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Docket: PR 16-01-04797 & CI 20-01-27821
(Winnipeg Centre)
Indexed as: Dalrymple et al. v. DeMeyer Estate; Dusik et al. v. DeMeyer Estate
Cited as: 2022 MBQB 31

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: The Estate of Germaine Mary DeMeyer

(File No.: PR 16-01-04797)

B E T W E E N:

APPEARANCES:

LINDA DALRYMPLE and MICHAEL DALRYMPLE in his capacity as Power of Attorney for LINDA DALRYMPLE, applicants,	)	JONATHAN PATERSON for the applicants
- and -	)	
ROBERT GEORGE DEMEYER and WALTER RICHARD VAN WALLEGHEM as co-executors and trustees of THE ESTATE OF GERMAINE MARY DEMEYER, respondents.	)	DAVID KOCHAN for the respondents

(File No.: CI 20-01-27821)

A N D B E T W E E N:

	)	DILLON K.P. ACHESON for the applicants
BRADLEY JAMES DUSIK and VICTOR STANLEY DUSIK, as executors of THE ESTATE OF DOREEN MARY DUSIK (DECEASED), applicants,	)	

- and -

ROBERT GEORGE DEMEYER and WALTER RICHARD VAN WALLEGHEM as co-executors and trustees of THE ESTATE OF GERMAINE MARY DEMEYER,	)	DAVID KOCHAN for the respondents
respondents.	)	JUDGMENT DELIVERED: February 25, 2022

PERLMUTTER A.C.J.Q.B.

BACKGROUND

[1] This dispute arises out of the administration of the estate of Germaine Mary DeMeyer, who died on November 20, 2013. The respondent Robert George DeMeyer, who is Ms DeMeyer's son, and the respondent Walter Richard Van Walleghem are co-executors of her estate. Mr. DeMeyer along with Ms DeMeyer's other children the applicant Linda Dalrymple (whose application is also brought by her son Michael Dalrymple in his capacity as her attorney), Doreen Dusik (who recently died and whose executors Bradley and Victor Dusik continue her application), and Bernice Reimer are equal beneficiaries of the estate. The estate consists of money and real property on which is located a house. From September 23, 2013, until around November 2020, when the property was sold, Mr. DeMeyer resided on the property. Except where otherwise required, I refer to the Dalrymples and the Dusiks collectively as the applicants. While Ms Reimer was served, she has not participated in these proceedings.

ISSUES

[2] The respondents do not contest the order sought by the applicants under s. 44 of ***The Court of Queen's Bench Surrogate Practice Act***, C.C.S.M. c. C290, requiring them to provide an accounting before the master of their administration of the estate. However, the respondents maintain that such an accounting is unnecessary in light of their counsel's description of the "informal but accurate" accounting provided in Mr. DeMeyer's affidavit of August 11, 2021. In turn, the Dalrymples' counsel points out that Mr. DeMeyer included a variety of expenses in his affidavit, which he deposed were paid by the estate or paid by him on behalf of the estate, only some of which are supported by receipts. The Dalrymples' counsel, with whom the Dusiks agree, argues that these need to be collected into a formal affidavit for a passing of accounts so they can be subjected to scrutiny and contested if necessary. In these circumstances, I am requiring the respondents to proceed with an accounting before the master regarding their administration of Ms DeMeyer's estate. It will be for the master to determine what, if any, costs are payable and by whom as a result of such accounting.

[3] Of the other relief sought in the notices of application, the only remaining issues to be adjudicated in this court are:

1. Is Mr. DeMeyer liable to the estate for occupation rent for the property, which amount would be fixed by the master?

2. Are the respondents liable for diminution of value of the estate and if so, should the master fix the amount of such diminution?

3. Who, if anyone, is to pay costs and on what basis?

ANALYSIS

1. Is Mr. DeMeyer liable to the estate for occupation rent for the property, which amount would be fixed by the master?

[4] While Mr. DeMeyer resided on the property, he did not pay rent. As such, it is the applicants' position that he should pay occupation rent to the estate for the period he occupied the property, from which are to be offset his reasonable expenses relating to maintenance of the property.

[5] Mr. DeMeyer deposed that Ms Dalrymple and Ms Reimer both agreed with him, prior to him moving into the house (after Ms DeMeyer moved out of the house), that he would pay the expenses of the house, including property taxes, insurance and utilities, as the occupancy costs. At the time, Mr. DeMeyer and Ms Dalrymple were Ms DeMeyer's attorneys pursuant to a power of attorney. Mr. DeMeyer deposed that they also agreed the estate would pay for yard and lawn maintenance, repairs, and replacements, although Mr. DeMeyer paid these amounts. In any event, the respondents say that in the absence of Mr. DeMeyer paying these expenses, the estate would have incurred them and the insurance premiums would have been higher because the house was vacant. The respondents point out that the estate had insufficient funds to maintain the property. The respondents also argue that the Dalrymples' notice of application does not claim occupation rent and it would be inequitable for the Dusiks, whose amended application specifically claims occupation rent, to benefit from the payment of occupation rent as Ms Dusik was the cause of the delayed sale of the property.

[6] In turn, the applicants say that if there was an agreement as described by the respondents, which they deny, it is voidable as it would amount to self-dealing by a trustee. They assert that such an agreement would have been a breach of Mr. DeMeyer's fiduciary duty to Ms DeMeyer as her attorney when she was alive and a breach of his duty as executor to act in the best interests of the beneficiaries, by profiting from rent-free occupation. They say the respondents should have sold the property sooner or sought a paying tenant. The Dalrymples' counsel argues that the notice of application is broad enough to claim occupation rent and the Dusiks deny that Ms Dusik was the cause of delay in the sale of the property.

[7] I agree with the applicants that applicable to the circumstances of the case at hand are the following principles and presumption described in ***Bluestone v. Dagarsho Holdings Ltd.*** (2004), 23 R.P.R. (4th) 80 (affirmed at 37 R.P.R. (4th) 53 (Ont. C.A.)), by Karakatsanis J. (as she then was) (para. 26):

> ...Occupation rent is an equitable remedy. The often cited general principle of occupation rent is that "if a person is in occupation without a lease, although the relationship of landlord and tenant will not exist, the law will imply a contract for payment to the landlord or a reasonable amount for the use and occupation of his land": *Young v. Bank of Nova Scotia* (1915), 34 O.L.R. 176, 23 D.L.R. 854 (Ont. C.A.). The principle is based upon the presumption that the parties have agreed to reasonable compensation. That presumption can be rebutted by evidence that the parties intended that the occupation be without compensation. Occupation rent is also an appropriate measure of damages for trespass and unjust enrichment....

[8] The foregoing quotation is cited with approval in ***Bergmann v. Amis Estate***, 2010 ONSC 993 (at para. 39), wherein Daley J. also explained (paras. 37-38):

> The granting of occupation rent is an equitable remedy related to and arising in circumstances of unjust enrichment. The entitlement to occupation rent arises where those entitled to the property have been ousted [citation omitted]...
>
> In order to establish an entitlement to occupation rent it must be demonstrated that the party in possession of the premises has been enriched and that there has been a corresponding deprivation suffered by those entitled to the property and the absence of a juristic reason for the enrichment...

(See also ***Taran v. Ellison Estate***, 2019 MBQB 154, para. 22; and ***Goff v. Goff Estate***, 2010 ONSC 2179, paras. 7-8, where an executrix occupying estate property was ordered to pay occupation rent.)

[9] It is undisputed that Mr. DeMeyer lived on the property for about seven years, having moved in about two months before Ms DeMeyer's death and moved out when the property sold. With the application of the presumption that occupation rent is owed, the question arises whether this presumption is rebutted. With the application of the doctrine of unjust enrichment, the question arises whether there is a juristic reason for any enrichment. Both questions are answered by the determination of whether there was an agreement that permitted Mr. DeMeyer to occupy the property without paying rent and paying as occupancy costs only those expenses identified by him.

[10] The applicants argue that if factually there was such an agreement it is not valid because Mr. DeMeyer deposed the agreement was made when he was acting as Ms DeMeyer's attorney (when she was alive) and he continued to live in the property following her death, while an executor of her estate. As such, he was subject to the principle cited in ***Harrison v. Zelezniak Estate***, 2008 MBQB 8 (varied at 2009 MBQB 326), quoting from ***Lerner, Re***, [1952] 4 D.L.R. 605 (Man. Q.B.), as follows (para. 65):

> It is a rule of universal application that no Trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interests of those whom he is bound by fiduciary duty to protect.

[11] The applicants also rely on the statement in Donovan W.M. Waters, Q.C. et al., ed., *Water's Law of Trusts in Canada*, 3rd ed., (Toronto: Thomson Carswell, 2005) at p. 877 that "[c]ontracts made when the fiduciary is in such a conflict are voidable at the instance of the person to whom the duty is owed".

[12] I find that there was no agreement that permitted Mr. DeMeyer to occupy the property for the duration he did without paying rent and paying only those expenses identified by him as occupancy costs for the following reasons.

[13] First, this was an alleged oral agreement. The only evidence of this oral agreement is from Mr. DeMeyer. Mr. Van Walleghem deposed in his affidavit sworn September 23, 2021, that he specifically recalls that in 2013, prior to Mr. DeMeyer moving into Ms DeMeyer's house, Mr. DeMeyer advised him about the details of the agreement. This is hearsay evidence that is contentious, and thus, presumptively inadmissible on these applications (Rule 39.01(5)). In any event, Mr. Van Walleghem's evidence is essentially oath-helping and I give it no weight. While corroboration of Mr. DeMeyer's evidence about this oral agreement is not required, I note there is no such corroboration. When I consider the circumstances as a whole, in my view, the evidence does not meet the respondents' evidentiary burden regarding the existence of an agreement reflecting that the parties intended Mr. DeMeyer's occupation of the property be without payment of occupation rent.

[14] Second, from the evidence, I cannot determine with sufficient certainty the intentions and expectations of the parties regarding the duration of Mr. DeMeyer's occupancy so as to find an agreement. The circumstances in which Mr. DeMeyer moved to the property included that Ms DeMeyer had previously moved to an assisted living residence and there was a need to deal with her vacant property. In this context, it makes sense that Mr. DeMeyer might briefly occupy the property. However, when Mr. DeMeyer moved to Ms DeMeyer's property he had sold his own house. As well, Mr. DeMeyer's counsel readily concedes that no one thought it would take seven years for the property to sell. In my view, the absence of a clear indication of the duration or term throughout which Mr. DeMeyer would occupy the property, which I find was essential in the circumstances, renders it sufficiently indefinite, vague and uncertain such that there is no agreement. I am also unable to reasonably infer the intended term of Mr. DeMeyer's occupation of the property or what was intended or reasonably expected to happen if the property did not promptly sell.

[15] Having concluded there was no agreement for Mr. DeMeyer's occupancy of the property, I also find the presumption that Mr. DeMeyer is to pay reasonable compensation for his occupation of the property is not rebutted. For this same reason, I find there is an absence of juristic reason for Mr. DeMeyer's enrichment. With respect to the question of Mr. DeMeyer's enrichment, I am also satisfied that Mr. DeMeyer has been enriched through his occupation of the property because he had all of the benefits of living on the property rent-free. As well, I am satisfied

that Ms DeMeyer's estate and therefore the beneficiaries suffered a corresponding deprivation by reason of the loss of opportunity to earn rental income.

[16] Accordingly, I find that Mr. DeMeyer is liable to Ms DeMeyer's estate for occupation rent in an amount to be determined by the master. The applicants agree, and I so find, that Mr. DeMeyer is entitled to a set-off from the amount owing for occupation rent the reasonable expenses he incurred for maintenance of the property. I find that such a set-off is equitable in the circumstances as it is reasonably foreseeable that such maintenance related expenses would have been incurred with respect to the property had it been rented to a third party (see also, ***Goff***, para. 8). In summary, in accordance with Rules 54.02(1)(b) and 54.02(2)(a), I am directing a reference to the master to take accounts and determine the amount of occupation rent which is owing to the estate with a set-off for the reasonable expenses incurred by Mr. DeMeyer with respect to the maintenance of the property (the reasonableness and amounts of which are all to be determined by the master).

[17] I will briefly deal with the respondents' other arguments against the claim for occupation rent.

[18] The respondents argue that in the absence of Mr. DeMeyer paying the expenses that he did, the estate would have had to pay these expenses and the estate lacked sufficient funds to do so. However, there is no explanation why a third party tenant could not have occupied the property and through such a tenancy, the expenses would be covered by the tenant or through rent paid by the

tenant. This also addresses the respondents' argument (without any evidence) that had Mr. DeMeyer not occupied the house, the insurance premiums would have been higher.

[19] The respondents' counsel argues that the Dalrymples' notice of application does not claim occupation rent and as such, it should be denied. In my view, the request in their notice of application for an accounting along with a request for the opinion, advice and direction of the court, in the context of the specific enumerated grounds for this relief, including that Mr. DeMeyer was living in the property and the respondents were allowing dissipation of the estate assets for their own personal benefit and enrichment to the detriment of the beneficiaries, is sufficient to advance this claim. In my view, these enumerated grounds provide the respondents and the court with adequate notice of the matters in dispute as evident by the nature of the respondents' responsive evidence and argument.

[20] The respondents' counsel argues that permitting the Dusiks to pursue a claim for occupation rent would be inequitable because the delay in the sale of the property and the conclusion of the administration of the estate were caused by Ms Dusik filing an application (in a different proceeding) in 2015. That is, the Dusiks do not pursue the equitable remedy of occupation rent with "clean hands". The gist of Ms Dusik's 2015 application was to declare void a right of first refusal to purchase the property granted by Mr. DeMeyer and Ms Dalrymple as Ms DeMeyer's attorneys to a third party purchaser of Mr. DeMeyer's neighbouring property, or, in the alternative, to declare that Ms Dusik was eligible to make an

offer to purchase the property. Mr. DeMeyer defended the granting of this right of first refusal on the basis that it was consideration for an easement agreement permitting access to Mr. DeMeyer's neighbouring driveway (which easement would run with the land) so that owners of Ms DeMeyer's property could have assured access/right of way to her property. However, there is no compelling evidence that Ms Dusik's 2015 application was vexatious. While in June 2020, after little progress, Ms Dusik abandoned her 2015 application, I agree with the Dusiks that it was open to the respondents (although not required) to more actively move the 2015 application forward. This would have presumably brought to a head the issues surrounding the sale of the property and the related occupation by Mr. DeMeyer. In my view, also weighing against a finding of inequity in allowing the Dusiks' claim for occupation rent is Mr. DeMeyer's enrichment through his occupancy of the property over the years it remained unsold. In sum, I do not find it inequitable for the Dusiks to claim that Mr. DeMeyer is to pay occupation rent to Ms DeMeyer's estate.

2. Are the respondents liable for diminution of value of the estate and if so, should the master fix the amount of such diminution?

[21] It is the Dusiks' position that the respondents failed to maintain the property, thereby causing a diminution in value of the estate, for which the respondents are liable. In support of this position, they essentially rely on an appraisal of the property completed on September 4, 2014, valuing the property at $387,000, compared to a reduced appraisal of the property on October 9, 2019, at $350,000, with the sale price on September 8, 2020, of $370,000.

[22] It is the respondents' position that they obtained multiple appraisals and listed the property for sale in September 2014, approximately 10 months after Ms DeMeyer's death. There were no offers and it was de-listed. In 2015, it was re-listed, and again, there were no offers. In July 2015, Ms Dusik filed her application (discussed above). The respondents say that while Ms Dusik's 2015 application was pending, the property could not be sold as Ms Dusik could have created a breach of obligations with respect to a third party purchaser. After Ms Dusik abandoned her application in June 2020, the property soon sold for an amount consistent with the appraisals and the fair market value as established by the arm's length third party offer. The respondents' counsel points out that the average of the appraisals from 2014 to 2020, is $348,380, and the property sold for $370,000. The respondents also point to the expenses incurred by Mr. DeMeyer in maintaining the property.

[23] No objection was raised to the filing of appraisals of the property prepared by third parties, none of whom filed affidavits. As such, I am treating these appraisals as non-contentious (see Rule 39.01(5)).

[24] In my view, there is no persuasive evidence of a diminution of value of the property.

[25] The only evidence that Mr. DeMeyer did not properly maintain the property is that the sale price of $370,000, in September 2020, and an appraisal of the property on October 9, 2019, at $350,000, were less than a higher appraisal on September 4, 2014, valuing the property at $387,000 (as of August 28, 2014).

However, I have no basis to find that this higher appraisal in fact reflected the fair market value of the property at the time. In evidence is also an appraisal of the property as of January 14, 2014, in the amount of 289,900 to 299,900, and as of July 4, 2014, in the amount of about $325,000. In 2014 and again in 2015, the property was listed for $415,000, and received no showings or offers. As such, I infer that the fair market value of the property was something less than $415,000, as at that time. As mentioned, on October 9, 2019, an appraisal estimated the market value of the property in the range of $350,000. An appraisal of the property as at June 2, 2020, estimates its value at $380,000. While these appraisals are lower than the appraisal of September 4, 2014, valuing the property at $387,000, they are also higher than the two others from 2014 (in the amounts of $289,900 to $299,900 and $325,000).

[26] Simply, given the deviations in value of the many appraisals and the absence of any evidence, through cross-examination or otherwise, which may address the reliability of one appraisal over another, including for example any change in market conditions, the foregoing evidence does not demonstrate or permit a reasonable inference of diminution of value from 2014 to 2020.

[27] There is also no compelling evidence that Mr. DeMeyer was not maintaining the property. Mr. DeMeyer deposed to the costs he has incurred with respect to the property. The respondents' counsel advises that over a seven year span, these costs total in excess of $87,000. While the reasonableness of the costs and the

extent to which they can be set off against occupation rent will be determined by the master, *prima facie* they do not support a diminution in value.

[28] Accordingly, the Dusiks' application for an order that the respondents pay amounts for diminution of value of the estate is dismissed.

3. Who, if anyone, is to pay costs and on what basis?

[29] It is the applicants' position that the respondents' delays in probating the will, administering the estate, and providing an accounting forced legal action by them. They say that this, along with the respondents' failure to safeguard the estate assets by not selling the property sooner or obtaining rental income and Mr. DeMeyer's use of the property for his own gain, were so outrageous as to justify the payment of solicitor and client costs by them.

[30] It is the respondents' position that they never refused to provide an accounting and as noted above, they say Mr. DeMeyer's affidavit of August 11, 2021, provides an informal but accurate accounting. The respondents assert that as shown by the appraisals of the property soon after Ms DeMeyer's death, the intent was to sell the property and have Mr. DeMeyer stay in the property and pay the expenses until the property was sold. However, it could not have been predicted that this would take seven years, for reasons that the respondents largely attribute to Ms Dusik's 2015 application. On the basis of the delay caused by Ms Dusik's 2015 application, the respondents argue that the Dusiks should be liable for solicitor and client costs. They also argue that solicitor and client costs ought to be awarded against the Dusiks as a result of the respondents' motion to

strike Ms Dusik's notice of application in the case at hand because it was duplicative of certain aspects of Ms Dusik's 2015 application. The respondents' motion to strike Ms Dusik's application was ultimately abandoned with the understanding that the Dusiks would amend this notice of application. The respondents seek party and party costs against the Dalrymples.

[31] It is undisputed that solicitor and client costs are awarded in circumstances where there has been reprehensible, scandalous or outrageous conduct on the part of one or more of the parties (***Young v. Young***, [1993] 4 S.C.R. 3, para. 260). It is my view that none of the conduct by any of the parties can be described as reprehensible, scandalous or outrageous. The Manitoba Court of Appeal has repeatedly indicated that solicitor-client costs are "not usually awarded for pre-litigation conduct" and has identified limited situations where that conduct can justify such an award (***Bibeau v. Chartier***, 2022 MBCA 2, para. 96). In my view, the case at hand is not one of those limited situations. The estate and therefore the applicants are being compensated for delay with Mr. DeMeyer's payment of occupation rent. As noted, the respondents have not contested proceeding to a formal passing of accounts, albeit they reserve the right to argue before the master the issue of costs of this passing of accounts on the basis that it is unnecessary. As to the respondents' attribution of delay to Ms Dusik as a basis for their claim for solicitor and client costs, as discussed above, it was always open to them to have more actively moved the 2015 application to a conclusion.

[32] In exercising my discretion to award costs, I have considered the factors outlined in Rule 57.01(1). The Dalrymples did not ultimately pursue a claim for diminution of value of the estate. In light of the Dalrymples' success in their claim for occupation rent, the Dalrymples are entitled to their costs on a party and party basis as against Mr. DeMeyer. While the Dusiks were similarly successful regarding their claim for occupation rent, the respondents successfully defended the Dusiks' claim for diminution of value. In light of this divided success, no costs are ordered to either the Dusiks or the respondents for the Dusiks' application. With respect to the respondents' claim for costs regarding their motion to strike Ms Dusik's application, ultimately, the Dusiks amended the application to remove the duplicative aspects of Ms Dusik's 2015 application and focus the application on the actual matters in issue as determined above. In these circumstances, I am not ordering any costs regarding the respondents' motion to strike. As noted, the question of what costs are owing regarding the passing of accounts and by whom such costs, if any, are payable will be determined by the master, as will the costs relating to the reference surrounding occupation rent.

CONCLUSION

[33] In conclusion, Mr. DeMeyer is liable to the estate for occupation rent for the property less a set-off for the reasonable expenses he incurred for maintenance of the property, all in amounts to be determined by the master. The Dusiks' application for an order that the respondents pay amounts for diminution of value of the estate is dismissed. The Dalrymples are entitled to their costs on a party

and party basis, as against Mr. DeMeyer. No other costs are ordered. However, it remains open to the parties to claim costs regarding the upcoming proceedings before the master.

A.C.J.