

SUPREME COURT OF NOVA SCOTIA

Citation: Smith's Field Manor Development Ltd. v. Campbell, 2010 NSSC 63

Date: 20100222

Docket: Hfx No. 101803

Registry: Halifax

Between:

Smith's Field Manor Development Limited and
Karen L. Turner-Lienaux

Plaintiffs

and

Wesley G. Campbell

Defendant

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: February 5, 2010

Counsel: I. Andrew Rankin for the Defendant *ex parte*

Moir, J.:

[1] Mr. Campbell was awarded costs of \$360,532 against the defendants. He took out judgment in 2001. An execution order was later issued under the *Nova Scotia Civil Procedure Rules* (1972), which provided that an execution order was good for six years after the judgment. Those Rules also permitted one year renewals, and Mr. Campbell obtained renewals in 2007 and 2008.

[2] The last renewal was good until July, 2009. In the meantime, the new Rules came into effect. On behalf of Mr. Campbell, Mr. Rankin brought an *ex parte* motion "for an order directing the Prothonotary to issue an execution order effective [for] five years". He relies on Rule 79.22(4).

[3] The 1972 Rules provided two ways in which the six year period in Rule 52.05(2) could be extended. The prothonotary could renew the order for twelve month periods under Rules 52.05(3) and 51.05(1)(c)(v). Alternatively, the court could permit the prothonotary to issue a new execution order under Rule 52.04(1).

[4] The practice was to seek renewal, rather than a fresh order, and the application for a renewal was usually made *ex parte*. This meant that the judgment debtor had two avenues through which to challenge the renewal. Rule 37.13 allowed the court to set aside, or vary, an *ex parte* order. Rules 52.09 and 53.13 allowed the court to stay an execution order permanently or temporarily.

[5] Recently, Justice LeBlanc provided a helpful commentary on the principles applicable to renewals and stays of execution orders: *MacKay v. MacMillan*, [2009] N.S.J. 611 (S.C.) para. 21 to para. 50.

[6] The 2009 Rules make changes to the scheme for expiry and extension of execution orders. Rule 79.22 continues the power to stay execution orders without any substantive change, and Rules 22.06 to 22.08 continue the provision for review of *ex parte* motions but with much more detail. In my assessment, the changes are not substantial and *MacKay v. MacMillan* continues to provide guidance on the fundamentals.

[7] The execution order now expires five years after it is issued: Rule 79.22(4). This merely brings the period in line with analogous limitations, such as the limit on outstanding proceedings in Rule 4.22, Rule 5.18, and Rule 7.29.

[8] There are now three ways in which a judgment creditor may extend execution. A superceding execution order, good for another five years, is available from the prothonotary to correct a mistake in the execution order or in response to a sheriff's return of the execution order on the ground that there is no known source for recovery: Rules 79.20, 79.21, and 79.22(4). That does not apply here.

[9] A judge can extend the period of an execution order: Rule 79.22(4). However, a motion under this Rule in a proceeding such as this one, where the judgment debtor continues to be entitled to notice, would not usually fall under Rule 22.03. It could not be made *ex parte*.

[10] The third avenue available to a judgment creditor whose execution order has expired is in 79.05. Rule 79.05(1) permits a judgment creditor to obtain an execution order "no more than five years after the date of the judgment". Rule 79.05(2) provides:

A judge may permit a person to make a motion to the prothonotary for an execution order more than five years after the date of the judgment.

Rule 79.05(4) provides that the "motion for permission may be made *ex parte*".

[11] The affidavit evidence satisfies me that the threshold discussed in *MacKay v. MacMillan* has been met by Mr. Campbell. In my view, the five year period for an execution order is a good guide for fresh execution orders unless a reason appears for making it shorter or longer.

[12] Mr. Campbell has permission to obtain a fresh execution order for the amount of the judgment for costs less credits and plus interest and expenses. The period of the new execution order will be five years from the date it is issued.

J.