NOVA SCOTIA COURT OF APPEAL
Citation: *Landry v. Benjamin*, 2019 NSCA 73

Date: 20190828
Docket: CA 490378
Registry: Halifax

Between:

Joseph Landry and Lorraine Landry
Applicants/Appellants

v.

John Benjamin and The Registrar of
General Land Titles and Municipality of the County of Annapolis
Respondents

Judge:	Beaton, J.A.
Motion Heard:	August 22, 2019, in Halifax, Nova Scotia in Chambers
Written Decision:	August 28, 2019
Held:	Motion dismissed.
Counsel:	Raymond Kuszelewski, for the appellants Nicholas Moore, for the respondent, John Benjamin Jack Townsend, for the respondent, The Registrar of General Land Titles W. Bruce Gillis, Q.C., for the respondent, Municipality of the County of Annapolis Jeremy Smith, for the Attorney General of Nova Scotia (Watching Brief)

Decision:

[1] The appellants were the previous owners of a property sold to the respondent John Benjamin at a municipal tax sale in 2018. When the appellants failed to deliver possession of the property, he successfully applied in the Nova Scotia Supreme Court for vacant possession. (A companion claim for lost rental income was dismissed). The appellants were ordered to vacate the property after 45 calendar days from the date of the oral decision of the Court.

[2] The appellants then filed a Notice of Appeal and made a motion in Chambers for a stay of the order to vacate pending hearing of the appeal (*Rule* 90.41(2)). At the conclusion of the hearing I provided a brief commentary on why the motion was dismissed and advised that written reasons would follow, as set out below.

[3] A stay of execution is a discretionary remedy. The burden is on the moving party to establish the necessity for a stay on a balance of probabilities. The principles governing whether to grant a stay are set out in the frequently cited decision in *Fulton Insurance Agencies Ltd. v. Purdy* (1990), 100 N.S.R. (2d) 341, as most recently reviewed by this Court in *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45. There, Beveridge, J.A. discussed the test for granting a stay at ¶22-23:

> [22] For the primary test, an applicant will be successful if the Court is satisfied on a balance of probabilities: an arguable issue is raised by the appeal; the appellant will suffer irreparable harm should the stay not be granted (assuming the appeal is ultimately successful); and, the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.
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> [23] The appellant may also obtain relief pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[4] On the motion the appellants, the respondent Benjamin and the respondent Municipality all agreed on the test to be applied. The respondent Registrar and the Attorney General took no position on the motion. The appellants relied on both the primary and secondary tests in support of their motion. The respondent Benjamin opposed the motion on the basis the appellants could not establish there is an arguable issue(s) raised by the appeal and further, that there was no evidence the

appellants would suffer an irreparable harm should a stay not be granted, such that the primary test could not be met. The respondent Benjamin also maintained the circumstances were not exceptional and therefore did not meet the secondary test.

[5] The respondent Municipality echoed the arguments of the respondent Benjamin, and further submitted that the matters raised on appeal are *res judicata* as a result of an earlier decision of this Court in *Landry v. 3171592 Nova Scotia Ltd.*, 2007 NSCA 111, another motion for a stay in which the same appellants were unsuccessful (for different reasons) in relation to ostensibly similar circumstances. In my view, the question of whether the appeal is *res judicata* will be one for the full panel to determine, where presumably much more information will be available than was before me on the motion.

[6] As to the primary test in *Fulton (supra)* and its three aspects, on the first aspect – whether there is an arguable issue raised by the appeal – I agree with the respondents that several of the itemized grounds of appeal appear on their face to be somewhat vague. I did not have the benefit of a transcript of the oral decision. While a transcript is not mandatory when seeking a stay pending appeal, it is not possible to properly weigh the question in this case relying only on the order generated by the trial judge, nor do I need to do so in light of my other conclusions as set out below.

[7] As to the second aspect of the primary test – the appellants will suffer irreparable harm if the stay is not permitted – the evidence of the appellants did not establish any harm, much less irreparable harm. The appellant Lorraine Landry did not file evidence. The only evidence before me on the point was the affidavit evidence of the appellant Joseph Landry that he would “have no place to go should the eviction take place” (para. 6). That assertion provided no explanation, detail or context in support of it, such as for example details regarding his current financial means or his efforts to secure alternate housing or living arrangements. I am left with no evidence upon which to determine the precise harm that could only be addressed or remedied by imposing a stay, or the unrecoverable loss the appellants might incur if a stay were not imposed. The evidence of Mr. Landry lacked the necessary or any context as that requirement was discussed by Beveridge, J.A. in *Colpitts (supra)*:

> [48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:

> [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 R.J.R.-MacDonald v. Canada (Attorney General), [1994] 1 S.C.R. 311 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 s. 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

I cannot conclude there is a financial burden to the appellants if the stay were refused, nor that irreparable harm or deprivation would be suffered by them.

[8] As to the third aspect of the primary test – the so-called "balance of convenience" question – the appellants' counsel submitted that any loss to the respondent Benjamin occasioned by the imposition of a stay would be nominal relative to the harm the appellants would suffer if the stay was not granted. There was no such evidence before the Court in relation to the situation of either of the appellants nor any of the respondents, and therefore the argument was not made out.

[9] In written submissions, the appellants put forward the alternative argument that "there are arguable issues of the (sic) individual aboriginal title to be heard" which would bring the matter within the secondary test, being a determination of the existence of exceptional circumstances.

[10] The exceptional circumstances test was explained by Roscoe, J.A. in *Landry (supra)* at *¶10:*

> [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] N.S.J. No. 481, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:
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>> [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. …

[11] I cannot discern from the very limited evidence before the Court nor from the arguments advanced on the motion that there is any aspect of the circumstances or the subject appeal that could invoke the secondary test. Nothing put before me could identify or lead to the conclusion that the interests of justice would require the Court to grant a stay on that basis.

[12] The motion for a stay cannot succeed on either the primary or secondary test and is therefore dismissed.

[13] The respondents Benjamin and the Municipality sought costs on the motion which had previously been adjourned without day. The appellants argued that any costs related to either appearance should be costs in the cause.

[14] Costs are ultimately within the discretion of the Court and are intended to do justice as among the parties. The respondent Benjamin and the Municipality were the successful parties on the motion, although it is recognized the respondents ultimately would have had to respond to the Motion for Directions which was heard simultaneously with the stay motion.

[15] The appellants shall pay costs to the respondent Benjamin in the amount of $700 payable forthwith, and to the respondent Municipality in the amount of $275 payable forthwith.

Beaton, J.A.