NOVA SCOTIA COURT OF APPEAL
Citation: *Marshall v. Robbins*, 2019 NSCA 91

Date: 20191126
Docket: CA 490392
Registry: Halifax

Between:

Gregory Marshall

Appellant

v.

Julie Robbins

Respondent

Judge:	Beaton, J.A.
Motion Heard:	November 7, 2019, in Halifax, Nova Scotia in Chambers
Held:	Motion dismissed
Counsel:	Gregory Marshall, appellant in person Karen Killawee and Kristy Hall, for the respondent

Decision:

[1] This matter came before the Court in Chambers on the appellant Husband's motion for a stay pursuant to *Civil Procedure Rule* 90.41(2). The burden rested with the Husband to persuade the Court on a balance of probabilities that a stay was warranted. The respondent Wife opposed the motion. Following argument, I reserved my decision. The motion is dismissed for the reasons set out below.

[2] A decision was rendered June 4, 2019 in proceedings in the Supreme Court of Nova Scotia concerning the parties' property. The trial judge ordered that both parties were to share in the equity of two properties which were required to be sold, with the sale being in the sole authority of the Wife to govern. One property was to be listed for sale forthwith; the other occupied by the Husband and one of the parties' children, could continue to be occupied pending sale provided certain conditions were met. The order including those conditions was issued August 8, 2019 and directed in part:

> 9. So long as the Defendant has possession and occupation of 91 Victoria Street, he shall pay to the Plaintiff an amount equal to the monthly payment of property taxes, home insurance and the conventional mortgage, including any mortgage insurance fee. Such payment shall be made on the first day of each month. He shall be further responsible for utilities and other expenses accrued in his day to day use of the property …

[3] There was no dispute before me that the Husband stopped making the payments contemplated in clause 9 of the Order after August 2019, as a result of which the Wife served him with two successive eviction notices in October 2019 directing him to vacate the premises by October 31, 2019.

[4] On that date the Husband filed a Notice of Motion in this Court seeking, among other matters, a stay of both the trial judge's order and the eviction notices. The Notice also contained a list of other relief sought, which can be dispensed with by observing that those claims were either in relation to matters raised in the Notice of Appeal which do not constitute the subject matter of a stay, were matters more properly to be put before a panel of the Court, or were requests for specific types of relief this Court has no jurisdiction to entertain.

[5] *Civil Procedure Rule* 90.41(2) sets out the Court's powers on the motion for a stay:

> 90.41(2) A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[6] The words "judgment" and "order" as used in the rule are important in relation to the Husband's request for relief relating to the two eviction notices served upon him by the Wife. Those notices do not constitute part of the judgment appealed from nor are they orders, therefore they are not within the scope of my authority on the motion.

[7] The test for a stay was set out in the frequently cited decision in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.), most recently reviewed by this Court in *Intact Insurance Company v. Malloy*, 2019 NSCA 85. There, Van den Eynden, J.A. described the two part test in relation to the discretionary remedy of a stay:

> [3] The exercise of this discretion is guided by the principles set out in *Purdy v. Fulton Insurance Agency Ltd.* (1990), 100 N.S.R. (2d) 341 (N.S.C.A.). These principles establish that to succeed on a stay application, the appellant must prove on a balance of probabilities that:
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> > (1) there is an arguable issue raised on appeal;
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> > (2) if the stay is not granted and assuming the appeal is ultimately successful, the appellant will have suffered irreparable harm such that it cannot be compensated for monetarily; and
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> > (3) the appellant would incur greater harm than the respondent if the stay is not granted (the so-called balance of convenience test).
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> [4] This three-part test is referred to as the primary test. However, if the appellant cannot meet all the criteria for the primary test, a stay may still be granted if the appellant can establish there are exceptional circumstances that render a stay fit and just. This is referred to as the secondary test. ...

[8] The Husband's argument relied on both the primary and secondary tests. The Wife opposed the motion maintaining it amounted to nothing more than a "stall tactic" given the Husband's failure to make certain payments required by the order under appeal. In the alternative, the Wife urged the Court that if a stay were to be granted, it should come with a condition that the Husband be required to make the payments associated with his ongoing occupancy of the property. Given the Husband's vigorous representations to the Court about his lack of intention

regarding any payments to the Wife, that would have been a futile option even had I been persuaded to grant the motion.

[9] As to the primary test in *Fulton, supra* and its three aspects, on the first aspect—whether there is an arguable issue raised by the appeal—while I agree with the submission of counsel for the Wife that the threshold for the analysis is low, it should not be said to have been met where the appeal as filed would seem to constitute only a dissatisfaction with the trial outcome. While I do not conflate the sheer number of grounds, 18 in this case, with the merits of the appeal, the Notice of Appeal on its face reads as alleging in part certain evidentiary errors, and so it would be for an appeal panel to consider those arguments. However, it is not necessary to consider the question of arguable issues further, in light of the other conclusions I have reached.

[10] The second aspect of the primary test—the Husband will suffer irreparable harm if the stay is not granted—constituted the main thrust of the Husband's position. He asserted that both he and his child will suffer irreparable harm if required to vacate his current premises prior to the summer of 2020, when he was planning to move in any event. Much of the argument was speculative in nature, such as for example, that his child's school year and possibilities for acceptance to university will be adversely impacted by a move, and that there are no suitable alternative accommodations available to him.

[11] Irreparable harm was considered by Beveridge, J.A. in *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45:

> [48] Irreparable harm is informed by context. This was described by Cromwell J.A., as he then was, in *Nova Scotia v. O'Connor*, 2001 NSCA 47:
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> > [12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *R.J.R.-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
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> > [13] However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

> …
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> [50] The potential impact on an appellant's right of appeal is relevant—particularly where the appellant would suffer the penalty imposed before the appeal challenging that penalty could be heard (see: *Grafton Street Restaurant Ltd. v. Nova Scotia (Utility and Review Board)*, 2002 NSCA 97; *Alementary Services Ltd. v. Nova Scotia (Alcohol and Gaming)*, 2009 NSCA 61 at paras. 7-9; *Dixon v. Nova Scotia (Public Safety)*, 2011 NSCA 15 at para. 12).

[12] In this case, the order under appeal is in the context of a family law proceeding. As set out earlier, the order states the parties share equally in the equity of two properties, which are to be sold. As he is an equitable owner, I can see no impact to any remedy of the Husband, nor any potential harm that would be occasioned by the absence of a stay prior to the appeal being heard. Granted, the Husband's ability to remain a *de facto* tenant of the property might well be impacted if he were to continue to refuse to pay the Wife contrary to clause 9 of the order, but in my view it cannot be said that the absence of a stay means his stake in the order would be lost. Potentially having to move out of the property and find another location in which to reside would not disturb the Husband's equitable interest in the property.

[13] While undoubtedly inconvenient and potentially disruptive both financially and practically, the act of having to relocate, whether self-induced or not, does not rise to the level of irreparable harm such that the Husband could not recover any loss that might be occasioned by the lack of a stay. The Husband will not be permanently deprived of any value or interest in the absence of a stay.

[14] Timing is also an important consideration here. The Husband did not seek a stay of the August 8, 2019 order until October 31, 2019 his motion was filed. He freely acknowledged to the Court that by that time, for a variety of reasons, he had stopped payments to the wife associated with his occupation of the property. Therefore, it is reasonable to conclude that the harm he now asserts did not exist at the issuing of the order and arose only when the Wife presented him with eviction notices.

[15] I am not persuaded that the absence of a stay would result in a deprivation or harm to the Husband of an irreparable nature.

[16] As to the third aspect of the primary test—the so-called "balance of convenience" question—the Husband asserted the loss to the Wife occasioned by the imposition of a stay would be nominal in comparison to the harm he would

suffer if it were not granted, because it was unaffordable for him to have to move out of the property. Equally positioned as the two parties are pursuant to the trial judge's order as equitable owners of two properties, one of which has already been sold, I am not able to conclude that the Husband is unequally disadvantaged if a stay is not imposed. It would seem that imposing a stay would have the effect of putting the Wife in a more unfavourable position than the Husband, because he has made it clear to the Court he wishes to vacate the property in his own time and without making the required payments to the Wife.

[17] Finally, the Husband urged the Court that there are exceptional circumstances—the so-called secondary test—which command the imposition of a stay. The exceptional circumstances test was explained by Roscoe, J.A. in *Landry v. 3171592 Nova Scotia Limited*, 2007 NSCA 111:

> [10] The secondary test in *Fulton*, states that in exceptional circumstances the court may grant a stay if it is fit and just. Recently in *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2006 NSCA 129, Justice Cromwell considered the secondary test and explained that it is rarely satisfied:
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> > 11 Very few cases have been decided on the basis of the secondary test in Fulton. Freeman, J.A. in *Coughlan et al. v. Westminer Canada Ltd. et al.* (1993), 125 N.S.R. (2d) 171 (C.A., in Chambers) at para. 13 offered as an example of exceptional circumstances a case in which the judgment appealed from contains errors so egregious that it is clearly wrong on its face. As Fichaud, J.A. observed in *Brett v. Amica Material Lifestyles Inc.* (2004), 225 N.S.R. (2d) 175 (C.A., in Chambers), there is no comprehensive definition of "exceptional circumstances" for *Fulton's* secondary test. It applies only when required in the interests of justice and it is exceptional in the sense that it permits the court to avoid an injustice in circumstances which escape the attention of the primary test.
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> > 12 While there is no comprehensive definition of what may constitute "exceptional circumstances" which may justify a stay even if the applicant cannot meet the primary test, those exceptional circumstances must show that it is unjust to permit the immediate enforcement of an order obtained after trial. …

[18] With respect, there was nothing unique about the circumstances of these parties or either of them that could invoke the secondary test. Nothing put before me could identify or lead to the conclusion that the interests of justice would require the Court to grant a stay on that basis.

[19] While the parties' present circumstances as legal opponents arising from their former relationship are undoubtably deeply personal to them, that does not elevate them to the level of exceptional such that this Court must step in to prevent an injustice.

[20] The motion for a stay cannot succeed on the primary or secondary test and is therefore dismissed. The Husband shall pay costs to the Wife as the successful party on the motion in the amount of $500, payable forthwith.

Beaton, J.A.