

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Skiba v. Racho*, 2005 YKSC 57

Date: 20051027
Docket No.: S.C. No. 05-A0102
Registry: Whitehorse

Between:

ELAINE SKIBA

Plaintiff

And

**MARGARET-ANNE RACHO, RUSSELL GRIFFITHS
& HEATHER GRIFFITHS**

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Sean Kelly
André Roothman

Counsel for the plaintiff
Counsel for the defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Elaine Skiba for interim possession of a condominium at 27A Finch Crescent, Whitehorse, pursuant to an Agreement for Sale dated March 1, 2005. Ms. Skiba took possession of the condominium in early March. She remained in possession until her household effects and personal property were removed and the locks changed in late August by a new purchaser, preventing her from entering the condominium. Ms. Skiba was in arrears in her payments to Ms. Racho, the vendor.

[2] Ms. Skiba also applies for the following additional remedies which counsel for the defendants consents to:

1. this application being heard on short notice;
2. that the defendants supply a list of all personal property, chattels, and business records located at 27A Finch Crescent which they, or their agents, removed or in any way interfered with within twenty-four hours;
3. that the defendants return all personal property, chattels and business records belonging to the plaintiff within twenty-four hours;
4. that the defendants return to the plaintiff any and all mail addressed to her forthwith.
5. that the Registrar of Land Titles be restrained from granting a certificate of title or otherwise dealing with 27A Finch Crescent until further court order.

[3] I order the relief consented to.

[4] The only remaining question to be determined is whether Elaine Skiba should be granted the injunctive relief of interim possession of 27A Finch Crescent.

THE FACTS

[5] On or about March 1, 2005, Elaine Skiba entered into an Agreement for Sale with Margaret-Anne Racho to purchase the Condominium at 27A Finch Crescent.

[6] The Agreement for Sale contained the following terms, among others:

1. the purchaser was to take vacant possession of the 27A Finch Crescent on March 1, 2005, and pay for all utilities;
2. the purchaser was to pay the bi-weekly mortgage payments of the vendor in the amount of \$523.92 commencing March 15, 2005;

3. on the closing date of September 1, 2005, the purchaser was to either assume the existing mortgage or replace it with a new mortgage for the balance outstanding.

[7] Elaine Skiba, who had been residing with the defendants Russell and Heather Griffiths, took possession of the Lands in March 2005. She remained in possession until sometime in late August when the Griffiths removed her possessions and changed her locks, without her consent. She states that she has done extensive work on the condominium including major cleaning, renovations and painting.

[8] There is disagreement about how many bi-weekly payments were made. Ms. Racho, who had moved to Manitoba, requested that the mortgage payments be paid by way of post-dated cheques. However, Ms. Skiba made payments directly to Ms. Racho's Scotia bank account in Whitehorse. The bank records provided by Ms. Racho indicate payments on the following days and in the following amounts:

<u>Date of payments</u>	<u>Amount of Payment</u>
March 15, 2005	\$524.00
April 5, 2005	\$524.00
April 19, 2005	\$524.00
May 3, 2005	\$524.00
June 8, 2005	\$524.00
June 21, 2005	\$524.00

[9] According to the bank records presented by Ms. Racho, there were no payments received in July and August.

[10] Ms. Skiba states that a family emergency occurred in late July and she left the Yukon for Alberta on August 11, 2005.

[11] Ms. Racho acknowledged that Ms. Skiba's payments were made irregularly but stated "I was in no real position to argue and I took Ms. Skiba's payments when she did deposit them."

[12] Ms. Racho states that she was "quite frantic" by the beginning of August and sent an email to Ms. Skiba on August 8, 2005, which, on the face of it, did not reveal that she was "quite frantic". I find that it was a friendly email that began with the following:

"Good Day Elaine,

Just a gentle reminder from one procrastinator to another!

Wondering if you would be able to deposit the August first payment in my account; it would be greatly appreciated if you would be able to take care of that at your earliest convenience.

How is your summer going? ..."

[13] After her email, Ms. Racho was asked by Heather Griffiths if Ms. Skiba was current with her payments. Ms. Racho advised Ms. Griffiths that Ms. Skiba was "quite behind and that I was concerned that she would not be able to fulfill her portion of our agreement". Heather Griffiths informed Ms. Racho that Ms. Skiba "was having personal problems and that the reason Ms. Skiba had moved to the Yukon was in order to deal with those problems".

[14] In the same conversation, Heather Griffiths said that "she and Mr. Griffiths would be able to purchase the property as Ms. Skiba had in effect defaulted on her portion of the agreement and would assist me from the Yukon in addressing the property at 27A Finch Crescent".

[15] Ms. Racho stated that she forwarded a copy of the Agreement for Sale to Heather Griffiths “so that she would be able to seek legal advice on how best to proceed”.

[16] On August 16, 2005, Ms. Skiba emailed Ms. Racho confirming that she had not made the deposit. She stated:

“Sorry I haven’t done that deposit yet ... I was waiting for a deposit that hasn’t arrived yet. I will get it to you as soon as possible. We can change the name on the duplex next month. I have almost finished the renovations and am selling the property. I am actually in Alberta ... I just became a grandmother and am on my way to see the baby. I will be at the bank later today when I get to a bigger center ... I will get both payments in ASAP.”

[17] Ms. Racho stated that upon receipt of the August 16, 2005, email from Ms. Skiba, she felt that the only action she could take was to sell the property to relieve her financial hardship.

[18] Ms. Racho did not respond to Ms. Skiba by email. Instead, she arranged to have a letter backdated to August 1, 2005, posted at 27A Finch Crescent where she knew Ms. Skiba would not find it as she was in Alberta. The letter gave Ms. Skiba fourteen days to vacate the premises. The letter referred to Ms. Skiba as a “tenant” and also threatened legal action if she did not vacate the premises. Ms. Skiba stated that she was in Whitehorse until August 11, 2005, and did not receive the letter dated August 1. In a letter dated August 24, 2005, Ms. Racho stated that the contract was null and void for non-payment and the contents of the condominium were being seized. Ms. Skiba did not see it until her return to Whitehorse on August 31, 2005.

[19] Ms. Racho states she then forwarded a letter to the Griffiths authorizing them to change the locks which they did. This letter was not attached to Ms. Racho’s affidavit.

[20] When Ms. Skiba returned to Whitehorse on August 31, 2005, the locks to 27A Finch Crescent were changed and her household effects and personal property had been removed from the home and placed in an Express Furniture truck parked in the yard. There were some confrontations involving the RCMP but Ms. Skiba has been prevented from entering the property.

[21] In the meantime, Ms. Racho had proceeded to sign a Contract of Purchase and Sale with Heather and Russell Griffiths for 27A Finch Crescent. This contract was for more attractive terms than the Skiba Agreement for Sale. It contained a \$1,000 deposit, \$5,000 cash on closing and the assumption of the mortgage. It appears to have been concluded on August 25, 2005, but the actual document contains no date of execution.

[22] Heather Griffiths filed an affidavit making a number of allegations about Ms. Skiba's financial and personal situation. She alleges that Ms. Skiba is unable to close her purchase. Ms. Skiba denies the allegations and states that she has been and remains prepared to close the purchase.

[23] Heather Griffiths also states that she and Mr. Griffiths have paid \$5,000 to Ms. Racho as a deposit although the Contract of Purchase and Sale refers to a \$1,000 deposit and a \$5,000 payment on closing. She indicates that \$4,500 has been spent on repairs and renovations and that they are now renting the property to tenants.

[24] Counsel for Heather and Russell Griffiths has offered to pay \$5,000 into court as security for damages. Counsel for Ms. Skiba indicates that Ms. Skiba is prepared to take possession subject to any existing tenancies.

[25] I conclude the following from the facts:

1. Ms. Skiba was not current in her mortgage payments but Ms. Racho was not demanding timely payments. Ms. Racho was not relying upon a condition that time was of the essence until late August 2005;
2. Ms. Racho did not decide to terminate the Agreement for Sale with Ms. Skiba until she began her discussions with the Griffiths;
3. Ms. Racho's repudiation of the Agreement for Sale was never communicated to Ms. Skiba who had no reason to believe that her purchase was in jeopardy until the Griffiths took control and possession of the property.

ISSUES

[26] There are two issues to consider:

1. Is Ms. Skiba required to show that she was ready, willing and able to close her Agreement for Sale on September 1, 2005?
2. Does Ms. Skiba meet the traditional conditions required for the injunctive pre-trial relief of interim possession?

ANALYSIS

Issue 1: Is Ms. Skiba required to show that she was ready, willing and able to close her Agreement for Sale on September 1, 2005?

[27] The law of contract for the sale of land requires the purchaser to be ready, willing and able to pay and the vendor to be ready, willing and able to convey title on the closing date. Thus, the vendor submits that Ms. Skiba has lost her right to sue for specific performance or, in this application the right of possession, because she did not prove that she was able to pay the payments in arrears and assume the mortgage on the closing date of September 1, 2005.

[28] Ms. Racho clearly repudiated the Agreement for Sale with Ms. Skiba. She signed a new Contract of Purchase and Sale with Heather and Russell Griffiths and authorized the new purchasers to change the locks on the premises and take possession.

[29] The Yukon Court of Appeal has long since stated that when a vendor repudiates an agreement to purchase land, the purchaser does not have to tender or even have the funds available for tender in order to preserve their right to sue for breach by the vendor. See *Williams Yamada Agencies Ltd. v. Erion*, [1981] Y.J. No. 6 at paragraph 4.

[30] I conclude that, for the purpose of this application for interim possession, Ms. Skiba was under no obligation to prove she was ready, willing and able to close the transaction as a result of Ms. Racho's prior repudiation of the Agreement for Sale.

Issue 2: Does Ms. Skiba meet the traditional conditions required for the injunctive pre-trial relief of interim possession?

[31] In this case, Ms. Skiba is applying to return to possession of 27A Finch Crescent prior to trial. The result of granting Ms. Skiba interim possession is that she will receive part of her remedy before the trial of the issues before the court. The test for granting an interim injunction is set out in *British Columbia (Attorney General) v. Wale et al.* (1986), 9 B.C.L.R. (2d) 333, at paragraph 45:

“... First, the applicant must satisfy the Court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.”

[32] McLachlin J.A., then a Justice of the British Columbia Court of Appeal, elaborated on the two tests as follows:

1. the requirement to show irreparable harm was considered to be part of the assessment of the balance of convenience;
2. irreparable harm refers to the question of whether damages can be an adequate remedy;
3. clear proof of irreparable harm is not required and doubt as to the adequacy of damages as a remedy may support an injunction;
4. the judge must not become the prisoner of a formula.

[33] She concluded at paragraph 51:

“... The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case. ...”

[34] This approach to the assessment of the balance of convenience was summarized in *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279 (BCCA) which listed the following points to be considered:

- (a) the adequacy of damages as a remedy for the applicant if an injunction is not granted and for the respondent if an injunction is granted;
- (b) the likelihood if damages are finally awarded they will be paid ;
- (c) the preservation of the contested property;
- (d) other factors affecting whether the harm from the granting or refusal of the injunction would be irreparable:
- (e) which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;
- (f) the strength of the applicant's case;

- (g) any factors affecting the public interest; and
- (h) any other factors affecting the balance of justice and convenience.

Fair Question to be Tried

[35] I have no doubt that there is a fair question to be tried. Ms. Skiba was a purchaser in possession of 27A Finch Crescent. Her possessions were unceremoniously removed from the premises and the locks changed preventing her from entering her home, a situation which remains to this day.

[36] As set out in section 97 (1) of the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, a tenant in rental premises, who has not vacated or abandoned the premises, cannot be removed without a court order. A purchaser in possession has no less a claim and, more likely, a greater claim than a tenant.

[37] The ultimate question of whether Ms. Skiba should be and is able to pay her arrears and assume the mortgage remains to be determined at trial. She clearly has a fair question to be tried given her status as a purchaser in possession.

The Balance of Convenience

[38] I will consider the factors to be addressed in assessing the balance of convenience.

1. The Public Interest

[39] This factor looms large in this case. There is a public interest in ensuring that the rule of law applies in disputes. It is not in the public interest for purchasers in possession to be removed from their premises by vendors, or prospective purchasers in the manner it was done in this case. I take judicial notice of the fact that house values are rising quickly in Whitehorse. There will no doubt be situations like this where real or

perceived contractual breaches occur. However, vendors must take care, particularly with purchasers in possession, not to enter into new contracts for sale before previous contracts are resolved. This may require a court application where the parties are in disagreement.

2. Altering the *Status Quo*

[40] There is no doubt that Ms. Skiba was behind in her payments which would be of concern to any vendor. However, the law has long recognized equitable remedies for purchasers of land who fall in arrears. That determination, the balancing of legal and equitable remedies, must be made by a court when the vendor and purchaser do not agree. In this case, it is the prospective purchasers, with the blessing of the vendor, who have changed the *status quo*.

3. The Adequacy of Damages as a Remedy

[41] It is doubtful that damages are an adequate remedy for purchasers in possession who find themselves on the street, literally, when the vendor decides to pursue a better offer. On the other hand, damages may not be an adequate remedy if the prospective purchasers succeed at trial. Nevertheless, the prospective purchasers had the preferred option of leaving Ms. Skiba in quiet possession and seeking a court ruling before locking Ms. Skiba out of the premises she had occupied for almost six months under an Agreement for Sale.

4. The Likelihood of Damages Being Paid

[42] It is more likely that the prospective purchasers can pay a damages award as they have shown the financial ability to pay an additional \$6,000 to the vendor and offer

to pay \$5,000 into court as security in the event they do not succeed. Ms. Skiba, at this date at least, has not demonstrated the same financial ability.

5. The Strength of the Applicant's Case

[43] This aspect of the balance of convenience is more difficult to assess because the evidence at trial may be different or more complete than the affidavits before the court now. However, as it stands before me now, Ms. Skiba's case has some strength by virtue of the fact that she was a purchaser in possession as opposed to a purchaser who would take possession on closing. The ultimate question of her entitlement to close the purchase will be determined at trial.

6. Further Factors

[44] This application has the further complication that there are other, perhaps innocent tenants, who are in possession of 27A Finch Crescent. It would be unfortunate to have those tenants uprooted so soon upon the assumption of their tenancies. However, a purchaser in possession has a greater claim than a tenant, particularly where the purchaser was in possession before the tenant. The tenant would also be accorded their rights under the *Landlord and Tenant Act*.

[45] In conclusion, I view the balance of convenience as favouring the granting of interim possession to Ms. Skiba since she was in possession under an Agreement for Sale that was repudiated by the vendor before Ms. Skiba had an opportunity to close the transaction.

[46] I order that she be granted interim possession of 27A Finch Crescent, subject to the existing tenancies and their rights under the *Landlord and Tenant Act*. This is

conditional upon Ms. Skiba's undertaking to abide by any order this Court may make as to damages. The order shall include the matters ordered in my introduction.

[47] Counsel may speak to costs.

VEALE J.