Court of Appeal for Saskatchewan
Docket: CACV4344

Citation: *Gustafson v SSC Security Services Corp.*, 2025 SKCA 21
Date: 2025-02-19

Between:

Terry Chad Gustafson

Appellant
(Applicant)

And

SSC Security Services Corp. and Terry Blaine Gustafson

Respondents
(Respondents)

Before:	Kalmakoff, McCreary and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Keith D. Kilback
In concurrence:	The Honourable Justice Jeffery D. Kalmakoff The Honourable Justice Meghan R. McCreary
On Appeal from:	QBG-RG-00436-2018; QBG-RG-02120-2015, Regina (Sask KB)
Appeal heard:	January 9, 2025
Counsel:	James F. Trobert for the Appellant Graham E. Quick for SSC Security Services Corp. No one appearing for Terry Blaine Gustafson

Kilback J.A.

I. INTRODUCTION

[1] Terry Blaine Gustafson [Terry] owned certain farmland that was subject to an order nisi for judicial sale. Before there was any attempt to sell the lands, the underlying mortgage was assigned to Terry's son, Terry Chad Gustafson [Chad].

[2] Chad applied to replace the order nisi for judicial sale that had been granted to the previous mortgagee with a new order nisi for foreclosure. A judge of the Court of King's Bench sitting in Chambers dismissed the application: *Input Capital Corp. v Gustafson* (11 March 2024) Regina, QBG-RG-00436-2018 and QBG-RG-02120-2015 (Sask KB) [*Decision*].

[3] Chad appeals from the *Decision*. He argues that the Chambers judge erred by: (i) failing to consider the inherent jurisdiction of the Court of King's Bench to grant the requested order; and (ii) misapprehending or disregarding evidence that there was no equity in the lands and failing to apply the legal principle that foreclosure is preferable to judicial sale in those circumstances. Chad contends that but for these errors, the Chambers judge would have granted the application and replaced the order nisi for judicial sale with a new order nisi for foreclosure.

[4] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

[5] Chad held a first mortgage on the farmland in question. Input Capital Corp. (which later became the respondent, SSC Security Services Corp.) held a second mortgage.

[6] On March 31, 2022, ICC was granted an order nisi for judicial sale. Paragraph 15 of the order nisi authorized ICC to apply to vary the terms of the order or to apply for foreclosure in the event that the sale was unsuccessful or not confirmed:

> 15. In the event that sale is unsuccessful, or not confirmed, [ICC] may apply to vary the terms of this Order or apply for foreclosure absolute:
>
> > (a) the title to the mortgaged land to vest and remain in [ICC] absolutely freed from all right, title and interest of [Terry] and all persons claiming through or under [Terry]; and

> (b) [Terry] and all persons claiming through or under [Terry] in possession of the mortgaged land to give up possession of the mortgaged land to [ICC] within 20 days after service on them of a copy of the Final Order of Foreclosure.

[7] Before any attempt was made to sell the lands, Chad redeemed the mortgage by paying $4,210,995.79 to ICC during the redemption period provided for in the order nisi. ICC assigned the mortgage to him under s. 125 of *The Land Titles Act, 2000*, SS 2000, c L-5.1. The parties agree this was a valid assignment and that Chad acquired the right to continue with the foreclosure action. See: *Farm Credit Corp. v Nelson* (1993), 102 DLR (4th) 743 (CanLII) (Sask QB) at para 57.

[8] As the new mortgagee, Chad then applied for an order substituting a new order nisi for foreclosure for the order nisi for judicial sale that had been granted to ICC. Chad's position was that there was no equity in the lands. He sought to foreclose on the lands, subject only to his first mortgage.

[9] SSC opposed the application. SSC holds a judgment against Terry and has a $4.6 million enforcement charge registered against title to the lands. SSC's concern was that foreclosure would ultimately vest title in Chad's name, which would prevent it from having any opportunity to enforce the judgment against the lands.

[10] SSC submitted to the Chambers judge that there may be some equity in the lands that could be captured in a sale to partially satisfy its judgment. SSC had begun to pursue a sale, but the parties had not yet completed mediation under *The Saskatchewan Farm Security Act*, SS 1988–89, c S-17.1, which was required before an order directing the Sheriff to sell the farmland could be granted.

[11] The Chambers judge dismissed Chad's application to substitute an order nisi for foreclosure for the existing order nisi for judicial sale for two main reasons: (i) paragraph 15 of the order nisi could only authorize the application for foreclosure if a sale had been attempted, which had not occurred; and (ii) he could not determine whether there was any equity in the lands because the parties had filed competing appraisals and he was not able to prefer one over the other. Relevant parts of the *Decision* read as follows:

> [7] In my opinion, para. 15 of the order could only come into play if a sale had been attempted which is not the case. However beyond that I find myself in the same position as Smith J. was in on August 16, 2022 when he rejected a similar application when he succinctly stated the equity is "a major question". I also note that previously I had indicated

> that there was no equity in the lands. However, based on the competing appraisal reports; it is possible that land prices have gone up since then which could produce equity. Therefore in my view I am not bound by this previous determination.
>
> [8] In my opinion the issue of the equity in the land cannot be answered by two competing appraisals. The court is not in the position of being able to prefer one appraisal opinion over the other. The applicant bears the burden of persuading this Court that his application (even if para. 15 of the order does not come into play) should be successful. I find that he has not been able to accomplish this because of the conflicting nature of the appraisal opinions. Therefore it would be inappropriate for this Court to grant his application based on this divergence of expert opinion.
>
> [9] Therefore I must dismiss his application with costs to be awarded to SSC in the usual manner.

III. ISSUES

[12] This appeal raises the following issues for determination:

(a) Did the Chambers judge err by failing to consider the inherent jurisdiction of the Court of King's Bench to grant the requested order?

(b) Did the Chambers judge err by misapprehending or disregarding evidence that there was no equity in the lands and failing to apply the legal principle that foreclosure is preferable to judicial sale in those circumstances?

IV. ANALYSIS

A. The jurisdiction issue

[13] On the first ground of appeal, Chad argues the Chambers judge erred by concluding that paragraph 15 of the order nisi could only authorize the application for foreclosure if a sale had been attempted, and by failing to consider the inherent jurisdiction of the Court to substitute an order nisi for foreclosure for the existing order nisi for judicial sale.

[14] As noted above, paragraph 15 of the order nisi provided that "[i]n the event that sale is unsuccessful, or not confirmed, [ICC] may apply to vary the terms of this Order or apply for foreclosure absolute". Chad submits that the Chambers judge's analysis of his jurisdiction to make the order should not have ended with his finding that "para. 15 of the order could only come into play if a sale had been attempted which is not the case" (*Decision* at para 7). He argues that the

Chambers judge failed to act judicially by not considering that he had inherent jurisdiction to grant the order, regardless of whether the conditions in paragraph 15 of the issued order nisi were fulfilled. Respectfully, I am not persuaded the Chambers judge erred in this way.

[15] In support of this ground of appeal, Chad cites *Moskowitz Capital Mortgage Fund II Inc. v Kolisnek Developments Inc.*, 2023 SKKB 148 [*Moskowitz*]. In that case, an issued order nisi for judicial sale permitted the plaintiff to apply to amend the terms of the order or to apply for foreclosure, if no offers were made by the expiration of the listing period or if a sale was abortive or not confirmed (at para 59). Justice Danyliuk held that, since none of these preconditions were met, the Court did not have jurisdiction to amend the order nisi pursuant to the terms of the order itself (at para 61). However, he determined that the Court's supervisory jurisdiction over judicial sales permitted the Court to amend the order nisi (at para 66).

[16] Chad contends the Chambers judge erred in not applying the reasoning in *Moskowitz* to find that he had jurisdiction to grant the requested order, even if he was not satisfied that paragraph 15 of the order nisi permitted Chad to apply for a new order nisi for foreclosure.

[17] In my view, *Moskowitz* is not determinative. It is true that judicial sale is an equitable remedy that is subject to supervision by the Court: *The Toronto-Dominion Bank v Gibbs*, 2019 SKCA 57 at para 49, [2019] 12 WWR 71; *Co-operative Trust Co. of Canada v O'Grady* (1985), 43 Sask R 317 (WL) (CA) at para 4. However, the existence of a supervisory power that may permit the Court to *amend* an order nisi for judicial sale in appropriate circumstances does not, on its own, necessarily imply jurisdiction to *replace* an existing order nisi for judicial sale with an order nisi for foreclosure without regard for the terms of the existing order.

[18] I also recognize that a court has jurisdiction to order a judicial sale whenever it is deemed necessary or expedient to do so, notwithstanding that an order nisi for foreclosure had been issued: *Lees v Industrial Development Bank* (1970), 14 DLR (3d) 612 (WL) (Sask CA) at para 23, leave to appeal to SCC denied (1972), 24 DLR (3d) 247 (note); *Saskatoon Credit Union Ltd. v Goertz*, [1989] 3 WWR 244 (WL) (Sask CA) at para 22; *Co-operative Trust Co. of Canada v Twelfth Building Ltd.*, 1984 CarswellSask 728 (WL) (Sask CA) at para 1. But this also does not necessarily suggest jurisdiction to do the inverse and to grant a new order nisi for foreclosure without regard for the terms of an existing order nisi for judicial sale.

[19] In any event, it is not necessary to determine whether such jurisdiction exists in order to resolve this appeal. The Chambers judge did not dismiss Chad's application solely because the conditions set out in paragraph 15 of the order nisi that would allow Chad to apply for foreclosure were not met. His main concern was that he was unable to determine whether there was equity in the lands based on the conflicting appraisals that had been filed.

[20] For this reason, the Chambers judge found Chad had not demonstrated that the application should be granted – regardless of the fact that no sale had been attempted and the conditions in paragraph 15 were not met. The Chambers judge stated that "[t]he applicant bears the burden of persuading this Court that his application (even if para. 15 of the order does not come into play) should be successful. I find that he has not been able to accomplish this because of the conflicting nature of the appraisal opinions" (*Decision* at para 8, emphasis added).

[21] As I read this passage, the Chambers judge was alive to and considered the argument that there could be a possible source of jurisdiction to grant the order other than paragraph 15 of the order nisi. He was simply not persuaded that the application should succeed even if paragraph 15 was not a barrier to granting the requested order.

[22] In these circumstances, the Chambers judge made no error by failing to expressly consider an alternative basis for his jurisdiction to replace the order nisi for judicial sale that had been granted to the previous mortgagee with a new order nisi for foreclosure.

B. The evidence issue

[23] On the second ground of appeal, Chad argues that the Chambers judge erred by (i) misapprehending or disregarding evidence that there was no equity in the lands, and (ii) failing to apply the legal principle that foreclosure is preferable to judicial sale in those circumstances. I am not persuaded by these arguments.

[24] An appellate court may intervene in a discretionary decision such as the one before the Chambers judge if there has been an error of law, including an error in the identification or application of the legal criteria that govern the exercise of the discretion. The standard of review applicable to such errors is correctness. An appellate court may also intervene if there has been a

palpable and overriding error of fact: *MacInnis v Bayer Inc.*, 2023 SKCA 37 at paras 38–39 [*MacInnis*]. See also: *Hoedel v WestJet Airlines Ltd*., 2023 SKCA 135 at para 20; *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114 at para 26, 489 DLR (4th) 300; and *Stromberg v Olafson*, 2023 SKCA 67 at para 118, 45 BLR (6th) 171.

[25] In the *Decision*, the Chambers judge noted that there were competing appraisals of the farmland, describing them as being "at the heart" of the application (at para 4). SSC had filed a desktop appraisal report completed by Serecon Inc. dated July 19, 2023, valuing the lands at $6,300,000. In contrast, Chad had filed an appraisal report prepared by Crown Appraisals dated October 23, 2023, valuing the lands at $4,892,000. The Chambers judge recognized that SSC's appraisal suggested there might be equity in the lands, while Chad's appraisal suggested there was no equity in the lands beyond the value of his mortgage. He stated as follows:

> [4] At the heart of this application are two competing appraisal reports. Chad's appraisal of the land suggests no equity beyond his mortgage. He argues this should allow him to foreclose. The appraisal received by SSC (originally for the *SFSA* application and now also relied on this present application) sets the fair market value of the lands much higher. As a result, SSC contends there is free board equity beyond Chad's mortgage.

[26] Chad contends that the Chambers judge misapprehended the evidence by failing to appreciate the "superior evidentiary weight" of his appraisal. He says it was inherently more reliable than SSC's appraisal, primarily because it was based on an actual site inspection by the appraiser, while SSC's appraisal was not. He also argues his appraisal was more accurate because the comparables used to determine value were more appropriate. In the result, Chad submits the Chambers judge erred by failing to accept his appraisal to find that the value of the lands was $4,892,000, which would have led to the conclusion that there was no equity in the lands.

[27] Building on this argument, Chad says the Chambers judge then compounded this factual error by failing to apply the principle that a judicial sale should generally be denied if the mortgagor's indebtedness to the mortgagee exceeds the value of the mortgaged lands and there is no equity. Chad relies on the articulation of this principle set out in *St. Gregor Credit Union Ltd. v Zimmer*, 2004 SKQB 75 at para 15, point 3, [2004] 8 WWR 548:

> [15] In *Co-operative Trust Co. of Canada v. O'Grady*, [1986] 1 W.W.R. 731, the Saskatchewan Court of Appeal confirmed that the rules of equity apply to judicial sales. Those rules and the common law applicable to judicial sales of land have been considered in numerous decisions. The following guidance is extracted therefrom:
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> …

> 2. Where the value of mortgaged lands exceeds the mortgagee's claim and a windfall would accrue to the mortgagee upon a foreclosure, a judicial sale should be ordered: *Montreal Trust Co. of Canada v. Olympia & York Developments Ltd. (Administrator of)* (1998), 19 R.P.R. (3d) 111 (Ont. Gen. Div.).
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> 3. A judicial sale should be denied if the mortgagor's indebtedness to the mortgagee exceeds the value of the mortgaged lands: *Newell v. McIvor*, 2000 SKCA 35, [2000] S.J. No. 152 (C.A.) (QL). In *Newell*, the Court of Appeal also stated that the need to conclude a burdensome proceeding and to allow the mortgagee to realize on her security after lengthy delays are equitable considerations to be taken into account.
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> (Emphasis added)

[28] Assuming without deciding that this principle applies when considering whether to replace an existing order nisi for judicial sale with an order nisi for foreclosure (as opposed to whether an application for judicial sale should be granted or denied), I am not persuaded the Chambers judge erred in the manner alleged.

[29] In the circumstances before the Chambers judge, I see no palpable and overriding error in failing to accept Chad's appraisal as determinative. He was faced with two valuation opinions that were $1,408,000 apart in value. The Chambers judge considered both opinions, but found that "the issue of the equity in the land cannot be answered by two competing appraisals" (at para 8). He concluded that Chad had not established that his application should be successful because of the conflicting nature of the appraisal opinions.

[30] In my view, it was open to the Chambers judge to reach this conclusion. In general terms, an applicant requesting an amendment to an order nisi must provide the necessary evidentiary foundation: *CIC Asset Management v Townsgate Development Corporation*, 2022 SKCA 31 at para 25, citing *CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118 at para 30(j), [2018] 9 WWR 340. The Chambers judge found Chad had not done so in this case.

[31] I also see no error in the Chambers judge's identification or application of the principles governing the exercise of his discretion that Chad puts in issue. The Chambers judge clearly understood that the question of whether there was any equity in the farmland was "at the heart" of the application. He simply concluded he could not make that determination based on the conflicting evidence before him.

[32] In my respectful view, Chad's arguments distill to the proposition that the Chambers judge ought to have exercised his discretion differently by accepting his appraisal over SSC's appraisal and granting the application because there was no equity in the lands. However, an appellate court is not entitled to substitute its own decision for that of the judge merely because it would have exercised the discretion differently: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76–77; *MacInnis* at para 39.

V. CONCLUSION

[33] For the reasons set out above, I would dismiss the appeal with costs to SSC in the usual way. Since Terry did not participate in the appeal, I would make no order of costs for or against him. I would make no order of costs in relation to the application for leave to appeal.

"Kilback J.A."
Kilback J.A.

I concur.

"Kalmakoff J.A."
Kalmakoff J.A.

I concur.

"McCreary J.A."
McCreary J.A.