IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Maxwell v. Atwood, 2018 NSSM 13

Claim: SCY No. 470633
Registry: Yarmouth

Between:

LISA MAXWELL

CLAIMANT

– and –

GLENDON IAN ATWOOD

DEFENDANT

Adjudicator: Andrew S. Nickerson, Q.C.

Heard: January 23, 2018

Decision: January 23, 2018

Appearances: The Claimant,
The Defendant,

DECISION

Facts

[1] The facts are not in dispute.

[2] In 1996 the Defendant was married to the Claimant's daughter. The Defendant bought a house. The Claimant "co-signed" the mortgage. By 2002 the Defendant and his wife had separated. The mortgage had fallen into arrears and the mortgage holder had commenced foreclosure proceedings. The Claimant and her husband paid $4,940.50 in arrears and legal costs to stop the foreclosure and the Defendant, by deed containing the words "the lands are free from encumbrances and that the Grantor will procure further assurances as may be reasonably required", conveyed his interest in the subject property to the Claimant and her husband in May of 2002. They rented the property and continued to pay the mortgage payments.

[3] In 2007 the Claimant had a party interested in purchasing the property. When she consulted a lawyer she was advised that there was a judgment that had been registered against the Defendant before he had conveyed title in the approximate amount of $32,000. This prevented the sale. This was when the Claimant first became aware of the judgement. The sale failed because of the judgment. The Judgement was in relation to a repossessed vehicle that the claimant had no connection with. She made efforts to contact the Defendant. There was some minimal contact but nothing was resolved and the Claimant did not take legal action at that time.

[4] In 2017 the Claimant had paid the mortgage down sufficiently that she could sell. Her lawyer negotiated a settlement with the judgment creditor for $15,000. This was paid and the sale was closed. I have no evidence that the judgment creditor assigned the judgment to the Claimant. She now seeks that the Defendant pay to her the $15,000.

Issue

[5] Does the Claimant have a legal basis on which I can award her the $15,000.

Law and analysis

[6] The jurisdiction of the Small Claims Court lies in contract or tort. Tort does not apply in this case. I see no strictly contractual basis for liability as there was no agreement between the parties that the Defendant would pay in the event that the Claimant had to.

[7] However this has been expanded. There was much debate and conflicting decisions but I hold that the decision of Justice Edwards in **Wacky's Carpet & Floor Centre v. Joseph (2006), 2006 NSSC 353** (CanLII), allows me to consider unjust enrichment in certain circumstances. This case also determines that a "special relationship" is not necessary although I would have held that one existed in this case given that there was a history of a family connection.

[8] I glean from the legal authorities that an action for unjust enrichment is subject to the existence of the following conditions:

1. an enrichment;
2. an impoverishment;
3. a correlation between the enrichment and the impoverishment;
4. the absence of justification;
5. the absence of evasion of the law;

6. the absence of any other remedy.

[9] I find that the Defendant was enriched by the removal of the judgement and that the claimant was impoverished by having to pay and there is a correlation between the two. I find no justification for the enrichment. It was the Defendant's debt unrelated to the Claimant.

[10] I have paused over the issue of whether the Claimant's failure to obtain an assignment of the judgement in the settlement with the judgment creditor can be considered an available remedy. On reflection I don't think it is because a "remedy" implies the result of a legal process and not something that might have been negotiated.

[11] I find that the element of unjust enrichment have been made out.

[12] I expressed concern at the hearing over the effect of the Nova Scotia Limitation of Actions which is one of the reasons that I reserved decision. It is clear that today the limitation period for just about everything except land matters is two years. The fact that the Claimant became aware of the judgment at first look suggests that she is out of time and prevented from recovery by the limitation period.

[13] After consideration, I have concluded that her cause of action for unjust enrichment really did not arise until she had made payment of the settlement of the judgment. That is when the enrichment occurred. The Defendant got the benefit of the removal of the judgment against his credit at that time. I therefore rule that the Claimant can recover and I award her the sum of $15,000 together with costs.

[14] In addition I have looked at the *Real Property Limitations Act* and in particular Sections 10 and 23 which reads as follows:

> Action respecting land or rent
> 10 No person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. R.S., c. 258, s. 10.
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> …….
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> Limitation respecting charge against land
> 23 No action or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or

> payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person by whom the same is payable, or his agent, to the person entitled thereto, or his agent and in such case no such action or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given. R.S., c. 258, s. 23. *[my emphasis]*

[15] The Deed in 2002 although stated to be a Quit Claim deed contained a warranty that cited above that "the lands are free from encumbrances and that the Grantor will procure further assurances as may be reasonably required". I consider the present claim can be based on this warranty and that the wording of Sections 10 and 23 is sufficiently broad to cover a claim based on this warranty. I believe that the words "bring an action to recover any land" includes any interest in land. Clearly this action has been brought within 20 years. I do not think that title warranties in conveyances are subject to the two year limitation of the *Limitations Act*. I believe the Claimant's action is valid on this basis as well.

[16] I will award judgment in the amount of $15,000 and costs in the amount of $199.35 filing fee plus the cost of service if the Claimant provides the court with an invoice establishing her service cost within one week of the filing of this decision.

Dated at Yarmouth, Nova Scotia, this 7th day of February, 2018.

Andrew S. Nickerson Q.C., Adjudicator