IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Primeau v. Richards, 2004 NSSF 86

Date: 20040929
Docket: SFHF 10153
Registry: Halifax

Between:

Brigette Marie Alice Primeau

Applicant

v.

Alan Charles Richards

Respondent

Judge: The Honourable Justice Moira C. Legere-Sers

Heard: August 4, 2004, in Halifax, Nova Scotia

Final written submissions
Applicant - August 27, 2004
Respondent - September 3, 2004

Counsel: Kim A. Johnson, for the Applicant
Anthony Brunt, for the Respondent

By the Court:

[1] This is the application of Brigette Marie Alice Primeau, amended April 13, 2004, for a declaration that,

> (a) the real property located at 104 Quaker Crescent, Lower Sackville, Nova Scotia is vested solely in the Applicant, pursuant to the principles of constructive trust, resulting trust, and/or unjust enrichment; and
>
> (b) in the alternative, an order under Section 24(1) of the *Partition Act* vesting the property in the Applicant and determining the proper compensation for the Respondent and seeking costs.

[2] The parties are represented by counsel.

[3] There is a Consent Order dated April 23, 2001. Both parties were represented by counsel. They agreed that the Applicant would have exclusive possession of the home located at 104 Quaker Crescent until further order of the court or written agreement, subject to the following conditions:

> (a) Brigette Marie Alice Primeau shall maintain the home in good repair, paying the mortgage, taxes, and insurance, and indemnifying Alan Charles Richards should the mortgage company make any claim with respect to non payment of the mortgage. In the event of default Brigette Marie Alice Primeau will surrender possession of the home (with the house to be listed to sale, including the appliances); and
>
> (b) Brigette Marie Alice Primeau will make her best efforts to have Alan Charles Richards removed from the mortgage. If Brigette Marie Alice Primeau is unable to have Alan Charles Richards name removed from the mortgage she agrees that the home will be listed at least six months prior to the expiration of the mortgage (which is approximately August of 2004).

[4] The matter came before me for trial on August 4, 2004, the final submissions on August 27, 2004 and September 3, 2004 respectively.

[5] Section 24(1) of the *Partition Act.* R.S., c. 333, s. 1 states:

> "LAND INCAPABLE OF DIVISION
>
> 24(1) When the land, of which partition is sought, cannot be divided without prejudice to the owners, or when any specific part thereof is of greater value than the share of any party and cannot be divided without prejudice to the owners, the whole land, or the part so incapable of division, may be set off to any one of the parties who will accept it, upon payment by him to any one or more of the others of such compensation as the commissioners determine."

[6] The Applicant and Respondent met in September, 1995. They purchased a home together on August 13, 1998 for $98,000. The mortgage was originally $96,591.25. They required $7,629.12 for closing.

[7] $5,000 was gifted by the Respondent's father. There was written verification that this was a gift, pursuant to the bank's requirements. Mr. Richards is not seeking compensation for this $5,000. The Applicant indicates she put approximately $3,000 towards the balance to complete the sale. Mr. Richards disagrees.

[8] The parties separated in December, 2000, after living together for approximately 16 months. There was at least one separation in the interim. The mortgage outstanding at the time was $95,150. The Applicant's evidence confirms that there would be a $ 3,000 to $4,000 payout penalty in the event the home was sold at that time.

[9] The Respondent wanted the home sold at separation, believing there would be equity. This was an erroneous belief. There would clearly be a deficit should

the house be sold at or around the date of separation. They each would have incurred one-half of the penalty and all disbursement costs at sale.

[10] The Consent Order resulted. The Applicant was required by agreement to indemnify the Respondent in the event he would have been called upon to pay. He was not called upon at any time to pay an outstanding amount on the mortgage.

[11] The Applicant sought to obtain a guarantor in order to remove the Respondent from the mortgage. She was unable to do so until November 5, 2003.

[12] The Applicant also completed repairs and improvements to the property. Her estimation includes repairs and improvements of $8,000.

[13] The bank confirmed by letter dated November 5, 2003 that the Applicant was approved for a mortgage. The Applicant was in a position to remove the Respondent from the mortgage and requested a Quit Claim Deed from him. He sought a payment of the equity as a result of the increased value in the home. He refused to provide a Quit Claim Deed pending resolution of the division.

[14] During the cohabitation period the Respondent lived in the home with his daughter. From August, 1998 to November, 2000 he contributed approximately $800 per month towards expenses. His portion was supplemented by a payment of $100 from his daughter who lived there for a period of time.

[15] The Respondent contributed $300 in December, 2000, instead of $400. He argues that he had loaned the Applicant $700 in December and she did not repay this. She denies the existence of this loan.

[16] When the parties separated both the Respondent and his daughter left the premises.

[17] The Respondent seeks compensation, due to the fact that his credit rating and his ability to obtain credit was affected by his continued obligation to the bank. He has provided no proof that he has suffered any damages as a result of the inability of the Applicant to have him removed from the mortgage.

[18] There is no evidence he sought to have himself removed from the mortgage or approached the Applicant directly or through counsel to speed up the process or make any enquiries at any time.

[19] The Order requires that the Applicant make reasonable efforts to have the Respondent removed from the mortgage. In the event that she was unable to do so, six months in advance of August, 2004, being in or about March, 2004, the home was to be listed for sale.

[20] The Applicant was able to have him removed in exchange for a Quit Claim Deed in or about November, 2003. If, in fact, there was a financial detriment to the Respondent due to his name being on the mortgage, it could have been addressed by the transfer of a Quit Claim Deed from that time forward. There is, however, no evidence of any damage to his credit rating.

[21] The remaining issue is should the Respondent share in an equal division of equity as a result of the change in the valuation from the date of purchase to the current date.

[22] The home was purchased on August 13, 1999 for approximately $99,000 with a mortgage for $96,591.25. The Applicant submits that there was no change in the market value as of December, 2000. The Applicant believes the deficit, if a sale had resulted, would be in the approximate amount of $7,000.

[23] The Respondent made no contributions to the property after his $300 payment in December, 2000.

[24] The outstanding mortgage on the property as of August, 2004 is $89,889.11.

[25] There are four valuations in evidence. The municipal assessment for 2001 is **$86,400.** The parties purchased the property on August 13, 1999 for **$99,000**. The more recent bank valuation is **$134,000** and the Comparative Market Analysis indicates they could expect a sale between **$128,000 and $135,000.**

[26] The Applicant believes the improvement in equity is as a direct result of her investment and improvements and repairs to the property. The Respondent suggests that the increase in value is solely the result of market fluctuations. He offers no evidence to support this.

[27] The Applicant estimated that she spent approximately $5,000 on the property in the last year and in prior years less than $3,000. In addition, she and her fiancé invested considerable labour in the property.

[28] The Applicant includes a list of improvements to the property, as noted in paragraph 8 of her affidavit. These improvements *include*:

(a) Added a fence and gate to one side of the property;
(b) Purchased a new oil tank;
(c) Refurbished the furnace;
(d) Added new laminate flooring;
(e) New ceramic tile flooring;
(f) Paint;
(g) New doors and doorbell;
(h) New light switches and outlets;
(i) New molding and baseboards;
(j) Installed outward lighting in the backyard;
(k) New bathroom exhaust;
(l) Central lighting in the master bedroom;
(m) New sink and counter in the bathroom;
(n) Repaired kitchen faucets;
(o) Replaced kitchen refrigerator;
(p) All other ongoing and required household maintenance and repair; and
(q) Landscaping.

[29] The Applicant indicates that she was not able to find all of the receipts for repairs and presented to the Court a list that approximates $4,000. The labour was completed by herself and her new partner.

[30] It is notable that the Respondent did not enter in his pleadings a request for occupational rent and it will not be considered.

Conclusion

[31] I have considered the formula set out in *Taylor v. Taylor* (1984), 65 N.S.R. (2d) 294 (T.D.) and *Anderson v. Wilson* (1986), 73 N.S.R. (2d) 1 (T.D.). There is a presumption in a situation of joint ownership of equal sharing subject to certain equities.

[32] I set the estimated sale price as at August, 2004 at $131,000.

[33] Had the home been sold on separation in January, 2001, the parties would most certainly have incurred a loss of at least $7,000. In exchange for avoiding

that loss, the Applicant obtained exclusive possession and was required to indemnify the Respondent for any loss.

[34] After separation the Applicant contributed all mortgage payments, taxes and maintenance toward the upkeep of the home. The Court in *Taylor v. Taylor* and *Anderson v. Wilson* credit the paying party with one-half the mortgage and taxes.

[35] In this case, using the only statement I have, the mortgage and taxes due monthly are, as of late, $773.49. (This is less than the original monthly principle and interest expense in the Applicant's original property statement.)

[36] The Applicant bore sole responsibility for these payments for 44 months after separation. $773.49 X 44 months (January, 2001 to September, 2004) = $34,033.56. One half of this is $17,016.78.

[37] The Applicant gave evidence of significant repairs. She has provided photographs. The only documented receipts and therefore the most reliable evidence is the total of those receipts at approximately $4,000.

[38] Unfortunately, it is quite arbitrary to value their labour. It was their labour used to complete the repairs. I will estimate it in the amount of $2,000 over the period the repairs were effected. Total repairs and improvements inclusive of labour I estimate to be $6,000.

[39] This has contributed to the equity position. The Applicant will be credited with one-half of that.

Sale Price		$ 131,000
Real Estate		7,860
Legal Fees		500
HST		1,254
Mortgage		89,889
Balance		$ 31,496.89
½	=	$ 15,748.44

[40] Ms. Primeau will be given credit for one half the mortgage and tax payments ($17,016.78) in addition to $3,000 for improvements, leaving a deficit. No money is owed to the Respondent.

[41] In the event the parties are to be forced to sell the home and the deficit resulted in an unequal sharing, it is arguable that the Respondent would be required to contribute and ensure equal division of indebtedness.

[42] That, hopefully, will not be necessary.

Relief

[43] The Respondent shall convey to the Applicant by Quit Claim Deed all his right, title and interest in the property coincidental with the provision of a release of his liability flowing from ownership and the current outstanding mortgage.

[44] The Applicant shall have costs in the amount of $1,000.

[45] Counsel for the Applicant shall draft the order.

J.