Federal Court

Cour fédérale

Date: 20151026

Docket: T-456-15

Citation: 2015 FC 1207

Ottawa, Ontario, October 26, 2015

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM*

BETWEEN:

NATIONAL BANK OF CANADA

Plaintiff

and

**DONALD BURNS ROGERS,
JANICE MARILYN ROGERS, AND
THE OWNERS AND ALL OTHERS
INTERESTED IN THE SHIP "KICK AFT"**

Defendants

STEVEN CRATE

Third Party

JUDGMENT AND REASONS

[1] The National Bank has moved for summary judgment *in rem* against the yacht "Kick Aft" and *in personam* against her owners, Donald and Janice Rogers. The basis of the action is that after five years of making monthly payments Mr. and Mrs. Rogers defaulted on a loan used to purchase the Kick Aft, a loan secured by the first, and only, registered mortgage thereon.

[2] In the *in rem* portion of the action, the Kick Aft has been arrested and an order for her sale issued. The acting marshal in admiralty has not yet come to the Court with an offer in hand.

[3] The Rogers deny liability, and more to the point on this motion submit that the dispute cannot be resolved without a full trial. The thrust of their defence is that they are not liable because as assignee of the sales contract the Bank is liable for the Kick Aft's many deficiencies and is bound by the actions of the vendor of the Kick Aft, Crate Marine Sales Limited, or its principal, Steven Crate, both of whom were agents for the bank. These are crucial credibility issues which can only be decided by a trier of fact. They allege that they owe nothing on the loan. Even if they are wrong on these points, they submit that the motion is premature in that the Kick Aft should be sold before such personal liability as they may have can be determined.

[4] Although the plight in which the Rogers find themselves is lamentable, and although they may be entitled to contribution or indemnity from Steven Crate (Crate Marine is bankrupt), neither Mr. Crate nor his company had actual or apparent authority to bind the bank. The loan is in default. The Rogers have no viable defence. They are attempting to delay the inevitable. The bank is entitled to judgment now.

I. Summary Judgment

[5] The rules pertaining to summary judgment are set out in Rules 413 and following of the *Federal Courts Rules*. The test is whether the case is so doubtful that it does not deserve consideration by a trier of fact at a future trial (*Canada (MCI) v Houchaine*, 2014 FC 342). Both sides must file such evidence as is reasonably available to them which could assist the Court in determining if there is a germane issue for trial. It is not enough to rest on pleadings (*Kanematsu GmbH v Acadia Shipbrokers Ltd*, (2000), 259 NR 201, [2000] FCJ No 978 (QL)).

[6] Summary judgment is but one of several means at the Court's disposal to control its own process and to carefully husband a non-renewal resource: courtroom time. A case which is almost nearly always cited is the decision of Madam Justice Tremblay-Lamer in *Granville Shipping Co v Pegasus Lines Ltd S/A*, [1996] 2 FC 853, [1996] FCJ No 481 (QL). Is this case so doubtful that it deserves no further consideration? If there are relevant disputed questions of fact where credibility is in issue, the matter should be allowed to continue. Although the Rogers submit that there are credibility issues, they are not, in my opinion, germane.

[7] In this case there is no ambiguity, so that it is not necessary to draw a line between those cases which should go on and those which should be decided summarily. The evidence filed permits me to make the necessary findings of fact. The legal principles are not in doubt (*Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87).

II. The Facts

[8] This case turns on the following documents:

a. a Merchant Financing Program Agreement between the Bank and Crate Marine Sales Ltd.;

b. a Conditional Sale contract between Crate Marine Sales Ltd as seller and Mr. and Mrs. Rogers as buyers;

c. a Marine Credit Commitment agreement with respect to a Marine Mortgage between the Rogers and the Bank; and

d. a Marine Credit-Ownership Agreement between the Rogers and the Bank.

In addition, there are facts known to the Rogers but not known to the Bank which, even taking Mr. Rogers at his word, led him to erroneous conclusions.

[9] The Bank's evidence consists of the affidavit evidence of Linda Walker, Raymond Hébert and Jean-Guy Sabourin. Only Ms. Walker was cross-examined.

[10] Ms. Walker is the manager at the Bank's Oshawa Branch. She was not at that branch when the loan was made and, although she has access to the Bank's records, had no personal involvement until the loan came up for renewal in January of this year, and the missed payment the following month.

[11] Raymond Hébert is a marine adviser whose company is retained by the Bank from time to time, including this time, to attend to the registration of ships and mortgages thereon.

[12] Jean-Guy Sabourin is a security investigator at the Bank. He interviewed the defendant Donald Rogers on 24 February 2015, after the loan fell into default.

[13] The defendants' evidence consists of the affidavit of Donald Rogers and the cross-examination thereon.

[14] Many of the facts are not in dispute, or at least cannot be contradicted. Let us begin with Mr. Rogers.

A. *The Rogers*

[15] Mr. and Mrs. Rogers were interested in acquiring a new yacht. They approached Crate Marine Sales Ltd., from whom they had previously purchased such a craft. The company's president, Steven Crate, brought them to the Toronto Boat Show in January 2010.

[16] They agreed to purchase a yacht manufactured in the United States by Cruisers Yachts, a division of KCS International. It is unclear whether they bought the yacht on display. Even if so, it was not fully outfitted and surveyed.

[17] The purchase price was $924,914.97. The Rogers traded in their existing yacht for which they were given credit of $149,734.58, and in addition paid $100,000 in cash. This left a balance of $675,180.20 to be financed. The sale was evidenced by a conditional sales contract to which the Bank was not party and of which it apparently had no knowledge. This contract is not

relevant as it was replaced shortly thereafter by another conditional sales contract on the National Bank's own form.

[18] In order to finance the balance of the purchase price, the Rogers took advantage of a facility Crate Marine had with the Bank, the details of which were never disclosed to them. Be that as it may, the principal of Crate Marine, Steven Crate, collected financial information from the Rogers which was passed on to the Bank. The loan was approved. On 22 January 2010, they signed a conditional sales contract on the National Bank's own form. It shows Crate Marine as the vendor and Mr. and Mrs. Rogers as the buyers. However, there was an error in the contract in that the manufacturer was shown as Carver rather than Cruisers. Consequently, the agreement was re-signed on 1 February 2010.

[19] More will be said about this conditional sales contract which was on the National Bank's own form. The interest rate was 5.99% per annum on a five-year renewable term. Blended payments of principal and interest of $4,834.54 were to be made monthly. This contract was assigned by Crate Marine to the Bank, which leads to the Rogers' submission that they can set up the Kick Aft's many deficiencies against the Bank.

[20] On or about 23 February 2010, the Bank advanced the balance of price to Crate Marine.

[21] Monthly payments on the loan were made to the Bank through the Rogers account, without fail until February 2015.

[22] In May 2010, the Rogers took delivery of the Kick Aft. The only evidence is that she turned out to be grossly deficient. The Rogers complained bitterly to Crate Marine, but said nothing to the Bank.

[23] By 31 August 2010, Mr. Crate wrote to the Rogers to say that Crate Marine and KCS International would replace the Kick Aft at no additional charge, delivery to be on or before 15 April 2011.

[24] In October 2010, the Rogers delivered the Kick Aft to Crate Marine. Mr. Rogers suggests this was a surrender, not merely a winter lay-up.

[25] In November 2010, the ship and the mortgage were finally registered in Toronto. In order to obtain registration, various photographs of the Kick Aft had to be submitted to the registrar. On 12 November 2010, Mr. Rogers provided the final photo to Mr. Hébert's company. It was only at this time that Mr. Rogers decided that the yacht would be known as the Kick Aft.

[26] On 16 November 2010, the Kick Aft and the mortgage were registered.

[27] On 26 October 2011, Crate Marine purported to sell the Kick Aft to Ivan Dailey for $520,000. This sale was never registered, and the National Bank's mortgage remains on the books. The Bank had no knowledge of this purported sale.

[28] The relationship between the Rogers and Crate Marine went from bad to worse. Mr. Rogers insisted that Crate Marine make the monthly payments on the loan. The evidence is that it, or Steven Crate, gave the money to the Rogers who put it into their own account from which payments were made to the Bank. The Bank had no knowledge that the money emanated from Crate Marine or Mr. Crate.

[29] Suffice it to say that the Rogers never got their replacement yacht or any portion of the proceeds of the sale to Mr. Dailey, apart from the monthly payments on the loan. Crate Marine went into bankruptcy last year.

[30] In January of this year, the Bank's Ms. Walker telephoned to Mr. Rogers to point out that the loan was coming up for renewal in February. Mr. Rogers made no mention that the mortgage payments were in fact being made by Crate Marine, that the ship was defective and had been sold. The monthly payment due 2 February 2015 was not made. The following day Mr. Rogers telephoned Ms. Walker. He then came in to reveal the sorry tale.

III. Analysis

[31] The defendants' position that, in any event, the motion for summary judgment is premature because the Bank has not yet sold the Kick Aft is not correct in law. They refer to the decision of the Ontario Court of Appeal in *Manufacturers Life Insurance Company v Granada Investments Ltd*, [2001] OJ No 3932, 150 OAC 253, as authority for the proposition that a mortgagee in possession is obliged to sell at the best possible price. However, a mortgage on real estate cannot be equated to a mortgage on a ship.

[32] The Bank was under no obligation to institute an action *in rem*. It could simply have sued *in personam*. If its debt was paid in full, it would have had to discharge the mortgage.

[33] Having decided to take an action *in rem*, it was under no obligation to arrest the Kick Aft. The action *in rem* was perfected by service of the Statement of Claim *in rem*. Although service thereof is usually accompanied by service of a warrant for arrest, the Kick Aft need not have been arrested. Furthermore, the arrest did not put the Bank in possession (rule 483 of the *Federal Courts Rules*). The Rogers could have obtained the release of the Kick Aft from her arrest by posting bail (rule 485 and following of the *Federal Courts Rules*).

[34] It is the Court which sells the ship, not the mortgage creditor. The sale is not simply of the defendants' interest in the *res*, but is a sale of the ship itself, which is a reflection of admiralty's civilian roots. The sale gives the buyer title free of all liens and encumbrances. The purchase price is deposited into court and then distributed to the claimants in accordance with their priorities, if any. Only two parties have filed claims, the Bank and Mr. Dailey.

[35] Turning now to the merits of the defence, Crate Marine and Mr. Crate had no actual authority to act as the Bank's agent, and no reasonable person could possibly believe that they had ostensible authority.

[36] As to actual authority, the arrangement between Crate Marine and the Bank, which was never shown to the Rogers, makes it abundantly clear that no agency relationship was created.

[37] The submission that Crate Marine and Mr. Crate had ostensible authority is based on the fact that Mr. Crate collected financial information from the Rogers which was passed on to the Bank, and which ultimately led to the loan.

[38] Leaving aside the fact that Mr. Rogers himself is a retired banker, the collection of financial information, even via a mortgage broker, cannot lead to the conclusion that an agency relationship existed, much less serves as evidence as to the extent of that agency (*Xceed Mortgage Corporation v Wood*, [2007] OJ No 3703, 160 ACWS (3d) 623 (ONSC)).

[39] It seems to me that the Bank put itself at risk by taking an assignment of the contract between Crate Marine and the Rogers. It ran the risk that the Kick Aft might not have been fit for its intended purpose, and that this fact could be raised against it. It is a general principle that a defendant may raise against the assignee all the defences which could have been raised against the assignor (*NOV Downhole Eurasia Ltd v TLL Oil Field Consulting*, 2014 FC 889, affirmed 2015 FCA 106 on an unrelated issue; and *Springfield Fire & Marine Insurance Co v Maxim*, [1946] SCR 604).

[40] However, the Bank contracted out of this risk. Clause 12 provides that the buyer agrees that the property was sold without any warranty whatsoever other than those, if any, made by the seller or the manufacturer. The Rogers acknowledged that the Bank had not provided any warranties and would not be liable for any defect in the ship or any failure on the part of the seller or the manufacturer to comply with any warranty or obligation.

[41] The contract was governed by the law of the province in which the sale took place, in this case Ontario.

[42] Sections 51 and 53 of the *Sales of Goods Act*, RSO 1990, c S.1, provide that the buyer may maintain an action against the seller or set up in breach of warranty the diminution or extinction of the price. However, rights, duties and liabilities may be negated by express agreement.

[43] Canadian Maritime Law includes the laws administered by the admiralty courts in England up to 1934, subject to subsequent developments by Canadian statute or case law (*ITO-International Terminal Operators v Miida Electronic Ltd*, [1986] 1 SCR 752). That law included the *(UK) Sales of Goods Act* (*Ultramar Canada Inc v Mutual Marine Office Inc*, [1995] 1 FC 341 (the Pointe Levy)). However, Canadian Maritime Law includes conflict of law rules so that parties may stipulate another law; in this case that of Ontario (*Tropwood A.G. v Sivaco Wire and Nail Co*, [1979] 2 SCR 157).

[44] The Marine Credit Commitment Agreement with respect to a Marine Mortgage is undated but according to Mr. Rogers was signed 1 February 2010. In that agreement, the Rogers were to provide the Bank with all necessary documents to register the ship and mortgage. That agreement was governed by the laws of Canada and, in so far as applicable, the laws of the province in which it was deemed to have been signed. Ship mortgages are governed by Canadian maritime law.

[45] According to Mr. Rogers, the Marine Credit-Ownership Agreement was also signed 1 February 2010. However, it was forward dated to 16 November 2010, to coincide with the actual registration of the ship. Nothing turns on this save that the Bank was at risk for several months in that it held an unregistered mortgage on an unregistered ship.

[46] The Rogers' defence simply does not stand up to analysis. Apart from the contracts they signed, which are perfectly clear, it makes no sense whatsoever that the Bank was able to debit the monthly payments on the mortgage up to and including January 2015, notwithstanding Mr. Rogers position that he surrendered the Kick Aft to Crate Marine in October 2010, after it had agreed to swap the Kick Aft for another yacht. If they thought Crate Marine and Mr. Crate were agents of the Bank, it makes no sense whatsoever to accept monthly cheques from them and to deposit them into their account so that the mortgage could be kept up to date. If they thought they had a claim against the Bank, they should have stopped payments.

[47] If Mr. Rogers really believed that by redelivering the Kick Aft to Crate Marine in October 2010 he brought their obligations to an end, he would not have cooperated with the Bank the following month by providing the last photo required in order to have the yacht and the mortgage registered, and would not have named the yacht the Kick Aft. The only conclusion is that Mr. Rogers knew perfectly well that he was dealing with Crate Marine as seller, not as the Bank's agent. Indeed, the Bank was kept in the dark.

[48] Mr. Crate assured the Rogers in writing that the manufacturer and Crate Marine would provide a replacement yacht. No mention whatsoever was made of the Bank. As Mr. Rogers emailed Mr. Crate on 14 April 2014:

> Steven
> As you can appreciate we are getting upset about payment of the loan.
> This will shortly be out of my hands and I will be forced to advise BMO the boat is sold by Crates and the loan not repaid. Counsel has confirmed that the ships mortgage is in fact valid and in effect. As such BMO will look to recover the boat and pursue Jan and I for payment.
> This mess is absolutely destroying my life.
> Please do not put me in a corner where it becomes necessary to take steps to protect myself.

[49] In his affidavit, Mr. Rogers states that this was a reference to the National Bank. "BMO" is clearly a clerical error. The Bank of Montreal had financed their earlier yacht.

[50] At the hearing, I requested an update on the loan. According to an affidavit filed by Christine Rettie, a National Bank Branch Manager, as of 2 January 2015, the date of the last mortgage payment, the balance owing in principal was $575,363.52. Thereafter, interest accrues at 5.99% per annum which works out to $94.42 per day. Thus, the amount owing in principal and interest as of this judgment date, 26 October 2015, is $603,406.26. The Bank shall have judgment in that amount.

[51] The Court has discretion with respect to post-judgment interest (s 36(7) of the *Federal Courts Act*), notwithstanding what rate may have been stipulated by contract. Given that the only other alleged creditor who has come forward is Mr. Dailey who, at best, bought a yacht on which

there was a registered mortgage, there is no reason why post-judgment interest should not also bear the same rate of 5.99% per annum.

IV. Costs

[52] The contractual documents deal with costs, which nevertheless remain in the Court's discretion. The Bank shall have 15 days herefrom to either inform the Court that costs have been agreed or to move for directions.

V. Style of Cause

[53] The style of cause shall be amended to add Steven Crate as a third party to reflect Prothonotary Aalto's oral direction, dated 29 May 2015, granting leave to the Rogers to file a third party claim.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. The plaintiff's action is maintained.

2. The plaintiff is granted judgment against Donald Burns Rogers and Janice Marilyn Rogers *in personam* and *in rem* against the ship Kick Aft in the amount of $603,406.26 with post-judgment interest on that amount from 27 October 2015 until payment, calculated at 5.99% per annum.

3. Prothonotary Aalto's order of the sale of the Kick Aft, dated 22 May 2015, remains in place.

4. Costs may be spoken to in accordance with reasons given.

5. The style of cause is amended herewith to add Steven Crate as third party.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-456-15
STYLE OF CAUSE:	NATIONAL BANK OF CANADA v. DONALD BURNS ROGERS ET AL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 24, 2015
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	OCTOBER 26, 2015

APPEARANCES:

Michael S. Myers Michael Hackl	FOR THE PLAINTIFF
Christopher J. Cosgriffe	FOR THE DEFENDANTS
No one appeared	FOR THE THIRD PARTY

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