Federal Court  Cour fédérale

Date: 20100408

Docket: T-498-10

Citation: 2010 FC 377

Ottawa, Ontario, April 8, 2010

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ROBIN ROBERTS

Applicant

and

ROSEAU RIVER ANISHINABE FIRST NATION
as represented by CHIEF AND COUNCIL and
THE GINEW HOUSING AUTHORITY INCORPORATED

Respondents

REASONS FOR ORDER AND ORDER

[1] Robin Roberts is a member of the Roseau River Anishinabe First Nation, who is currently residing in Housing Unit B-96 ("the Unit") in Ginew, Manitoba, a community on the Roseau River First Nation Reserve. She seeks an interim and interlocutory injunction preventing the Roseau River Anishinabe First Nation and the Ginew Housing Authority Incorporated ("GHAI") from evicting her and her family from the Unit. She also seeks a mandatory order compelling the resumption of electrical service to the Unit. Ms. Roberts seeks such an order pending the hearing of

her application to judicially review a purported decision of the GHAI demanding that she leave the Unit by March 31, 2010.

[2] For the reasons that follow, I have concluded that Ms. Roberts has not demonstrated that she will suffer irreparable harm between now and the time that her application for judicial review is heard if the injunction is not granted. She has also not persuaded me that the balance of convenience favours the granting of the injunction. As a consequence, her motion will be dismissed.

Background

[3] Ms. Roberts is a member of an extended family, many of whom reside on the Reserve. Because a number of the individuals involved in this matter share the Roberts surname, I shall refer to each of them by their first names in these reasons for the sake of clarity.

[4] Until October of 2009, Robin resided in British Columbia. Following the death of her brother Floyd, Robin returned to the Reserve to attend his funeral. On her arrival in Ginew, Robin stayed with her sister Lynda, who was then living in the Unit.

[5] Lynda began living in the Unit in 2003. She had originally entered into a one-year Tenancy Agreement with either the GHAI or with another entity known as the Roseau River Housing Authority. When the term of the original agreement expired, Lynda remained in possession of the property on a month-to-month basis, and was never asked to sign another Tenancy Agreement.

[6] Following Floyd's death, a decision was made by the Roberts family at a meeting held on October 25, 2009, that Lynda would move into Floyd's home, which was evidently somewhat larger than the Unit. It was also decided by the family that Robin would remain on the Reserve, and would live in the Unit.

[7] One of the central issues in this case is whether Lynda had the unqualified ability to assign her right to occupy the Unit to Robin, or whether the consent of the GHAI was required.

[8] Lynda states in her affidavit that she had "seen a practice develop whereby people transfer houses between family members". As a consequence, Lynda states that she did not anticipate that there would be any issue with respect to the transfer of the Unit to Robin. Lynda's affidavit does not specifically address the question of whether consent to such transfers is required.

[9] The respondents deny that any such custom or practice exists.

[10] Neither side has produced a copy of Lynda's original Tenancy Agreement which would establish the terms under which she occupied the Unit. However, according to the evidence of Ed Hayden, who is the Director of both the GHAI and the Roseau River Housing Authority, that Agreement was in the Housing Authority's standard form. There is a copy of the standard form Tenancy Agreement in the record. This Agreement contains a provision stating that "The Tenants should not reassign or sublet the premises without permission form the GHA[I]".

[11] Mr. Hayden further states that the Director of Housing maintains a list of those individuals and families waiting for housing. There are currently some 17 families and 14 individuals on the list, some of whom have been waiting for as much as three years to be assigned housing.

[12] Mr. Hayden explains that when a unit becomes available, the unit is assigned to the name on the list which "comes closest to fitting the size of the unit", with families with children being given priority.

[13] What is not disputed is that on October 25, 2009, Lynda wrote to Mr. Hayden advising him that she would be moving into Floyd's unit, effective immediately. It is noteworthy that Lynda's letter does not purport to simply advise Mr. Hayden of the fact that she had assigned her right to occupy the Unit to her sister Robin. Rather, Lynda's letter seeks permission to have Robin move into the Unit.

[14] In this regard, the letter states:

> Please, also, accept my letter as my request to allow my sister, Rob[i]n Roberts to move in to Lot B-96. Rob[i]n is staying with me right now, however her daughter & grandchildren indicated they would live with Rob[i]n, so the Roberts family support this request and seek your support and consideration.

[15] Lynda states in her affidavit that although her letter seeks the GHAI's approval of the transfer, she requested such authorization merely "out of courtesy".

[16] By letter dated November 9, 2009, Mr. Hayden advised Robin that she would have to vacate the Unit by November 12, 2009, as the Unit had previously been assigned to Dana Roberts. Dana is Robin's and Lynda's niece. She had been on the waiting list for some time, waiting for a housing unit to become available. According to Mr. Hayden, Dana had signed a Tenancy Agreement prior to the receipt of Lynda's October 25 letter.

[17] The respondents have produced a copy the Tenancy Agreement entered into between Dana and the GHAI. Curiously, the document is dated October 23, 2009 – two days *before* Lynda's letter was sent to Mr. Hayden seeking approval to have Robin live in the Unit. The respondents suggest that Lynda may have verbally advised Mr. Hayden of her intention to move into Floyd's home at some point prior to October 25, but there is no evidence before the Court to support this suggestion.

[18] Lynda and Robin were surprised by the fact that Dana had entered into this Tenancy Agreement as Dana had been present at the October 25 meeting of the Roberts family, and had not objected to the decision to have Robin move into the Unit with her family, nor had Dana suggested that she had any interest in the property.

[19] Mr. Hayden's affidavit states that Dana had initially agreed to allow Robin to stay in the Unit temporarily, in order to give her time to find somewhere else to live. However, on November 9, 2009, Dana advised Mr. Hayden that she wanted to move into the Unit. Robin did not comply with Mr. Hayden's request to vacate the premises by November 12, 2009, and continued to live in the Unit.

[20] According to Mr. Hayden's affidavit, Robin advised him that she needed more time to find a place to stay in the nearby town of Altona. As Robin had just lost a second brother, and given that it was wintertime, Dana agreed to give Robin more time to find another home.

[21] Some time in December of 2009 or January of 2010, Robin had a chance encounter with Mr. Hayden outside the offices of the Chief and Council on the Roseau River First Nation Reserve. Mr. Hayden advised Robin that she had two weeks to leave the unit. Robin acknowledges that she agreed to look for alternate accommodations, but says that she did not agree to leave. It is noteworthy that there is no suggestion in Robin's affidavit that she told Mr. Hayden that in her view, she had a right to live in the Unit.

[22] Robin's affidavit goes on to say that she looked for another place to live, but could not find suitable alternate housing.

[23] As Robin puts it in her affidavit "The two weeks Mr. Hayden spoke of came and went and no one took steps to remove me from my House. As I was unable to find alternate accommodations, I decided to remain in my House."

[24] On March 18, 2010, Mr. Hayden again wrote to Robin, observing that she had been given ample time to find alternate accommodations. While Dana had agreed to allow Robin to stay in the Unit while Robin tried to find somewhere else to live, Dana now wanted to move into the Unit with her family. Consequently, Mr. Hayden advised Robin that she had to vacate the Unit.

[25] Mr. Hayden's March 18 letter goes on to state that:

> Hydro must have notice and billing that matches the tenancy agreement; Linda cannot assume two residences for billing purposes. Therefore, Hydro will shut off service to B96 until Dana can move in and assume residence. You will be given until March 31st to remove belongings. Hydro will shut off service on April 1st.

[26] Mr. Hayden's March 18 letter prompted action on Robin's behalf, and on March 30, 2010, she retained counsel. On April 1, 2010, counsel filed the motion for injunctive relief, seeking to have the matter heard on an *ex parte* basis. Justice Tremblay-Lamer directed that the respondents be provided with notice of the motion, and the motion was heard by me on an urgent basis on April 7, 2010.

[27] In an unsworn letter to the Court, Robin advises that on the afternoon of April 1, 2010, a representative of Manitoba Hydro attended at the Unit accompanied by a member of the Tribal Police. The two individuals went to the side of the Unit and shut off the power. While such information should ordinarily be put before the Court in affidavit form, I do not understand counsel for the respondents to dispute that the power to the Unit was in fact shut off on April 1.

Analysis

[28] The parties agree that in determining whether Robin is entitled to injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

[29] That is, Robin must establish:

> 1) That there is a serious issue to be tried in the underlying application for judicial review;
> 2) That irreparable harm will result if the injunction is not granted; and
> 3) That the balance of convenience favours the granting of the injunction.

[30] Given that the test is conjunctive, Robin has to satisfy all three elements of the test before she will be entitled to relief.

Serious Issue

[31] In *RJR-MacDonald*, the Supreme Court of Canada observed that the threshold for establishing the existence of a serious issue is a low one. In this regard, the Supreme Court noted that:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (at para. 50)

[32] Robin has identified a number of issues each of which she says meet the low threshold necessary to satisfy the "serious issue" component of the *RJR-MacDonald* test. These include several procedural fairness arguments, as well as the contention that the purported decision of the GHAI was a nullity, as the GHAI had been dissolved on July 17, 2009, and thus no longer exists.

[33] For the purposes of this motion, I am prepared to assume, without deciding, that the underlying action raises one or more issues that satisfy the "serious issue" branch of the *RJR-MacDonald* test.

Irreparable Harm

[34] Injunctive relief should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard, if the injunction is not granted: *Lake Petitcodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)* (1998), 149 F.T.R. 218, 81 A.C.W.S. (3d) 88 at para. 23.

[35] Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured by an award of damages: *RJR-MacDonald* at para. 59.

[36] The burden is on the party seeking the injunction to adduce clear and non-speculative evidence that irreparable harm will follow if his or her motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd*., 2005 FC 815, 140 A.C.W.S. (3d) 163 at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[37] That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will*

result: see *International Longshore and Warehouse Union, Canada v. Canada (Attorney General)*, 2008 FCA 3, 168 A.C.W.S. (3d) 315 at paras. 22-25, per Chief Justice Richard.

[38] Robin's affidavit states that she and her family will have nowhere to go if the injunction is not granted. She goes on to note that she is unemployed, and has applied for social assistance. She further deposes that if she does not receive social assistance, then her ability to provide the essentials for her family will become difficult if not impossible. However, in her unsworn letter to the Court, Robin indicates that her application for social assistance has been approved and that she is now receiving benefits.

[39] Robin's evidence on the issue of irreparable harm is most unsatisfactory. She makes the bald assertion that she looked for alternate accommodation after her meeting with Mr. Hayden in December of 2009 or January of 2010, without success. However, she has provided absolutely no detail regarding where she looked or what she did to try to find another place to live.

[40] While there does appear to be a housing shortage on the Reserve, as demonstrated by the long waits for housing there, there is no evidence before the Court of any concrete steps that Robin has taken to find temporary accommodation in the nearby town of Altona, or elsewhere. Living in Altona was evidently an acceptable alternative for Robin, as she told Mr. Hayden in November of 2009 that she was looking for a place there.

[41] Moreover, Robin has extended family on the Reserve. Indeed, she stayed with her sister Lynda in the Unit when she arrived on the Reserve in October of 2009. We know that Lynda is now living in a bigger home, having taken over Floyd's unit. The applicant has not explained why it is that she would not be able to stay with Lynda or any of her other relatives while this matter is being resolved.

[42] As a consequence, the evidence adduced by Robin to show that she will suffer irreparable harm between now and the time that her application for judicial review is heard falls well short of the "clear and non-speculative" threshold.

Balance of Convenience

[43] The test for an injunction is conjunctive. Given that Robin has failed to satisfy the irreparable harm element of the test, it is technically not necessary to address the issue of the balance of convenience. However, Robin has also failed to satisfy me that the balance of convenience favours the granting of the injunction.

[44] I would start by observing that Dana Roberts and her family have been grossly inconvenienced by what has transpired. After giving Robin some time to find another place to live, Dana's generosity was repaid by Robin's ongoing refusal to leave the Unit. Dana and her family have evidently had to move from place to place over the last few months. Most recently, the family has been staying with relatives, with several family members having to sleep in one bed because of space constraints. Dana's relatives are now pressing her to find somewhere else to live.

[45] That said, Dana Roberts is not a party to these proceedings, and thus her circumstances are not relevant in identifying where the balance of convenience lies as between the parties to the application.

[46] It is apparent from the evidence of Mr. Hayden that there is a process that is followed in relation to the allocation of scarce housing resources on the Roseau River First Nation Reserve. Those who play by the rules and take their place on the waiting list may have to wait in excess of three years to receive a housing unit.

[47] After living for some time in British Columbia, Robin returned to the Reserve in October of 2009, and shortly thereafter took over her sister's housing Unit. She has effectively "jumped the queue". Not only is this very unfair to those individuals who have played by the rules, it also undermines the integrity of the housing allocation process on the Roseau River First Nation Reserve.

[48] In the circumstances, I find that the balance of convenience favours the respondents. Accordingly, the motion is dismissed.

Suspension of the Order

[49] A Court order will ordinarily take effect immediately. However, the respondents have agreed to give Robin and her family seven days to vacate the Unit, in the event that her request for

an injunction is refused. In response to questions from the Court, counsel for the respondents has also undertaken to see that electricity is restored to the Unit during this seven day period.

Case Management

[50] Counsel for the respondents asks that this matter continue as a specially managed proceeding. I do not understand Robin to object to this request, and an order will go to this effect.

Costs

[51] In light of Robin's impecuniosity, the respondents are not seeking costs, and none are awarded.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. This matter shall be continued as a specially managed proceeding.

2. The motion for an injunction is dismissed, without costs.

3. Robin Roberts shall vacate Housing Unit B-96 on the Roseau River First Nation Reserve by 5 p.m. on Thursday, April 15, 2010.

4. In accordance with counsel's undertaking, the respondents shall ensure that electrical power is restored to the Unit within 24 hours of this order being sent to counsel for the respondents. No further efforts are to be made by the respondents to cut off the electricity or any other services to the Unit until after 5 p.m. on Thursday, April 15, 2010.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-498-10
STYLE OF CAUSE:	ROBIN ROBERTS v. ROSEAU RIVER ANISHINABE FIRST NATION as represented by CHIEF AND COUNCIL and THE GINEW HOUSING AUTHORITY INCORPORATED
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 7, 2010 by Videoconference
REASONS FOR ORDER AND ORDER:	Mactavish J.
DATED:	April 8, 2010

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