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Bob Aaron *bob@aaron.ca*

December 1, 2007

'Arrogant' bank chastised by judge

Whoever said you can't fight city hall or the big banks never met Brampton lawyer Ken Hood or his clients Mark and Laura McDonald.

When the McDonalds bought their cottage near Kapuskasing some years ago, they took out a personal loan secured by a mortgage with the Canadian Imperial Bank of Commerce.

From 2000 to 2006, the McDonalds diligently made payments on the mortgage in some months making double payments. In September 2006, they inadvertently missed one payment of $385.

Shortly afterward, the bank sued the couple for payment of $41,961.92 on the wrong mortgage the first mortgage on their Brampton home.

Upon being advised that the mortgage had been paid in full prior to the lawsuit, CIBC discontinued its action and had to pay the McDonalds $1,161 in costs.

After receiving the October 2006 payment of $385 on the cottage mortgage, the bank refused to accept any more payments and referred the couple to its lawyers. The McDonalds repeatedly requested a calculation of their loan balance for the period from 2000 to 2006, but were unable to obtain it. Nor were annual statements ever provided to them.

Eventually the bank started a second lawsuit, this time on the cottage mortgage.

In September 2007, Brampton lawyer Edwin Upenieks, counsel for the McDonalds, finally received a statement from Cassels Brock, solicitors for the bank, showing total arrears were $4,647.60 plus legal costs of $10,217.75.

Upenieks then arranged with an employee of Cassels Brock that the mortgage could be brought into good standing upon payment of the mortgage arrears, and the costs issue would be sorted out later.

He immediately couriered $4,700 (which included accumulated interest) to the bank's lawyers, only to have it returned four days later along with a letter stating that the bank would not accept partial payment. A subsequent letter denied that there was an agreement with Upenieks about the court costs. (The figure of $4,700 was a round number as a precaution to cover extra days' interest).

The case came before Justice Douglas K. Gray in Brampton in October. The parties had agreed that the mortgage could be brought into good standing upon payment of $4,879.26, and the McDonalds were prepared to pay the money immediately after the judge's decision.

The only issue in dispute was the matter of legal costs. The bank was seeking a ruling without a trial, based on documentary evidence only. Known as a "summary judgment" request, the bank wanted the borrowers to pay an additional $10,615.50 in costs.

Justice Gray was not impressed with the bank's case. "In my view," he wrote, "the conduct of the bank has been high-handed. To describe it as arrogant is not an overstatement. The uncontradicted evidence is that the cause of the alleged default was the refusal of the bank to accept the McDonalds' payments. Requests for information were ignored, and were met by notices of sale and the commencement of these proceedings ...

"To make matters worse, the Bank reneged on an agreement that it would accept the arrears and try to sort out the matter of costs later."

"If the bank had acted in a more responsible manner," Justice Gray added, "I have no doubt that this litigation would have been entirely avoided ... In my view, not only should the Bank be deprived of its costs, it should pay costs to the defendants."

In the end, the judge ordered the bank to pay the borrowers their court costs of $10,000. Brampton lawyer Ken Hood represented the McDonalds at the hearing. He told me last week that the decision has not been appealed by CIBC.

My advice to clients who have trouble with their banks is to contact the customer care centre, the regional vice-president or the bank's ombudsman.

It's often amazing how quickly problems are resolved when someone up the ladder intervenes.

***Bob Aaron** is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the column archives at www.aaron.ca/columns/toronto-star-index.htm.*

Date: 2007-10-05
Docket: 2014/07
URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii41887/2007canlii41887.html
Reflex Record (noteup and cited decisions)

Noteup

[Search for decisions citing this decision]

COURT FILE NO.: 2014/07

DATE: 20071005

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E EN:	)	
	)	
CANADIAN IMPERIAL BANK OF COMMERCE	)))	Christina Clare, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
MARK McDONALD and LAURA McDONALD	)))	Ken Hood, for the Defendants
	)	
Defendants	))	
	)	
	)	**HEARD:** October 4, 2007

REASONS FOR JUDGMENT

GRAY J.

[1] This is a summary judgment motion on a mortgage. While the mortgage is now technically in default, the parties are agreed on the amount required to bring it into good standing. That amount is $4,879.26. The Defendants have agreed to pay that amount immediately upon receipt of my decision. The only real dispute between the parties is with respect to the matter of costs. The Plaintiff seeks costs on a substantial indemnity basis in the amount of $10,615.50.

[2] For the reasons that follow, the Plaintiff s claim for costs is dismissed, and I award the Defendants costs fixed in the amount of $10,000.

Background

[3] In view of the rather unusual costs order I am making, a somewhat detailed description of the facts is required.

[4] As is often the case on a summary judgment motion, the facts have been presented through affidavit material. In this case, there are four affidavits:

(1) Affidavit of Cynthia Fontecilla, sworn May 18, 2007;

(2) Affidavit of Laura McDonald, sworn July 12, 2007;

(3) Reply Affidavit of Cynthia Fontecilla, sworn September 18, 2007; and

(4) Affidavit of Edwin G. Upenieks, sworn October 2, 2007.

[5] In her first affidavit, Ms. Fontecilla sets out the usual technical details respecting the mortgage itself, its amount, the interest rate, the monthly payments, and its term. She recites that, after default, there was a Notice of Sale, a Statement of Claim, and a Statement of Defence. She sets out the amount claimed to be owing.

[6] With respect to the alleged default under the mortgage, Ms. Fontecilla s affidavit is breathtaking in its simplicity and lack of detail. In paragraph six of her affidavit she states, simply, default in payment of monthly instalments occurred and still continues .

[7] Ms. McDonald is one of the Defendants. In her affidavit which, in many important respects is uncontradicted, she says that she recalls no dealings whatsoever with Ms. Fontecilla. When she inquired at her branch of the CIBC as to why they were refusing to accept the payments, she was directed to speak with Uday Mohaya.

[8] Ms. McDonald swears that this is the second action commenced by the Plaintiff. The first was for the amount of $41,961.92, relating to a mortgage on their home in Brampton. Upon being advised that all payments on the home mortgage had been made in full, the Plaintiff served a Notice of Discontinuance in April 2007, but it was not until several months

later that the Plaintiff paid the costs of the discontinued action. While not overly relevant, it is worth noting that the Defendants offered to settle the costs of that matter upon payment of $500. At the Plaintiff s insistence, the solicitors for the Defendants submitted a detailed invoice for $1,161.60, which was paid on August 1, 2007.

[9] Ms. McDonald swears that the mortgage in the case before me relates to a personal loan for the purchase of a cottage in Moonbeam, Ontario, which is near Kapuskasing. She says the mortgage amounts were originally deducted from her bank account, but thereafter payments were made directly at her CIBC branch. She swears, without contradiction, that throughout the years 2000 to 2006, inclusive, on some occasions more than the minimum amount was paid to pay down the principal amount. She also swears, without contradiction, that despite numerous requests for an accounting or an annual statement, none was ever received.

[10] She also swears, again without contradiction, that commencing after the October 2006 payment in the amount of $385, the Plaintiff refused to accept payments by herself or her husband. She says that notwithstanding repeated requests by the Defendants to accept their payments, the Plaintiff refused to accept any further payments on the basis that the matter was in the lawyer s hands. They received a letter from the Plaintiff s solicitors, dated February 5, 2007, demanding the amount of $41,707.25.

[11] Ms. McDonald and her husband sent a letter on February 19, 2007, to Mr. Mohaya at the Bank, being the person to whom they had been directed to communicate. I will not review the letter in detail. I only mention that the Defendants suggested that the information from the Bank s lawyers was incorrect, that the loan payments have not been correctly applied, and that the loan balance has been incorrectly calculated. They requested a recalculation of payments made from May 6, 2000 until October 6, 2006, and they maintained that annual statements regarding the loan have never been provided.

[12] Ms. McDonald swears, without contradiction, that she and her husband received no response to that letter. Instead, they received a Notice of Sale and two Statements of Claim.

[13] In the penultimate paragraph of her affidavit, Ms. McDonald says, For some reason unbeknownst to us, the Plaintiff has refused to accept our payments and instead, wants this loan to be in default and to take away our cottage. We will pay the arrears owing within seven (7) days of being advised how and where we can make these payments.

[14] In response to Ms. McDonald s affidavit, the reply affidavit of Ms. Fontecilla was delivered. While somewhat more detailed than her first affidavit, it is not overly so.

[15] Ms. Fontecilla does not deny that the Defendants were never provided with an accounting or an annual statement on the loan. Nor does she deny that, after the October 2006 payment, the Bank refused to accept payments. Nor does she deny that, when the Defendants inquired as to why the Bank was refusing to accept payments, they were directed to speak with Uday Mohaya. Nor does she deny that Mr. Mohaya was sent a letter from the Defendants on February 19, 2007. Nor does she explain as to why the Defendants were given no response to that letter.

[16] What Ms. Fontecilla does say is that the Defendants failed to meet their payment obligations in September and November of 2006, and that to date the Plaintiffs [Defendants] continue to be in arrears . The uncontradicted evidence, which she does not deny, is that the reason the Defendants were in arrears is because the Plaintiff refused to accept their payments. There is no explanation as to why the Plaintiff refused to accept the Defendants payments.

[17] The following paragraphs of Ms. Fontecilla s affidavit are reproduced in their entirety:

> 5. Shortly after default occurred, CIBC attempted to contact the plaintiffs to advise of the arrears owing. CIBC attempted to contact the plaintiffs by phone on November 6, 9 and 16, 2006.
>
> 6. Because CIBC did not receive any response, a letter was written to the plaintiffs on November 16, 2006, to advise that CIBC had been attempting to make contact and to quote the past due amount.
>
> 7. Thereafter, on November 23, 2006, CIBC again attempted to contact the plaintiffs by phone. Again, no response was received.
>
> 8. A formal demand for payment in respect of the arrears owing was issued by CIBC on November 30, 2006. At this time, the plaintiffs had been in default for 52 days.
>
> 9. Also, on November 30, 2006, CIBC again tried to contact the plaintiffs by phone and there was no answer.

[18] It is noteworthy that Ms. Fontecilla does not identify the person at CIBC who apparently attempted to contact the Defendants by phone on November 6, 9, 16, 23 and 30. Ms. McDonald was not cross-examined on her affidavit to suggest that any such telephone contact was attempted, or to obtain any explanation from Ms. McDonald. The letters allegedly written on November 16, 2006 and November 30, 2006 are not produced. Once again, there is no acknowledgement that the reason for the default is because the Plaintiff refused to accept the payments.

[19] In his affidavit, sworn October 2, 2007, Mr. Upenieks describes a number of communications he had with the Bank s solicitors. He notes that payment with respect to the costs of the earlier discontinued action was belatedly sent to him on August 1, 2007, with a letter from Cassels Brock of that date. With that letter is also enclosed a Statement History of the loan, consisting of four pages. Mr. Upenieks swears that in discussion with Mr. Ward, of Cassels Brock, it was confirmed that the Defendants would be entitled to either pay the arrears to date so as to bring the mortgage into good standing, or to redeem the mortgage.

[20] The Payment History, enclosed with the letter from Cassels Brock, shows a stream of payments for over six years, commencing in June 2000. The document does show the lack of a payment in September 2006, but it shows a payment in October 2006, and it also discloses that, in many months prior to the month of September 2006, more than one payment is recorded per month.

[21] Mr. Upenieks swears that on August 22, 2007, he spoke by telephone with Christina Clare of Cassels Brock. Ms. Clare indicated to him that she would obtain an arrears statement to the end of August, with accrued interest, and Mr. Upenieks reiterated that his clients would pay those arrears. He swears, without contradiction, that he and Ms. Clare agreed that the parties would then attempt to agree on the legal costs.

[22] Mr. Upenieks swears that he received a faxed letter from Cassels Brock, dated September 14, 2007, confirming that the total current arrears as of that day were $14,865.35, including $10,217.75 for legal fees. As such, the arrears at that time were $4,647.60.

[23] Mr. Upenieks swears, without contradiction, that he spoke by telephone with Christine Clare on September 19, 2007. He indicated that he would be obtaining a cheque in the amount of $4,700 for the arrears, so that the only outstanding matter would be the legal costs. Mr. Upenieks swears, without contradiction, that it was specifically agreed with Ms. Clare that the payment of the arrears, exclusive of costs, would put the mortgage into good standing.

[24] On the same day, namely September 20, 2007, Mr. Upenieks couriered a letter to the Bank s solicitors, enclosing a cheque in the amount of $4,700, payable to C.I.B.C. for the arrears on the mortgage. On the same day, he left a voicemail message with Ms. Clare indicating that his clients cheque had been sent out pursuant to their agreement, and requesting that she call him if the cheque was not received on September 20, 2007.

[25] Mr. Upenieks was, not surpisingly, shocked to receive by courier, on September 25, 2007, a letter from Ms. Clare, dated September 24, 2007 returning the McDonalds cheque in the amount of $4,700. Ms. Clare s letter states that CIBC cannot accept partial payments towards the mortgage debt, and accordingly the cheque in the amount of $4,700 is returned. In her letter, Ms. Clare does not explain how this position is consistent with the agreement that she reached with Mr. Upenieks. In a subsequent letter, dated September 27, 2007, Ms. Clare denies such an agreement was reached. It is noteworthy that that letter was produced by the Defendants, not by the Plaintiff, and that Ms. Clare has not filed an affidavit, under oath, to deny Mr. Upenieks sworn testimony on the point.

[26] Some things must be stressed about the events described in the preceding paragraph. First, it is apparent that, contrary to the agreement reached between Ms. Clare and Mr. Upenieks, the Bank had now reverted to its position that the McDonalds would have to pay the full amount of the disputed amount for costs, as the price of putting the mortgage into good standing. Second, as noted, Ms. Clare did not file an affidavit to deny, under oath, that there was an agreement to the contrary as sworn to by Mr. Upenieks. I draw the appropriate inference.

Disposition

[27] As indicated earlier, there is now no dispute as to the amount of the arrears, and the Defendants have agreed to pay those arrears forthwith. The only remaining issue is the matter of costs.

[28] The Bank seeks costs in the amount of $10,615.50. While not specifically referred to in argument, I assume that the mortgage contains the usual provision requiring the borrower to pay solicitor and client costs, or its modern equivalent, costs on a substantial indemnity basis. Indeed, the costs outline provided by the Plaintiff shows hourly rates being claimed for the various lawyers at the substantial indemnity rate.

[29] Notwithstanding the contractual provision, the Court retains a discretion to award costs on any basis that it considers just. (See *Bosse v. Mastercraft*, [1995] O.J. No. 884 (C.A.), and *Fradell Construction Corp. v. Iori*, [2007] O.J. No. 3305 (S.C.J.)). While the issue in cases such as these is normally whether costs should be awarded on a partial indemnity basis, rather than on a substantial indemnity basis, there is no question that the Court s discretion to award costs is unfettered: (see *Courts of Justice Act*, s. 131). This means that, depending on the circumstances, the plaintiff may be denied costs, or the defendant may be awarded costs.

[30] In my view, the conduct of the Bank in this case has been high-handed. To describe it as arrogant is not an overstatement. The uncontradicted evidence is that the cause of the alleged default was the refusal of the Bank to accept the McDonalds payments. Requests for information were ignored, and were met by Notices of Sale and the commencement of these proceedings. This came hard on the heels of the discontinuance of an earlier mortgage action, and ultimately the late payment of costs for that proceeding. To make matters worse, the Bank reneged on an agreement that it would accept the arrears and try to sort out the matter of costs later.

[31] If the Bank had acted in a more responsible manner, I have no doubt that this litigation would have been entirely avoided. As indicated earlier, the Bank s conduct throughout has been high-handed and arrogant. In my view, not only should the Bank be deprived of its costs, it should pay costs to the Defendants.

[32] In my view, the amount claimed by the Bank as its costs is a useful yardstick as to what is reasonable. The sum of $10,000 is a reasonable amount to be awarded to the Defendants.

Result

[33] Upon the delivery to Cassels Brock, within one week of the date of this Endorsement, of a certified cheque in the amount of $4,879.26, payable to Canadian Imperial Bank of Commerce, this motion for summary judgment, and this action, are dismissed.

[34] The Plaintiff s request for costs of this motion and the action is dismissed. The Plaintiff shall pay to the Defendants, forthwith, their costs of this motion and this action, fixed in the amount of $10,000, all inclusive.

GRAY J.

Released: October 5, 2007

COURT FILE NO.: 2014/07

DATE: 20071005

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Plaintiff

- **and**

MARK McDONALD and LAURA McDONALD

Defendants

REASONS FOR JUDGMENT

GRAY J.

Released: October 5, 2007