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Bank of Nova Scotia v. Bouwsema

The Bank of Nova Scotia (plaintiff) v. Tim Bouwsema (defendant)

Alberta Court of Queen's Bench

Deyell, J.

Judgment: March 18, 1991

Docket: Calgary 8906-01543

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Proceedings: Affirmed, [120 A.R. 152](#), [8 W.A.C. 152](#), [1992 CarswellAlta 390](#) (Alta. C.A.)

Counsel: R.A. Jerke, Davidson & Williams, for the plaintiff

Richard A. **Low**, Huckvale & Company, for the defendant

Subject: Corporate and Commercial; Civil Practice and Procedure

Mortgages --- Nature and form of mortgage — Land titles mortgage

Business loan not land mortgage — Law of Property Act, R.S.A. 1980, c. L-8, s. 41(1).

Debtor negotiated a loan with bank. Bank took the position that the real estate security which it already held against debtor was weak and that other collateral was required. Debtor signed a promissory note, a chattel mortgage, and a collateral land mortgage. When debtor defaulted, bank sued for repayment of the principal sum of the business loan plus interest owing on the promissory note. Debtor took the position that the loan was a land titles mortgage and that, pursuant to s. 41(1) of the Act, no action lay on a covenant for payment contained in the mortgage. The land mortgage was the prime loan. Held, judgment was for bank. Although bank could have structured the security more carefully, the evidence indicated that the loan was a business loan rather than a land mortgage.

Mortgages --- Action on covenant — Liability on covenant

Deyell, J.:

1 In April of 1987 the defendant, a 56 year old businessman in Lethbridge, approached Ron Russell, then

Senior Assistant Manager of the Lethbridge main branch of the Bank of Nova Scotia, to discuss a business loan. All negotiations with reference to the loan took place between Russell and Bouwsema. The defendant was a successful entrepreneur operating several business operations in the Lethbridge area. Russell requested that Bouwsema provide various statements and documents to support his position with reference to the loan.

2 The defendant provided a statement of his affairs Exhibit 1, tab 2; Income Tax Return, tab 4; Agreement for Sale of Land, tab 11; and Appraisal by Laurier Kramps, tab 22. Russell told the defendant that the bank would be relying on his personal financial statements when considering the loan. Russell prepared the documents in tabs 1, 3, 5, and 17. Russell discussed the information in tab 1 with Bouwsema before it was submitted. The defendant signed the statement of affairs, tab 2.

3 Russell told the defendant that the Granum real estate security was weak and other collateral was required before approving the loan.

4 On May 27, 1987 the defendant attended on Russell at the bank and signed the Promissory Note in tab 6. The note was a demand note for \$80,000 with interest payable monthly at a floating rate equal to the prime rate of the Bank of Nova Scotia plus 1 $\frac{1}{2}$ % per annum. The defendant also signed a chattel mortgage for \$80,000 (tab 8) secured against three chattels. The interest rate was 11%, subject to change.

5 On the 4th of June, the defendant attended on his solicitor, Allan Krushel, and executed a collateral mortgage in the principal sum of \$80,000, bearing interest at the rate of prime plus 1 $\frac{1}{2}$ % per annum. The land mortgage was secured against the Granum property. The mortgage is set out in tab 7.

6 The bank statements in tab 15 showed that the bank debited the defendant with \$80,000 on May 29, 1987. The funds were forwarded to the bank's solicitors, Davidson & Williams, and they sent the forms to Mr. Krushel on June 12. Krushel paid out certain claims and accounted to the defendant for the loan advance.

7 Subsequently the defendant defaulted on payment of the loan and the bank demanded payment in full.

8 This action is based on the plaintiff's claim for repayment of the principal sum plus interest owing on the promissory note and costs.

9 The defendant has defended the action on the premise that the loan was in fact a land titles mortgage on the Granum property. Pursuant to s. 41(1) of the *Law of Property Act* no action lies on a covenant for payment contained in the mortgage. The defendant argues that the land mortgage was the prime loan and the plaintiff is restricted to its security to the real estate in Granum.

10 Clement, J.A., in *Clayborn Investments Ltd. v. Wiegert* (1977), 5 A.R. 50; 3 A.L.R.(2d) 295, states that the onus of proving that the statute does not apply lies with the party who denies its application.

11 I have reviewed the testimony of Ron Russell. In the main, it supports the bank's position that the application by the defendant was considered a business commercial loan and not a mortgage on the Granum property.

12 I have reviewed the testimony of the defendant. He is inconsistent at times. Where his testimony is at variance with that of Russell, I accept that of Russell.

13 I am satisfied that the defendant applied to the bank for a business loan and the approval reflects the application. The procedure followed by the bank and the documents which were executed leave something to be

desired. However, I am satisfied they substantiate the bank's claim.

14 I find as a fact the defendant applied for a business loan and he is not entitled to plead the protection of the *Law of Property Act*, s. 41(1).

15 The plaintiff is entitled to judgment against the defendant in the sum of \$85,746.84 as at February 14, 1991, plus interest at the rate of \$23.13 per day until date of judgment.

16 The plaintiff is entitled to costs pursuant to the *Rules of Court*, without restriction.

Judgment for plaintiff.

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