NOVA SCOTIA COURT OF APPEAL

Citation: Landry v. 3171592 Nova Scotia Limited, 2007 NSCA 111

Date: 20071116
Docket: CA 287802
Registry: Halifax

Between:

Joseph Daniel Landry and Lorraine Landry

Appellant

v.

3171592 Nova Scotia Limited
and Municipality of the County of Annapolis

Respondents

Judge: The Honourable Justice Elizabeth Roscoe

Application Heard: November 15, 2007, in Halifax, Nova Scotia, In Chambers

Held: Application for stay is dismissed with costs in the cause.

Counsel: The appellants appeared on their own behalf
John Keith, for the respondent, 3171592 Nova Scotia Limited
Bruce Gillis, Q.C., for the respondent, Municipality of the County of Annapolis, not appearing

Decision:

[1] The appellants apply for a stay of execution pursuant to **Rule** 62.10(2) pending appeal of an order confirming the tax sale of their home to the respondent numbered company.

[2] The appellants were the owners of a residence in Wilmot, Nova Scotia. They did not pay the taxes assessed against the property for several years and on February 15, 2007, the Municipality sold it to the respondent numbered company at a tax sale pursuant to the provisions of the **Municipal Government Act**, S.N.S. 1989, c. 1989, c. 18. The appellants refused to give the new owner possession of the property. An application to the Supreme Court, dated July 17, 2007, was brought by the numbered company seeking a declaration of ownership and an order providing that the Sheriff cause the applicant to have vacant possession. The application was heard by Justice Kevin Coady on October 9, 2007.

[3] After the tax sale the appellants commenced an action against the Municipality claiming among other things, exemption from the payment of municipal property taxes based on their aboriginal status. That action has not yet been tried. At the hearing before Justice Coady the appellants sought an adjournment of the application pending the determination of their action against the Municipality. The request for an adjournment was denied. Justice Coady granted the application for a declaration of ownership and ordered the Sheriff to enter upon the lands to cause the appellants to vacate the property, but not earlier than November 19, 2007.

[4] The appellants have appealed the order of Justice Coady and seek a stay pending the hearing of the appeal. The appeal has been scheduled to be heard on May 13, 2008.

[5] The general rule with respect to stays is set out in **Civil Procedure Rule** 62.10. The filing of a notice of appeal does not operate as a stay of execution. The test which is invariably applied by chambers judges in this court, in determining whether to grant the application for a stay, is that set out by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341:

> In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:

> (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellants property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience or:
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> (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[6] To determine whether there is an arguable issue, I must examine the grounds of appeal. Many of the grounds are actually argument to support the second and third prongs of the **Fulton** test, that is, that the appellants will suffer irreparable harm if the stay is not granted and the balance of convenience favours them. Those which allege error of the chambers judge include allegations that he failed to grant the adjournment, failed to take into account events prior to and after the tax sale, and that the tax sale infringed their Aboriginal and Treaty rights and Constitutional rights, and those should have been determined prior to confirmation of the tax sale.

[7] In **Coughlan et al. v. Westminer Canada Ltd. et al.** (1993), 125 N.S.R. (2d) 171, Justice Freeman explained what is meant by an "arguable issue" at ¶ 11:

> 'An arguable issue' would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. It must be a ground available to the applicant; if a right of appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the Chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome

> of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the Chambers judge is that the outcome of the appeal is in doubt: either side could be successful.

[8] In this case, the arguments raised by the appellants are novel. In my research of the issue, I was unable to find any case where non-reserve land owned by an individual native person was found to be exempt from municipal property tax. The one case on point, is to the opposite effect. See: **Yellowknife (City) v. Ruman Estate** (1998) NWTJ No. 199 (S.C.) affirmed NWTCA, April 11, 2000, unreported, leave to appeal to the Supreme Court of Canada dismissed: [2000] S.C.C.A. No. 311. In the **Yellowknife** case, Irving J., summarized the applicable law in the following passages:

> 10 No authority has been cited that such an Indian person is exempt from municipal taxes arising from his ownership, in fee simple, of sub-divided land within a municipality other than the exemption pursuant to s. 87 of the Indian Act which provides:
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> > "87.(1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to sub-section (2) and to section 83, the following property is exempt from taxation, namely,
> >
> > > (a) the interest of an Indian or a band in reserve or surrendered lands; and
> > >
> > > (b) the personal property of an Indian or band situated on a reserve; and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, on or in respect of other property passing to an Indian. R.S., c. 149, s. 86; 1958, c. 29, s. 59; 1960, c. 8, s. 1."
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> 11 The three parcels of land owned or co-owned by the deceased Ruman in Yellowknife were not in any way Indian reserves or land reserved for Indians. These parcels, like any other privately owned parcels of land, are available

> generally to be bought or sold or used like any other parcels of land in Yellowknife. ...
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> 15 The Supreme Court of Canada considered the purpose of the taxation exemption contained in s. 87 of the Indian Act in the case of Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, where La Forest J. in giving the judgment of the Court stated at p. 131:
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>> In summary, the historical record makes it clear that ss. 87 and 89 of the Indian Act, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.
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>> It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

[9] In light of this, I am unable to find that the appellants have raised arguable issues of law in their notice of appeal. While the appellants have presented some evidence of potential irreparable harm, in the absence of an arguable issue, the primary test in **Fulton** is not made out.

[10] The secondary test in **Fulton**, states that in exceptional circumstances the court may grant a stay if it is fit and just. Recently in **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.**, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:

> 11 Very few cases have been decided on the basis of the secondary test in **Fulton**. Freeman, J.A. in **Coughlan et al. v. Westminer Canada Ltd. et al.**

(1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in **Brett v. Amica Material Lifestyles Inc.** (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for **Fulton's** secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.

12 While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. So, for example, in **Fulton** itself, Hallett, J.A. found that exceptional circumstances consisted of three factors in combination: first, that the judgment was obtained in a summary proceeding rather than after trial; second, that on the face of the pleadings the appellant raised what appeared to be an arguable issue and, thus, was likely to be successful on appeal; and third, the appellant had a counterclaim and claim to a set off that had not been adjudicated making it premature to execute on the summary judgment.

13 While there can be no comprehensive definition of what constitutes special circumstances, they must be circumstances which show that it would be unjust to permit immediate enforcement of the judgment. This is because a stay of execution, in common with interim injunctive relief, must justly apportion the risk of uncertainty about the ultimate outcome of the case. There are arguable issues raised on appeal, but one cannot at this stage speculate about what the outcome of the appeal will be. The risk created by this uncertainty is shared by both the appellant and the respondents. If a stay is granted and the appeal ultimately fails, the respondents will have been kept out of their money needlessly. If, on the other hand, the stay is denied and the appeal ultimately succeeds, the appellant will have been required to pay the judgment needlessly.

[11] In this case in my view there is nothing about the appellants' case that brings it within the sphere of exceptional circumstances. I see no obvious or egregious errors in the decision under appeal, no arguable issue has been raised and there are no special circumstances that would lead to an injustice if the judgment is enforced at this stage of the proceeding.

[12] I dismiss the application for a stay pending appeal. Costs of this application will be in the cause.

Roscoe, J.A.