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CV 03576

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DARIN McLENNAN

Plaintiff

- and -

SYLVIE PARENT

Defendant

Application by plaintiff that rental income be held in trust pending trial. Application by defendant for an order requiring plaintiff to post security for costs.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on August 24, and September 5, 1995.

Reasons filed: September 7, 1995

Counsel for the Plaintiff: Katherine R. Peterson, Q.C.

Counsel for the Defendant: Michael D. Triggs

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REASONS FOR JUDGMENT

1 There are two interlocutory applications for determination:

(1) An application by the plaintiff for an injunction directing that certain rental income be held in trust pending the trial of this action thereby preventing the defendant from making personal use of it.

- and -

(2) An application by the defendant for an order requiring the plaintiff to post security for costs.

2 In 1992 I delivered reasons for judgment on an earlier application by the plaintiff for an interlocutory injunction (see McLellan v. Parent, [1992] N.W.T.R. 226). Therefore I will only summarize the pertinent facts as background to these applications.

3 The defendant is the registered owner of certain residential property in Iqaluit, Northwest Territories. The plaintiff claims that she holds this property in trust for him. He seeks in this action an order transferring title to him. He also seeks an accounting of

the income generated by the property. It has been rented out since 1991. All rents have gone to the defendant who has used that money to pay mortgage and other expenses related to the property as well as to help maintain herself.

4 The plaintiff claims that he initially obtained a 50% interest in the property from Donald and Karen Tattrie in 1990. He alleges that in 1991 he bought the remaining 50% and the money to do so was supplied partly by him in cash and partly by the bank mortgage on the property. There is some support for the plaintiff's position in affidavit evidence from Mr. Tattrie. The defendant, on the other hand, claims that she purchased the property from the Tattries with her own funds and the mortgage. She is the sole registered owner of the property and the sole mortgagor named in the mortgage. The plaintiff, however, is a guarantor of the mortgage loan. The plaintiff claims that he had the property put into the defendant's sole name because of tax and legal advice he had received. He and the defendant were about to be married. The defendant claims that this action is motivated by nothing more than spite over the fact that she cancelled their proposed marriage.

5 This action was commenced in February of 1992. The parties have gone through extensive discoveries and are on the verge of setting a trial date. The plaintiff resides in British Columbia while the defendant resides in Quebec. Other than the property in Iqaluit, neither one has a connection to this jurisdiction.

6 In my 1992 judgment, I made an order restraining the defendant from transferring, encumbering, or in any way alienating the property until the trial. I did not, however, tie

up the rental income. That income has been continuously paid to the defendant. It is that income that the plaintiff wishes once again to have secured.

Application for Injunction:

7 I canvassed numerous authorities relating to interlocutory injunctions in my 1992 judgment. I held that there was a serious issue to be tried. I drew, however, a distinction between restraining disposition of the property itself (being the subject-matter of the litigation) and restraining use of the income from the property. I did so on both the question of irreparable harm and the question of the balance of convenience. I granted the injunction with respect to the property but not with respect to the income. My reasons for not restraining use of the income are found at pages 234 - 235 of my previous judgment:

> With respect to the application to attach the rental income, I am of a different opinion. The plaintiff obviously seeks an accounting of rental income received by the defendant. He says that the defendant, by her own admission, is impecunious and, together with the fact that she resides in Quebec, it would be difficult for him to realize on any monetary judgment. But the very nature of the case provides some protection for the plaintiff. If, as was suggested during argument, the real issue is to determine the respective contribution by each party to the purchase and maintenance of this property, then it is conceivable that the trial judge will find that each of them has an interest to one degree or another. Any monetary award could be accounted for by proportionately increasing the judgment creditor's interest in the property.
>
> Furthermore, I am not satisfied that the enforcement of a judgment in Quebec would cause undue hardship to the plaintiff in this era of liberalized reciprocal enforcement rules (see in this regard the Supreme Court of Canada decision in *Morguard Investments Ltd. v De Savoye*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 122 N.R. 81, 76 D.L.R. (4th) 256). I am therefore of the opinion that the plaintiff will not suffer irreparable harm if the rental income is not attached pending trial...
>
> I am also of the opinion, however, that an order to attach the rental income would be demonstrably unfair to the defendant. She is a student and, as her unchallenged affidavit evidence attests, she

> **depends on the surplus from the monthly rents to support herself. The plaintiff, on the other hand, is employed and has a significant income. The effect of such an order could be, however unintended, not just to tie up and preserve the defendant's assets until judgment, but, in the words of Estey J., to "force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial" (see *Aetna Financial* at p.37).**

8 Has anything changed since 1992?

9 Evidence submitted on behalf of the defendant reveals that she still depends on the surplus income from the rent to support herself. She is a full-time university student in the fourth year of a Bachelor of Arts programme majoring in psychology. She lives on her own and earns some income from summer and part time jobs. She estimated her expenses for the past 12 months as approximately $21,000.00. The total rental income from the property for the past 12 months was $29,184.00. The net amount available for the defendant's use, after payment of mortgage and other expenses, was approximately $11,000.00.

10 The plaintiff, however, submits that, while the defendant's personal situation may not have changed, the equities as between the parties have changed. It is argued that the defendant has had, over the past 3 years, the benefit of over $30,000.00 from the rental income. If this is allowed to continue until trial, it is submitted, there may not be enough equity in the property to compensate the plaintiff, by some disproportionate division, for the money that has already accrued to the defendant's benefit.

11 There are a number of factors to take into consideration.

12 First, there is no evidence of a depreciation or waste of the property itself. It has been leased since 1991 and, although the tenant has expressed an intention to not renew the lease on its expiry in 1996, this seemingly because of conflicts with the defendant over how the property is to be managed, there is no evidence that the plaintiff is likely to have a significantly devalued asset should he be successful in this action.

13 Second, the mortgage payments are current and there is no evidence of any serious concern over the defendant's intention to keep them current. If this were not the case, or if the mortgage goes into arrears, then there is an enhanced probability that some type of order would be made. For now, with the mortgage payments being made by the defendant, both parties are receiving a benefit since the equity position is improving as this action moves along.

14 Third, as pointed out by defendant's counsel, the defendant, as the legal owner, has a *prima facie* right to the use of this money. A prejudgment attachment of money is an extraordinary remedy and he refers me back to something I quoted in my previous judgment (from Barclay-Johnson v. Yuill, [1980] 3 All E.R. 190, per Megarry V.C. at page 193):

> **In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors to the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.**

15 Finally, even if a distribution of the equity in the property will not adequately compensate the plaintiff by itself, there is no evidence that it would be inordinately difficult to enforce a monetary judgment against the defendant. She lives in Quebec but we now live in an era of significantly liberalized rules relating to the reciprocal enforcement of judgments in Canada. She may be only a student now but there is nothing to suggest that she may be judgment-proof for the foreseeable future. In my opinion, there is no evidence to support the conclusion that the plaintiff may not be adequately compensated by damages.

16 For the foregoing reasons, I dismiss this application.

Application for Security for Costs:

17 The defendant seeks security for costs on the basis of the plaintiff's non-residence in this jurisdiction. Rule 533(1)(a) of the Supreme Court Rules provides that the court may order security for costs where the plaintiff resides out of the Northwest Territories. Security may be ordered at any stage of the proceedings.

18 Defendant's counsel acknowledges that the court has a discretion in every case as to whether or not to order security even when the plaintiff is non-resident. He also acknowledges that the residence of the plaintiff in a reciprocating jurisdiction for the enforcement of judgments is a factor to take into account. British Columbia is a reciprocating jurisdiction. This application, however, is based on what defence counsel submits is the overwhelming strength of the defendant's case.

19 There are a line of cases from this jurisdiction that have held that the fact of non-residence, and the absence (as here) of exigible assets in the jurisdiction, are insufficient, in and of themselves, to warrant security for costs where the plaintiff resides in a reciprocating jurisdiction: see, for example, Frank v. Commissioner of the Northwest Territories, [1985] N.W.T.R. 149 (S.C.); and Mortimer v. Inuvialuit Regional Corporation, [1987] N.W.T.R. 228 (S.C.). These authorities were criticized by the Alberta Court of Appeal in Crothers v. Simpson Sears Ltd., [1988] 4 W.W.R. 673, on the basis that reciprocal enforcement legislation still threw up significant barriers to recovery. In my view, however, the reasoning in the cases from this jurisdiction has only gained greater strength from the liberalization of reciprocal enforcement procedures promulgated by the Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077.

20 A host of authorities, including the Mortimer and Crothers cases, have also held that the court may go into the merits of the case and conclude whether the case is arguable, or the defence is weak, or the plaintiff is unlikely to succeed, and use that as a significant factor in the exercise of its discretion. In this case the defence argues that there is no hard evidence to support the plaintiff's case (presented either on these applications or in the discovery process) so, having regard to the burden of proof, it is highly unlikely that the plaintiff will succeed. Plaintiff's counsel argues that defence counsel is speculating as to the strength of the evidence and it would be speculation for me to come to any conclusions on the strength or weakness of either party's case.

21 The parties are diametrically opposed on the alleged facts of this case. Both sides will have to marshall whatever supporting evidence they can for use at the trial. This is not a case of mistaken interpretations of the same facts. Credibility issues will undoubtedly play an important part in the trial. There are also issues relating to the parties' respective state of mind and good faith. It would be pure conjecture for me, at this point, to form any conclusions on the issues. As has often been said, the court should not, prior to trial, attempt to resolve complex issues of fact or law on the basis of conflicting affidavit evidence.

22 Furthermore, I am not satisfied that this application was brought in a timely manner. The plaintiff relocated to British Columbia in August of 1994. The case is almost ready for trial. This application, at this stage of the proceedings, may only serve, if successful, to delay the trial further. There is nothing to suggest that the plaintiff could not meet a judgment for costs. There does not appear to be anything new or unusual now so as to warrant this application. Delay in bringing an application for security for costs, without adequate explanation, is a factor that may also be considered: Lowe v. Inuvik, [1984] N.W.T.R. 278 (S.C.).

23 For the foregoing reasons, I dismiss this application.

Conclusions:

24 The plaintiff's application for an injunction restraining disposition of the rental income and the defendant's application for security for costs are each dismissed. Since, in my view, neither application advanced the cause of these proceedings, I will deal with

them as one and direct that each party bear their own costs of both applications regardless of the outcome of the trial. Any rental money currently held in trust is to be released back to the defendant.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 7th day of September, 1995

Counsel for the Plaintiff: Katherine R. Peterson, Q.C.

Counsel for the Defendant: Michael D. Triggs

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