<u>IN THE SUPREME COURT OF NOVA SCOTIA</u>
Citation: Woodworth v. Kings (County), 2007 NSSC 185

Date: 20070619
Docket: S.K. No. 280487
Registry: Kentville

Between:

George Woodworth
Applicant/Intended Plaintiff

v.

The Municipality of the County of Kings

Respondent/Intended Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: Matter heard in Kentville, Nova Scotia, on May 15 & 18, 2007

Written Release of Decision: June 19, 2007

Counsel: Daniel L. Oulton, counsel on behalf of the Plaintiff

Geoffrey Muttart & Thomas R. MacEwan, counsel on behalf of the Defendant

By the Court:

[1] George Woodworth seeks an interim injunction against the Municipality of the County of Kings to prevent the demolition of his barn.

The Evidence

[2] George Woodworth is a farmer who resides on Church Street, Kings County, Nova Scotia. Surrounding his residence at civic number 572 Church Street is about 100 acres of farm land. On the opposite side of Church Street (civic number 587 Church Street), he owns farm and dyke land which he estimates to contain 100 acres. Close to the road on the 587 Church Street lot sits a very old, large and dilapidated barn. Photographs taken in April and June, 2006 and January, 2007, show that the barn is falling down, with an open roof. It is obviously dangerous and unsightly.

[3] On February 6, 2007, the Municipality Council for the County of Kings received a report from Gary R. Smith, its Manager of Protective and Emergency Services, of his investigation of complaints that go back to 1988, about the condition of Mr. Woodworth's property and, in particular, the barn. The report and

attached photographs show the barn to be structurally unsound, dangerous and beyond repair. Mr. Smith recommended that the Municipality issue an order for the demolition of the barn pursuant to s. 346 of the **Municipality Government Act**.

[4] Subsection 346(3) of that Act states that, where it is proposed to order demolition, before the order is made not less than seven days notice shall be given to the owner specifying the date, time and place of the meeting at which the order will be considered and that the owner will be given the opportunity to appear and to be heard before any order is made.

[5] On February 6th, the Municipal Council set February 20, 2007, at 2:00 p.m., at the Municipal Council chamber, as the date, time and place for a special council meeting to consider the proposed demolition order. On February 12, 2007, Mr. Woodworth was personally served by Mr Smith with a notice of the meeting, inviting him to attend and make representations. Mr. Smith also read the notice, explained it, and encouraged Mr. Woodworth to seek legal counsel.

[6] At 2 p.m. on February 20, 2007, the special Council meeting was convened. Mr. Woodworth was not in attendance. The minutes show that Mr. Gary Smith briefed the Council on his report, and Council voted to issue the proposed demolition order. The meeting lasted about ten minutes. Mr. Smith and a member of the audience left the meeting. Council then met as a committee of the whole to deal with other matters.

[7] A Demolition Order was issued on February 27th, giving Mr. Woodworth 45 days (April 13th) to demolish the barn, remove all debris, and fill the site. The Order stated that failure to comply may result in prosecution and fines and/or the Municipality may effect demolition of the barn at Mr. Woodworth's cost. On March 2, 2007, Mr. Woodworth was personally served the order, and an explanatory letter.

[8] By April 13, Mr. Woodworth had not demolished the barn.The Municipality called public tenders to effect the demolition. Tenders closed on May 3rd.

[9] Mr. Woodworth described, in an affidavit and oral evidence, his farming activity. It has decreased significantly over the years, in large part due to the "mad

cow" scare, which lowered cattle prices below production costs. At present he keeps two cattle in the basement of the barn in the winter, and pastures them in the summer. In the summer he contracts with other farmers to pasture cattle in his fields. He has an apple orchard but has not looked after it and now only picks "deer apples" in the fall. He cuts and bales hay, which he stores in a portion of the barn. His farm income is minimal.

[10] In his oral evidence Mr. Woodworth acknowledged the obvious serious deterioration of his barn and that it had to be demolished. He acknowledged that the main floor (the portion where there is a basement) is unstable and a portion was not safe to walk on. He himself has removed beams with the view to the demolition of the barn. On one windy day he would not enter part of the barn with municipal inspectors as it was not safe to do so. He hoped to use some of the barn in a new structure, if an engineer approved. He acknowledged that he did not need to use the barn in the summer and intended to have a new structure "by the fall".

[11] A few days before this hearing, an engineer with the Department of Agriculture in Truro to attend at his property to assess the condition of his barn and its foundation. On cross-examination, he acknowledged that the engineer had

advised him that there was no way to save the barn and it had to come down. It was his understanding that the engineer could not definitively advise him, until after the old barn was down, whether the foundation was secure enough to construct a new barn on. If that foundation was unsound, he would have to replace the barn on a new foundation.

[12] Mr. Woodworth advised that he had inquired into and received estimates for the cost of constructing a basic 40' x 60' structure on his old foundation. He felt that he could afford to replace the barn on the existing foundation, but, at his age and with the economics of farming being so bad, he would otherwise definitely be out of farming. He understood that, to comply with Municipal bylaws, he would be required to build a new barn at least 200 feet from the highway. He said it was not practical to build a barn there as the ground in that area was unstable. Construction on his residence lot was not practical as he would have to drive cattle across the road to access it.

[13] The Municipality’s Land Use Bylaw was tendered. I accept the Municipality’s argument that the bylaw and **Municipal Government Act** allow Mr. Woodworth to rebuild the barn, as a legal non-conforming use, on the site of

the existing barn (whether or not the foundation has to be replaced), if he did so within six months of the demolition of the old barn.

[14] Mr. Woodworth says that on February 20, 2007, he attended at the Municipal office building for the purpose of attending the special council meeting respecting the proposed demolition order. He acknowledges that he was “running late” for the meeting, came as fast as he could, and did not know how to contact the Municipality to advise them. In cross-examination he says that on the drive to the meeting he heard the 2:00 p.m. news and weather. On redirect by his own counsel, he says he was very close to the meeting at the time this occurred. He parked in the parking lot directly across from the Municipal building, entered the building, attended at the tax counter and asked directions to the meeting and was directed down the hall where there was a closed door over which was a sign indicating the entrance to the Council Chamber. He did not check to see if it would open. He did not know if he was supposed to go in, or to wait. He decided that he should not “barge into a closed door”. He waited outside the Chamber for several minutes and wandered the hallway looking for another entrance or someone to direct him. Eventually Brian Smith (an employee of the Municipality) came out of the Council Chamber, told him it was 3 p.m. and the meeting was over. Smith invited him into

his office and told him that the Council had approved the order and he had no further recourse. In his affidavit and on cross-examination, Gary Smith states that the special council meeting respecting the demolition order ended at 2:10 p.m.. He and a retired judge who was in the audience left at the end of the special Council meeting and stood talking outside the entrance to the Council Chamber for 10 - 15 minutes (that is, 2:10 to approximately 2:25) without encountering Mr. Woodworth or anyone else. He then left the area. Council then met in committee on other matters until 3:00 p.m. when Brian Smith exited the Council Chamber, met Mr. Woodworth, and explained to him what had happened.

Legal Proceedings

[15] On May 3, 2007, Mr. Woodworth filed an application and affidavit seeking an interim *ex parte* injunction. At about the same time Mr. Woodworth's counsel forwarded a copy of the application to the counsel for the Municipality. At about 1:30 p.m. I heard the application in open chambers with counsel for the Municipality present. I granted an *ex parte* order (1) enjoining the Municipality from taking any further action on the demolition order, (2) setting a return day for an *inter partes* hearing of May 15th, and (3) directing the applicant to commence an

action to determine the validity of the demolition order as soon as possible (and in any event, based on counsel's representation of the requirement for written notice before commencing an action, within 45 days).

[16] The *inter partes* hearing began on May 15th and was continued on May 18th. Further affidavits were filed, exhibits tendered and affiants cross-examined. Counsel filed briefs and made oral arguments.

The Law

[17] Section 43(9) of the **Judicature Act** and Civil Procedure Rule 43.01 codify the inherent common-law jurisdiction of the Court to grant orders of *mandamus* and injunction, including the ability of an intended plaintiff to apply for an injunction before commencing an action.

[18] The remedy is a discretionary one granted by the Court when and on such terms as the Court deems just.

[19] The test for interlocutory judgments is well established. It was set out by the House of Lords in **American Cyanamid Co. v. Ethicon Ltd** [1975] A.C. 396 and has been adopted by Canadian Courts, most notably by the Supreme Court of Canada decision in **R.J.R. MacDonald v. Canada** [1994] 1 S.C.R. 311. The prerequisite for an interlocutory injunction is set out in three questions:

> 1. Is there a serious issue to be tried? The threshold is low. The Court must make only a preliminary assessment of the merits of the case and be satisfied that the claim is not frivolous or vexatious.
>
> 2. Will the plaintiff suffer irreparable harm if the injunction is not granted? "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. (Paragraph 64).
>
> 3. What is the balance of convenience as between the parties as may be affected by the granting or refusal of the injunction? This is a case by case analysis of the applicable factors. At this stage, as was the circumstance in the **R.J.R MacDonald** case, in addition to the damage each party alleges it will suffer, the court must consider any public interest factors (paragraph 85).

[20] The applicant requests this Court to analyse its application on a modified version of the **R.J.R MacDonald** test set out by Justice Gruchy in **Anderson v. Evans** 2005 NSSC 50. This analysis contained five questions. The questions are:

1. Is there a serious case to be tried which is not frivolous or vexatious? This question is substantially the same as the first **R.J.R MacDonald** question.

2. Will damages, in the event they are found to result from the defendant's actions, provide the plaintiff with an adequate remedy? This question is substantially the same as the second **R.J.R MacDonald** question.

3. Will the plaintiff's undertaking with respect to damages which may be suffered by the defendant by the granting of the interim injunction provide adequate compensation to the defendant in the event of the defendant's success at trial?

4. When the foregoing questions result in a doubt as to adequacy of the various remedies, the court focuses on the question of the balance of convenience between the parties. This issue is substantially the same as the third RJR-MacDonald question.

5. Only if necessary, does the court consider and give a prediction of ultimate success in the action.

Analysis

[21] Is there a serious issue to be tried? The applicant puts forth no argument, or at least no arguable case, that the barn is not dangerous and that it should not be demolished. Mr. Woodworth's argument is that the Municipality failed to give him the opportunity to appear and be heard before the demolition order was made. It thereby breached the **Municipal Government Act,** making the demolition order invalid.

[22] It is not this Court's role, at this stage in the legal proceedings, to assess the credibility of the parties to determine when Mr. Woodworth arrived for the special council meeting, and, specifically, whether he arrived before the special meeting had terminated at 2:10 p.m.. There is some evidence upon which a Court might find that Mr. Woodworth arrived after 2:00 p.m. but before the Special Meeting ended. The strength or weakness of the respective party's position with respect to that evidence is for another day. For the purposes of an interlocutory injunction, in respect to the first RJR-MacDonald question for which the threshold is low, I am satisfied that the intended action challenging the validity of the demolition order on the procedural basis that he was denied a hearing is not frivolous or vexatious.

[23] Will the plaintiff suffer irreparable harm if the injunction is not granted? The applicant must convince the Court that he will suffer irreparable harm if the relief is not granted; alternatively, as framed by Justice Gruchy in **Anderson v. Evans**, would damages provide the plaintiff with an adequate remedy?

[24] The applicant frames its position on this question into three arguments:

1. It would be unable to erect a replacement structure at the same foundation because of the set back requirements of the Municipal bylaws, and it would be too expensive, and impracticable, to build a new barn where he legally could.

2. The applicant is not wealthy and could not afford the litigation costs of pursuing a claim for damages against the Municipality.

3. The applicant would face financial ruin if the Municipality demolished the barn. The cost to the Municipality to demolish the barn would exceed his cost to demolish it. Because he could not afford to pay it, and it would become a lien against his property, and his property - a unique property that has been in his family for 90 years, would be sold pursuant to the lien and lost to him.

[25] In addition, the applicant's written submission is that it has a strong argument that renovation of the existing structure is possible; demolition by the Municipality would end that possibility. This last submission is contrary to Mr. Woolworth's acknowledgments on cross examination.

[26] The applicant appears to argue that if the barn is demolished it cannot be rebuilt where it is, and that alternative locations are not practicable because the cost of construction exceeds his ability to pay or finance, and the alternate locations are not amenable to his farm operation.

[27] Even if this submission was correct, which I do not accept, it does not constitute irreparable harm that cannot be measured by monetary damages, which the Municipality has the obvious financial ability to pay.

[28] The defendant's evidence is that Mr. Woodworth can rebuild on the present site if he does so within six months, if he produces engineer approved plans to the Municipality in support of a building permit. Since Mr. Woolworth can replace the barn, there is no evidence of any loss or damage, let alone irreparable harm. This Court accepts that the barn is dangerous, and must be demolished. The only possible harm to the applicant is if he fails to replace the barn within six months. Any damages that might arise by reason of his inability to replace the barn within six months are measurable in monetary damages.

[29] The argument that the applicant does not have the ability to pursue a claim for monetary damages is not irreparable harm.

[30] If I am wrong in respect of my analysis of the irreparable harm question, the third **R.J.R MacDonald** question requires me to analyse the balance of

convenience between the parties as may be affected by the granting or refusal of the requested injunction.

[31] There is no question that the barn is dangerous, unsafe and not useable as it is, and that it must come down. The most that the applicant can attain by the granting of an injunction is a delay in the demolition of the barn until the Municipal Council holds another meeting. This assumes that the Municipality is found at trial to have denied the applicant a hearing in accordance with subsection 346(3) of the Municipal Government Act.

[32] Balanced against this is the statutory duty of the Municipality to protect the public interest, which public interest includes the requirement that every property in the Municipality be maintained so as not to be dangerous. The barn is obviously dangerous, is close to the highway, and, as shown in the photographs and oral evidence, is not secured so as to prevent members of the public, including children who may not know better, from its danger condition. The Municipality has a duty to enforce the legislation.

[33] In assessing the balance of convenience, I have relied upon the analysis of public interest factors described by Roscoe, J.A., for the Nova Scotia Court of Appeal in **Town of New Glasgow v. MacGillivrary Law Office Inc**. 2001 NSCA 155, at paragraphs 15 to 21.

[34] The third question posed by Justice Gruchy in **Anderson v. Evans** relates to the adequacy of the applicant's undertaking with respect to damages which may be suffered by the Municipality by granting the interim injunction in the event the Municipality is successful at trial. The applicant has not offered an undertaking in damages. If, as his counsel submits, he cannot afford to pursue monetary damages against the Municipality, it is unlikely that he could realistically provide an undertaking that would shift the risk to he who is asking for the pre-trial remedy.

[35] Finally, the *ex parte* order required the applicant to commence an action within 45 days of May 3rd. That time has expired and no action was commenced.

[36] Effective immediately, the *ex parte* interim injunction is vacated, and the *inter partes* application denied.

J.