KING'S BENCH FOR SASKATCHEWAN

Citation: **2026 SKKB 55**

Date: **2026 03 12**
Docket: KBG-MF-00068-2023
Judicial Centre: Melfort

BETWEEN:

AFFINITY CREDIT UNION 2013

Plaintiff

- and -

BENJAMIN WAYNE SMIROLDO

Defendant

Appearances:

Jeffrey D. Kerr	for the plaintiff
Benjamin Wayne Smiroldo	on his own behalf

FIAT — DANYLIUK J.
March 12, 2026

Introduction

[1] The plaintiff seeks an order nisi for sale by judicial listing. However, the plaintiff has a significant problem with its application: the defendant has served and filed a statement of defence and counterclaim.

[2] For the reasons set out below, I cannot grant the plaintiff's application at

this time. I have concluded I must dismiss the application without prejudice to the plaintiff to bring it again. I am also of the view that some sort of prior application is required, although it will be up to the plaintiff to determine exactly what type of application to bring.

Facts

[3] On September 7, 2021 the defendant [Smiroldo] granted a mortgage in favour of the plaintiff [Credit Union] to secure a $200,000.00 loan. The mortgage matured August 1, 2023. The last payment Smiroldo made was $197.00 on August 18, 2023. The value of the land, according to the Credit Union, is $370,000.00 and the land is occupied by Smiroldo.

[4] At present there is over $206,000 owing in total, with arrears of $34,546.40 and unpaid land taxes of $2,671.99. The mortgage was not obtained to finance the purchase price of the land so the Credit Union intends to pursue a deficiency judgment. There is a subsequent mortgage against title.

[5] In the fall of 2023 the Credit Union brought an application for leave to commence an action for foreclosure and related relief pursuant to the provisions of *The Land Contracts (Actions) Act, 2018*, SS 2018, c L-3.001 [*LCAA*]. The Credit Union says there was nothing to even suggest this land was used for agricultural purposes. In fact, on September 7, 2021 as part of the mortgage loan documentation Smiroldo signed a solemn declaration in which he indicated he was not using the land for significant agricultural purposes, and that he was confirming this was a "non-agricultural mortgage".

[6] It was during these initial leave appearances that Smiroldo first raised the contention that he was a farmer and was using the subject land for agricultural purposes. Leave to commence the action was granted on April 9, 2024 but the statement of claim

could not be issued for 60 days. The claim was issued July 8, 2024 and was personally served upon Smiroldo on July 13, 2024. He did not defend and was noted for default on August 6, 2024.

[7] Smiroldo subsequently applied to set aside the noting. The Credit Union did not oppose and it was opened up on October 15, 2024. Time passed and Smiroldo did not defend, so the Credit Union again noted him for default on February 21, 2025. Smiroldo applied to set aside that noting and obtained such an order on April 1, 2025. That order provided that Smiroldo had to serve and file his defence and counterclaim by April 11, 2025. Smiroldo did so on April 1, 2025. The Credit Union provided a defence to the counterclaim.

[8] In early May 2025 Smiroldo served a 26-paragraph notice to admit facts on the Credit Union, which admitted a few facts but not many.

[9] In early January 2026 the Credit Union brought this application for an order nisi for sale by judicial listing. That application came before me on February 24, 2026, the scheduled return date. I heard submissions and reserved my decision. I also granted leave to the parties to file any cases or other legal authorities, provided this was done by the close of business on February 26, 2026.

[10] For some reason Smiroldo filed a chambers appearance memorandum (which was late) and an affidavit regarding mediation, which was not properly filed. The extension of time was to address legal concerns. The time for filing evidence had passed. I have disregarded the affidavit in its entirety. While Smiroldo is free to represent himself in these proceedings, he must comply with *The King's Bench Rules* as well as all other practices of this Court. He cannot file whatever he wants, whenever he wants.

[11] The Credit Union did not file any further material.

Issue

[12] The issue in this application is:

1. Given that there is a defence and counterclaim filed, can the plaintiff obtain an order nisi in this matter?

Analysis

1. Given that there is a defence and counterclaim filed, can the plaintiff obtain an order nisi in this matter?

[13] It is difficult to understand how the Credit Union would think it could obtain a judgment against the defendant with a defence and counterclaim filed. This is especially true where the defence alleges Smiroldo has the status of farmer therefore the Credit Union has used the wrong process to obtain leave and launch this action. If Smiroldo is correct, this goes to the Court's jurisdiction and the entire action may be a nullity.

[14] For example see *Royal Bank of Canada v Toews*, 2007 SKQB 142. This was primarily a case about costs but a reading of the full decision reveals that before the bank could proceed to complete its foreclosure (specifically, obtain order nisi) it had to strike out the statement of defence.

[15] Similarly see *Toronto Dominion Bank v Mitchelson*, 2015 SKQB 305, where the plaintiff simultaneously applied for an order striking the claim, summary judgment, and an order nisi. Implicit in the judgment is that the plaintiff bank needed to do something with the statement of defence before seeking its remedy, which was the order nisi.

[16] More directly on point is *Royal Bank of Canada v Kadziolka*, 1996 CanLII 7118, 146 Sask R 98 (SKQB). There, the bank obtained leave to commence its

action under *The Land Contracts (Actions) Act*, RSS 1978, c L-3 (since rep). The defendants' statement of defence pled this was farm land and the plaintiff had failed to comply with *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1 [*SFSA*]. Just before trial the plaintiff wished to discontinue. Noble J. allowed the withdrawal of the claim but ordered costs against the plaintiff. He noted the information that this was farm land was available to the bank all along, which may be a factual distinction from the case herein – although Smiroldo has asserted his status as a farmer throughout this action. Still, *Kadziolka* supports the proposition there is an arguable issue for trial, especially in light of authorities which take "a relatively broad interpretation of these terms": *Primewest Mortgage Investment Corporation v Waynert*, 2017 SKQB 360 at para 43, per Elson J.

[17] A like result pertained in *Bank of Nova Scotia v Comeault*, 1998 CanLII 13390, 166 Sask R 219 (SKQB). There the mortgagors defended on the basis that leave had been obtained under the *LCAA* when it should have been under the *SFSA*. At para. 13 Justice Pritchard noted:

> [13] As the history of these proceedings show, the Bank has been aware since February 24, 1995, of Comeault's position that the lands are farmland as defined under the *SFSA* . Although there was no obligation on the Bank to proceed other than it has, given its knowledge of Comeault's position and of the circumstances under which it obtained the October 11, 1994 order, it must have known that it was at all times running the risk that an application of this kind might be successfully made.

[18] While the statement of defence in this case is not exactly an elegant pleading, it raises issues that cannot be ignored. Most importantly the defendant asserts his status as a farmer which potentially invokes the operation of the *SFSA.* If the Credit Union has obtained leave under the wrong legislation the action is a nullity.

[19] Further, it is no answer from the Credit Union that Smiroldo has raised this issue late in the proceedings. Smiroldo has been steadfast in asserting his status as

a farmer. In *Toronto-Dominion Bank v Beisel*, 1987 CanLII 4667, 61 Sask R 40 (SKCA), the creditor's assertion that the mortgagor ought to have raised this issue earlier was rejected.

[20] Also see *United Enterprises Ltd. v Bronze Motor Inn Ltd.*, 1987 CanLII 4500, 63 Sask R 244 (SKQB). There, a waiver of the appropriate legislation was secured but not respecting every defendant. The net effect of failing to obtain leave was that the creditor had to start over, even though the matter had proceeded to trial.

[21] When a loan is secured by a mortgage over farm land, compliance with the *SFSA* is mandatory. See *Royal Bank v Ouellette*, 1990 CanLII 7668, 87 Sask R 78 (SKCA).

[22] I also have referred to *Nipawin Credit Union Ltd. v Anklovitch*, 2001 SKQB 119. There it was held at para. 17:

> [17] In my opinion, the *Act* is to be strictly construed. A mortgagor is entitled to require that there be compliance with the legislation. In this instance that has not occurred with respect to the estate. That being so, the estate has a valid objection and the notice is held to be ineffective in relation to it.

[23] The issue in the case at bar was also squarely in issue in *Royal Bank v Hamilton*, 2010 SKQB 130. There the issue was explained in para. 1:

> [1] … The issue at hand is whether or not any or all of the lands contained in the parcel subject to the mortgage are farm lands and whether or not Mr. Hamilton is a farmer who is farming these lands such that they would be subject to the provisions of [the *SFSA*].

Justice Konkin determined the defendant was, in fact, a farmer within the meaning of the *SFSA* and dismissed the bank's application for leave.

[24] *Hamilton* was applied by Justice Schwann (as she then was) in *Wells*

Fargo Financial Corporation Canada v Anakaer, 2013 SKQB 210. She concluded (paras. 50 to 53) that the debtor in that case was a farmer within the meaning of the *SFSA.*

[25] As can be readily seen, there are arguments that must be dealt with. I emphasize I am not deciding any of them now. Rather, I have reviewed these authorities in an effort to determine whether I can give effect to the Credit Union's assertions that the statement of defence and counterclaim are so devoid of merit that I can simply ignore them and award judgment to the Credit Union in the form of an order nisi for sale. I cannot do this. There are sufficient issues raised in the pleadings to warrant an application to strike or a summary judgment application.

Conclusion

[26] The Credit Union is not entitled to seek its remedy without first having established jurisdiction and liability. Smiroldo's defence and counterclaim cannot be ignored and must be dealt with according to law. There are no shortcuts available to the Credit Union.

[27] Accordingly I dismiss the application for order nisi for sale by judicial listing, without prejudice to the Credit Union to bring such an application at some later date should the matters raised in the pleadings be adjudicated.

[28] In the circumstances I make no order as to costs. Should the Credit Union wish to take out a formal order pursuant to this fiat, Rule 10-4 of *The King's Bench Rules* is waived.

"R.W. Danyliuk" J.
R.W. DANYLIUK