

*Kell v. Senych Estate*, 2005 NWTSC 64

Date: 2005 07 21

Docket: S-0001-CV2004 000348

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CECILIA KELL

Applicant

- and -

CRAIG SENYCH,  
EXECUTOR OF THE ESTATE OF WILLIAM SENYCH, DECEASED  
CECILIA RABESCA AND RON PAQUETTE

Respondent

MEMORANDUM OF JUDGMENT

[1] The Applicant Cecilia Kell commenced the within proceedings by filing an Originating Notice of Motion on November 16, 2004. She seeks a declaration that she is the owner of a leasehold interest in a certain residential property in Rae-Edzo. On the date of filing the Originating Notice of Motion the registered owner of the leasehold interest was the Senych Estate. Later, the Respondents Rabesca and Paquette became the registered owners of the leasehold interest, the Estate having sold it to Rabesca and Paquette for \$30,000.00. By Court Order on February 23, 2005 Rabesca and Paquette were added as Respondents to these proceedings.

[2] The Respondent Estate now makes application for a summary dismissal of these proceedings. Alternatively, the Respondent Estate seeks an Order for security for costs. The Respondents Rabesca and Paquette join in the request for security for costs.

[3] It is alleged that Kell and the late William Senych were involved in a common-law relationship and lived together in the subject residential property in the years 1992-1995. Ms. Kell says the two of them bought the leasehold interest but the leasehold title was put into the name of Senych only. The parties separated in 1995 and Kell moved out of the residence. She commenced legal proceedings against William Senych in May 1995 claiming, *inter alia*, an interest in the subject residential property (Court file No. CV 05689).

[4] William Senych died in November 1995. Kell commenced a second Court action in March 1996 against the Senych Estate claiming, *inter alia*, an interest in the subject residential property (Court file No. CV 06332).

[5] More than seven years later, in October 2003, both Court actions CV 05689 and CV 06332 were dismissed for want of prosecution, with costs ordered against Kell. Kell filed a Notice of Appeal in the Court of Appeal with respect to the dismissal of Court action CV 06332. That appeal lies dormant since its filing in May 2004.

[6] As stated, the within proceedings were commenced by the filing of an Originating Notice of Motion on November 16, 2004 seeking a declaration that Ms. Kell is the owner of a leasehold interest in the property.

[7] The grounds on which the Estate seeks a summary dismissal of these proceedings pursuant to Part 12 of the *Rules of Court* are threefold:

- i) these proceedings are barred by virtue of the *Limitation of Actions Act*,
- ii) the Estate has already disposed of the subject property,
- iii) abuse of process.

[8] With respect to the first two grounds, the onus is on the Estate to satisfy the Court that there is no genuine issue for trial — see Rule 176(2).

[9] Regarding the issue of the limitation period, the *Limitation of Actions Act* states:

s.18. No person shall take proceedings to recover any land except

- (a) within 10 years after the time at which the right to do so first accrued to the person through whom he or she claims; or

- (b) if the right did not accrue to such a predecessor, then within 10 years after the time at which the right first accrued to the person taking the proceedings.

s.19. Where

- (a) a claimant or a predecessor has in respect of the estate or interest claimed been in possession of the land or in receipt of the profits of the land, and
- (b) while entitled to the possession or receipts has been dispossessed or has discontinued the possession or receipt,

the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits were so received. (emphasis added)

[10] Given the proposed evidence that Kell was living in the subject premises with Mr. Senych until February/March 1995, and that these proceedings were commenced in November 2004, I have not been convinced that there is no genuine issue as to whether these proceedings were commenced outside the limitation period.

[11] Regarding the fact that the Estate has disposed of its interest in the property, I cannot agree that that fact alone is a bar to Ms. Kell seeking a declaration of her interest, if any, in the property. In these proceedings Ms. Kell seeks no damages against the Estate but *in rem* relief only.

[12] The Estate also seeks summary dismissal of the within proceeding by reason that it is an abuse of the Court's process. This is the strongest of the arguments made on behalf of the Estate. The Estate cites the cases of *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4<sup>th</sup>) 488 (Alta.C.A.) and *Hoque v. Montreal Trust*, [1997] N.S.J. No. 430 (N.S.C.A.) in support of the proposition that it is an abuse of the process of the Court to attempt to re-litigate issues or causes of action which have been or should have been determined in earlier proceedings.

[13] After some consideration, I find that the circumstances of this case are distinguishable from those in *420093 B.C. Ltd.* and *Hoque*. In each of *420093* and *Hoque* there had been, in the earlier proceedings, an actual determination of the substantive question in issue. That was not the case here, when the October 2003 Order terminated the earlier Court proceedings by reason of want of prosecution.

[14] For these reasons, I dismiss the Estate's application for summary judgment.

[15] Turning to the alternate request for security for costs, I find that there is merit in this application.

[16] In the two previous Court actions, Kell sought essentially the same relief as in the within proceedings, plus other relief. Although there was no adjudication by the Court on the merits of that request for relief, the earlier proceedings were dismissed because of Ms. Kell's lack of diligence in those Court proceedings and she was ordered to pay the Defendant's taxed party and party costs of those proceedings. To date, she has not paid those taxed costs.

[17] I agree with the submission that by initiating these new proceedings, she is avoiding compliance with previous Court orders as to costs, yet seeking the same relief from the Court. If this were permitted, it would indeed be an abuse of the Court's process.

[18] Rule 633(1) states, in part:

633(1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that...

...

(b) the plaintiff has another proceeding for the same relief pending, or  
(c) the plaintiff has failed to pay costs as ordered in the same or another proceeding

...

[19] In the circumstances of this case I am of the view that it is just and appropriate that, before continuing with this third Court action, Kell ought to pay the costs ordered in the two previous Court actions, and post security for the Respondents' costs of this third Court action.

[20] Accordingly I hereby order:

1. The Applicant Kell shall pay to the Estate the amount of the taxed Bill of Costs in Court actions CV 05689 and CV 06332.
2. The Applicant Kell shall pay into Court as security for the costs of the Respondents to the within proceedings, up to and including any examinations for discovery, the sum of \$5,000.00.
3. The costs payments ordered in paragraphs 1 and 2 above shall be made within 60 days of the date this Memorandum is filed.
4. Until compliance with paragraphs 1 and 2 above, all further steps in the within proceeding are stayed.
5. In default of compliance with paragraphs 1 and 2 within the time allowed, the within proceeding is dismissed without further order.

[21] As I have dismissed the application for summary judgment but granted the application for security for costs, and there thus being mixed success, there will be no order as to costs of these applications.

J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT, this  
21<sup>st</sup> day of July 2005

Counsel for the Applicant Kell:	Robert A. Kasting
Counsel for the Respondent Senych Estate:	Elaine Keenan-Bengts
Counsel for Respondents Rabesca and Paquette:	Adrian C. Wright

S-0001-CV 2004 000358

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MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE J.E. RICHARD

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