KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 128**

Date: **2024 07 16**
Docket: KBG-YT-00006-2023
Judicial Centre: Yorkton

BETWEEN:

AFFINITY CREDIT UNION 2013

Plaintiff

\- and -

DONALD VICTOR MONASTYRSKI, SANDRA DALE MONASTYRSKI, STAN BYBLOW, LEON BOHACH and SASKENERGY INCORPORATED

Defendants

Counsel:

Avery D. Layh	for the plaintiff
Richard T. Carlson	for the defendants

FIAT
July 16, 2024

CURRIE J.

Introduction

[1] Affinity Credit Union 2013 applies for an order confirming the judicial sale of land belonging to Donald Victor Monastyrski and Sandra Dale Monastyrski. The order *nisi* for the sale of the land, in this foreclosure action, was granted by a judge of this court on October 31, 2023.

2024 SKKB 128 (CanLII)

[2] In response to the credit union's application, the Monastyrskis apply for an order setting aside the order *nisi*. They say that, by operation of s. 44 of *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1, the land – which is their homestead – is exempt from being the subject of an order for foreclosure or sale.

[3] Before addressing the application for confirmation of the sale, I must determine the application for an order setting aside the order *nisi*.

Provisions of *The Saskatchewan Farm Security Act*

[4] The relevant provisions of the *Act* are these:

> **2**(1) In this Act:
>
> …
>
> (h) "homestead" means:
>
> (i) the house and buildings occupied by a farmer as his or her bona fide farm residence; and
>
> (ii) the farm land on which the house and buildings mentioned in subclause (i) are situated, not exceeding 160 acres or one quarter section, whichever is greater;
>
> …
>
> **9**(1) Notwithstanding any other Act or law or any agreement entered into before, on or after the coming into force of this Act:
>
> …
>
> (d) subject to sections 11 to 21, no person shall commence an action with respect to farm land;
>
> …
>
> **43** In this Part:
>
> (a) "farmer" means a mortgagor;
>
> (b) "mortgage" does not include a mortgage:
>
> (i) financed by a vendor:
>
> (A) who is an individual; or
>
> (B) that is a corporation with fewer than 10 shareholders; or

2024 SKKB 128 (CanLII)

> (ii) granted before the coming into force of this Act to Farm Credit Canada continued pursuant to the *Farm Credit Canada Act*.
>
> **44** …
>
> …
>
> (10) Notwithstanding any Act or law:
>
> (a) no order for sale of a mortgaged homestead shall be made in an action for:
>
> (i) foreclosure of the mortgage; or
>
> (ii) any relief other than foreclosure that may be granted to the mortgagee; and
>
> (b) no power of sale contained in a mortgage of a homestead shall be exercised and no directions for sale shall be given.
>
> …
>
> (12) Subject to subsection (13), the board may make orders excluding any mortgage or class of mortgages from the operation of this section where, in the opinion of the board, it is in the best interests of the farmer.
>
> …
>
> (12.3) This Part does not apply to a mortgage that is made:
>
> (a) solely for the purpose of purchasing a homestead;
>
> (b) solely for the purpose of new construction or improvements on the homestead; or
>
> (c) for the purposes described in both clauses (a) and (b).

Circumstances

[5] The starting point for the Monastyrskis' argument is the undisputed fact that the mortgaged land, which is the subject of the order *nisi* for sale, is their homestead. By operation of s. 44(10), they say, the order *nisi* ought not to have been granted and, in any event, it is unenforceable and should be set aside.

[6] The credit union, in response, relies on s. 44(12.3)(b). The credit union says that it granted the loan, and accepted the Monastyrskis' mortgage of the land as security therefor, for the purpose of new construction and improvements on the homestead. Specifically, the loan was for the Monastyrskis to construct a log home on

2024 SKKB 128 (CanLII)

the land.

[7] By operation of s. 44(12.3)(b), says the credit union, s. 44(10) does not apply to the mortgage, so that the order *nisi* was appropriately granted and is enforceable.

2024 SKKB 128 (CanLII)

[8] There is no dispute that, at the time of making the mortgage, the Monastyrskis and the credit union agreed that the mortgage was being made for the purpose of construction of a log home on the land. Nicole Zieglgansberger, a business advisor of the credit union, said in her January 10, 2023 affidavit at para. 6:

> 6. The Land is Donald and Sandra Monastyrski's homestead. The Credit Union did not obtain a home quarter protection exclusion order from the Farm Land Security Board [under s. 44(12)] as the purpose of the Mortgage was to construct a log cabin on the Land. …

[9] The mortgage itself refers to the purpose of the mortgage loan being construction of a log home on the land. Schedule "B" to the mortgage provides:

> Saskatchewan Homestead Provisions
>
> This Schedule forms part of the Mortgage between the Mortgagors, Donald Victor Monastyrski and Sandra Dale Monastyrski and the Mortgagee, Affinity Credit Union 2013.
>
> It is agreed an order under Section 44(12) of The Saskatchewan Farm Security Act is not required because this mortgage is made solely for the purpose of purchasing a homestead, new construction on a homestead or making improvements on a homestead.

[10] Schedule "C" to the mortgage provides:

> SCHEDULE OF ADDITIONAL TERMS
> CONSTRUCTION
>
> This Schedule forms part of the Mortgage between Donald Victor Monastyrski and Sandra Dale Monastyrski as Mortgagor, and Affinity Credit Union 2013 as Mortgagee, dated the 11th day of July, 2018, ("the Mortgage").

> Where the Mortgage Property is to be constructed or improvements are undertaken on the property, the Mortgagor hereby covenants and agrees with the Mortgagee as follows:
>
> 1. To construct:
>
>   Log cabin on NW 35-25-9-W2 RM of GARRY No. 245
>
> …

2024 SKKB 128 (CanLII)

[11] In her May 10, 2024 affidavit, Sandra Monastyrski confirmed that the intended purpose of the mortgage loan was the construction of a log home on the land, and she explained how things went awry:

> 4. In 2016, we were approved for a mortgage loan with Affinity secured by the Land (the "Mortgage"). The total amount of the Mortgage was $281,250.00. The reason we were borrowing the money was because we wanted to build a home on the Land instead of living in the mobile home. We agreed to purchase a log home package from a company in Williams Lake, British Columbia called Pioneer Log Homes of British Columbia ("Pioneer"). We chose a house design and they were to send us a package of building materials, primarily consisting of logs that would be shipped to the Land and then they would send the assemblers to erect the house on site. The package would not have been everything necessary to build the home. We would need to hire local contractors to provide and install wiring, plumbing, heating, as well as all finishing and cabinets, etc. We also had to build our own basement.
>
> …
>
> 6. To the best of our recollection, there were two or three advances made by Affinity under the Mortgage. Approximately $120,000.00 was advanced in total but we don't know the exact amount. A portion of the advances by Affinity was used to pay for the house foundation on the Land. We paid part of that cost and some of Affinity's money went toward that. That was approximately in the amount of $35,000.00 – $36,000.00. All advances were made to Mr. Patenaude's law office and disbursed by him. The remainder of all amounts advance by Affinity was paid by Mr. Patenaude to Pioneer. To the best of my recollection, it was paid by way of two installments. It represented a substantial part of the cost of the log home package, but not all of it.
>
> …

> 8. In approximately July of 2017, Pioneer told us that they would not be able to deliver our log home package because, according to them, there had been a forest fire and whatever existed of our home package had been destroyed. This may or may not have been true because we did not ever go to British Columbia to see for ourselves. However, the company never did deliver a log home package or any part of one to us.
>
> 9. No material was ever shipped or delivered by Pioneer to the Land or elsewhere.
>
> 10. We repeatedly asked Pioneer to refund our money or to provide us with the log home package that we had paid for but they essentially ignored us. We did not ever receive a refund or the home package.
>
> 11. When we learned that Pioneer was not going to deliver the log home package to us, we spoke with Affinity and told them what had happened. They eventually advised that they were not prepared to make any further advances under the Mortgage.

[12] As to the mortgage advances referred to by Sandra Monastyrski, Ms. Zieglgansberger has attached to her May 29, 2024 affidavit an unsigned copy of what she identifies as the contract between Donald Monastyrski and Pioneer. That contract provides for payment by the Monastyrskis to Pioneer of:

- $56,248.50 on execution of the agreement;
- $56,248.50 on completion of one-half of construction of the log structure; and
- $56,248.50 on completion of construction, prior to delivery of the log home to the land.

[13] It was in accordance with this schedule of payments, says Ms. Zieglgansberger at para. 8 of her May 29, 2024 affidavit, that the credit union advanced funds: “The Credit Union had to advance funds under the Mortgage to commence and continue construction of the log home package ….”

[14] From these circumstances arise two main points for determination. First

2024 SKKB 128 (CanLII)

is how s. 44(12.3) – and in particular its reference to "a mortgage that is made … solely for the purpose" – is to be interpreted. Second is how the facts of this matter fit into that interpretation.

2024 SKKB 128 (CanLII)

Procedural question

[15] Before I may address those points, however, I must consider whether the Monastyrskis' application is properly before me.

[16] Typically a judge of this court does not set aside an order that was made by another judge of the court. The Monastyrskis, though, draw my attention to two decisions of this court. First they cite *Bank of Nova Scotia v Comeault* (1998), 166 Sask R 219 (QB). In that foreclosure action Justice Pritchard explained at para. 9 that the parties there were in agreement that the court has "the inherent jurisdiction and discretion" to set aside the court's earlier order, in which a judge of this court declared that the subject lands were not "farmland" within the meaning of *The Saskatchewan Farm Security Act*. On that basis, she proceeded to determine whether to set aside the earlier order, and in the end she directed that the earlier order should be set aside.

[17] Second, the Monastyrskis refer me to *Shell Canada Products Ltd. v L & D Truck Ltd.*, 2005 SKQB 336, 276 Sask R 315. In that case I had been asked to set aside a summary judgment that a judge of the court had granted in favour of the plaintiff against the defendant. After reviewing the law on the point, I said at para. 10:

> [10] The court has inherent jurisdiction to set aside a judgment. The court will do so in exceptional circumstances, when equity and fairness so dictate. Exceptional circumstances recognized to date include fraud, lack of jurisdiction, irregularity, perjury, new evidence, and lack of notice.

[18] The Monastyrskis' application, then, is properly before me so that I can consider whether exceptional circumstances exist.

[19] The credit union, however, argues that it would not be equitable and fair for the court to even consider the Monastyrskis' application, because they could and should have raised their argument about the application of s. 44 long ago. Certainly, they say, the Monastyrskis had the chance to raise the point at the October 31, 2023 chambers hearing where the order *nisi* was granted (and where the Monastyrskis appeared on their own behalf). Too, they could have raised the point as early as the February 28, 2023 chambers hearing at which a judge of this court ordered that s. 9(1)(d) of the *Act* (set out above) does not apply to the mortgage (and where the Monastyrskis were represented by counsel).

[20] In her affidavit Sandra Monastyrski has explained the Monastyrskis' approach to these proceedings:

> 13. My spouse and I did appear in court on October 31, 2023 when Affinity was applying for the Order in this action. We had not obtained legal advice. We did not understand the foreclosure process, let alone any of the provisions of *The Saskatchewan Farm Security Act*. We did not understand that there were provisions regarding home quarters or homesteads under that legislation. We only first obtained legal advice on Monday, April 29, 2024.

[21] The credit union points out that the Monastyrskis have had ample time to obtain legal advice – aside from whatever legal advice they received at the time of the February 28, 2023 chambers hearing. Indeed, the credit union observes that the Monastyrskis were first served with notice of these proceedings in November 2021.

[22] The credit union refers me to *Pillar Capital Corp. v Swift River Farms Ltd.*, 2021 SKQB 119 (varied on other grounds at 2022 SKCA 89). In that case Justice Scherman was asked to set aside an order *nisi*. He referred to the power of the court to do so in exceptional circumstances, and in that case he found that exceptional circumstances did not exist.

2024 SKKB 128 (CanLII)

[23] Justice Scherman, though, did not dismiss the application without considering the submissions as to whether he should set aside the order *nisi*. He heard the submissions and then determined whether exceptional circumstances existed so as to justify setting aside the order.

2024 SKKB 128 (CanLII)

[24] Here the credit union asks me to dismiss the Monastyrskis' application without considering their submissions as to why exceptional circumstances exist. The credit union points out that several parties have relied on the order *nisi*, and have conducted themselves on the basis that it is operational. A selling officer was appointed. A realtor was retained. The land was marketed and shown. An offer has been made and accepted, and now the proposed purchasers await completion of the sale to which they have agreed on the basis of a court order.

[25] These are valid points, but they are not enough to persuade me that I should not even consider the Monastyrskis' submissions, framed as they are as a matter of interpretation of the *Act*. Balanced against those points is the possibility, advanced by the Monastyrskis, that there exists a court order that contravenes a statutory provision – a possibility that, if established, could constitute an exceptional circumstance justifying setting aside the order *nisi*.

[26] The Monastyrskis' application is properly before me, and I will consider the submissions as to whether exceptional circumstances exist so as to justify setting aside the order *nisi*.

Interpretation of s. 44(12.3)

[27] The section to be interpreted is s. 44(12.3):

> **44**(12.3) This Part does not apply to a mortgage that is made:
>
> (a) solely for the purpose of purchasing a homestead;
>
> (b) solely for the purpose of new construction or improvements

on the homestead; or

(c) for the purposes described in both clauses (a) and (b).

[28] The Monastyrskis argue that "a mortgage that is made … solely for the purpose" must be interpreted according to how the mortgage funds ultimately were used. They say that the Legislature consistently has focused on the protection of farmers in enacting and amending the *Act*. For this reason, say the Monastyrskis, any ambiguity must be resolved in favour of a farmer.

[29] Accordingly, they assert, s. 44(12.3) applies to their mortgage only if the mortgage funds that were advanced actually were used for new construction or improvements on the homestead. Those funds were not so used, they say. The money that was advanced was sent to Pioneer, but the money never led to construction or improvements on the land.

[30] Certainly I appreciate the Monastyrskis' reference to the protection of farmers. The overall tenor of the *Act*, both historically and currently, is to shield farmers from aggressive enforcement by creditors, and sometimes even to shield farmers from their own rash or ill-conceived financing decisions. Nonetheless, I find no ambiguity in s. 44(12.3). Its meaning is clear.

[31] If the Legislature had intended the interpretation that is asserted by the Monastyrskis, the Legislature easily could have expressed that intention plainly. The Legislature could have referred to the use to which the mortgage funds ultimately were put, rather than to the purpose for which the mortgage was made.

[32] In fact, the Legislature's focus was on the intended purpose of the loan at the time that the mortgage was made – not on the ultimate use of the funds. This focus makes sense, since it provides certainty for both the farmer and the lender. At the time of entering into a mortgage contract, both the farmer and the lender can know with

2024 SKKB 128 (CanLII)

certainty what is the purpose of the mortgage loan, and they can document that purpose (as was done here). At the time of entering into a mortgage contract, though, they cannot know whether some circumstance will intervene to change how the funds will be used (as occurred here).

2024 SKKB 128 (CanLII)

[33] In referring to “a mortgage that is made … solely for the purpose”, s. 44(12.3) refers to the purpose that is agreed between the lender and the farmer, at the time of making the mortgage, not to how the mortgage funds ultimately are used.

[34] That being the case, the Monastyrskis then suggest that s. 44(12.3) should be interpreted so that a lender is obliged to ensure that the mortgage funds are used for the agreed purpose. I reject this suggestion as impractical and unreasonable.

[35] The circumstances of this matter demonstrate how unworkable the suggestion is. The idea that the planned home construction could be derailed by a forest fire in British Columbia would not have occurred to either the Monastyrskis or the credit union, and it is unreasonable to ask a lender to contemplate, plan for and take responsibility for such a contingency.

[36] The Monastyrskis’ suggestion effectively would require lenders to serve as project managers and insurers. Lenders’ efforts to offload the responsibility by way of imposing trust conditions on the farmer’s lawyer (tied to advancing funds) would be bound to fail, since the lawyer would recognize that accepting such responsibility by way of trust conditions (thereby making the lawyer a project manager and insurer) would be untenable.

[37] The imposition of such an obligation on lenders could lead to lenders declining to provide financing to farmers on the security of homesteads. At the least, it could be expected to lead to lenders reverting to the days of seeking a s. 44(12) exclusion order for each and every homestead mortgage, something that the Farm Land

Security Board had found to be costly and inconvenient for farmers, lenders and the board (which was the impetus for the inclusion of s. 44(12.3) in the *Act*: Donald H. Layh, *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary & Case Law* (Langenburg: Twin Valley Books, 2009), at 310-311).

[38] Either result would lead to farmers finding it more difficult to obtain financing secured by a homestead, a consequence that is contrary to the tenor of the *Act*.

[39] As I have said, in referring to "a mortgage that is made … solely for the purpose", s. 44(12.3) refers to the purpose that is agreed between the lender and the farmer, at the time of making the mortgage, not to how the mortgage funds ultimately are used. The provision does not impose on the lender an obligation to ensure that the mortgage funds are used for the agreed purpose.

Application of the law to the facts

[40] There is no dispute that, at the time of making the mortgage, the Monastyrskis and the credit union agreed that the mortgage was being made solely for the purpose of new construction on the homestead. For this reason, s. 44(12.3) applies to render s. 44(10) inapplicable to the mortgage.

[41] Consequently, I reject the Monastyrskis' argument that the order *nisi* ought not to have been granted and that it is unenforceable. No exceptional circumstance exists to justify setting aside the order *nisi*.

Confirmation of sale

[42] The Monastyrskis acknowledge that, if their s. 44 argument fails, they have no basis for opposing confirmation of the sale.

[43] The credit union has pointed out that its draft order confirming sale

2024 SKKB 128 (CanLII)

mistakenly refers to party-and-party costs, whereas the order *nisi* included an award of costs of the action on a solicitor-client basis. The credit union asks that its draft order issue, provided the reference to costs be amended to refer to solicitor-client costs. I so order.

Conclusion

[44] The Monastyrskis' application, for an order setting aside the order *nisi*, is dismissed with costs.

[45] The judicial sale is confirmed. The draft order that was filed by the credit union may issue, provided that the reference to costs be amended to refer to "costs on a solicitor-client basis".

"G.M. Currie" J.
G.M. CURRIE

2024 SKKB 128 (CanLII)