

**IN THE SUPREME COURT OF NOVA SCOTIA**

Citation: Dempsey v. Dempsey, 2008 NSSC 137

Date: 20080514  
Docket: SH. No. 290935  
Registry: Halifax

Between:

**Reginald Dempsey, Dermot Dempsey, Carleton Dempsey, Donald Dempsey,  
Lyllith Pellerin, Caroline Dempsey Ranger, Marina Forster and Cyril  
Dempsey, all of Halifax Regional Municipality, Province of Nova Scotia**

-and-

**Karen Dempsey of Herring Cove in the Halifax Regional Municipality,  
Province of Nova Scotia**

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**Decision**

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**Judge:** The Honourable Justice Robert W. Wright

**Heard:** April 29, 2008 in Halifax, Nova Scotia

**Written Decision:** May 14, 2008

**Counsel:** Counsel for the Plaintiffs - Walter Thompson, Q.C.  
Counsel for the Defendant - Anthony Nicholson

Wright J.

**FACTUAL BACKGROUND**

[1] This Chambers application raises the question of the procedural requirements to be followed by a plaintiff who wishes to record a Certificate of *Lis Pendens* under s. 58 of the **Land Registration Act** (being Chapter 6 of the Nova Scotia Acts of 2001 as amended and hereinafter referred to as “the Act”).

[2] By way of background, this proceeding was commenced by Originating Notice (Action) dated January 22, 2008. The plaintiffs are the eight surviving adult children of Everett Dempsey and Theresa Dempsey (both now deceased). The defendant is the widow of the ninth sibling in the family (Christopher Dempsey), who unfortunately was killed in a workplace accident in the year 2000.

[3] During his lifetime, Everett Dempsey was the owner of a piece of real property situate on John Brackett Drive in Herring Cove consisting of a house lot and a waterfront lot. Although both the house lot and the waterfront lot are encompassed by a single metes and bounds legal description, they are physically divided by John Brackett Drive and bear separate civic numbers and separate Property Identification numbers.

[4] In 1991 Everett Dempsey executed his Last Will and Testament which provided that the house lot would be left to his son Christopher for use as his residence during his lifetime with the remainder to his son’s heirs absolutely. He further provided that the balance of his real property known as “water lots” would be left to his nine children for the sole use and benefit of his family. Everett’s

wife, Theresa, predeceased him in 1989.

[5] Prior to Everett's death in 1998, a Warranty Deed dated August 20, 1996 was recorded in the Registry of Deeds office at Halifax naming Everett Dempsey as grantor, and Christopher Dempsey and his wife Karen Dempsey as grantees in joint tenancy, of the entire property. It is not yet clear when the plaintiffs first discovered the existence of this deed but it appears that with the death of Christopher Dempsey in late 2000, the issue "went into abeyance" as described in the Statement of Claim. It is further pleaded that in the meantime, the plaintiffs Reginald Dempsey and Dermot Dempsey continued to fish commercially from the waterfront lot (which contains a wharf and fish shed) without interruption or interference and that other members of the family have also in the meantime used the waterfront lot for water access and docking their boats.

[6] This uneasy situation came to a head in December of 2007 when the defendant's solicitor gave written notice to the plaintiffs that the waterfront lot was under an Agreement of Purchase and Sale with a closing date of January 15, 2008 and that the plaintiffs were therefore required to remove all of their tools and equipment by the end of December. This precipitated the present legal action being commenced against the defendant on January 22, 2008.

[7] In their Statement of Claim, the plaintiffs have challenged the validity of the deed from their father Everett to their brother Christopher and his wife Karen dated August 20, 1996 asserting that it should not have included the waterfront lot. It is pleaded that their father was 91 years of age at the time, and was then living in a

nursing home where he was kept in a locked ward. It is further alleged that he then suffered from severe dementia, that he was completely deaf and that his eyesight was seriously impaired. The plaintiffs also question the authenticity of their father's signature on the deed.

[8] Based on these allegations, the plaintiffs challenge the validity of the 1996 deed on a number of bases, namely, mental incompetence, undue influence, fraud, or mistake by the inclusion of the waterfront lot in the conveyance. In the alternative, the plaintiffs plead that the deed, if valid, created a constructive trust of the waterfront lot in favour of the nine siblings. The plaintiffs accordingly claim an order setting aside the 1996 deed on any one or more of the grounds pleaded, and an interim injunction restraining the defendant from selling the property in the meantime. In the alternative, they also claim an order declaring that the defendant holds the waterfront lot as trustee for their use and benefit.

[9] The defendant has since filed a Defence denying all of the plaintiff's allegations and asserting that she is the sole owner in fee simple of the entire property by virtue of the 1996 deed and the right of survivorship following her husband's death. She intends to sell the entire property and move elsewhere at the earliest opportunity (the earlier Agreement of Purchase and Sale having collapsed).

[10] Given that stated intention and subsequent attempts to sell the property, counsel for the plaintiffs, Mr. Walter Thompson, requested the prothonotary of this court to sign a Certificate of *Lis Pendens* pursuant to s. 58(3) of the Act. The

prothonotary took the precaution of having an informal consultation with a Chambers judge who advised that counsel for the plaintiff should be informed to proceed by way of application to this court, on notice to the defendant, seeking an order authorizing the prothonotary to issue the Certificate of *Lis Pendens* being requested. Mr. Thompson did so by filing an Interlocutory Notice on April 3, 2008 pursuant to which the plaintiffs seek an order directing the prothonotary to sign the Certificate of *Lis Pendens* requested or, in the alternative, an interim injunction enjoining the defendant from selling, mortgaging or encumbering the property pending the trial of this action. Various affidavits have been filed in support of the application countered by the defendant's affidavit in response.

[11] The application was heard before me in Chambers on April 29, 2008 at which time I gave a brief oral decision in favour of the plaintiffs in my interpretation of s. 58 of the Act. I indicated to counsel that more expansive reasons would follow by written decision as set out herein.

### **ISSUES**

[12] The issues for determination on this application can be stated as follows:

- (1) What are the procedural requirements to be followed in obtaining a Certificate of *Lis Pendens* under s. 58 of the Act?
- (2) Should a certificate of *Lis Pendens* be signed by the prothonotary in the present case for recording under s. 58 of the Act?

## **LEGAL ANALYSIS AND CONCLUSIONS**

[13] The plaintiffs have brought this application under s. 58 of the Act which reads as follows:

58(1) A certificate of *lis pendens* in prescribed form may be recorded with respect to the parcel described in it.

(2) A certificate of *lis pendens* may be removed from the register on the earliest of

- (a) cancellation of the recording;
- (b) the recording of an order of the court dismissing the action or discharging the *lis pendens*;
- (c) the recording of a certificate of a prothonotary of the court that the action was discontinued; and
- (d) the expiration of five years from the recording of the certificate of *lis pendens*.

(3) A certificate of *lis pendens* shall be signed by a prothonotary of the court in which the action affecting the parcel was commenced.

(4) A person filing or continuing a certificate of *lis pendens* without reasonable cause is liable to compensate any person who may have sustained damages as a result.

[14] The law respecting the doctrine of *lis pendens* can be found in *Anger and Honsburger, Law of Real Property* (3<sup>rd</sup> Edition) (2007, ch. 34: 100). Briefly summarized for the purposes of the present application, the term *lis pendens* means “lawsuit pending”. Once a Certificate of *Lis Pendens* is filed, it serves as notice to everyone that the title to a particular piece of land is being questioned in a legal proceeding and warns against dealing with the defendant with respect to that land until the title dispute is determined. Its practical effect is to act as an injunction so as to prevent the defendant from dealing with the land until the lawsuit is determined. In order to support a Certificate of *Lis Pendens*, it is necessary that the action call into question the title to, or an interest in, land.

[15] From a procedural standpoint, our Act simply provides that a Certificate of *Lis Pendens* in prescribed form may be recorded with respect to the parcel described in it once signed by a prothonotary of the court in which the action affecting the parcel was commenced. The Act does not say that an order of the court is required authorizing the prothonotary to sign such a certificate. The Act speaks of an order of the court being required only for purposes of dismissing the action or discharging the *lis pendens* or, of course, awarding compensation to any person who may have sustained damage as a result of the filing of a Certificate of *Lis Pendens* without reasonable cause.

[16] In my interpretation of the Act, the legislative intent as it pertains to Certificates of *Lis Pendens* was designed as follows. As a safeguard against abuse of process, a Certificate of *Lis Pendens* must be signed by a prothonotary before it can be recorded under the Act. The role of the prothonotary therefore is to review the allegations pleaded in the Statement of Claim and if those allegations clearly call into question some title or interest in a specified parcel of land, the prothonotary should then sign the Certificate of *Lis Pendens* for recording under s. 58(1). It is then open to the defendant to make an application to the court under s. 58(2)(b) of the Act to discharge the *lis pendens*, using the legal test developed in the jurisprudence cited in Ch. 34:100 of the *Anger and Honsburger* text above mentioned. If a Certificate of *Lis Pendens* has been found by the court to have been recorded without reasonable cause, the court may order compensation to any person who may have sustained damage as a result.

[17] There will be those cases, however, where a reading of the Statement of

Claim does not clearly call into question some title or interest in a specified parcel of land (for example, when a Statement of Claim is drafted by a self-represented litigant or otherwise pleads a cause of action based on some ill defined equitable interest). In those situations, the prothonotary may exercise a discretion to refer a request for a Certificate of *Lis Pendens* to a judge for directions, in similar fashion as a prothonotary may refer any order to a judge for directions under Civil Procedure Rule 51.09(2).

[18] It appears that the foregoing interpretation of our Act is consistent with the workings of the counterpart legislation in the provinces of Ontario, Saskatchewan and Alberta who have long operated under a land titles system, as evidenced by the reported cases from those jurisdictions dealing with applications to discharge or vacate a Certificate of *Lis Pendens* (see, for example, *Fisher v. Campbell Custom Homes Ltd.* (2007) CarswellSask 576, *Bevans v. Bevans* (1993) CarswellAlta 871 and *Procopia v. D'Abbondanza* (1969) CarswellOnt 952). I conclude that if the Nova Scotia Legislature had contemplated a requirement that the plaintiff first obtain an order of the court authorizing the prothonotary to sign a Certificate of *Lis Pendens*, it would have expressly so stated in the Act.

[19] Because of the way the present application came before the court, there remains to be dealt with the plaintiffs' request for a Certificate of *Lis Pendens* to be signed by the prothonotary. Here, the Statement of Claim clearly calls into question the title or some interest in a specified parcel of land, namely, the waterfront lot. Indeed, the plaintiffs seek, *inter alia*, an order setting aside the deed dated August 20, 1996 from their father Everett Dempsey to Christopher and

Karen Dempsey. If they are successful in that action, the merits of which are not under consideration in this application, title to the waterfront lot will become vested in them by virtue of the Last Will and Testament of Everett Dempsey. Accordingly, the plaintiffs are entitled to have a Certificate of *Lis Pendens* signed by the prothonotary with respect to the waterfront lot for recording under s. 58 of the Act.

[20] The defendant, of course, remains at liberty to file a further interlocutory application for an order discharging the *lis pendens* under s. 58(2)(b) of the Act. As I have laid out for future cases, that is the manner in which the validity of the Certificate of *Lis Pendens* will normally come before the court.

[21] There will be no costs award made in the unusual circumstances of this application.

J.

