

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhao v. Jiao*,
2024 BCSC 2248

Date: 20241107
Docket: S244261
Registry: Vancouver

Between:

Xu Qing Zhao, Yuan-Cheng Ge also known as Yuan Cheng Ge, and Yue Ping Ke

Plaintiffs

And

Jin Qin Jiao, Tian Yi Zhang, and Ya Ran Li

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs 16-18 on December 17, 2024.

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

S. Chiu

Counsel for the Defendant, Jin Qin Jiao:

R. LaPlante

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
October 29, 2024

Place and Date of Judgment:

Vancouver, B.C.
November 7, 2024

Overview

[1] **THE COURT:** In this action, the plaintiffs claim against the defendants for non-payment of the purchase price for the purchase and sale of two residential properties, one located in Kelowna (the “Kelowna Property”) and the other at 1805-7888 Ackroyd Road, Richmond, British Columbia (the “Richmond Property”). Only the Richmond Property is in issue on this application.

[2] The Defendant, Jin Qin Jiao, is the registered owner of the Richmond Property. Ms. Jiao applies to cancel a certificate of pending litigation (“CPL”) registered against the Richmond Property on June 24, 2024, under charge CB1398613 by the plaintiff, Xu Qing Zhao. Ms. Jiao applies to cancel the CPL under s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] and also seeks summary dismissal of the plaintiffs' claim against her under Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Alternatively, Ms. Jiao seeks to have the CPL cancelled on the basis of hardship under s. 256 of the *LTA*.

[3] For the reasons that follow, I find that the notice of civil claim does not plead an interest in land as required by s. 215 of the *LTA*. In light of this, I find it unnecessary to deal with Ms. Jiao's application under Rule 9-6 and s. 256 of the *LTA*.

Pleadings

[4] The initial notice of civil claim was filed June 24, 2024 (“NOCC”) together with the CPL. The defendants named in the NOCC were Ms. Jiao, John Doe and Jane Doe. On July 16, 2024, the plaintiffs filed an amended notice of civil claim (“ANOCC”) in which Mr. Zhang and Ms. Li were substituted in place of John and Jane Doe. The material facts in claims pleaded otherwise remain substantively the same as in the NOCC.

[5] The plaintiff, Yue Ping Ke, is the plaintiff Ms. Zhao's aunt and a friend of the plaintiff, Yuan-Cheng Ge. The claim against Mr. Ge is brought in respect of the Kelowna Property, which is not in issue on this application.

[6] Ms. Jiao is the mother of the defendant, Tian Yi Zhang and the mother-in-law of the defendant, Ya Ran Li, who is married to Mr. Zhang.

[7] The plaintiffs plead that Ms. Ke met Mr. Zhang and Ms. Li in 2019. In early 2022, Mr. Zhang and Ms. Li learned from Ms. Ke that Ms. Zhao intended to sell the Richmond Property. Mr. Zhang and Ms. Li expressed an interest in purchasing it and asked Ms. Ke to arrange the sale for them.

[8] The plaintiffs plead that Mr. Zhang and Ms. Li entered into an oral agreement with Ms. Zhao to purchase the Richmond Property, which they define in the NOCC as the “Zhao Agreement”. The plaintiffs do not plead when this agreement was entered into.

[9] The material terms of the Zhao Agreement are alleged to have been as follows:

- a) The defendants would pay a purchase of \$1.85 million. However, “the purchase price to be shown on the records would be \$1.6 million to reduce the property transfer tax payable”;
- b) Ms. Jiao would be the purchaser on any purchase and sale agreement and registered on title to the Richmond Property upon closing;
- c) The defendants would pay a down payment of \$873,000 with the balance of the purchase price to be funded by mortgage financing;
- d) The defendants would borrow the funds for the down payment from a friend and transfer those funds to Ms. Zhao before closing in order to qualify for mortgage financing;
- e) Upon transfer of title from Ms. Zhao to Ms. Jiao, Ms. Zhao would return the down payment to the defendants so that they could in turn return the borrowed funds to their friend; and

- f) Within six months of transfer of title from Ms. Zhao to Ms. Jiao, the defendants would pay the full purchase price of \$1.85 million to Ms. Zhao.

[10] The plaintiffs plead that the purchase of the Richmond Property "pursuant to the Zhao Agreement" completed in March 2022, and the property was transferred from Ms. Zhao to Ms. Jiao on March 17, 2022. They alleged that Ms. Zhao returned the \$873,000 down payment as contemplated in the Zhao Agreement by way of a cheque payable to Mengyu Wang, who they say was a designate of the defendants.

[11] The plaintiffs plead that despite numerous demands, "Ms. Zhao has not received any payment from the Defendants for the sale of the Richmond Property to the Defendants": ANOCC at paras. 17 to 19.

[12] Based on these material facts, the plaintiffs assert claims for breach of contract, unjust enrichment and resulting trust. They seek the following relief in respect of the Richmond Property:

1. Judgment for Ms. Zhao against the Defendants jointly and severally for a total of \$1,850,000.00 for the purchase price of the Richmond Property.
2. A declaration that before the Defendants pay to Ms. Zhao the \$1,850,000.00 purchase price of the Richmond Property in full, the Defendant Jiao holds the title of the Richmond Property in trust for Ms. Zhao.
3. A Certificate of Pending Litigation against title to the Richmond Property.
4. Damages for Ms. Zhao against the Defendants for breach of the Zhao Agreement.
5. Pre-judgment interest to Ms. Zhao against the Defendants pursuant to the interest terms, if any, under the Zhao Agreement, or in the alternative, pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 (the "COIA").

[13] Notably, the plaintiffs:

- a) expressly plead that none of them "have ever met the Defendant Jiao or have had any direct communications with the Defendant Jiao": ANOCC at para. 10; and
- b) do not plead that Ms. Jiao was a party to the Zhao Agreement, pursuant to which they allege the Richmond Property was transferred to her.

Purchase and Sale of the Richmond Property

[14] The following facts are uncontested and present a materially different picture of the transaction between Ms. Zhao and Ms. Jiao, pursuant to which Ms. Jiao purchased the Richmond Property from Ms. Zhao, than the material facts pleaded in the NOCC and ANOCC.

[15] In February 2022, Ms. Zhao, as seller, and Ms. Jiao, as purchaser, entered into a standard form written contract of purchase and sale for the Richmond Property dated February 24, 2022 (the “Jiao Contract”). The purchase price under the Jiao Contract was \$1.6 million. A deposit of \$50,000 was required, which Ms. Jiao paid into her lawyer's trust account.

[16] Both Ms. Jiao and Ms. Zhao had professional assistance in respect of the transaction. Ms. Jiao was represented by a lawyer, Ling Jiang; a notary, Susan Tong acted for Ms. Zhao.

[17] On March 14, 2022, Ms. Tong provided Ms. Jiang with the documentation executed by Ms. Zhao necessary to complete the sale of the Richmond Property to Ms. Jiao, including the Form A transfer and a statutory declaration. In her statutory declaration, Ms. Zhao declared that:

I have agreed to sell and am selling to Jin Qin Jiao (the “Buyer”) all of my rights, title and interest in and to the Property for the gross sale price of \$1,600,000.00.

[18] Ms. Jiao's purchase of the Richmond Property closed on March 15, 2022. Ms. Jiang provided net sale proceeds in the amount of \$1,598,232.91 to Ms. Tong on her undertaking to, among other things, discharge a mortgage registered against the Richmond Property by the Bank of Montreal (the “BMO Mortgage”).

[19] Of the funds paid into Ms. Tong's trust account, \$723,849.73 was in fact used to discharge the BMO Mortgage, which was released from title to the Richmond Property on March 17, 2022.

[20] Given these uncontested facts, the plaintiffs concede that paras. 18 and 19 of the NOCC, which are also paras. 18 and 19 of the ANOCC, are false. Ms. Zhao will be unable to prove the truth of the facts asserted, namely, that the defendants "did not pay any of the purchase price for the Richmond Property" or that she has "not received any payment from the Defendants for the sale of the Richmond Property", as pleaded in paras. 18 and 19 respectively.

[21] Ms. Zhao now concedes that she received \$1.6 million from Ms. Jiao as the purchase price for the Richmond Property under the Jiao Contract, and that she applied approximately \$723,849 of the purchase price to discharge the BMO Mortgage from title to the Richmond Property as required under the terms of the Jiao Contract.

Analysis

[22] Section 215(1) of the *LTA* provides that:

Registration of certificate of pending litigation in same manner as charge

215 (1) A person who has commenced . . . a proceeding, and who is
(a) claiming an estate or interest in land, . . .
may register a certificate of pending litigation against the land . . .

[23] Thus, as a precondition to registration of a CPL, the NOCC must disclose a claim to an interest in the Richmond Property: *Batth v. Sharma*, 2024 BCCA 29, at para. 22, citing *Xiao v. Fan*, 2018 BCCA 143, at para. 31.

[24] The court has inherent jurisdiction to cancel a CPL where a pleading fails to meet the precondition of a claim for an interest in land as required by s. 215: *Lipskaya v. Guo*, 2022 BCCA 118, at para. 64; *Xiao* at paras. 19 and 22, as well.

[25] The relevant law was succinctly summarized in *Lipskaya* as follows:

[64] The court has inherent jurisdiction to cancel a CPL that does not meet the preconditions for registration, that is, where no interest in land is claimed: *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 7; *Bilin v. Sidhu*, 2017 BCCA 429. An "interest in land" is claimed where title may change as a result of the proceedings: *V.B. v. K.B.*, 2013 SKQB 412 at

para. 72. The court can cancel a CPL where damages would be adequate relief: *Wai v. Chung*, 2020 BCSC 34 at paras. 26–28. An application to cancel a CPL for non-compliance with s. 215 of the *LTA* does not involve a weighing of the evidence or an assessment of the strength of the claim—the court only considers whether such a claim is pleaded: *Yi Teng* at paras. 36–38.

[26] The test to be applied on an application to cancel a CPL that is alleged not to meet the preconditions of s. 215 of the *LTA* is whether the facts pleaded, assuming them to be true, are capable of supporting a claim to an interest in land: *Xiao* at para. 27; and *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357, at para. 39 [*Yi Teng*]. Where the pleadings are incapable of supporting a claim to an interest in land, the CPL is cancelled by exercise of the court's inherent jurisdiction with immediate effect, because it was improperly registered at the start: *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172, at para. 40 [*GMC*].

[27] There must be a nexus or causative link between the facts alleged and the interest to which they would give rise if ultimately proved: *Yi Teng* at para. 39. If the facts would not give rise to an interest in land, then they are incapable of supporting such a claim, and the pleadings do not meet the threshold criteria for issuance of a CPL under s. 215: *Lipskaya* at para. 64.

[28] A party's entitlement to a CPL must be founded on the state of the pleadings when it was registered. A CPL cannot be maintained when the pleadings were inadequate to disclose a claim to an interest in land at the time the certificate was filed, and any deficiencies in those pleadings cannot be salvaged by subsequent amendments: *Batth* at para. 8, citing *Bilin v. Sidhu*, 2017 BCCA 429, at para. 62. This CPL was filed contemporaneously with the filing of the NOCC. Accordingly, the analysis under s. 215 must be anchored in that pleading, though in the present case, the NOCC and the ANOCC are substantively the same; the only difference being the substitution of Mr. Zhang and Ms. Li for John and Jane Doe.

[29] A party seeking to cancel a CPL on the basis that the opposing party does not claim an interest in land has two options. First, they can bring the application pursuant to s. 215(1), asserting that the pleading does not claim an interest in land.

An application to cancel a CPL under s. 215 is based on the pleadings. The court is not to analyze the merits of the claim. The question is whether the facts pleaded, assuming they are true, are capable of supporting a claim to an interest in land: *GMC* at para. 41.

[30] Additionally or alternatively, where a party asserts that there is no merit to the claim of an interest in land, they can apply for summary dismissal under Rule 9-6: *Batth* at para. 16, citing *Xiao* at paras. 13, 22 to 27; and *Ai Kang Yi Yuan Enterprises Corp. v 1098586 B.C. Ltd.*, 2022 BCSC 670 at para. 38.

[31] The distinction between the two approaches was summarized in *Nouhi v. Pourtaghi*, 2019 BCSC 794, where the Court noted that under s. 215, the issue is purely a question of adequacy of pleadings, while an application under Rule 9-6 is predicated on the contention that the pleaded claim to an interest in land is without merit:

[13] The distinction drawn between the two approaches is that in the first, the question is whether the pleadings disclose a claim for an interest in land without regard to the merits of the claim; it is purely a question of adequate pleadings. In the second, the applicant seeking to cancel the certificate of pending litigation contends that the claim is without merit and applies to dismiss it summarily: *Xiao v. Fan*, 2018 BCCA 143 at para. 13. It is only in the first case that the s. 215(1) mechanism to cancel a certificate of pending litigation will apply. If the pleadings disclose a claim to an interest in land, the summary dismissal approach must be taken: *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 9. *Xiao* explains this point as follows:

[27] Accordingly, the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the *Land Title Act* is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be considered, and the test to be applied is whether there is a *bona fide* triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.

[32] Ms. Jiao is pursuing both options. She seeks, at first instance, cancellation of the CPL under s. 215 of the *LTA* on the basis that the NOCC does not disclose a

claim to an interest in the Richmond Property. Also, Ms. Jiao seeks summary judgment dismissing the entirety of the claim against her under Rule 9-6(5)(a).

[33] Evidence is not considered on an application to cancel a CPL for noncompliance with s. 215 of the *LTA: GMC* at para. 41. An interest in land must be established through the pleadings. The notice of civil claim is considered as a whole, assuming the pleaded facts are true, to determine whether the pleaded facts are capable of supporting an interest in land: *Batth* at para. 30; *GMC* at para. 41.

[34] If the facts pleaded, if true, would not give rise to an interest in land, then they are incapable of supporting such a claim, and the pleading will not meet the threshold criteria under s. 215: *Yi Teng* at para. 39.

[35] However, allegations based on assumptions and speculation, or allegations that are manifestly incapable of being proven, are not required to be accepted as true: see e.g. *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142, at para. 54; see also *Operational Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 1985 CanLII 74, at para. 27, as cited in *Parmar v. Sidhu*, 2022 BCSC 1359, at para. 11. This is pertinent in the present circumstances because it means that I am not required to accept as true those facts which Ms. Zhao now admits are false, most notably that Ms. Jiao did not pay the purchase price for the Richmond Property, and correspondingly, that Ms. Zhao did not receive any payment from the defendants for the Richmond Property.

[36] I also do not accept as true for the purpose of this application, the assertion in para. 16 of the NOCC that the Richmond Property was transferred by Ms. Zhao to Ms. Jiao “pursuant to the Zhao Agreement”. Ms. Zhao does not plead that Ms. Jiao was a party to the Zhao Agreement, nor was it disputed on this application that the property was transferred to Ms. Jiao pursuant to the Jiao Contract.

[37] The plaintiffs rely primarily on a remedial constructive trust being imposed as a remedy for unjust enrichment as the basis for the claim of an interest in the Richmond Property. A constructive trust may be sufficient to sustain the registration

of a CPL: *Memphis Blues BBQ International Ltd. v. P.K. Johnson Inc.*, 2024 BCSC 497, at para. 29 [*Memphis Blues*]; citing *Nouhi* at para. 20. When an interest in land is claimed based on a constructive trust, the question on an application to cancel a CPL is whether the constructive trust is a possible remedy: *Memphis Blues* at para. 30.

[38] A remedial constructive trust is available to remedy unjust enrichment: *Memphis Blues* at para. 34. The relevant question to ask is whether the plaintiffs' claim in unjust enrichment is properly pleaded. The elements of an unjust enrichment claim are well settled. The plaintiffs must establish the following three elements: (a) Ms. Jiao was enriched; (b) Ms. Zhao suffered a corresponding deprivation; and (c) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10, at para. 32; and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, at para. 85.

[39] If a claim in unjust enrichment is properly pleaded, I must then also consider whether the plaintiffs have pleaded the additional criteria necessary to claim the remedial constructive trust over the properties, namely: (a) a causal connection or a nexus to the subject property; and (b) that damages would be inadequate: *Nouhi* at para. 26.

[40] Considering the NOCC as a whole as it relates to the Richmond Property, and assuming those facts which are capable of proof as being true, I find that the NOCC does not properly plead a claim in unjust enrichment against Ms. Jiao, nor does it plead the necessary material facts in support of a claim for a remedial constructive trust. Specifically, given that paras. 17 and 18 of the NOCC are admittedly false and thus cannot be assumed to be true, the NOCC does not plead a complete cause of action in unjust enrichment against Ms. Jiao, because there was no pleading that Ms. Jiao was enriched and that Ms. Zhao suffered a corresponding deprivation. This alone is, in my view, sufficient to defeat Ms. Zhao's claim to an interest in land by way of her claim for unjust enrichment and remedial constructive trust against Ms. Jiao.

[41] Regardless, it is clear from the NOCC that the plaintiffs' alleged entitlement to both a remedial constructive trust and a remedial trust is predicated on the defendants not having given any value for the Richmond Property. As they plead in Part 3 of the NOCC:

3. The Plaintiffs claim that as a result of the Defendants' failure to pay the purchase price for the Richmond Property and the Kelowna Property respectively, the Defendants have been unjustly enriched by receiving title and interest of the Richmond Property and the Kelowna Property without paying any value to the detriment of Ms. Zhao and Mr. Ge for no juristic reason.

4. Ms. Zhao claims a constructive trust in the Richmond Property in the amount of the purchase price of \$1,850,000.00 plus increase in value of the said property.

...

6. The Defendants gave no value for the Richmond Property and the Kelowna Property.

7. A resulting trust arises where legal and equitable title to property is one party's name, but that party, because he gave no value for the property, is under an obligation to return it to the original title owner, or the person who did give value for it.

[Emphasis added.]

[42] In the absence of a properly pleaded claim in unjust enrichment, the prospect of this relief being granted, most notably a remedial constructive trust being imposed as a remedy, thereby giving rise to a claim to an interest in the Richmond Property for Ms. Zhao, does not arise. The necessary nexus or causative link between the facts alleged against Ms. Jiao and the interest in the Richmond Property to which they would give rise, if ultimately proved, is absent on the NOCC, accepting only those facts which are capable of proof to be true.

[43] This becomes all the more apparent bearing in mind that the plaintiffs plead that the Richmond Property was transferred pursuant to the Zhao Agreement, but do not plead that Ms. Jiao was a party to that agreement: at paras. 15 and 16. In this respect, it is well-settled that under the doctrine of privity of contract, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it: *The Owners of Strata Plan KAS3204 v. Navigator Development Corporation*, 2020 BCSC 1954, at paras. 49-50, as cited in *Empire Building Supplies*

Ltd. v. Green Canada Construction Ltd., 2022 BCSC 1903, at para. 72. While agency and trust may operate as exceptions to privity, no such pleading or any material facts in support thereof is contained in the NOCC.

[44] If the pleaded facts would not give rise to an interest in land, then they are incapable of supporting such a claim, and the pleadings do not meet the threshold criteria for issuance of a CPL under s. 215 of the *LTA*: *Lipskaya* at para. 64; and see also *Yi Teng* at para. 39.

[45] Ms. Zhao may have a monetary claim against Mr. Zhang and Ms. Li in the amount of \$873,000 based on the NOCC as presently pleaded, but that claim does not give rise to an interest in the Richmond Property, nor does it permit Ms. Zhao to use the CPL to secure her claim against Mr. Zhang and Ms. Li for their alleged breach of the Zhao Agreement, for which the primary relief sought in the NOCC is monetary damages. A CPL is not be used as pre-judgment execution for a purely financial claim: *Lipskaya* at para. 65. All the more so, in my view, it ought not to be used to secure a monetary claim against another defendant in circumstances where the plaintiff accepts that the defendant having legal title to the property has paid the agreed-upon purchase price for the property in full, namely, where Ms. Jiao has paid the full purchase price owing to Ms. Zhao under the Jiao Contract.

[46] Accordingly, based on the facts as pleaded, considered in light of the concessions made over the course of the hearing, and assuming only those facts which are capable of being proven to be true, I find that the NOCC does not plead a claim to an interest in land as required under s. 215 of the *LTA*.

Conclusion

[47] Ms. Jiao's application for cancellation of the CPL under s. 215 of the *LTA* is granted.

[48] Ms. Jiao also sought summary judgment dismissing the claim against her under Rule 9-6 on the basis that no triable issues arise on the pleadings. Ms. Jiao relied on a multitude of grounds to establish this, including s. 59 of the *Law and*

Equity Act, R.S.B.C. 1996, c. 253 and the parole evidence rule. However, the parties' submissions on this aspect of the application did not engage sufficiently with the applicable legal principles to enable the Court to determine the issues raised. There is a significant body of jurisprudence—as to the principles that apply under Rule 9-6 generally, dismissal of a CPL under this rule specifically, and the legal principles that Ms. Jiao says demonstrate lack of triable issues—that were not sufficiently addressed.

[49] This may have been a factor of the two-hour time estimate for this matter proving insufficient, but the cursory treatment of this aspect of the application in the application materials was of similarly limited assistance. In the circumstances, I decline to determine the issue in the absence of sufficient submissions from counsel, particularly as Ms. Jiao seeks summary dismissal of the entirety of the claim, not simply that part of the claim which sought the CPL against the Richmond Property. Ms. Jiao's application for summary dismissal is therefore adjourned generally. I am not seized.

[50] Finally, my determination that the CPL is to be cancelled under s. 215 of the *LTA* renders it unnecessary to address Ms. Jiao's application under s. 256 of the *LTA*. That aspect of the application is also adjourned generally.

[51] As the successful party, Ms. Jiao is entitled to her costs of this application payable in the cause at Scale B.

“Hughes J.”