SUPREME COURT OF NOVA SCOTIA

Citation: Royal Bank of Canada v. Marmura Estate, 2014 NSSC 17

Date: 20140117
Docket: Hfx No. 410276
Registry: Halifax

Between:

Royal Bank of Canada one of Canada's Chartered Banks and **the Toronto-Dominion Bank**, one of Canada's Chartered Banks

Applicants

and

Elizabeth S. Marmura and Elizabeth S. Marmura, Executor of the Estate of **Michael B. Marmura**

Respondents

and

Daniel J. MacIsaac and Registrar General of Land Titles

Intervenors

Judge: The Honourable Justice Allan P. Boudreau

Heard: June 17, 2013, in Halifax, Nova Scotia

Counsel: Joshua J. Santimaw, for Applicant Royal Bank of Canada
Nicholas Mott / Marc LeClair for Applicant Toronto-Dominion Bank
Ian Breneman for Respondents Elizabeth S. Marmura and Estate of Michael B. Marmura
Augustus Richardson, Q.C. for Intervenor Daniel J. MacIsaac

The Registrar General participated by way of a watching brief only.

[3]

By the Court:

Introduction:

This case involves the apparently unsettled issue, in Nova Scotia at least, of the effects of an unregistered Agreement of Purchase and Sale under the relatively new Land Registration Information System (the "System"). This System was adopted and put in place in 2003 pursuant to the enactment of the *Land Registration Act*, S.N.S, 2001 c. 6, as amended, (the "*LRA*"). The *LRA* replaced the then existing Registry Act system, which had been in place for a long time. In the present case, an Agreement of Purchase and Sale was entered into and eventually closed; however, before the closing and the registration of the resulting deed, the two applicants each recorded a judgement against one of the two vendors. The lawyer acting for all the parties to the Agreement of Purchase and Sale did not search the Judgement Roll prior to closing the transaction and he was consequently not aware of the two recorded judgements.

The applicants now claim that the recorded judgements attached to the vendor's legal interest in the property in question prior to closing and now request that their judgements be recorded on the Parcel Registry for the lands. The Respondents and the Intervenors argue that, once the Agreement of Purchase and Sale was signed, the Vendors had no ownership interest in the lands which could be attached by the subsequently recorded judgements, particularly since the transaction was ultimately completed.

The Issues:

What legal or priority status does the *LRA* convey on a duly recorded judgment *vis a vis* an unregistered instrument such as the Agreement in question?

If the *LRA*, on its plain and ordinary meaning, appears to grant priority to a recorded instrument *vis a vis* an unregistered one, is there a competing and overriding common law doctrine which survives the *LRA* in the circumstances of this case?

Background:

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John A. Byers and Susan Byers ("Mr. & Mrs. Byers") owned a property in Antigonish County as joint tenants. The property had been registered, pursuant to the present System under the new *LRA* on June 24, 2004. Mr. Byers had apparently run into financial difficulties with both applicants. The Applicant, Toronto Dominion Bank ("TD), obtained a judgement against Mr. Byers on December 9, 2008 in the amount of $260,152.88. The Applicant, Royal Bank of Canada ("RBC"), obtained a judgement against Mr. Byers on April 24, 2009 in the amount of $10,767.94. On March 11, 2009, Mr. & Mrs. Byers executed an Agreement of Purchase and Sale (the "Agreement") to sell the property in question to Elizabeth and Michael Marmura (the "Marmura's"). The purchase / sale price was $310,000.00. Mr. Marmura has since passed away and Mrs. Marmura represents herself and her late husband's estate.

The judgement in favour of TD was recorded in the Judgement Roll for Antigonish County on April 9, 2009 and the judgement in favour of RBC was recorded in the same Judgement Roll on May 1, 2009.

The vendors and the Purchasers were both represented by the same lawyer, Daniel J. MacIsaac of Antigonish. Mr. MacIsaac did not know the vendors or the purchasers and he was retained by way of the real estate agent who forwarded a copy of the Agreement to him on or about June 25, 2009. The sale of the property closed on June 30, 2009. A mortgage in favour of CIBC of approximately $125,000.00 was paid from the closing funds, and after deduction of real estate and other fees, the net proceeds were paid to Mr. & Mrs. Byers. The judgements in favor of TD and RBC were not addressed at the time of closing. In his affidavit sworn on February 18, 2013, Mr. MacIsaac states the following at paragraph [10]:

> I was not aware at this time of any judgements having been granted, or registered, against either or both of the Byers. The Grantor Grantee Index ("GGI") was inadvertently not checked by me or my office. I do not know whether either of the two judgements that the Toronto-Dominion Bank and the Royal Bank of Canada had against Mr. Byers would have shown up in the GGI on or before the closing date of June 30, 2009.

However, there is no question but that the judgements were recorded in the Judgement Roll as I have previously indicated and would have shown up in the usual search of that register.

[2]

The Applicants contend the *LRA* makes it clear that unregistered documents such as the Agreement have no legal effect on third parties and that recorded documents such as the judgements in question attached to the judgement debtor's "registered interest" in any lands owned in that registration district.

The Respondents and the Intervenors contend that, from the moment the Agreement was entered into, the vendors no longer had an "ownership interest" in the property which could be attached by the subsequently recorded judgements. However, their position appears to be contingent on the Agreement being completed by a closing culminating in an exchange of consideration and a deed capable of being registered. In other words, a completed *bona fide* transfer of ownership.

The Authorities:

I have opted to first set out the provisions of the *LRA* which appear to govern the circumstances of this case. I will start with the "Purposes of the Act" which are enumerated in section 2:

> 2. The purpose of this Act is to
>
> (a) provide certainty in ownership of interest in land;
>
> (b) simplify proof of ownership of interests in land;
>
> (c) facilitate the economic and efficient execution of transactions affecting interests in land; and
>
> (d) provide compensation for persons who sustain loss in accordance with the Act. 2001, c. 6, s. 2; 2008, c. 19, s. 1.

There are also six definitions in the interpretation provisions of the *LRA* which appear pertinent. They are the following:

> Section 3 (1) In this Act,
>
> (f) "instrument" means every document by which the title to land is changed or affected in any way; [Emphasis added]

[2]

(g) "interest" means any estate or right in, over or under land recognized under law, a prescribed contract or a prescribed statutory designation…

(r) "record" means to secure priority or enforcement for an interest by means of entries in a register pursuant to this Act;

(t) "register" or "parcel register" means the register established pursuant to this Act for a parcel of lands <u>and includes any document incorporated into the register by reference</u>; [Emphasis added]

(u) "registered owner" means the person shown in a register as the owner of a registered interest;

(w) "registration" means to affect, confer or terminate registered interests by means of entries in a register pursuant to this Act, and includes a revision or a registration;

The *LRA* further provides as follows:

<u>Registered interests</u>

20 A parcel register is a complete statement of all interests affecting the parcel, as are required to be shown in the qualified lawyer's opinion of title pursuant to Section 37, <u>subject to any subsequent</u> qualifications, revisions of registrations, <u>recordings</u> or cancellation of recordings in accordance with this Act. 2008, c. 19, s. 11. [Emphasis added]

<u>Effect of Registration</u>

44 (1) Where a parcel is registered pursuant to this Act, this Act applies to an interest in the parcel, notwithstanding the fact that the instrument evidencing the interest was previously registered pursuant to the Registry Act.

…

<u>Unregistered instruments ineffective</u>

45 (1) <u>Except as against the person making the instrument</u> , no instrument, until registered or recorded pursuant to the Act, <u>passes any estate or interest</u> in a registered parcel or renders it liable as security for the payment of money. [Emphasis added]

…

[2]

Judgement roll

65 (1) A registrar shall establish a judgement roll for the registration district.

(2) A judgment creditor may record a judgment for the recovery of money in the judgment roll for a registration district.

(3) A judgment shall be certified by the registrar, clerk or Prothonotary of the court that issued it.

(4) A judgment recorded in a judgment roll binds and is a charge upon any registered interests of the judgment debtor within the registration district, whether acquired before or after the judgement is recorded, from the date the judgement is recorded until the judgment is removed from the roll. … [Emphasis added]

Effect of judgment

66 (1) A judgement is a charge as effectually and to the same extent as a recorded mortgage upon the interest of the judgment debtor in the amount of the judgement.

(2) A judgment against one joint tenant does not server the joint tenancy.

(3) A judgment against one owner of an interest does not extend to or bind the interests of the other owners. … [Emphasis added]

Court Orders

92 (1) Subject to this Act, in any proceeding with respect to a parcel registered pursuant to this Act, the court may order a registrar to

(a) record an interest;

…

Analysis:

In the present case it is a common ground that the Agreement was not registered pursuant to the *LRA*. There appears to be some question as to whether it is in fact, a "registerable" instrument; however, that is not a question which I have to decide in this case.

[2]

Section 45 (1) of the *LRA* quoted above appears to make it clear that "no instrument until registered or recorded pursuant to this Act, passes any estate or interest in a registered parcel". If one accepts the Respondents' and the Intervenors' position that the Agreement passes some interest from the vendors to the purchasers at the time of execution, then it is clearly an "instrument" as defined in Section 3 (1) (f) above. It is an instrument which, according to the Respondents and the Intervenors, purports to convey an interest which affects title to land, and which is not registered. Nevertheless, according to section 31 (1)(4), of the *LRA* the vendors remain the "registered owners" as defined in that section.

As stated, it is also common ground that the judgements in question were lawfully recorded in the Judgement Roll of the district in which the lands in question are located. Also as stated, this occurred after the agreement was entered into on March 11, 2009 and before the closing of the sale on June 30, 2009. What then is the statutory and legal effect of those recorded judgements?

Section 65 and 66 of the *LRA* deal specifically and directly with judgements. Section 65 (4) states that "A judgement recorded in a judgement roll binds and is a change upon any registered interest of the judgement debtor within the registration district…" If that was not clear enough, Section 66 (1) goes on to state that "a judgement is a charge as effectually, and to the same extent as a recorded mortgage upon the interest of the judgement debtor"… There can be no doubt that the interest of the vendor, Mr. Byers, in the lands in question, was bound and charged by the judgment in question.

Therefore, on its face, the *LRA* appears to render the unregistered Agreement ineffective to convey any interest of Mr. Byers to the purchasers, "except as against the person making the instrument". It is this last phrase which the Respondents and the Intervenors indicate has been relied upon by some courts to employ a "legal fiction" sometimes called the "relation back theory". This theory leads to the conclusion that, by signing an Agreement of Purchase and Sale, the vendors have agreed to convey their legal ownership interests in the land upon certain conditions, and a time in the future. This theory purports to rely in part on trust principles to the effect that the vendor was holding the land in trust for the purchaser until the completion or closing of the transaction. Under this theory, if the closing takes place and a deed of title is provided, then the vendor is deemed not to have had a legal ownership interest in the land such that is could be attached by an intervening judgement. The argument is made that, at most, only the net

proceeds from the sale are attachable. However, it is proposed that if the transaction does not close the judgements would, by some "further legal fiction", reattach to the land.

If one accepts that the Agreement does create some form of trust, as opposed to simple contractual rights and obligations, then section, 28 (1) of the *LRA* would require that those agreements be registered:

> Trusts
>
> 28 (1) Where an instrument discloses that a party to an instrument is a trust, or holds an interest in trust, the party's interest shall be registered or recorded in the name of the trustee or trustees only, followed by a notation that the interest is held in trust.

While the *LRA* does not specifically address the consequences for failure to register a trust agreement, on can assume that section 45 (1) dealing with unregistered instruments would govern, and the agreement would be such an unregistered instrument.

A further anomaly to this line of reasoning is that if the intervening charge upon the land was a mortgage it would be recorded on the "Parcel Register" and not on the "Judgement Roll"; Thus, a purchaser ascertaining the statutes of interests in a parcel of land would be notified of the existence of a mortgage, but not the existence of a judgement, which is recorded in the separate Judgement Roll. Therefore, contrary to Section 66 (1), a recorded judgement would be treated differently than a registered mortgage.

All of this may beg the question; what do the words "except as against the person making the instrument" mean? I find that those words have a clear and simple meaning. If those words were not in section 45 (1), that section would in effect be a nullification of contract law. This phrase simply preserves a contract as between the parties making it, but it does not and should not affect third parties, nor-nullify the other recording and registration requirements of the *LRA*.

The stated purposes of the *LRA*, are to provide certainty of ownership and to simplify proof of that ownership which will obviously facilitate the execution of transactions. Section 20 States that "a parcel register is a complete statement of all interests affecting the parcel…, subject to any subsequent… recordings…"

Therefore, any instrument such as an Agreement of Purchase and Sale purporting to convey any interests in land without being registered would fly directly in the face of section 20. Moreover, section 20 qualifies the completeness of the parcel register by making it subject "to any subsequent recordings', of which the judgements in question would be such subsequent recordings.

Legal precedents decided before the *LRA* are of limited assistance. I find that the legal fiction referred to as the "relation back theory" does not override the straight forward and common sense wording of the *LRA*. To rule otherwise would most certainly defeat the stated purposes of the *LRA*. It has been argued that maintaining the "relation back theory" would not create mischief as there are other legal principles to deal with potential abusers of such a theory; however, that appears to be what occurred in the present case. It seems that Mr. Byers was made aware of the judgements in question but he chose not to disclose this fact. He took the proceeds and is now nowhere to be found.

It is worth noting that in **CitiFinancial Canada East Corp v. Touchie**, 2010 Carswell NS 254; 2010 NSSC 149; 319 D.L.R. (4th) 118; 925 A.P.R. 88; 292 N.S.R. (2d) 88, Brison, J. (as he then was) had the following to say about the priority of a subsequently registered mortgage over a previously unregistered mortgage:

> 30 It would seem that the intention of the legislature was to recognize an obligation between the parties (s. 45) that would not bind third parties until the mortgage was recorded (s. 37). In an earlier and unofficial, annotated version of the *Land Registration Act*, the following comment appears summarizing s. 45:
>
>> Instruments affecting title to land to be registered or recorded.
>>
>> The person making an instrument passes the subject estate or interest to the person receiving the instrument as per the law currently in place in Nova Scotia. However, the instrument must be registered or recorded, as applicable, in order to bind third parties. Thus, there is no change from the Registry of Deeds system on this point.
>
> While the commentary is obviously not binding on the court, it does provide a sensible reconciliation of ss. 37 and 45. [Emphasis added]

The **CitiFinancial** case was decided under the *LRA* and gave priority to the registered subsequent mortgage. It appears manifest that registration is a

fundamental and necessary requirement of the new System under the *LRA* in order to affect third parties without notice, which is the undisputed position of the application in the case at bar. The Respondents have contended that a judgement is not a mortgage; however, we must remind ourselves of section 66 (1) of the *LRA* which clearly states that they are effectually equal. Moreover, the judgements in question meet all of the following requirements of section 49 (1) of the *LRA*:

> Duties of Registrar
>
> 49 (1) A recorded interest shall be enforced with priority over a prior interest where the subsequent interest was.
>
> (a) obtained for value;
>
> (b) obtained without fraud on the part of the owner of the subsequent interest;
>
> (c) obtained at a time when the prior interest was not recorded; and
>
> (d) recorded at a time when the prior interest was not registered or recorded.
>
> …

It also gives me some measure of comfort that the legal profession in Nova Scotia cautions its members to search the Judgement Roll as well as the Parcel Register before closing a transaction; and that that is the accepted practice. In fact section 9 of the *LRA* appears to give statutory effect to the practice standards of the Nova Scotia Barristers' Society and states the following:

> (9) The qualified lawyer's opinion of title required in clause (4)(b) shall be prepared in accordance with the relevant Nova Scotia Barristers' Society practice standards in effect at the time of the opinion and
>
> (a) shall set out
>
> (i) the interests being registered in the parcel and, subject to Section 40, all encumbrances, liens, estates, qualifications and other interest affecting the parcel, and
>
> …

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> as appear on the records at the land registration office in the county where the parcel is situated.

It has been argued that the most that can be attached by the judgements in this case is one half of the net proceeds attributable to this sale. That would appear to be the common sense approach where the sale in the result of a *bona fide* arms length transaction. However, if the judgements are not settled and removed from the record as far as the land in question is concerned, there is no alternative but to have them recorded on the Parcel Register for the land. A purchaser who pays the net proceeds of a transaction such as the Agreement in this case to the vendors without checking the Judgement Roll does so at his or her peril. It should not be necessary and it is not feasible for judgement creditors to serve execution orders on the parties to such a transaction because the judgement creditors would not normally be aware of the pending sale, as was the case here.

<u>Conclusion:</u>

I therefore grant the applications of TD and RBC. I will issue an order accordingly, prepared by counsel for the Applicants and consented as to form by counsel for all parties.

<u>Costs</u>

I urge the parties to agree on costs in the matter, which appeared to be an unsettled issue; however, if agreement is not reached, I will hear the parties at a mutually convenient time.

Boudreau, J.

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