NOVA SCOTIA COURT OF APPEAL
Citation: *Smith v. Beals Estate*, 2015 NSCA 93

Date: 20151015
Docket: CA 427335
Registry: Halifax

Between:

Carl David Smith

Appellant

v.

Estate of Ronald Lester Beals, Georgina Peggy Beals, Karen Grant Beals and Robert Corey Grant

Respondents

Judges:	MacDonald, C.J.N.S., Fichaud and Bryson JJ.A.
Appeal Heard:	September 28, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed, without costs, per reasons for judgment of Bryson, J.A.; MacDonald, C.J.N.S. and Fichaud, J.A. concurring
Counsel:	Carl David Smith, Appellant in Person Georgina Peggy Beals and Karen Provo, Respondents in Person

Reasons for judgment:

[1] This is an appeal from a property decision by Justice Allan Boudreau, 2014 NSSC 156. Both parties are self-represented.

[2] The case arises out of a 1991 quit claim deed with respect to approximately 24 acres of land in the Preston area, Halifax County. The deed purported to release five-sevenths of the interest in the land to Ronald Lester Beals. Ronald Lester Beals died in 1997, but in the meantime conveyed several lots out of the larger piece of land to various members of his extended family - some of whom had built houses on the lands already, some of whom had not. One of the grantees was the appellant, Carl David Smith.

[3] Mr. Smith is one of eight children of Edmund and Volda (Volga) Beals. His father would have inherited a one-seventh interest in the lands in question, as did his uncle, Ronald Lester Beals. Mr. Smith's mother was one of the releasors in the 1991 deed and purported to release her deceased husband's (Edmund's) one-seventh interest in the lands. Mr. Smith now contends that his mother's release of the one-seventh interest was ineffective because she and her husband had been previously divorced. He wishes to lead fresh evidence to prove this.

[4] In *R. v. Palmer*, [1980] 1 S.C.R. 759 the Supreme Court explained that fresh evidence will only be admitted if the evidence was unavailable at trial, is relevant to a decisive issue, is credible and could have affected the result.

[5] Mr. Smith asks us to consider as "fresh evidence" a 1986 divorce decree between his parents. Because his parents were no longer married at the time of his father's death, his mother would not have inherited from his father under the *Intestate Succession Act*, R.S.N.S. 1898, c 236. Mr. Smith suggests that his mother had nothing to convey to Lester Beals in the 1991 deed.

[6] We do not know what arrangements were made between Mr. Smith's parents when they divorced. But Mr. Smith concedes that his mother continued to live in the family home after the divorce.

[7] Assuming that we received this evidence, it would not change the outcome. It relates only to a one-seventh interest and does not alter the fact that many parties, including the appellant, Mr. Smith, have relied on the 1991 deed because they have accepted deeds to these lands from Lester Beals, whose title Mr. Smith

now challenges. He cannot simultaneously claim title to his land and say that the man who gave him that title - Lester Beals - had no title himself.

[8] In his closing submissions to Justice Boudreau, Mr. Smith said he did not want the 1991 deed "totally nullified", in part because he had received a lot himself from Lester Beals. Rather he wanted the deed to be declared invalid with respect to some remaining lands now held by Lester Beals' heirs (the respondents). He also wanted a grant of three acres and the former homestead for himself from the remaining lands.

[9] Mr. Smith cannot have it both ways. He cannot claim that the deed he received from Lester Beals is valid, while the deed to Lester Beals is not. This is a logical inconsistency which the law sometimes calls "election". In *Halsbury's Laws of Canada - Equitable Remedies* (Markham, Ont: LexisNexis, 2012) at para. HER-19 "Nature of Election", Maurice Coombs describes it:

> Under the doctrine of election, a person may not consciously and unequivocally exercise a right that is inconsistent with another right. To establish an election in equity, it is unnecessary to show that the electing party made a conscious choice between inconsistent rights at the time the original decision was made; an equitable election does not involve a choice but accepting the consequences of a decision already made.

[10] More succinctly, Viscount Maugham in the House of Lords, adopted this description in *Lissenden v. C.A.V. Bosch Ltd.*, [1940] A.C. 412 (H.L.) at 418:

> The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election.

[11] Mr. Smith also invites us to re-visit his arguments before Justice Boudreau which included:

1. That the 1991 deed was obtained by Lester Beals fraudulently and in breach of trust because he induced some of the signatories to transfer the lands to him on the representation that the lands would be shortly going up for tax sale and the family would lose the property.
2. That he would act as trustee of the lands.
3. That a number of the signatures on the deed were not of releasors but rather of agents who signed on their behalf (i.e. children). He particularly names Kevin Beals as a releasor who did not sign the deed.

4. Mr. Beals also alleged that the 1991 deed did not comply with s. 4 of the *Statute of Frauds*, R.S.N.S. 1989, c. 442:

> No interest in land shall be assigned, granted or surrendered except by deed or note in writing signed by the party assigning, granting or surrendering the same, or by his agent thereunto authorized by writing, or by act and operation of law.

[12] Justice Boudreau was satisfied that the 1991 deed was valid. He found that there was no trust entered into by Lester Beals when he received the 1991 lands:

> [18] Georgina Beals was asked to testify by Mr. Smith after the close of the case, which I permitted. She admitted that it was not Lester's intention to take all of the Land for himself and that Lester and his heirs had been faithful to that intention. If the Deed to Lester was impressed with any kind of trust, as contended by Mr. Smith, then the responsibility would be upon Mr. Smith to prove the terms of such a trust, and that those terms had not been respected. Both of those things have not been proven in sufficient detail to permit the court to conclude that a trust, if any, was not respected.
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> [19] Also the Deed was signed in the presence of lawyer Weatherburn and there was no evidence tendered that would prove that Kevin Beals had not approved of or consented to the Deed and authorized its execution in the circumstances that existed some 23 years ago.
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> Conclusion:
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> [20] In the final analysis, Mr. Smith has not proven, on a balance of probabilities, that the April 15, 1991 Deed was not lawfully executed by the parties and signatories to that Deed. It has also not been proven that the terms or conditions for that conveyance have not been respected. Mr. Smith has stated that he wants the Deed to stay on the record, apparently because his and other deeds would be adversely affected. The Deed is either valid, or it is not. It cannot be halfway.

[13] Mr. Smith wants us to re-examine the evidence and overturn Justice Boudreau's findings. Mr. Smith is not a lawyer and so may not be aware of the role and authority of this Court on appeal. As Justice Cromwell said in *A.M. v. Children's Aid Society of Cape Breton-Victoria*, 2005 NSCA 58:

> [26] This is an appeal. It is not a retrial on the written record or a chance to second guess the judge's exercise of discretion. The appellate court is not, therefore, to act on the basis of its own fresh assessment of the evidence or to substitute its own exercise of discretion for that of the judge at first instance. This Court is to intervene only if the trial judge erred in legal principle or made a palpable and overriding error in finding the facts. The advantages of the trial judge in appreciating the nuances of the evidence and in weighing the many

> dimensions of the relevant statutory considerations mean that his decision deserves considerable appellate deference except in the presence of clear and material error: *Family and Children's Services of Lunenburg County v. G.D.*, [2003] NSJ No 416 (Q.L.) (C.A.) at para. 18; *Family and Children's Services of Kings County v. B.D.* (1999), 177 N.S.R. (2d) 169 (C.A.); *Nova Scotia (Minister of Community Services) v. C.B.T.* (2002), 207 N.S.R. (2d) 109; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at paras. 10 - 16.

[14] We cannot reconsider Justice Boudreau's treatment of the evidence and overturn his decision unless he made a very clear and material error - what we call a "palpable and overriding error". Nothing in the record suggests that Justice Boudreau made any such errors. I would dismiss the appeal, but in the circumstances, without costs.

Bryson, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.