KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 83**

Date: **2024 05 10**
Docket: KBG-SA-00785-2023
Judicial Centre: Saskatoon

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BETWEEN:

THE BANK OF NOVA SCOTIA

Plaintiff

- and -

DARRELL LAVIGNE

Defendant

Counsel:

Graham E. Quick	for the plaintiff, The Bank of Nova Scotia
no one appearing	for the defendant, Darrell Lavigne

DECISION GERECKE J.
May 10, 2024

INTRODUCTION

[1] Valuation evidence is important to a mortgagee's application for an order *nisi*, whether for sale or foreclosure. This is not new.

[2] Any sale application requires the Court to determine an upset price. If it is set too high, a property might go months without offers. If the upset price is too low on a sale through realtor, the mortgagor may be severely prejudiced because the sale

price may be lower than it could have been, which can result in an increased deficiency or, no less pernicious, eat into the mortgagor's equity in the property.

[3] Properly supported and admissible valuation evidence is critical to the Court's ability to determine upset prices. Without it, the Court can do little more than guess.

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[4] In the main, the Court receives two main variants of valuation evidence in residential mortgage enforcement [foreclosure] matters: formal appraisals by appraisers certified by the Appraisal Institute of Canada, and "Comparative Market Analysis" reports [CMAs] prepared by realtors. At times, the Court receives drive-by appraisals and drive-by CMAs where the residence's interior has not been inspected.

[5] The evidence of value is mainly used in three ways in a foreclosure matter:

a. to determine whether to grant leave to commence the action under *The Land Contracts (Actions) Act, 2018*, SS 2018, c L-3.001;

b. on an application for order *nisi* for foreclosure, to determine whether there is sufficient equity to justify requiring the mortgagee to proceed by sale rather than foreclosure; and

c. on an application for order *nisi* for sale, to set the upset price, below which the mortgagee is not authorized to sell the property.

[6] Valuation evidence, as it attempts to forecast what a willing buyer would pay based on recent and relevant sales data, is opinion evidence. Increasingly, however, lawyers for mortgagees ignore the requirements for admission of opinion evidence on foreclosure matters.

[7] This is an application for Order *Nisi* for Sale by Real Estate Listing.

Whether through inadvertence or otherwise, the valuation evidence filed on behalf of the bank is unsatisfactory. As a result, the plaintiff's application is dismissed, with leave to re-file on appropriate valuation evidence. My reasons follow.

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ANALYSIS

[8] Lawyers who focus on foreclosure practice deal with many files at a time. For them, such applications are routine. However, those same matters can involve the highest of stakes for each mortgagor whose home is subject to foreclosure. For many mortgagors, home equity represents much of their accumulated wealth. For others, a deficiency judgment would represent crippling debt. To those individuals and families, the price at which their home is sold in mortgage enforcement is far more than a trifling number.

[9] Most mortgage lenders and their counsel possess a massive advantage in foreclosure matters. Mortgagors lack knowledge of the process. They have little or no bargaining power. Many are filled with anxiety or outright fear, to the point where some who are behind on mortgage payments (unwisely) fail to open important letters from their lenders. Most mortgagors are unrepresented and entirely unsophisticated as to foreclosure practice. Frequently they can only speculate about their home's value.

[10] The responsibility of protecting the interests of mortgagors therefore rests principally on the Court. Arising from the dynamic I describe above, mortgagees and their lawyers also bear responsibility in such proceedings to conduct themselves transparently and reasonably.

[11] Again, none of this is new. Nearly a century ago, in *Bank of Toronto v Matheson*, [1928] 2 DLR 991 at 992 (Sask KB), this Court stated:

> Undoubtedly a sale is one of the rights of a mortgagee. He is entitled to realize his debt, or as much of it as he can, out of the property by a sale. It is difficult to understand why he should be

> hampered by the fixing of an arbitrary reserve bid which, in practically all cases, would result in an abortive sale. It is the duty of the Court to see that the sale is conducted fairly and openly under reasonable conditions, and fairly advertised. …
>
> [Emphasis added]

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[12] Consider also the following discussion of the Court of Appeal in *Saskatoon Credit Union Ltd. v Goertz*, [1989] 3 WWR 244 (Sask CA):

> [34] The general principle governing the upset price or reserve bid under s. 5 has been touched on above: the amount fixed by the judge must be a reasonable price, that is, as near the fair market value as is possible to be obtained at a forced sale. Since the judge did not fix a reserve bid and since this case must be remitted to the court below for up-to-date evidence as to present value of the property, prevailing market conditions and all other relevant factors before a reserve bid can be fixed, it is inappropriate to attempt any more than a very general statement of principle. Since s. 5 applies only to sales at the request of the mortgagee, it was obviously enacted to protect the interest of the mortgagor. Whether the land is worth more or less than the amount owing, it will always be in the best interest of the mortgagor that the land not be sold at a price far below its real value, always a possibility at a forced sale. Thus, the primary responsibility of the judge must be to ensure that the best possible price will be obtained for the land.
>
> [Emphasis added]

[13] If the logic and history I set out above are not sufficient, one need only review this Court's foreclosure jurisprudence from the past few years. The principles established by this Court include the following:

a. Judicial sale is an equitable remedy subject to supervision by the Court: *The Toronto-Dominion Bank v Gibbs*, 2019 SKCA 57 at para 49, [2019] 12 WWR 71, and *Manulife Bank of Canada v Holmes*, 2023 SKKB 105 at paras 14-15 [*Manulife*].

b. The value of property under foreclosure is an important consideration: *Huron & Erie Mortgage Corporation v Chambers*, (1943), [1944] 1 DLR 131 (Sask CA), cited at *Royal Bank of Canada v Pearl Boutique Ltd.*,

2020 SKQB 106 at para 47.

c. Valuation evidence is opinion evidence. Opinion evidence is generally accepted only from witnesses or deponents with expert credentials. For the Court to accept opinion evidence, counsel must establish that the purported expert understands and abides by the duties that bind expert witnesses: *CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118 at para 45 [*Taylor*]. Although practitioners have moved away from a rigorously following the rules of evidence concerning opinions of value that are filed, that trend needs to be reversed: *Taylor*, at para 47.

d. In most cases, an appraisal is considered more reliable than a realtor's estimate of value: *Royal Bank of Canada v Hanterman*, 2013 SKQB 158 at para 8, 419 Sask R 253; *Bank of Nova Scotia v Nieswandt*, 2020 SKQB 53 at para 14 [*Nieswandt*]; *Royal Bank of Canada v Gaudet*, 2019 SKQB 87 at para 25 [*Gaudet*]; *Manulife*, at para 107; and (in a different context) *McCabe v Kowalyshyn*, 2021 SKQB 144 at para 32 [*McCabe*], appeal dismissed at *McCabe v Kowalyshyn*, 2022 SKCA 56.

e. Drive-by valuations are less reliable than where the person giving the opinion has inspected the home's interior: *Taylor*, at para 44. They are more acceptable at the leave stage than on applications for order *nisi*: *Gaudet*, at para 27.

f. There are legitimate reasons for the Court to be cautious about valuations from realtors who expect to be engaged to sell the property –a realtor who will be involved in the sale has a financial stake in the outcome of the matter, which goes to the very admissibility of their evidence: *Taylor*, at para 46, and *McCabe*, at para 32. It is much more difficult to accept that a person with a pecuniary interest in the matter has provided objective

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opinion evidence.

g. Where the Court is asked to renew an order *nisi* for judicial sale or reduce the upset price, clear and cogent evidence as to value is required: *Nieswandt*, at para 14.

h. Lawyers are obligated to do more than just routinely file valuation evidence that does not approach an acceptable standard: Rule 5.1-1 of the *Code of Professional Conduct* (Regina: Law Society of Saskatchewan, April 2023) [*Code*], and paragraphs 1 and 2 of the related commentary. See also *Canadian Imperial Bank of Commerce v Knight*, 2023 SKKB 220 at para 32, and *CIBC Mortgages Inc. v Remy Estate*, 2023 SKKB 277 at para 21.

i. To date, this Court has not held that in every foreclosure each mortgagee must obtain a full appraisal from a certified appraiser. However, all evidence of value must be reasonable: *Royal Bank of Canada v Yuzak*, 2019 SKQB 145.

j. A mere recommendation from a realtor as to a list price, and a suggestion of what the property might sell at, does not assist the Court in establishing an upset price: *Royal Bank of Canada v Schnedar*, 2004 SKQB 146 at para 18, 248 Sask R 123.

[14] *Nieswandt* held that on a second attempt to reduce the upset price, clear and cogent evidence is required. It was decided in the context of a second application to reduce the upset price, so one would not have expected the Court to lay down rules to govern all foreclosure practice. However, there is no reason to restrict the "clear and cogent evidence" requirement to that narrow context. Put simply, <u>clear and cogent evidence is required in every case where this Court is asked to establish an upset price</u>.

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Below I discuss at least some of what that necessarily entails.

Principles governing valuation evidence

[15] Following is a non-exhaustive list what the Court expects for valuation evidence on any application for an order *nisi* (including where the remedy sought is foreclosure).

a. The value (whether a specific amount or a range) must be expressed as an opinion. If no opinion is expressed, the purported evidence is nothing more than inadmissible hearsay. Frequently, a CMA prepared by a realtor expresses no opinion at all, simply recommending a list price and then stating an expectation of what the property might sell for.

b. The valuator's credentials must be provided. It is acceptable for those to be contained in the report. The Court will not google a realtor to ascertain whether he or she is new to the field. Certifications may be sufficient where they are specific to valuation expertise and widely known and accepted. Otherwise, the valuator's experience relevant to the type of property being valued must always be provided. Without the valuator's credentials, the purported evidence is nothing more than inadmissible hearsay.

c. Current sales must be referenced in the valuation report. Housing prices have generally risen in Saskatchewan for decades. Sometimes that is gradual; sometimes the increases are sharper. The Court is not comprised of valuation experts who keep track of current trends. The Court's expectation is therefore that current valuation evidence be filed on any application for order *nisi*. As an example, 12-month-old sales will rarely be considered current, particularly outside the smallest of markets. If

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older sales are used, a clear explanation must be provided as to why.

d. The valuation report must set out the characteristics of the property being valued. As occurred here, the Court sometimes receives valuation reports that set out no characteristics of the property other than an address and a photograph. For a residence, the report must set out at least the basics of the home, including (but not limited to) square footage, number of bedrooms and bathrooms, whether there is a garage or other notable features, and some indication of condition. If only exterior condition can be observed because it was a drive-by, that must be explained, and the evidence must explain why it was not possible to inspect the interior. Information on characteristics can virtually always be obtained by lenders. Appraisals containing such details are used in lending and frequently are available to the mortgagee when the mortgage goes into foreclosure. All properties are subject to property tax assessment where the assessors collect and maintain such data, which usually is publicly available.

e. Adjustments must be made between the property being valued and the comparable sales. If the valuation report consists merely of a list of sold properties and then a recommended value, it is impossible for the Court to do more than speculate about how that value was arrived at.

f. Any unusual assumptions must be set out in clear fashion. The CMA filed on this application states, "This value may change up or down if the assumptions made in this analysis are not accurate", but it identified no assumptions.

g. An opinion from a realtor should be attached to an affidavit sworn by the realtor. Rule 5-46 of *The King's Bench Rules* relates to the use at trial of

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appraisal reports. There is no corresponding rule for comparative market analyses from realtors.

h. Little is achieved by including unsold listings in a valuation report. Valuation evidence represents an attempt to forecast the price that a willing arm's length seller and buyer would agree to for a property. A list price is indicative of nothing more than what a prospective seller aspires to be paid for his or her property. The seller might be realistic, desperate or engaging in wishful thinking.

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[16] At this time, I am not laying down a broad rule that CMAs cannot be relied on as evidence of value, including on an order *nisi* application. I note, however, that mortgage lenders rarely, if ever, lend on the strength of what a realtor suggests a property is worth. They demand appraisals. Foreclosure is a financial transaction of no less import. This Court should not be asked to grant orders based on valuation evidence that makes no attempt to achieve the same level of discipline and detail that is expected of certified appraisers.

Application of principles to the valuation evidence in this matter

[17] The CMA filed by the bank here is not acceptable. I will not grant any relief based on this "evidence". In particular, the following deficiencies exist:

a. It is entirely unsworn.

b. No credentials are provided concerning the realtor who wrote the CMA.

c. The CMA relied on is nearly a year old – this application was filed on April 10, 2024. Four of the six sales that the CMA references are from May to July 2022. The remaining two sales are from October and November 2022.

d. The only particulars it contains concerning the subject property are the address and a small photograph that shows an older bungalow.

e. No proper opinion of value is expressed.

f. No adjustments are made to the sales that it references. Those sold properties range from two to four bedrooms and 646 to 893 square feet.

g. It was accompanied by no explanation of why the property's interior could not be inspected.

h. It stated that the value was subject to change if assumptions made were not accurate, but no assumptions were set out.

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[18] Thus, the CMA falls woefully short of any reasonable expectations for valuation evidence.

CONCLUSION

[19] The application for an order *nisi* for sale by realtor is dismissed with leave to re-apply on appropriate materials. The plaintiff is directed not to pass along to the defendant any costs or expenses of any kind relating to the dismissed application, nor to claim costs of this application in any eventual assessment of costs in this action.

"D.G. Gerecke" J.
D.G. GERECKE