

COURT OF APPEAL FOR ONTARIO

CITATION: Bon-Star Inc. v. First National Financial GP Corporation,
2023 ONCA 567
DATE: 20230829
DOCKET: C70078

Simmons, Harvison Young and George JJ.A.

BETWEEN

Bon-Star Inc.

Respondent
(Appellant)

and

First National Financial GP Corporation

Applicant
(Respondent)

Arthur Camporese, for the appellant

David P. Preger and David Z. Seifer, for the respondent

Heard: May 30, 2023

On appeal from the order of Justice Cory A. Gilmore of the Superior Court of Justice, dated November 3, 2021 with reasons reported at 2021 ONSC 7260.

REASONS FOR DECISION

[1] The appellant appeals from an order which declared, among other things, that a mortgage given by the appellant as mortgagor to the respondent as mortgagee is a closed mortgage with no prepayment privileges and that the mortgage cannot be prepaid without compensating the respondent for lost interest through to maturity.

[2] At the conclusion of the appeal hearing, for reasons to follow, we allowed the appeal, in part, to vary the declarations in accordance with terms we had discussed with the parties and to which they did not object, to be set out in our reasons. These are our reasons.

The alleged errors in failing to adjourn the November 1, 2021 hearing date, in requiring the appellant to proceed without counsel on that date, and in unilaterally appointing Mr. Nikolic to act on behalf of the appellant in the absence of a request for that relief by the appellant

[3] The appellant submitted that the application judge erred in refusing its request for a third adjournment of the proceedings, in requiring it to proceed without counsel and in appointing Mr. Nikolic to act on behalf of the corporation for the purposes of the hearing of the application/counter-application without a request for that relief from the appellant. We disagree.

[4] The decision whether to grant an adjournment is a matter of discretion entitled to deference on appeal. These proceedings were set in May 2021 to be

heard in September 2021. As of the September 2021 hearing date, the appellant had not filed any material. The adjournment to October 18, 2021, and a subsequent adjournment to November 1, 2021 were both peremptory on the appellant. The second adjournment was peremptory on the appellant with or without counsel because of an ongoing dispute between the appellant and his then counsel.

[5] Although the application judge's decision not to grant a third adjournment of the November 1, 2021 hearing date meant the appellant was required to proceed without counsel, we are not persuaded that she erred in refusing to grant a further adjournment or in appointing Mr. Nikolic to act for the corporation. As we have said, there had been two prior peremptory adjournments. The application judge was aware of Mr. Nikolic's connection to the corporation. She was also aware that Mr. Nikolic had sworn an affidavit in support of the corporation's position, that his affidavit demonstrated his familiarity with the issues before the court and that former counsel had filed a factum on the appellant's behalf. In the circumstances, appointing Mr. Nikolic to act for the appellant was preferable to having the matter proceed without anyone to speak for the appellant.

[6] That said, we observe that, even if the appellant had succeeded on this ground of appeal, that would not have justified allowing the appeal beyond the extent to which we have allowed it.

The alleged error in entertaining the respondent's request for declaratory relief

[7] Further, we are not satisfied that the application judge erred in entertaining the respondent's request for declaratory relief concerning the terms of the mortgage between the parties.

[8] The appellant did not challenge the propriety of granting declaratory relief in the court below. Rather, the appellant brought a counter-application seeking a declaration concerning amounts owing in the event of a sale of the property subject to the mortgage. Whether there was an existing binding agreement for the sale of the property subject to the mortgage, the appellant had requested a discharge statement for a sale and a dispute existed between the parties concerning whether the subject mortgage could be prepaid and/or prepaid without a penalty.

The terms of the declarations

[9] Although not conceding that such declarations were necessary, at the appeal hearing the appellant did not seriously dispute the propriety of the declarations that insurance coverage placed by the respondent is a recoverable expense under the mortgage and that the mortgage is a closed mortgage. Similarly, subject to the clarification that "with no prepayment privileges" means "no prepayment privileges in favour of the mortgagor", the appellant did not seriously dispute that aspect of the closed mortgage declaration.

[10] The main issue on appeal was therefore the propriety of the declaration that the mortgage “cannot be prepaid without compensating the [respondent] for lost interest through to maturity.”

[11] We agree that the application judge erred in making that broad declaration. For example, the mortgage contains a clause (the “Due on Sale” clause) permitting the respondent, at its option, to accelerate the balance owing under the mortgage, together with interest to the payment date, in the event the appellant sells the property subject to the mortgage without the respondent’s consent. Whether the appellant could ever prepay the mortgage without paying an interest penalty would depend on the circumstances then existing, the specific terms of the mortgage at issue and the negotiating positions of the parties.

Disposition

[12] Based on the foregoing reasons, paragraphs 1 and 2 of the formal order in this matter are varied to read as follows:

1.THIS COURT ORDERS AND DECLARES that the Mortgage is a closed mortgage with no prepayment privileges in favour of the Respondent Mortgagor.

2.THIS COURT ORDERS AND DECLARES that in relation to the transaction for which the Mortgagor had requested a discharge statement, and for which the Mortgagee had not invoked the “Due on Sale” clause as of the date of this application, the Mortgagor was not entitled to prepay the Mortgage without compensating the Mortgagee for lost interest through to maturity in accordance with the terms of the Mortgage.

[13] The balance of the appeal is dismissed.

[14] As the application was made necessary by the conduct of the appellant mortgagor and as the respondent mortgagee has been substantially but not completely successful on both the appeal and the application, costs of the appeal are to the respondent mortgagee on a partial indemnity scale fixed in the amount of \$20,000 inclusive of disbursements and HST and the costs ordered below are varied to a total of \$20,000 in favour of the respondent mortgagee.

“Janet Simmons J.A.”

“A. Harvison Young J.A.”

“J. George J.A.”