



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Austin v. Dunne*, 2023 NLSC 30

Date: February 27, 2023

Docket: 201901G5152

BETWEEN:

PETER AUSTIN

PLAINTIFF /

DEFENDANT BY COUNTERCLAIM

AND:

DARLENE DUNNE

DEFENDANT /

PLAINTIFF BY COUNTERCLAIM

Before: Justice Vikas Khaladkar

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

February 9, 2023

Summary:

The Applicant's request for a Preservation Order was granted.

Appearances:

Jonathan Martin Appearing on behalf of the Plaintiff /
Defendant by Counterclaim

Johnathan E. Earle Appearing on behalf of the Defendant /
Plaintiff by Counterclaim

Authorities Cited:

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

KHALADKAR J.:

INTRODUCTION

[1] The parties have an ongoing dispute concerning a house located at 2 Hayes Road, in the Town of Harbour Main, in the Province of Newfoundland and Labrador.

[2] On April 7, 2021 the parties attended a Settlement Conference at which they agreed to a Consent Order by virtue of which the subject property (the “property”) would be sold and a summary trial would be conducted to determine the parties’ entitlement, if any, to the proceeds of the sale.

[3] At the time the Consent Order was issued there was a mortgage outstanding against the property. The Applicant, Mr. Austin, was permitted to reside in the property so long as he continued to make the bi-weekly mortgage payments and paid the monthly insurance premium.

[4] In May, 2022 the Respondent, Ms. Dunne, paid the balance of the mortgage in the amount of \$27,778.09. The property was sold on November 8, 2022 and the sum of \$124,216.23 is currently being held in trust by the Respondent's solicitors.

APPLICANT ARGUED

[5] The Applicant applied, pursuant to Rule 22.02 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the "*Rules*") for a Preservation Order. He argued that the monies currently held in the trust by the Respondent's solicitors should remain in trust pending the outcome of the proceedings in this action.

[6] The Applicant argued that the Respondent's response should, by rights, have been made under Rule 22.02 of the *Rules* - not for injunctive relief under Rule 22.01 of the *Rules*. He argued that a Preservation Order is appropriate under the circumstances, but there is no equitable reason to return funds to the Respondent on account of her paying out the mortgage.

[7] The Applicant argued that when the house was sold there was no mortgage. The net proceeds, after realtor and legal fees, were deposited into trust.

[8] The Applicant's position is that the summary trial is only a month away. He argued that the status quo should be maintained until the parties have had an opportunity to advance their claims, and defenses, in Court.

RESPONDENT ARGUED

[9] The Respondent took the position that she should be paid the amount expended by her in discharging the mortgage against the property in advance of a

summary trial being conducted in the month of March, 2023. She indicated that she is suffering financial hardship as a result of the inability to access these funds.

[10] The Respondent's position, put simply, is that she was not obligated to prepay the mortgage. That the mortgage would have been paid at the time the sale of the house was closed and, therefore, the net proceeds of the sale would have been \$96,438.14. She requests the return of the monies paid by her to discharge the mortgage.

ANALYSIS

[11] Under Rule 22.02 of the *Rules* the Court is given a wide discretion in determining the terms on which to order the detention, custody or preservation of property.

[12] The Applicant alleges that the parties entered into a partnership agreement to acquire, and develop, the property. He said that he expended monies and provided material and labour to renovate the property. He said that he is entitled to half of the proceeds of the sale of the property together with damages for the breach of the partnership agreement.

[13] The Respondent denied that any such agreement existed and said that she is entitled to all of the funds from the sale of the house. She has counterclaimed against the Applicant for damages she allege she has suffered as a result of the Applicant's actions.

[14] I have no doubt that there is a serious issue that needs to be tried. We are only a few weeks away from conducting the trial in this matter.

[15] Counsel for the Respondent indicated, in his oral argument, that the Respondent is finding it difficult to make ends meet because she does not have her money in hand.

[16] If the Respondent is completely successful at trial all the money currently held in trust, including the money that she paid to discharge the mortgage, will be paid to her. If she is completely unsuccessful at trial then she stands to, potentially, lose all of the money that is currently held in trust and have a judgment registered against her for any deficiency.

[17] If I grant payment out of the mortgage monies as requested by the Respondent, the Applicant would not suffer any immediate harm. If he is completely successful at trial he may be forced to take additional measures to recover the \$27,778.09 paid out to the Respondent.

[18] If I grant the Preservation Order, the Respondent would be required to carry on, as she has done since May, 2022 without the benefit of the money that she paid. The Respondent would only have to do so for the time it requires to conclude the summary trial (in a month's time) and to have a decision rendered. The inconvenience would be for a matter of two or three months at the most.

[19] Rule 22.02 of the *Rules* states as follows:

Detention, preservation or inspection of property

22.02. (1) The Court may, on such terms as it thinks just, make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding, or as to which any question may arise therein, or which may be used as evidence therein, or for the inspection of any such property in the possession of a party.

(2) For the purpose of enabling an order under rule 22.02(1) to be carried out, the Court may authorize a person to enter any land or building of a party.

(3) Where the right of a party to a specific fund or to any amount of money is in dispute in a proceeding, the Court may order the fund or the amount to be paid into Court or otherwise secured.

[20] Given the short time between now and the date set for trial, I do not see any urgency to upset the status quo.

CONCLUSION

[21] The funds held by the Respondent's solicitors shall continue to be held in trust until further order of the Court.

[22] The costs of this Application shall be in the cause.

VIKAS KHALADKAR
Justice