Citation: *Cunning v. City of Whitehorse*, 2009 YKSM 1 Date: 20090123
Docket: 08-S0012
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Faulkner

Patricia Cunning

Plaintiff

v.

City of Whitehorse

Defendant

Appearances:
Ron Cherkewich Counsel for the Plaintiff
Andre Roothman Counsel for the Defendant

REASONS FOR DECISION

[1] This is an application by the defendant, the City of Whitehorse, to dismiss the plaintiff's claim on the ground that the claim is not within the jurisdiction of the Small Claims Court.

[2] The plaintiff, Patricia Cunning, is one of a large number of homeowners in the Takhini North subdivision of Whitehorse who faces paying for upgrades to the antiquated water and sewer system in the subdivision.

[3] On April 11, 2008, Ms. Cunning and 73 other Takhini North landowners filed an action in the Supreme Court of Yukon seeking damages and other relief from the defendant City of Whitehorse. The allegation, put briefly and bluntly, is that the developers of the subdivision, who had purchased the area from the

Federal government, were allowed by the City to fob off onto the current landowners their responsibility to upgrade the water and sewer system. The device used was a “transfer of easement agreement” which was registered against the titles to the lots in the subdivision. This occurred, say the plaintiffs, through the City’s negligence and in breach of its statutory duties.

[4] Also on April 11, 2008, Ms. Cunning, as sole plaintiff, commenced a concurrent action against the City in the Small Claims Court. The allegations are, to all intents and purposes, identical to those made in the Supreme Court action. The relief claimed was also identical except that the damages sought were implicitly limited to $25,000, which is the maximum monetary jurisdiction of the Court.

[5] The City filed a Reply to the Small Claims action denying liability but also denying that the Small Claims Court had jurisdiction to hear Ms. Cunning’s case. In its Reply, and in a subsequent application to dismiss or stay the claim, the City cited two grounds. First, the City said, Ms. Cunning claimed declaratory and injunctive relief, which relief the Court has no power to grant, having regard to section 2 of the *Small Claims Court Act*, R.S.Y. 2002, c. 204, amended S.Y. 2005 c. 14. This section reads as follows:

> 2(1) Subject to subsection (2), the Small Claims Court
> (a) has jurisdiction in any action for the payment of money if the amount claimed does not exceed $25,000 exclusive of interest and costs;
> (b) has jurisdiction in any action for the recovery of personal property if the value of the property does not exceed $25,000. and
> (c) shall perform any function assigned to it by or under any other Act.
> (d) The Commissioner in Executive Council may by Order increase the monetary jurisdiction of the Small Claims Court under paragraphs 2(1)(a) and 2(1)(b).

> (2) The Small Claims Court does not have jurisdiction in
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> (a) any action for the recovery of land or in which an interest in land comes in question;
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> (b) any action against the personal representatives of a deceased person or in which the validity of a devise, bequest or limitation under a will or settlement is disputed, or
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> (c) any action for libel or slander.

[6] In the face of the City's objection to the Court's jurisdiction based on the plaintiff's claim for equitable relief, Ms. Cunning abandoned her relief claims other than that for $25,000 monetary damages.

[7] The City also argued that it was unfair that it should have to defend two suits in two different courts based on the same cause of action. In *Cunning v. City of Whitehorse*, 2008 YKSM 3, I agreed. I held that Ms. Cunning could not concurrently sue the defendant in two courts and that she had to elect to proceed with one suit or the other.

[8] In consequence of that decision, Ms. Cunning elected to proceed in Small Claims Court and discontinued her participation in the Supreme Court action.[1]

[9] One might have been forgiven for thinking that the jurisdictional issues had been dealt with. However, when the matter was next before the Court (for a pre-trial conference) counsel for the City advised that he intended to bring *another* application challenging the jurisdiction of the Small Claims Court to hear Ms. Cunning's case. This time, he said, the City would argue that the Small Claims Court had no jurisdiction because the action was one in which "an interest in land comes in question". It will be recalled that s. 2(2)(a) of the Small Claims Court Act provides that the Court has no jurisdiction in such matters.

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[1] The Supreme Court action, meanwhile, has not advanced beyond the filing of the claim. It appears to be the intention of the Takhini North residents to use Ms. Cunning's Small Claims Court suit as a test case.

[10] A new Notice of Motion was subsequently filed and the second application was argued before me on January 6, 2009.

[11] The first question to be determined is whether the Court should entertain the motion at all having regard to the fact that the City has already argued the jurisdiction question and the Court has already made a ruling. It is quite clear, and the City concedes, that it could have made its present objection back in September 2008 when the first motion was argued. Section 2 of the *Small Claims Court Act* was squarely before the Court. The argument the City makes now could just as easily have been made then. No cogent reason was advanced for the failure to do so. There were no intervening changes in circumstances or in the law. Meanwhile, of course, Ms. Cunning had already acted in reliance on the Court's ruling on the first motion.

[12] The most charitable construction that can be put on it is that counsel didn't think of the objection until afterward. The plaintiff argues, with some justification, that what the City is trying to do is to have two bites at the cherry, two kicks at the can, and two hearings for the price of one.

[13] With apologies to counsel, who dealt with the matter of issue estoppel at some length, I think this aspect of the matter can be quickly disposed of. The defendant's conduct would incline any court to consider invoking the doctrine of issue estoppel. Even if the court ultimately found that doctrine inapplicable, this is clearly a case where the court would exercise its discretion against allowing a rehearing on the grounds that the applicant was seeking to make arguments that it should have made at the time of the first. Such an application is an abuse of process.

[14] However, I do not think that either issue estoppel or abuse of process can be invoked if the effect would be to confer on the Court jurisdiction that it does not have under the statute that created it. Parties could not, even by expressely

attorning to the jurisdiction of the Small Claims Court, cloak it with authority to decide a case where an interest in land was the issue. The most obvious reason is that any resulting orders regarding the title to the land in question would be ineffective having regard to the provisions of the *Land Titles Act,* R.S.Y. 2002, c. 130. See particularly s. 151 and the definition of “court” and “judge” in s. 1.

[15] It thus becomes necessary to determine if this is a case in which “an interest in land comes in question”. The City says that an interest in land is in question in this case because the easements (by which the current owners became saddled with the redevelopment costs) are in dispute. It is quite true that the easements feature prominently in the case. In fact, the plaintiff claims that the easement is not really an easement at all, but a colourable attempt by the developers to saddle the purchasers with the plumbing bill.

[16] It must be said that the easement, on its face, is rather unusual. It does not, as an easement usually does, grant a right of way over the servient lands. Rather, it purports to charge the owners of the lands at the time the water lines and sewers are repaired with the responsibility to pay for those repairs.

[17] Be that as it may, the nature of the easement is not really in dispute. The plaintiff does not ask that it be interpreted or, more to the point, declared invalid. Rather, she says, she has been saddled with the easement (and the accompanying responsibility to repair) through the City’s fault. She claims monetary damages, not removal of the easement.

[18] In my view, an interest in land “comes in question” in a law suit if, and only if, the judgment the court makes could affect an interest in land.

[19] In *Re Chilliwack (District)*, [1984] B.C.J. No. 2935 (B.C.S.C.), the Small Claims Court judge had held he had no jurisdiction in a nuisance case because the defendant municipality disputed the claim that it owned the lands from

whence that notorious coastal scourge, runaway blackberry bushes, had escaped. The British Columbia *Small Claim Act*, R.S.B.C. 1979, c.387 at that time provided that the Small Claims Court lacked jurisdiction "where the title to land comes into question".

[20] On appeal, Proudfoot J. (as she then was) held that although ownership of the lands in question was a factual matter that needed to be decided in order to determine who was liable for any nuisance proved, that did not mean that title to land was in question. Whatever judgment the court gave, it could not affect the title to the land in any way.

[21] To a similar effect is the decision of Stansfield J. (as he then was) in *Lou Guidi Construction Ltd. v. Fedick,* [1994] B.C.J. No 2409 (B.C.P.C.). The suit dealt with damages claimed in regard to an uncompleted sale of real property. The Court held that there was no bar to the Small Claims Court considering interests in land in a case for damages within the court's jurisdiction so long as the remedies sought by the claimant did not in any way purport to affect an interest in land:

> "…the focus of the jurisdictional inquiry is the nature of the relief sought, not whether the matter touches upon certain issues (para. 18)."

[22] Another way to look at the question of whether or not an interest in land is in issue is to ask whether or not a *lis pendens* could be issued. Clearly, none could here. This is not a complete test, of course, because there could be cases where an interest in land was clearly in issue but no *lis pendens* is filed. An example would be a case of a landowner bringing action to remove an encumbrance from a property to which he already held title. However, reference to the sorts of cases where a *lis pendens* is normally filed gives a better sense of what the phrase "interest in land comes in question" really encompasses. See for example: *Tkalych v. Tkalych* 2001 SKQB 208.

[23] The proposition that the question of jurisdiction should be settled by regard to the relief claimed is reinforced if one looks at the provisions of s.10 of the Small Claims Court Act. It provides that:

> An action in Supreme Court may be transferred to the Small Claims Court by the clerk of the Supreme Court on request and with the consent of all parties filed before the trial commences, if
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> (a) the only claim is for the payment of money or recovery of possession of personal property; and
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> (b) the claim is within the jurisdiction of the Small Claims Court. (emphasis added)

[24] If one looks at the present suit in light of what relief is claimed, it is clear that the jurisdiction of the Small Claims Court is not ousted by s. 2(2)(a) of the *Small Claims Court Act.*

[25] There is one additional aspect of the jurisdictional issue that bears consideration. My assessment of the nature of the suit is based upon the pleadings. No evidence has been heard. More significantly, it appears likely that the complexion of the matter may change. I say this because, Mr. Shewfelt, the City Manager, deposes in his affidavit of Dec. 30, 2008 that he has instructed the City's counsel in this action to issue third party notices to, amongst others, the corporations that were parties to the easement agreement, should the matter proceed in this Court.

[26] Should this occur, the issues in dispute (*and the relief sought*) could change. The plaintiff runs the risk that she will proceed along the primrose path through the Small Claims Court only to find her way barred by nasty men in striped pants and winged collars, again claiming that this Court has no jurisdiction to hear her case[2]. However, that is all speculation at this point. For

[2] They may, as well, be clutching copies of *Holland* v. *Saskatchewan*, 2008 SCC 42 and arguing that she has no cause of action.

the present, the plaintiff has made her choice of forum and that choice should be respected.

[27] The defendant's application is dismissed.

[28] It remains to consider the question of costs. Section 38 of the *Small Claims Court Regulations* O.I.C. 1995/152 provides:

> 38(1) No costs are recoverable in respect of a motion except that, where the court is satisfied that a motion should not have been brought or should not have been opposed, or was necessary because of the default of a party, the court may fix the costs of the motion and order them to be paid immediately.
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> (2) The cost of a motion fixed by the court under subsection (1) shall not exceed $50 unless there are special circumstances.

[29] This is clearly a case where the motion was necessitated by the default of a party. This is also a case where special circumstances make it just as clear that $50.00 would be grossly inadequate compensation to the injured party. In addition to the ordinary trouble and expense of responding to the motion is the fact that Mr. Cherkewich resides and practices in Saskatchewan. He had to travel to Whitehorse specifically to deal with this motion.

[30] With some ingenuity, Mr. Roothman argued that there were no costs as Mr. Cherkewich is acting *pro bono* in this case. Moreover, Mr. Roothman said, the costs of travel should not be paid because the plaintiff has chosen to hire counsel from outside when local counsel could have done the work.

[31] The fact Mr. Cherkewich agreed to act without fee is irrelevant. His commitment of time has been substantially increased owing entirely to the defendant's actions and he is entitled to be compensated. Mr. Cherkewich estimated that he spent 20 hours preparing for and arguing the motion. This is in addition to travel time. The expenses of the trip are also the result of the

defendant's conduct and will have to be paid by the plaintiff[3]. In my view, engaging outside counsel was entirely reasonable in this case as it involves matters that would put many members of the resident bar in a position of conflict or, at least, discomfort[4]. Even if local counsel had been found, it is far from clear that it would have been more economical than bringing Mr. Cherkewich in, given that he is working without fee.

[32] I fix the costs of this motion at $1000.00 in addition to the disbursements incurred for travel, meals and accommodation, payable immediately by the defendant to the plaintiff.

[33] Mr. Cherkewich indicated that he would undertake to donate any costs awarded on account of solicitor's fees to such charity as the Mayor of Whitehorse would select.

[34] Should any of the matters regarding costs prove problematic, the parties may apply to the Court for further directions.

Faulkner T.C.J.

[3] I am not forgetting that Ms. Cunning may have the financial backing of other Takhini North residents who are involved in similar proceedings against the City.

[4] The Claim alleges, amongst other things, that the principals of the development corporation were concurrently members of the firm of solicitors providing legal services to the City. In addition, many members of the local bar would have acted for purchasers or mortagees of the lots in Takhini North or for real estate agents involved in the sales.