

G.P.I. Greenfield Pioneer Inc. et al. v. Moore a.k.a.
Beatie et al.

[Indexed as: G.P.I. Greenfield Pioneer Inc.
v. Moore]

58 O.R. (3d) 87
[2002] O.J. No. 282
Docket No. C34147

Court of Appeal for Ontario
Finlayson, Catzman and Borins, JJ.A.
January 29, 2002

Civil procedure -- Certificate of pending litigation -- Order dismissing a motion to vacate a certificate of pending litigation not determinative of the issue of whether the registrant had a reasonable claim to an interest in land -- Role of motion judge on a motion to vacate limited to determining whether there is a triable issue in respect of whether the party registering the certificate has a reasonable claim to an interest in land -- Order dismissing a motion to vacate not a judgment in rem and not making the matter res judicata -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103.

AB and NM owned a property that had been their matrimonial home as joint tenants. Under a separation agreement, AB transferred his interest to NM, but he retained a right of first refusal to purchase the property. When NM signed an agreement to sell the home to G.P.I. Greenfield Pioneer Inc. ("GPI"), DH and MS ("the purchasers"), AB sued to enforce his right of first refusal. In his action, AB obtained a certificate of pending litigation, which he registered on the title of the property. NM moved to have the certificate vacated, but after finding that AB had "a reasonable claim to

an interest in [the] land", McTurk J. dismissed the motion.

Subsequently, AB purchased the property, and the purchasers sued NM for breach of contract, and they sued AB for damages under s. 103(4) of the Courts of Justice Act ("CJA"), which provides that a party who registers a certificate without a reasonable claim to an interest in land is liable for any damages sustained by any person as a result of its registration. NM did not defend, and at the commencement of the trial, AB moved for the determination of a question of law. On the motion, the trial judge, Lofchik J. ruled that the purchaser's claim under s. 103(4) of the CJA should be dismissed on the ground that the order of McTurk J. was in rem and the matter was res judicata on the issue of whether AB had a reasonable claim to an interest in land. The purchasers appealed.

Held, the appeal should be allowed.

Lofchik J. erred in finding that the decision of McTurk J. was a decision in rem and that the matter was res judicata in respect of any claims for damages under s. 103(4) of the CJA.

NM moved to have the certificate discharged under s. 103(6) (a)(ii) on the ground that AB did not have a reasonable claim to the interest in the land claimed. On such a motion, the role of the motion judge is to determine whether there is a triable issue in respect of whether the party registering the certificate has a reasonable claim to an interest in land but not to determine whether the party has or has not a reasonable claim to an interest in land. The role of the judge is analogous to the role of a judge on a motion for summary judgment who determines whether there is a genuine issue for trial. The decision that there is a triable issue does not support a plea of res judicata and was not a decision in rem. This is because no adjudication of the registrant's interest in the land is required on a motion to discharge a certificate of pending litigation. Although obtaining and registering a certificate may have the effect of turning the action into an action in rem, in the sense that the certificate gives notice that rights in land are being claimed, it is only if the result

of the action is a determination of the title to the property, that the action would result in a judgment in rem. Accordingly, the appeal should be allowed.

Cases referred to

420093 B.C. Ltd. v. Bank of Montreal (1995), 34 Alta. L.R. (3d) 269, 128 D.L.R. (4th) 488, [1996] 1 W.W.R. 561 (C.A.); Brock v. Crawford (1908), 11 O.W.R. 143 (K.B.); Chiu v. Pacific Mall Developments Inc. (1998), 19 R.P.R. (3d) 236, 24 C.P.C. (4th) 67 (Ont. Gen. Div.); Clock Investments Ltd. v. Hardwood Estates Ltd. (1977), 16 O.R. (2d) 671, 79 D.L.R. (3d) 129 (Div. Ct.); Galinski v. Jurashek (1976), 1 C.P.C. 68 (Ont. H.C.J.); Graywood Developments Ltd. v. Campeau Corporation (1985), 8 C.P.C. (2d) 58 (Ont. S.C.); Inwood v. Ivey, [1939] O.W.N. 56, [1939] 2 D.L.R. 101 (H.C.J.); McTaggart v. Toothe (1884), 10 P.R. 261 (Ont. Ch.); Mormick Investments Inc. v. Khoury, [1985] O.J. No. 1072 (H.C.J.); Procopio v. D'Abbondanza (1969), [1970] 1 O.R. 127 (C.A.); Willoughby v. Knight (1973), 1 O.R. (2d) 184, 39 D.L.R. (2d) 656 (H.C.J.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 103

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 21.01(1)(a)

Authorities referred to

Williston, W.B., and R.J. Rolls, The Law of Civil Procedure (Toronto: Butterworths, 1970)

APPEAL of an order of Lofchik J. (2000), 32 R.P.R. (3d) 54 (S.C.J.) dismissing an action on the grounds of res judicata.

Michael W. Kelly, for appellants.

David Thompson, for respondent.

The judgment of the court was delivered by

[1] BORINS J.A.: -- The issue in this appeal is the effect of an unsuccessful motion to discharge a certificate of pending litigation ("CPL") on a subsequent action for damages under s. 103(4) of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA") by the prospective purchasers of the land against which the CPL had been registered. On a motion under s. 103(6) (a)(ii) to discharge the CPL, which had been registered by Allan Beattie, the respondent in this appeal, McTurk J. declined to discharge the CPL on the basis of his finding that Mr. Beattie had "a reasonable claim to an interest in [the] land". Lofchik J. dismissed the prospective purchasers' claim for damages against Mr. Beattie under s. 103(4) of the CJA on the ground that the order of McTurk J., being res judicata, precluded their action. The prospective purchasers have appealed from the dismissal of their action. For the reasons that follow, I would allow the appeal.

The Facts

[2] The facts are brief and are contained in an agreed statement of facts. At the opening of trial, in reliance on the agreed facts, the respondent moved under rule 21.01(1)(a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for the determination of a question of law that he contended was determinative of the appellants' claim for damages under s. 103(4) of the CJA. The question of law was whether McTurk J.'s finding that Mr. Beattie had "a reasonable claim to an interest in [the] land" was determinative of the appellants' s. 103(4) claim.

[3] The real property in issue had been the matrimonial home of the respondent and his estranged wife, Nellie May Moore, which they owned as joint tenants. Pursuant to the terms of their separation agreement, Mr. Beattie transferred his

interest in the property to Ms. Moore. However, he retained a right of first refusal to purchase the property in the event that Ms. Moore decided to sell it.

[4] Ms. Moore decided to sell the property to the appellants. Their agreement of purchase and sale was conditional upon Mr. Beattie declining to exercise his right of first refusal prior to a specific time and date. A dispute arose between Mr. Beattie and Ms. Moore over his purported exercise of the right of first refusal. This resulted in a legal proceeding between them commenced by Mr. Beattie in which he sought to enforce his right to first refusal to purchase the property. Consequent to that proceeding, he obtained and registered a CPL on the title to the property prior to the closing date for the appellants' purchase of the property.

[5] As the appellants would not complete the transaction while the CPL was registered against the property, Ms. Moore moved, unsuccessfully, for an order discharging the CPL. Subsequently, arising from circumstances irrelevant to this appeal, Mr. Beattie purchased the property. As a result, the appellants commenced this proceeding against Ms. Moore and Mr. Beattie, seeking damages for breach of contract against her and damages under s. 103(4) of the CJA against him. Lofchik J. awarded the appellants damages of \$50,430 against Ms. Moore, who did not defend the action and, as I have indicated, dismissed their claim against Mr. Beattie.

The Relevant Legislation

[6] The relevant legislation is s. 103(1), (4) and (6) of the CJA, which reads as follows:

103(1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).

(4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration.

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(6) The court may make an order discharging a certificate,

(a) where the party at whose instance it was issued,

(i) claims a sum of money in place of or as an alternative to the interest in the land claimed,

(ii) does not have a reasonable claim to the interest in the land claimed, or

(iii) does not prosecute the proceeding with reasonable diligence;

(b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just.

(Emphasis added)

Reasons of McTurk J.

[7] It was in the context of the action brought against her by Mr. Beattie that Ms. Moore moved under s. 103(6)(a)(ii) to discharge the CPL that Mr. Beattie had registered against the title to the property. The motion was heard one week before Ms. Moore's transaction with the appellants was to be completed.

Mr. Beattie filed an affidavit in response to the motion in which he provided facts in support of his claim against Ms. Moore.

[8] McTurk J. endorsed the following reasons for refusing to discharge the CPL:

I find that the Plaintiff has a reasonable claim to an interest in land. Furthermore on the equities and considering the particular circumstances including the unique interest of the Plaintiff in the land; that there is no alternative claim for damages by the Plaintiff; that damages could adequately compensate the Defendant if she was successful at Trial; that to vacate the Certificate of Pending Litigation would virtually erase the Plaintiff's claim, I hold that the Application to discharge the Certificate of Pending Litigation be dismissed. Costs in the cause.

[9] It is significant to observe that Mr. Beattie's responding affidavit contained this acknowledgment:

41. I am aware of the provisions of Section 116(4) [now s. 103(4)] of the Courts of Justice Act, S.O. 1984, c. 11 as amended which provides that I can be held liable for any damages sustained by any person (including GPI Greenfield Pioneer Inc.) as a result of the registration of the Certificate of Pending Litigation if this Honourable Court should later determine that the Certificate was registered without a reasonable claim to the interest in the land.

Reasons of Lofchik J.

[10] The appellants' claim for damages against the respondent is based on two causes of action: (1) the statutory claim created by s. 103(4) of the CJA, and (2) the tort of inducing a breach of contract or intentional interference with contractual arrangements.

[11] At the opening of trial the respondent moved for the determination of two questions of law, which the trial judge described as follows [at p. 56 R.P.R.]:

(i) Is the finding of McTurk, J., that the plaintiff has a reasonable claim to an interest in the land binding on the plaintiffs in this action so as to preclude a claim for damages under s. 103(4) of the Courts of Justice Act.

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(ii) Is a claim for damages founded on the tort of inducing breach of contract or intentional interference with contractual arrangements arising from a registration of a Certificate of Pending Litigation sustainable on the facts of this case as stated above.

[12] The trial judge gave these reasons [at pp. 56-57 R.P.R.] for deciding the first question in favour of the respondent:

Res Judicata

The doctrine of res judicata or issue estoppel, in the context of an interlocutory motion, is limited to issues which the motions judge is required to decide in order to dispose of the motion before him. *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.* (1998), 42 O.R. (3d) 618 (Ont. C.A.).

In deciding whether or not to vacate the Certificate of Pending Litigation, McTurk, J. was required to decide whether Beattie had a reasonable claim to an interest in land. Having made this finding, his decision is a decision in rem and the matter is res judicata in respect of any claims for damages under s. 103(4) of the Courts of Justice Act, and it is not open for the plaintiffs in this action to re-litigate the issue. Therefore, any claim for damages in this action based on s. 103(4) of the Courts of Justice Act must fail.

[13] The trial judge also answered the second question in favour of the respondent. Although the appellants have appealed from both findings, in oral argument their counsel conceded that the appellants' real attack is upon the correctness of the trial judge's answer to the first question. Although counsel

contended that the trial judge had also erred in his answer to the second question, he did not pursue this ground of appeal indicating that if the appellants were successful on the first ground they would only pursue their claim for damages under s. 103(4) of the CJA. Accordingly, I will express no opinion on the second ground of appeal.

Analysis

[14] In my view, the trial judge erred in finding that the decision of McTurk J. was a decision in rem and that "the matter is res judicata in respect of any claims for damages under s. 103(4)" of the CJA. A brief review of the nature and purpose of a CPL and the nature of a motion to discharge a CPL will be helpful in explaining why I have reached this conclusion.

[15] Section 103(1) of the CJA entitles a plaintiff, who has commenced a proceeding in which an interest in land is in question, to obtain a CPL and to register it against the title to the land. The registration of the CPL protects the plaintiff by effectively preventing disposition of the property prior to judgment. As such, a CPL can be as effective as an interlocutory injunction in restraining dealings with the property as, generally speaking, it is considered to be an encumbrance on the land. See *Brock v. Crawford* (1908), 11 O.W.R. 143 at p. 146 (K.B.). No rights are given by a CPL. The effect of registration of a CPL on the title to land is to give notice that rights in respect to the land are being claimed in a pending court proceeding.

[16] As severe hardship may result to the owner of the land as the result of the registration of a CPL, s. 103(6) confers a broad discretion on the court to discharge a CPL and, depending on the circumstances, to impose appropriate terms. As the practical effect of a CPL is similar to that of an interlocutory injunction restraining dealing with the land, to discourage abuse s. 103(4) imposes liability for damages resulting from the registration of a CPL where the registrant is "without a reasonable claim to an interest in the land". For an historical discussion of a certificate of lis pendens, which

was the term by which a CPL was previously known, see W.B. Williston and R.J. Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970), Vol. 2, at pp. 599-607 and *Brock v. Crawford*, supra, at pp. 145-47 O.W.R.

[17] Subsection 103(6) confers a broad discretion upon the court to discharge a CPL upon a demonstration by the defendant in the action in which the CPL was obtained of any of the grounds contained in the subsection, the last of which invites an examination of the equities as between the parties. How such discretion is to be exercised was described by Steele J. in *Clock Investments Ltd. v. Hardwood Estates Ltd.* (1977), 16 O.R. (2d) 671 at p. 674, 79 D.L.R. (3d) 129 (Div. Ct.):

I am of the opinion that the governing test is that the Judge must exercise his discretion in equity and look at all of the relative matters between the parties in determining whether or not the certificate should be vacated.

[18] In this case, Ms. Moore based her motion to discharge the respondent's CPL on s. 103(6)(a)(ii), contending that he did not have a reasonable interest in the land claimed. In *Procopio v. D'Abbondanza* (1969), [1970] 1 O.R. 127 at p. 128, this court stated that a certificate of *lis pendens* should not be discharged where "there is a triable issue as between the parties as to an interest in the lands in question . . .". It is significant for the purpose of the issue raised in this appeal that at p. 128 O.R. the court went on to make it clear that in finding that there was a triable issue as to an interest in the lands it was "not in any way deciding the rights of the parties in any respect, either as to the lease, the assignment of the lease or the right to register the assignment of the lease", which were the issues to be decided in the pending action. See, also, *Brock v. Crawford*, supra, at p. 147 O.W.R.; *Inwood v. Ivey*, [1939] O.W.N. 56 at p. 58, [1939] 2 D.L.R. 101 (H.C.J.); *Willoughby v. Knight* (1973), 1 O.R. (2d) 184 at p. 195, 39 D.L.R. (3d) 656 (H.C.J.); *Galinski v. Jurashek* (1976), 1 C.P.C. 68 (Ont. H.C.J.).

[19] Although the cases to which I have referred were concerned with the test to be applied on a motion to discharge

a certificate of *lis pendens* obtained under the relevant provisions of the Judicature Act prior to its replacement by s. 103(1) of the CJA, which introduced the term CPL, there is no reason in principle why the earlier jurisprudence should not apply to a motion under s. 103(6) of the CJA. Indeed, cases which have been decided since the CJA came into force in 1984 continue to apply the earlier jurisprudence. See, e.g., *Graywood Developments Ltd. v. Campeau Corporation* (1985), 8 C.P.C. (2d) 58 (Ont. S.C.); *Chiu v. Pacific Mall Developments Inc.* (1998), 24 C.P.C. (4th) 67, 19 R.P.R. (3d) 236 (Ont. Gen. Div.).

[20] It follows that on the motion to discharge the CPL the onus was on the moving party, Ms. Moore, to demonstrate that there was no triable issue in respect to whether the respondent had "a reasonable claim to the interest in the land claimed". As such, the onus is analogous to that of a defendant seeking a summary judgment dismissing a plaintiff's claim under Rule 20 of the Rules of Civil Procedure. As on a Rule 20 motion, the role of the motion judge was not to find as a fact whether the respondent had, or did not have, "a reasonable claim to the interest in the land" which was the subject of the claim in his action against Ms. Moore. That issue remained to be determined at the trial of the pending action. Just as the finding of a motion judge on a Rule 20 motion that a genuine issue for trial exists in respect to a plaintiff's claim cannot support a plea of *res judicata* at the trial of that issue, neither can a finding of a motion judge on a s. 103(6) motion to discharge a CPL that there is a triable issue in respect to whether the registrant has a reasonable claim to the interest in the land support a plea of *res judicata* at the trial of a claim for damages under s. 103(4) of the CJA. This is because no adjudication of the registrant's interest in the land is required on a motion to discharge a CPL.

[21] Moreover, to preclude a claim for damages under s. 103(4) of the CJA on the basis of a ruling under s. 103(6) would be contrary to the principles on which a plea of *res judicata* is based. See, e.g., *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488, 34 Alta. L.R. (3d) 269 (C.A.). If a ruling on a motion to discharge a CPL could

properly be considered as determinative of whether a registrant had a reasonable claim to an interest in the land, this would render meaningless a claim for damages under s. 103(4).

[22] Although in his reasons for declining to discharge the CPL McTurk J. appears to have made a finding that the respondent had a reasonable claim to an interest in land, it was not necessary for him to do so. Read as a whole, his reasons indicate that he appreciated that in ruling on the motion he was exercising the discretion conferred by s. 103(6). In my view, it is clear that in declining to discharge the CPL McTurk J. correctly applied the test on a motion under s. 103(6)(a)(ii), namely, whether there is a triable issue as to the reasonableness of the registrant's claim to an interest in the land. There is no doubt that the evidence in the respondent's affidavit opposing the motion to discharge the CPL supports such a result. The functional effect of McTurk J.'s ruling was to permit the registration of the CPL to remain on the title to the property pending the trial of the respondent's claim against Ms. Moore. As he did not adjudicate the issue raised by the appellants in this action, his ruling cannot preclude the appellants from doing so.

[23] It follows that the trial judge was incorrect in holding that McTurk J.'s decision gave rise to a successful plea of res judicata in this action. It appears that the trial judge, in concluding that "McTurk J. was required to decide whether Beattie had a reasonable claim to an interest in land", did not appreciate that the role of the court on a motion to discharge a CPL under s. 103(6)(a)(ii) of the CJA is limited to deciding whether there is a triable issue in respect to whether the registrant has a reasonable claim to the interest in the land claimed.

[24] This conclusion conforms with the caution issued by this court in *Procopio*, supra, at p. 128 O.R. that the result of a motion to discharge a certificate of lis pendens is not determinative of the issue of whether the registrant in fact has a reasonable interest in the land claimed. This was also the opinion of Henry J. in *Mormick Investments Inc. v. Khoury*, [1985] O.J. No. 1072 (H.C.J.), which was a claim for damages

arising out of the registration of cautions against the plaintiffs' lands. Prior to the action, Linden J. had vacated one of the cautions on the ground that the defendant had no interest in the land. Henry J. rejected the submission that the issue decided by Linden J. was res judicata. At para. 37, Henry J. stated:

While [Linden J.] clearly found that the plaintiff had no interest in the lands the proceeding before him was interlocutory in nature, designed to decide only whether the cautions ought to remain on title until trial, or be vacated. The motion to vacate them was not appropriate to dispose of the issue finally; to say that it had that effect would have the result that, because the motions court judge found on affidavit evidence that the plaintiff could not succeed as the material before him disclosed no interest in the land, it would foreclose to the plaintiff the resolution of the action on its merits at a full trial.

[25] It would also appear that the respondent, in para. 41 of his affidavit in response to the motion to discharge the CPL which I have set out in para. 9, was of the opinion that the purpose of the motion was not to adjudicate whether he had a reasonable claim to an interest in the land. In his affidavit he acknowledged his potential liability under what is now s. 103(4) of the CJA should the court "later determine that the Certificate was registered without a reasonable claim to the interest in the land".

[26] Finally, I would add that the trial judge also erred in characterizing the order of McTurk J. as "a decision in rem". As McTurk J. was not adjudicating whether the respondent had a reasonable claim to an interest in land, his ruling did not amount to a judgment upon the rights and claims to the land asserted by the parties to the action in which the CPL had been obtained. Indeed, no rights are given by a CPL; its entire effect is only to serve as notice that rights in land are being claimed. Although obtaining and registering a CPL may have the effect of turning the action in which it was obtained from an action in personam into an action in rem, it is only if the result of the action is a determination of the title to the

property, or some interest therein, that the action would result in a judgment in rem. See *McTaggart v. Toothe* (1884), 10 P.R. 261 at p. 262 (Ont. Ch.).

Conclusion

[27] For the foregoing reasons, I would allow the appeal, set aside the judgment of the trial judge dismissing the appellants' action and order that the respondent's motion made at the outset of the trial be dismissed insofar as it pertains to the appellants' claim for damages under s. 103(4) of the CJA with the costs of the motion reserved to the judge hearing the appellants' claim. The appellants are entitled to their costs of this appeal.

Order accordingly.