IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nguyen v. Pham,*
2023 BCSC 1246

Date: 20230720
Docket: S244836
Registry: New Westminster

2023 BCSC 1246 (CanLII)

Between:

Thi Xoa Nguyen also known as Minh Thi Xoa Nguyen

Petitioner

And

Thi Hong Van Pham

Respondent

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for Petitioner:	K. Dotten
Counsel for Respondent:	D. Brar
Place and Date of Hearing:	New Westminster, B.C. March 28, 2023
Place and Date of Judgment:	New Westminster, B.C. July 20, 2023

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Introduction

[1] The petitioner and respondent are tenants in common, each as to a one-half interest, of property in Halfmoon Bay, B.C. There is a house on the property that requires some repairs. No one lives full time on the property. The parties and their families occasionally use it for recreation.

[2] The petitioner seeks an order that the property be sold, and the proceeds be divided after an accounting of funds owed by each party. She also seeks ancillary orders regarding conduct of sale. The petitioner relies on s. 6 of the *Partition of Property Act.*, R.S.B.C. 1996, c. 347 [*PPA*], or alternatively Rule 13-5 of the *Supreme Court Civil Rules* [*SCCR*].

[3] The respondent submits that the petition is not suitable for summary determination and the Court should convert this proceeding to an action and transfer it to the trial list, or alternatively, order cross-examinations on affidavits. Further, there is a good reason not to order sale of the property. The respondent has commenced a separate civil action seeking specific performance of a January 9, 2022 agreement ("Agreement") between the parties for the respondent to purchase the petitioner's interest in the property. In the event the Court makes an order for sale of the property, the respondent also seeks ancillary orders.

[4] There is no dispute the parties entered into the Agreement. The completion date was January 28, 2022, but it is agreed that there was an extension to January 31, 2022. Whether there was any agreed extension beyond that is not clear. The sale did not complete. The reasons for that are in dispute. The petitioner states that the respondent failed to complete. The respondent states that she was ready, willing and able to complete, and the claimant refused to do so.

[5] The key fact which underlies the dispute is that the purchase price was below fair market value, resulting in potential tax consequences to each party: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 69(1).

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[6] The issue for determination is whether the Court should order the sale of the property. I have concluded that the answer at this time is "no". The sale of the property would determine the respondent's claim for specific performance without a trial or summary trial of that issue. The only matter before the Court was this petition proceeding. Even if both proceedings had been before the Court, it is not possible on the current state of the evidence to make findings of fact as to what took place, for example, whether there was anticipatory repudiation, or any repudiation was accepted.

[7] The petition is dismissed with leave for the petitioner to set it for hearing again after consideration of these reasons.

Legal Framework

[8] Section 6 of the *PPA* states:

> 6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.
>
> [Emphasis added.]

[9] Because the petitioner is a tenant in common as to half of the property, the Court must order a sale of the property unless there is a good reason to the contrary. Section 6 confers a broad and unfettered discretion to the Court to refuse a sale of the property "when, having regard to the particular facts and circumstances, such an order would not do justice between the parties": *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 24. Thus, the issue for determination under the *PPA* is whether in all the circumstances, there is a good reason to the contrary.

[10] The relevant portion of Rule 13-5 states:

> (1) If in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.
>
> [Emphasis added.]

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[11] Thus, the issue under Rule 13-5 is whether a sale is necessary or expedient.

[12] This proceeding under the *PPA* was brought by petition as is required by Rule 2-1(2)(g)(iv) of the *SCCR*. A petition that raises a triable issue is not necessarily required to be converted to an action and referred to trial. A judge has the discretion to use the hybrid procedures pursuant to Rule 16-1(18) and Rule 22-1(4), (such as cross-examination of affiants) within the petition proceeding, to assist in determining the issues: *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160.

[13] The Court must be mindful of the object of the Rules: to secure the just, speedy and inexpensive determination of every proceeding on its merits, that is proportional to the amount involved, importance, and complexity of the proceeding: *Cepuran* at para. 166; R. 1-3. Factors that may be relevant in deciding whether to convert a petition proceeding to an action include:

> (a) the undesirability of multiple proceedings;
>
> (b) the desirability of avoiding unnecessary costs and delay;
>
> (c) whether the particular issues involved require an assessment of the credibility of witnesses;
>
> (d) the need for the Court to have a full grasp of all the evidence; and
>
> (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

See: *Cepuran* at paras. 161–165*; Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627 at para. 39; *Boffo Developments (Jewel 2) Ltd v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 at para. 51 [*Boffo*].

Evidence

[14] The parties have co-owned the property since November 2016. Prior to then, the respondent owned the property with someone else. At the time of the purchase in 2016, the agreed market value of the whole of the property was $758,800, and there was a mortgage on the property. At the time of the Agreement in January 2022, the mortgage was about $435,000. The BC Assessment value was about $1.6 million.

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[15] From 2016 to 2021, the parties each shared the costs associated with the property, including the mortgage, house insurance, and utility bills.

[16] Beginning in 2020, the parties discussed the possibility of one of them buying the other's interest in the property. In November 2021, the petitioner and her husband and the respondent and her husband had a meeting where they made a verbal agreement that the respondent would purchase the petitioner's interest for $290,000, with a deposit of $90,000, and with the respondent to take over the mortgage. Unfortunately, the petitioner's husband passed away the next day. Neither the petitioner nor respondent rely upon this verbal agreement. The petitioner never received the $90,000 deposit.

[17] On January 9, 2022, the parties made the Agreement. It was essentially the same terms except the deposit was now $50,000 (which was paid), and the closing date was January 28, 2022. How an extension to January 31, 2022 came about is not in evidence. The entirety of the Agreement states:

> Payment Agreement
>
> Due date of payment: Jan. 28/2022
>
> Total amount due: $290,000
>
> I, Van Pham, agree to pay Xoa Thi Nguyen in the amount of $290 [sic] by Jan. 28, 2022. The payment is in exchange for the transfer of the 50% ownership of the property located at 8924 Armstrong Way, Halfmoon Bay, British Columbia, Canada belonging to Xoa Thi Nguyen and will be transferred to Van Pham. I Van Pham, have made the payment of $50,000 on January 9, 2022. I will make the remainder of the payment in the amount of $240,000 by Jan 8 [sic], 2022.

[18] The evidence of what took place thereafter is patchy. Some of the evidence is hearsay. I am not making any contested findings of fact because I am not able to do so on the state of the evidence. The record, as it presently exists regarding the specific performance claim, raises triable issues.

[19] The petitioner states that leading up to January 28, 2022, the respondent and her husband "harassed" her about the sale of her interest in the property. She submits that the respondent did not have the funds to complete. She states she told the respondent and her husband on more than one occasion that she was not interested in receiving

smaller payments than what had been agreed. She states that between January 9 and 28, 2022 she:

> … worked with my notary Steven Le to prepare the “seller” conveyancing documents. This included drafting documents related to possible tax consequences of the sale.

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[20] I note that the Agreement is silent regarding tax consequences. The petitioner states that the respondent did not complete the purchase of her interest in the property by January 28, 2022. They both hired notaries to attempt to finalize the interest but “it did not happen”.

[21] The respondent states that:

> In anticipation of the closing of the purchase and sale, I engaged a lawyer to prepare a Contract of Purchase and Sale and Deed of Gift.

[22] I note that the Agreement is silent regarding a deed of gift. The respondent states that on about January 17, 2022, she sent a bank draft in the sum of $30,000 to the petitioner and advised the petitioner that “a written contract of purchase and sale and a deed of gift will follow”. Hearsay documents suggest that a contract of purchase and sale and deed of gift were presented to the petitioner’s notary on about February 7, 2022. I will describe documents these below. The respondent states that at all material times, she was ready, willing and able to complete the purchase of the property.

[23] The petitioner states she never received a $30,000 bank draft from the respondent. The petitioner states hearsay that she was told by her son Michael Nguyen that he spoke to the respondent’s husband who requested a meeting to give her son an undisclosed amount of additional deposit. Her son told the respondent’s husband that the petitioner wanted the full amount owing.

[24] The respondent attaches a disclosure statement dated January 19, 2023 which she completed for a mortgage broker to seek mortgage financing of $450,000 needed for January 31, 2022. The respondent does not state that she actually obtained financing, however, later hearsay text messages indicate that there was a mortgage advisor from Peak Mortgage who contacted the petitioner’s notary Steven Le indicating

that she was acting with respect to the respondent's purchase of the property, and had instructed counsel. The petitioner states that the $450,000 would not have been enough to complete as the mortgage was $435,000 and had to be paid out in addition to paying the petitioner $290,000. However, that does not mean that the respondent did not have other funds.

[25] The respondent states that in January 2022 (date not given) her notary sent a vendor's statement of adjustments to the petitioner's notary Steven Le. The sale price is stated to be $595,950 based on the 2020 BC Assessment value of $1,191,900/2, against which is debited, one half of the mortgage ($432,000/2 = $216,000), the $50,000 deposit already paid, and the "vendor's portion of renovation funds to renovate the property" ($89,950), with the balance due to the petitioner being $240,000. Neither party explained the sale price or renovation funds deduction. There is nothing about it in the Agreement. The only evidence is a hearsay email from Steven Le saying he did not draft this document, he believes he received it from the respondent's counsel, and those figures came from the petitioner.

[26] On January 21, 2022, an office assistant in Steven Le's office emailed the respondent's notary and stated:

> As per our conversation, our seller advised that the figures should be as follow:
>
> Assessed value of the property: $1.6M
>
> Less existing mortgage: $431K
>
> Net value: $1,168,000
>
> Sale price of ½ interest should be: $584,000
>
> Less proceeds to seller: $290,000
>
> Balance of $294,000 to be used for renovations
>
> Steven advised that our seller insists on a contract as it is to protect all parties involved. Steven is willing to draft up the contract if your client agrees to pay for the $800 fee.

[27] The respondent responded "Misunderstand. Sorry". Neither party explained the sale price or the renovation funds deduction. Again, in a hearsay email from Steven Le, he states that those figures came from the petitioner.

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[28] The next evidence chronologically is a January 24, 2022 text between the parties, which the petitioner points to as supporting that the respondent did not have the funds to complete because at one point she stated “I will give you cheques gradually but need more time”. The context of this text also appears to be that the respondent was contacting the petitioner because the petitioner wanted other documents signed but the petitioner refused to respond to her calls and the respondent did not know what the petitioner wanted. The respondent also stated “Even if I don’t purchase it, it’s no problem”.

[29] On January 25, 2022, there is a set of text messages between Steven Le, the parties, and a former notary and friend of the parties, Stella Nhung, who became involved to try to find a solution to address concerns that the CRA would question the sale of the property below assessed value. Ms. Nhung suggested back dating the transaction to use an earlier lower assessed property value. Steven Le suggested that Ms. Nhung explain this to the respondent so the respondent can prepare a contract. He also commented that it would be hard to complete on January 31 and suggested that February 1 or 2 “is better” to which the respondent stated “Maybe. Have to be both party agreem [sic] the price”. Steven Le noted that the respondent’s notary was no longer acting as it was “too complicated” and now there was a new lawyer for the respondent. Ms. Nhung wrote that she told the petitioner to get legal advice because she could not do anything further, and Steven Le also wrote that this was not within his scope of practice.

[30] On January 26, 2022, there is another set of text messages between Steven Le and the respondent’s mortgage advisor at Peak Mortgage, and with counsel for the respondent regarding the tax issue. The mortgage advisor stated that Peak Mortgage’s lawyer will also represent the respondent for the purchase to complete on January 28, 2022. Steven Le’s response indicated that he had spoken to that counsel. He wrote:

> I explained to Ka Won [this is the respondent’s counsel for the purchase] that my Seller will essentially only gain $290,000.00 (less $50,000) which was paid to her before) for the transfer of this ½ interest as per their initial agreement.
>
> If you look at today’s market price of BC assessment of about $1.6M for this property, the two parties have gained about $1.2M after the payment of the

> current mortgage of about $431,000.00. Therefore each party has gained about $600,000.00 but my client is only getting $290,000.00.
>
> Since my client is only gaining $290,000.00 the contract must reflect this for CRA purposes. So the Buyer's gain is actually $910,000.00.
>
> I have discussed this with Ka Won and have asked her to draft an offer/contact to present to my Seller. My seller in turn will need to show it to her accountant for advice. Ka Won says she will not be able to complete on January 31. She will look into this and respond to us later with a date and a newly draft contract.

[31] The respondent's counsel stated:

> I explained to the buyer the situation and she understands that we need to draft a new contract that is acceptable for CRA purposes. We understand that it would likely take some time as both sides would need to consult an accountant and have changed the completion date to February 11th.

[32] Whether this new date was agreed between the parties is not stated. Neither party gave evidence concerning this. The mortgage advisor also asked if it would be possible to back date the contract to reflect property prices based on an earlier BC tax assessment as the parties would have completed the sale in November 2021 if the petitioner's husband had not passed away. Steven Le expressed doubt that this would be accepted by the CRA, and that this was beyond the scope of his practice and that the mortgage advisor should advise the respondent to get advice.

[33] There is no evidence or correspondence indicating what took place on January 28 or 31, 2022, for example if transfer documents or funds were tendered.

[34] The next event for which there is some evidence is on February 2, 2022. Counsel for the respondent emailed Steven Le stating that the respondent would like to extend completion to February 25, 2022 and that she will aim to get the contract to him early next week for review. An email a few minutes later asks Steven Le to ignore the previous email and his client would like to proceed on February 11, 2022 and she will send the contract shortly.

[35] On February 3, 2022, the petitioner left for an extended trip to the US.

[36] The petitioner states that she attempted to return the $50,000 deposit on more than one occasion. During the time she was away, she asked her son to call the

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respondent's husband. She gives hearsay evidence that he did so, and attaches a February 5, 2022 text message from Michael Nguyen to the respondent's husband informing him that the petitioner wanted to return the deposit.

[37] The respondent attaches the draft contract of purchase and sale and deed of gift to her affidavit. They are dated February 4, 2022. On February 7, 2022, the respondent's counsel wrote that her client would like to proceed with the completion on February 25, 2022.

[38] The draft contract of purchase and sale states that the purchase price is $839,580, and that the respondent will pay the petitioner $290,000 less the deposit of $50,000, with the remaining balance to be given by the petitioner to the respondent by deed of gift in the amount of $549,580. The completion date is now stated to be February 11, 2022. The draft deed of gift evidences a gift of $549,580 from the petitioner to the respondent.

[39] The petitioner states that in February 2022 (date not given) while she was in the US, she received a call from Steven Le who told her that he had received a contract of purchase and sale and deed of gift. Mr. Le provided her with copies of those documents on her return to Canada at the end of February 2022. The petitioner states that prior to February 2022, she had never heard of the deed of gift. She never discussed a deed of gift with the respondent and she never agreed that she would gift any part of the property to the respondent.

[40] On February 11, 2022, the petitioner texted the respondent and advised that the mortgage requires renewal, and their mortgage advisor (a different person from the respondent's) advised they could renew for one year at 1.47% variable rate. They could sign by email. She requested bank details from the respondent so she could return the $50,000.

[41] The petitioner states that on February 15, 2022, the respondent asked the petitioner for the deposit and texted her threatening court action. The petitioner asked the respondent for her bank information so that she could return the deposit to which

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she stated that she only wanted cash. No copy of the text message is attached. The respondent does not address this in her affidavit.

[42] On February 28, 2022 the respondent texted the respondent:

> What day are you coming home? You and I have already signed papers and deposited money a long time ago, but you are not working with me. You said you do not want the CRA to have concern. I have talked the accountant because you and I had come to a deal in November already. Regarding the tax, I will pay for it. But if you don't want to sit down one time to settle thing finally, I will be forced to let the lawyer settle this for us.

[43] In March, 2020, the petitioner retained counsel. She offered to sell her interest in the property to the respondent for $625,000 based on the BC Assessment value of $1,679,700. There was no response to the offer. In the letter it states that this price "is obviously higher than the offer our client was previously prepared to accept but at that time she was unaware of the considerable increase in the value of the property".

[44] The petitioner still has the $50,000 deposit, but the respondent apparently refuses to accept it.

[45] This petition was filed in June 2022, and a response to petition filed in early July 2022. In that response to petition, the respondent seeks specific performance of the Agreement, but the draft notice of civil claim was not given to the petitioner until January 2023, and not filed until approximately 10 days before this petition was heard. No explanation for the gap in time was given. The pleadings in that action are not before the Court, although the parties agree it is a claim for specific performance. The Court was not told what the court file number is.

[46] The petitioner states that since November 2021, the respondent has not paid all of her portion of the mortgage. The mortgage required renewal in November 2021, and the respondent refused to cooperate in the renewal. As a result, the mortgage rate has increased. The monthly payment is now $3,067.97 versus the previous mortgage monthly amount of $1,822.48. The petitioner deposited at least $20,000 into the parties joint account in 2022 to pay the mortgage. The respondent has deposited $13,000. The petitioner states that as of January 2023, she has stopped paying the mortgage as she

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can no longer afford to do so. The petitioner earns approximately $1,000 net bi-weekly. She petitioner states she cannot afford to purchase the respondent's interest. She states her relationship with the respondent is problematic and she wishes to limit their contact.

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[47] The petitioner also states the respondent has not paid her half share of other expenses for the property. She calculates the respondent's half share as being approximately $15,500. In about August 2022, the respondent's counsel contacted the petitioner's counsel to discuss possibly listing the property for sale. At that point, the petitioner began investigating what would need to be done at the property to prepare it for sale. The petitioner describes that the property is in poor condition. She hired someone to remove debris. In September 2022, she retained Ms. Dueck, a realtor. Ms. Dueck advised the petitioner to investigate possible asbestos, mold and water ingress before the property could be listed. Subsequently, the petitioner obtained a quote and had asbestos testing done. There was no asbestos. The same company gave a quote for what is said to be remediation work to the house, but from the quote, appears to go beyond that to a remodel. The estimate is $208,029. The petitioner asked Ms. Dueck to advise what items of the quote were necessary to complete in advance of listing the property for sale. Ms. Dueck advised that work costing approximately $39,000, being mold abatement and basement insulation and a vapour barrier, would be required. The petitioner states she may be able to raise half of the $39,000. Ms. Dueck estimates that the value of the property with the $39,000 in repairs to be approximately $1.3 million, and if fully renovated to be between $1.6 to $1.8 million. Again, much of Ms. Dueck's evidence is hearsay and opinion.

Analysis

[48] The petitioner argues that the issue of specific performance is a “red herring” because she is seeking only sale of the property, and not determination of the specific performance claim which will remain extant. The net sale proceeds can remain in trust. However, in support of her argument as to why there is no good reason, she makes arguments as to why the respondent does not have a meritorious claim for specific

performance. The respondent submits that the good reason is the specific performance claim.

[49] The difficulty with the petitioner's position is that if the Court orders that the property is sold, it will effectively determine the specific performance claim. There are clearly triable issues with respect to the specific performance claim, and that claim was not squarely before the Court for determination by way of summary trial application or some other appropriate application. The specific performance action had just been filed prior to the hearing of the petition, and the time for the petitioner to file a response had not expired. Even if a summary trial application had been before the Court, on the state of the current record, I would not have been able to find the facts necessary to determine the issue.

[50] Case authorities have held that pre-existing contractual agreements between the parties governing the sale of property may be a good reason to the contrary, or a factor given significant weight: *Lona Enterprises Ltd. v. Eurocan Industries Inc.*, 2018 BCSC 842 at para. 8 [*Lona*]; *Ben 102 Enterprises v. Ben 105 Enterprises Ltd.*, 2007 BCSC 1071 and cases cited therein at paras. 10–15. As stated by Justice Branch in *Lona*:

> [8] … The logic behind this approach is obvious. If a party agrees to a contract governing sale for good and valuable consideration, that party should not be able to effectively avoid the terms of that contract simply by making application under the *Act*, barring compelling circumstances as to why it should no longer be held to the terms of its bargain.

[51] In my view, considering all of the circumstances here, where the admissible evidence shows that there are triable issues regarding the specific performance claim, the existence of the specific performance claim is a good reason to the contrary. I have considered the petitioner's other arguments that the respondent is not paying her share of the mortgage payments and expenses, and co-owning the property is no longer desirable. However, in my view, circumstances have not yet come to the point where they outweigh the determination of the specific performance claim on its merits. As these petitioner's arguments overlap the arguments advanced under Rule 13-5, to avoid duplication, I will discuss them when addressing that basis of the petition.

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[52] In the alternative, the petitioner relies on Rule 13-5 of the *SCCR*. In my view, s. 6 of the *PPA*, rather than Rule 13-5 is the more applicable provision. While Rule 13-5 applies to a "proceeding" which includes a petition, the wording of that Rule appears to contemplate that it applies when "the issue of the sale of property arises in the course of a proceeding, for example in a family action, whereas the *PPA* provides a direct and specific remedy that is itself the object of a petition": *Ostrikoff v. Ostrikoff*, 2023 BCSC 77 at para. 38; *Phoenix Homes Limited v. Takhar,* 2017 BCSC 699 at para. 16 [*Phoenix*]. Regardless, I will address this basis for an order for sale as well.

[53] Necessity may exist where neither party has the financial means to buy out the other: *Bunn v. Bunn Estate*, 2016 BCSC 2146 at para. 39.

[54] Expediency is satisfied if the sale is objectively determined to be advantageous to both parties, irrespective of their wishes: *Phoenix* at para. 10; *Boffo* at paras. 72–73.

[55] The petitioner submits that a sale is both necessary and expedient because neither party can apparently afford to keep the property. She points to the alleged need of the property to be "remediated", the respondent's failure to pay her share of the mortgage, and the respondent's refusal to cooperate in the renewal of the mortgage at a lower interest rate.

[56] The respondent submits that the sale is neither necessary nor advantageous. If the property is sold, it effectively determines her claim to purchase the property at an advantageous price.

[57] In my view, considering the property interests at stake, a sale at this time is not necessary. I agree that it is concerning that the respondent has not cooperated with the renewal of the mortgage, or paid her share of the mortgage and property expenses. However, I do not conclude that the sale of the property is a necessity now, although if the respondent continues not to cooperate with renewal and not pay her share of expenses, a sale may become a necessity in the future, despite the specific performance claim. The petitioner states she cannot afford to pay further funds. While she has provided evidence of her employment income, she has not provided evidence

of her other financial circumstances and assets, or how up to recently she has been able to afford the payments. Nor am I persuaded that repairs are required imminently to the property.

[58] In my view, a sale is not advantageous at this time for the same reason that there is a good reason to the contrary: a sale will effectively determine the respondent's claim for specific performance without a trial or summary trial of the issue.

[59] A similar difficulty presented in *Phoenix.* In that case, one of two shareholders of a property development company commenced a derivative action against the other shareholder. One of the allegations was the other shareholder had entered into an agreement to sell property owned by the company, to another defendant, View Side, at less than fair market value. The company applied pursuant to Rule 13-5 to list the property for sale at fair market value. Justice N. Smith dismissed the application. He noted that the interests of three parties were at stake: the company as plaintiff; one shareholder as defendant; and View Side which sought specific performance of the agreement to purchase the property. He concluded that an order for sale of the property would make specific performance of the agreement impossible and would amount to a summary dismissal of View Side's claim for specific performance. He rejected the argument that he could decide on a Rule 13-5 application that the claim for specific performance had no chance of success and that damages would be an adequate remedy at paras. 12–15, stating:

> [15] … Although the court has broad discretion under the Rule, I am not persuaded that it goes so far as to include what would amount to a final decision on the merits of an issue in the action. Even if the court's jurisdiction under the Rule does go that far, it would not be appropriate to exercise that discretion when I have already found that closely related issues cannot be decided summarily.
>
> [Emphasis added.]

[60] Those comments are applicable here. The record raises triable issues regarding the specific performance claim. Even if the issue of specific performance were squarely before the Court on a summary trial application, on the current state of the record, I would not be able to find the facts.

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[61] I appreciate it will be frustrating for the petitioner to be faced with the specific performance action after she has filed this petition and it was set for hearing. Although specific performance was raised immediately in the response to petition, the timing of the filing of the specific performance action was not explained.

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[62] Finally, I have considered whether to order cross-examination on affidavits or to convert this matter to an action. In my view, it is not necessary to do so. Even if cross-examination on affidavits is ordered, the specific performance issue will be determined in the other action, where examinations for discovery can take place. Depending on the outcome of the specific performance action, there may not be a need for cross-examination on affidavits, or may not be a need for this petition at all. By stating this, I am not ruling that an order for sale is not possible in the future before determination of the specific performance action if circumstances change, but concluding only that at this time, such an order should not be made.

Order

[63] The petition is dismissed. The petitioner is granted leave to reset the petition for hearing after consideration of these reasons, and if she feels future events make it appropriate to do so.

“Norell J.”