IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vancouver City Savings Credit Union v. Bower,* 2023 BCSC 636

Date: 20230420
Docket: H210286
Registry: Vancouver

Between:

Vancouver City Savings Credit Union

Petitioner

And

Steven Albert Bower, Albert Francis Bower, Darcia Marie Bower, Angela Mercy Fajayan Bower, Aaron Fajayan Bower, Kenneth Nelson, Jenny Zhang, Thomas Gallacher, Linda Carter, Jason Kai, Clayton Dicks, Mario Copeland, Gilles Gaudreau, Roberto Curty, Vance Dyzandra, All Tenants or Occupiers of the Subject Lands and Premises

Respondents

Before: The Honourable Justice Caldwell

Reasons for Judgment

In Chambers

Counsel for the Petitioner:	J.J.R. Schachter
Counsel for the Respondent, S.A. Bower:	M.S. Menkes
The Respondents, appearing on their own behalf:	A. (Albert) F. Bower A.M.F. Bower D.M. Bower J. Zhang
Place and Date of Hearing:	Vancouver, B.C. January 11, 2023
Place and Date of Judgment:	Vancouver, B.C. April 20, 2023

[1] This is an application for a declaration of default and an *order nisi* of foreclosure. The balance of the relief is being adjourned to be heard later, if necessary, and by agreement of counsel. I am not to be seized of such later application.

BACKGROUND

[2] In March 2007, Albert Bower ("Albert"), who is now deceased, and his son Steven Bower ("Steven"), granted Vancouver City Savings Credit Union ("VanCity") a first mortgage against a property in Surrey (the "Property"). The Property was owned by Albert and Steven as joint tenants. The mortgage contained VanCity's standard mortgage terms, including s. 8.01(d) and (aa), which provide as follows:

> 8.01 The Borrower covenants with the Lender that:
>
> …
>
> (d) the Borrower has good title in fee simple to the Land subject only to the Permitted Encumbrances;
>
> …
>
> (aa) the Borrower will advise the Lender, in writing, of any material change in the financial or other circumstances of the Borrower, including:
>
> …
>
> (ii) any transfer or agreement to transfer ownership of the Land,
>
> and shall furnish the Lender with any additional information in connection with such material change as the Lender may request from time to time.

[3] On or about January 20, 2012, Albert and Steven severed the joint tenancy. Albert came off title completely and title was transferred to Albert's children. The registered owners became Steven, as to an undivided 62.5%; Darcia Marie Bower ("Darcia"), as to an undivided 12.5%; Angela Mercy Fajayan Bower ("Angela"), as to an undivided 12.5%; and Aaron Fajayan Bower ("Aaron") as to an undivided 12.5%. Darcia, Angela, and Aaron are Albert's other children and Steven's siblings.

[4] Notice of the transfer was not provided to VanCity, in or about January 2012.

[5] In or about October 2018, Steven and Albert had a meeting with Ian Marshall, a representative of VanCity. During that meeting, the transfer was discussed or

disclosed. Steven advised Mr. Marshall that he was in negotiations to buy out his siblings' interest in the Property. Albert said in his affidavit that "the mortgage specialist did not ask if there had been any changes of ownership" but in the next paragraph, said "I informed the mortgage specialist that I wanted to go back on title".

[6] In June 2020, VanCity received correspondence from counsel for Darcia, Angela, and Aaron raising issues about mortgage documentation, which they indicated they had never received or signed.

[7] In late July 2020, VanCity sent demand letters to Albert and Steven, as well as to Darcia, Angela, and Aaron indicating that the mortgage was in default as a result of the 2012 transfer. This was done to protect VanCity's right to claim under the promise to pay provisions of the mortgage.

[8] In August 2020, at least, Darcia advised a VanCity representative that she had no interest in being a co-applicant on any new mortgage for the Property.

THE PARTIES' POSITIONS

[9] While other issues were discussed, namely the conversion of the Property to a rooming house and Steven's refusal to grant VanCity's inspector access to the Property in September 2020, the main and only significant argument of VanCity is that the 2012 transfer amounts to a breach of paragraph 8.01(d)(aa)(ii) of the mortgage terms and is a default under the mortgage.

[10] Counsel for Steven argues that there was no breach. He says that the transfer of title was not a transfer of ownership of the Property but was rather done "in trust" and that Albert at all times retained beneficial ownership, albeit there was a change in the registration and the title. He says that this is a triable issue and that the matter should be referred to the trial list or, at least, be converted to a hybrid proceeding as contemplated in *Cepuran v. Carlton*, 2022 BCCA 76 [*Cepuran*]. He also refers to the cases of *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 [*Petrick*] and *Pecore v. Pecore*, 2007 SCC 17 [*Pecore*], and says that this is a gratuitous

transfer from a parent to adult children and, therefore, there is a presumption of resulting trust, not a transfer of an actual ownership interest in the land.

DISCUSSION

[11] In *Cepuran*, the Court of Appeal held that Rules 16-1(18) and 22-1(4) of the *Supreme Court Civil Rules* gives the Court wide discretion to use hybrid procedures without having to convert a petition to an action, even where there is a potentially triable issue: at paras. 158–166. The approach to procedure is to be determined on a case-by-case basis, with an eye to the purpose of the *Rules* as set out in Rule 1-3: *Cepuran* at para. 166.

[12] The central issue here is whether the property was transferred in 2012, thus breaching the mortgage terms, or whether the property was still beneficially owned by Albert and simply held in trust by his children.

[13] I do not find this matter should be converted into a trial, nor does it warrant a hybrid procedure. I find the affidavit evidence here sufficient to determine the key issue and to secure the just, speedy, and inexpensive determination of this proceeding on its merits.

[14] First, unlike in *Pecore*, the joint tenancy between Steven and Albert was severed and the title was divided, so as to be held in undivided interests among the siblings as to various percentages. In my view, this essentially negates the discussion as to rights of survivorship. Such specific transfer or registration of a discreet and defined interest seems to me to speak to an intention of Albert to identify and actively gift each child an identified interest.

[15] Second, Albert himself swore in his affidavit of November 12, 2021:

> 6. On or about February 2012, I gifted and assigned my 50% interest in (the Property) to my four children, Steven Bower, Darcia Bower, Aaron Bower and Angela Bower, at 12.5% interest each. The gifting resulted in Steven Bower holding 62.5% interest. The intention of the gifting of the Property was to ensure my children received their inheritance as the Property was originally joint tenancy between Steven Bower and myself.

> …
>
> 14. I married Jenny Zhang on or about October 2018 …
>
> 15. I revised my will and added Jenny Zhang, subsequently leaving my estate as 20% to each of Jenny Zhang, Steven Bower, Darcia Bower, Aaron Bower, and Angela Bower.
>
> 16. I asked my four children if they could transfer their gifted interest back to me. Steven Bower objected to the gifted interest transfer. Darcia Bower, Aaron Bower, and Angela Bower would transfer their gifted interest back to me only if Steven Bower did as well.
>
> 17. I continued to ask Steven Bower if he would transfer his gifted interest back to me and he continued to object.

[16] Albert himself described and swore to the 2012 transfer being a gift. No mention was made at any time that any form of trust was intended, even though it is noteworthy that this litigation was ongoing and the issue of resulting trust had been raised by Steven at the time Albert's affidavit was sworn. Albert on the other hand did not allege a trust situation. Instead, his affidavit suggests that Steven was the one child/sibling who steadfastly refused Albert's request to re-gift the 12.5% interest back.

[17] Third, in *Petrick*, the court noted:

> [47] It is important not to overstate the importance of either the presumption of resulting trust or the presumption of indefeasible title. Neither is engaged in circumstances where the actual intention of the transferor at the time of transfer is clear on the evidence. As noted by Smith D. J.A. in *Fuller*, in discussing the presumption of resulting trust at para. 47:
>
> > Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate.

DECISION

[18] I am of the view that the intention of Albert, at the time of the transfer, was to gift absolutely his 50% interest in the Property equally to each of his four children. His sworn evidence to that effect is clear. Steven's actions confirm that he understood and took the position that such was the case in the face of Albert's request, and Steven's denial, for a return gifting due to his changed circumstances. Those circumstances may have led Albert to reconsider or even regret his previous

gifts to his children, but as the authorities state, it was his intention at the time of the gift which governs, not Albert's later reconsideration: *Pecore* at para. 5.

[19] Accordingly, I find that there was a transfer of ownership of the Property in 2012. That resulted in a breach of the mortgage terms, specifically 8.01. The mortgage is in default as a result of that breach. In the circumstances, I do not find a basis to grant relief from forfeiture under the *Law and Equity Act*, R.S.B.C. 1996, c. 253, regarding that default. Such relief is of an equitable nature and quite simply, Steven does not come before the court with clean hands.

[20] I grant a declaration of default and an *order nisi* of foreclosure.

[21] The petitioner is entitled to its costs at Scale C as against Steven.

"Caldwell J."