NOVA SCOTIA COURT OF APPEAL
Citation: *Corkum v. Dagley*, 2007 NSCA 9

Date: 20070123
Docket: CA 267229
Registry: Halifax

Between:

Caroline Corkum

Appellant

v.

Randall Stephen Dagley

Respondent

Judges:	Roscoe, Oland and Fichaud, JJ.A.
Appeal Heard:	January 18, 2007 in Halifax, Nova Scotia
Held:	Appeal dismissed with costs as per reasons for judgment of Oland, J.A.; Roscoe and Fichaud, JJ.A. concurring
Counsel:	Peter Bryson, Q.C. and Jeff Aucoin for the appellant William L. Ryan, Q.C. and Sarah J. Dykema for the respondent

Reasons for judgment:

[1] The appellant, Caroline Corkum, appeals the April 20, 2006 decision of Justice Arthur W. D. Pickup of the Supreme Court of Nova Scotia (2006 NSSC 126) and his May 15, 2006 Order. At the conclusion of the appeal hearing, we dismissed her appeal with reasons to follow. These are those reasons.

[2] In his decision, the trial judge set out the facts and the claims made by the appellant as follows:

> ¶ 1 Eleanor Dagley purchased a house at 6 Ascot Way in Lower Sackville, Nova Scotia in 1986. Shortly thereafter the plaintiff Caroline Corkum moved into this property with her husband and young daughter. The plaintiff paid rent from 1986 to March of 1989. No further monthly rental payments were made to Eleanor Dagley after March of 1989. Mrs. Dagley conveyed the property to her brother, Randall Dagley, the defendant on June 8, 2001. Eleanor Dagley died on November 27, 2002.
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> ¶ 2 The plaintiff claims an interest in the property at 6 Ascot Way, alleging that there was an agreement between herself and Eleanor Dagley for her to purchase the property. In the alternative, she claims that she acquired an equitable right in the property as a result of her dealings with Eleanor Dagley.

He dismissed her claim, with costs to the respondent and, after allowing the counterclaim for rent, awarded the respondent rent for the period of the appellant's occupation from June 8, 2001 to January 1, 2005, together with costs.

[3] The appellant appeals, claiming errors in

(a) the trial judge's findings that

(i) no contract existed between her and the late Eleanor Dagley; and

(ii) the respondent did not have notice of her equitable rights in the property occupied by her or, alternatively, in finding that the respondent had no duty to make inquiry of her about her equitable rights, while in occupation;

> (iii) Section 45 of the *Evidence Act*, R.S.N.S. 1989, c. 154 should substitute the word "spouse" for the word "wife" and that, in the alternative, that provision would prevent her succeeding in her claims against the respondent; and
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> (b) the judge's assessment of the damages sustained by the respondent on his counterclaim.

[4] The first two of the four grounds of appeal allege errors in the trial judge's findings of fact or are questions of mixed fact and law. The standard of review for a trial judge's findings of fact, and for inferences drawn from fact, is palpable and overriding error: see *McPhee v. Gwynne-Timothy*, [2005] N.S.J. No. 170 at ¶ 31. Unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact, mixed questions of fact and law are reviewed on the same standard of palpable and overriding error: see *McPhee*, supra at ¶ 32.

[5] We see no such error in the trial judge's finding that the appellant had not proven the existence of an oral agreement between herself and the late Eleanor Dagley on a balance of probabilities. Nor are we persuaded that he made a palpable and overriding error in finding that the respondent had had neither actual nor constructive notice of any equitable interest of the appellant, and further that, in the circumstances of this particular case, the respondent had made such inquiries as a reasonable person would make. Having decided that the respondent was a *bona fide* purchaser for value without notice, the judge was not required to determine whether the appellant had acquired any equitable interest in the property.

[6] In his decision, the trial judge decided that the word “wife” in s. 45 of the *Evidence Act* should be read as “spouse.” He was satisfied that the provision applied to the evidence of the appellant and of her former spouse relating to any agreement with the late Eleanor Dagley, or any statements or acts by her, which evidence in his view had not been corroborated by other material evidence.

[7] It is not necessary to determine whether he erred in reading the reference to “wife” as “spouse” or in finding that s. 45 was applicable to that evidence in order to dispose of this appeal. The trial judge explicitly stated that his conclusion that the appellant’s claim should fail was reached without reliance on that provision,

and that he had not needed to rely upon the lack of corroboration. Since s. 45 was not considered or applied in his final decision to dismiss, the error alleged by the appellant is either not an appropriate ground of appeal or it is irrelevant.

[8] The final ground of appeal relates to the judge's assessment of damages pursuant to the respondent's counterclaim. Before an appellate court can intervene in an award of damages, it must be satisfied that the trial judge applied a wrong principle of law, or that the award is so inordinately low or so inordinately high as to constitute a wholly erroneous estimate of the damages: see *Flynn v. Halifax (Regional Municipality)*, [2005] N.S.J. No. 175 at ¶ 107. The appellant argues that the judge erred in awarding damages in an amount never requested by the respondent and for a time period for which rent was never requested. The trial judge found as a fact that the appellant paid no rent to the respondent from the time he acquired the property on June 8, 2001 until January 1, 2005. The amount of monthly rent he set is what the appellant paid in rent in 1988 to the late Ms. Dagley. We are not persuaded that the trial judge applied a wrong principle of law nor that he made an award that was a "wholly erroneous estimate of the damage."

[9] We would dismiss the appeal with costs in the amount of $2,500. plus disbursements.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.