducted from the advance; and (2) they were transactions that did not, and could not, comply with the requirement that the lender disclose the total cost of consumer credit;
 - b) Harvey Wipp failed to disclose his interest in the Crystal Mortgages; and
 - c) the fees and interest rates charged for the prior Alpine Mortgages were grossly in excess of those otherwise available in the market, and therefore constituted an "unconscionable act or practice" under the BPCPA.

- [54] During submissions, the respondent conceded that the alleged breaches by Mr. Wipp of the disclosure provisions of the Mortgage Brokers Act only give rise to potential administrative penalties and do not give rise to any right to compensation or damages. Accordingly, no set-off can arise out of those claims.
- [55] The petitioner submits that all or most of the allegations relating to the BPCPA are answered by the fact that these transactions were not "consumer transactions". The petitioner says the evidence shows the transactions took place between sophisticated businessmen, emphasizing in particular the document entitled "Commercial Agreement" that the parties signed. There is, however, a factual dispute between the parties about the purpose or reason for the various loans. If the case had come down to just this point, the matter would have been referred to trial as this is a triable issue. Similarly with the issues of the alleged unconscionability due to the magnitude of fees charged. But there is another issue that must be resolved first: whether the allegations go to the root of the mortgages in issue.
- [56] There is considerable force in the petitioner's argument that none of the claims of the respondent go to the root of either the Crystal Mortgages or the foreclosure proceeding. The claims concerning the Lance Exploration shares and the other consideration paid to Alpine relate to the Alpine Mortgages, not the Crystal Mortgages. The only connecting point between the two sets of mortgages is the arrangement by which Mr. Proudfoot found a buyer for the shares prior to Alpine's search for replacement financing. The shares, however, had already been given for previous credit extensions, so this was simply the liquidation of that earlier consideration.
- [57] Moreover, the claims raised by the respondent are claims against Alpine and Mr. Wipp, not against Crystal Properties. The parties do not match, which makes set-off problematic. The respondent attempts to meet this legal impediment by arguing that Mr. Wipp is the "beneficial owner" of the Crystal Mortgages and that Mr. Wipp caused "the mortgages to be registered in the name of the corporation most convenient to him at the time". Effectively, the respondent submits that the parties to both the Alpine Mortgages and the Crystal Mortgages are one and the same, or at least, that Mr. Wipp and Crystal Properties are one and the same. On this point, I agree with the petitioner's submission that while a narrowly-held corporation or a corporation with a sole shareholder may appear to be the alter ego of its shareholders, "the two entities remain legally distinct and must be treated as such": *Edgington v. Mulek Estate*, 2008 BCCA 505, at para. 26.
- [58] For those reasons, I conclude while Mr. Proudfoot may have arguable claims against Alpine and Mr. Wipp, those claims do not go to the root of either the mortgages at issue or the foreclosure proceeding. I also conclude that the putative cross-claims are not so clearly connected with the demand of the petitioner that it would be manifestly unjust to allow the petitioner to enforce payment without taking the cross-claim into consideration.

V. Conclusion

- [59] Accordingly, there will be an order nisi of foreclosure in favour of the petitioner. The respondent's application to have this matter referred to trial is dismissed.
- [60] The order nisi will be in the terms sought, except for the requested one-day redemption period. The petitioner sought a one-day redemption period because the respondent has already had a long period of time within which to redeem the mortgage. While I agree that this warrants a shortened redemption period, I consider it inappropriate to limit that period to one day because the respondent ought to have at least some opportunity to make arrangements to redeem following the release of this judgment.

"Blok J."

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