

SUPREME COURT OF YUKON

Citation: *Faro (Town of) v. Knapp*, 2014 YKSC 72

Date: 20141217
S.C. No. 10-A0109
Registry: Whitehorse

Between:

Town of Faro

Petitioner

And

Angelika Knapp dba A. KNAPP ACCOUNTING SERVICES and NORTH STAR
ADVENTURES, a partnership between Angelika Knapp and Eric Dufresne,
ANGELIKA KNAPP and ERIC DUFRESNE

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Grant Macdonald, Q.C.
Angelika Knapp and Eric Dufresne

Counsel for the Town of Faro
Appearing on their own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ms. Knapp and Mr. Dufresne (“the applicants”) are the owners of Lot 1028, Quad 105K/03, Plan 2007-0016, as joint tenants (“Lot 1028”). Lot 1028 is located in the Town of Faro, in the Yukon Territory.

[2] The Town of Faro has recovered court costs in the total amount of \$8,747.61 against the applicants and is proceeding to sell Lot 1028 to satisfy their Writs of Execution.

[3] The applicants initially applied for an order without notice to stay the sale of Lot 1028 and the Writ of Seizure and Sale filed on March 4, 2013.

[4] This Court ordered that the applicants serve counsel for the Town of Faro and set the matter down for hearing on December 3, 2014. That hearing was adjourned to December 9, 2014, to permit the filing of affidavits by the Sheriff of Yukon and the applicants.

ISSUES

[5] There are three issues to address:

1. Did the applicants have notice of the assessments of the three Bills of Costs?
2. Has the Sheriff complied with s. 23 of the *Executions Act*, R.S.Y. 2002, c. 79 (the "*Act*") which requires all or part of a writ of execution against the personal property of the applicants to be returned unsatisfied before Lot 1028 can be offered for sale?
3. Has the Sheriff complied with the 30-day notice requirement to the applicants in s. 24 and the 10 days deemed notice in s. 40 of the *Act*?

Issue 1: Did the applicants have notice of the assessments of the three Bills of Costs?

[6] There are three separate orders for costs and writs of execution:

- (a) The appeal in CA 09-YU635 was dismissed with costs on August 19, 2010. The costs of that appeal were assessed on January 13, 2012, in the sum of \$4,102.88. Ms. Knapp and Mr. Dufresne participated in the assessment by telephone;

- (b) The decision of Justice Gower in SC 10-A0109 directed Ms. Knapp and Mr. Dufresne to pay costs in the sum of \$3,000 within six months following the date of the judgment (i.e. by November 16, 2011);
- (c) The decision of Justice Hinkson in CA 11-YU681 ordered Ms. Knapp and Mr. Dufresne to pay costs to be assessed. The costs in CA 11-YU681 were assessed in the sum of \$1,644.73 on March 1, 2013.

[7] The applicants acknowledge that they were present for the assessments in (a) and (b) above totalling \$7,102.88. In the result, the two Writs of Execution are valid and the application to stay the sale of Lot 1028 on this ground is dismissed.

[8] The contested writ of seizure and sale is based on the assessment of costs in the amount of \$1,644.73 on March 1, 2013 is therefore not a basis in which to stay the two valid Writs of Seizure and Sale.

[9] In terms of the March 1, 2013 assessment, the applicants allege that the assessment of costs took place without their knowledge.

[10] However, I note that the appearance of the applicants filed in S.C. 10-A0109 provides an address for delivery as follows:

Lot 1028
Johnson Lake
Faro, Yukon Y0B 1K0

P.O. Box 70
Faro, Yukon Y0B 1K0

[11] Counsel for the Town of Faro delivered a copy of the draft bill of costs by ExpressPost dated January 23, 2013, to the above address. On January 30, 2013, a further letter was mailed enclosing a copy of an Appointment to Settle the Order, a proposed Order, an Appointment to Assess Costs and a Bill of Costs. On

February 11, 2013, a further letter was mailed enclosing an amended Appointment to Settle the Order and assess costs.

[12] By regular mail dated March 11, 2013, counsel for the Town of Faro wrote the applicants to advise that the three bills of costs were outstanding in the amount of \$8,747.61 and the Sheriff, if instructed, was in a position to take the necessary steps to have their property sold if the costs remained unpaid. Again on April 1, 2013, by regular mail, counsel for the Town of Faro advised that if the costs were not paid, the Sheriff would proceed to an execution sale of Lot 1028.

[13] Delivery of the Appointment to Assess Costs is effective pursuant to Rule 11(6)(d) and 11(7). The applicants may nonetheless show that the document did not come to their notice under Rule 11(9)(a). Ms. Knapp has deposed the following in an affidavit #5 sworn and filed December 9, 2014:

5. The above described events contributed to a complete breakdown which occurred during the joint case management conference on January 22, 2013. I remained in Whitehorse to receive physical and emotional support until I was well enough to return to Faro on my own. During this time I did not make any arrangements for my mail as I did not expect to be away for an extended period of time.

6. In the affidavit of December 1, 2014 filed in this proceeding, Mr. Macdonald referred to correspondence that was sent by mail. It is my practice to deal with matters when they arise. It follows that the referenced documents did not reach me.

[14] However, on October 24, 2013, Deputy Sheriff Phillip Morgan served a copy of the Writ of Execution in CA 11-YU681 referred to in para. 6(c) above. This is the same assessment of costs referred to by counsel for the Town of Faro in his letter of March 11, 2013. The applicants therefore had the bill of costs served directly on them

and made no attempt to set aside the costs assessment until November 28, 2014, over one year later, when the Town of Faro was proceeding to sell Lot 1028.

[15] In *Scotia Mortgage Corp v Dhillon*, 2007 BCSC 1109, Mr. Dhillon was not personally served and never knew of the foreclosure or sale of his home. In the equivalent British Columbia *Rules of Practice*, Rule 12(11) provides a similar rule that a person can set aside the consequences of default where a document did not come to the person's notice. That is not the case here. Even if I accept that Ms. Knapp did not receive the mailed documents, the assessment of costs was brought to the attention of the applicants by personal service and no remedy was sought until now.

[16] Therefore, the Writ of Seizure and Sale in CA 11-YU681 in the amount of \$1,644.73 is valid and the application to stay on that ground is dismissed.

Issue 2: Has the Sheriff complied with s. 23 of the *Executions Act*, R.S.Y. 2002, c. 79 (the "*Act*") which requires all or part of a writ of execution against the personal property of the applicants to be returned unsatisfied before Lot 1028 can be offered for sale?

[17] The *Act* provides the following:

23 (2) Land shall not be offered for sale until

(a) all or part of a writ of execution against the personal property of the execution debtor has been returned unsatisfied; and

...

[18] The precise issue raised by the applicants is that s. 23(2)(a) has not been complied with. In affidavit # 3, sworn and filed November 28, 2014, Ms. Knapp stated her understanding at para. 4 that "personal property has to be sold prior to land being offered for sale by the Sheriff". While this is not a correct understanding of s. 23(2)(a),

the issue is now whether the Sheriff has acted reasonably upon receiving counsel for the Town of Faro's instructions to sell Lot 1028.

[19] The Deputy Sheriff's evidence is as follows in his affidavit filed December 8, 2014:

8. On October 8th 2014, we received a letter of instruction to proceed with the Writ of Seizure and Sale on the lands owned by Angelika Knapp and Eric Dufresne. Copy of letter is attached and marked as Exhibit D.

9. On October 10th 2014 I ran a search with Motor Vehicles and found three vehicles in their names. The newest vehicle was a 2003 Chevrolet Silverado truck but the registration was expired, the other vehicles were a 1972 Ford F250 and a 1989 Jeep Cherokee, print outs are attached and marked collectively as Exhibit E.

10. Our normal practice is to discuss Writ Files with Legal services to make sure we were working within the parameters of the Execution act [as written]. This meeting confirmed that the vehicle was unregistered and that, therefore, even if it was still in their possession, we felt there was little value in it. As well under the Exemptions act I should leave them one vehicle to allow them to travel to and from Faro for shopping etc.

11. As the two vehicles remaining were 25 years old or more, the cost of our attendance to the residence, transporting a unit to Whitehorse, storage for 40 days plus advertising cost would be around \$1950.00. It was decided that there was nothing of value to be seized. We also worked out the necessary time line for the service of the Notice of Offer to the defendant's. I prepared and sent Mr. Macdonald a letter of Nulla Bona on the Writs dated October 10th 2014.

[20] I conclude that the Deputy Sheriff has acted reasonably and fairly in the circumstances. There is no requirement in the *Act* that the Sheriff cannot sell land under a Writ of Seizure and Sale just because there may be personal property available. Here the Sheriff believed that the cost of removing and storing the property would equal or

exceed the value of the property. The Sheriff is entitled to rely upon common sense to return a writ unsatisfied in these circumstances.

Issue 3: Has the Sheriff complied with the 30-day notice requirement to the applicants in s. 24 and the 10 days deemed notice in s. 40 of the Act?

[21] The respective sections of the *Act* are:

24(1) At least 30 days before land is offered for sale, the sheriff shall serve a notice of the offer in the prescribed form on, or mail it by registered or certified mail to,

(a) the execution debtor;

(b) the registered owner of the land to be sold, if the registered owner is not the execution debtor;

(c) the execution creditor; and

(d) every person who appears by the records of the land titles office to have an interest in the land acquired after the receipt of the writ by the registrar under the Land Titles Act, or after the receipt of the first writ if more than one writ has been received.

(2) Before land is offered for sale, the sheriff shall cause public notice of the sale in the prescribed form to be published at least once a week, for four consecutive weeks, in a newspaper circulating in the Yukon, the last of the notices to be published at least 10 days before the date of the sale.

...

40(1) If any notice is authorized to be mailed to a person under this Act, the notice may be mailed to that person at their post office address last known to the person mailing the notice.

(2) Proof of the mailing of a notice under this Act may be made by affidavit.

(3) A notice mailed under this Act shall be deemed to have been received 10 days after the date on which it was mailed.

[22] Section 24 of the *Act* requires the Sheriff to notify the execution debtor “at least 30 days before land is offered for sale.” The qualification “at least” pursuant to s. 18(k) of the *Interpretation Act*, R.S.Y. 2002, c. 125, means that both the first and last day are not included in the counting of 30 days.

[23] Where notice is mailed by registered or certified mail, as in this case, s. 40(3) of the *Act*, deems a notice mailed to have been received 10 days after the date on which it was mailed.

[24] In the case at bar, the letter of the Sheriff was mailed to the applicants on October 23, 2014, arrived in Faro on October 27, 2014, and was picked up and signed for by the applicants on November 5, 2014.

[25] The first notice of Sheriff’s sale was published on November 28, 2014, with sealed bids to be received up to and including December 20, 2014, with bids to be opened on December 30, 2014.

[26] In my view, the effect of the at least 30 days plus the deemed receipt 10 days after mailing creates a 40-day period not including the first and last day. By my count, the 40 clear days begins in October 24, 2014, and ends on December 3, 2014. As a result, the Sheriff’s calculation is not correct and the notice published on November 28, 2014, is not in compliance with ss. 24 and 40 of the *Act*. I order the proposed offer of sale to be set aside.

[27] Counsel for the Town of Faro submitted that the matter could be remedied by simply changing the first newspaper publication date to December 5, 2014. In my view, the period of notice cannot simply be readjusted by changing the publication date. In the circumstances of the case, the notice period must be strictly complied with.

[28] Therefore, pursuant to ss. 35 and 36 of the *Act*, I order that the notice of sale of land mailed on October 23, 2014 is set aside and that the Sheriff recommence the sale proceeding with proper notices under ss. 24 and 40 of the *Act* and the proper publication procedure under s. 24(2).

VEALE J.