SUPREME COURT OF NOVA SCOTIA
Citation: Tawil v. Lawen 2016 NSSC 323

Date: 20161102
Docket: Hfx. No. 453285
Registry: Halifax

Between:

Catherine Tawil, Samia Khoury and Mary Lawen
by her Litigation Guardian Catherine Tawil

Plaintiffs

v.

Michael Lawen

Defendant

Decision

Judge:	The Honourable Justice Robert Wright
Heard:	November 2, 2016 in Halifax, Nova Scotia in Chambers
Oral Decision	November 2, 2016
Written Decision:	November 25, 2016
Counsel:	Peter Rumscheidt for the Plaintiffs Victor Goldberg for the Defendant

Wright, J. (orally)

[1] This is a summary judgment motion on evidence brought by the defendant Michael Lawen, seeking dismissal of this action on the basis that the plaintiffs do not have standing to challenge the validity of seven property conveyances made in favour of Mr. Lawen under an enduring Power of Attorney he held from his father, Jack Lawen, signed on July 13, 2004. Jack Lawen has since passed away on January 16, 2016.

[2] Jack Lawen is the father of the three plaintiff sisters and the defendant Michael Lawen so we have the unhappy situation of three sisters suing their brother over their father's estate.

[3] The background chronology can be summarized as follows:

1. Subsequent to signing the enduring Power of Attorney in 2004, Jack Lawen executed his Last Will and Testament on May 27, 2009. In that Will, he appointed his two brothers, Joseph and George, to be his executors, made cash bequests of $50,000 to each of the plaintiffs Catherine Tawil and Samia Khoury (his third daughter Mary being disabled and under government care) and directed the residue of his estate to go to his son Michael;

2. On November 13, 2012 Jack Lawen signed a revocation of the 2004 Power of Attorney which was later found in a bank file on or about January 14, 2016. This revocation document was witnessed by two bank employees but apparently sat in the bank file during the intervening period;

3. On January 13, 2015 two of the seven properties owned by Jack Lawen were conveyed to Michael Lawen in his exercise of the Power of Attorney he held from his father;

4. On January 6, 2016 the remaining five properties were likewise conveyed to Michael Lawen through the exercise of that Power of Attorney. The aggregate value of these seven properties exceeds $2.6 million dollars;

5. On January 16, 2016, just ten days later, Jack Lawen died (having developed cognitive deficits since about 2013); and

6. On May 12, 2016, probate of the Will was granted to Dr. Joseph Lawen (the other brother having renounced his executorship). The value of the estate remaining is estimated at $130,000.

[4] This summary goes beyond the bare facts needed to decide this motion, but presents a fuller picture of the dynamics of this litigation.

[5] Within three months of their father's death, the plaintiffs filed their first Action against the Executor, which was soon thereafter amended to add Michael Lawen as a defendant. In that Action, both causes of action were plead, namely, declaratory relief challenging the validity of the seven conveyances, and the claim advanced under the *Testators Family Maintenance Act* ("TFMA").

[6] On June 2nd, the estate filed a Notice of Motion seeking summary judgment on the pleadings and severance of the TFMA claim. That motion was superseded by a procedural agreement between counsel whereby three filings were made on

July 11th , namely, a discontinuance of the first Action, and the commencement of two new Actions, one under the TFMA against the executor of the estate and the present one against Michael Lawen for declaratory relief challenging the validity of the conveyances made under the Power of Attorney.

[7] A further dimension of the agreement between counsel was that apart from the filing of a defence in the TFMA action, that proceeding would be held in abeyance pending the outcome of the separate action against Michael Lawen challenging the validity of the deeds.

[8] That brings us to the present motion filed on behalf of Michael Lawen for summary judgment on evidence on the basis that the plaintiffs do not have legal standing to challenge the validity of the impugned deeds because they have no current legal or pecuniary interest in the seven properties, given the terms of the Will.

[9] The only evidence before the court on this motion is an affidavit sworn by the executor Dr. Joseph Lawen in connection with the earlier summary judgment motion filed on June 2nd (which was never heard) and the affidavit of the plaintiff Catherine Tawil.

[10] It is acknowledged by both counsel that the contents of those affidavits does not disclose a genuine issue of material fact being in dispute. However, it does present a question of law, namely, whether the plaintiffs have legal standing to bring this action for declaratory relief challenging the validity of the impugned deeds.

[11] That question is squarely before the court on this motion within Civil Procedure Rule 13.04(6)(a) which reads in part:

> "A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) Determine a question of law, if there is no genuine issue of material fact for trial" ;

[12] The defendant's main argument on this motion is that the plaintiffs have no standing to bring this action because they presently have no legal or pecuniary interest in the seven properties conveyed to the defendant, given the terms of the Will. The second argument added by the defendant is that any claims challenging the validity of the deeds would properly have to be brought by the executor, not the plaintiffs who lack standing to do so and who have taken no steps to remove Dr. Lawen as the executor of the estate.

[13] The position of the plaintiffs is summarized in their counsel's brief which I paraphrase as follows, namely, that the plaintiffs do have standing to bring the within proceeding seeking declaratory relief because they do have a legal or pecuniary interest in the outcome of the proceeding. This flows from their potential receipt of proper maintenance and support arising out of their claim under TFMA. That claim would only be viable if the seven properties formed part of the estate. In addition, the plaintiffs say that if they are not permitted to proceed with this action, the matter will almost certainly not proceed at all as there is no realistic possibility of a different party continuing with the claim.

[14] I have been referred to a number of cases on standing in estate matters, none of which are based on the same set of facts as presented here where the standing asserted is predicated on a TFMA claim being pursued. For the sake of brevity, I

will therefore make only two references to the basic principles of standing which are noted in the defendant's brief.

[15] First, there is the decision of the Nova Scotia Court of Appeal in **Bedford Service Commission v. Nova Scotia (Attorney General)** (1976), 18 N.S.R. (2d) 132 confirming that there is no standing in the abstract. The Court there stated (at para. 23):

> Standing, i.e., the capacity or right to take action, does not exist at large and is a meaningful concept only with reference to the particular kind of action contemplated. The question must be: Does *this* plaintiff have the right to take *this* action against *this* defendant? In this or any case of standing we must determine what justiciable issue is involved and how the plaintiff is affected. As Arnup J.A., said in *Rosenburg*, supra, at p. 6: In considering the right of the plaintiffs to bring this action, it is necessary to categorize the legal issue involved, and then to examine the relationship of the two plaintiffs to that issue, and how they are personally affected by its determination . . .

[16] The second reference I wish to make is to the well-known text on the law of standing, authored by The Honourable Thomas Cromwell, entitled *Locus Standi*: *A Commentary on the Law of Standing in Canada* (Carswell: Toronto, 1986). In the introduction of that text (at page 9), the law of standing is summed up in two fundamental rules. The first is that apart from certain cases in which standing is in the discretion of the Court, the plaintiff must possess an interest in the issues raised in the proceeding (the second rule relates to a private plaintiff relying on an interest in the enforcement of a public right).

[17] The issue therefore boils down to the two pronged question of whether these plaintiffs possess an interest in the issues raised in this proceeding such that they have the right to take this action against this defendant.

[18] I readily conclude that this question must be answered in the affirmative.

[19] Granted, the plaintiffs do not presently have a legal or pecuniary interest in the subject properties, but they clearly do have an interest in the determination of whether the deeds are valid and legally binding. That is to say, they clearly have an interest in the determination of what assets form part of the estate.

[20] The plaintiffs are not outsiders here. They have a statutory right under the TFMA to make a claim as dependents. There is no floodgates concern here.

[21] Practically speaking, this motion if granted would mean that the propriety of the conveyances made under the Power of Attorney could never be challenged by anyone. It would effectively deprive the plaintiffs of any opportunity to have their claim under the TFMA ever heard.

[22] The right to make that claim, whether successful or not, presents a potential or prospective interest in those properties to be ultimately determined in a court of law. In my view, that is sufficient to give them standing in this action. To rule otherwise would produce an unjust result to the detriment of the plaintiffs.

[23] In the end, it may well prove to be that Mr. Lawen's actions in exercising the Power of Attorney were legitimately taken and are not to be interfered with. However, that needs to be determined by the Court in the circumstances surrounding this case. It should not be pre-empted by this motion without the opportunity for this crucial issue to be heard.

[24] I would add that although it normally falls to the executor of the estate to challenge any dealings or transactions thought to be inappropriate or offside, that role is not an exclusive one. Here, the executor has stated in his affidavit that he

has determined that it would be contrary to the best interests of the estate to support or assist the plaintiffs in their efforts to challenge the validity of the conveyances, contrary to the express provisions of the Will. He has therefore declined to take any action as executor to that end. While that position may not come as a surprise, it would not be practical to require the plaintiffs to first make an application to have him removed. That would simply add delay and expense which I view as unnecessary.

[25] Because of their TFMA based claim, I conclude that the plaintiffs should not be deprived of their standing to pursue this action simply because the executor has decided not to do so in the first instance. This motion is therefore dismissed.

J.