IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Han v. Han,*
2023 BCSC 1210

Date: 20230717
Docket: H245493
Registry: New Westminster

Between:

Jeong Sook Han

Petitioner

And

Jae Kyu Han and
All Tenants or Occupiers of the Subject Lands and Premises

Respondents

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Petitioner:	V. Winn as agent for I.H. Kinman
The Respondent Jae Han Appearing on own behalf:	J. Han
Place and Date of Hearing:	New Westminster, B.C. April 3, 2023
Place and Date of Judgment:	New Westminster, B.C. July 17, 2023

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Introduction

[1] On this application the petitioner seeks an order *nisi* and judgment for the mortgage debt in a foreclosure proceeding, stemming from an April 2019 mortgage. The respondent opposes granting the foreclosure order on the basis that the $3,500,000 claimed was never advanced to him. In substance the respondent contends there is a triable issue or issues and judgment should not be granted at this stage of the proceeding. He argues he does not owe $3,500,000.

Background

[2] The petitioner, Jeong Sook Han, is the mother of the respondent, Jae Kyu Han. The respondent resides at 774 Adiron Avenue, Coquitlam, BC (the "Property").

[3] The evidence on this application included:

- the plaintiff's affidavit sworn August 18, 2022 confirming the contents of the petition, attaching the registered Form F mortgage (the "Mortgage") and the Prescribed Standard Mortgage Terms;
- the affidavit of Raj Bains, a paralegal at the petitioner's lawyer's law firm attaching an October 26, 2022 appraisal of the Lands by Adlaw Appraisals Ltd. (the "Appraisal");
- the respondent's first affidavit dated September 9, 2022 confirming the statements in the response to petition and attaching a copy of the Mortgage and the respondent's 2019 and 2020 income tax returns;
- the respondent's second affidavit dated March 27, 2023 attaching an enduring power of attorney signed April 1, 2019 and a revocation of enduring power of attorney signed February 23, 2022; and
- a title search of the Property dated March 29, 2023.

[4] These documents indicate that the respondent became registered owner of the Property on February 28, 2018 for a price of $1,200,000. This information is

revealed, in part, in the Appraisal. The respondent granted the Mortgage to the petitioner in the principal amount of $3,500,000 on April 1, 2019.

[5] Nothing in the affidavits explains why the Mortgage was granted to the petitioner more than one year after the respondent acquired title.

[6] The petitioner relies only on the registered mortgage as proof of the debt, without putting any evidence before the Court to establish that the monies were actually advanced to the respondent or that the debt remains owing.

[7] In the petition, the petitioner suggests the Mortgage was granted "for valuable consideration…" and was intended to secure the sum of $3,500,000 with interest as set out in the Mortgage. That assertion is not accurate; there is no interest component set out in the Mortgage.

[8] In the response to petition, the respondent asserts that he never received $3,500,000 from the petitioner and because the money was not advanced, he cannot repay the petitioner. In his affidavit, the respondent reiterates that position. He deposes he never received the principal amount of $3,500,000.

[9] It may be significant in this dispute that the Mortgage granted by the respondent appears to have been witnessed by the petitioner's lawyer. There is no indication the respondent had any independent legal advice concerning the granting of that security and the respondent said he did not understand what the document was about.

[10] Other than these facts, the evidence provided by both parties is sparse and the lack of detail and assertions of important facts is concerning.

[11] In her submissions, petitioner's counsel said the respondent had returned to Canada from Korea in April 2019. It was at that time that the petitioner had the respondent sign a mortgage and grant her enduring power of attorney. Petitioner's counsel also submitted that the Mortgage principal included monies she had previously advanced to her son over a period of 5-10 years, up to that date. It is

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those advances plus the purchase price of the Property which she says makes up the principal Mortgage amount. There was no evidence provided concerning advances to the respondent by the petitioner.

[12] The respondent represented himself on this application. In his response to petition and in his submissions he said that the Property had been given to him by his mother as a gift but in April 2019 the petitioner had asked him to sign two documents at a lawyer's office. The respondent said he did not understand what he was signing.

[13] He says he did not learn that he had granted his mother an enduring power of attorney until 2022, and he subsequently revoked it in February 2022. He says it was never registered.

[14] As with the petitioner's submissions, it is unfortunate many of the respondent's comments were not set out in his affidavit.

[15] It is apparent the Mortgage and enduring power of attorney were prepared by Ronald J. Argue, a lawyer most likely acting for the petitioner when the respondent's signature was obtained on the Mortgage and the enduring power of attorney. There is no indication the respondent received any independent legal advice concerning these documents.

[16] Another important aspect of the petition is that the Mortgage refers to the Prescribed Standard Mortgage Terms including the following:

> 2(1) In return for the lender agreeing to lend the principal amount of the borrower, the borrower grants and mortgages the land to the lender as security for repayment of the mortgage money and for performance of all the borrowers promises and agreements.

[17] The evidence indicated that the property has a current market value of $1,400,000 and an assessed value of $1,303,000.

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The Issues

[18] The question I am asked to consider is whether the evidence presented by the petitioner is a sufficient basis to grant an order *nisi* and judgment on the debt claimed. This question, in turn requires consideration of whether the petitioner has established that there is no *bona fide* triable issue.

[19] If I find that the petitioner has failed to establish that no triable issue exists, I must decide whether to direct a trial of the issue or whether the issue can be resolved through alternative methods, such as by ordering cross-examination on the affidavits of the parties. The overriding concern in this determination is what would best serve the interests of justice.

Legal framework

[20] The legal test applicable at this stage was helpfully summarized by Justice Gomery in *The Bank of Nova Scotia v. Khoe*, 2021 BCSC 1153. The legal framework applicable to a foreclosure proceeding where triable issues are raised by a respondent or the facts cannot be found on the evidence presented is as follows:

> [14] At this stage in the litigation, Ms. Khoe need not prove that either one of her defences would succeed. To avoid the Bank's application for order *nisi* and have the case referred to the trial list, it is sufficient for her to show that there is a genuine or *bona fide* triable issue going to the foundation of the Bank's claim; *HGE Administrative Services Ltd. v. Perrick,* 2011 BCCA 308 at para. 17. The foundational issues relate to the validity of the mortgage, the Bank's ability to claim under the mortgage and commence the foreclosure, and the amount due and owing under the mortgage; *Coast Capital Savings Federal Credit Union v. Arbutus Bay Estates Ltd.,* 2021 BCCA 185 at para. 33, citing *Griffin v. 0904713 B.C. Ltd.,* 2013 BCSC 273 at para. 41.
>
> [15] The burden of demonstrating the absence of a genuine triable issue lies on the Bank; *Griffin*, at para. 34. The Bank can only succeed if the absence of a triable issue is "manifestly clear"; *Griffin*, at para. 33. Put another way, the evidentiary threshold faced by Ms. Khoe in arguing for the existence of a triable issue is very low; *Griffin*, at para. 32. The Bank's position has been analogized to that of the Crown in a criminal case in that it resembles the requirement of proof beyond a reasonable doubt; *Canadian Western Bank v. 0777419 B.C. Ltd.,* 2009 BCSC 683 at para. 30; *Coast Capital* at para. 30.

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[21] In *Bank of Montreal v. Jamieson*, 2011 BCSC 1141 Justice Pearlman described the considerations that inform the Court's assessment of the burden concerning a triable issue:

> [39] I return to the guiding principle stated by McLachlin J., as she then was, in *Royal Bank of Canada v. Rizkalla,* that unless it is manifestly clear that the mortgagors are without a defence that deserves to be tried, their application to place the matter on the trial list should be granted.

[22] In *Capital Now Inc. v. Munro,* 2023 BCSC 197, Justice D. MacDonald reviewed the applicable legal principles in determining whether there is a *bona fide* triable issue:

> [55] As set out in Griffin at paras. 30-31 *and Yu Yue Construction & Development Ltd. v. 1098686 B.C. Ltd.*, 2022 BCSC 248 at para. 21, a *bona fide* triable issue arises when:
>
> (a) there is a true defence;
>
> (b) there is serious dispute as to facts or law which raises a reasonable doubt;
>
> (c) the dispute cannot be resolved on the evidence and submissions that are before the court; and
>
> (d) the dispute would affect the outcome of the proceeding.

Analysis

[23] In my view, the first triable issue raised by the respondent concerns the amount of the debt owing to the petitioner. On this point, I am satisfied that a *bona fide* triable issue exists. The Mortgage itself contemplated an advance of the mortgage debt at the time the mortgage was granted. The registered mortgage says that in return for the lender agreeing to lend money, the borrower granted mortgage security. There is no evidence before the Court on this application about the amount or the timing of the advance of funds by the petitioner. The phrase "in return for the lender agreeing to lend" suggests that the loan was made at the time the mortgage was granted. In that case, there should be evidence of the advance made by the petitioner at that time.

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[24] In the petitioner's affidavit, she does not contend that any promise was made to repay the sums that were or might have been advanced to the respondent in the years before the mortgage was granted.

[25] In argument, petitioner's counsel said that the money was advanced to the respondent over a period of 5-10 years, up to the date the Mortgage was signed. Further, she agreed that the petitioner, for some time, received rental income from the Property, which would constitute payment toward any debt owed. This was not in the petitioner's affidavit, but based on counsel's assertions at the hearing, questions arising as to what funds were advanced to the respondent, when they were advanced and what the balance owing might be.

[26] In addition to the serious question about the existence and size of the debt, there may be a limitation defence. There is also an inconsistency between the petition and the Mortgage; the petition contends interest was payable under the Mortgage whereas the Form F – Mortgage indicates that there is no interest payable under the Mortgage.

[27] Further, there is some evidence that the respondent signed the Mortgage and enduring power of attorney in the presence of the petitioner's solicitor; the respondent said he did not understand the documents he signed on April 1, 2019.

[28] Overall, I am satisfied that the petitioner has not met the burden to establish that it is manifestly clear that no triable issue exists: *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 at 325, 1984 CanLII 396 (S.C.).

[29] It is evident that the petitioner did not address the issues raised by the respondent in his response to petition or in his affidavits. Although I am not entitled to rely on the submissions of either party at the hearing as evidence, I accept that the petitioner's submissions suggest there are triable issues not fully developed in the material. Similarly, the respondent's submissions indicate that there is likely more important evidence that needs to be canvassed to ensure this matter is properly considered.

[30] In the face of the triable issues revealed in the material filed, and given the paucity of evidence in the affidavit material, and the submissions made, I find the petitioner has not met the test that it be manifestly clear that no triable issue exists.

[31] I have considered the alternative of using the hybrid procedure permitting cross-examination on affidavits to address conflicts in the evidence or absence of evidence: *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160.

[32] However, as discussed in *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473 by Skolrood J. (as he then was), the failure of the pleadings to address all of the factual and legal issues in that case was sufficiently important to make the alternative of cross-examinations on affidavits inappropriate (at paras. 55–61). In the matter before me, the current state of the pleadings, particularly in light of the issues raised by the respondent and submissions, persuade me it would be inappropriate to order cross-examination of the parties only.

[33] The issues in this petition cannot be resolved on cross-examinations of witnesses on their affidavits. The interests of justice require that each party file proper pleadings setting out their claims and the defences and there will likely be examinations for discovery required.

[34] This matter is remitted to the trial list. The respondent is entitled to costs of this application.

“Armstrong J.”

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