

IN THE MATTER OF THE
CIVIL ENFORCEMENT ACT, S.A. 1994, c.C-10.5

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF FORT McMURRAY

BETWEEN:

FORT McMURRAY HOUSING

Applicant

- and -

ROYAL BANK OF CANADA, TERRY FLYNN,
LEO HALEY and ARLENE MEDVESEK

Claimants

- and -

DOUG GORDON STOLTE

Respondent

MEMORANDUM OF DECISION
of the
HONOURABLE MR. JUSTICE LEE

A. Facts

[1] This case arises out of a dispute regarding the ownership of a mobile home initially owned by the Respondent and situated on the Applicant's land pursuant to a lease agreement.

[2] The chain of events that lead to this application began in June of 1998 when the Respondent, Mr. Stolte, decided to move to Edmonton. As a result of his decision to move, Mr. Stolte put his mobile home up for sale on June 24, 1998.

[3] Apparently he discussed his plans with the Applicant, Fort McMurray Housing, and was under the impression that rather than making his lease payments on a monthly basis, he would pay all rent owing when he sold the home.

[4] However, by the fall of 1998 the Applicant was concerned about the amount of rent that was owing and decided to have the home seized by a bailiff on September 10, 1998. There are several difficulties arising from the seizure.

[5] First, because Mr. Stolte was no longer living in the home, he was not personally served with the seizure documents. The documents were instead attached to the door of the mobile home. The bailiff also attempted to serve the documents via double registered mail, however, the acknowledgment of receipt was returned unsigned. By all accounts, it appears that Mr. Stolte was never personally served with the notice of the seizure.

[6] Second, it appears that a search conducted by the bailiff prior to the seizure failed to uncover the fact that the home had already been seized in April 1997 by the Royal Bank of Canada, who had and continue to have a registered purchase money security interest registered against the home.

[7] On October 14, 1998 Mr. Stolte accepted an offer of \$32,000 for the home from a third party. Upon receiving the offer, Mr. Stolte requested that the Royal Bank refrain from acting on their security until after the transaction was completed. The Royal Bank agreed and also contacted Fort McMurray Housing, requesting that it also refrain from acting. Unfortunately, the purchaser was unable to obtain financing and the offer of \$32,000 was withdrawn.

[8] On October 22, 1998, after learning that the offer of \$32,000 had been withdrawn, the Applicant took steps to sell the home. After being assured by the bailiff that no objection to the seizure had been filed, the applicants solicited offers through newspaper advertisements in a local Fort McMurray newspaper, *Fort McMurray Today*. The ad ran on October 30, 1998 and November 7, 1998 and is found as exhibit "L" in the affidavit of Robin Lakes.

[9] On November 3, 1998 Mr. Stolte received a second offer on the home for \$21,000 which he accepted on November 11, 1998. In order to meet the closing date of November 20, 1998, Mr. Stolte contacted both the Royal Bank and the Applicant to obtain payout statements. The Royal Bank agreed; however, Fort McMurray Housing refused, taking the position that because it had already begun the tender process, it was not in a position to allow Mr. Stolte to sell the home. As a result of the Applicant's refusal, Mr. Stolte was unable to complete the sale.

[10] By the closing date for bids on November 16, 1998 the Applicants had received four offers. In addition, they had also received a late offer of \$24,000 from Arlene Medveszek after the closing deadline. The highest bid submitted on time belonged to Leo Haley and Terry Flynn at \$12,756.

[11] There is some dispute as to what occurred after the bid had been accepted. Fort McMurray Housing claims that Haley and Flynn missed the balance payment that was required within seven day of acceptance. Haley and Flynn maintain that they were always ready to pay the balance, but that the Applicant had decided to award the bid to Ms. Medveszek because her

bid was higher, notwithstanding the fact that the Applicant had already accepted Haley and Flynn's bid.

B. Analysis

I Priority of Claim

[12] Before examining which party had the right to sell the mobile home, it is necessary to sort out the order of claims on the proceeds of the sale. From the facts described above, the two principle claimants are the Royal Bank and Fort McMurray Housing.

[13] The Royal Bank has a purchase money security interest in the mobile home whereas the Applicant's claim is in the form of a landlord's distress.

[14] It is clear from *Blackfoot Mobile Home Park v. Royal Bank of Canada et al.* (1995), 168 A.R. 303 (Alta Q.B.) that as a result of what is now s. 104(c)(iii) of the *Civil Enforcement Act*, S.A. 1994, c.C-10.5, a purchase money security interest will have priority over a landlord's distress.

[15] Therefore, because the Royal Bank's claim is a purchase money security interest and the Applicant's claim is in the form of a landlord's distress, the Royal Bank has priority with respect to any sale proceeds of the mobile home.

[16] Second in line will then be Fort McMurray Housing, followed by the Respondent who may claim any equity remaining after the creditors have been paid.

II Seizure and Sale

a) Fort McMurray Housing

[17] Fort McMurray Housing claims to have validly seized the mobile home under the *Civil Enforcement Act*. However, there are several impediments to this claim.

[18] First, there is the issue of previous seizure. As indicated in the facts, the Royal Bank had already seized the mobile home prior to Fort McMurray Housing's seizure of September 10, 1998. This raises the question of what legal effect a second seizure has.

[19] A helpful case in this area is *Bank of Nova Scotia v. Neufeld Evergreen Mobile Home Park Ltd. and Purschke* (1985), 65 A.R. 227 (Alta Q.B.). Although the issue in *Neufeld* arose in respect to priority of claim, the situation is similar to the fact situation here.

[20] In *Neufeld*, the landlord seized the property in question under a landlords distress, however, the chattel had already been seized by the Bank under a chattel mortgage.

[21] Stratton J. determined that the landlord could not distrain goods and chattels that were already *custodia legis* (in the custody of or keeping of the law). Because the mobile home had already been seized by the sheriff on behalf of the Bank, Stratton J. determined that the mobile

home was already *custodia legis* at the time of the second seizure by the landlord. As a result, the second seizure was deemed to have no legal effect.

[22] This interpretation of the law was later supported in *Evergreen Mobile Home Park v. Fuchs* (1995), 171 A.R. 321 (Alta Q.B).

[23] If one applies the reasoning in *Neufeld* to the current situation, it is apparent that because Fort McMurray Housing's seizure occurred after the Royal Bank had seized, it is of no legal effect. Thus, it would appear that Fort McMurray was not entitled to sell the mobile home. However, the Applicant suggest that the rule from *Neufeld supra* be reconsidered.

[24] First, the Applicant argues that since the duties of the sheriff have been privatized by the *Civil Enforcement Act*, it is no longer clear that property in the hands of private bailiffs, rather than the sheriff in *Neufeld* and *Fuchs*, is still property *custodia legis*.

[25] Second, the Applicant argues that s. 58(14) of the *Personal Property Security Act*, (P.P.S.A.) S.A. 1988, c. P-4.05 (as amended), although not in issue here, creates a conflict between the terms of the *Personal Property Security Act* and the *custodia legis* rule.

[26] Section 58(14) of the P.P.S.A. reads:

A seizure shall not affect the interest of a person who under this Act or under any other law has priority over the rights of the secured party.

[27] Finally, the Applicant points to the *obiter* comments of Master Funduk in *Canada Life Assurance v. Kupka* (1991), 118 A.R. 203 where he states:

I think the result that subsequent seizures are "void" or that the chattels cannot be seized by more than one creditor requires re-analysis. I think that it is quite workable to say that the Sheriff has a "special property" in any chattels that he seizes but that subsequent seizures are not prohibited, at least as long as the Sheriff does them. Surely it should be just a matter of priorities between competing creditors, as it was in this case. To say that there cannot be subsequent seizures is to prevent other creditors from exercising the rights that they would otherwise have to go against the chattels.

As long as all seizures are done by the Sheriff I see no potential for harm in more than one seizure.

That problem will have to be left for another day and probably for higher judicial authority.

[28] In light of these three arguments, the Applicants have urged me to reconsider the *custodia legis* rule in order to find that the second seizure was of legal effect, and that they were entitled to sell the mobile home.

[29] Even if I accept that the *custodia legis* rule does not apply in this case, the Applicant is still required to establish that the property was properly seized and disposed of under the *Civil Enforcement Act*. Seizure of property under a landlord's distress is covered by s. 104 of the *Civil Enforcement Act* which reads:

104 In carrying out a distress by a landlord for rent the following applies: (a) sections 34(2), 45 46, 47(1) and 48 apply to the distress as if it were a seizure made pursuant to writ proceedings;

As a result of s. 104, the Applicant was obliged to follow the procedures under ss. 34(2), 45, 46, 47(1) and 48 of the *Civil Enforcement Act*. Most relevant to the investigation here are ss. 45 and 46.

[30] Section 45 reads:

45(1) Personal property that is described in a notice of seizure is seized when a bailiff,

(a) while at the place at which the property is located, serves the seizure documents on

(i) the enforcement debtor or an adult member of the enforcement debtor's household,

(ii) an adult occupying or working at the location at which the property is located, or

(iii) a person who has possession of or control over the property,

or

(b) subject to the regulations, attaches to the property documents indicating that the property is seized or posts the notice of seizure in a conspicuous place at the location at which the property is located.

(2) Notwithstanding subsection (1), where this or another enactment sets out a different seizure process in respect of certain property or classes of property, that property is seized when it is seized pursuant to that seizure process.

(3) Where a bailiff effects seizure under subsection (1) or under section 57(1) but at the time of the seizure did not serve the seizure documents on the enforcement debtor or an adult member of the debtor's household, an agency must serve the seizure documents on the debtor as soon after effecting seizure as is practicable.

(4) *Notwithstanding subsection (3), if an agency is unable to serve the seizure documents*

(a) on the enforcement debtor,

or

(b) on an adult member of the enforcement debtor's household, the instructing creditor may proceed in the same manner as if the enforcement debtor had been served with the seizure documents and had filed a notice of objection in respect of the seizure. [Emphasis added]

[31] Section 45 allows the bailiff to proceed with a seizure where he or she is unable to serve notice on the debtor or an adult member of his or her family. However, if a seizure is performed without notice to the debtor, the bailiff must proceed as though the debtor has filed a notice of objection. In order to determine how the bailiff is to proceed when a notice of objection is filed, one must look to s. 46 which reads:

46(1) Where an enforcement debtor wishes to object to a seizure of personal property, the enforcement debtor must within 15 days from the day that

(a) the seizure documents are served under section 45(1)(a) (i) on the enforcement debtor or an adult member of the enforcement debtor's household, or

(b) the seizure documents are served under section 45(3) on the enforcement debtor, serve a notice of objection in the prescribed form on the agency that carried out the seizure.

(2) On being served with a notice of objection, the agency shall not sell or otherwise dispose of the property unless permitted to do so by the Court. [Emphasis added]

[32] As a result of section 46, where property has been seized and a notice of objection filed, the bailiff cannot dispose of the property without the permission of the court. If one combines the effect of both section 45 and 46, it appears that where a chattel is seized without personal notice to the debtor, the bailiff cannot dispose of the property without the permission of the court.

[33] If we apply these sections of the *Civil Enforcement Act* to the case at hand, it follows that Fort McMurray Housing was never entitled to sell the mobile home. Personal service was never effected on Mr. Stolte or an adult member of his family. Although notice was posted to his door, there is no confirmation that he received that notice. Further, Mr. Stolte did not receive notice through registered mail. In fact, Mr. Stolte did not learn of the seizure of his home until October 14, 1998 when he was informed over the telephone by an employee of the Applicant.

[34] As a result, the bailiff was only allowed to proceed with the seizure under the terms of s. 45(4)(b), and was obligated to proceed as though Mr. Stolte had filed a notice of objection. With

a notice of objection filed, the bailiff had no legal authority to offer the mobile home up for sale without the permission of the Court. As it is clear from all accounts, the permission of the court was neither sought nor obtained. The bailiffs had no authority to offer the mobile home for sale and no authority to effect a sale of the mobile home to any person who submitted a bid.

[35] As a result of the forgoing, I conclude that Fort McMurray did not comply with the terms of the *Civil Enforcement Act* when seizing and attempting to sell the mobile home. Therefore, I conclude that because the seizure and sale was not executed in accordance with the *Civil Enforcement Act*, the sale by tender was invalid and therefore void.

b) The Bidders

[36] As a result of the analysis above, the applicants were not authorized by law to offer the mobile home up for sale by tender. Consequently, any purchase through the sale by tender is void *ab initio* and cannot be enforced against Mr. Stolte.

[37] Since I have concluded that Fort McMurray Housing had no authority to pass title on the home, any dispute arising out of the sale by tender is between the respective bidders and Fort McMurray Housing.

[38] The materials filed before me indicate that Haley and Flynn claim to be the successful bidders. The starting point for assessing such a claim is outlined by *R. v. Ron Engineering* (1981), 119 D.L.R. (3d) 267. Under *Ron Engineering*, the bidding process is separated into two contracts. The first contract, contract A, is made up of the set of terms under which the bid is submitted. The second contract, contract B, is the contract which arises when a particular bid is accepted. In this case, both the terms of contract A and contract B are contained in the newspaper ad placed on behalf of the Applicant.

[39] Judging by the wording of the ad, the Applicant does not appear to be obligated to sell to any particular bidder. As a result, there are no real rights arising from the submission of a bid, and contract A is of little importance.

[40] However, rights do arise if a bid is accepted. According to the contract B portion of the ad, the successful bidder has seven days to pay the balance of the purchase price.

[41] It is apparent that Haley and Flynn's bid was accepted on the closing date of November 16, 1998. As a result, contract B was brought into effect giving Haley and Flynn seven days in which to pay the balance. Unfortunately, it is at this point that the stories diverge.

[42] Haley and Flynn maintain that they were prepared to pay the balance on the day their bid was accepted; whereas the Applicant states that Haley and Flynn breached contract B by failing to make the balance payment within the allowed seven days. In light of this dispute regarding the facts surrounding the ultimate rejection of Haley and Flynn's bid, a trial of the issue would be necessary to settle the dispute. However, I leave it to the parties which course they wish to take on this issue.

c) Stolte's Claim

[43] Although the Applicant's sale of the mobile home was void, it does not necessarily follow that Mr. Stolte is entitled to sell the home himself. In order to determine whether Mr. Stolte has the right to sell the home, one must look back to what would have occurred had the terms of the *Civil Enforcement Act* been followed.

[44] Under s. 46 of the *Civil Enforcement Act*, an application should have been made before the court before the mobile home could be sold. The respondent submits that had this occurred, he would have asked the court to grant him relief under s. 10 of the *Judicature Act*, R.S.A. 1980, c. J-1 which reads:

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

The respondent argues that where a debtor has a substantial equity in a property, it is the practice of the Alberta Courts to grant relief under this section. As of November 20, 1998, the Respondent owed \$9,519.81 to the Royal Bank, and \$2,387.22 (including seizure costs) to Fort McMurray Housing, for a total of \$11,907.03. Based on a sale price of \$24,000, Mr. Stolte had over \$12,000 in equity remaining in the home. In my opinion, given the amount of equity Mr. Stolte has to lose, he should be allowed an opportunity to sell the property himself.

[45] Mr. Stolte has also made two further requests. First, he has asked that he be allowed to sell the home to Ms. Medveszek who submitted the highest bid, albeit late, in the sale by tender conducted on behalf of Fort McMurray Housing. Material filed before me indicates that Ms. Medveszek is still interested in purchasing the home, and I see no reason why the respondent should not be allowed to negotiate a sale with her.

[46] Second, Mr. Stolte has requested that, should he be unable to sell the home to Ms. Medveszek, he be allowed a further 3 months to find another purchaser.

III *Seizure Costs and Rent Payments*

[47] As a final request, Mr. Stolte has asked that he only be held liable for rental arrears up to November 20, 1998. Essentially, Mr. Stolte argues that because the Applicant was responsible for his failure to meet the closing date of November 20, 1998 for the sale of his home, he should not have to carry the burden of further rent payments past that date. Further, because the Applicant was the cause of his failure to sell by November 20, 1998, he has asked that any interest accumulated on the amount owing to the Royal Bank from November 20, 1998 onward be deducted from the Applicant's claim against his home.

[48] This is a difficult point to decide.

[49] On the one hand, it appears as though Fort McMurray Housing believed that they were acting within their rights in selling the home. They relied on the bailiffs to conduct searches properly and ensure that the seizure was performed in accordance with the *Civil Enforcement*

Act. In fact, the seizure was done properly. The only irregularity was in the attempted sale of the home.

[50] Further, the Applicant is well within its rights to request that rent continue to be paid while the Respondent's mobile home is on its property. The Respondent is an overholding tenant under the *Mobile Home Site Tenancy Act*, R.S.A., 1982, c. M-18.5, and, under that *Act*, the Applicant, as landlord, is entitled to collect all rent owing.

[51] On the other hand, it is difficult to see what reason the Applicant had for denying the plaintiff a payout statement when he requested it. The Applicant submits that they felt that it was required to continue with the sale by tender; however, this does not seem conclusive of the issue.

[52] There is no indication that the Applicant was bound in any way to continue with the sale by tender process. If one looks at the ad that the Applicant used to solicit bids for the home, one can see that there are no obligations placed on Fort McMurray Housing to accept any of the bids received.

[53] In fact, in certain circumstances, the Applicant would be prevented from accepting bids that were not "commercially reasonable".

[54] One would have thought that if the Applicant was entirely concerned about repayment, they would have welcomed the chance to allow the respondent to sell the home. As a result, it is somewhat difficult to characterize the actions of the Applicant as completely innocent.

[55] However, if I am forced to weigh the evidence and characterize the actions of both parties, I am unable to accept the Respondent's assertion that this situation is entirely the Applicant's fault. While it is true that the Applicant failed to provide Mr. Stolte with a payout statement, it is also evident that the Respondent was not as co-operative as he could have been in attempting to obtain the statement. For example, Mr. Stolte contributed to this situation by refusing to disclose any of the details of the proposed sale to the Applicant.

[56] The fact remains that the Respondent has had his mobile home on the Applicant's land and has refused to pay rent since June of 1998. He is in violation of his rent agreement, and I would require greater proof of wrongdoing on the part of Fort McMurray Housing before I would be compelled to abrogate Fort McMurray Housing's right to continue collecting rent until the sale of the home.

[57] The same analysis applies to the issue of interest payments payable to the Royal Bank. Again, I would need to find considerably more culpability on the part of Fort McMurray Housing before I would be prepared to make it responsible for the interest accumulated on the Royal Bank loan since November 20, 1998.

[58] In the circumstances I do not think the facts here warrant the actions that Mr. Stolte has requested regarding rent and interest. As a result, Mr. Stolte is responsible to the Applicant for all rent owing up to the sale of the home. Mr. Stolte is also responsible for all interest accumulated on the Royal Bank loan.

[59] Mr. Stolte will have three months to sell the home. However, should he fail to sell the home within the 3 months I have allowed, the Applicant may proceed with the sale.

DATED at Edmonton, Alberta this 25th day of February, 1999.

J.C.Q.B.A.

APPEARANCES:

Rana W. Muwais
for the Applicant

Brian J. Asmundson
for the Claimants, Terry Flynn and Leo Haley

Dennis E. Bayrak
for the Respondent