

Date: 2022 11 23  
Docket: S-1-CV-2022-000 149

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

IN THE MATTER of the *Property Assessment and Taxation Act*, 97.84, c 2, as amended;  
AND IN THE MATTER of a decision of sale at auction dated June 7, 2022

**BETWEEN:**

NDABEZINHLE RUSIKE

Applicant

-and-

CITY OF YELLOWKNIFE AND DAVE PHYPER AND LISA PHYPER

Respondents

**MEMORANDUM OF JUDGMENT**

**INTRODUCTION**

[1] Ndabezinhle Rusike (“Rusike”) was the registered owner of a condominium legally described as Unit 11, Plan C-2089, Yellowknife. His taxes were in arrears. The City of Yellowknife (the “City”) commenced the process to enforce arrears under Part III.1 of the *Property Assessment and Taxation Act*, RSNWT 1988, c P-10 (*PATA*). Ultimately, the property was sold at public auction to the Pypers on June 3, 2022 and title issued to them on August 11, 2022.

[2] Cedric Rusike, who is Ndabezinhle Rusike’s son, filed an “Originating Notice of Appeal” in this Court with respect to the City’s decision to sell the condominium at auction to recover municipal tax arrears. Although styled as an appeal, it is in substance an application to challenge the sale of the property under s 97.87 of *PATA*. The City seeks to have the application struck because it was filed beyond the 30-day time limit set out in s 97.87. For the sake of simplicity, I will refer to Cedric by first name only. It should also be noted that Cedric has a Power of Attorney from his father which allows him to act in his father’s stead in this matter.

[3] Rusike seeks an adjournment of the City's application to strike. Additionally, he applies to have an order granted October 27, 2022 giving the purchasers vacant possession (the "eviction order") stayed pending an appeal to the Court of Appeal.

[4] For reasons that follow, the City's application is granted and Rusike's applications are dismissed. It should be noted that this case was initially set down by Chief Justice Smallwood for November 18, 2022 to conduct a pre-hearing conference respecting Rusike's Originating Notice of Appeal. The City then scheduled its motion for the same time and Rusike brought forward his motion to stay the eviction order. As a result of my ruling on the City's motion, there is no longer any need for a pre-hearing conference.

## **BACKGROUND AND FACTS**

### ***The Enforcement Process***

[5] The tax arrears enforcement process is set out in ss 97.1 to 97.87 of *PATA*. It starts with the taxing authority, in this case the City, preparing a tax arrears list by March 31 of each year. The list must include the taxable property, the amount of the arrears, and the name and address of the assessed owner as shown on the taxing authority's tax roll. Following this, the taxing authority must, on or before April 30 of the same year, send written notice to the assessed owner by registered mail. That notice must set out the amount of the arrears and advise the assessed owner the property may be sold at public auction if the arrears are not paid. Additionally, the notice must include an offer to enter into an agreement for the assessed owner to pay the arrears in instalments.

[6] Next, the taxing authority is required to post the arrears list in at least five conspicuous places in the municipality, publish it in a local newspaper, and send notice to encumbrance holders at the address shown on the records in the Land Titles Office. Arrears may be paid at any time during this process before the property is offered at public auction. Additionally, the assessed owner can redeem the property by paying the arrears within 30 days of the date of the public auction, pursuant to s 97.84. If the owner exercises the right to redeem within the 30-day period, the sale cannot be completed.

[7] Property which remains on the arrears list as of December 31 in a given year may be offered for sale by public auction on a date set by the taxing authority. Once

again, the taxing authority must send written notice to the assessed owner by registered mail to the address shown on the tax roll and to encumbrancers at the address shown on records in the Land Titles Office. The notice must include the time and place of the public auction and include information on the right to redeem under s 97.84. Additionally, notice of the public auction must be published in the *Northwest Territories Gazette* between 30 and 75 days before the auction and in two issues of a newspaper of general circulation in the municipal taxation area between 10 and 30 days before the auction.

[8] If the property is sold at auction, the taxing authority must send the assessed owner and encumbrancers written notice by registered mail of the sale, the right to redeem under s 97.84, and the right to challenge the sale under s 97.87.

[9] Section 97.87 sets a 30-day time limit, running from the date of the auction, within which an assessed owner may bring an application to challenge the sale in this Court. It also specifies the grounds upon which the assessed owner can challenge the sale, namely: the taxing authority did not conduct the sale in a fair and open manner or did not comply with the requirements set out in ss 97.1 through 97.86; and the assessed owner has suffered actual and substantial prejudice as a result.

### ***The Process Followed in this Case***

[10] The City filed a Record in this matter on November 17, 2022. I have drawn the facts from the Record, as well as from the affidavits Cedric filed in support of his applications.

[11] The Record makes it clear the City complied with the requirements set out in Part III.1 of *PATA* in enforcing Rusike's tax arrears.

[12] On April 29, 2021 the City, through its external counsel, sent a registered letter to Rusike at the address on the tax roll. The letter explained there were outstanding municipal tax arrears owing on the property and if they were not paid by July 15, 2021, the City would be required to include the property and Rusike's name in a list of arrears in the local newspaper. Further, if the arrears were not paid by December 31, 2021 the property could be offered for sale at public auction. (Record, tabs 4 and 5).

[13] The arrears remained unpaid. The City published this information in a Notice of Tax Arrears in the *Yellowknifer* on July 21, 2021. (Record, tab 6).

[14] City Council met on February 14, 2022 and passed a motion to auction certain properties, including Rusike's, on June 3, 2022. (Record, tab 11).

[15] Notice of the public auction was published as required in Part II of the *Northwest Territories Gazette*, Vol 43, No 4, pp 75-78 on April 4, 2022. (Record, tab 16).

[16] On May 5, 2022 the City's external counsel sent Rusike a letter by registered mail to the address on the tax roll. This time, as required by *PATA*, the letter advised the City would be auctioning Rusike's property on June 3, 2022. The Canada Post tracking sheet indicates a notice card was left at Rusike's address indicating the letter could be picked up at a postal depot. A final notice was delivered on May 15, 2022. The letter was not claimed. (Record, tabs 12 and 13).

[17] The property was encumbered by a mortgage issued by the Royal Bank of Canada. As required, the City's external counsel sent a letter to its Yellowknife branch by registered mail on May 5, 2022, advising of the arrears and potential sale by auction. The May 5, 2022 letter to Rusike was enclosed. The Canada Post tracking sheet shows the letter was received by the Royal Bank in Yellowknife on May 25, 2022. (Record, tabs 14 and 15).

[18] The City published a list of properties to be sold at public auction in the *Yellowknifer* on May 13, 2022 and again on May 20, 2022. Rusike's property was listed in both notices. (Record, tabs 17 and 18).

[19] The property was sold at public auction on June 3, 2022 to the Phipers. (Record, tabs 20 and 25).

[20] On June 7, 2022 the City's external counsel sent another letter by registered mail to Rusike. The letter advised the property had been sold at auction on June 3, 2022 and that Rusike had 30 days to redeem the property by paying the tax arrears. It also advised Rusike of his right to challenge the sale within 30 days, under s 97.87. The time would run from the date of the auction and would expire July 4, 2022. The letter was not claimed and the Canada Post tracking sheet shows it was returned on June 28, 2022. (Record, tabs 21 and 22).

[21] The City's external counsel sent a letter to the Royal Bank in Yellowknife advising of the sale by auction on June 7, 2022 by registered mail. Again, a copy of the letter to Rusike was included and the Royal Bank was advised of the redemption date. The Canada Post tracking sheet shows the Royal Bank did not claim the letter from the post office, however, and it was returned on July 5, 2022.

[22] The property was transferred to the Phypers on July 25, 2022. The new title issued August 11, 2022. (Record, tabs 26 and 27). Members of Rusike's family continue to occupy the property.

[23] Cedric filed the application to challenge on his father's behalf in this Court on September 16, 2022, styled as an Originating Notice of Appeal. The stated ground for the challenge is that the City failed to conduct the sale at auction in a fair and open manner.

[24] Cedric filed two affidavits in support of his application. He deposes he received the Final Tax Notice for the property from the City on July 4, 2022. He points out the final notice states on its face it was mailed to him on June 30, 2022 and I infer from this statement he received it through the mail. The notice indicates \$11,655.46 in tax arrears and other charges was due by August 31, 2022. He says he went to City Hall on July 6, 2022 to ask about the Final Notice and was told by a clerk he had until August 31, 2022 to pay the amount stated as owing. He paid the arrears and other charges on August 16, 2022. By that time, both the time to redeem the property and the time to challenge the sale had expired, and the new title had, as noted, issued to the Phypers.

[25] Cedric also deposes he received the June 7, 2022 letter from the City's external counsel on July 4, 2022. He says although the letter itself is marked as being sent by registered mail, he received it *via* regular mail and has attached a copy to the envelope to his Affidavit as an exhibit. I note, however, that the Record at tab 22 contains a copy of an envelope addressed to Rusike clearly marked "Registered Mail" as well as a copy of the Canada Post tracking sheet showing the item was sent by registered mail. It may be the City's external counsel sent the same letter by ordinary mail. In any event, I am satisfied the June 7, 2022 letter was sent to Rusike by registered mail, as required under *PATA*.

[26] On August 29, 2022, Cedric met with a manager at City Hall who told him the property had been sold at auction. He then went to the City's external counsel and showed him his receipt for payment of the outstanding arrears. He asked what

he could do to keep the property. He says he was told the external counsel would speak with someone at the City and get back to him, but he did not receive any additional information.

[27] On September 15, 2022, Cedric received a letter from the Phypers' counsel demanding vacant possession of the property. The new title showing the Phypers as the registered owners was provided at the same time.

[28] The Phypers brought an application on October 21, 2022 for an eviction order. Chief Justice Smallwood granted the order on October 27, 2022. In oral reasons she addressed many of the same issues raised at the hearing before me on November 18, 2022, including the finality of the sale under *PATA*. Rusike has appealed the eviction order to the Court of Appeal.

## **ISSUES**

[29] The issues are these:

- a. Can this Court extend the statutory limitation period to challenge the sale under s 97.87 of *PATA*?
- b. Has Rusike met the test to stay the eviction order?; and
- c. Should Rusike's application for an adjournment be granted?

## **THE PARTIES' POSITIONS**

[30] The City's position is that Rusike's challenge is barred by the limitation period in s 97.87(1) of *PATA* and accordingly, it should be dismissed. The Phypers oppose Rusike's application to stay the eviction order.

[31] Rusike seeks an adjournment. Cedric Rusike stated in his submissions that he has contacted legal counsel to assist him, but that counsel is not licensed to practice in the Northwest Territories and must obtain a restricted appearance certificate.

[32] With respect to the limitation period and the stay, Cedric suggests in his affidavit evidence, as well as his submissions, that neither he nor his father had notice that the City was taking proceedings to enforce the tax arrears until July 4, 2022, the last day to redeem the property or challenge the sale.

## ANALYSIS

### *Extension of Statutory Limitation Period*

[33] In my view, the Court cannot waive or extend the limitation periods to redeem the property or challenge the sale set out in ss 97.84 and 97.87 of *PATA*.

[34] Courts generally do not have inherent authority to extend statutory limitation periods. *Norn v Stanton Regional Hospital*, [1998] NWTR 355 at para 29. Sometimes, legislation includes provisions which allow courts to extend limitations. Under s 87(1) the *Residential Tenancies Act*, RSNWT 1988 c R-5, the deadline for filing and serving an appeal from a Rental Officer's order is 14 days; however, s 87(3) expressly permits the Court to extend that time. Similarly, s 29(2) of the *Human Rights Act*, SNWT 2002, c 18 sets a two year deadline for filing a complaint, but s 29(3) allows that deadline to be extended in certain circumstances. Unlike the *Residential Tenancies Act* and the *Human Rights Act*, however, *PATA* contains no provision authorizing this Court to extend either the redemption period or the limitation period for challenging the sale. Had the Legislature intended to allow it to be extended, it would have been expressed in the legislation.

[35] The policy behind limitation periods is obvious: they provide certainty to litigants. As stated by Richard, J. in *Irish et al v MacKenzie Hotel et al*, [1998] NWTR 326 (SC) at paras 12-13:

Limitation periods are enacted by the legislature for good reason. An express limitation period cannot simply be ignored.

A defendant or prospective defendant in civil litigation is entitled to the benefit of any limitation period prescribed in an enactment. (...) The policy underlying the enactment of a limitation period includes reliance on consequences which flow from expiration of the limitation period.

[36] In addition to the general policy reasons to enforce limitation periods, there is a practical need to do so in the context of municipal tax enforcement. Certainty and finality are particularly important when it comes to purchasing land. The assurance that the sale will be final if after 30 days the property has not been redeemed, nor the sale challenged, is critical to the proper functioning of the municipal tax enforcement system. The threat of a previous owner asserting an interest at some future, unknown date would act as a significant disincentive to potential purchasers and, without doubt, mortgagees and thereby undermine the system.

[37] The fact that the City accepted payment of the arrears past the deadline for redeeming the property makes no difference to the outcome, given what I have said about the Court's ability to extend the limitation periods. Moreover, the evidence does not allow me to conclude it would be reasonable for Cedric to have been left with the impression "all was well" once he paid the arrears. He deposes he received the June 7, 2022 letter, which, as noted, advised that the property had been sold on June 3 and set out the 30-day deadlines within which the property could be redeemed or the sale challenged. In any event, there is no prejudice to Rusike by reason of the payment being made as the money will ultimately be accounted for when the balance of the sale proceeds is distributed.

[38] As noted, Cedric's affidavit evidence and submissions raise the possibility that neither he nor his father had actual knowledge of the *PATA* proceedings until Cedric received the June 7, 2022 letter on July 4, 2022 and that he was unaware the property had actually been sold before he paid the arrears on August 16, 2022 and met with manager at the City on August 29. Unfortunately, although Rusike may feel this is unfair, it does not change the outcome. I will explain why.

[39] Cedric's affidavits do not offer an explanation as to why neither he nor his father picked up the registered letters sent between April of 2021 and June of 2022, nor why the mail was not monitored. Cedric was, however, provided an opportunity to explain this in his submissions at the hearing on November 18, 2022. In summary, the reasons he gave are (1) his father was out of the country caring for an ill family member; (2) there were tenants living in the property for a few years who only moved out in April of 2022; (3) Cedric had only recently returned to Yellowknife after living in Iqaluit, moving into the property in June of 2022; and (4) the mail was not checked very often.

[40] Respectfully, there is no legal merit to any argument that the time limit to either redeem the property or challenge the sale should be extended because Rusike did not know about the proceedings. The same argument has been made in other courts considering municipal tax enforcement proceedings under similar legislation, without success: *EJS Holdings Ltd v Calgary (City)*, 1982 ABCA 237, 1982 CarswellAlta 158; *Elliott v Toronto (City)*, 1999 CanLII 1073 (ONCA), 1999 CarswellOnt 790. In *EJS Holdings Ltd*, the Alberta Court of Appeal considered an argument that the municipal tax arrears enforcement legislation which existed at the time required the taxing authority to ensure the owner and encumbrancers were served with actual notice. The legislation required notice be sent to assessed owners and encumbrancers by registered mail, as well as through the *Gazette* and in local



newspapers. Justice Prowse found *service* on the assessed owner was not required by the legislation:

11 If the legislature had intended that such a letter had to be received by the addressee, then it would have required service and, one would have thought, service on the registered owner. Further, it would have made provision for substituted service or for dispensing with service in certain specified circumstances. It did not. It follows that to accept the respondent's contention would require us to conclude that service of a copy of the advertisement must be made and that no sale could be proceeded with if the city was unable to locate the person named on the assessment roll.

12 There is already provision in *s. 7* by which the registered owner, persons claiming an interest in the land and subsequent purchasers and encumbrancers receive notice that the land is subject to tax recovery proceedings. After such notice, they have to act to protect their interests. To assist them, the legislature enacted the cumulative requirements of *s. 11* by which notice of the proposed sale may come to their attention. It concluded that literal compliance with those provisions was sufficient in view of the notice that had been given under *s. 7* and in view of the common knowledge that land is subject to tax.

[41] Similarly, the Legislature has set out how assessed owners, encumbrancers and potential purchasers will be notified of tax recovery proceedings and auctions, as well as their respective rights and obligations. There is nothing in *PATA* which requires the taxing authority to track down owners and *serve* them with notice to pay their tax arrears. The City is obliged only to provide the written notice by registered mail and to publish notices as required in the newspaper and the *Northwest Territories Gazette*. In this case, it is clear the notice requirements have been met: the City sent letters to Rusike by registered mail; it published the notice of the tax arrears in the local newspaper; and it published notice of the public auction in the *Northwest Territories Gazette* and in the local newspaper. Nothing else was required.

[42] It is no answer that Rusike missed the notices because he was absent and did not make arrangements to have someone monitor his mail. Property ownership carries with it certain responsibilities and expectations, including staying up to date with municipal taxes, keeping the address on the tax roll current, and checking for and reading mail from the taxing authority. In *Elliott v Toronto*, the Ontario Court of Appeal addressed the argument that the sale was invalid because one of the appellants had not read the notices sent by mail. The Court suggested that owners who ignore their mail do so at their peril:

46 In *Excelsior Mining Co. v Lohead* (1915), 35 O.L.R. 154 (Ont. H.C.) an action to set aside a sale of the plaintiff's land for taxes in arrears, the owner had not received a notice to redeem under the *Assessment Act, 1904*, 4 Edw. VII, c. 23, s. 165. It was noted at p. 159 by Boyd C. that "[t]he sale was completed without any notice coming home to the plaintiffs as to the state of the arrears and the impending tax-deed". He then said on the same page:

The machinery of taxation moves; and if a non-resident owner does not avail himself of the simple means afforded by the statute of lodging his proper address where all notices may be sent by the municipal officers, he can only blame himself if disaster ensues.

### *Application for a Stay Pending Appeal*

[43] A stay is a form of injunctive relief. It is discretionary, to be granted on an exceptional basis. This is because the effect is to grant a remedy to one party over another before the merits of the case can be heard. *Commission scolaire francophone, Territoires du Nord-Ouest et al v Northwest Territories (Attorney General)*, 2008 NWTSC 53 at para 9.

[44] Three criteria must be satisfied for the Court to exercise its discretion to issue a stay. The applicant must demonstrate: a strong *prima facie* case; that irreparable harm will result if the stay is not granted; and that the balance of convenience favours the stay. *RJR MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311. Rusike has not satisfied these requirements.

[45] First, my finding that the time for filing the application to challenge the sale has passed and cannot be extended means the application is statute-barred and cannot proceed. This rules out any possibility of there being a strong case.

[46] Second, even if there was a strong *prima facie* case, Rusike has not demonstrated irreparable harm will ensue if the stay is not granted. Irreparable harm was described in *RJR MacDonald*, at 341 as follows:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"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. . .* (emphasis mine)

[47] In the event Rusike succeeds in appealing the eviction order, his damages would be readily quantifiable in monetary terms.

[48] Finally, the balance of convenience does not favour a stay. Rusike's application to challenge the sale cannot proceed for reasons stated above.

***Application for Adjournment***

[49] In the circumstances, I decline to exercise my discretion to grant an adjournment. I appreciate Rusike was not represented by counsel at the hearing on November 18, 2022. In light of my finding on the limitation issue, however, having counsel would make little difference.

**CONCLUSION**

[50] The City's application to dismiss Rusike's application to challenge the sale is granted. Rusike's applications to stay the eviction order and for an adjournment are dismissed.

[51] As the City and the Phypers have prevailed, they shall each have their costs. If they wish to address the scale of costs, they may do so by making arrangements with the Supreme Court Registry within 10 days of the date of these reasons. Otherwise, costs will be assessed on a party and party basis under Column 4 of Schedule A.

K.M. Shaner  
J.S.C.

Dated at Yellowknife, NT, this  
23<sup>rd</sup> day of November, 2022

Ndabezinhle Rusike

Represented under a Power of  
Attorney by Cedric Rusike

Counsel for the City of Yellowknife:

Cole Caljouw

Counsel for Phypers:

Douglas McNiven

Counsel for the Royal Bank of Canada:

Andrea Steen

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