IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Opatril v. Horton,*
2024 BCSC 2310

Date: 20241219
Docket: S58627
Registry: Vernon

Between:

Lois Anne Opatril

Petitioner

And

Lindsay Colinne Horton

Respondent

Before: The Honourable Justice Maisonville

Reasons for Judgment

Counsel for the Petitioner:	A.J. Eden
Counsel for the Respondent:	B. Knopf
Place and Date of Hearing:	Vernon, B.C. October 23, 2024
Place and Date of Judgment:	Vernon, B.C. December 19, 2024

INTRODUCTION

[1] The petitioner, Lois Opatril, is the owner of a property at Willow Street, Vernon, BC (the "property"), together with the respondent, Lindsay Horton. They hold the property as tenants-in-common. The petitioner seeks an order that the property be sold and the proceeds be distributed pursuant to s. 4(1) of the P*artition of Property Act*, R.S.B.C. 1996, c. 347 [*PPA*]. She relies on s. 6 of the *PPA*, which sets out:

> 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.

[2] The petitioner also seeks an order that the conduct of the sale of the property be granted to her.

[3] The respondent opposes the sale of the property.

[4] I have come to the determination that the issues between the parties as set out in the petition cannot be fairly resolved on the basis of affidavit evidence and there will have to be a trial of this matter.

[5] Given my decision, I will only review the facts in a cursory manner.

BACKGROUND

[6] The petitioner and the respondent are acquaintances and are not related. The respondent is the daughter of Greg Horton, with whom the petitioner had been in a romantic relationship for some time. The petitioner became acquainted with the respondent through her relationship with Mr. Horton.

[7] The respondent has worked as a server at various restaurants in Vernon. The petitioner is retired and living in Revelstoke.

[8] In or about early 2019, the respondent was living in Mr. Horton's one-bedroom house in an open loft area above his living room. She had a dog and she was able to live in her father's home with her pet.

[9] The petitioner was visiting Mr. Horton and during the visit, the respondent indicated that she was having issues finding a pet-friendly rental property in Vernon.

[10] The petitioner suggested to the respondent that she should buy a house if she could not find suitable pet-friendly accommodation.

[11] The respondent explained that she could not qualify for mortgage because she was a server and her tips are not declared on her income tax returns. The respondent deposed she did not have enough money saved up for a down payment either.

[12] The petitioner suggested that they buy a property together. She deposed that she told the respondent that she had money to invest in property and that because she, the petitioner, was working at the time, she could obtain a mortgage with a financial institution. The respondent “jumped at the idea of buying a house together”.

[13] The petitioner indicated that she was concerned about the long-term commitment for a mortgage because she was planning on retiring the next few years, which she eventually did.

[14] The respondent indicated to the petitioner that she was confident that, within five years, she would be able to obtain a mortgage on her own and buy out the petitioner’s share in any property they purchased together with money she could save from her work.

[15] They came to a verbal agreement. Regrettably there was no written contract.

ANALYSIS

[16] At issue now is what that agreement was. Had the petitioner agreed to a limited amount of only $120,000 of equity in the property for her investment? Was

the down payment in the amount of $77,444.07 and other contributions covered by the petitioner, including a further substantial amount during the COVID pandemic to ensure the respondent was able to pay the mortgage, just “loans”?

[17] According to the petitioner, the agreement was that after five years of owning any property they bought together, the respondent would obtain a mortgage and buy out the petitioner’s share in the property, or the property would be sold and the proceeds divided equally.

[18] According to the respondent and her father, Mr. Horton, the amount the petitioner agreed to was not a division of the equity but, rather, the petitioner’s claim was restricted to only $120,000 of the equity.

[19] Mr. Horton swore an affidavit in the proceedings.

[20] Mr. Horton indicated in the affidavit that he was present when the verbal agreement was made between the petitioner and the respondent to purchase the property. He indicated the gist of the agreement was that the petitioner would supply the down payment and be on title to protect her interest; that the respondent was to pay for all household bills, such as taxes, the mortgage, the house insurance, repairs, and so on; that the respondent would be able to decorate or upgrade the property if she wanted; and that in five years, the petitioner wanted the respondent to pay back all of the money she had lent the respondent (which he said included the down payment) plus 10% interest.

[21] Mr. Horton deposed that he told the petitioner that “she was selling yourself short, and that she should be benefiting in any gains after the five years”, but the petitioner said: “all I want is my investment return plus any interest I would have received in the bank”.

[22] The petitioner denies this was the agreement, noting this was her life savings and was to be her retirement funds. The property was to serve as an investment better than a GIC or like instrument.

[23] The property was purchased in November 2019 for $376,000 with the petitioner paying a down payment of $77,444.07. The respondent paid $2,000 towards the purchase and was to pay the mortgage and the property taxes. As of the 2024 BC assessment, the property has a value of $625,000.

[24] Numerous text messages are in evidence. The respondent relies upon them to say that certain emoticons in the texts indicate the petitioner agreed to accept only $120,000 rather than half of the equity in the property after a sale.

[25] The affidavit evidence of the petitioner on the one side and the respondent's, coupled with the affidavit of Mr. Horton and the respondent's realtor on the other, are in substantial conflict.

[26] There is now substantial equity in the property. Should the respondent's position prevail, after subtracting the mortgage, which at August 5, 2024 sits at $242,549.04, the equity has increased from approximately $79,000 to over $382,000.

[27] I find that I am unable to determine this matter on the affidavit evidence alone. This is a case which will turn significantly on findings of credibility. I have carefully considered whether Rule 22-1(7)(d) and whether it is possible to arrive at a conclusion without the parties testifying before the court.

> Power of the court
>
> (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
>
> […]
>
> (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

[28] In *Cepuran v. Carlton*, 2022 BCCA 76, a division of five-justice division of the Court of Appeal considered, inter alia, when it was appropriate to convert a petition to an action and set the matter down for trial as well as when it was appropriate to use other measures such Rule 16-1(18) for greater discovery and Rule 22-1(4) for

cross-examination on affidavits. At para. 162, the Court of Appeal held it was reluctant to specify when a petition should be converted stating: "[i]t will be up to the courts to determine on a case-by-case basis whether a petition proceeding is suitable for adopting a hybrid procedure or should be converted to an action and referred to trial".

[29] The Court commended the reasoning of Justice Ballance in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 and Justice Dardi in *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, in which they set out relevant factors to consider deciding whether to convert a petition proceeding to an action.

[30] Justice Ballance noted that a summary process should generally be converted to a full trial where serious and disputed questions of fact or law are raised: para. 49. Still, she noted that "[…] the mere existence of a *bona fide* triable issue may not, of itself, be enough to warrant conversion to the trial list". A trial judge should consider whether the concerns associated with proceeding by petition can be ameliorated by adopting a hybrid procedure involving some limited discovery of documents or cross examination on affidavits: *Boffo* at para. 49; *Cepuran* at para. 160.

[31] At para. 51, Ballance J. summarized the factors laid out by Dardi J. in *Terasen Gas Inc*. for determining whether to convert a petition to an action:

> [51] […]
>
> (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; and
>
> (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.

[32] As stated by the Court of Appeal in *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 24, s. 6 of the *PPA* conveys a discretion that is "broad and unfettered". The Court continued:

> [24] […]. [*PPA* s. 6] bestows on the court the ability to refuse to order a sale when, having regard to the particular facts and circumstances, such an order would not do justice between the parties. […]

[33] The language of s. 6 is neutral in terms of onus. It is for the court to assess the evidence and to determine whether justice requires that a s. 6 order be denied: *Sahlin* at para. 23; *Bradwell v. Scott*, 2000 BCCA 576 at para. 35.

[34] Justice Duncan in *Ackerman v. Ackerman*, 2024 BCSC 1702 considered it fair and just to convert a partition proceeding brought by the petition to an action in circumstances which included the difficulty in finding facts.

[35] Here, cross-examination on affidavits alone will not suffice. More than one affidavit has already been filed by the petitioner answering the respondent's affidavit. Those further facts, however, outline even further inconsistencies between the parties' evidence. Consequently, I find that I am unable to fairly determine the facts nor can the conflicting issues be fairly assessed without having the parties testify. This matter cannot be resolved except by making a finding of credibility and reliability of the testimony on one competing versions of events. Written materials alone cannot assist with that determination.

[36] Furthermore, I note that the respondent raised the defence of promissory estoppel at the hearing, which the petitioner did not oppose.

[37] The current state of the pleadings do not address all of the issues and submissions of the parties. In *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473, Justice Skolrood, as he then was, held in the case before him the failure by the parties to address all the legal and factual issues was sufficiently important to render cross-examinations on affidavits alone inappropriate.

CONCLUSION

[38] I find the interests of justice require the filing of proper pleadings setting out the claims and the defences. There will likely be examinations for discovery required. This matter is remitted to the trial list.

"Maisonville J."