

SUPREME COURT OF YUKON

Citation: *Estate of Buyck*, 2015 YKSC 23

Date: 20150608
S.C. No. 14-P0034
Registry: Whitehorse

IN THE MATTER OF THE ESTATE

OF

ALICE MAY BUYCK, DECEASED

Before: Mr. Justice R.S. Veale

Appearances:

Breagh D. Dabbs
Claire E. Anderson

Counsel for the Estate of Alice May Buyck
Counsel for the First Nation of Na-Cho Nyak Dun

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Estate of Alice May Buyck applies for a declaration that the First Nation of Na-Cho Nyak Dun (“Na-Cho Nyak Dun”) does not have a valid claim to Lots 11, 12, 13 and 14, Mayo, Yukon Territory, (the “Lots”), which are registered in the name of Alice Buyck.

[2] Na-Cho Nyak Dun claims that the Lots should be transferred to the First Nation pursuant to a verbal agreement with Wilmont Wesley Buyck (“Wes Buyck”) and Alice Buyck whereby Na-Cho Nyak Dun agreed to construct a house on the Lots and grant a life estate to the Buycks in the Lots and the right to occupy the house in return for a transfer of the title to the Lots to Na-Cho Nyak Dun.

FACTS

[3] Alice Buyck was a citizen of Na-Cho Nyak Dun. She lived in a common-law relationship with Wes Buyck who was not a citizen of Na-Cho Nyak Dun.

[4] In 1964, Wes Buyck purchased the Lots and buildings. The Certificate of Title records Wesley Buyck as the registered owner.

[5] The former Mining Records office was located on the Lots but it was torn down leaving only a detached garage, which is still on the Lots.

[6] Wes Buyck worked for the Government of Yukon in Mayo until 1974, when he was transferred to Stewart Crossing, a nearby community. Alice and Wes Buyck lived in government housing. They lived in Stewart Crossing until Wes retired on January 1, 1993.

[7] Rose Lemieux is the daughter of Wes and Alice Buyck. She states that just prior to his retirement, Wes Buyck felt that the only way he could get a house for Alice was by transferring the Lots to Na-Cho Nyak Dun in exchange for a house. Rose Lemieux was not personally present for any of the discussions between Wes Buyck and Na-Cho Nyak Dun.

[8] On August 6, 1992, Wes Buyck signed a transfer of the Lots to the First Nation of Na-Cho Nyak Dun in consideration of \$1.00. Stewart Moses witnessed the signature of Wes Buyck, but the Affidavit of Attestation was unsworn. The affidavit of value was unsworn. The transfer was never registered at the Land Titles Office.

[9] Wes Buyck passed away on January 21, 1993, just three weeks after his retirement.

[10] By a Will dated December 5, 1986, Wes Buyck appointed his daughter, Rose Lemieux, to be his executor and trustee. The Will transferred one-half of his estate to Alice Buyck and the balance to his children.

[11] Rose Lemieux telephoned Deputy Chief Billy Germaine on February 9, 1993, to inquire about the details of the arrangement between Na-Cho Nyak Dun and Wes Buyck. Billy Germaine returned the transfer of the Lots signed by Wes Buyck on August 6, 1992. Rose Lemieux states that Billy Germaine provided her with the Transfer signed by Wes Buyck and told her that she could keep it and Na-Cho Nyak Dun did not need it.

[12] Billy Germaine states that it was his understanding that Rose Lemieux was to get the paperwork done to transfer Wes Buyck's Lots to Na-Cho Nyak Dun but she never did. It was never his understanding that the deal to transfer the land was cancelled prior to the construction of the house.

[13] On March 9, 1993, Rose Lemieux signed a Caveat against the Lots stating:

Rose Lemieux, Executrix of the Estate of Wesley Buyck, Deceased, of the City of Whitehorse, in the Yukon Territory, claiming an interest pursuant to an Agreement made on or about August 2, 1992, between Wesley Buyck and Alice Buyck and the First Nation of Nacho Nyak Dun ("Nacho Nyak Dun") whereby Nacho Nyak Dun agreed to construct a house on the lands and premises described herein (the "lands") and grant Wesley Buyck and Alice Buyck a life estate in the lands and premises and the right to occupy the house in return for a transfer of the title to the lands to Nacho Nyak Dun, in the lands and premises more particularly described as follows: ...

[14] In the Affidavit of Caveator attached to the Caveat, Rose Lemieux swore the following:

That the allegations contained in the annexed Caveat are true in substance and in fact as I verily believe.

[15] The Caveat was registered against the Lots in the Land Titles Office on March 12, 1993.

[16] The Supreme Court of Yukon appointed Rose Lemieux as Executor of Wes Buyck's estate on March 16, 1993.

[17] Billy Germain, Deputy Chief of Na-Cho Nyak Dun remembers when Na-Cho Nyak Dun built a house for Alice Buyck and Wes Buyck to live in, in exchange for giving up their land and using the house for the duration of their lives.

[18] Roberta Hager has worked at Na-Cho Nyak Dun since 1985. She recalls that Alice or Wes requested that Na-Cho Nyak Dun build a house for Alice Buyck to live in and that the land would eventually be transferred over to Na-Cho Nyak Dun in exchange for the house being built.

[19] Rose Lemieux stated that she told Na-Cho Nyak Dun prior to construction of the house for Alice Buyck that Alice was not in agreement with transferring all the Lots to Na-Cho Nyak Dun but only the lot on which the house was to be located.

[20] Rose Lemieux stated that Na-Cho Nyak Dun built a house for Alice Buyck in the spring and summer of 1993 on the Lots. A Na-Cho Nyak Dun document entitled "Alice Buyck, Expense to Date, April 30, 1993", listed a total of \$49,057.28 in labour and materials. Additionally, Stan Lubaszko entered into a contract for \$11,000 with Na-Cho Nyak Dun to provide the electrical work on the house.

[21] On August 5, 1993, Rose Lemieux transferred the Lots and house to Rose Lemieux, Executor of Wes Buyck's estate.

[22] On January 3, 1995, Billy Germaine wrote to Rose Lemieux to inquire whether she, as Executor of the Estate of Wes Buyck, would transfer the house and Lots to Na-

Cho Nyak Dun so that the Lots would be Settlement Lands of Na-Cho Nyak Dun under the Final Agreement between Na-Cho Nyak Dun, Canada and Yukon signed May 29, 1993. The transfer had to be completed before February 14, 1995, the Effective date of the Final Agreement. The Lots were included in the Na-Cho Nyak Dun Final Agreement as part of the First Nation's Settlement Land provided that:

- no later than the Effective Date of this Agreement, the owner registered in the Land Titles Office shall transfer all right, title and interest in the land to the First Nation of Nacho Nyak Dun, failing which, the land shall not become Settlement Land,

[23] On January 31, 1995, the house and Lots were transferred into the name of Alice Buyck without the encumbrance of the Caveat. There is no evidence as to whether the Caveat lapsed or was withdrawn.

[24] Rose Lemieux advised the lawyer for Na-Cho Nyak Dun on February 10, 1995, by telephone that Alice was not in agreement with transferring all the Lots to Na-Cho Nyak Dun, but was willing to transfer the lot on which the house was built. By letter dated February 10, 1995, the lawyer for Na-Cho Nyak Dun confirmed the intention as follows:

Further to our telephone conversations today, I confirm that it was your intention to transfer to the NND [Na-Cho Nyak Dun] only the lot on which the house is situated. In order to do this, you would need a survey of the Property because it is not certain on which lot or lots the house sits. There is likely not enough time to get a surveyor to Mayo before the Effective Date of February 14, 1995. Also, you would prefer to negotiate with Council concerning the cost of surveying.

In view of this situation, it appears that no transfer of the Property will take place prior to Effective Date. You have, however, expressed an interest in having the "house lot" transferred to NND in fee simple after the Effective Date. (my emphasis)

[25] Counsel for Rose Lemieux responded by letter, dated March 16, 1995 to Na-Cho Nyak Dun:

Please be advised that I represent Rose Lemieux, Executrix of the Estate of the late Wilmont Wesley Buyck and Mrs. Alice Buyck. As you are aware, Mrs. Alice Buyck is the registered owner of the above-noted Properties. Na-Cho Nyak Dun First Nation (the "First Nation") constructed a home for Mrs. Buyck on one of the above-noted Properties. She presently resides in this home.

Mrs. Buyck wishes to clarify her legal position with respect to the Properties. In order for this to take place, a legal survey of the Properties must be conducted in order to determine the exact sitting of the Lots and in particular to determine upon which Lot the house in which Mrs. Buyck resides is located.

Once this legal survey has been completed, Mrs. Buyck is prepared to transfer title to the Lot upon which the house was constructed to the First Nation. She will retain title to the other three Lots in her own name. In addition, Mrs. Buyck will require a life estate in the Lot which she transfers to the First Nation providing for her right to reside in the house on the Lot for the remainder of her lifetime. I propose that the First Nation pay for the legal survey of the Lots and provide a copy to me as soon as it has been prepared.

I look forward to hearing from you with respect to this proposal. (my emphasis)

[26] It appears that Na-Cho Nyak Dun did not respond to the March 16, 1995 letter or prepare a survey of the Lots.

[27] On July 16, 2013, Na-Cho Nyak Dun wrote a letter to Alice Buyck asking her to sign a Tenancy Agreement with the First Nation.

[28] On August 14, 2013, Na-Cho Nyak Dun wrote a letter to Alice Buyck advising that she did not have a signed Tenancy Agreement which was required to occupy a Na-Cho Nyak Dun housing unit. Alice Buyck did not sign a Tenancy Agreement.

[29] Alice Buyck passed away on April 2, 2014.

[30] Jim Yamada, Canadian Residential Appraiser, at the request of the Estate of Alice Buyck, appraised the house and Lots at a market value of \$157,000 in a report dated November 19, 2014.

[31] Alice Buyck paid for property taxes and maintenance of the house and Lots from 1993 until she passed away on April 2, 2014.

[32] Alice Buyck executed a Last Will and Testament dated May 7, 1998. She appointed Shirley Telep as her Executor. Probate was granted to Shirley Telep on July 25, 2014.

[33] Shirley Telep confirmed that Na-Cho Nyak Dun built a house for Alice Buyck in the spring and summer of 1993 on the Lots.

[34] In her Will, Alice Buyck gave the house and Lots to Shirley Telep to manage for the use and benefit of her ten children and if sold, to divide the proceeds into ten equal shares.

[35] Shirley Telep advises that the family wishes the Lots and house to be transferred to daughter Linda Buyck.

[36] I find the following facts:

1. There is no written agreement between Wes Buyck, Alice Buyck and Na-Cho Nyak Dun relating to the construction of the house and the transfer of the Lots to the Na-Cho Nyak Dun in exchange for life estates for Wes and Alice Buyck and the right to occupy the house.
2. There is evidence of an Agreement based upon the signed Transfer of the Lots by Wes Buyck to Na-Cho Nyak Dun dated August 6, 1992.

3. The Caveat provides sworn evidence that there was an Agreement made on or about August 2, 1992, “whereby Nacho Nyak Dun agreed to construct a house on [the lands] and grant Wesley Buyck and Alice Buyck a life estate in the lands and premises and the right to occupy the house in return for a transfer of the title to the lands to Nacho Nyak Dun ...”.
4. Na-Cho Nyak Dun constructed the house on the Lots in the spring and summer of 1993 and Alice Buyck resided there until she passed away on April 2, 2014. She paid the property taxes and generally maintained the house.
5. Na-Cho Nyak Dun included the Lots in their Final Agreement dated May 29, 1993, as Settlement Land, conditional upon transfer of the Lots to the First Nation by February 14, 1995.
6. The first written confirmation of Na-Cho Nyak Dun that Alice Buyck did not wish to transfer all four Lots but only the lot or lots on which the house was situated was made by letter dated February 10, 1995.
7. The First Nation did not accept the offer of Alice Buyck to transfer the house and lot or lots upon which the house was situated or pay for the legal survey.
8. There is no evidence by way of a legal survey to indicate the location of the house on the Lots.

ISSUES

[37] The following issues will be addressed:

1. Was there an Agreement between Wes and Alice Buyck whereby Na-Cho Nyak Dun agreed to construct a house on the Lots and grant a life estate to Wes and Alice Buyck in return for a transfer of title to Na-Cho Nyak Dun?
2. If there is an Agreement, is it defeated by the *Statute of Frauds* because it was not in writing?
3. Is the Na-Cho Nyak Dun claim defeated by being beyond the limitation period?

1. Was there an Agreement between Wes and Alice Buyck whereby Na-Cho Nyak Dun agreed to construct a house on the Lots and grant a life estate to Wes and Alice Buyck in return for a transfer of title to Na-Cho Nyak Dun?

[38] I have no doubt that there was an oral agreement between Wes and Alice Buyck and Na-Cho Nyak Dun on or about August 2, 1992, whereby Na-Cho Nyak Dun agreed to construct a house on the Lots owned by Wes Buyck and grant Wes and Alice Buyck a life estate in the Lots and house in return for a transfer of the title to the Lots and house to Na-Cho Nyak Dun. The evidence in support of this finding is the Caveat sworn and filed by Rose Lemieux, the Executrix of the Estate of Wes Buyck, in March 1993, shortly after Wes Buyck passed away. It is also supported by Wes Buyck signing a transfer of the Lots.

[39] There is no dispute that Na-Cho Nyak Dun built the house on the Lots and that Alice Buyck enjoyed the use of the house and Lots for the rest of her life.

[40] It is also clear that Na-Cho Nyak Dun included the Lots as Settlement Land under their Final Agreement dated May 29, 1993, with Canada and Yukon.

[41] However, the First Nation was unable to have the Lots and house converted to Settlement Land because Alice Buyck had changed her mind about transferring all four lots and preferred to transfer only the lot or lots on which the house was situated.

[42] I have found that Na-Cho Nyak Dun did not agree to that change.

2. If there is an Agreement, is it defeated by the *Statute of Frauds* because it was not in writing?

[43] The *Statute of Frauds*, 23 Car. 2, Cap. 3, sec 4, remains in force in the Yukon. See *Doering v. E. Caron Diamond Drilling Limited*, [1978] Y.J. No. 7 (C.A.).

[44] Section 4 reads:

4. No action shall be brought whereby ... to charge any person ... upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

[45] In my view, the Caveat sets out the agreement between Wes and Alice Buyck and Na-Cho Nyak Dun in complete terms that were understood and agreed upon by the parties in a sufficient form to satisfy the requirements of the *Statute of Frauds*. The Caveat constitutes a memorandum or note in writing signed by the Executrix of the Estate of Wes Buyck.

[46] In *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69, at para. 11, the Court stated:

Quite simply equity recognizes as done that which ought to have been done. A verbal agreement which has been partly performed will be enforced. ...

[47] In *Hill*, the Supreme Court avoided the operation of s. 21 (1) of the *Public Highways Act*, R.S.N.S 1954, c. 235, which would have denied the petitioner a remedy

by invoking the equitable doctrine of part performance to prevent the Crown from relying on the writing requirement.

[48] In the case at bar, Na-Cho Nyak Dun has performed its agreement to construct a house on the Lots, in which Alice Buyck has had a life estate. Counsel for the estate of Alice Buyck submits that the agreement could only be enforced against Wes Buyck or his estate and not the estate of Alice Buyck. I do not agree. Although Wes Buyck was the registered owner of the Lots, the agreement was clearly made in contemplation of Alice Buyck, a member of Na-Cho Nyak Dun, having a life estate in the Lots and house. Alice Buyck cannot benefit from the agreement and then resile from it. Furthermore, Alice Buyck's entitlement to reside in the house arose out of her interest in Wes Buyck's estate. I conclude that the oral agreement preceded Wes Buyck's death and therefore is binding on his estate and Alice Buyck's interest can only be what Wes Buyck granted in his will, i.e. the Lots subject to the enforceable oral agreement.

[49] I conclude that the agreement between Wes and Alice Buyck and Na-Cho Nyak Dun, as evidenced in the Caveat and the part performance of constructing the house, is not defeated as contrary to the *Statute of Frauds*.

3: Is the Na-Cho Nyak Dun claim defeated by being beyond the limitation period?

[50] The applicable limitation period is set out in s. 17 of the *Limitations of Actions Act*, R.S.Y. 2002, c. 139, which reads:

Recovery of land

No person shall take proceedings to recover any land after 10 years from the time at which the right to do so first accrued to some person through whom the person claims, hereinafter called "predecessor" or if the right did not accrue

to a predecessor then within 10 years after the time at which the right first accrued to the person taking the proceedings, hereinafter called "claimant".

[51] While the limitation period of 10 years is clear, the question is when did the claim arise to start the clock ticking?

[52] Counsel for the estate of Alice Buyck submits that the clock began to run when Na-Cho Nyak Dun knew that Alice Buyck was not in agreement with transferring all four lots but only the lot or lots on which the house was situated. Na-Cho Nyak Dun clearly knew of Alice Buyck's position on this as it is referred in its lawyer's letter of February 10, 1995. If one considers this to be an anticipatory breach or partial repudiation of the agreement, arguably, Na-Cho Nyak Dun was put on notice and their time for bringing this action expired in February 2005.

[53] *Heath v. Darcus* (1992), 84 D.L.R. (4th) 694 (B.C.C.A.), is a case where a Will left a house to six children. Five children quitclaimed the house to their sister, who was in financial need, on the oral agreement with the sister that she would later sign the house back to the estate so that its proceeds could be divided as contemplated by the will.

[54] In that case, the agreement was made in January 1956, but the sister in financial need denied the alleged agreement in a letter from her lawyer dated June 27, 1978. In 1984, the sister moved away from the property and rented it out. In August 1987, she transferred a one-half interest to her son, as a tenant in common. The court action to recover the land was commenced on January 17, 1987, which would be more than 10 years beyond the anticipatory breach letter of June 27, 1978.

[55] McEachern, C.J.B.C. decided the following:

In my view, Mrs. Darcus had a right under both the will and the trust agreement to remain in the house for as long as

she wished, even until her death. The letter possibly gave the beneficiaries the right to treat her rejection as an anticipatory breach of trust, and to bring an action for a declaration of trust. On the other hand, knowing Mrs. Darcus had the right to remain in the house, the beneficiaries were entitled to wait until she dies, or left the house, to see if she or her estate would do the right thing. They had no right, in 1978, or at any time until Mrs. Darcus died or left the house, to claim it back.

[56] He further stated that it was not until the sister in financial need left the house in 1984 that the remaining sisters had the right to assert a cause of action for the recovery of possession and title and therefore the sisters commenced the action within the limitation period.

[57] Applying the decision in *Heath*, the right of Na-Cho Nyak Dun to bring its action began on the death of Alice Buyck and thus the limitation period has not expired. While it may have been open to Na-Cho Nyak Dun to commence an action based upon the anticipatory breach of Alice Buyck, it was not required to do so and could wait to see if the executor of Alice Buyck's estate would "do the right thing". There was no acceptance of the anticipatory breach or partial repudiation of Alice Buyck. See also *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, at para. 91 and *Brown v. Belleville (City)*, 2013 ONCA 148.

[58] I conclude that the Na-Cho Nyak Dun claim is not defeated by the limitation period defence.

SUMMARY

[59] In conclusion, I have found that the agreement of Na-Cho Nyak Dun to construct a house on the Lots under a verbal agreement granting a life estate to Wes and Alice Buyck in return for a transfer of the title to the Lots is a valid enforceable contract. I

therefore order that the title to the Lots be transferred by the executor of the estate of Alice Buyck or by Court Order. Costs may be spoken to, if necessary, in case management.

[60] It is my understanding that the beneficiaries of the estate of Alice Buyck may be in agreement that Linda Buyck should be accepted as the tenant in the house. This was not a matter addressed in this case but it is worthy of consideration by Na-Cho Nyak Dun given the history of the Lots.

VEALE J.