

CANADA / JUDGMENT

Wadden v. 470139 B.C. Ltd.

2014 BCSC 747

COURT

Supreme Court of British Columbia

DECIDED

1 May 2014

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2014 BCSC 747 Wadden v. 470139 B.C. Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Wadden v. 470139 B.C. Ltd., 2014 BCSC 747 Date: 20140501 Docket: 100499 Registry:

Kelowna Between: Joseph Leo Wadden and Melanie Hope Wadden Petitioners And 470139 B.C.

Ltd. Respondent Before: Master B.M. Young (as Registrar) Reasons for Decision Counsel for the

Petitioners: E. Knowler, Articling Student Appearing as representative of the Respondent: J.D.

James Place and Date of Trial/Hearing: Kelowna, B.C. January 28, 2014 Place and Date of

Judgment: Kelowna, B.C. May 1, 2014

- [1] This proceeding relates to a claim by the petitioners against the respondent to disallow the respondent's claim for default interest of \$2,250 demanded by the respondent in foreclosure proceedings.
- [2] Foreclosure proceedings were commenced by Fisgard Capital Corporation against these petitioners. Fisgard held a first mortgage against the petitioners' home and the respondent held a subsequent mortgage. 470139 B.C. Ltd. was named as a respondent in the Fisgard foreclosure proceeding.
- [3] The petitioners sold the subject property during the redemption period for a purchase price of \$364,000 which was sufficient to pay out and discharge all selling expenses, outstanding property tax, and the first and second mortgage in full. The respondent in this proceeding provided a payout statement which included a three-month pre-payment penalty in lieu of notice for \$2,250. The petitioners disputed this amount and paid it under protest in order to clear title to complete the sale of their home. The balance of \$2,250 was held in the petitioners' solicitor's trust account.
- [4] Rather than bringing an application in the Fisgard foreclosure proceeding, these petitioners commenced a new petition to challenge the \$2,250. The petition was heard by Madam Justice Beames on December 5, 2013. She interpreted Clause 12 of Part 10 of the respondent's mortgage and found: I do not find that there is an express obligation contained in this mortgage to pay three months' interest in lieu of notice if notice is not given. The remedy, in my view, when the mortgage is silent with respect to what occurs if notice is not given, would be, theoretically, for the mortgagee to make a demand based on a breach of contract. On that basis, it is my view that the sum of \$2,250 was not claimable by the

respondent mortgagee and was not payable by the petitioners/mortgagors. In that decision, Madam Justice Beames ordered party and party costs be awarded to the petitioners, pursuant to Appendix B.

- [5] The petitioners brought this Appendix B tariff costs matter before me by way of appointment, claiming \$10,150 in costs, disbursements and taxes for an action to settle a dispute over \$2,250. Understandably, the respondent has objected to this bill of costs, primarily on the ground that it is disproportionately high.
- [6] On behalf of the respondent numbered company, Mr. James submits that there was no justifiable legal reason to issue a new petition to deal with this issue between the respondents. He argues that the matter should have been brought as a notice of application under foreclosure Rule 21-7(5)(f) and (j) as it was incidental to the foreclosure proceedings. He cites *Bank of Montreal v. Peri Formwork Systems Inc.*, 2010 BCCA 444, where the court said that the settling of priorities between builders lien claimants was incidental to foreclosure proceedings but was none the less a final order and would not require the parties to apply for leave to appeal.
- [7] Supreme Court Rule 21-7(5) sets out the powers of the court. I note that sub-paragraphs (c), (f), (j) and (k) have applicability to the case before me. I have set those sub-sections out below: Powers of the court
- (5) The court may do one or more of the following in a proceeding under subrule (1):
- (c) determine summarily, or order that an account be taken of and that a registrar certify, the amount that is due to the petitioner or to any person on the date of the hearing of the petition or on the date of the accounting, as the case may be;
- (f) determine summarily, or order an inquiry to determine, any issues raised between respondents, including priorities;
- (j) grant further or corollary relief;
- (k) make an order under Rule 22-1.
- [8] I accept Mr. James' submission that the foreclosure rule sets out broad discretion to the court to settle financial issues either directly related or incidental to the foreclosure proceeding so that the respondent does not have to commence separate proceedings to resolve payment disputes between them.
- [9] Mr. Sommerer's explanation for starting an originating proceeding by petition is that the issue between the homeowners and the second mortgagee did not affect the first mortgagee, who had been paid out by this time. He said in his affidavit: There was no context within the Fisgard proceeding whereby a claim between two respondents could be conveniently resolved, and attempting to do so there could not occur without involving Fisgard and incurring costs obligations to Fisgard.

- [10] I disagree. It is not uncommon for a second mortgagee to bring an application in the first mortgagee's foreclosure proceeding, rather than commencing their own foreclosure proceeding. This is usually done to save costs. They might apply for conduct of sale in the first mortgagee's foreclosure proceeding and proceed to approval of the sale and resolving issues of payout of various charges. Frequently the first mortgagee petitioner will not appear if the dispute does not affect their security. In the case before me, Mr. James deposes that he did not commence a foreclosure proceeding on behalf of 470139 B.C. Ltd. in an effort to save costs, which would have to be paid by the homeowners.
- [11] It is not procedurally wrong to bring an originating proceeding, but it added to the cost and in my view was unnecessary. I interpret Rule 21-7(f) to permit the hearing of financial disputes between respondents to the foreclosure proceeding, including priorities between the respondents which may have no effect on the petitioner's claim whatsoever.
- [12] I therefore find that it was unnecessary and unreasonably expensive to commence an originating proceeding and to make claims for costs under tariff items 1, 2 and 3 or claims under tariff item 6.
- [13] Since this matter could have been brought by way of application in the foreclosure proceeding, I will allow claims under tariff items 21 and 22. I understand that the matter came on for hearing before Madam Justice Beames for one-half day on December 5, 2013.
- [14] I accept that extensive legal research was conducted and the parties did file written submissions which were provided in the hearing record for my review. These submissions appear comprehensive and helpful to the presiding judge.
- [15] At paragraph 12 of her decision, Madam Justice Beames said: I had the opportunity, as I indicated to counsel and to Mr. James on behalf of the respondent numbered company before submissions commenced today to receive all of the material that has been filed in these proceedings, including the affidavits and the written arguments, as well I received and read the authorities provided. Having read the mortgage, and particularly Clause 12 of Part 10, and having read and referred to all of the material that has been provided, I do not find that there is an express obligation contained in this mortgage to pay three months' interest in lieu of notice if notice is not given.
- [16] It is clear that the written arguments and briefs of authority provided to the judge in advance of the hearing reduced the time required for the hearing itself and I would therefore allow a claim under tariff item 36 for written submissions.
- [17] I must keep in mind the object of the Supreme Court Civil Rules, set out in Supreme Court Rule 1-3: Rule 1-3 -- Object of Rules Object
- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
- (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.
- [18] In looking at proportionality, the Rules direct me to consider the amount involved in the proceeding. The amount is a nominal \$2,250; however, dollar value is not the only consideration in assessing proportionality. I must also consider the importance of the issues in dispute and the complexity of the proceeding.
- [19] I have read the affidavit of Mr. Wadden filed in support of the petition. The issue of whether or not he and his wife were required to pay a penalty in lieu of notice was a significant issue to the Waddens, who could ill afford to pay this amount.
- [20] The respondent numbered company would not consent to a partial refinancing of the property and this left the Waddens no alternative but to sell their home as quickly as possible before either the petitioner in the foreclosure proceeding or the respondent obtained exclusive right to market the home. They did obtain an offer, which was substantially lower than what they had hoped, but then the respondent would not clear title until this payment in lieu of notice was paid.
- [21] I set out this history to illustrate that this matter was of significant importance to the Waddens.
- [22] It is also of significant importance to the respondent to uphold Clause 12 of its mortgage, which allows it to claim payment in lieu of notice and is likely contained in all of its mortgages. The respondent numbered company downplayed the significance of the issue at the assessment, but in the next breath advised me that it had appealed Madam Justice Beames' decision. Clearly, this is an important issue to both parties.
- [23] Although the dollar value is nominal, the legal argument was fairly complex. The petitioners filed 11 authorities and 14 pages of written submissions, plus a further two pages of response to written submissions of the respondent. I will take these factors into consideration when assessing the bill of costs.
- [24] The total bill of costs is four and one-half times the dollar value of the entire claim. I find that to be disproportionate, even though this legal issue is of importance to the parties and is somewhat complex. Because there was, in my view, a more expeditious way to proceed by notice of application in the foreclosure proceeding, I am disallowing tariff items 1, 2, 3, 6, 26, 27 and 40 as claimed on the bill of costs. I am allowing claims to be brought under tariff items 21, 22, 29, 30, 36, 41 and 42.

- [25] The following chart sets out the decisions I have made with respect to the tariff items: Item Description Number of Units Claimed Amount Allowed Instructions and Investigations 1 Correspondence, conferences, instructions, investigations or negotiations by a party until the start of the proceeding, for which provision is not made elsewhere in this tariff
- minimum (1)
 - maximum (10) 7 0 2 Correspondence, conferences, instructions, investigations or negotiations by a party after the start of the proceeding to the completion of the trial or hearing, for which provision is not made elsewhere in this tariff
 - minimum (1)
 - maximum (30) 20 0 3 Correspondence, conferences, instructions, investigations or negotiations by a party after the trial or hearing to enforce any final order obtained in that trial or hearing, for which provision is not made elsewhere in this tariff
 - minimum (1)
 - maximum (10) 4 0 Court Documents 6 All process, for which provision is not made elsewhere in this tariff, for commencing and prosecuting a proceeding
 - minimum (1)
 - maximum (10) 7 0 Applications, Hearings and Conferences 21 Preparation for an application or other matter referred to in Item 22, for each day of hearing if hearing begun
 - (a) if unopposed (2)
 - (b) if opposed (3) not claimed 1.5 22 Application, other than an application referred to in Item 23 or 27, for each day
 - (a) if unopposed (4)
 - (b) if opposed (5) not claimed 2.5 26 Preparation for an application or other matter referred to in Item 27, for each day of hearing
 - (a) if unopposed (4)
 - (b) if opposed (5) 2.5 (1/2 day - December 5, 2013) 0 27 Hearing of proceeding, including petition, special case, proceeding on a point of law, stated case, interpleader or any other analogous proceeding, and applications for judgment under Rule 7-7 (6), 9-6 or 9-7, for each day
 - (a) if unopposed (6)
 - (b) if opposed (10) 5 (1/2 day - December 5, 2013) 0 29 Preparation for attendance referred to in Item 30, for each day of attendance

- for ½ day (2) 1 1 30 Attendance before a registrar to settle an order or to assess costs, for each day
 - for full day (4) 2 2 Trial 36 Written argument
 - minimum (1)
 - maximum (10) 10 (petitioners' submissions and response to respondent's submissions) 7 Attendance at Registry 40 Process for setting down proceeding for trial (1) 1 0 41 Process relating to entry of an order or a certificate of costs when Item 30 or 44 does not apply (1) 1 (December 5, 2013 order of Madam Justice Beames) 1 42 All process, for which provision is not made elsewhere in this tariff, relating to execution on or enforcement of an order, exclusive of any application to the court (1) 1 (order reasons for judgment) 1 Total number of units: 61.5 16 Multiplied by unit value: \$110 \$110 Subtotal: \$6,765.00 \$1,760.00 HST (12%): \$811.80 \$211.20 Total: \$7,576.80 \$1,971.20 Disbursements
- [26] The first disbursement claimed is photocopying at \$.25 per page, for a total of \$602.25. This is for 2,409 copies. In his affidavit of justification, Mr. Sommerey says that copies recorded include printing and scanning copies of letters, emails and other electronically received documents printed for the file, printing multiple copies of pleadings, affidavits, written submissions and case authorities for the purposes of assembling chambers records and books of authorities for the court and the lawyers and mailing copies of correspondence and documents to the clients when required.
- [27] To illustrate the amount of printing and copying needed to prosecute this proceeding, Mr. Sommerey had his legal assistant count the number of pages in the following major documents, "which were created at least in duplicate to provide one copy to the writer and one for the court":
- a) pleadings binder - 305 pages, which was duplicated because originals were filed and copies were;
 - b) chambers record - 136 pages, duplicated;
 - c) petitioners' book of authorities - 140 pages, duplicated; and
 - d) respondent's authorities - 42 pages.
- [28] If I add those items and multiply by two, I get 1,204 pages. I assume that some correspondence was scanned or printed.
- [29] I will allow \$400 for photocopying (which is 1,600 copies at \$.25 per page). I am not going to start counting pages to see if the total is correct. This is a reasonable ball-park figure.

- [30] The largest disbursement claim is for case law/research. The petitioners claim \$1,079.95 for case law/research. Mr. Sommerey says in his affidavit of justification that his firm now uses Westlaw Canada as their legal resource research facility and, in his experience, computer-based legal research is far more efficient and effective time wise than doing research manually. I agree with this comment.
- [31] It was necessary in this law suit to perform substantial legal research to review the law with respect to s. 8 of the Interest Act, including case law and statutory law from Ontario. The law firm charges their clients \$15 per search and the searches are posted electronically to the file as a disbursement. The law firm pays Westlaw \$1,666.67 per month for access to the legal resource database. He calculated what the law firm paid to Westlaw for the year and what charges for the year were made on legal files. He calculated the actual ratio to cost and determined that the actual cost for the amount posted to the file was 44.7% overall. On this file, he posted \$2,416 worth of Westlaw research. Applying the 44.7% cost to the amount posted ratio, it is determined that the Westlaw costs are \$1,079.95.
- [32] I am satisfied that the computer-assisted research was necessary. I am also satisfied that Mr. Sommerey has provided evidence of the actual cost for the computer-assisted research on this file and I allow this disbursement.
- [33] Mr. James raised an interesting question and that is whether any cost is reasonable, given that there are free computer-assisted research programs available. The articling student who conducted legal research was counsel at the assessment before me. She advised me that much of the legal research involved cases prior to 1986 and that although CanLII can be a useful free resource, it is less reliable for noting up older cases. I accept that explanation. I find that the computer-assisted research is reasonable in the certain sense of this case. Although this is not determinative of the issue, I note that Mr. James conducted research using CanLII and did miss the fact that one of his cases had been overturned.
- [34] There is a claim for BC On-line searches. I am not certain why they were necessary. There was nothing about this charge in the affidavit of justification, so I deny the claim for \$23.40.
- [35] There was a \$4.25 telephone charge to Nanaimo which is not explained, so that disbursement will be deducted from telephone and fax disbursements on the bill of costs.
- [36] I disallow the \$200 cost to file the petition. I will reduce it to \$80, which would have been the cost for filing a notice of application.
- [37] I disallow the \$150 charge for this assessment, the \$80 fee to file the appointment, and the \$40 fee to file a certificate of costs, since the respondent was substantially successful in his challenge of this bill of costs.
- [38] I allow the following five other disbursements included on the bill of costs: courier charges (\$8), postage/MTS (\$12), JC WordAssist (\$60), trust administration fee (\$10), and BC Online submission fees (\$6).

[39] The total costs allowed are: \$1,760 for fees, plus applicable tax(es), and \$1,655.95 for disbursements plus tax(es) as and where applicable. "Master B.M. Young"

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