

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 38**

Date: **2024 03 05**
File No.: KBG-SC-00115-2022
Judicial Centre: Swift Current

BETWEEN:

INNOVATION CREDIT UNION

PLAINTIFF

- and -

BRUDOR HOLDINGS LTD., TRAVIS NERADA, BAHAN HOLDINGS LTD., and CHINOOK REFRIGERATION & AIR CONDITIONING LTD.

DEFENDANTS

Appearing:

Avery Layh
No one appearing

for the plaintiff
for the defendants

FIAT
March 5, 2024

BERGBUSCH J.

I. INTRODUCTION

[1] The plaintiff, Innovation Credit Union, applies for two orders: an order to vary the upset price in an order *nisi* for sale by real estate listing; and an order confirming sale of the affected property and directing the disbursement of sale proceeds.

[2] Although all defendants were duly served with the plaintiff's application, none of them appeared on the return date of the application.

[3] The decision whether to vary the upset price in an order *nisi* for sale is discretionary. Among the factors that the court must consider is the debtors' exposure to unreasonable loss. In this case, the plaintiff has agreed to limit the amount of any deficiency judgment to the net difference between the total amount of its claim and the original upset price, rather than the proposed lower upset price. Given that concession and the reasons offered by the plaintiff for the requested relief, the court is prepared to grant the requested order to vary the upset price and the order confirming the sale, with one revision.

II. BACKGROUND

[4] The defendants, Travis Nerada and Cathy Nerada, applied for credit from the plaintiff on October 6, 2017. The plaintiff agreed to lend them \$205,600, with interest equal to the plaintiff's prime rate of interest plus 3.00% per year [Loan]. Cathy Nerada subsequently filed for bankruptcy.

[5] On October 6, 2017, the defendant, Brudor Holdings Ltd., executed a guarantee in favour of the plaintiff, guaranteeing to pay upon demand the amounts owing by Travis Nerada and Cathy Nerada to the plaintiff. On October 20, 2017, as security for the guarantee, Brudor Holdings Ltd. granted a mortgage in favour of the plaintiff in the principal amount of \$205,600, which was registered against title to the following land: Surface Parcel #144272550, Lot 3 Blk/Par 50 Plan No 2230 Extension 0 [Land]. The Land is a vacant commercial property, used until 2021 as a bar, restaurant, and hotel.

[6] Travis Nerada and Cathy Nerada defaulted on the Loan. As of October 7, 2022, the total arrears including principal, interest, utilities, and maintenance were \$202,680.94. The plaintiff made a demand for payment on the guarantee and the mortgage on August 4, 2022.

[7] Bahan Holdings Ltd. also provided a guarantee to the plaintiff dated October 6, 2017, agreeing to pay on demand \$205,600 plus interest in the event that Travis Nerada and Cathy Nerada breached their obligations to the plaintiff. The plaintiff made a demand for payment from Bahan Holdings Ltd. on June 22, 2022.

[8] Chinook Refrigeration & Air Conditioning Ltd. is named as a defendant because it appears to have an interest in the equity of redemption, subject to the plaintiff's rights.

[9] All of the defendants were noted for default in December 2022.

[10] On April 18, 2023, Justice Robertson granted an order *nisi* for sale by real estate listing [Order *Nisi*]. The Order *Nisi* determined that the total amount outstanding under the mortgage was \$210,532.31 as of March 16, 2023. Subject to the mortgagors' right of redemption, the Order *Nisi* authorized a sale of the Land and all present and after-acquired personal property [Personal Property] of Brudor Holdings Ltd. Among other things, the Order *Nisi* appointed a selling officer and authorized that the Land and Personal Property be listed for sale for a 180-day listing period. The Order *Nisi* also set an upset price on the following terms:

8. ...

d) The Selling Officer has discretion to accept an offer and to make any counter-offer as the Selling Officer considers advisable in relation to the Land and Personal Property, provided that the Land and Personal Property shall not be sold for an amount less than \$199,900.00, without Court approval.

[11] The plaintiff's application for the Order *Nisi* was supported by the affidavit of a realtor with six years' experience in marketing commercial property in the Swift Current, Saskatchewan area, who opined that the Land had an approximate value of \$220,000 to \$245,000 and the Personal Property had little to no value.

[12] In a subsequent affidavit sworn on January 22, 2024, the realtor provided a summary of the efforts made to list the Land for sale. The Land was initially listed for sale on June 9, 2023, at \$249,900. The list price was lowered on August 15, 2023, to \$229,900, and again on September 20, 2023, to \$209,000. During the listing period, the Land was shown to approximately 20 parties.

[13] On October 11, 2023, an offer was received from Skylar Dillman to purchase the Land for \$150,000. At the direction of the selling officer, a counteroffer of \$199,900 was made. The counteroffer was rejected. After further exchanges of offers, the selling officer accepted an offer from Mr. Dillman to purchase the Land for \$160,000, conditional upon the court varying the upset price and confirming the sale.

[14] During Mr. Dillman's due diligence process, the realtor was made aware of structural concerns with the building – specifically, that a back wall had begun to buckle, as well as the presence of asbestos. The realtor was already aware of significant plumbing deficiencies in the building. After the offer was conditionally accepted, the realtor also learned of a pigeon infestation in the building's attic and the full extent of the structural defects. Finally, the realtor attested that the City of Swift Current was holding off on issuing a work order related to the buckling wall in anticipation that the purchaser would remedy the deficiency once the sale closed.

[15] The plaintiff filed an affidavit of the selling officer, Paul Federoff, who also gave an account of the steps taken to list the Land and the negotiations with Mr. Dillman.

[16] Finally, the plaintiff filed an updated affidavit of default sworn by its Manager of Loss Prevention, Jennifer Schmidt. As of January 11, 2024, the total amount owing to the plaintiff was \$228,907.92, including principal, interest, utilities, and maintenance. Outstanding property taxes owing to the City of Swift Current totaled \$88,278.12.

[17] The Land has been vacant since summer 2021. The plaintiff has been unable to obtain an insurance policy for the Land.

[18] Ms. Schmidt averred that, if the court does not approve the sale to Mr. Dillman, the plaintiff will not be able to pursue further remedies respecting the land given the amount of tax arrears owing and the cost to repair the identified structural defects.

[19] Following the hearing in chambers and in keeping with leave granted by the court, counsel for the plaintiff filed a letter with the Local Registrar indicating that the prospective purchaser and the City of Swift Current were both prepared to wait for the court's decision, although Mr. Dillman hopes to close the purchase in March 2024. In addition, counsel confirmed the submission made in oral argument that the plaintiff is prepared to seek a deficiency judgment based upon the upset price of \$199,900 rather than the actual sale price of \$160,000 if the sale is approved.

III. ISSUES

[20] The issues are whether the court should exercise its discretion to vary the upset price and whether the court should approve the proposed sale.

IV. APPLICABLE PRINCIPLES

[21] In proceedings by a mortgagee in respect of the mortgaged land, judicial sale is an equitable remedy: *Co-operative Trust Company of Canada v O'Grady* (1985), 43 Sask R 317 (CA) at para 4. The alternate remedy is foreclosure.

[22] *The Limitation of Civil Rights Act*, RSS 1978, c L-16 requires the court to set an upset price or reserve bid when granting an order for judicial sale in an action upon a mortgage:

Reserve bid in mortgage sales

5 Where, in an action upon or relating to a mortgage of real property, the mortgagee, or a person claiming through or under him, seeks to have the property sold, and the proceeds of sale applied in satisfaction of the mortgage indebtedness in whole or in part, the court or judge shall not order sale of the property except subject to such upset price or reserve bid as the court or judge deems proper having regard to all the circumstances.

[23] The amount fixed as the upset price or reserve bid must be a reasonable price as near to the fair market value of the land as possible: *Saskatoon Credit Union Ltd. v Goertz and Atlas Industries Ltd.* (1989), 73 Sask R 81 (CA) at para 34 [Goertz]. The primary responsibility of the court is to protect the interest of the mortgagor in having the land not sold at a price far below its real value: *Goertz*.

[24] The court has the discretion to order a second judicial sale in appropriate circumstances: *Royal Bank of Canada v Schnedar*, 2004 SKQB 146 at para 8, 248 Sask R 123 [Schnedar]. In *Schnedar* at para 10, Justice Laing (as he then was) set out the reasons to refuse a second judicial sale where the mortgagee had the right to bid at the first sale and the reason the land was not sold is that no acceptable bids were received:

[10] The rationale, as I understand it, for a court declining to exercise its discretion in favour of a second judicial sale requested by a mortgagee when the mortgagee had the right to bid at the first sale and the only reason the sale was aborted is because no acceptable bids were received is as follows:

(i) Section 5 of the *L.C.R.A.* [*The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16] maintains the right of a mortgagee to seek a deficiency judgment on a non-money purchase mortgage.

(ii) Considerable evidence and effort is put into establishing the reserve price required by s. 5 of the *L.C.R.A.*, and requires the court to take into account the interests of both the mortgagor and the mortgagee in establishing an upset price for the sale.

(iii) The upset price will in effect establish the maximum deficiency the mortgagor will have to pay.

(iv) If a party does not agree with the upset price established in this court, that party has the right to appeal to the Court of Appeal before the sale goes forward.

(v) The mortgagee is given the right to bid at the sale in order to crystallize the deficiency amount when no other acceptable offers are forthcoming, rather than have the property be foreclosed, which would eliminate the right to claim a deficiency payment (s. 6 of the *L.C.R.A.*).

(vi) To allow a second judicial sale at a lower upset price would amount to an appeal of the amount established for the first upset price.

(vii) A second application to lower the upset price works only in favour of the interests of the mortgagee and not of the mortgagor, which is contrary to the balancing of interest required by s. 5 of the *L.C.R.A.*

[Emphasis added]

[25] See also *CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118 at para 30, [2018] 9 WWR 340 [*Taylor*]. In *Taylor*, Danyiuk J. identified additional factors that should be considered on an application to vary an order *nisi* for sale, including any delay in the foreclosure action or sale process occasioned by the mortgagee.

[26] An order to confirm a sale which does not conform to the terms of the order *nisi* requires compelling reasons: *Manulife Bank of Canada v Holmes*, 2023 SKKB 105 at para 49 [*Manulife*]. However, if the court is prepared to vary the order *nisi*, granting the order to vary and then approving the sale in the same application is permissible and avoids unnecessary cost and delay: *Manulife* at paras 53 and 109.

V. APPLICATION

[27] Counsel for the plaintiff acknowledged in oral argument that the weight of the authorities militates against an order to vary the order *nisi* to set a lower upset price, especially where the mortgagee had the right to bid and elected not to do so.

[28] The plaintiff provided a detailed rationale for its application to vary the Order *Nisi* in this case, addressing the factors listed by Danyliuk J. in *Taylor*. In particular:

- a) The plaintiff pursued the mortgage action promptly, including the judicial sale process. After listing the Land at an optimistic price initially and then gradually reducing the price in stages when the market did not respond, no offers were received at or above the upset price during the listing period.
- b) The property is a vacant commercial building built in 1906. Demand for an older building such as the one in issue is limited and the market for commercial buildings in general is stagnant.
- c) The offer received is a true representation of the Land's fair market value, given the condition of the building.
- d) The building's deficiencies were not known to the plaintiff or its appraiser when the appraisals were provided. The unfavorable condition of the building only became known over time and mainly through the prospective purchaser's due diligence efforts.
- e) The appraiser relied upon by the plaintiff has good experience of the market for commercial properties in the Swift Current area and understands her duty to the court to provide objective opinion evidence within her area of expertise.
- f) The plaintiff elected not to exercise its right to bid on the Land for the following reasons:
 - i. The Land is subject to substantial property tax arrears.

- ii. The plaintiff does not wish to own a vacant commercial property.
- iii. The upset price is greater than the fair market value of the Land.
- iv. The City of Swift Current has indicated that it will impose a work order compelling work to correct structural defects to the building.
- v. Apart from the crumbling wall, the building's condition is deficient in other respects including the presence of asbestos, damaged plumbing, and a pigeon infestation.

[29] The plaintiff has also attempted to address any prejudice to the mortgagor resulting from a lowered upset price by conceding that it will seek a deficiency judgment based upon the original upset price of \$199,900.

[30] In this case, the Order *Nisi* has been followed in all respects except that the sale price conditionally accepted by the selling officer is less than the upset price. The plaintiff has explained to my satisfaction that the steps it has taken throughout the mortgage action and the judicial sale process have been reasonable and timely. I accept the explanation that the condition of the building is worse than understood by the appraiser when she gave the opinion of value relied upon by the court in setting the upset price in the Order *Nisi*. Further, I am satisfied that the proposed purchase price of \$160,000 is reasonable, having regard for the condition of the building, the impending municipal work order, the tax arrears, the stagnant market for commercial real estate, and the efforts undertaken to market the property. The defendants had notice of the application but did not appear to oppose the requested relief. The plaintiff's explanation for declining to bid on the Land is also reasonable: see *Manulife* at para 76.

[31] Finally, the mortgagor and guarantors will not be prejudiced by a reduction in the upset price since the deficiency judgment will be calculated as though

the property had sold for the original upset price of \$199,900. As a result of this concession, the debtors will not be burdened with an unreasonable loss. Balancing the interests of the parties, I conclude that granting the requested orders is equitable.

VI. CONCLUSION

[32] For the foregoing reasons, the draft order varying the upset price may issue. The draft order confirming sale may also issue, except that para. 5 should be amended to include the underlined wording as follows:

5. Once the shortfall under the Mortgage has been established, the Plaintiff may apply to the Court for judgment in that amount, less \$39,900.00 (being the difference between the original upset price of \$199,900.00 and the sale price of \$160,000.00), plus allowable costs, against Brudor Holdings Ltd. and Travis Nerada.

[33] If the revised wording is problematic, the plaintiff has leave to file a draft order with alternate wording for my consideration.

[34] The court thanks the plaintiff's counsel for her helpful written and oral submissions.

J.
P. T. BERGBUSCH