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Docket: CI 23-01-40362
(Winnipeg Centre)
Indexed as: 10031695 Manitoba Ltd. v. 72230 Manitoba Ltd.
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

	)	Eric Blouw
10031695 MANITOBA LTD.,	)	Trevor Yakimchuk
	)	for the plaintiff and
plaintiff,	)	defendants by counterclaim
- and -	)	
	)	
72230 MANITOBA LTD.,	)	Alyssa Mariani
defendant,	)	for the defendant and
	)	plaintiffs by counterclaim
AND BETWEEN:	)	
	)	
72230 MANITOBA LTD. AND	)	
GLENN KARR,	)	
plaintiffs by counterclaim,	)	
- and -	)	
	)	
10031695 MANITOBA LTD. AND	)	
BONNIE WEST,	)	Judgment Delivered:
defendants by counterclaim.	)	May 30, 2024

TOEWS J.

THE FACTS

[1] Bonnie West (West) is the sole director, officer and shareholder of the plaintiff and defendant to the counterclaim 10031695 Manitoba Ltd. (1003). Glenn Karr (Karr),

is the sole director, officer and shareholder of the defendant (plaintiff by counterclaim), 72230 Manitoba Ltd. (722). When not referred to by their personal or corporate names in these reasons, West and the plaintiff corporation will be referred to as the plaintiff or plaintiffs while Karr and the defendant corporation will be referred to as the defendant or defendants.

[2] Karr and West are former husband and wife. They were married on June 11, 2011, and separated on June 30, 2021. A divorce judgment was issued on or about June 6, 2022. Both Karr and West have a long history of working in Winnipeg's blinds and drapery business. Karr asserts that 722 owns 24% of the shares in 1003. That claim is disputed by West.

[3] At the heart of the dispute in this litigation is a commercial property located on Academy Road (the Academy Property). 722 is the registered owner of the Academy Property. On or about November 1, 2020, while Karr and West were still married, 1003 and 722 entered into two written agreements with respect the Academy Property, namely:

a) A lease agreement (the lease agreement) pursuant to which 722 agreed to lease the Academy Property to 1003 for a period of five years commencing on November 1, 2020; and

b) An option agreement (the first option agreement) pursuant to which 722 granted 1003 an option to purchase the Academy Property for $850,000 at any time while 1003 has a valid lease for the Academy Property and is not in default under that lease.

[4] On or about June 11, 2021, after completing renovations to the Academy Property, 1003 took possession of the Academy Property pursuant to the lease agreement.

[5] Karr and 722 take the position that in March 2023, after failing to pay the rent due and owing, 1003 abandoned the Academy Property, leaving damage caused by its removal of inventory, chattels and fixtures. Since then, 1003 has not paid any rent and the Academy Property has remained vacant.

[6] On March 24, 2023, West caused a caveat claiming an interest in the Academy Property to be registered against the Academy Property on account of the first option agreement. After 1003 vacated the Academy Property, 722 states it received an offer from a third party to purchase the Academy Property for fair market value; however, the offer is contingent upon the caveat and a pending litigation order registered by 1003 against the Academy Property being discharged.

[7] The parties have set out extensively the facts being advanced respectively by the parties in their pre-trial briefs and their appeal material. I do not intend to reproduce those facts here, but I will consider those submissions and to the extent that it is necessary to set out those facts in my reasons for decision on this appeal, they will be reproduced herein.

[8] I would note that this dispute was referred to the General Division of the Court of King's Bench by a justice of the Family Division of the Court of King's Bench on the basis that the matter is no longer a family dispute within the jurisdiction of the Family Division but purely a commercial dispute that falls more appropriately within the

jurisdiction of this division of the court. However, I would further note that the plaintiff here is taking the position that the separation agreement which the parties entered into is not valid and seeks to have that separation agreement set aside as part of the relief sought in this action.

[9] This appeal by the defendant arises in respect of a decision by Senior Associate Judge Clearwater (herein referred to as the Senior Associate Judge) who delivered reasons for judgment on June 16, 2023 (set out in the appeal brief of the plaintiff at Tab 1) on the defendant's motion to set aside the pending litigation order (the PLO) which she granted on an *ex parte* basis and also on the defendant's motion to set aside caveats registered against the Academy Property.

[10] In summary, the Senior Associate Judge stated that she did not have the jurisdiction to remove the caveats and accordingly dismissed the request to vacate any of the caveats. Those caveats remain registered against the Academy Property. The Senior Associate Judge similarly declined to remove the PLO and the defendant appealed her order to this court.

[11] I will review the Senior Associate Judge's reasons for decision in greater detail later in my reasons.

THE ISSUES

[12] The issues to be determined in this appeal are as follows:

a) Whether 1003 failed to make full and fair disclosure of all material facts on the hearing of its without notice motion to obtain the PLO;

b) Whether 722 is entitled to a discharge of the PLO pursuant to Rule 42.02(1) of the Court of King's Bench Rules; and

c) Whether 722 is entitled to a discharge of the caveat registered on title to the Academy Property in respect of the first option agreement.

[13] The parties do not dispute that in hearing this appeal, the hearing is *de novo* but the Senior Associate Judge's decision is not to be unread or ignored on appeal. Associate judges are judicial officers with a particular expertise in interlocutory proceedings in civil litigation and it is for a judge hearing the appeal to decide how much consideration to give to an associate judge's decision considering the associate judge's reasons, the record both on appeal and before the associate judge, errors committed by the associate judge, and any other relevant matter.

THE POSITION OF THE DEFENDANTS

[14] There is no dispute as between the parties that the requirement of an applicant on a without notice motion is to make full and fair disclosure. This includes the requirement that the applicant's affidavit material include a reasonable statement of the positions known or likely to be taken by the party opposite and that the fair disclosure of the facts be set out expressly in the body of the affidavit. It is not sufficient to append as exhibits to the affidavit, documents which contain the relevant information. (See: ***Oggi Investments Ltd. v. Huntingdon Real Estate Investment Trust***, 2011 MBQB 10, 263 Man.R. (2d) 25)

[15] In this case 722 and Karr state that there was a failure by 1003 to disclose various material facts including, *inter alia*, the fact that it had failed to tender the full

purchase price when it attempted to execute the first option agreement and that it was in violation of the terms of its lease as of March 2023. Furthermore, they state that 1003 failed to disclose the damage caused to the Academy Property when 1003 vacated that property. Finally, they state that 1003 failed to disclose its failure to comply with requests to enter into a commercial agreement and refused to execute a commercial agreement drafted by Karr's lawyers.

[16] The defendants rely on Rule 42.02(1) as setting out the test to discharge the PLO. That rule provides:

> **42.02(1)** The court may, on motion at any time, make an order discharging a pending litigation order,
> (a) where the party at whose instance it was made,
> (i) claims a sum of money which, in the opinion of the court, is a satisfactory 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 made can be adequately protected by another form of security; or
> (c) on any other ground which is considered just;
> and the court may, in making the order, impose such terms as to the giving of security or otherwise as is considered just.

[17] Pursuant to this rule, the defendant states that the test to discharge a PLO is analogous to the test on summary judgment; namely that the court must determine whether there is a triable issue that the plaintiff has a reasonable claim to an interest in the land in question.

[18] The defendants say there are four reasons why 1003 claimed interest in the Academy Property is without merit:

i. The first option agreement was replaced by a new option after the execution of the separation agreement executed by the parties and is therefore incapable of being exercised;

ii. Even if the first option agreement remained valid after the execution of the separation agreement and the granting of the new option, it was not exercised in accordance with its terms prior to 1003 defaulted under the lease;

iii. In order to advance a claim for specific performance, a plaintiff must show that it is at all times ready, willing and able to exercise the option. Since 1003 was not in good standing under the lease, it is not entitled to specific performance of the first option agreement and therefore has no interest in the property;

iv. Damages are a reasonable alternative to 1003's claim.

[19] Finally, in respect of the caveats, 722 states that to maintain the registration of the caveat on title to the Academy Property, 1003 must prove that it has an interest capable of being the subject matter of a caveat. Since 1003 does not have an interest in the Academy Property, it cannot satisfy the legal test to maintain the caveat. 722 relies on the equitable jurisdiction of the court to discharge the caveat since the statutory provision of ***The Real Property Act***, C.C.S.M. c. R30, found at s. 163 does not appear to apply since this action constitutes a "proceeding" within the meaning of that statutory provision.

THE POSITION OF THE PLAINTIFFS

[20] In response to the position advanced by 722, 1003 states that it did not fail to tender the purchase price, and simply withheld the minimum amount that it was owed by 1003 on account of overpayments of rent that Karr compelled West to make under threat of eviction. 1003 denies that it was in breach of the lease agreement at the time that it exercised the first option agreement.

[21] 1003 admits that in obtaining the PLO it was required to make full and frank disclosure of all material facts, including an indication to the court as to what the opposite party's position is on the material facts, if they are known to 1003. It states that it took the step of obtaining a PLO because it learned that 722 was trying to sell the Academy Property despite the caveats. It asserts that time was of the essence and that given the complexity of the dispute between the two corporations, sufficient disclosure was made in the circumstances.

[22] 1003 argues that it has a reasonable claim to an interest in the Academy Property. It states that the first option agreement was not superseded or replaced by the new option that was contemplated by the separation agreement.

[23] It is the position of 1003 that the separation agreement ought to be set aside or rescinded on the basis that Karr made various material misrepresentations knowing them to be false. In the alternative, 1003 states that both parties were under a common misapprehension as to Karr's ownership interest in 1003 and that the separation agreement should be set aside on that basis.

[24] In the further alternative, 1003 states that the commercial agreement proposed in the separation agreement is too uncertain to be valid and is nothing more than an unenforceable and non-binding agreement to agree.

[25] West states that she will be seeking an order setting aside or amending the separation agreement and that if she is successful in that regard, 722's argument that the first option agreement was terminated and replaced by the new option carries no weight.

[26] 1003 maintains that damages are not a reasonable alternative to 1003's interest in the Academy Property. It states that this property is a unique stand-alone carriage house on a street with complimenting boutiques and an active neighbourhood business association that organizes regular events to promote the local businesses. Any alternative location is not suitable for the business and the fact that West has managed to keep her businesses alive (with significantly lower revenue) while operating out of another location does not lead to the conclusion that damages are a reasonable alternative to 1003's interest in the Academy Property.

[27] 1003 takes the position that even if the PLO is discharged, the caveat registered in respect of the first option agreement must remain on the title since there is no statutory provision that would authorize the removal of the caveat at this stage of the proceedings. In respect of the equitable jurisdiction of the court, 1003 takes the position that the inherent jurisdiction of the court does not permit the court to exercise its discretion beyond that afforded by ***The Real Property Act***, unless there has been an abuse of its own process.

THE DECISION OF THE SENIOR ASSOCIATE JUDGE

[28] The Senior Associate Judge provided oral reasons for decision in this matter on June 16, 2023.

[29] In her reasons (found at Tab 1 of the plaintiff's appeal brief), the Senior Associate Judge first dealt with the issue of the caveats currently registered on the property. In that regard, she held that an associate judge (then styled as the Master) did not have the jurisdiction to remove the caveats under the relevant legislation and therefore declined the request to vacate "any or all of the caveats". (p. T1)

[30] In respect of the PLO, the Senior Associate Judge considered the defendant's motion to set aside the PLO based on the plaintiff's failure to make full and fair disclosure as is required in *ex parte* motions and on the basis that the plaintiff does not have a good and continuing interest in the land such that specific performance is not supportable in law.

[31] In respect of the allegation that the plaintiff failed to make full and fair disclosure in her supporting affidavit when she sought the PLO, the Senior Associate Judge stated that the test for such a determination is "whether the moving party, at minimum, indicates in a reasonable manner the positions known or likely to be taken by the opposing party". If the moving party is successful on this issue, the pending litigation order will be set aside despite there being an interest in the land in question (p. T4).

[32] Also at page T4, the Senior Associate Judge identifies the second issue in this motion as being whether the plaintiff's interest in the Academy Property has been extinguished by the breach or termination of the lease in March 2023. This, she states,

revolves around the analysis by the court as to whether the plaintiff, on full and fair disclosure, has made out a triable issue concerning her claim for specific performance and an interest in land.

[33] The Senior Associate Judge specifically refers to Rule 42.02 (reproduced earlier in these reasons) and the considerations of the criteria by the court set out in that rule in setting aside a PLO. She notes that the setting aside of PLOs under that rule is discretionary.

[34] Reviewing the evidence before her, the Senior Associate Judge arrives at the conclusion that nothing in the defendant's affidavit material "leads me to believe the plaintiff had any more clear a picture at the time of her original evidence was presented to the Court of the defendant's position than what she articulated." (pp. T5 – T6) Accordingly, she was not prepared to set aside the PLO for failure to make full and fair disclosure in the *ex parte* motion.

[35] In respect of whether there is a triable issue, the Senior Associate Judge states in her reasons that "the contest surrounds whether the exercise of [the first option] was strictly complied with and/or whether the plaintiff can maintain an ongoing interest having no current or ongoing lease." (p. T7)

[36] In respect of this issue the Senior Associate Judge concludes, at p. T7:

> While ultimately the defendant may be successful at trial convincing the judge that his interpretation of the option agreements is correct, in my view it is not plain and obvious at this point. The interpretations available on the facts give rise to a triable issue concerning strict compliance and I would not set aside the pending litigation order for those reasons.

[37] Furthermore, the Senior Associate Judge concludes that:

> On these facts I am satisfied that there is a triable issue as to whether the plaintiff has ongoing rights to specific performance.
>
> (p. T8)

[38] In this respect she states:

> … one could conclude, if the matter is heard on the merits, that the defendant was instrumental in making the plaintiff's ability to maintain the lease in good standing virtually impossible.
>
> In my view, at least at this stage of the proceedings and on this evidence, there is a triable issue as to whether the option crystalized … or whether if one accepts that the lease remains a condition precedent that the failure by the plaintiff to be able to abide by the lease terms was contributed to by the defendant's own actions."
>
> (pp. T 8-9)

DECISION

[39] In considering the application to remove the PLO, I have reviewed the material relied upon by the parties and which the Senior Associate Judge considered in arriving at her decision that she was not prepared to remove the PLO. It was her decision that there was full and fair disclosure of the necessary information by the plaintiff at the *ex parte* hearing. Secondly, she did not accept the defendant's argument that there was no triable issue, finding that there is a triable issue as to whether the plaintiff has ongoing rights to specific performance.

[40] Upon my review of the evidence, I arrive at the same conclusion as the Senior Associate Judge as to whether the plaintiff complied with the obligation to fully and fairly disclose her knowledge at the *ex parte* hearing of the defendant's position or likely position. As she states, the standard is not perfection. I do not intend to reproduce the evidence here, but I find that the conclusions of the Senior Associate Judge in this

respect is supported by the evidence and the law, and I adopt her analysis of the evidence and come to the same conclusions in that respect.

[41] It is in respect of the Senior Associate Judge's approach to the second issue that causes me some concern, namely whether the plaintiff is entitled to maintain the PLO and seek the benefit of specific performance. If this was the only obstacle to the sale of the land in accordance with the defendant's stated intentions, I would order the removal of the PLO and allow an arm's length sale to proceed on the condition that 50% precent of the sale price be held in trust pending the resolution of the plaintiff's claims.

[42] In my opinion, while the evidence establishes the Academy Property is a very desirable location, especially for the type of business being conducted by the plaintiff, it is not sufficiently unique such that it would entitle the plaintiff to a transfer of the Academy Property pursuant to the equitable doctrine of specific performance if she were ultimately successful. In my opinion, damages are an adequate remedy and the plaintiff's interests would be protected by holding 50% of the sale price in trust.

[43] I note that the defendant has offered to place $300,000 in trust for this purpose. While that is a sizeable amount in view of the value of the Academy Property being in the neighbourhood of $1,000,000, the amount that I have suggested satisfies me that if there were a sale, any concern that the recovery of damages ordered in favour of the plaintiff at the conclusion of the trial would not be frustrated by a penniless corporate defendant is addressed.

[44] Furthermore, I agree with the defendant that there is a significant hardship to 722 to allow 1003 to continue to assert an interest in the Academy Property while, based on the evidence before me, it remains vacant. Litigation of this claim will take several years, during which time 722 will be asked to bear the expenses associated with maintaining a vacant property.

[45] Nevertheless, despite my inclination to remove the PLO based on the evidence before me, the removal of the PLO does not appear to clear the path for the sale of the land by the defendant. Both parties agree there remains a significant obstacle to the sale of the Academy Property created by the provisions of ***The Real Property Act***.

[46] Specifically, s. 163 of ***The Real Property Act*** provides:

> **Application to discharge caveat.**
> 163(1)
>
> Except in the case of a caveat filed by the district registrar, the applicant or owner may, at any time before the caveator has taken proceedings thereunder, apply to the court calling upon the caveator to show cause why the caveat should not be discharged.
>
> **Disposal of certain caveats.**
> 163(2)
>
> In case of a caveat filed by the district registrar, if the district registrar, upon application for the purpose being made, refuses to withdraw the caveat, the applicant or owner may apply to the court, after having served written notice of the application upon the person on whose behalf the caveat was filed, and upon the district registrar, for an order that the caveat be withdrawn or discharged.
>
> **Hearing and order.**
> 163(3)
>
> Upon the hearing of the application, the court may make such an order, either, dismissing the application, discharging or withdrawing the caveat or directing any of the parties to commence proceedings, as seems just and proper.

[47] The defendant acknowledges that the action commenced by the plaintiff constitutes a "proceeding" and therefore s. 163 of the ***The Real Property Act*** "does not appear to apply". In the face of that acknowledged statutory obstacle, the defendant relies on the court's equitable jurisdiction to discharge the caveat in this case, given the fact that, "on the evidence, 1003 does not have a registrable interest in the Property." (p. 29 of the Appeal Brief of the Defendant/Appellant)

[48] In my opinion, the court is not able to exercise its equitable jurisdiction to grant the defendant the remedy being sought. As the court noted in ***Forsythe v. Labossiere***, 2022 MBCA 28, [2022] M.J. No. 88 (QL), at paras. 20-22:

> **20** In *Bojkovic*, this Court considered sections 150 and 163 of the *Act* and the court's jurisdiction to discharge a caveat.
>
> **21** The issue in *Bojkovic* was the jurisdiction of a motion judge to discharge an unpaid vendor's caveat (agreed to be a valid caveat), on condition that monies be paid into court as security pending trial. The caveat was filed several months before the statement of claim. At that time, section 163(3) of the *Act* did not provide for discharge of a caveat upon the posting of security (as presently contemplated by sections 163(3)(c)-163(3)(d) of the *Act*), but limited the remedies to either dismissing the application, discharging the caveat or directing that proceedings be commenced (see para 9). This Court held that the motion judge erred when he relied on the inherent jurisdiction of the court to discharge the caveat and order the posting of security in the face of the specific statutory regime set out in the *Act*.
>
> **22** In *Bojkovic*, Hamilton JA explained that the *Act* sets out two methods by which an owner can seek to have a caveat discharged: the 30-day notice procedure under section 150 and the show cause application under section 163 (see para 7). Further, the remedies under sections 150 and 163 of the *Act* are the only circumstances provided where a caveat may be discharged summarily and are only available until proceedings under the caveat are commenced (see paras 53, 71). Absent an abuse of process, the inherent jurisdiction of the court does not permit the court to discharge a validly registered caveat once proceedings thereunder have been commenced. The Court stated (at paras 50, 53, 69, 71):
>
> > By its wording, s. 163(3) contemplates two options. They are "either" to deal conclusively with the caveat by dismissing the application or discharging or withdrawing the caveat or to direct a party to commence

> proceedings. The court is to determine which of these options "seems just and proper" in the circumstances.
>
> . . . [T]he remedies available under ss. 150 and 163 are only available until proceedings are commenced. . . . [Section] 163(1) expressly states that it may only be invoked "before the caveator has taken proceedings" under the caveat. The parties have not identified any provision in the *Act* permitting the court to discharge a caveat once proceedings have been commenced.
>
> . . . [T]he *Act* sets out a regime by which a caveat may be discharged. The legislature did not see fit to provide the court with a broad discretion to discharge a caveat. . . .
>
> Unless the caveat falls within one of the circumstances where it may be discharged summarily . . . , the legislature contemplated that proceedings be commenced. In my view, the inherent jurisdiction of the court does not permit the court to exercise its discretion beyond that afforded to it by the *Act*, unless there has been an abuse of its own process. It cannot be called upon to provide a remedy to discharge a caveat that is validly registered and the subject of pending proceedings in court.

[49] In my opinion, there is no evidence of an abuse of the court's process here and accordingly, the court cannot be called upon to provide an equitable remedy to discharge a caveat that is validly registered and the subject of pending proceedings in court.

CONCLUSION

[50] In these circumstances there is no point to removing the PLO even if I am of the opinion that it should be removed. The caveats effectively prevent the court from granting the remedy sought by the defendant on this appeal even if the PLO was removed. Accordingly, I decline to do so.

[51] In the result, the appeal of the defendant is dismissed with costs in favour of the plaintiff based on the applicable tariff.

[52] I would note at this point, if the plaintiff intends to commence proceedings to set aside the separation agreement as stated in argument, this application should be commenced in the Family Division of the Court of King's Bench. This dispute was initially referred to the General Division by a justice in the Family Division on the basis that all the family related proceedings had been dealt with and that this matter was purely a commercial dispute suitable for being dealt with by the General Division. Since the separation agreement entered into by the principals of the two corporate parties now appears to be in dispute, the jurisdiction to settle that matter falls properly to a justice of the Family Division.

[53] As such, if the proceedings to set aside the separation agreement are commenced in the Family Division, such that it is unreasonable to expect that the trial cam proceed in the General Division as presently scheduled, the parties should seek direction from the Chief Justice regarding a trial adjournment.

_____ J.