NOVA SCOTIA COURT OF APPEAL
Citation: Patriquen v. Stephen, 2010 NSCA 67

Date: 20100730
Docket: CA 330795
Registry: Halifax

Between:

Michael Ronald Patriquen

Appellant

v.

Melanie Jane Stephen

Respondent

Judge:	The Honourable Chief Justice Michael MacDonald
Appeal Heard:	July 29, 2010, in Halifax, Nova Scotia
Held:	Motion for a stay of execution is dismissed without costs to either party.
Counsel:	Appellant, in person Respondent, in person

Reasons for judgment:

[1] This is a motion for a stay of execution pending an appeal. Following oral submissions, I dismissed the motion with reasons to follow. Here are my reasons.

BACKGROUND

[2] Justice Williams of the Supreme Court (Family Division) heard the parties' acrimonious divorce and ordered corollary relief primarily covering the division of property.

[3] The appellant husband has appealed this judgment and seeks a stay of execution pending the appeal, which is set to be heard on November 16th of this year. His sole issue involves the judge's direction to sell the matrimonial home where he resides with the parties' 27-year-old quadriplegic son and 17-year-old daughter. Self-represented, he essentially argues that without a stay he and his children will be out on the street, destitute. His home-based business will also be jeopardized. The respondent wife, also self-represented, describes the motion as yet another frivolous attempt to delay the just settlement she has been attempting to secure for over four years now.

[4] In advance of the motion, I faced a barrage of competing affidavits heavily detailed and laden with hearsay. It represented an attempt to re-litigate the acrimonious process they and the courts have endured for the past four years. Because the parties are self-represented, I accepted these voluminous documents with a direction that I would screen them as appropriate. However, I did not allow cross-examination on them since that process would surely have led to a re-trial which, of course, was far from the purpose of the motion.

[5] The result is that I am left with starkly different versions of events with it being impossible to differentiate truth from fiction. Here is a summary of each.

[6] The appellant says that he is a great father and his children depend on him. Their mother has essentially abandoned them. He cares for his son's physical needs, which is a full time job, and he is responsible for their daughter. He runs a business out of this home and this will be lost should the home be sold. In short, without a stay, he and their children will be out on the street destitute.

[7] The respondent says that the appellant continues to play the system and is simply attempting to throw yet another wrench into what has been an exhaustive four-year process. He has turned the children against her. They will not be left destitute and will have ample time to arrange for alternate accommodations as she has had to do. Their son can receive government assistance for his care and housing. In fact she has offered to care for him. She adds that their daughter is essentially on her own with her boyfriend. She asserts that, in reality, the appellant has two reasons for not wanting the home sold. First, when the home is liquidated, the appellant fears that his portion of the proceeds will be forfeited to pay his fines (proceeds of crime offences) and his tax bill totalling hundreds of thousands of dollars. Second, he does not want to move his marijuana grow operation (conceding that he has a medical licence for 25 plants).

ANALYSIS

The Test

[8] An appellant to the Nova Scotia Court of Appeal is not granted a stay as of right. Instead, upon motion to a judge of this court, the well-quoted tests established by Hallett, J.A. in **Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341 must be met. This involves a three-step primary test where the appellant must establish, (a) an arguable issue on the merits, (b) irreparable harm should the stay be denied, and (c) that the balance of convenience favours a stay. Then there is an overarching second test for exceptional cases. Hallett, J.A, explains:

> [28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either:
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> [29] (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 appellant's 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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> [30] (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.

[9] It will not be necessary for me to consider the first and third steps of the primary test. I say this because, for the reasons that follow, I conclude that the appellant has failed to establish irreparable harm should the stay be denied.

Irreparable Harm

[10] What does it take to establish irreparable harm? Cromwell, J.A. (as he then was) in **The Queen v. O'Connor**, 2001 NSCA 47, confirmed that this concept is very much driven by the context of each appeal:

> [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in **RJR — MacDonald v. Canada (Attorney General)**, [1994] 1 S.C.R. 312 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
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> [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[11] As I have said, it is impossible to establish where the truth lies between the parties' polarized versions of events. However, the following facts are undisputed and together they lead me to conclude that the appellant has failed to establish irreparable harm.

[12] With his motion dismissed, the appellant will not be left immediately out in the street as he portrayed in oral argument. There has been no offer yet to buy the property and I take judicial notice of the fact that it would take several weeks to deliver vacant possession should a sale be arranged. In other words, there should

be time to arrange alternate accommodations. Furthermore, the trial judge is continuing to monitor this aspect of the order. In fact, he will be holding a follow-up hearing next week for this very purpose. He no doubt will be sensitive to the appellant's concerns in this regard.

[13] Furthermore, while I am not able to decipher fact from fiction on this file, the very same arguments and materials were before Justice Williams, who nonetheless ordered the property sold.

[14] Finally, although the son professes his hostility towards his mother in affidavits filed as far back as 2006 (which she says is the product of parental alienation), she nonetheless has offered to care for him. This is important should the appellant's spectre of desperation become a reality.

[15] Therefore, considering all the circumstances of this motion, the appellant has failed to establish irreparable harm of the kind sufficient to justify a stay of application.

Exceptional Circumstances

[16] I turn briefly to the "exceptional circumstances" aspect of the *Fulton* test. In **W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.**, 2006 NSCA 129, Cromwell, J.A., as he then was, explained that to quality for this exception relief, the circumstances must show that it would be unjust to enforce the judgment before appeal:

> [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.
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> [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.
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> [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. ...
>
> [Emphasis added]

[17] Here the respondent successfully argued before the trial judge that the home should be sold. All the same arguments that I heard today from the appellant were made then. The judge had a much better opportunity to consider this matter than I. There is nothing exceptional about this proceeding and nothing unjust about the immediate enforcement of this order.

[18] I confirm that the motion is dismissed without costs.

MacDonald, C.J.N.S.