

CANADA / JUDGMENT

Fisgard Capital Corporation v. Hutton

2012 BCSC 1670

COURT

Supreme Court of British Columbia

DECIDED

9 November 2012

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2012 BCSC 1670 Fisgard Capital Corporation v. Hutton IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fisgard Capital Corporation v. Hutton, 2012 BCSC 1670 Date: 20121109 Docket: 12-3286 Registry: Victoria Between: Fisgard Capital Corporation Petitioner And: Donald Rodney Hutton Respondent Before: Master Bouck Reasons for Judgment Counsel for the Petitioner: L. LeBlanc Counsel for the Respondent: G. Kinar Place and Date of Trial/Hearing: Victoria, B.C. October 30, 2012 Place and Date of Judgment: Victoria, B.C. November 9, 2012

- [1] This is a foreclosure proceeding.
- [2] The respondent acknowledges default under the mortgage. The only relief opposed by the respondent was the one day redemption period sought by the petitioner. The petitioner did not seek an order for immediate conduct of sale.
- [3] After hearing submissions, I declared the mortgage to be in default and granted judgment to the petitioner in the amount sought. The redemption period was set at six months.
- [4] The respondent argues that he ought to receive costs related to the appearance that day as the successful party (at least one issue). The respondent relies on the Supreme Court Civil Rules (including Rule 14-1(15)) but was unable to cite a specific authority where a mortgagor was granted costs in these particular circumstances. The petitioner sought costs as the successful party on Scale B.
- [5] Section 20 of the Law and Equity Act, R.S.B.C. 1996, c. 253 addresses costs in foreclosure proceedings. The provision was enacted to give the court broad powers with respect to costs and not be restricted by provisions under a mortgage. Pursuant to Appendix B to the former Rules of Court, uncontested foreclosure proceedings were required to be assessed at Scale A. That particular provision is not included in Appendix B to the Supreme Court Civil Rules but the practice continues. Of course, this case concerned a partly contested matter.
- [6] In *Bailey v. Victory*, 57 B.C.A.C. 23, the Court of Appeal addresses the purpose of a costs order: The general rule, as set out in Rule 57(9), is that costs follow the event. The successful litigant is entitled to costs as indemnification for the costs incurred in having been forced into litigation. The rules contain other provisions which show, and recent cases have indicated, that the power of the court to award costs is not limited to indemnification. In

appropriate cases awards for costs can be made with a view to discouraging frivolous claims or defences and unnecessary or abusive proceedings, to encourage prompt and early settlements, and, in appropriate cases, to penalize improper conduct. But through the Rules and the decided cases runs one simple overriding principle which must not be lost sight of -- that is that discretionary exceptions to the general rule must be made judicially. At para. 13.

- [7] While the petitioner had a different view of the evidence with respect to the redemption period, there was no improper conduct on its part. The petition was necessarily brought as a result of the respondent's default. Except for the redemption period issue, it would seem to me that the petitioner is the successful party.
- [8] Even if I were to find that the respondent achieved some success at this hearing, it is difficult to parse out the redemption period issue from the substantive relief granted such that Rule 14-1(5) might apply: see *Lee v. Jarvie*, 2012 BCSC 1521 at paras. 12 and 13.
- [9] Given my ruling with respect to the redemption period, this matter should have proceeded on an uncontested basis with the 6 month period being sought. A proper result might see the petitioner receiving its costs related to the hearing of the petition costs but only on Scale A.
- [10] However, there is in fact authority for the position taken by the respondent: *Harbourfront Holdings Ltd. v. Kucera*, 2012 BCSC 1552. In that foreclosure proceeding, the respondent "consented" to all relief sought by the petitioner, except for the redemption period. The respondent was successful in extending the redemption period and was awarded costs in any event of the cause: para. 43.
- [11] I am unable to find any basis on which to distinguish this case from the one at bar. Given that the decision is one of a judge of this court, it is binding on me.
- [12] Accordingly, the respondent shall have his costs for the preparation and attendance at the hearing of the petition on October 30, 2012, at Scale B in any event of the cause but not payable forthwith. "C. P. Bouck" Master C. P. Bouck

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