IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hill v. Halifax (Regional Municipality), 2007 NSSC 348

Date: 20071126
Docket: SH 263407
Registry: Halifax

Between:

Gary P. Hill

Plaintiff

v.

Halifax Regional Municipality

Defendant

Judge:	The Honourable Justice Glen G. McDougall
Heard:	November 26, 2007, in Halifax, Nova Scotia
Written Decision:	November 28, 2007
Counsel:	James D. MacNeil, Esq. and Kelly Peck, Articled Clerk, for the plaintiff Randolph Kinghorne, Esq., for the defendant

By the Court:

[1] The Applicant, Halifax Regional Municipality ("HRM"), asks this Court to grant summary judgment pursuant to **Civil Procedure Rule** 13 which states:

> 13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> > (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

[2] Given the timing of the application the Court had to first grant leave to Defendant's counsel to make the application in compliance with **Civil Procedure Rule** 28.05 (2).

[3] In support of the summary judgment application, two affidavits were filed by HRM. In addition, the proposed Book of Exhibits to be used at trial was tendered. Tab 24 of the Book of Exhibits contained the affidavit of Mr. Bruce P. Mosher. Mr. Mosher was the process server who posted notice of HRM's intent to sell the land for taxes in accordance with section 166 of the *Municipal Government Act*, R.S.N.S. 1998, c. 18, s. 1 ("*MGA*").

[4] Mr. Mosher was called for cross-examination purposes. He first confirmed the contents and verified his signature on the affidavit. He was then cross-examined by counsel for the plaintiff.

[5] Mr. Mosher testified that he posted the tax sale notice on the door of a shed situate on the property. The shed was the only structure located thereon.

[6] A photograph attached to Mr. Mosher's affidavit as an exhibit showed the shed and the notice posted on the door by the process server. The photograph also showed two other notices that had been posted either on the door or adjacent to it.

[7] Mr. Mosher indicated that it had taken a little work to find the property. He had to follow a path to get to the shed on which the notice was eventually posted. The notice could not likely have been seen from the road. The other two notices that were already posted on the shed had not been placed there by Mr. Mosher.

[8] The court then heard the arguments of counsel on the motion. Mr. Kinghorne referred the court to section 140 of the *MGA*. Section 140 is contained in Part VI of the *MGA* under the heading "Tax Collection". It reads in part:

> 140 (1) Upon completion of the title search and any survey, the owner of each lot and a person with a mortgage, lien or other charge on the land shall be served with notice of intent to sell the land for taxes.

[9] Section 166 of the *MGA* spells out the requirements for service under Part VI. It reads:

> 166. Services of a notice required pursuant to this Part is sufficient

> (a) if it is mailed by ordinary mail to the last known address of the person on whom the notice is to be served; or
>
> (b) where the address of the person is unknown, if it is mailed to a tenant or occupant of the land or a copy of the notice is posted in a conspicuous place on the premises.

[10] The law as it pertains to summary judgment applications brought by a defendant is clearly spelled out in the Supreme Court of Canada decision in **Guarantee Co. of North America** v. **Gordon Capital Corp.** (1999), 178 D.L.R. (4th) 1 (S.C.C.), and in a more recent decision of the Nova Scotia Court of Appeal in **United Gulf Developments Ltd.** v. **Iskander**, [2004] N.S.J. No. 66; C.A. 205057. The Honourable Justice Elizabeth Roscoe wrote this decision on behalf of the unanimous three-person panel.

[11] I will read from the commentary on this case as contained in that section of the **Civil Procedure Rules** pertaining to summary judgment.

> The appropriate test for a defendant is stated in *Guarantee Co. of North America v. Gordon Capital Corp*. (S.C.C., 1999): the applicant must show "that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court.... Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success". There is no appreciable difference between "no genuine issue" and "no arguable issue". Where there are disputes of fact, the disputes should be determined at trial.

[12] Mr. Kinghorne, on behalf of the Applicant, argues that there are no factual disputes and hence no arguable issue to be determined at trial.

[13] Service of notice of intent to sell must be effected on the property owner and any person with a mortgage, lien or other charge on the land. As a judgment creditor of the land owner, the plaintiff was entitled to notice.

[14] What then constitutes notice? Section 166 of the *MGA* provides the answer. It can be mailed by ordinary mail to the last known address of the person on whom the notice is to be served (reference made to section 166, paragraph (a)) or, where the address of the person is unknown, it can be mailed to a tenant or occupant of the land

or a copy of the notice may be posted in a conspicuous place on the premises (reference made to section 166, paragraph (b)).

[15] In the case before me, counsel for the applicant has the burden of showing "that there is no genuine issue of material fact requiring trial and therefore summary judgment is a proper question for consideration by the court.... Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success." (Reference made to **Guarantee Co. of North America** v. **Gordon Capital Corp**, *supra*).

[16] Instead of mailing the notice of intent to sell by ordinary mail, HRM decided to use registered mail. As such, it exceeded the requirements of section 166. Although the correct address was used the notice was returned to HRM by Canada Post with the "No Such Address" box checked off. What prompted Canada Post to do so is not known.

[17] HRM then arranged to have the notice "posted in a conspicuous place on the premises" and advertised the tax sale by placing two advertisements in the local newspaper.

[18] There is nothing in the *MGA* requiring proof that notice was actually received.

[19] In the case of **Re: Antle**, [1990] N.S.J. No. 193, the Honourable Justice Allan Boudreau had to deal with similar provisions of the *Assessment Act,* R.S.N.S. 1989, c. 2. Justice Boudreau in deciding the notice requirements of the *Assessment Act* had been complied with spoke about the three alternate methods of service. The three alternatives included:

> (i) prepaid registered mail to the last-known address of the person in question;
>
> If the last address is not known then:
>
> (ii) by leaving the notice with the tenant or occupant of the lands; or
>
> (iii) by posting a copy of the notice in some conspicuous place on the premises.

[20] Justice Boudreau went on to state at page 3 of his decision.

> Therefore, even if the address of the person is not known, it is not necessary for a copy of the notice to be posted on the property in question though it may be prudent to do so. In such case, it would be sufficient for a copy of the notice to be left with the tenant or occupant of the lands.

[21] The case before Justice Boudreau was an application under the *Vendors and Purchasers Act*, R.S.N.S. 1989, c. 487. He had to decide or rule on whether an objection to title was valid. The facts were agreed to by both counsel.

[22] In the case before me counsel for the plaintiff submits that the facts are not agreed upon. Furthermore, he suggests that section 166 does not apply equally to the owner of the land which is subject to a tax sale and an encumbrancer of that land.

[23] I do not agree with Mr. MacNeil's submission. Section 166 applies to any person entitled to be served with notice.

[24] Furthermore, the *MGA* does not require proof of receipt of notice in order to meet the requirements of service as contained in section 166.

[25] By choosing to send the notice by registered mail instead of ordinary mail HRM did not contravene the provisions of the *Act*. Indeed, registered mail was more than the *Act* required. Regardless of this, Canada Post returned the notice stating that there was no such address. The result would have likely been the same if the mailing had been by ordinary mail instead of registered mail.

[26] Having received notice that the mailing could not be delivered, HRM then arranged for the notice to be posted in a conspicuous place on the premises.

[27] There is no dispute as to where the notice was posted. It was placed on the door of the only structure located on the property. Indeed, the owner at one time lived in these premises.

[28] Counsel for the plaintiff suggests that whether the place chosen to post the notice was a "conspicuous place on the premises" is an arguable issue that can only be determined after hearing all the evidence.

[29] "Conspicuous place" is defined in Black's Law Dictionary, Fifth Addition, to mean:

> Within the meaning of a statute relating to the posting of notices, a "conspicuous place" means one which is reasonably calculated to impart the information in question.

[30] The facts required for this court to determine if the notice was posted in a conspicuous place are not in dispute. The court has the necessary factual basis to determine this issue. The *MGA* does not stipulate that the notice has to be posted in the most conspicuous place. It simply requires it to be posted in a conspicuous place. By posting the notice on the door of the only structure located on the property the requirements of section 166 have been met.

[31] The mailing of the notice to the plaintiff at his last known address by registered mail, in and of itself, was sufficient to satisfy the notice requirements of the *MGA*.

[32] The further step to post notice in a conspicuous place on the premises was a further precautionary step that HRM really did not have to carry out. It was perhaps prudent and wise, but based on the legislation it was not really necessary.

[33] It is up to the Provincial Legislature to set the requirements for service of notice. In its collective wisdom it has set those requirements.

[34] HRM has met its obligations according to the *MGA*. By doing so they have no legal liability to the plaintiff.

[35] The applicant has met the burden of establishing that there is no genuine issue of material fact requiring trial.

[36] The burden then shifts to the respondent to establish his claim as being one with a real chance of success. He has not done so.

[37] The defendant's application for summary judgment is therefore granted.

[38] I will ask counsel to attempt to agree on costs, failing which I ask for written submissions to be filed with this Court no later than Thursday, December 27, 2007.

J.