CANADA / JUDGMENT

Khan v. Soni

2012 BCCA 207

COURT	DECIDED
British Columbia Court of Appeal	9 May 2012

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2012 BCCA 207 Khan v. Soni COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Khan v. Soni, 2012 BCCA 207 Date: 20120509 Docket: CA039504 Between: Mohammed Iqbal Khan also known as Mohammed Iqbal Martin Khan also known as Mohammed Khan and Haleeman Khan Appellants (Plaintiffs) And Parveen Soni, Dipekka Soni, Rajinder Soni, Harpreet Singh Purwal, Gurbir Kaur Purewal and Reliable Customized Solutions Inc. Respondents (Defendants) Before: The Honourable Madam Justice Levine The Honourable Madam Justice Garson The Honourable Madam Justice A. MacKenzie On appeal from Supreme Court of British Columbia, October 28, 2011 (Khan v. Soni, Vancouver Registry S-112561) Oral Reasons for Judgment Counsel for the Appellants: G.A. Pyper Counsel for the Respondents: G.F. Gregory Place and Date of Hearing: Vancouver, British Columbia May 9, 2012 Place and Date of Judgment: Vancouver, British Columbia May 9, 2012

[1] LEVINE J.A.: The appellants appeal from an order striking parts of their Notice of Civil Claim in which they sought to challenge matters that were the subject of mortgage foreclosure proceedings resulting in an Order Absolute of Foreclosure on August 25, 2010. The Supreme Court chambers judge found the claims to be an abuse of process of the court, as an attempt to relitigate those matters and a collateral attack on those proceedings in which findings were made that are res judicata between the parties. In my opinion, the chambers judge was entirely correct, and I would dismiss the appeal.

[2] The background is summarized in the respondents' factum:

5) The Appellants granted mortgages to the Respondents over five properties they owned (the "Properties").

6) The Mortgages went into arrears, and the Respondents brought foreclosure proceedings.

7) On June 16, 2009, Master Taylor granted Order Nisi over all of the Properties, and directed that the amount outstanding be determined by the Registrar. On January 7, 2009, Registrar Baker determined that the amount outstanding was $3,213,584.94. The Order Nisi recording this amount was duly entered. Throughout this time, the Appellants were represented

8) On March 16, 2010, Master Scarth granted the Respondents conduct of sale.

9) On May 7, 2010, Master Baker dismissed the Appellants' application for an Order extending the redemption period.

10) On August 25, 2010, Master Taylor pronounced Order Absolute vesting title in the Properties to the Respondents. The effective date of the Order Absolute was postponed to October 1, 2010 to give the Appellants more time to arrange financing. The Appellants failed to refinance the Properties.

11) On February 24, 2011, pursuant to the Order Absolute, the Respondents, Rajinder and Parveen Soni, registered themselves as owners of the Properties.

[3] The Appellants filed their Notice of Civil Claim on April 19, 2011. They sought orders setting aside the accounting and the Orders Nisi and Absolute, an extension of the redemption period, and declarations concerning the amounts owing under the mortgages. They also raised for the first time claims under the Business Practices and Consumer Protection Act, R.S.B.C. 2004, c. 2, s. 8, the Interest Act, R.S.C. 1985, c. I-15, and a residential tenancy claim.

[4] The appellants raised four grounds of appeal in their factum, but addressed only two of them in argument. They did not address claims that the chambers judge erred in failing to consider the provisions of the Law and Equity Act, R.S.B.C. 1996, c. 253, and in not allowing Mr. Khan to amend his Notice of Civil Claim, and I will not address those here.

[5] The appellants say that the trial judge erred in granting relief to the respondents notwithstanding they had not filed a response to their Notice of Civil Claim in which they specifically pleaded res judicata. There is no merit to this ground of appeal. The respondents' application to strike the appellants' pleadings was brought under Rule 9-5(1)(d) of the Supreme Court Civil Rules, which expressly provides that it may be brought "At any stage of a proceeding ...". In their Notice of Application, the respondents expressly relied on the principle of res judicata.

[6] The second ground of appeal addressed by the appellants in their factum is that the trial judge erred in failing to address the verbal tenancy agreement they allege was made between the parties allowing the appellants to continue to occupy the property. The respondents argue this is matter within the jurisdiction of the Residential Tenancy Branch, not the BC Supreme Court. It is not a proper ground of appeal in any event. The validity of the tenancy agreement was not a matter for the chambers judge to decide on the respondents' application to strike pleadings. He did not strike the claim concerning this matter.

[7] The appellants did not directly challenge the chambers judge's decision that their pleadings challenging the foreclosure proceedings were an abuse of process of the court, nor could they. The principles relied on by the chambers judge were recently considered by this Court in HSBC Bank Canada v. Ba-Oose, Inc., 2011 BCCA 511, an appeal, like this one, from an order striking claims that were an attempt to relitigate a foreclosure proceeding. The Court said (at paras. 21-23): In my view, the chambers judge was correct in finding that this action

> (or, at least, most of it) is an abuse of process. As the respondent contends, an order nisi in a foreclosure proceeding is a final judgment of the court (see Bank of Montreal v. Singh (1979), 109 D.L.R. (3d) 117 (B.C.C.A.)). An order nisi of foreclosure cannot be granted unless the court is satisfied that the mortgage is both valid and legally enforceable. The court must also determine the amounts secured by the mortgage and whether there has been a default. Once an order nisi is pronounced, it is not open to a mortgagor to challenge the validity of the mortgage by way of a separate action. Because the validity and enforceability of the mortgage are prerequisites to the granting of an order nisi, the facts necessary to determine that the mortgage is enforceable become res judicata. In the case before us, most of the plaintiffs' claims go directly to the question of whether the mortgage was valid and enforceable according to its terms. If the plaintiffs wished to argue that the mortgage was unconscionable or entered into in an unlawful manner, their opportunity to do so was in defence of the application for an order nisi of foreclosure. They could not consent to the granting of the order nisi and then commence a separate action to challenge the validity of the mortgage. The order nisi, either expressly or by implication, affirmed the legality and enforceability of the mortgage. [Emphasis added.]

[8] The chambers judge correctly applied these principles in this case in finding that the appellant's claims challenging the foreclosure proceedings were an abuse of process.

[9] I would dismiss the appeal.

[10] GARSON J.A.: I agree.

[11] A. MACKENZIE J.A.: I agree.

[12] LEVINE J.A.: The appeal is dismissed. "The Honourable Madam Justice Levine"

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