SUPREME COURT OF NOVA SCOTIA

Citation: Maxwell Properties Ltd. v. Mosaik Property Management Ltd., 2017 NSSC 81

Date: 20170316
Docket: Hfx No. 458069
Registry: Halifax

Between:

Maxwell Properties Limited

Plaintiff

v.

Mosaik Property Management Limited, George Giannoulis, Stavros ("Steve") Giannoulis and J.L. Silver Construction Inc.

Respondents

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 10, 2017, in Halifax, Nova Scotia
Oral Decision:	March 16, 2017
Written Decision:	March 22, 2017
Counsel:	Gavin Giles, Q.C., for the Plaintiff Brian Church, Q.C., for the Respondent

By the Court (Orally): McDougall, J.

[1] This is a motion for an interlocutory injunction pursuant to *Civil Procedure Rule* 41. The motion arises out of a dispute between neighbouring commercial property owners and developers. I issued an interim injunction in this matter on February 2, 2017, pursuant to *Civil Procedure Rule* 41.04, pending the hearing of this interlocutory injunction motion. This interim injunction order was submitted to the court and consented to by counsel on behalf of the plaintiff and the defendants.

[2] The plaintiff seeks an injunction prohibiting the defendants from trespassing on its property and the airspace above it and from committing waste and otherwise causing damage to the plaintiff's property. The defendants oppose the injunction request.

[3] The plaintiff, Maxwell Properties Limited, is a property owner and developer that owns and manages a building at 1580 Grafton Street in Halifax. The defendant, Mosaik Property Management Limited, is a developer and contractor that is renovating and rebuilding a development known as "the Dillon" at Sackville and Market Streets. The Dillon adjoins the plaintiff's Grafton Street property with about one foot of clearance between them. The defendant J.L. Silver Construction is a construction contractor involved in the project. The individual defendants are directors and officers of Mosaik.

[4] The plaintiff alleges that the defendants knew that their activities would impact its Grafton Street property and the use and quiet enjoyment of the property by its tenants. However, the plaintiff states the defendants failed to disclose details of their construction activities which have allegedly led to trespasses against the plaintiff's property. The plaintiff also says the defendants have refused to compensate it for trespass and have failed to take steps to minimize the impact of the project on the plaintiff's property. The plaintiff also alleges that building materials and substances have dropped from the construction site onto the roof of the plaintiff's building thereby causing damage. Further, the plaintiff claims contracting personnel have trespassed onto their roof and the defendants have allowed cranes, hoists, and building materials to overhang their building thus trespassing into the plaintiff's airspace.

[5] The defendants make a general denial of the allegations. In their defence, they state that the plaintiff wanted to buy the property that is now the site of the

Dillon in order to forestall the project. They also claim that there was an arrangement between the individual defendant, George Giannoulis, and the plaintiff's president, John Lawen, to resolve the dispute over the alleged airspace trespass by means of a charitable donation by Mr. Giannoulis to Mr. Lawen's church. The defendants also maintain that any airspace violation is *de minimis* in nature being temporary and extending no more than eighteen inches over the plaintiff's property. Further, they say the plaintiff rejected their proposals for protecting its property by means of either a tarp or a plywood shield and that it has therefore failed to mitigate its damages.

[6] The defendants claim that the plaintiff's intransigence in coming to any form of agreement should disqualify it from the equitable remedy of injunction on the basis of the "clean hands" doctrine. The plaintiff denies that it has refused to agree on a settlement of the dispute as alleged by the defendant.

[7] The plaintiff relies on *Lewvest Ltd. v. Scotia Towers Ltd.* (1981), 126 D.L.R. (3d) 239, a decision of the Newfoundland Supreme Court, Trial Division, where Goodridge J. (as he then was) said:

> 6 Under our system of law, property rights are sacrosanct. For that reason, the rules that generally apply to injunctions do not always apply in cases such as this. The balance of convenience and other matters may have to take second place to the sacrosanctity of property rights in matters of trespass.
>
> 7 What has happened here is that the third defendant, by trespassing on property of Lewvest Limited, can save itself, according to the evidence, close to half a million dollars. If it can save that money, so be it, but the Court is not going to give it a right to use the plaintiffs property. That is a right that it must negotiate with the plaintiff.
>
> 8 If the plaintiff will not give it that right and there is no provision in the *City of St. John's Act*, R.S.N. 1970, c. 40, whereby it may be acquired, there is nothing the Court can do about it.
>
> 9 The Court has no power to expropriate the property of one party and give it to another, either in whole or in part. If I were to deny this application for an injunction, I would in effect be doing just that -- giving the third defendant a licence to use the plaintiff's property.

[8] The defendants also submit that injunctive relief should be denied on the basis of caselaw characterizing temporary incursions into airspace by construction equipment as nuisances: see *Janda Group Holdings Inc. v. Concost Management Inc.*, 2016 BCSC 1503; *Kingsbridge Development Inc. v. Hanson Needler Corp.* (1990), 72 O.R. (2d) 159 (Ont. S.C.); and *Didow v. Alberta Power Ltd.*, 1988

ABCA 257. These cases involved temporary construction cranes, in *Janda* and *Kingsbridge*, and the cross-arms and wires of power poles, in *Didow*. The court in *Didow* distinguished, on the basis that the trespass by the permanent power poles was not comparable to the temporary intrusions by cranes, which the court suggested would better be characterized as nuisance. At the hearing, counsel for the plaintiff produced several Commonwealth cases in support of the contrary view.

[9] Even if I were to accept the distinction suggested by the defendants, it appears to me that the intrusion in this case is not entirely comparable to an overpassing crane since it involves fixed, albeit temporary, objects as well as ongoing work that, at times, has apparently led to some falling of debris and materials directly onto the plaintiff's building. I am satisfied based on the authorities, including *Lewvest*, that this situation is properly treated as one of trespass.

[10] The defendants also submit that to grant an injunction in these circumstances would be "an unwise precedent," given that Mosaik has gone through the necessary regulatory process in which the plaintiff had an opportunity to comment. The defendants assert that the plaintiff is seeking "an unlimited and unchallengeable veto over any development adjoining their property." The court, they submit, should not undermine the intention of Municipal Bylaws to increase density in the downtown core by "allowing Maxwell to capriciously deny Mosaik the right to build its building."

[11] Pursuant to *Civil Procedure Rule* 41.01, an interlocutory injunction is "an order for an injunction … granted on notice of motion and effective before the trial of an action or hearing of an application to which the interlocutory injunction … relate[s]." The basic test for an interlocutory injunction was set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334:

> … First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits…

[12] Applying the *RJR-MacDonald* factors, the plaintiff submits that the trespass constitutes an unjustified interference with its exclusive possession of its property and, therefore, amounts to a serious issue to be tried. The plaintiff argues that the defendants have, without permission, "effectively expropriated" its property for the purpose of "advancing their construction of their own building." Plaintiff's counsel argues that the law aggressively protects private property rights and cites the maxim that "a man's home is his castle." I accept that such interference with a property right amounts to a serious issue to be tried.

[13] The plaintiff says there is a real risk of irreparable harm arising from the physical damage to the roof installations required to ensure the "safety, comfort and quiet enjoyment" of the building by its tenant. The plaintiff says its reputation as "a property manager and the revenue-generating ability of the Plaintiff's Property depend on the Plaintiff's ability to provide current and potential tenants with a safe and disruption-free work environment." The plaintiff further argues that it risks losing its primary remedy, that being the protection of its property from incursion, when the construction finishes. At that point, the plaintiff says, determining damages "will be all but impossible."

[14] The plaintiff refers to *Demone Monuments and Granite Products Ltd, v. Heritage Memorials Ltd.*, 2015 NSSC 314, where Justice Campbell, of this court, in enjoining certain allegedly commercially defamatory speech, discussed the value of injunctive relief in situations where it would be difficult for the plaintiff to prove its damages in monetary terms. In that case, he noted at paragraph 40, "[w]hen statements are made to individual members of the public it is difficult to determine in any practical way, how many people might have heard the statements over a period of time and how many of those would have had their opinions formed in part by those statements." The plaintiff argues that similar concerns arise in this case, in that the defendants are trespassing for the purpose of advancing their own construction of the Dillon, putting into issue what cost savings they have realized as a result. It would be accordingly difficult, counsel submits, for the plaintiff to establish its damages.

[15] The defendants dispute the plaintiff's claim that its damages could not be quantified and state that they are prepared to remedy any damage caused by their construction activities.

[16] For the purposes of an interlocutory injunction, I will accept that the plaintiff will have difficulty establishing its precise damages arising from the defendants'

use of its airspace and the surface areas of its property. While the resulting damage does not seem likely to be more than very minor, irreparable harm does not require serious damage. Monetary damages should, however, help assuage the plaintiff's grievance once the offending structures have been removed.

[17] As to the balance of convenience, the plaintiff says the defendant will suffer no harm from having the trespasses by it and its subcontractors and their personnel enjoined. However, the plaintiff argues, "no amount of assessment of relative incursion or balance of convenience will ever justify one party's use (or taking) of another party's property," other than in the public law context of expropriation. I accept that the interference with the plaintiff's rights of ownership, marginal though it is, tilts the balance of convenience in its favour.

[18] Accordingly, I am satisfied that the plaintiff has made out a basis for the issuance of an injunction on the ground of trespass.

[19] The evidence establishes that the defendants have put up temporary construction frameworks that overhang the plaintiff's property and that occupy the airspace above the roof of the plaintiff's building. The defendants have indicated that the framework will only be required for two to three months in order to complete construction of the exterior walls on two sides of the Dillon development. As such, the trespass is apparently temporary. I am satisfied that this represents a minimal intrusion into the plaintiff's airspace. Any interference with the plaintiff's use and enjoyment of its property is virtually non-existent.

[20] The temporary scaffolding or walkway that allegedly rests on a metal fence on the plaintiff's roof is a somewhat more serious intrusion. It should not be supported by the plaintiff's fence, if that is the case, but should be suspended or otherwise connected to the exterior of the defendants' own building. Accordingly, to the extent that the scaffolding is resting directly on the fence, this should be rectified either by suspending it from the Dillon building itself, or by immediate removal if that is not possible. If it can be so connected, the defendants will have two weeks from the date of this decision to complete the necessary work to prevent any contact between the scaffolding and the plaintiff's fence.

[21] As for the other temporary structures, the injunction requiring their removal is granted but with its effect delayed for three months, until June 17, 2017. In that time the defendants shall complete whatever work is required on the exterior of the Dillon where it abuts the plaintiff's property. Other than this delay in enforcement,

the terms of the interim injunction granted on the 2nd day of February, 2017 shall form part of the interlocutory injunction order that will follow from this decision.

[22] A similar delay in enforcement to the one I ordered was given by Glube, J. (as she then was) in the case of *MacLean v. MacDonald*, [1980] N.S.J. No. 631; 50 N.S.R. (2d) p. 108 where, at para. 19 on p. 4, she wrote:

> **19** The plaintiff is entitled to costs, including costs of the surveyor presumably as part of the disbursements. I would ask that counsel advise me within thirty days whether any arrangements satisfactory to the parties can be made for this property. If not, then the declaration and mandatory injunction will be granted and the defendant should be advised at the end of that thirty days, if no arrangements have been made, that he will have to vacate the property.

[23] I have simply provided a little more time to allow the parties to try to come to an arrangement failing which the defendants will have to remove the offending structure from the airspace above the plaintiff's building.

[24] I, therefore, invite the parties to attempt to agree on an amount to compensate the plaintiff for the trespass failing which they may return before me for an assessment of damages. Alternatively, the parties may prefer to await the outcome of the trial. The same approach is recommended to address the issue of costs.

McDougall, J.