SUPREME COURT OF NOVA SCOTIA
Citation: Halifax Equipment Rentals, Sales and Service Ltd. v. Bonin, 2011 NSSC 158

Date: 20110421
Docket: Hfx. No. 343382
Registry: Halifax

Between:

Keith MacKay, assignee of Halifax Equipment Rentals, Sales and Service Limited

Plaintiff

v.

Ruth Eleanor Bonin and Harvey Cameron Dauphinee, c.o.b. as a registered partnership under the firm name Harvey Dauphinee's Trucking and Excavation

Defendants

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	April 13, 2011, in Halifax, Nova Scotia
Written Decision:	April 21, 2011
Counsel:	Keith MacKay, for the Plaintiff Matthew Moir, for the Defendants

By the Court:

Introduction

[1] After an *ex parte* motion made by Keith MacKay (hereafter "MacKay") and heard before Wright, J., he ordered on February 27, 2011 that:

> 1. Keith MacKay be substituted as Plaintiff for Halifax Equipment Rentals Sales and Service Limited
>
> 2. The Prothonotary is granted permission to issue an Execution Order to Keith MacKay for the purpose of enforcing the judgment entered on or about September 3, 1991, against Harvey Cameron Dauphinee (hereafter "Dauphinee").
>
> 3. The style of cause is accordingly amended.
>
> 4. No costs awarded.

[2] The claimed basis for proceeding *ex parte* was that:

> 1. The plaintiff has waived notice;

2. The Defendant is not entitled to notice because neither a notice of defence nor a demand for notice has been filed;

3. The Defendant's position is unaffected by the relief sought.

4. Such a motion is expressly permitted to be made on an *ex parte* basis - *Civil Procedure Rule* (hereafter "CPR") 22.03(1)(d) and 79.05(4).

[3] On December 29, 2010, MacKay received the assigned benefits of the judgment that Halifax Equipment Rentals Sales Services Limited (hereafter "Halifax") had secured against Dauphinee in 1991, from Jardine Investments Limited ("Jardine") which had been assigned Halifax's interest therein - see sworn December 29, 2010 affidavit of Shirley Jardine; and sworn February 1, 2011 affidavit of Keith MacKay.

[4] On March 29, 2011, Dauphinee filed a Notice of Motion requesting that Justice Wright's February 7, 2011 Order be set aside pursuant to CPR 22.06(3). In his argument, Dauphinee alternatively argued that the Execution Order should be permanently stayed pursuant to CPR 79.22(1).

[5] That motion is now before me for resolution.

Jurisdiction

[6] CPR 22.06(2) allows Dauphinee to “require the motion to be heard again”... this time with the benefit of the Defendants’ evidence and argument. CPR 22.06(3) allows the Judge (who need not be the same judge who heard the *ex parte* motion) to “set aside, vary or continue the order”.

[7] CPR 22.06(8) governs the affidavit evidence that is permissible on the “rehearing”.

[8] I agree with MacKay’s suggestion that this rehearing is **not** in the nature of an appeal, but rather a “revisiting of the issue anew on the basis of additional information supplied by the party who was not heard the first time...” to use the words of Green, JA for the Court commenting on the Newfoundland Rule which is substantially similar - *Canadian Paraplegic Association (Newfoundland & Labrador) Inc. v. Sparcott Engineering Ltd.* (1997) 150 Nfld & PEIR 203 (CA).

[9] Dauphinee has submitted a new, and alternative basis for its position that MacKay ought not be permitted to realize on the Execution Order. The request that the Court permanently stay the Execution Order pursuant to CPR 79.22(1) was not raised in the *ex parte* hearing, and therefore the Parties are not restricted to the substance contained in the affidavit(s) filed at that time on that issue.

Position of Dauphinee

1. The judgment in favour of Halifax, assigned by Jardine to MacKay in December 29, 2010 was fully satisfied by Dauphinee in November 2007; (at the hearing, Dauphinee abandoned this position);

2. Halifax and/or Jardine did not take steps to sell Dauphinee's lands when called upon in 2006 by (MacKay) another judgment creditor, and therefore from September 3, 1991 (judgment date) to December 29, 2010 were guilty of laches, and Dauphinee should not, so close to the 20 year limit for taking action on a judgment [s. 2(1)(c) *Limitation of Actions Act RSNS* 1989 c. 258 as amended], now be subjected to enforcement of the judgment (at the

hearing MacKay conceded that as an assignee, he steps into the shoes of Halifax, and therefore any laches found to lie against Halifax, also lie against him);

3. Since Dauphinee and his divorced/deceased wife were tenants in common, her estate still has an interest in the property in Halifax County - being Pid 40226177 (5014 and 5028 St. Margarets Bay Rd.) - see exhibits “P” and “Q” sworn March 28, 2011 affidavit of Dauphinee and Exhibit “B” and “Z” sworn April 5, 2011 affidavit of MacKay.

4. If the property is sold pursuant to the Execution Order “Dauphinee and non-parties will suffer irreparable harm” since Dauphinee operates his business from the property; his daughter lives in a house on the property; and the Estate of Sheila Kelly (Dauphinee) has an interest therein;

Why Dauphinee’s arguments are not persuasive

[10] Although a concession was made by Dauphinee at the hearing that he cannot prove the Halifax judgment was satisfied in 2007, he still maintained he had a reasonable and honest belief that it had been satisfied and therefore his inaction on satisfying that judgment is explained. Therefore, I will still examine those circumstances.

[11] The $15,927.15 paid by Dauphinee in November 2007, was only in satisfaction of the W.N. White (hereafter “White”) and Atlantic Electronic (hereafter “Atlantic”) judgments.

[12] Dauphinee claims that it was his understanding that the $15,927.15 was paid in satisfaction of the White, Atlantic **and** Halifax judgments outstanding at that time - para. 27, sworn March 28, 2011, affidavit.

[13] MacKay had been assigned the benefits of the White and Atlantic Judgments in January 2007 and March 2006 respectively,

[14] In his letter of November 20 and 23, 2007, MacKay makes it clear how he arrived at the $15, 927.15 amount and that only the Atlantic and White judgments

would be satisfied by payment thereof to him - Exhibit “G” and “H” sworn March 28, 2011, affidavit.

[15] Dauphinee claims his lawyer’s letter dated November 26, 2007, supports his position - Exhibit “I”, sworn March 28, 2011, affidavit, yet it is inconsistent with other undisputed facts:

(a) MacKay had not been assigned, nor did he claim to have been assigned the Halifax judgment in 2007 - that only happened on December 29, 2010;

(b) Halifax Small Claims Court Action [SCCH] No. 22522 resulted in a judgment against Dauphinee by Atlantic and assigned to MacKay March 21, 2006. - Exhibit “A” sworn April 5, 2011, affidavit of MacKay;

(c) That Atlantic judgment was registered in Hants County against Dauphinee’s properties therein situate - being located at Rhines Road, East Gore - Exhibit “B” and “D” sworn April 5, 2011, affidavit of MacKay.

(d) The White judgment was assigned to MacKay January 10, 2007, (Exhibit “J” sworn April 5, 2011, affidavit of MacKay) and registered in the Hants County Registry of Deeds, February 14, 2007 - Exhibit “K” sworn April 5, 2011, affidavit of MacKay.

(e) As a consequence, Mackay had those three Hants County properties of Dauphinee put up for sale and had bid $15,000.00 for them collectively - Exhibit “S”, “T”, “U”, sworn April 5, 2011, affidavit of MacKay - also paras. 27 to 31.

[16] As Dauphinee’s counsel’s letter dated November 26, 2007 makes clear, the $15,927.15 “represents payment in full of all outstanding judgments in the name of Harvey Dauphinee **against his properties located at East Gore**.” - Exhibit “I” sworn March 28, 2011, affidavit of Dauphinee.

[17] As requested in that letter, MacKay provided Satisfaction Pieces for action SCCH 22522 [Atlantic judgment] and CH No. 69941 / SH No. 276363 [White judgment] - Exhibit “J” sworn April 5, 2011, affidavit of MacKay.

[18] If Dauphinee misunderstood which judgments the $15,927.15 payment was applied to, that is not evident in the communications between his counsel and MacKay.

[19] The Halifax judgment clearly was **not** satisfied by the $15,927.15 payment.

[20] Dauphinee's counsel at the hearing indicated that the only evidence of Dauphinee's honest/reasonably held belief that the Halifax judgment had been satisfied in 2007, was his receipt of the November 26, 2007 letter of Mr. Jones to MacKay found at Exhibit "I" and paras. 27 - 28, sworn March 28, 2011 - affidavit of Dauphinee.

[21] Dauphinee may have been under the impression that that judgment was to satisfy all the outstanding judgments against him, but the letter and circumstances surrounding it at that time, and later, do not make such an impression a reasonably held belief. I find that Dauphinee did not reasonably believe that the Halifax judgment was satisfied. Therefore, he cannot explain his not making efforts to pay off the Halifax judgment by claiming he thought it had already been paid off.

[22] Were Halifax and/or Jardine guilty of laches thus disentitling MacKay, who was assigned the Halifax Judgments of September 3, 1991 on December 29, 2010? As noted earlier, MacKay accepts any laches on their part as his own.

[23] I conclude that MacKay is not prevented from proceeding to enforce the Halifax judgment on this basis.

[24] Dauphinee argues that he is "not seeking to have the original judgment set aside, but rather to have the renewal order set aside" - para. 25 of Dauphinee brief. This is said to be so because after 5 years of a judgment's effective date, the Prothonotary is no longer entitled to issue an Execution Order on request. A creditor must request the Court to authorize the issuance of an Execution Order - as MacKay did in this case - CPR 79.05(1), (2), (5) and 79.06(1)(e) regarding a change of parties (eg. MacKay becoming the new assignee).

[25] MacKay notes as assignee of the Atlantic judgment against Dauphinee, he requested in June 2006, that prior creditors, Jardine (assignee of Halifax) and NOVA Enterprises Ltd., proceed with a sale to realize funds towards their (and his)

judgments under *The Sale of Land Under Execution Act* - Exhibit “G” sworn April 5, 2011, affidavit of MacKay.

[26] That sale process had not previously ocurred because, it seems the Province of Nova Scotia took the position that, as another judgment creditor, *The Sale of Land Under Execution Act* did not apply to it and in view of that position, the other creditors could expect a costly litigation if they proceeded with the process as MacKay requested - Exhibit “I” and “M” sworn April 5, 2011, affidavit of MacKay.

[27] The March 12, 2007 letter from Stephen McGrath, counsel for the Province [Exhibit “M”, April 5, 2011 affidavit] confirms that Mr. MacKay was able to proceed as the result of an accommodation with the Province as a prior creditor regarding the Atlantic judgment.

[28] Both counsel made reference to two cases regarding laches which I find helpful:

1. *MacKay v. MacMillan* 2009 NSSC 330 per LeBlanc, J., especially at para. 36;

2. *Smiths Field Manor Development Ltd. and Karen L. Turner-Lienaux v. Wesley G. Campbell* 2010 NSSC 63 per Moir, J., especially at para. 6.

[29] MacKay argues that in these circumstances, the other creditors (including Jardine / Halifax) were somewhat hamstrung until the Province of Nova Scotia judgments ceased to exist. - See also para. 8, sworn December 29, 2010 affidavit of Shirley Jardine. Given the overall circumstances in this case, and that facet in particular, their inaction at least to that point in time, was not the kind of inaction that should amount to a finding of laches.

[30] Although a debtor may well be surprised to be haunted by judgments from many years ago, they do have a 20 year shelf life once registered at the Registry of Deeds - it is not as though the debtor is unaware of their existence. Their continued existence is easily ascertainable to those who wish to make the effort.

[31] At the hearing, counsel for Dauphinee argued that as an alternative, a permanent stay should be imposed against the February 7, 2011 Order's direction that the Prothonotary issue an Execution Order.

[32] Dauphinee's counsel suggested that the test to decide whether to order a stay of proceedings [as in those pending an appeal] in civil cases was set out by Saunders, JA in *White v. EBF Manufacturing Ltd.* 20085 NSCA 103, especially at paras. 16 - 18 and 46.

[33] Notably those cases are distinguishable as involving an application for a **temporary** stay pending the outcome of an appeal. In the case at Bar, Dauphinee concedes that the judgment is unsatisfied, but he argues that no Execution Order should issue.

[34] The matter of a **permanent** stay of proceedings of an Execution Order was considered by Justice LeBlanc in *MacLellan Lincoln Mercury Limited v. Jacobsen* 2007 NSSC 245. The default judgment was granted June 16, 1987 and registered at the Registry of Deeds in 1987 and on May 7, 2007 he was notified

that the Plaintiff was taking steps to sell the property under the *Sale of Land Under Execution Act* - [paras. 13, 18 and 35].

[35] That case is factually distinguishable as *Jacobsen* was arguing that it would be prejudicial to allow the statutory sale of a residential property **because** he was not served with a statement claim; however, Justice LeBlanc found as a fact that he had been served - paras. 19 and 37.

[36] On appeal, the Court of Appeal found that Justice LeBlanc misinterpreted the meaning of Justice Roscoe's words in *Windy Bay Fisheries Ltd. v. Neiff Joseph Land Surveyors Ltd.,* (1996) 157 N.S.R. (2d) 367 (CA). Justice Oland in *Jacobsen* 2008 NSCA 45 confirmed that on an application to renew an Execution Order, a judge must: determine the matter of delay in light of the circumstances; assess the balance to be struck between the parties; and consider the effect of the delay by the applicant creditor as compared with any significant prejudice suffered by the respondent debtor.

[37] Moreover, as Saunders, JA put it, albeit in the context of a stay pending appeal in *White v. EBF Manufacturing* 2005 NSCA 103 at para. 46:

> "The overarching principle in the exercise of this court's discretionary power to grant a stay of execution must always be to seek to do justice between the parties."

[38] Justice Oland in *Jacobsen* specifically referred to *N.S. Tractors and Equipment Ltd. v. Morton* (1986) 79 NSR (2d) 59 (SCTD) per Burchell, J. as reflecting the existing jurisprudence. Notably his decision was upheld on appeal - unreported decision Sptember 9, 1986 SCA 01671. Jones, JA for the Court stated:

> "The Respondent established that the Judgment was unsatisfied and provided a reasonable explanation of the steps taken to recover the debt. In the absence of some rule of law barring recovery on the judgment, the Respondent, in our opinion, was entitled to proceed."

[39] In *Morton*, Burchell, J. set out the considerations he followed in his earlier decision in *Commercial Credit Plan Ltd. v. MacLeod* (1986) 75 NSR (2d) 197. In *Commercial Credit* he adopted the reasoning in an English Court of Appeal case, *W.T. Lamb and Sons v. Rider* [1948] 2 All E.R. 402.

[40] Justice Burchell summarized the law in *Commercial Credit*:

> "It is said, and I am inclined to agree, that the requirement for leave arises from equitable considerations and, ordinarily, a refusal will be appropriate only where, in

> view of the judgment creditor's delay, the granting of an order will have a prejudicial effect upon the judgment debtor."

[41] He noted that the initial burden is on the applicant creditor "to account for its delay".

[42] Justice LeBlanc in *MacKay v. MacMillan* supra, has conveniently summarized the jurisprudence most recently:

> 36 Before the Court of Appeal decision in *Jacobsen*, there was no clearly articulated test applicable on an application to renew an execution order. The leading cases in this regard were the two 1986 decisions by Burchell. J., *Commercial Credit* and *Nova Scotia Tractor*, and the 1996 Court of Appeal decision in *Windy Bay*, as well as the Court of Appeal decision in Commercial Credit. Several principles emerge from a review of these cases:
>
> > 1. A refusal to renew an execution order is a serious impairment of the plaintiff's rights. An application to renew an execution order "should not be dismissed lightly since the result will be a serious impairment of the rights of the Judgment creditor which has, after all, established its entitlement to payment of the debt": *Commercial Credit*.
> >
> > 2. A refusal to renew is only appropriate where the defendant is prejudiced because of the plaintiff's delay: *Commercial Credit*. The cases are not clear as to the degree of prejudice to the defendant that is required to justify a refusal to renew.
> >
> > 3. Lack of a detailed explanation for delay will not necessarily be fatal to the plaintiff. In Commercial Credit, Burchell, J. relied on the English Court of Appeal decision in *W. T. Lamb & Sons v. Rider*,

> [1948] 2 All E.R. 402, as authority for the proposition that "in making an application of this kind there is an initial or threshold burden on the applicant to account for its delay." *Commercial Credit* was decided on the basis that this "threshold burden" had not been discharged by the Judgment creditor. There is reason to question whether *Lamb* indeed stands for that proposition. It appears that the Court of Appeal was describing the requirement to adduce evidence explaining the plaintiff's delay in order for leave to be granted, it was referring to leave to appeal out of time, not leave to proceed to execution. The delay to be explained, then, was not the plaintiff's delay in seeking to execute the Judgment, but rather the delay in seeking leave to appeal a master's order declining to grant leave to proceed to execution where more than six years had passed since the judgment. In any event, the decision of the Court of Appeal in *Windy Bay* implicitly rejects such a threshold burden. The Chambers judge had granted leave to renew the execution order after 19 years. The defendant argued on appeal that "there should have been an explanation provided respecting the delay in pursuing collection." This ground of appeal was unsuccessful. The Court held that while it would have been "preferable" for the affidavit in support of the application to have more detail, the minimal amount of detail provided was sufficient.
>
> 4. A long delay in and of itself is not prejudicial to the defendant.

[43] Dauphinee argues in the case at Bar that:

1. The sale of land of a debtor is only one means of realizing on a judgment that is unsatisfied, thus the Creditor is not without other remedies;

2. MacKay, who conceded responsibility for any laches of his predecessor (Jardine and Halifax), should be found responsible for laches because nothing was actively done beyond registering the

September 3, 1991 judgment until December 29, 2010, when MacKay was assigned the judgment;

3. Jardine did nothing to advance its interests in 2006, by not seeking an Execution Order under the *Sale of Land Under Execution Act* as requested by MacKay, who at the time of writing of his June 19, 2006 letters to Jardine and Nova Enterprises Ltd., was a subsequent creditor (under the later registered Atlantic Judgment);

4. Dauphinee will suffer "irreparable harm" if the property is sold because:

(a) he has a business on the property;

(b) he and his daughter live on the property and she is a potential heir to his deceased's wife's Estate and thus has an interest in the "family home";

(c) his deceased's wife's Estate will have to share the property with the "stranger" who purchases the property if the sale proceeds.

[44] Dauphinee argues that cumulatively, these considerations in all the circumstances, combine to cause his request for a permanent stay to be justifiable.

[45] MacKay counters that:

1. There exists an economic reality that explains why creditors who register judgments at the Registry of Deeds "sit and wait" rather than aggressively pursue relying on those judgments: Litigation is a time consuming and costly business which is a significant hurdle for many creditors who are already missing the benefit of the money that the debtor owes them; and that debtors often owe multiple creditors or judgments, as in the case here, thereby reducing the likelihood of any one unsecured creditor recovering their money; and lastly that registering a judgment provides some leverage to creditors against debtors who own land which is the most likely avenue to prod a debtor to pay;

2. In light of that economic reality, and the Province of Nova Scotia's position regarding the inapplicability of the *Sale of Land Under Execution Act*, MacKay did not have much choice except to wait until the prior creditor's judgments ceased to have legal effect, before attempting to realize on his judgment;

3. There is no clear evidence that:

(a) Dauphinee has in any way changed his position (relied on the delay) **because** of the delay herein by MacKay or his predecessors in attempting to realize upon the 1991 judgment;

(b) Dauphinee cannot pay and is impecunious - in fact, he owns multiple properties and has a business according to the affidavit evidence;

(c) Dauphinee has made any efforts at all to inquire into what judgments if any he has still outstanding and made any, even modest, attempts to repay monies he undeniably owes;

(d) Dauphinee's daughter will suffer any harm if the property is sold - there is no evidence as to her age, circumstances, or even whether she has any legal interest in the property as a possible heir of Dauphinee's deceased wife's Estate;

(e) Dauphinee has an economically viable business on the property, or that even if that could be inferred, that sale of

> the property would prejudice Dauphinee's business operations in any way;
>
> 4. That only Dauphinee's interest as a tenant in common could be sold, and so the Estate of his deceased's wife would suffer no prejudice. Both it and Dauphinee are in the exact same position that they were when the judgment was registered in the Registry of Deeds - notably the Estate does not appear to have taken any interest in the property - perhaps the circumstances of their divorce explain that, although I have no evidence beyond paras. 43 - 45 of the March 28, 2011, sworn affidavit of Dauphinee.

[46] Regarding the latter point, MacKay makes reference to a decision by Coughlan, J., reiterating that only Dauphinee's interest in the property could be sold:

> *Centennial Realities Ltd. v. Spiropoulous* 2002 NSSC 231 at para. 12.

The Evidence Presented and Factual Finding

[47] I have affidavits from Shirley **Jardine (December 29, 2010). MacKay (February 1, 2011 and April 5, 2011) and Dauphinee (March 28, 2011).** I have

not heard *viva voce* testimony from the affiants, so I am at a disadvantage in making credibility assessments and findings.

[48] Nevertheless, I find I can conclude as follows:

1. The facts are generally undisputed; moreover:

2. Dauphinee did not satisfy the Halifax judgment, and did not reasonably believe that he had done so by his payments of $15, 927.15 in 2007;

3. Dauphinee has not demonstrated any significant, much less "irreparable harm", prejudice by virtual of the delay by Halifax / Jardine / MacKay in waiting to realize on that Halifax judgment until December 29, 2010;

4. MacKay, while having to explain a delay from September 3, 1991 to December 29, 2010, did provide a reasoned and reasonable explanation for the delay **in the circumstances of this case.**

Conclusion

[49] To do justice as between MacKay and Dauphinee, in light of my finding of a reasonable explanation for the delay, and no demonstrated significant prejudice to Dauphinee, I also find that on balance, the prejudice of a permanent stay **or** of not permitting the Execution Order to issue, is much greater than the prejudice to Dauphinee if the Execution Order is issued. Therefore I dismiss Dauphinee's motion, with no order as to costs.

J.