DATE: 19990215 CA:153762

NOVA SCOTIA COURT OF APPEAL

Cite as Saunders v. Oceanus Marine Inc., 1999 NSCA 5

BETWEEN:

EDMUND R. SAUNDERS and RETA W. SAUNDERS Applicants/Appellants	)	Edmund R. Saunders, In person
- and -	)	
	)	G. F. Philip Romney, for the Respondent
OCEANUS MARINE INCORPORATED Respondent	)	
	)	Application Heard: February 11, 1999
	)	Decision Delivered: February 15,1999

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY, IN CHAMBERS

PUGSLEY, J.A. (In Chambers):

The appellants have filed a notice of appeal from the order of the Honourable Justice Carver, of the Supreme Court, sitting in Chambers, dated January 28, 1999, granting foreclosure and sale of certain property near Westin, Kings County, owned by the appellants, and mortgaged to the respondent.

The foreclosure sale will take place on February 24, 1999.

The notice of appeal was dated Saturday, February 6th, and filed with this Court on Monday, February 8th. It was apparently received by the respondent's solicitor on February 9th.

After enumerating the grounds of appeal, the notice provides:

> AND FURTHER TAKE NOTICE that on Thursday, the 11th day of February, 1999, at the hour of 10:00 in the forenoon, or so soon thereafter as counsel can be heard, the appellants will apply to the learned Appeal Court judge sitting in Chambers at the Law Courts, Lower Water Street, Halifax, Nova Scotia, for the setting down of this appeal and for an order staying the execution of the order herein under appeal.

I have set the appeal for hearing on May 11, 1999.

No material by way of supporting affidavit, or otherwise, was filed with the Court in support of the application for the stay.

Mr. Saunders appeared in Chambers to make representations on behalf of the appellants.

Civil Procedure Rule 37 contemplates that an interlocutory application of this nature will be supported by affidavit to enable the opposing party to know the case it is to meet, as well as to assist the Court to reach an informed judicial decision.

The procedure followed by the appellants was not a satisfactory one, either for counsel for the respondent, or for the Court. As counsel raised no objection, and both he and Mr. Saunders reside in Lunenburg County, and were required to attend in Halifax for this application, I was prepared to let the matter proceed.

Justice Carver settled the principal amount due to the respondent on the mortgage being foreclosed at the sum of Forty-two Thousand, Six Hundred Dollars ($42,600.00).

Mr. Saunders acknowledged that the only issue on the appeal is whether Justice Carver erred in failing to take into account the sum of approximately Eight Thousand Dollars ($8,000.00), the appellants allegedly paid to reduce the principal outstanding on the mortgage.

Mr. Saunders requested the stay to enable him to finalize business arrangements so that he could obtain sufficient funds to pay off what he considered to be the true principal amount of the mortgage.

Mr. Saunders advises that the property being foreclosed consists of a farm house, and sixty acres of agricultural land which was willed to him, and other relatives, in or about the year 1990, by his relative Ruth Stronach Connell.

Ms. Connell's Will provided in part:

> 2. I give, devise and bequeath all of my estate, real and personal of whatsoever kind and wheresoever situated, as well as any property over which under any document I have power of appointment, to my cousins, Edmund R. Saunders, Gilford A. Saunders, Douglas L. Saunders, and the survivor or survivors of them upon trust for the following purposes:
>
> > 1. To use their discretion in transferring and conveying my real property to any descendants of my ancestor, John E Cox, who in their sole discretion will be most likely to pass the said property on to lineal descendants of my said ancestor, John E. Cox. In so doing my said trustees may transfer and convey to anyone or any one of my said trustees, or their descendants.

Mr. Saunders further represents that he restored the farmhouse in the early 1990's at a cost of approximately Thirty-four Thousand Dollars ($34,000.00). It is presently rented by him for a monthly rental of Five Hundred Dollars ($500.00). The farm land, which is apparently being used for agricultural purposes, is rented for Two Thousand Dollars ($2,000.00) per annum.

The appeal of an order of the Supreme Court does not constitute an automatic stay.

As noted by Justice Freeman in **Coughlan v. Westminer Canada Limited** (1993), 125 N.S.R. (2d) 171, at 174:

> Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the Court it is required in the interests of justice.

Pursuant to the principle set out by Hallett, J.A. in **Fulton Agencies Limited v. Purdy** (1990), 100 N.S.R. (2d) 341, an applicant for a stay may meet either the primary test, so called, by satisfying the Court there is an arguable issue raised on the appeal, that the applicant will suffer irreparable harm if the stay is not granted, and that the balance of convenience between the parties favours the granting of the stay, or, the secondary test, that there are exceptional circumstances which would make it fit, and just, that the stay be granted.

Mr. Saunders makes his application on the basis of satisfying the Court on the secondary test, and submits that exceptional circumstances have been established because:

- It is in the public interest that land in Kings County, presently devoted to agricultural use, continue to be maintained for that purpose;
- He incurred “moral” obligations when he accepted the property under the Will, and has a duty to pass on the property to the lineal descendants of John Cox;

Mr. Saunders has not provided me with any evidence respecting the first point, nor am I satisfied that it is a relevant factor to be considered on an application of this kind.

With respect to the second point, there is no material before me to indicate, or even suggest, that:

- Mr. Saunders has made any effort to carry out the trust imposed upon him nine years ago in the sense that he has taken any action to transfer and convey the property to anyone who is a lineal descendant of Mr. Cox;
- there is any unique character respecting the property, or that it has a quality or style, the loss of which would be difficult to compensate in damages;
- the expenditure he made for repairs was for any purpose other than to earn income on an investment property.

There may very well be cases where actions, or omissions, by a party might involve the party in a breach of a fiduciary, or even moral, duty to others that could form the basis of an “exceptional circumstance” application under **Fulton**.

It has not been established on the material before me that this is one of those cases.

While Mr. Saunders makes his application on the basis of the secondary test in **Fulton**, it is relevant that he has not satisfied me that there is an arguable issue raised on the appeal.

The issue, as he framed it, is whether Justice Carver erred in failing to take into account Eight Thousand Dollars ($8,000.00) the appellants allegedly paid on the principal amount of the mortgage.

I have received a copy of the submissions advanced to Justice Carver at the Chambers application. No *viva voce* evidence was taken, nor were any affidavits introduced. There was no evidence that the two payments referred to by Mr. Saunders were, in fact, ever made, or if made, that they were made for the purpose of reducing the principal of the mortgage. The only “evidence” placed before Justice Carver was a letter of January 28, 1999, from a firm of chartered accountants pointing out that minor adjustments, aggregating less than Five Hundred Dollars ($500.00), should be deducted from the amount claimed by the respondent. These adjustments were taken into account by Justice Carver when he determined that the principal amount outstanding on the mortgage was Forty-two Thousand, Six Hundred Dollars ($42,600.00).

While the failure to demonstrate that there is an arguable issue on the appeal is not necessarily fatal, to an application based on the secondary test in **Fulton**, it is a factor to be considered.

As I indicated earlier, the appellants are self-represented.

It is, however, relevant to note that the litigation between these parties has extended over a period of three years. There have been a multiplicity of actions in the Supreme Court initiated by the respondent to foreclose on a number of properties mortgaged by the

appellants, which have become in arrears. There have been at least six matters heard by the Court of Appeal. This is the third application in Chambers (two in an earlier case which had been appealed) advanced on behalf of the appellants requesting the Chambers judge to enter a stay of execution pending the hearing of the appellants' appeal. In all of the Chambers applications, and all of the hearings before the Court of Appeal, with one exception, Mr. Saunders acted for the appellants in the preparation of documents, including submissions of argument, and personally has appeared to advance these submissions. He is no stranger to the court process, or the procedures followed. It is a matter of record that he practised law in Lunenburg for many decades before his retirement in the early 1990's. He is familiar with the use of affidavits to support applications to the Court. In fact, one of his earlier applications for a stay was supported by his own affidavit.

It is a factor that this particular application for foreclosure had been contested by Mr. Saunders in the Supreme Court, and after receiving an unfavourable verdict, unsuccessfully on appeal to this Court, before it reached Justice Carver. The submissions raised by Mr. Saunders before me were not advanced on any earlier occasion.

In the circumstances, I am not satisfied that the equitable jurisdiction of this Court should be exercised in favour of the appellants to order a stay of execution of the appellants' *prima facie* right, in view of Justice Carver's decision, to proceed to foreclosure.

I would reject the application for stay and order costs of the application in the cause of the appeal.

Pugsley, J.A.

C.A. No. 153762

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Applicants/Appellants	)	
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- AND -	)	HONOURABLE
	)	JUSTICE
	)	RONALD
N.PUGSLEY		
OCEANUS MARINE INCORPORATED	)	(IN CHAMBERS)
Respondent	)	