Lewis v. Romita

[1980] O.J. No. 2806,
13 R.P.R. 188, 3 A.C.W.S. (2d) 225, No. 24650/78
Ontario Supreme Court - High Court of Justice
Southey J.
February 7, 1980

[1] SOUTHEY J. (orally):-- The plaintiff is the owner and occupant of a residential property, 130 Pritchard Avenue, located on the north side of Pritchard Avenue, in the borough of York. The property was purchase by the plaintiff and her late husband in 1943 and she has lived there continuously since that time.

[2] The defendant is the owner of a commercial property located on the northwest corner or Pritchard Avenue and Jane Street. The defendant's property, extends back from Jane Street along the north side of Pritchard Avenue, so that the rear boundary of his property forms the easterly sideyard boundary of the plaintiff's property.

[3] The defendant purchased his property in 1975. At the time the defendant purchased the property, the fence between the properties of the plaintiff and the defendant was not located precisely on the boundary between the two properties, as determined by the descriptions contained in the registered instruments, but rather was located 1.8 feet east of the southwest corner of the plaintiff's property, as described in the instruments of title. That corner is the southeast corner of Lot 215 and is the point at which the easterly boundary of the plaintiff's property, as described in the instruments, intersects with the northern boundary of Pritchard Avenue.

[4] The fence was much closer to the boundary line at the northern limit of the defendant's property, which was about 50 feet north of Pritchard Avenue.

[5] At the time the defendant purchased his property in 1975, the property was in a very bad state of repair. The backyard, which was adjacent to the side yard of the plaintiff's property, was literally a junkyard. The defendant proceeded to renovate the buildings on the property and to clean up the backyard. Ultimately he installed in the backyard a parking area for the businesses carried on in the commercial property on Jane Street, together with little gardens for the sideyards.

[6] During the course of these renovations, in 1977, re fence, between the two properties, somehow was moved closer to the lot line, as determined from the paper titles.

[7] Exhibit No. 6 is a survey of the defendant's property after these renovations had been completed and it shows the fence as being located at the intersection - as being located 5 1/2 inches east of the lot line, at the intersection with the north side of Pritchard Avenue and 3 1/2 inches east of the lot line, at the northern, boundary of the defendant's properties. This means that the fence apparently was moved about 16 inches closer to the lot line, on the northern boundary of Pritchard Avenue and remained at about the same location at the northern boundary the defendant's properties.

[8] The matters in controversy in this action, therefore, are the respective rights of the plaintiff and the defendant to the tiny triangle of land between the fence, as located prior to the renovations, and its location after the renovations. That is a triangle, having a base of 16 inches on the north side of Pritchard Avenue and narrowing to a point about 50 feet north of Pritchard Avenue.

[9] The plaintiff claimed damages in the amount of $10,000 for trespass to her lands; an order restraining the defendant from going on any part of her land; a declaration that she is the absolute owner of the triangular-shaped piece of land I have described; a mandatory injunction requiring the defendant to relocate the fence to its position, prior to the 1977 renovations; and her costs of the action.

[10] The claim for damages was abandoned at the opening of trial this morning and counsel for both sides were in agreement that if the plaintiff is entitled to any relief, she is entitled to an order - a mandatory order requiring the defendant to return the fence to its location, prior to the 1977 renovations.

[11] It appears from Ex. 5, which is a group over slightly at the that the effect of the move was to narrow very slightly at the Pritchard Avenue end, a narrow strip of land, covered with grass or low-lying weeds, located between a paved driveway, leading to the back of the plaintiff's property. No evidence was given of any actual interference with the plaintiff's use of her property, as a result of the move of the fence.

[12] It is an unfortunate thing indeed that a controversy about such a tiny and insignificant piece of land should come to trial in this or any other Court.

[13] Counsel for the defendant submitted that the value of the lands in question were so trifling, that the action should be dismissed, in accordance with the maxim, "*de minimis non curat lex*", that is, "The law does not concern itself with trifles.

[14] No authorities were cited to me to support the application of that principle in a case involving ownership of land, and I am reluctant to dispose of the case on that basis, where it involves title to a piece of land located close to a commercial area, and as to which no evidence

has been given respecting value. The value must be slight, but I do not choose to speculate as to what the value of this one foot or more piece of frontage on Pritchard Avenue might conceivably be at some point in the future, when taken in conjunction with the lands now owned by the plaintiff or the lands now owned by the defendant.

[15] Accordingly, I propose to decide the case on the merits, as best I can.

[16] The case was put to me on an agreed statement of facts which reads as follows:

1. The fence has existed since before 1943 when the Plaintiff bought her land. At all material times, the Plaintiff believed that the fence was the boundary lot line and she made full use of the property up to the fence. The owner of the Defendant's lands prior to the Defendant, had agreed to the location of the fence.

2. The actual lot line and the prior location of the fence are accurately shown on the attached survey.

3. In 1977, during extensive renovations on the Defendant's property, the fence was moved closer to the lot line, without the consent, approval, knowledge or direction of either the Plaintiff or the Defendant.

[17] In addition, counsel made further statements of fact that were agreed upon between the parties, and to which I have or may hereafter make reference in my reasons for judgment.

[18] The plaintiff claims that she had acquired possessory title to the triangular-shaped piece of land in question, by reason of her use and occupation of it for the 34 years, from 1943 establishing possessory title were stated as follows by Mr. Justice Lerner in *Raab v. Caranci* (1977), 24 O.R. (2d) 86 at 90, affirmed 24 O.R. (2d) 832n:

> In order to establish his right to possessory title by adverse possession, the plaintiff must establish that his possession is open, notorious, constant, continuous and exclusive of the right of the true owner. In *Pflug and Pflug v. Collins*, [1952] O.R. 519, affirmed [1953] O.W.N. 140, Wells, J., at p. 527 O.R., p. 689 D.L.R., stated in words cited with approval by the Divisional Court in *Re St. Clair Beach Estates Ltd., v. MacDonald et al*. (1974), 5 O.R. (2d) 482 at p.487, that to succeed claimants to title by adverse possession must show:
>
> 1) Actual possession for the statutory period by themselves and those through whom they claim;
>
> 2) that such possession was with the intention of excluding from possession the owners or persons entitled to possession; and

3) discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.

[19] All of these requirements must be met throughout the ten-year limitation period as provided by ss. 4 and 15 of the Limitations Act.

[20] Looking at the photographs in Ex. 5 and the statement in the agreed statement of facts, that the plaintiff had, at all material times, made full use of the property up to the fence, it is quite obvious, in my judgment, that the plaintiff has satisfied the requirements for establishing possessory title, as set out in the passage I have quoted above.

[21] The relevant provisions of The Limitations Act, R.S.O. 1970, c. 246, read as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[22] Section 15 reads:

> 15. At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is extinguished.

[23] On the basis of that, therefore, it would appear that the plaintiff's possession of the triangular-shaped parcel of land throughout the 34 years amply satisfies these sections of *The Limitations Act*, and that the effect of S. 15 is that the title of the plaintiff and his predecessors to this piece of land was extinguished.

[24] Counsel for the defendant submitted, however, that there could be no adverse possession by the plaintiff of the sliver of land in question, because of the agreement referred to in the last sentence of para. 1 of the agreed statement of facts.

[25] That sentence reads as follows:

> The owner of the Defendant's lands prior to the Defendant, had agreed to the location of the fence.

[26] Undoubtedly, possession by the defendant of the land in question, under certain types of agreement would have been fatal to the plaintiff's claim for possessory title. For example, if

there had been an agreement by the plaintiff and the defendant's predecessor in title, that the lands in question belonged to the defendant's predecessor in title, but could be used by the plaintiff in order to facilitate the use of her driveway, and that the fence might be located accordingly, then clearly the plaintiff would have occupied the land with the consent of the defendant's predecessor in title. In those circumstances, there would be no adverse possession and no possessory title could arise.

[27] Counsel for the defendant conceded, however, that the onus was on the defendant to prove the existence of an agreement sufficient to negative adverse possession and the possessory title.

[28] In my judgment, the agreed statement of facts and the other statements of fact to which counsel agreed orally at trial, do not provide evidence of any such agreement which might discharge that onus. I say that because in the first place, the agreed statement of facts does not establish that the plaintiff was a party to the agreement referred to in the sentence quoted above.

[29] Secondly, the sentence is woefully lacking in any particulars as to what the nature of the agreement was. All the sentence says is that it was agreed - that the owner of the defendant's land prior to the defendant, had agreed to the location of the fence.

[30] This may have been simply an agreement that the proposed fence was located, in fact, on the boundary as determined by the paper titles, with such agreement being entered into by persons, both mistaken, as to the actual location on the land of that boundary.

[31] If that was the agreement and in my judgment the defendant has not established by the evidence that it was not the agreement, then such agreement, in my view, would not negative adverse possession or prevent the acquisition by the plaintiff of possessory title.

[32] With the greatest deference to my learned sister, Madame Justice Boland, I am unable to agree with the somewhat negative thoughts to the contrary, expressed by her in obiter in *Bea v. Robinson* (1977), 18 O.R. (2d) 12 at 16.

[33] The weight of authority appears to me to be that that possession that would otherwise be adverse but which is enjoyed under an agreement made under a mutual mistake of fact as to the boundary between properties, is sufficient adverse possession to bring into operation the provisions of *The Limitations Act*: see the judgment of Chief Justice Robinson in Martin v. Weld (1860), 19 U.C.Q.B. 631, which was followed and expanded by Smiley J., in *McGugan v. Turner*, [1948] O.R. 216 at 221. That view, in my judgment, accords with common sense. If the neighbouring landowners have agreed as to the location of the boundary between their properties, and one of them erects a fence, and they then proceed to occupy the lands on

either side of the fence for 30 years, as though that were the boundary, even though the original agreement was made under a mistake of fact, I should think that it was then too late, if the mistake was then discovered, for one of the parties to set aside the agreement and claim possession of land on the neighbour's side of the fence.

[34] The party, claiming to be entitled to set aside the agreement and claim land on the other side of the fence, had the right to bring an action to set aside the agreement from the time the agreement was made. After ten years, his right to bring that action, in my judgment, is barred by s. 4 and any title to the property on his neighbour's side of the fence is extinguished, under s. 15 of *The Limitations Act*.

[35] If this were not the case, landowners could never rely on possessory title.

[36] For the foregoing reasons, it is my view that the defendant has failed to discharge the onus upon him of showing the existence of an agreement, which would negative adverse possession and the acquisition of a possessory title.

[37] Even if that onus was not on the defendant, I consider that I am entitled to make findings of fact, based on reasonable inferences from the agreed facts, that no such agreement did exist. In my judgment, the only reasonable inference from reading para. 1 as a whole is that the plaintiff was not the person who entered into the agreement referred to in the last sentence of the paragraph.

[38] If that inference is not justified, however, I consider it fair to infer that if she did enter into an agreement with the owner of the defendant's lands, prior to the defendant, she would not have agreed that such prior owner had any title to any lands on her side of the fence.

[39] In my view, that is the only inference consistent with the agreed fact that the plaintiff believed that the fence was the boundary lot line and that she made full use of the property up to the fence.

[40] I do not think it is reasonable to infer that the plaintiff, having that belief, would have entered into any agreement to the effect that she was not the owner of the lot up to the fence that she believed to be located on the boundary lot line.

[41] The only agreements which it can possibly be inferred were entered into by the plaintiff, must have been agreements as to where the boundary lot line, in fact, fell, and that the fence might be put there.

[42] For the reasons I have already given, such an agreement made by the plaintiff would not negative adverse possession or prevent her acquiring possessory title.

[43] For these reasons, it is my judgment that the plaintiff is entitled to the relief that counsel have agreed upon, namely the mandatory injunction requiring the defendant to relocate the fence to its position, prior to September 5, 1977.

[44] As I said earlier in my judgment, it is indeed an unfortunate thing that such a trifling matter has occupied this Court for the time which this case has involved.

[45] I find myself considering, and indeed counsel covered this matter in their judgment, who is responsible for this matter coming this far and why was it not settled amicably, without the commencement of any litigation.

[46] In my judgment, the plaintiff acted most unreasonably in claiming damages in the amount of $10,000 on the facts of this case. The legal point at issue is not a simple one and it was no doubt very difficult to determine what were the facts at the time the various fences were built. In these circumstances, I don't think the defendant can be blamed for defending the action, as long as it contained the claim for damages. That claim was dropped only this morning and by then it would have been pretty late in the game to move the fence, rather than incur legal costs.

[47] I feel that the blame for this matter coming this far must rest squarely on the plaintiff, and accordingly I do not propose to order that the defendant pay any of the plaintiff's costs of the action.

[48] There will be no order for costs.

[49] This disposition of costs can be further supported by the rather obvious fact that the value of the lands in question falls within the jurisdiction of the County Court. I prefer not to put my ruling as to costs on that basis, however, because I think it would have been wrong for this matter to have occupied the County Court for a day.

[50] There will be judgment for re relief claimed in para. 7(b) of the statement of claim, but without costs.

[51] MR. CHEIFETZ : I believe, My Lord, I am entitled to an order declaring that the title of the predecessor to the defendant was extinguished. You have made that specific finding in the judgment, but it is my understanding that that order has to go as well, because otherwise, this matter might pop up in Court again next time there is a conveyance.

[52] HIS LORDSHIP: You are right and that was agreed to.

[53] Well, then, an addendum, Madam Reporter.

[54] Counsel for the plaintiff has brought to my attention that counsel were agreed that the plaintiff, if entitled to any remedy, was also entitled to a declaration that the defendant's title to the triangular-shaped piece of property in question had been extinguished.

[55] Counsel, there will be judgment for such a declaration in terms of para. 7(c) of the statement of claim.

[56] MR. CHEIFETZ: And My Lord, you are not entitled to say that the plaintiff is the owner.

[57] HIS LORDSHIP: You claimed the wrong thing.

[58] MR. CHEIFETZ: In effect, yes, My Lord, what you must say is that the title of the predecessor was extinguished: The Court of Appeal in Brown v. Phillips, [1964] 1 O.R. 292.

[59] HIS LORDSHIP: I am not going into any more cases.

[60] What you agreed to isn't what you want. A declaration as to title is a declaration that the plaintiff is the absolute owner.

[61] MR. CHEIFETZ: Well, My Lord, you can give me that declaration, but you won't have the authority to give me that sort of declaration.

[62] HIS LORDSHIP: Well what is it you want?

[63] MR. CHEIFETZ: An order to the effect that the title of the defendant's predecessors in title and my friend and I can speak to it -

[64] HIS LORDSHIP: The defendant's predecessors -

[65] MR. CHEIFETZ: - was the defendant in that case -

[66] HIS LORDSHIP: It is the defendant that you have to worry about.

[67] MR. CHEIFETZ: - in that case, that the defendant's title in that piece of property has been extinguished.

[68] HIS LORDSHIP: All right. Well, you would prefer 7(c) - the plaintiff is the absolute owner.

[69] MR. HILL: That's fine with me.

[70] HIS LORDSHIP: I think that's the way -

[71] MR. CHEIFETZ: Well -

[72] HIS LORDSHIP: Have you got any authority that I can't say that?

[73] MR. CHEIFETZ: Yes, My Lord.

[74] HIS LORDSHIP: That I can't say that it is the absolute owner?

[75] MR. CHEIFETZ: Yes, My Lord, you cannot say, under The Limitations Act where adverse possession is acquired, the Court of Appeal, a decision by Mr. Justice McGillivray, Schroeder, and Mr. Justice Kelly held in 1963 that the declaration to be given in these facts should be to the effect that the title be extinguished and not that the title be acquired.

[76] HIS LORDSHIP: All right. The plaintiff will also have a declaration that the title of the defendant to lands west of the line on which the fence is to be relocated hereunder has been extinguished.

SOUTHEY J.