

CANADA / JUDGMENT

Nielsen (Re)

2020 BCSC 79

COURT

Supreme Court of British Columbia

DECIDED

22 January 2020

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2020 BCSC 79 Nielsen (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nielsen (Re),

2020 BCSC 79

Date: 20200122

Docket: B-180013

Registry: Vancouver

In the Matter of the Bankruptcy of

Rene Eigil Nielsen

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Petitioner Trustee,

BDO Canada Limited:

F. Finn,

Articled Student

Counsel for the Bank of Montreal:

J.D. Schultz

Counsel for Her Majesty the Queen:

N.S. Johnston

Counsel for the Bankrupt:

No one appearing

Place and Date of Hearing:

Vancouver, B.C.

December 2, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2020

Introduction

- [1] The Bank of Montreal (BMO) seeks to recover legal costs it incurred in connection with the recovery of amounts held back from the proceeds of sale in proceedings H160269, Vancouver Registry.
- [2] By way of background, on April 25, 2016 BMO commenced foreclosure proceedings against Rene Eigil Nielsen regarding default of a residential mortgage. An Order Nisi was granted July 14, 2016 which confirmed, among other things that \$356,399.83 was owing to BMO and secured by the mortgage and that BMO was entitled to costs on a party and party basis (the Muir Order).
- [3] It is a term of the mortgage that in the event of default Mr. Nielsen would be responsible for the costs incurred by BMO in protecting their security or collecting money owing on a solicitor client (special cost) basis.
- [4] On April 20, 2017 Master Scarth ordered the sale of Mr. Nielsen's residence for \$558,000.
- [5] The sale closed May 1, 2017. At the time of closing Mr. Nielsen refused to sign a statutory declaration confirming that he was a Canadian resident as required by the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.) (ITA).
- [6] In the absence of confirmation of residency, the purchasers held back 50% of the purchase price as required by s. 116 of the ITA (the holdback funds).
- [7] BMO took action to gain access to the holdback funds. It gathered considerable evidence to show that Mr. Nielsen was a resident of Canada and brought court applications seeking the following orders allowing the sale to proceed without holdback:
 - 1. Leave to file paperwork to obtain a clearance certificate to allow the sale to proceed without holdback;
 - 2. An order that it was the residency of BMO as vendor rather than Mr. Nielsen that was relevant; and

3. An order that in light of the evidence collected by BMO, reasonable inquiries had been made indicating that Mr. Nielsen was a resident, the purchasers should pay the holdback funds to BMO for distribution pursuant to the Scarth order.

(the holdback applications).

- [8] All of these holdback applications were opposed by the Canada Revenue Agency (CRA).
- [9] The first two applications were dismissed. The remaining application, 3 above, was not proceeded with as on or about June 30, 2017 the purchasers remitted the holdback funds to the CRA. BMO then changed tack and commenced these bankruptcy proceedings.
- [10] On January 26, 2018 BMO applied for an order prohibiting the CRA from distributing the holdback funds to Mr. Nielsen as per their indications. On January 29, 2018 this court ordered the holdback funds be paid into court to the credit of the foreclosure proceedings.
- [11] On February 5, 2018 a bankruptcy order was made against Mr. Nielsen. BDO Canada Limited was appointed trustee of the estate.
- [12] On May 30, 2018 the trustee applied for a declaration that the holdback funds were the property of the bankrupt Mr. Nielsen and an order that they be returned to the trustee. The trustee's application relied in part on the residency evidence collected by BMO. The CRA opposed the trustee's application.
- [13] On July 11 2018, Smith J. granted an order providing the relief sought by the trustee subject to the CRA assessing Mr. Nielsen on the basis that he was not a non-resident. As a result the trustee filed a 2017 tax return on behalf of Mr. Nielsen and the CRA assessed him on the basis that he was a resident of Canada. The CRA then transferred the holdback funds to the trustee.
- [14] Subsequently BMO submitted a proof of claim to the trustee asserting a secured claim for \$44,195.65 constituting the costs incurred in preserving and recovering the holdback funds on a solicitor and client or special cost basis.
- [15] The trustee has not made a decision regarding this claim. It organised an April 27, 2019 meeting of the creditors to seek direction on the claim but cancelled it at the request of the CRA. No further action has been taken by either the trustee or the CRA.

Issues

- [16] The issues before this court are:
1. Whether BMO is entitled to costs; and
 2. if so, whether it is entitled to special costs.

The Law

- [17] Section 37 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 (BIA), permits creditors of the bankrupt to apply to court to reverse or modify an act or decision of the trustee regarding the administration of the estate of a bankrupt.
- [18] Under Rule 14-1 of the Supreme Court Civil Rules which governs costs, costs are assessed as party and party costs unless they are ordered to be special or lump sum costs (R. 14-1(1)).
- [19] Special costs (formerly called solicitor client costs) are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties as a means of penalizing a party's conduct in the litigation.
- [20] Justice Walker reviewed the law regarding special costs in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, 23 B.C.L.R. (5th) 379 as follows:
- [8] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word "reprehensible". The term represents a general and all encompassing expression of the applicable standard for an award of special costs. "Reprehensible" conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court's view deserves reproof or rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* 1994 CanLII 2570 (B.C.C.A.), (1994), 119 D.L.R. (4th) 740 at 745 - 747 (C.A.); *Stiles v. B.C. (W.C.B.)* 1989 CanLII 235 (BC CA), (1989), 38 B.C.L.R. (2d) 307 at 311 (C.A.); *Leung v. Leungreflex*, (1993), 77 B.C.L.R. (2d) 314 at para. 5 (S.C.); *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 (CanLII), 2007 BCSC 1724 at para. 6; and *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 at para. 23 (C.A.).
- [9] In *Garcia* at 747, Lambert J.A. described the standard to be met in order to justify an award of special costs:

... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word "reprehensible" is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word "reprehensible", taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[10] The need for courts to disassociate themselves from misconduct is so important that special costs may be awarded even when the successful party does not have to pay legal fees. In Fullerton at para. 29, the Court of Appeal stated that "[s]ince the rationale for the award is to penalize, it matters not that the successful party does not have any legal fees to pay".

[11] Special costs may be ordered in the following circumstances:

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

[Emphasis added.]

[21] In *Gichuru v. Smith*, 2014 BCCA 414, our Court of Appeal held that special costs may be ordered where there has been no wrongdoing and may arise from the terms of a contract: para. 90.

Analysis

[22] BMO seeks an order for party and party costs up to the sale of the property, as per the Muir Order, and special costs thereafter.

[23] BMO takes the position that special costs are warranted for two reasons: first, the issues in relation to the holdback funds were novel and unusual and second, the conduct of the parties made BMO's recovery of funds more complicated and drawn out than they should have been. The applications and extra work were caused by Mr. Nielsen's continued refusal to confirm his residency.

[24] The trustee takes no position.

[25] The CRA however opposes BMO's application for costs for the following reasons:

1. BMO was unsuccessful in their holdback applications and as such they are not entitled to claim costs; and
 2. As no costs were awarded by Smith J., this is an attempt to re-litigate that application.
- [26] The CRA takes the position that special costs are not warranted in any event as the applications were not sufficiently complex or difficult and BMO chose to litigate foreclosure proceedings despite being advised by counsel for the CRA that the court was without jurisdiction to make the order sought.
- [27] With respect to the CRA's argument regarding the rule that the successful party is entitled to costs, while that is the general rule I disagree that it prevails in these circumstances. While BMO was unsuccessful in some applications along the way, they were ultimately successful in having Mr. Nielsen recognised as a resident of Canada and having the holdback funds transferred to the trustee.
- [28] I disagree as well with the CRA's submission that because costs were not sought before Smith J. that this constitutes an appeal of his order.
- [29] Overall I am satisfied that Mr. Nielsen made the resolution of this matter far more difficult than it should have been. Mr. Nielsen's senseless failures to respond to correspondence from BMO asking him to confirm his residency made what should have been a straight forward recovery of funds in accordance with the mortgage contract, complicated and prolonged. There can be no reason for his actions other than to be obstructionist.
- [30] I conclude that the costs incurred by BMO were a result of the conduct of Mr. Nielsen. In my view it would be inequitable for BMO to bear those costs.
- [31] The question then becomes whether BMO is entitled to special costs for actions taken by them following the sale of Mr. Nielsen's property.
- [32] The mortgage agreement entered into by Mr. Nielsen with BMO expressly stipulates that he is responsible for costs incurred by BMO in "collecting what is owed if the mortgage goes into default, and exercising [BMO's] powers under the mortgage" on a solicitor-client basis.
- [33] Absent special circumstances, where the parties have agreed in writing to such contractual terms, the court will enforce them: *AMT Finance Inc. v. Gonabady*, 2010 BCSC 278 at para. 101; *Chew Fidelity Ltd. v. Greater Victoria Contracting Services Ltd.*, 2019 BCSC 1474 at para. 79.
- [34] There are no special circumstances in this case. As such I am satisfied that BMO is entitled to their costs to be assessed as special costs from the sale of the property forward.

Conclusion

- [35] I make the following orders:

1. BMO is entitled to the following:
 - a. Party and party costs up to the sale of the property;
 - b. Special costs for all actions taken by BMO after the sale of the property in order to collect funds owing and to exercise its power under the mortgage;
 2. The matter is returned to the trustee for assessment.
- [36] BMO's application for an order that this proceeding is not subject to the levy imposed by s. 147 of the Bankruptcy and Insolvency Act is adjourned generally.
- [37] BMO is entitled to costs of this application.

"The Honourable Madam Justice Murray"

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