SUPREME COURT OF YUKON

Citation: *Young v*. *Beacon*, 2010 YKSC 67

Date: 201011105
S.C. No. 10-AP002
Registry: Whitehorse

Between:

JOYCE YOUNG

Appellant

And

ANTHONY JAMES BEACON and

LINDSEY WHITE RUSSELL

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Joyce Young	Appearing on her own behalf
Peter Sandiford	Counsel for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the appellant, Ms. Young, for a stay of execution of a judgment of the Territorial Court on April 9, 2010, in favour of the respondents, Mr. Beacon and Ms. Russell. The appellant also seeks the release of her vehicle, a 1999 Jeep Cherokee, which has been seized by the respondents in execution of their judgment.

ISSUES

[2] The issues on such an application are:

1. Is there some merit to the appeal in the sense that there is a serious question to be determined?
2. Will irreparable harm be caused to the appellant if the stay is refused?
3. Will the appellant or the respondents suffer the greater harm from the granting or refusal of a stay, pending a decision of the appeal on the merits?

BACKGROUND

[3] On July 15, 2006, the respondents purchased the appellant's residence in Whitehorse (the "residence"), but allowed the appellant to remain as a tenant in the residence for a specific period of time. A disagreement then arose as to whether and when the appellant was required to vacate the residence.

[4] On August 3, 2009, the respondents obtained an order from the Territorial Court declaring that the appellant's tenancy at the residence was a "tenancy-at-will", which had been lawfully terminated by notice from the respondents to the appellant, with the termination effective November 30, 2008. The order further required the appellant to vacate the residence by August 20, 2009. The appellant complied with the order and did not appeal it.

[5] On July 22, 2009, the respondents brought a separate action in the Small Claims Court for damages for the overholding of the tenancy by the appellant from December 1, 2008 to August 30, 2009, as well as for unpaid invoices for labour performed by Mr. Beacon at the appellant's Lac LaBerge property. The trial of that action was heard on

November 23 and 24, 2009 and continued on January 20, 2010, at which time closing submissions were made by the respondents' counsel. The appellant also began her closing submissions on that date, but requested additional time to conclude them. She was directed by the trial judge to file her additional submissions in writing, which she did on February 3, 2010. The respondents filed their reply argument on February 10, 2010, following which the appellant filed a further "Counter Claimant's Rebuttal" which the trial judge reviewed and directed to be filed on February 17, 2010. The respondents then filed a further supplemental argument on February 22, 2010.

[6] The trial judge issued his reasons for judgment on April 9, 2010 (cited at 2010 YKSM 2), awarding the respondents $20,592 as compensation for the appellant being an overholding tenant. He further awarded to the respondents the amount of $3,107.19 for labour and materials provided by Mr. Beacon to the appellant. From the total of $23,699.19, the trial judge deducted a sum of $50 for electricity used by Mr. Beacon, resulting in a net total judgment of $23,649.19. The respondents were also awarded their costs under the *Small Claims Court Act,* R.S.Y. 2002, c. 204, as well as prejudgment and post-judgment interest.

[7] At para. 8 of his reasons, the trial judge specifically noted that he made a number of accommodations throughout the trial for the fact that the appellant was a self-represented litigant.

[8] On April 22, 2010, the respondents' counsel wrote to the appellant confirming that his clients had obtained the judgment and invited her to make payment of the judgment to his firm's office. Counsel's letter also referred to certain goods which the trial judge

ordered the respondents to return to the appellant, which were located at counsel's office. The appellant did not reply to this letter.

[9] On May 10, 2010, the appellant filed a notice of appeal in this Court from the judgment. She did not take any steps to serve the respondents with a filed copy of the notice of appeal.

[10] On September 21, 2010, the appellant filed an amended notice of appeal, adding two grounds of appeal, to make four grounds in all.

[11] On September 28, 2010, a case management conference was held with respect to the appeal. At that time directions were made on a proposed application by the respondents to strike out the appeal. Also on that date, the respondents directed the Sheriff to seize the appellant's 1999 Jeep.

[12] On October 13, 2010, the appellant appeared on short notice before a Deputy Judge of this Court seeking the within stay of execution and the release of the Jeep. Because of the short notice, the matter could not then proceed and it was adjourned to October 28, 2010, for a full hearing of the stay application. In the meantime, further execution by the respondents on their judgment was stayed.

LAW

[13] In *Coburn v. Nagra*, 2001 BCCA 607, Saunders J.A. at para 11, quoted from Legg J. in *Roe, McNeill & Co v. McNeill* (1994), 49 B.C.A.C. 247, where he set out the relevant factors to consider on a stay application:

> "1. A successful plaintiff is entitled to the fruits of his judgment. He should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided (Voth Bros. Construction

> (1974) Ltd. v. National Bank (1987), 12 B.C.L.R. (2d) 43 (C.A.)).
>
> 2. The court's power to grant a stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation or to prevent irremedial damage or where there are other special circumstances (Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd. (1982), 42 B.C.L.R. 141 (C.A.) at 142).
>
> 3. In the exercise of its discretion the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise and grant the stay on terms it considers appropriate (Rogers Foods (1982) Ltd. v. Federal Business Development Bank (1984), 57 B.C.L.R. 344, (C.A.) at 347).
>
> 4. A first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success (Rogers at 347 and Mikado Resources Ltd. v. Dragoon Resources Ltd. (1990), 46 B.C.L.R. (2d) 354, (C.A.) at 357)."

[14] *Coburn* was cited with approval in the more recent case of *Susan Heyes Inc.* v. *Vancouver (City)*, 2009 BCCA 348. In *Heyes*, Chiasson J.A., at para. 4, also describes the principles that govern this type of an application. He quoted from Smith J. in *Gill v. Darbar*, 2003 BCCA 3, as follows:

> "The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: … The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: …. The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted …" (citations omitted)

ANALYSIS

1. Is there some merit to the appeal in the sense that there is a serious question to be determined?

[15] As stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para 78, the threshold here is a low one. Whether the test has been satisfied should be determined by the motions judge on the basis of common sense and an extremely limited review of the case on the merits. If satisfied that the appeal is neither frivolous nor vexatious, the motions judge should proceed to consider the second and third branches of the test, even if of the opinion that the plaintiff is unlikely to succeed with the appeal. A prolonged examination of the merits is generally neither necessary nor desirable at this stage.

[16] That said, I am not persuaded that the appeal has any merit, and I therefore find it to be essentially frivolous.

[17] The first ground of the amended notice of appeal is that the trial judge lacked jurisdiction to hear the matter because s. 2(2)(a) of the *Small Claims Court Act*, states that:

> "The Small Claims Court does not have jurisdiction in
>
> > (a) any action for the recovery of land or in which an interest in land comes in question; …"

[18] Clearly, the action below was not one for "the recovery of land." As for when an "interest in land" may come into question, the case of *Cunning v. City of Whitehorse*, 2009 YKSM 1, is helpful. There, Faulkner J. dealt with this issue at paras. 18 – 24, referring to *Re Chilliwack (District)* (1984), 53 B.C.L.R. 391 (S.C.); *Lou Guidi Construction Ltd. v. Fedick,* [1994] B.C.J. No 2409 (P.C.) and *Tkalych v. Tkalych* 2001 SKQB 208.

From these cases, Faulkner J. concluded that the focus of the jurisdictional inquiry should be on the nature of the remedy sought and whether that remedy could affect the title to land in any way.

[19] In the case at bar, the main issues before the trial judge were the determination of the terms agreed to between the parties regarding the sale of the residence from the appellant to the respondents, and whether there was an overholding of the tenancy following the completion of the purchase. There were other issues raised by the appellant at trial, but they were dismissed by the trial judge and they did not call into question an interest in land.

[20] The trial judge concluded that the contract of purchase and sale of the residence included the following terms:

- It was to be “subject to existing tenancies” until May 31, 2007;
- The respondents agreed to do “$5,000 worth of work” at the appellant’s Lac Laberge property; and
- There were “no representations, warranties, guarantees, promises or agreements other than those set out” in the contract.

[21] The appellant submitted to the trial judge and to this Court that the contract of purchase and sale was never fulfilled by the respondents because the “$5,000 worth of work”, was to be specifically the completion of an addition to the appellant’s home at Lac Laberge, consisting of a bedroom and bathroom. Further, since this work was never completed, the respondents’ obligations under the contract remained unfulfilled and the requirement that she move out of the residence no later than May 31, 2007 was vitiated.

[22] The trial judge found that the contract of purchase and sale did not specify that the "$5,000 worth of work" was specifically in relation to the addition. He also found that no other collateral documents were to be considered as part of the terms of the contract of purchase and sale, since the contract itself specified that it was the entire agreement between the parties.

[23] It must also be noted that the contract of purchase and sale was completed and executed by the parties, each with independent legal advice, on June 21, 2006. Pursuant to the terms of the contract, the respondents paid the appellant a $5000 deposit and the balance of the purchase price of $220,000 on July 15, 2006. Accordingly, the respondents took possession of the residence on that date, subject only to the appellant's tenancy, which was not to go beyond May 31, 2007. Prior to the respondents commencing their action in Small Claims Court for damages for overholding and the unpaid work done by Mr. Beacon, it does not appear that the appellant raised any issue about the contract of purchase and sale for the residence being incomplete or invalid. In other words, it seems that, prior to the trial, the appellant never challenged the legality of the respondents' title to the residence, and she only did so at the trial as an incident of her defence to the claim that she pay damages for her overholding. Further, I agree with the respondents' counsel that it is not sufficient for the appellant to simply assert an interest in land in this dispute in order to support her jurisdictional objection. For s. 2(2)(a) of the *Small Claims Court Act* to come into play, the question about an interest in land must be a genuine one, not a mere fanciful assertion.

[24] In summary, there was nothing in the action commenced by the respondents which gave rise to questions about "recovery of land" or "an interest in land". They were

merely seeking money damages for the overholding of the tenancy by the appellant and for the work done by Mr. Beacon over and above the $5,000 amount which he performed pursuant to the contract of purchase and sale. Since the trial did not involve any issues of recovery of land or an interest in land, then I fail to see how this appeal could give rise to such issues. Accordingly, it seems to me that the first ground of appeal is bound to fail.

[25] The second ground of appeal is that the trial judge erred in fact and law in deciding this matter under the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131. I am not sure I understand what the appellant means here. When I questioned her about it at the hearing, she made two points in reply. First, she submitted that there was no agreement regarding a tenancy and therefore the matter should not have been decided under the *Landlord and Tenant Act*. Second, she submitted that the trial judge was not bound to accept the earlier order made by a Deputy Judge of the Territorial Court on August 3, 2009 declaring that the appellant had a tenancy-at-will at the residence, that the tenancy was terminated by notice effective November 30, 2008, and that the appellant was bound to vacate the premises by August 20, 2009.

[26] The answer to the appellant's first point is simply that there was indeed a finding by the Deputy Judge of the Territorial Court that there was a tenancy between the appellant and the respondents at the residence. That decision was never appealed by the appellant. Therefore, she could not challenge it before the trial judge and nor can she challenge it in this Court. Rather, the judgment stands as a lawful order of the Territorial Court and the trial judge quite properly relied upon it as setting the context for his decision. Having accepted that context, it was entirely appropriate for the trial judge to consider the respondents' application for damages for overholding under s. 42 of the

L*andlord and Tenant Act.* Accordingly, the second ground of appeal also seems bound to fail.

[27] The third ground of appeal essentially is that the respondents should have pursued their damages for the overholding of the tenancy when they made their application to the Deputy Judge of the Territorial Court for declaratory relief and an eviction order, and that their failure to do so has given rise to a multiplicity of proceedings. The short answer to that proposition is that s. 95(4) of the *Landlord and Tenant Act* specifically states that a landlord may proceed with a claim for use and occupation after the expiry of a tenancy by a summary application under s. 96 or by another action:

> "95(4) A landlord's claim for arrears of rent or compensation for use and occupation by a tenant after the expiration or termination of the tenancy may be enforced by action or on summary application as provided in section 96." (emphasis added)

As such, there was nothing requiring the respondents to seek their damages for overholding while applying for the eviction order. Indeed, the trial judge found that summary proceeding would likely have been "considerably protracted" had the respondents done so. Thus, the respondents were entirely within their rights to commence a subsequent small claims action for those damages. Therefore, this third ground of appeal also seems doomed to fail.

[28] The fourth and final ground of appeal is that the trial judge "erred in his determination of the facts upon which the issues ought to have been decided." I appreciate that I am only to conduct the preliminary assessment of the merits of the appeal at this stage. However, without further particulars, this ground of appeal is overly

vague. It is not open to the appellant to object to the findings of fact on such a broad basis. I agree with the respondents' counsel that the appellant cannot simply appeal on the basis that she disagrees generally with the findings of fact made by the trial judge. Rather, it seems to me that the appellant must point to particular aspects of the record which either indicates that there was a complete absence of evidence to support specific findings made, or that the trial judge made blatantly contradictory findings of fact. She has done neither. Accordingly, at this stage, this ground of appeal also seems bound to fail.

2. Will irreparable harm be caused to the appellant if the stay is refused?

[29] The onus is on the appellant to establish that she will suffer irreparable harm unless a stay is granted; *Morguard Real Estate Investment Trust. v. Davidson*, 2001 BCCA 735, at para. 13. In other words, she must show that if the respondents are not prevented from continuing to execute on their judgment pending the hearing of the appeal, the appellant will suffer harm that could not be remedied if she is ultimately successful in the appeal. As stated in *RJR-MacDonald*, cited above, at paras. 58 and 59

> "At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. …"

[30] In the case at bar, the appellant only provided evidence regarding the difficulties she faces by not having access to her 1999 Jeep. She deposed that she is 71 years of

age and lives in her home at her Lac Laberge property, approximately 50 km outside of the city of Whitehorse. She says she has no other reliable transportation and cannot rely on her neighbours. She further deposed that it would not make any sense for her to purchase a replacement vehicle because of her fear that the respondents might seize that as well.

[31] While this degree of inconvenience is unfortunate, that is not the test for irreparable harm. The respondents have a money judgment and they are entitled to pursue the fruits of that judgment. The appellant is not without assets. She owns the property she resides on at Lac Laberge. She received $225,000 when the respondents purchased the property in 2006. She also deposed that she has a number of other motor vehicles in Whitehorse “to be sold”. In these circumstances, it would appear that the appellant is capable of posting sufficient security with the court to protect the interests of the respondents in collecting their judgment, in the event that the appeal is ultimately unsuccessful. Even if that is not possible, the only way in which the appellant would be irreparably damaged if a stay is not granted would be if the respondents are successful in executing their judgment, and then are unable to repay the appellant if she succeeds in the appeal. However, the appellant has provided no evidence in that regard. Indeed, her evidence suggests the contrary, in that the respondents are both gainfully employed and that the property on which they reside has two income-earning rental units on it. Thus, the appellant has failed to meet her onus on this branch of the three-part test.

3. Will the appellant or the respondents suffer the greater harm from the granting or refusal of a stay, pending a decision of the appeal on the merits?

[32] On this third branch of the three-part test, I must decide whether, on balance, the inconvenience to the appellant, if the stay should be refused, would be greater than the inconvenience to the respondents if the stay should be granted. As stated in *RJR-MacDonald,* cited above, at para. 63, the factors which must be considered in assessing this "balance of inconvenience" are numerous and will vary in each individual case

[33] It immediately strikes me that one of the factors relevant to this branch of the test is the failure of the appellant to proceed expeditiously with this appeal. As indicated above, after filing the original notice of appeal on May 10, 2010, the appellant did nothing to prosecute the matter; she did not even serve the respondents. Nor did the appellant reply in any way to the earlier correspondence from the respondents' counsel inviting her to make contact with him to discuss payment of the judgment and the return of the goods that were owed to her by the respondents.

[34] When asked to explain her inaction in that regard, the appellant's only response was that she was having difficulty finding a lawyer to represent her. In the circumstances, that explanation rings rather hollow, as it does not excuse her failure to serve the initial notice of appeal or her simple lack of courtesy in failing to respond to the letter from the respondents' counsel. Further, it seems the appellant was able to capably represent herself at the three-day trial in the Small Claims Court.

[35] The second factor which I take into account on this branch of the three-part test is that the appellant appears to have sufficient assets to pay the amount of the money judgment into court pending the hearing of the appeal, or to post sufficient security to

protect the interests of the respondents in that regard. In her submissions at the hearing of this application, the appellant claimed that she has attempted to raise such security, but has been unsuccessful in doing so. However, she failed to provide any evidence in her two supporting affidavits to detail her efforts in that regard. Rather, her apparent inaction in attempting to post sufficient security is consistent with her failure to take timely steps to prosecute this appeal.

[36] As stated in *Coburn*, cited above, a successful plaintiff is entitled to the fruits of his judgment and should not be deprived of them unless the interests of justice require that they be withheld until the defendant's appeal is decided. Having found against the appellant on the first two branches of the three-part test, and also for the reasons I have just stated, I find that the respondents will suffer the greater prejudice if a stay of execution is granted pending the outcome of this appeal. In other words, the balance of inconvenience tips in their favour.

CONCLUSION

[37] The application for a stay of execution is dismissed. The respondents should have their costs in any event of the outcome of the appeal.

GOWER J.