IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1230310 BC LTD v. 1122792 BC LTD.,*
2023 BCSC 798

Date: 20230511
Docket: 15160
Registry: Campbell River

Between:

1230310 BC LTD

Plaintiff

And:

**1122792 BC LTD. and WIESLAW ADAM MAKUCKI,
also known as ADAM JOHNSON
and 11957961 CANADA LTD**

Defendants

Before: Master Bouck

Reasons for Judgment

Counsel for Plaintiff:	K. Rejminiak
Counsel for Defendant, 1122792 BC LTD.:	P. Waller
Place and Date of Hearing:	Victoria, B.C. April 19, 2023
Written Submissions Received:	May 8, 2023
Place and Date of Judgment:	Victoria, B.C. May 11, 2023

The Application

[1] The plaintiff commenced this action on March 9, 2021. The action relates to a purchase of contract of sale made between the plaintiff and 1122792 B.C. Ltd. ("1122") with respect to real property located in Gold River, B.C. (the "Property"). The contract did not complete and the Property was instead sold to the defendant 11957961 CANADA Ltd. ("1195"). The plaintiff seeks an order for specific performance of its contract, a declaration that the conveyance of the Property to 1195 was fraudulent, a certificate of pending litigation, or, alternatively, a remedy in damages. A certificate of pending litigation (the "CPL") was registered by the plaintiff on title to the Property at or about the same time that the action was commenced.

[2] The defendant 1122 now seeks an order for cancellation of the CPL pursuant to s. 252 of the *Land Title Act*, R.S.B.C. 1996, c. 250 (the "*LTA*") on the basis that the plaintiff has not taken any steps to prosecute its claim for more than one year. The plaintiff rejects this premise but says that, in any event, the interests of justice favour dismissal of the application.

[3] Neither 1195 nor the defendant Johnson filed application responses nor appeared despite their counsel receiving proper notice. 1122 relies on affidavits from those parties that were sworn in relation to an earlier application that has never been adjudicated upon.

[4] While this judgment was under reserve, the court of appeal issued reasons in *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172 ("GMC") in which the considerations on this type of application are discussed. As a result, the parties were invited to provide written submissions addressing the impact of this decision on the relief sought.

The Evidence

[5] As at April 2019, the plaintiff was the legal and beneficial owner of the Property. There is a 24-unit apartment building situated on the Property.

[6] On November 6, 2019, 1122 entered into a contract of purchase and sale for business assets with the defendant Johnson with respect to the Property. The business assets to be sold were the fee simple lands, leases, contracts, business records, permits and licenses and other items identified in an attached Schedule K. The contract was terminated when Johnson failed to pay the required deposit on December 18, 2019. The next day, a fire damaged several of the apartment units on the Property.

[7] A second contract was then negotiated between 1122 and Johnson with a new completion and possession date of March 2, 2020. The principal of 1122 deposes that this contract was abandoned due to Johnson's inability to complete the purchase.

[8] 1122 then entered into a third contract with Johnson on February 26, 2020, this time for a purchase price of $850,000 and a completion date of March 12, 2020. With 1122's consent, Johnson assigned the contract to 1195. 1195 then sought extensions of the completion date. By April 8, 2020, 1122 and 1195 had agreed to substitute the third contract with a share purchase agreement. Again, at the request of 1195, 1122 agreed to extend the completion date for this new contract to July 3, 2020. In May of that year, the "parties" (as described in the affidavit material) entered into a fixed term tenancy agreement under which Johnson would be caretaker of the Property until the July 3, 2020 completion date. In a now somewhat familiar pattern, the share purchase agreement was terminated when Johnson was unable or unwilling to complete the contract. Johnson refused to vacate the Property despite 1122 giving him the required notice to do so.

[9] The plaintiff entered the picture soon thereafter. The contract that is the subject matter of this proceeding was entered into by 1122 and the plaintiff on July 14, 2020. The contract specified a completion date of August 13, 2020 with possession the day following. As a standard term of the purchase contract, the plaintiff would assume the Property with vacant possession or subject to existing tenancies. As a further term of the contract, 1122 warrants that the previous offer on

the subject property “has been collapsed and there is no financial or any other matter that is outstanding and or attached” to the Property.

[10] It appears that Johnson was undeterred in his intent to purchase the Property. On July 30, 2020, Johnson and 1195 commenced an action in the Campbell River registry of this court (S15124) naming as defendants 1122, its principal and some or all of the realtors involved in the various contractual arrangements (the “Johnson action”). This notice of civil claim is handwritten and presumably prepared by Johnson. The remedies sought include “enforce the contract of sale”. Johnson and/or 1195 then proceeded to register certificates of pending litigation on the titles to not only the Property but also on lands owned by 1122’s principal.

[11] The principal of 1122 deposes that the contract with the plaintiff did not complete due to the Johnson’s ongoing occupation of the Property and the inability of 1122 to deliver clear title.

[12] In the affidavit sworn by its principal, Jasbir Atwal, the plaintiff provides more detail on the relevant events. Prior to the completion date, Mr. Atwal was made aware by his conveyancing lawyer of Johnson’s ongoing occupancy and the Johnson action. Mr. Atwal further deposes that requests were made by 1122 over the next few months to extend the completion date on the plaintiff’s contract so as to deal with the Johnson issues. Those requests were acceded to. The affidavit does not address any addendums to the contract of purchase and sale that would have formalized these extensions except to say (on information and belief) that the agreement was reduced to writing. The affidavit does not identify an agreed upon completion date beyond August 13, 2020.

[13] Meanwhile, Johnson and 1122 were attempting to resolve their dispute.

[14] In the Johnson action, the CPLs were cancelled by the order of Baird J. made October 16, 2020. The court further ordered that the plaintiffs in that action were to cease representing themselves as and/or purporting to be the caretakers, owners or managers [of the Property] until further order of the court.

[15] By January 18, 2021, following what the principal of 1122 describes as protracted negotiations, the Property was sold to 1195. As part of that transaction, 1122 advanced to 1195 a demand loan in the sum of $193,310.00. The loan was secured by a first mortgage on title to the Property and became due on March 5, 2021.

[16] Mr. Atwal deposes that he learned of this sale upon contacting his conveyance lawyer on January 18, 2021. 1123 responded to this news by instructing counsel to file a caveat on title to the Property. Mr. Atwal deposes that he also filed a petition seeking an order that the caveat be given priority over the Form A that would transfer ownership from 1122 to 1195. However, the petition in question was actually commenced by 1122 and sought an order that the Form A be given priority over the caveat.

[17] The petition was heard by Saunders J. on March 23, 2021. On April 19, 2021, the court ordered that title to the Property be vested in 1195; that the caveat be discharged; but that 1123's CPL remain on title: *1122792 B.C. Ltd. v. 1230310 B.C. Ltd.*, 2021 BCSC 715. At paragraph 15 of his reasons, Saunders J. addresses the last described order:

> [15] The 123 CPL was not challenged in the filed petition, but counsel are agreed that my order should address it. Clearly, the 123 CPL has no priority over the Application and should not interfere with registration of 119's title to the Lands. In the absence of a state of title certificate showing title as of the date of the hearing, it would not be appropriate to discharge the 123 CPL; it may yet have priority over any subsequently registered or created interests. The effect of my order, however, will be that registration will proceed, notwithstanding the 123 CPL remaining on title.

[18] 1195 has not repaid the loan from 1122. In an affidavit sworn on November 22, 2021 in this action, Johnson deposes that the plaintiff's CPL prevented him (or perhaps, more accurately, 1195) from obtaining financing to make the final payment due "under the mortgage". I observe that the loan came due before the plaintiff's CPL was registered. There is no evidence of specific efforts made by Johnson and/or 1195 to obtain financing before March 5, 2021.

[19] On August 9, 2021, 1195 and 1122 appeared again before Baird J. The appearance resulted in an order whereby Johnson and 1195 are required to pay the sum of $193,310.00 to 1122 (the “Judgment”) but with enforcement steps to be delayed for 60 days. Also in August, 2021, Johnson and 1195 filed an application asking the court to cancel the plaintiff’s CPL. That notice of application is not in evidence so I am unable to determine the legal basis asserted therein. The application has been adjourned generally.

[20] On January 17, 2022, 1122 commenced foreclosure proceedings in the Victoria registry with respect to its mortgage. The petition seeks a three-month redemption period.

[21] The within action has been prosecuted in fits and starts. Although the action was commenced in March 2021, 1122 was not served until early September of that year and only after 1123 received the application filed by Johnson and 1195 to have the plaintiff’s CPL removed from title to the Property. 1122 delivered its response to civil claim in October 2021. On January 27, 2022, the plaintiff’s counsel prepared a list of documents. However, it appears that the list was not delivered to the other parties until March 20, 2023. This omission was not discovered until the office of plaintiff’s counsel reviewed the file in preparation for this application.

[22] In March 2022, 1230 filed and served its response in the foreclosure proceeding. In that response, 1230 pleads that the Property is unique and goes on to describe in detail the events surrounding the collapsed sales and the dealings between the various parties over the past few years. In opposing the foreclosure relief, 1230 takes the position that the transfer of the Property that gave rise to the mortgage was null and void, and that therefore the mortgage is improperly registered. Ms. Rejminiak is also counsel of record for 1230 in the foreclosure proceeding.

[23] On May 13, 2022 of that year, Ms. Rejminiak commenced a maternity leave.

[24] By September 2022, Mr. Waller had assumed conduct of 1122's defence in this action and became counsel of record in the foreclosure proceeding. On September 6, Mr. Waller wrote to Ms. Rejminiak advising of his instructions to make application to the court at the earliest possible time for an order removing the "spurious" CPL filed by the plaintiff. Ms. Rejminiak's automated email out-of-office reply advised the sender of her maternity leave and that she would not be accepting service on behalf of her clients. While the message does not specify a date of return, the senders are directed to contact her office or her partner, Gurpreet Badh, on urgent matters. Mr. Waller's message was re-sent accordingly. Ms. Badh's response to Mr. Waller was that counsel of record would be returning to the office in late November and that any application should be set after that date, with an early December date proposed. Mr. Waller advised Ms. Badh that the application would be set for November 10 but that did not in fact happen.

[25] In February 2023, the plaintiff attempted to reserve examination for discovery and trial dates with the defendants' counsel. Counsel for 1122 did not respond to the inquiry. Counsel for Johnson and 1195 informed the plaintiff that he was withdrawing as counsel but no steps appear to have been taken in that regard by the time that this application was heard.

[26] On March 15, 2023, 1122 filed and served this application. Two days later, the plaintiff delivered an appointment to examine a representative of 1122 for discovery on May 17, 2023. On March 20, 2023, the plaintiff served a notice to mediate on all of the defendants.

[27] The original date set for the hearing of this application was chosen by 1122 unilaterally. After further discussions between counsel, the application was moved to the Victoria registry and set on a mutually convenient date.

[28] I am informed by counsel that the plaintiff has very recently filed a notice of intention to proceed.

[29] The apartments damaged by the 2019 fire have now been remediated.

[30] Other than the CPL, the only charges on title to the Property as of March 8, 2023 are 1122's mortgage, the related assignment of rents and the Judgment.

Legal Framework

[31] Section 252 of the *LTA* provides as follows:

> 252(1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.
>
> (2) An application under subsection (1) must be made to the court in which the proceeding was commenced and must be brought
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> (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
>
> (b) by petition, if the applicant is not a party.
>
> (3) The registrar must, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), cancel the registration of the certificate of pending litigation.

[32] In GMC, the court of appeal cites with approval the following analysis of s. 252 found in *Lawn Genius Manufacturing (Canada) Inc.(Drainmaster) v. 0856810 B.C. Ltd. Inc.*, 2016 BCSC 1915:

> [12] … The court retains the discretion not to cancel the CPL, even where the statutory prerequisites are met, if cancellation would not be fair and equitable: see *Kal West Mechanical Inc. v. Bush*, 1999 CarswellBC 774 (S.C.) at para. 6; and *Tomczyk v. Toronto Dominion Bank* (1982), 36 B.C.L.R 149 (S.C.). Where the statutory prerequisites are met, prejudice to the landowner is presumed and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest cancellation of the CPL would be unjust: see *Wiest v. Middelkamp*, 2005 BCSC 1626 at para. 12 and *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133 at para. 12. The meaning of "step" in s. 252 of the *Act* is informed by case law in which the definition of that term in the analogous provisions in the *Supreme Court Civil Rules,* is discussed. The step must be either required or permitted by the *Supreme Court Civil Rules*, and it must move the action forward towards trial or resolution: see *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133 at paras. 9-10; *Canadian National Railway Co. v. Chiu*, 2014 BCSC 75 at para. 7; *Easton v. Cooper*, 2010 BCSC 1079 at paras. 6-13; and *Khan v. Johal*, 2006 BCSC 1547 at paras. 11-15. Finally, on the question of whether the "one year" in s. 252 of the *Act* refers to the year immediately preceding the bringing of an application pursuant to that section, in *Wiest v.*

> *Middelkamp*, 2004 BCSC 882 [*Wiest*], at para. 11, Goepel J. (as he then was) said:
>
> > Thus, a prerequisite to an application under s.252 is that no step has been taken in the proceedings for one year. The question then becomes whether there has been a step taken in these proceedings in the year before the defendants brought this application..
> >
> > [Emphasis added.]

[33] As noted in GMC, s. 252 merely entitles a person to bring an application for cancellation where no formal step has been taken in the proceeding for more than one year: para. 64. The court has the discretion to refuse to cancel the certification of pending litigation based on whether, in all the circumstances, cancellation is in the interests of justice: GMC at para. 57.

[34] Prior to GMC, the factors identified as relevant to the exercise of the court's discretion in this type of application include:

a) Whether the [application] respondent has given an acceptable explanation for the delay in prosecuting the claim;

b) Whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and

c) Whether respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.

Wiest v. Middelkamp, 2005 BCSC 1626 at para. 13.

[35] The court of appeal in GMC elaborates on these factors. The merits of the underlying claim is still a valid consideration. In addition, despite a finding that no formal steps have been taken by the registrant for more than one year, the court must also consider the *informal* steps taken by registrant if those steps were directed at resolving the litigation or moving forward to trial (my emphasis). The court must weigh any actual or presumed prejudice to the landowner in maintaining the CPL against the prejudice to the registrant if the CPL were cancelled: GMC at para. 90.

Discussion

[36] There is no debate over 1122's entitlement to bring this application given that no formal steps have been taken in the action since 2021. 1122 is presumptively prejudiced by the CPL remaining on title to the Property.

[37] However, the real question for the court to answer is whether the interests of justice favours cancellation of the CPL.

Acceptable explanation for the delay in prosecuting the claim

[38] In submissions, the plaintiff attributes the delay in the prosecution of this claim largely to counsel's leave from practice. Mr. Atwal does not directly address the delay in his affidavit. The court will not be critical of counsel's decision to take a leave from practice but that does not relieve the plaintiff from an obligation to diligently pursue its claim. Nonetheless, since at least early February 2023, the plaintiff has taken informal steps to move this action towards resolution. It may not be said that the litigation is dormant.

Is there actual prejudice if the order is not granted?

[39] 1122 argues that the CPL prevents the foreclosure proceeding from moving forward and leaves the co-defendants unable to raise funds to pay monies owed. I am unable to accept this submission. There is no stay in place and 1122 can pursue an order nisi, despite the CPL remaining on title. It may be that the foreclosure petition will be referred to the trial list given 1230's response. Moreover, even if the petition is decided summarily, there is a live issue as to whether the court would allow a short redemption period. The evidence does not address the current value of the Property. However, based on the value as of January 2021, it seems likely that 1195 would be entitled to the usual six-month redemption period. There is a myriad of possibilities of what might happen either during or at the end of the redemption period. One possibility is that judgment will be rendered in this action before the end of the redemption period. That process will necessarily resolve the validity of the CPL. Another possibility is that 1195 proceeds with its own application to cancel the CPL and is successful. Yet another possibility is that an order for conduct of sale is

granted at the end of the redemption period and the plaintiff in this action makes a successful offer to purchase the Property. While all of these scenarios are speculative, they also illustrate that the supposed actual prejudice to 1122 is speculative.

Does the plaintiff's claim in the land have a reasonable prospect of succeeding?

[40] The parties did not really address the legal basis for the plaintiff's claims but rather focused on the issue of prejudice. In terms of the claim for specific performance, 1122 argues that there is nothing unique about the Property; that the Property is in fact in a different condition than it was when the contract of purchase and sale was entered into due to the fire remediation steps; and that damages would fully compensate the plaintiff. Those arguments may well prevail at trial. However, orders on interlocutory applications that would effectively remove a remedy for specific performance claims are to be avoided: *Cooney v. Purely Canadian Log Homes Ltd.*, 2023 BCSC 210 at para. 37 citing with approval: *Towne v. Brighouse*, (1898), 6 B.C.R. 225 (S.C.)*; Cloverlawn-Kobe Developments Ltd. v. Tsogas*, (1979), 104 D.L.R. (3d) 279 (B.C.S.C.); *Mercedes-Benz of Canada Limited v. SAS Properties Ltd.*,(1975), 10 B.C.L.R. 19 (S.C.) appeal dismissed (1975), 10 B.C.L.R. 19 (C.A).

[41] It is not clear from the pleadings whether the CPL is registered with respect to the specific performance claim only or is somehow also related to the fraudulent conveyance relief. The legal basis of the fraudulent conveyance claim was only cursorily addressed in submissions. In answer to the court's inquiries in that regard, the applicant repeated the submission that damages are an adequate remedy to the plaintiff for the collapsed sale. In these circumstances, the merits of the fraudulent conveyance claim did not form part of my deliberations.

Result

[42] I find that the interests of justice favour the plaintiff as it will suffer the greater prejudice if the CPL is cancelled at this time. The application is dismissed but

without prejudice to 1122 to bring future applications for cancellation of the CPL if circumstances warrant that step.

[43] Costs of the application will be in the cause as between the plaintiff and 1122.

"Master C. P. Bouck"