January 22, 2020

Keeping an Eye on Foreclosing Banks

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Case Commented On: *Canadian Imperial Bank of Commerce v Strihavka*, 2019 ABQB 835

Who is keeping an eye on the conduct and claims of banks and other financial institutions that are foreclosing on people's homes in Alberta? In at least one case – this case of *Canadian Imperial Bank of Commerce v Strihavka* – it was a Master of the Court of Queen's Bench who discovered a bank was providing false or, at least, misleading evidence and the bank's lawyer was not living up to their professional responsibilities, all for the purpose of taking a person's home away from them more quickly than allowed at law. Whether this one case is an aberration due to an isolated act of carelessness, negligence or malice, or whether this case is one of many is unclear. The facts suggest there might be systemic issues in foreclosure proceedings in this province.

Foreclosure

Foreclosure is the legal process that enables a financial institution, such as the bank in this case, to either sell or become the owner of their borrower's real property when the borrower, such as the homeowner in this case, defaults on their mortgage. The usual default is failing to make the mortgage payments of principle and interest owed on the money lent by the bank. The bank can act to recover the money it lent and interest and costs as soon as one payment is missed, but usually wait for two to three months, perhaps while trying to reach an agreement with the homeowner.

The legal process for foreclosure is in Part 5 of the *Law of Property Act*, RSA 2000, c. L-7 and the Alberta *Rules of Court*, Alta Reg 124/2010. Applications are usually before a Master in Chambers of the Court of Queen's Bench of Alberta. Masters in Chambers are judicial officers with the authority to hear and decide certain types of applications, appointed under the *Court of Queen's Bench Act*, RSA 2000, c C-31. There are currently twelve Masters in Alberta, six sitting in each of Edmonton and Calgary ("Justices and Masters").

Foreclosures begin with the bank filing and serving a Statement of Claim. The homeowner then has twenty days to file and serve a Statement of Defence or a Demand of Notice. Many homeowners do not defend. The bank then files an Affidavit of Value with an appraisal setting out the current fair market value of the home, and an Affidavit of Default setting out how much is in default, how much is owing on the mortgage, etc. The bank then applies to the court for the remedies that it wants, such as an order for the sale of the home. A good summary of the process can be found in Foreclosure in Alberta, produced by the Centre for Public Legal Education Alberta.

Often the court will grant an order that gives the homeowner a specific period of time to bring the mortgage up to date – the redemption period. That same order will also provide that if the homeowner does not redeem the mortgage by bringing all payments current, then the bank can put the home up for sale by a method specified by the court. That was the type of order the bank was seeking in this case.

The *Law of Property Act* section 41(1)(b) provides that the period of redemption for non-farm land shall be six months. However, the bank may ask the court to decrease that redemption period, as the bank did in this case. The court may do so depending on the factors listed in section 41(2)(b):

> (2) In an action coming under subsection (1), the Court on application may decrease or extend the period of redemption having regard to the following circumstances:
> …
> (b) when the action is in respect of a security on land other than farm land,
> (i) the ability of the debtor to pay,
> (ii) the value of the land including the improvements made on it,
> (iii) whether the land has been abandoned,
> (iv) the nature, extent and value of the security held by the creditor,
> (v) the earning capacity of the debtor, and
> (vi) whether the debtor's failure to pay was due to temporary or permanent unemployment or other conditions beyond the control of the debtor.

The Master's Decision

In this case, the bank was applying to Master W. Scott Schlosser to shorten the redemption period from six months to one day in a foreclosure on a home near St. Paul. The homeowner was not present when the application was made. Master Schlosser heard the application by telephone, as is usual for many applications arising from outside Edmonton and Calgary. The court file was in St. Paul (at para 24).

The fact that this was a telephone application and the court file was not available to the Master was very important, as was the homeowner's absence. In such a situation, the bank's lawyer was "obliged to present both sides of the picture fully, fairly and candidly" (at para 24).

Most of the evidence presented to the Master by the bank's lawyer about the factors in section 41(2)(b) of the *Law of Property Act* was in the Affidavit of Default sworn by one of the bank's Mortgage Administrators in Toronto. That Affidavit stated that the Mortgage Administrator was swearing positively to the facts in the Affidavit (at para 6). In the "entirely self-serving" Affidavit of Default (at para 25), the Mortgage Administrator repeated a generic paragraph from the Statement of Claim, swearing that:

> The Plaintiff says that the default herein of the Defendant has not been due to causes beyond his control and that having regard to the said Defendant's ability to pay and the value of the Plaintiff's security, the period of redemption in the judgment in this action should be shortened. (at para 6)

No source was given for those conclusions or facts, except the value of the home and the amount owing were set out in the Affidavit of Value. Master Schlosser stated that this paragraph of the Affidavit of Default "appears to be false" (at para 8). At best, if the Mortgage Administrator's intention was simply to repeat the paragraph in the Statement of Claim rather than swear to it as a fact, the paragraph "would only be misleading" (at para 9).

For unstated reasons, Master Schlosser obtained and reviewed the court file (at para 1). There were two documents in that court file that had been used to support an earlier application for substitutional service. One was a process server's affidavit which stated only that he had attended at the home once and telephoned once without receiving an answer (at para 10). The second was a legal assistant's affidavit with an occupancy report attached to it. The occupancy report stated:

> On May 23, 2019, our inspector attended to [the residence], County of St. Paul, AB, to complete the requested occupancy check and received no answer at the time of the visit. Property appears to be occupied as a large dog was seen inside of the home and vehicles parked on the property. Our 24hr contact notice has been posted that advises occupants to call our office to confirm occupancy details.
>
> On May 23, 2019, we received a call back from [the homeowner] ... .
>
> He will pay all o/s fees by Tuesday, May 28, 2019.
>
> He was laid off, then was in Europe (his father was sick and then died).
>
> He has a new job and is getting a tax refund soon.
>
> Property is a bungalow and it appears to be in good condition.

As Master Schlosser noted, the evidence on the file was "directly contrary to the Mortgage Administrator's Affidavit of Default" (at para 14). The occupancy report indicated that the default was caused by a temporary inability of the debtor to pay, the land was not abandoned, the earning capacity of the homeowner had been restored, and the homeowner's failure to make mortgage payments was due to temporary unemployment as well as a further condition beyond his control (at para 12). This information was relevant to the factors in subsection 41(2)(b)(i)(iii)(v) and (vi) of the *Law of Property Act*. The bank's lawyer did not bring any of the information in the occupancy report to the Master's attention during the telephone application (at para 12).

There were other problems with the evidence involving subsections 41(2)(b)((ii) and (iv), the factors about the value of the home and the value of the bank's security. The debt on the

mortgage, excluding legal fees, was $142,549.98 as of the date of the bank's application (at para 16). The appraisal in the Affidavit of Value stated the home was worth $165,000 (at para 17).

The bank's lawyer argued that the homeowner's equity of $22,450.02 was, in effect, nothing because there would be more than $10,000 in legal fees and the realtor's commission would be just under $9,000 (at para 18). Master Schlosser held that the legal fees were "grossly over-estimated" because there had only been three other steps in the action, all based on generic documents which were filed by fax, with only one *ex parte* court appearance for the order for substitutional service (at para 19). In addition, although the bank's legal costs in the foreclosure were secured by the mortgage, a realtor's commission was not (at para 21), and there were cheaper ways to sell (at para 20). Even if the legal fees and commission had been legitimate parts of the debt owed to the bank, Master Schlosser did not accept that the $3,500 left over in a "worst-case scenario" would be nothing to a person who had lost their job and was about to lose their home (at para 18).

The bank's application for a one day redemption period was dismissed (at para 1). It was denied with no costs awarded to the bank (at para 27). The evidence on the file indicated the homeowner was entitled to at least a six month redemption period (at para 26). The bank's application was recognized as the type of thing the *Law of Property Act* was designed to prevent (at para 25).

Comments

It seems most likely that the issues in this case, including the false or misleading Affidavit of Default and the failure of the bank's lawyer to present a full and fair account of the situation, were caused by the routinization of foreclosure procedures. The offending paragraph in the Affidavit of Default simply repeated a generic paragraph in the Statement of Claim, without making any reference to the facts of this particular case. Master Schlosser indicated he would be "very surprised" if the Mortgage Administrator in Toronto had "any personal knowledge of these facts whatsoever" (at para 7). The bank had little or no contact with the homeowner (at para 10). The bank's lawyer claimed 17 heads of relief in the Statement of Claim, the vast majority of which were not applicable to this case (at para 23). Master Schlosser called them "generic materials" that gave little notice to the homeowner of what the bank actually wanted, materials that "may as well have been in Latin" (at para 23).

The likelihood of a systemic reduction to routine is also increased by the fact there is little new in the law of foreclosure. Most of the contentious points of law were resolved in the 1980s in Alberta (Alberta Law Reform Institute, *Mortgage Remedies in Alberta*, Final Report No 70 (1994), paras 3.57-3.74). With the law and procedure fairly well settled, concerns for the efficient handling of increasing numbers of foreclosure actions in Alberta might prompt the creation of generic, fill-in-the-blanks documents.

The likely routinization, as well as the facts of this particular case, raises a number of questions.

There is the question of the duties owed by banks and their lawyers. We know the duties of the bank's lawyer, spelled out in the Master's decision (at para 24) and in the Law Society of Alberta *Code of Conduct*, Rule 5.1.1, and commentary 8. And the Law Society of Alberta has a

complaints procedure explained at "Providing Information Concerning a Lawyer." But do the lawyers for foreclosing financial institutions have a duty to dig deeper, to ensure that the generic documents that they are given by their clients match the actual facts of the case?

And what is the duty owed by the bank's Mortgage Administrator? Do those occupying similar positions in financial institutions owe duties to their borrowers in situations such as these? The Mortgage Administrator in this case was based in Toronto. In Ontario, the Financial Services Regulatory Authority licenses and regulates all mortgage brokerages, brokers, agents and administrators in Ontario to ensure compliance with provincial laws (FSRA, "Mortgages"). Banks themselves are overseen by multiple federal regulators, with the Financial Consumer Agency of Canada (FCAC) responsible for consumer protection.

And what about those who hear almost all of the foreclosure actions in Alberta, the Masters in Chambers of the Court of Queen's Bench?

Is the accuracy and fairness of foreclosure proceedings up to Masters in Chambers? Should they require and review the entire court file on every application in a foreclosure proceeding? Should they proceed on the basis that the lawyers are living up to their professional responsibilities? Should they assume the accuracy and truthfulness of sworn Affidavits of Default and other evidence? Or do they need to second guess every application?

Perhaps this one case is an aberration. Perhaps it is the only foreclosure case in which false or misleading evidence was put forward.

But foreclosure proceedings in Alberta have increased recently and continue to increase. The Canadian Bankers Association tracks "Number of Residential Mortgages in Arrears" and the latest statistics from August 31, 2019 indicated that 2,910 mortgages, or 0.50% of all mortgages, were in arrears for three or more months in Alberta. That percentage has been steadily climbing since early 2015.

Is the foreclosure process working? Are the legal protections for homeowners and farmers that successive Alberta governments have for decades been determined to maintain working as intended? Or is the foreclosure process deserving of investigation and further research?

This post may be cited as: Jonnette Watson Hamilton, "Keeping an Eye on Foreclosing Banks" (January 22, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/01/Blog_JWH_Strihavka.pdf