IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Finanders v. Finanders, 2005 NSSC 145

Date: 20050603
Docket: S.H. No. 181682
Registry: Halifax

Between:

Gregory Finanders

Plaintiff

v.

Robert Lewis Finanders and Cynthia Faye Finanders

Defendant

Judge:	The Honourable Justice Frank Edwards
Heard:	May 25, 2005, in Halifax, Nova Scotia
Counsel:	Michael Maddalena, for the plaintiff Colin Bryson, for the defendant

By the Court:

[1] The Plaintiff has brought this action seeking relief under the Partition Act, R.S.N.S. 1989, c. 333, in particular an order for sale and distribution of the proceeds.

[2] The Plaintiff is the brother of the Defendant Robert Lewis Finanders. The Defendants are husband and wife.

[3] On or about July 17, 1987, the Plaintiff in conjunction with the Defendants acquired a parcel of land at 1570 #12 Highway, Chester Grant, containing approximately 2.25 acres. The property at that time was a vacant lot. The deed by which title was taken stated that Robert Lewis Finanders and Cynthia Fay Finanders held a one-half interest as Joint Tenants, and the other one-half interest was held by Gregory Anthony Finanders which half interest was to be held as Tenants-in-Common with the interest of the Defendants.

[4] The acquisition cost of the property was $7,100.00. Both parties contributed equally to the acquisition cost with the majority of funds to pay for the property obtained by a joint loan taken out by the Plaintiff with the Defendants. The

Plaintiff paid 50 percent of the loan payment, and the Defendants paid the other 50 percent.

[5] In 1988 or 1989, Robert Finanders, commenced construction of a seasonal dwelling on the property. Gregory Finanders provided labour (he is an electrician by trade) and materials towards the construction. The dwelling was habitable in or about 1991. Gregory Finanders was permitted to have use of this seasonal dwelling.

[6] In or about 1996, the Defendants asserted that they were in control of the seasonal dwelling. Subsequently the Plaintiff ceased using the seasonal dwelling and requested the Defendants to buy out his interest in the property but the parties were unable to agree to a price or terms.

[7] From 1987 to 1992, the parties shared the payment of the property tax bill. From 1993 to 1997, the Plaintiff paid the insurance on the dwelling while the Defendants paid the real property taxes.

[8] At the time the property was acquired, the parties had a belief, albeit mistaken, that the lot could be subdivided to create two building lots. It appears that the property is not capable of subdivision due to the topography of the property and further, the location of the cottage built by Robert Finanders has restricted the possibility of siting another dwelling with an on-site sewage disposal system.

[9] ***Issues:*** 1. Is the Plaintiff entitled to an order for sale of the property under the Partition Act?

2. If the property is sold, what percentage of proceeds is the Plaintiff entitled?

3. What terms for sale of the property should be contained in the order?

[10] ***The Law:*** Issue 1. Is the Plaintiff entitled to an order for sale of the property under the Partition Act?

[11] As noted above, this action is brought pursuant to the ***Partition Act***. Section 4 of the Partition Act, states:

> "All persons holding land as joint tenants, co-parceners or tenants-in-common, may be compelled to have such land partitioned or to have the same sold and the proceeds of the sale

> distributed among the persons entitled, in the manner provided in this Act".

[12] Section 5 gives the right of action to any of the co-tenants.

[13] Section 28(1) provides that:

> "Where the land, or any part thereof, cannot be divided without prejudice to the parties entitled...the Court or judge may order that such land be sold after such notice and in such manner as the Court or judge directs, and that the net proceeds of such sale shall be divided among the parties entitled."

[14] The Ontario Court of Appeal in ***Davis v. Davis***, [1954] 1 D.L.R. 827 stated the general principle in partition cases as follows:

> "There continues to be a prima facie right of a joint tenant to partition or sale of lands. There is a corresponding obligation on a joint tenant to permit partition or sale, and finally the Court should compel such partition or sale if no sufficient reason appears why an order should not be made. I do not attempt to enumerate or describe what reasons would be sufficient to justify refusal of an order for partition or sale. I am content to say that each case must be considered in the light of the particular facts and circumstances and the Court must then exercise the discretion vested in it in a judicial manner having due regard to those particular facts and circumstances as well as to the matters which I have said are, in my opinion, fundamental."

[15] In ***Moss v. Zorn*** [1991] N.W.T.R. 141 a decision of the North West Territory Supreme Court, the Applicant and three others were the co-owners of land. The property was not capable of division. The Respondents argued in favour of maintaining a status quo whereby the Applicant would have a right to usage of the property for 25 percent of the time. The Court held:

> "I agree that it would be more beneficial to the respondents to deny the order for sale and leave the status quo undisturbed; but the Act does not speak of the status quo as the alternative, it speaks instead of the alternative being partition. It is clearly not in the interests of any of the parties to have a partition of the property. The nature of the property, to begin with, is such that a fair division of it among the parties is not possible. Nor would a partition allow any of them to enjoy the property as a whole, as the respondent' wish, absent an agreement among all of them, which is very unlikely. It is furthermore extremely doubtful that any of the parties could individually sell his quarter interest, with or without partition, unless all the rest were to be included."

[16] As in ***Moss v. Zorn*** the nature of the property in the present case is such that the lands are incapable of division and a fair division is not possible. Accordingly, sale is the appropriate remedy.

[17] Issue 2. If the property is sold, what percentage of proceeds is the Plaintiff entitled?

[18] The more pertinent issue before the Court in this action is the appropriate division of sale proceeds.

[19] In making an order for sale, the Court takes into account any equitable allowances. In this regard see ***Mastron v. Cotton*** [1926] 1 O.L.R. 767, a decision of the Ontario Supreme Court, Appellate Division. The Court there stated:

> "What is just and equitable depends on the circumstances of each case. For instance, if the tenant in occupation claims for upkeep and repairs, the Court, as a term of such allowance, usually requires that the Claimant shall submit to an allowance for use and occupation: *Rice v. George* (1873) 20 G.r.221; *Pascoe v. Swan* (1859) 27 Beav. 508, 54 E.R. 201. Again if one tenant has made improvements which have increased the selling value of the property, the other tenant cannot take the advantage of increased price without submitting for allowance for the improvements: *Leigh v. Dickson*, 15 Q.B.D. 60, per Cotton L. J., p. 67; 21 A. a.l.s., p. 851, para. 1595. and, once again, when, as here, one tenant has paid more than his share of encumbrances, he is entitled to an allowance for such surplus: re *Curry, Curry v. Curry* (1898), 25 A.R. (Ont.) 267; 33 Court. J.u.r., p.909.
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> These allowances being made as equitable allowances, there may as a matter of course, be circumstances under which they should not be made. For instance, the circumstances may indicate that the improvements were made or the surplus payments were made or intended to be as gifts by one tenant to the other."

[20] Also in ***Lasby v. Crewson***, [1891] O.J. No. 76, (O.H.C.J..) the Court stated:

> "I think the authorities determine beyond any question that in a suit for partition a co-tenant is entitled to lasting improvements or repairs, by which he has enhanced the value of the property. I refer to *Rice v. George*, 20 Gr. at p. 226; *Wood v. Wood*, 16Gr. 471; *Morley v. Mathews*, 14 Gr. 551; *Pascoe v. Swan*, 27 Beav. 508; *Teasdale v. Sanderson*, 33 Beav. 534, and *Leigh v. Dickeson,* 15 Q. B.D. 60. The judgment of Cotton, L.J., in the latter case, puts the questions in my judgment beyond any doubt. He says at p. 67: 'Therefore, no remedy exists for money expended in repairs by one tenant in common; so long as the property is enjoyed in common; but in a suit for partition it is usual to have an enquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition'."

[21] In ***Handley v. Archibald***, (1899), 30 S.C.R. 130, an appeal from a decision of the Supreme Court of Nova Scotia, Sir Henry Strong of the Supreme Court of Canada noted in an action amongst tenants-in-common:

> "The appellants are entitled to an account of and allowance for the improvements made by them or any of them, but if they insist on such an account they must also themselves account for the rents and profits received by them or for an occupation rent and that at the improved value. The case for an account of the

> improvements is made by the clear added defence, and it is also claimed in the appellant's factum. The law on this head appears clear. An action cannot be maintained by one tenant in common against another for the value of improvements alone. But in a partition action in equity such an allowance was always made."

[22] ***Anger and Honsberger Real Property***, 1985, Canada Law Book, at page 822 states:

> "At common law there could be no action of account by one tenant in common against another who had occupied the whole property unless he had appointed the latter as his bailiff so as to make him liable to account in that capacity. In equity, however, a tenant in common is liable to account in an action by the others and, by statute, a tenant in common who receives more than his share is made liable to account to co-tenants."

[23] In the present case, the Plaintiff contributed an equal share to the original cost of purchase. This included one-half of the purchase price and one-half of the loan (at 13 percent) obtained to finance the purchase.

[24] The Plaintiff is also claiming credit for his contribution to the construction of the cottage. He is not entitled to any such contribution. The Plaintiff helped with the construction strictly on a volunteer basis, brother to brother. In the same vein, the Plaintiff supplied some material (cinder blocks) for construction of the foundation. Such blocks were obtained free by the Plaintiff. I am satisfied that

they were passed on to the Defendant on the same basis. The Plaintiff also supplied electrical material without any expectation of compensation.

[25] The Defendants have had exclusive occupation of the property since 1997. Until that time, the Plaintiff had enjoyed regular use of the cottage. As noted, until 1997, the Plaintiff had also paid house insurance in lieu of his share of the property taxes. The Defendants have paid the property taxes since 1996 for a grand total of $3,296.15. In these particular circumstances, I am satisfied that the tax payment offsets the Plaintiff's claim of occupation rent.

[26] Exhibit 1 is an appraisal report dated April 17, 2003, prepared by Kempton Appraisals Ltd. That Report places the land value at approximately one-third of the appraised value of the land plus cottage. I do not accept that that represents a fair proportion. The cottage is built at the wrong location of the property. It is subject to regular seasonal flooding. I accept the evidence that this has caused significant structural deterioration. This deterioration has worsened since the appraisal. As well, the flooding will certainly and significantly detract from the cottage's market appeal. Quite aside from the repair cost, a potential buyer faces

the costly prospect of raising the structure or moving it. I would fix the value of the cottage at one-half the value of the land plus cottage.

[27] The values themselves in the Appraisal are dated and may not reflect what exposure to the market will now realize. As well, the Carlos Appraisal (Exhibit 2), July 8, 2003, determined a substantially higher figure for the land alone. (Carlos was asked not to consider the dwelling.)

[28] ***Conclusion:*** In view of the foregoing, I am ordering that the property be sold. The net proceeds of the sale shall be divided as follows: 75 percent to the Defendants; 25 percent to the Plaintiff.

[29] If the parties cannot agree on a listing price, or agent, or whether any offer received should be accepted, I will decide any such issue after hearing telephone representations from Counsel.

[30] ***Costs:*** In 1997, the Plaintiff made an offer to sell his interest in the property to the Defendants for $6,000.00. The offer was reasonable and the Defendants should have accepted it. This costly litigation could thus have been avoided.

Although he did not get everything he wanted, the Plaintiff has been the successful litigant -- the property shall be put on the market. The Plaintiff shall therefore have his costs in the amount of $2,500.00 plus reasonable disbursements to be taxed by me.

Order accordingly.

J.