Date: 20011205
Docket: S.H. No. 165787

IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as *Centennial Realties v. Spiropoulos, [2001] NSSC 155)*

BETWEEN:

Centennial Realties by its lawful assignee, James Georgantas

Applicant/Plaintiff

-and-

Danai Spiropoulos (sometimes also known as Danai Spire or Spiro) and Sophia Spiropoulos (sometimes also known as Sophia Maxwell) and Arthur Spiropoulos of Halifax in the Province of Nova Scotia

Respondents/Defendants

DECISION

HEARD: In Chambers at Halifax, Nova Scotia before the Honourable Associate Justice Michael MacDonald August 15th, 2001

ORAL DECISION August 15th, 2001

WRITTEN RELEASE OF DECISION: December 5, 2001

COUNSEL: W. Michael Cooke, Q.C. for the Application/Plaintiff
Barrister & Solicitor

Michael C. Moore, for the Respondent /Defendant
Moore & Associates

MACDONALD, A.C.J.:

[1] The plaintiff/applicant is a creditor of the defendant Arthur Spiropoulos. Arthur Spiropoulos conveyed certain real estate to his daughters, the defendants Danai Spiropoulos and Sophia Spiropoulos. The plaintiff/applicant has commenced an action under the *Statute of Elizabeth* to set aside this conveyance as being fraudulent. He has now applied for this same relief by way of summary judgment.

Test for Summary Judgment Application

[2] At the outset it must remembered that in summary judgement applications, a defendant need not prove the merits of the defence. He or she need only raise a fairly arguable point. There are numerous Nova Scotia Court of Appeal decisions standing for that principle including: *Carl B. Potter Ltd. v. Antil Canada Ltd. Mercantile Bank of Canada* (1976), 15 N.S.R. (2d) 408; *The Bank of Nova Scotia v. Dobrowski*, (1977), 23 N.S.R. (2d) 532; and *Ocean Contractors Ltd. v. Acadian Construction Ltd.* (1991), 107 N.S.R. (2d) 366. With that background I will assess the merits of the plaintiff's application.

Test for Setting Aside Conveyance

[3] The leading authority in this province dealing with applications under the *Statute of Elizabeth* is the *Bank of Montreal v. Crowell and Crowell* (1980), 37 N.S.R. (2d) 292 where Hallett, J., as he then was, noted at paragraph 27:

> To succeed under the *Statute of Elizabeth*, the plaintiff need only prove three facts:
>
> 1. The conveyance was without valuable consideration. It may not be sufficient if the plaintiff proves only that the consideration was somewhat inadequate...
>
> 2. The grantor had the intention to delay or defeat his creditors...

3. That the conveyance had the effect of delaying or defeating the creditors.

[4] The question for me therefore is whether or not the defendants have raised a fairly arguable issue on any of these three requirements.

Valuable Consideration

[5] The first issue is whether or not there was valuable consideration. It is clear and undisputed that no money changed hands. In other words, the grantees, paid no money, signed nothing and on the face of it were under no obligation.

[6] Nonetheless, the defendants maintain that the following clause in Schedule A of the deed represents valuable consideration: "*This conveyance is also further subject to any undisputed obligations of the grantor in respect to the herein property*."

[7] The evidence is clear that at the time of the conveyance there were undisputed mortgages owing on the property. The defendants therefore argue that this clause making the conveyance subject to these undisputed obligations amounts to consideration, or at least raises a fairly arguable issue.

[8] In advancing this submission, the defendants rely upon the decision of *McCoy Co. Limited v. Avalon Design and Management Ltd.* (1988), 80 N.S.R. 1, where the Nova Scotia Court of Appeal confirmed a trial judge's conclusion that an obligation to pay debts relating to the property in that case amounted to valuable consideration.

[9] However, this case is distinguishable from the case at bar. In *McCoy, supra* the trial judge found valuable consideration because the grantees had agreed to be responsible for debts which were equal to or perhaps greater than the actual value of the property. There was no such exposure in the case at bar. Simply put, a substantial equity interest has been conveyed without consideration.

[10] In other words, it must be remembered that conveying a property by warranty deed or quit claim deed that is subject to a mortgage is not a conveyance of the legal title. It is a conveyance of the equity. Assuming that the mortgagees would be protected because they own the legal title, then there was an unencumbered or an unfettered conveyance of the equity to the defendants for which there was no consideration. Reference has been made to a vague promise on the part of the daughters to look after their father in his old age. Again there was nothing in writing and this does not raise a fairly arguable *vis à vis* the issue of consideration.

Intention to Delay of Defeat Creditors

[11] The second criterion referred to in *Crowell* is that the grantor had the intention to delay or defeat its creditors. As Hallett, J. (as he then was) noted in Crowell, this intention may be imputed. At p. 303 and 304, he notes:

> ...It is not necessary that the creditor exist at the time of the conveyance... However, the Court will impute the intention if the creditors exist at the time of the conveyance provided the conveyance is without consideration and denudes the grantor debtor of substantially all his property that would otherwise be available to satisfy the debt (*Sun Life v. Elliott).*

[12] Considering this issue, it must be noted that Justice Hallett's words are not that the court "may", it is that the court "will" impute intention to defraud if the two noted criteria are met; namely, that the conveyance was without consideration and that it denudes the grantor/debtor of substantially all the property that would otherwise be available. It is clear from both the affidavit and *viva voce* evidence that there would be no other property upon which the plaintiff could satisfy its debt. It is also clear the debt existed at the time of the conveyance. The defendants has therefore failed to raise an arguable issue on this branch of the test.

The Effect of the Conveyance

[13] The third test in *Crowell* is that the conveyance have the effect of delaying or defeating the creditors. There is no arguable issue whatsoever on this point. It is clear from all the documents that there has been a delay in execution. It is clear that there are no other assets upon which the plaintiff

can draw. Therefore, all three aspects of the *Crowell* test have been met. The defendants therefore have failed to raise an arguable issue to be tried. I am allowing the application and granting the relief sought.

[14] I further order the defendants to pay costs in the amount of $1,000.00 plus disbursements to be taxed.

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Michael MacDonald, A.C.J.