

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

	)	G. R. Champagne
	)	<i>for the Appellant</i>
ENSSAF GHAZALI)	
	)	D. Thiessen and
(Plaintiff) Respondent	)	R. Swan
	)	<i>for the Respondent</i>
- and -)	
	)	<i>Chambers motion heard and</i>
GHADY GUISTI	)	<i>Decision pronounced:</i>
	)	November 14, 2024
(Defendant) Appellant)	
	)	<i>Written reasons:</i>
	)	November 27, 2024

TURNER JA

[1] At the hearing, I dismissed the defendant’s motion for a stay pending appeal and an injunction to prevent possession and sale, as well as a pending litigation order with reasons to follow. These are those reasons.

Background

[2] The plaintiff is the sole registered owner of a house at 881 Dudley Avenue in Winnipeg, Manitoba (the property).

[3] In 2008, the plaintiff allowed her sister (Susan), brother-in-law (Hussain) and their children to reside at the property on an interim basis because Susan had recently lost her job. The defendant is one of Susan and Hussain’s children.

[4] The plaintiff and Susan agreed that Susan and her family would not pay rent, but would be responsible for paying the property taxes and utilities while residing at the property.

[5] In 2014, Susan and Hussain separated. Susan continued to reside at the property with the children until they moved out some time in 2018. In the fall of 2018, the defendant moved back into the property to attend university.

[6] Susan continued to pay the agreed upon expenses of the property until she told the plaintiff that she could no longer afford to do so. As a result, the plaintiff wanted to sell the property so she asked Susan to tell the defendant that the defendant would have to move out. The defendant refused. A compromise was reached where the defendant was allowed to stay at the property until the end of the university term in April 2022.

[7] After that deadline, the defendant continued to refuse to leave the property. The plaintiff hired counsel, who sent a letter to the defendant, demanding, among other things, that the defendant vacate the property by August 10, 2022.

[8] The defendant continued to refuse to vacate the property. Therefore, the plaintiff initiated a claim on October 19, 2022, for an order allowing vacant possession of the property, among other things (the original claim). The defendant filed a statement of defence on November 21, 2022.

[9] After pleadings closed, four pre-trial conferences were held. The defendant attended all four conferences as a self-represented litigant. The summary motion judge (the motion judge) also allowed Hussain to attend the

conferences and granted him leave to conduct any cross-examinations on the defendant's behalf. Hussain did not attend the last pre-trial conference.

[10] At the last pre-trial conference, the motion judge ordered that the plaintiff's summary judgment motion would be heard on June 19, 2024. He also ordered that cross-examinations on affidavits would take place before him on the same date. Deadlines were set for filing any further evidence and briefs.

[11] The defendant did not file any further evidence. Therefore, at the June 19, 2024 hearing, the motion judge had the following evidence before him: Hussain's affidavit (affirmed June 23, 2023), the plaintiff's affidavit (affirmed November 23, 2023) and Susan's affidavit (affirmed February 8, 2024).

[12] Neither the defendant nor Hussain appeared at the June 19, 2024 hearing. Accordingly, no cross-examinations on the affidavits took place despite the fact that the plaintiff and Susan were present to testify.

[13] The motion judge found that the defendant had been duly served with notice of the hearing date, in addition to having been at the pre-trial conference when the date was set. Therefore, he allowed the hearing to proceed.

[14] At the conclusion of the hearing, the motion judge reserved his decision. He issued an endorsement on June 26, 2024, in which he found that there was no reason to doubt that the plaintiff was the owner of the property. He rejected the evidence in Hussain's affidavit, stating that it did not rise to anything more than bare assertions and was uncorroborated. There was no

evidence that the defendant or Hussain had an ownership interest in the property. Therefore, the defendant had no right to remain in the property.

[15] The motion judge concluded that the plaintiff was entitled to judgment against the defendant for immediate vacant possession of the property, a declaration that the defendant had trespassed on the property since April 15, 2022, damages of \$50,700 and costs (the order). A copy of the endorsement was emailed to the plaintiff's counsel, the defendant and Hussain on June 26, 2024.

[16] On August 13, 2024, both the defendant and Hussain were served with the order. The plaintiff also obtained a writ of possession on August 14, 2024.

[17] On August 20, 2024, the defendant (now represented by counsel) filed a notice of appeal with this Court.

[18] On September 3, 2024, the defendant filed a notice of application before the motion judge, seeking a stay of the order and the writ of possession, an interim injunction to prevent the sale of the property and a pending litigation order. The application was heard on October 15, 2024 and was dismissed by the motion judge.

[19] Also on October 15, 2024, the defendant and Hussain filed a claim against the plaintiff that commenced a new proceeding (the new claim). They claim that they are entitled to the property based on the doctrine of adverse possession.

[20] On October 18, 2024, the plaintiff was served with a motion for a pending litigation order and interlocutory injunction to prevent the sale of the property pending a determination of the new claim. The motion was heard and dismissed by the Associate Chief Justice of the Court of King's Bench on October 22, 2024 (the ACJ's order). He found that the motion was an abuse of process and a collateral attack on the previous findings of the motion judge. The new claim remains pending in the Court of King's Bench.

[21] On November 2, 2024, the plaintiff accepted an offer to purchase the property. The closing date is on November 29, 2024.

Analysis

Should There Be a Stay of the Order Pending Appeal?

Should There Be an Injunction Preventing the Sale of the Property?

[22] The defendant says that the order should be stayed pending appeal and I should grant an injunction preventing the sale of the property because she did not get proper notice of the June 19, 2024 hearing as the plaintiff's action was barred by *The Limitations Act*, CCSM c L150 [the *Limitations Act*], and because the defendant has a claim to the property based on the doctrine of adverse possession (more commonly referred to as squatter's rights).

[23] The test to be applied for a stay pending appeal and/or for an injunction is the three-part test set out in *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) [*RJR — MacDonald*] (see also *Kuny v Pullan Kammerloch Frohlinger*, 2021 MBCA 56 at para 7).

[24] The three-part test requires that the applicant establish (1) there is an arguable issue to be determined on appeal, (2) the applicant will suffer irreparable harm if the stay/injunction is not granted, and (3) the balance of convenience favours granting the stay/injunction.

Is There an Arguable Issue to Be Determined on Appeal?

[25] In the present motion, I am not in a position to, nor should I, determine the ultimate resolution of the appeal. Additional materials may be filed before the panel and additional arguments may be presented. For the purposes of this motion, I must decide whether there is an arguable case based on the materials before me and I must keep in mind that the threshold of “arguable issue” is a relatively low one.

[26] The defendant’s assertion that she did not receive notice of the June 19, 2024 hearing has no merit. At the last pre-trial conference held on January 30, 2024, the motion judge directly told the defendant that a summary judgment hearing would occur on June 19, 2024 at 10:00 a.m. That date was also provided in writing in pre-trial conference memorandum (No. 4), which was sent to the defendant. There is no credible evidence that she was not aware of the date.

[27] The defendant asserts that the question of whether the plaintiff’s action was barred by the *Limitations Act* is an arguable issue on appeal. She also says that the question of whether she has a legal claim to the property based on the doctrine of adverse possession is an arguable issue. I do not agree.

[28] Although it was not raised in her statement of defence to the original claim, the defendant says that the motion judge should have considered that the plaintiff filed her statement of claim more than fifteen years after the defendant started occupying the property. However, section 61(2) of *The Real Property Act*, CCSM c R30, clearly abolishes claims based solely on the length of time someone possesses a property. In addition, the *Limitations Act* does not create a cause of action. Rather, it sets out limitation periods for civil claims (see s 1). The basis of the claim itself must be based on other legislation or applicable common law.

[29] Furthermore, at best, the defendant's possession of the property only became "adverse" in April 2022 after the plaintiff demanded that she move out. Prior to that date, the plaintiff allowed the defendant to live at the property so there was nothing adverse about the situation.

[30] As such, I am of the view that there are no serious issues to be determined on appeal. Therefore, the defendant has not satisfied the first part of the *RJR — MacDonald* test and her application must fail.

[31] If I am incorrect regarding whether there is a serious issue to be tried, I will go on to consider the two other prongs of the *RJR — MacDonald* test.

Will the Defendant Suffer Irreparable Harm?

[32] Irreparable harm is harm that cannot be cured by an order for damages (see *RJR — MacDonald* at 341).

[33] In the present case, the defendant will not suffer irreparable harm if the property is sold. Should she be successful, at best, her loss may be compensated by damages for the months she was deprived of the ability to reside at the property.

Does the Balance of Convenience Favour Granting the Stay?

[34] As noted above, an offer to purchase the property has been accepted and the closing date is on November 29, 2024. Granting a stay or an injunction, which would delay the closing of the sale of the property until the appeal can be heard, would clearly inconvenience the plaintiff and the purchaser.

[35] There is no evidence that the defendant will suffer inconvenience. At the hearing of this motion, counsel for the defendant advised that the defendant was no longer residing at the property so, presumably, she has already found somewhere else to live.

[36] The balance of convenience clearly favours the plaintiff.

Should the Defendant Be Granted a Pending Litigation Order?

[37] I also dismissed the defendant's request for a pending litigation order. In addition to the reasons set out above, the defendant herself has not provided any evidence that she has a valid interest in the property, she has not provided an undertaking as to damages, she did not plead a pending litigation order in the new claim and she has not appealed the ACJ's order.

Costs

[38] At the conclusion of the hearing, I heard the parties on the issue of costs. I advised that I would provide my decision on costs within the reasons dismissing the defendant's motion.

[39] The plaintiff submitted that she should be awarded solicitor and client costs given the conduct of the defendant throughout the proceedings. The defendant submitted that she has simply been pursuing a defence that she believes has merit.

[40] Solicitor and client "costs should be awarded only in exceptional circumstances and normally as a result of conduct that can be described as reprehensible, scandalous or outrageous on the part of one of the parties to the litigation" (*Judges of the Provincial Court (Man) v Manitoba*, 2013 MBCA 74 at para 165).

[41] While I understand the plaintiff's frustration over the years in attempting to sell the property and having to pursue litigation, I am not persuaded that the defendant's conduct rises to the level of reprehensible, scandalous or outrageous in the circumstances. I am not prepared to order solicitor and client costs on this motion. The plaintiff is, however, entitled to tariff costs.

Conclusion

[42] For the foregoing reasons, I dismissed the defendant's motion and awarded tariff costs in favour of the plaintiff.

Turner JA
