

CANADA / JUDGMENT

062478 B.C. Ltd. v. Wallace

2011 BCSC 1383

COURT

Supreme Court of British Columbia

DECIDED

14 October 2011

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2011 BCSC 1383 0624708 B.C. Ltd. v. Wallace IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: 0624708 B.C. Ltd. v. Wallace, 2011 BCSC 1383 Date: 20111014 Docket: S075187 Registry:
Vancouver Between: 0624708 B.C. Ltd. PLAINTIFF And David Scott Wallace, Shona Yvonne
Wallace, Eugene Lewis Wallace and Evelyn Mary Wallace DEFENDANTS Before: The Honourable
Mr. Justice Goepel Oral Reasons for Judgment Counsel for the Plaintiff: S.A. Mellows Counsel for
the Defendants, David Scott Wallace and Shona Yvonne Wallace: S.B. Jackson Counsel for the
Defendants, Eugene Lewis Wallace and Evelyn Mary Wallace: J.D. Buchan Place and Date of
Hearing: Vancouver, B.C. October 12, 2011 Place and Date of Judgment: Vancouver, B.C. October
14, 2011

INTRODUCTION

- [1] The defendants, David Scott Wallace and Shona Yvonne Wallace apply to cancel a certificate of pending litigation (the "CPL") registered by the plaintiff on July 31, 2007 against property located at 2780 and 2800 Smith Street, Richmond, British Columbia ("the Disputed Properties").
- [2] The principal of the plaintiff company is Daniel Wallace. He is David's brother. David and Daniel are the sons of the defendants Eugene Lewis Wallace and Evelyn Mary Wallace. Shona is married to David. For ease of reference, I will be referring to various members of the Wallace family by their first name.

BACKGROUND

- [3] The Disputed Properties are part of three contiguous properties on Smith Street. Eugene and Evelyn originally owned the Disputed Properties together with an adjacent property located at 2760 Smith Street.

- [4] In or about 1999, 2760 Smith was transferred to David and Shona. In 2006, David and Shona acquired a one-third interest in the Disputed Properties together with an option to purchase the balance of the Disputed Properties from Eugene and Evelyn for \$250,000 if the option was exercised by November 1, 2011. If the option was exercised after that date, the option price was \$300,000.
- [5] Daniel alleges that in 2002, on behalf of the plaintiff company, he entered into an oral agreement with Eugene pursuant to which the plaintiff would pay all costs with regard to the Disputed Properties. For doing so it would be entitled to a share in the equity of the Disputed Properties. Eugene and Evelyn would hold the plaintiff's interest in trust for its benefit ("the Trust Agreement"). It is far from clear from the material before me whether the plaintiff is claiming 100% or some lesser interest in the Disputed Properties.
- [6] Since 2002 the plaintiff has paid some \$277,000 (the "Expenditures"). The Expenditures include \$227,000 in mortgage payments and \$50,000 in property taxes.
- [7] Daniel alleges that when David and Shona acquired their interest in the Disputed Properties, they did so with full knowledge of the Trust Agreement. David denies any such knowledge and deposes that he only became aware of the alleged agreement when this action was commenced. He suggests in submissions but has not plead that he is a bona fide purchaser without notice.
- [8] Eugene denies the existence of the Trust Agreement. He says Daniel made the mortgage payments because the mortgage was taken out to finance Daniel's various business activities.
- [9] The three Smith properties are in an area zoned for industrial use. David operates a woodworking business on the Disputed Properties.
- [10] David and Shona and their four children reside in a residence located on 2800 Smith Street. The residence is non-conforming to the present zoning but allows an occupant to carry on manufacturing or some other industrial activity while living in the residence.
- [11] On October 16, 2007, the plaintiff commenced these proceedings. The relief sought included:
- (a) a declaration that the defendants hold a beneficial interest in the properties for the benefit of the plaintiff;
 - (b) a determination of the extent of the beneficial interest held in trust for the plaintiff;
 - (c) an order that the defendants transfer the plaintiff's interest in the property to the plaintiff;
 - (d) an order for partition and sale of the properties;
 - (e) damages for breach of trust and breach of contract;
 - (f) a certificate of pending litigation;

- (g) judgment for the amount of the expenditures; and
 - (h) restitution of the amount of the expenditures.
- [12] David and Shona defended the action, Eugene and Evelyn did not. On June 10, 2010, the plaintiff obtained a default judgment against Eugene and Evelyn and an order that Eugene and Evelyn pay to the plaintiff damages to be assessed for breach of trust. Trial of the action is set for seven days in February 2012.
- [13] On July 29, 2011, the defendants entered into an agreement to sell the three Smith Street properties for a total of \$1,500,000. The price for the Disputed Properties was \$1,100,000. The sale is subject to the CPL being removed from title by October 15, 2011. The sale is set to close on October 30, 2011. David and Shona intend to use the sale proceeds to exercise their option to purchase Eugene and Evelyn's remaining interest in the Disputed Properties.
- [14] David had originally attempted to sell 2760 Smith Street separately. On this application, there is an affidavit from a licensed realtor indicating the Smith lots are most valuable being sold together for the purpose of redevelopment. The purchaser intends to demolish the residence and conduct an auto-related business on the three lots. The affidavit indicates that \$1,500,000 is a fair price for the three Smith Street properties.
- [15] David indicates that his current business is hampered by the size of the existing shop and he wishes to move to a new location in Mission, where more land is available. He will be able to have a bigger shop and hopes to increase his business. He indicates he has located a property in Mission that is suitable for his business and residence and has entered an agreement to purchase that property for \$550,000, which purchase is subject to the sale of the Smith Street properties. At present, the property in Mission contains only a partial workshop and a small cabin. David intends to complete the shop and construct a new home for his family.
- [16] At the start of the school year, David and Shona enrolled their children in a school in Mission. Shona and the children are presently living in a mobile home which the owner of the Mission property has agreed can remain on the property pending completion of the sale. POSITION OF THE PARTIES
- [17] David and Shona submit that they will suffer hardship and inconvenience if the CPL is not removed from title. The family will be prevented from relocating to Mission, David's business will not be able to expand, they will be prevented from realizing the value of 2760 Smith Street (which is not subject to any claim) and they will lack the necessary funds to exercise their option to purchase for \$250,000 Eugene and Evelyn's remaining interest in the Disputed Properties. They submit they are willing to provide security to secure any damages the plaintiff might suffer.
- [18] The plaintiff denies that the applicants have shown any hardship and inconvenience. It submits that the suggested hardship has only arisen because of the applicants' recent decision to relocate to Mission. It submits that the Disputed Properties are of a unique

nature because of the existing residence on property otherwise zoned light industrial. It submits that its case is strong as evidenced by the failure of Eugene and Evelyn to defend the claim. It notes that the trial of this matter is set for February 2012 and, given the short timeframe before trial in which the issue of ownership will be finally determined, the application should be dismissed. DISCUSSION Statutory Framework

- [19] The application is brought pursuant to the provisions of ss. 256 and 257 of the Land Title Act, R.S.B.C. 1996, c. 250 (the "Act"). The relevant sections of the Act are: 256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
- (a) particulars of the registration of the certificate of pending litigation.
 - (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
 - (c) the grounds for those statements, apply for an order that the registration of the certificate be cancelled. 257 (1) On the hearing of the application referred to in section 256 (1), the court
 - (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
 - (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
 - (2) The form of the undertaking must be settled by the registrar of the court.
 - (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.
- [20] Pursuant to s. 256(1)(b) of the Act, hardship and inconvenience is a threshold requirement to an order cancelling a CPL: *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141. The provision does not require the hardship and inconvenience to be significant: *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379 at para. 24.

- [21] In the circumstances of this case, I find that the plaintiff has established inconvenience and hardship. If the CPL is not removed, David and Shona will not be able to exercise their option to purchase the Disputed Properties for \$250,000. Further, they will be unable to sell their own property, or relocate their family to Mission. In *Fraser v. Case*, [1999] B.C.J. No. 1541 (S.C.), the parties' inability to move to a location of their choice was held to be sufficient hardship to warrant the lifting of a CPL.
- [22] The plaintiff is in reality seeking specific performance of its 2002 agreement. Prior to the Supreme Court of Canada decision in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 ("Semelhago"), specific performance was regarded as the presumptive remedy for a breach of contract for the purchase and sale of real estate. Since *Semelhago*, the remedy remains available in circumstances in which a plaintiff can establish that there is not a readily available substitute property and damages are not an adequate remedy: *Serebrennikov v. Sawyer's Landing Investments 1 Ltd.*, 2010 BCSC 1276.
- [23] In this case, the plaintiff does not seek to acquire the Disputed Properties for his own use. The material makes it clear that Daniel sees the Disputed Properties as a unique investment opportunity and believes that the present sale price does not represent the Disputed Properties' true value. Accepting without finding the properties are unique, there is no evidence that damages are not an adequate remedy. Absent such evidence the claim for specific performance is doomed to fail. If the present sale is for less than market value, the plaintiff will be entitled to damages for the improvident sale: *Bronson v. Hewitt*, 2010 BCSC 169.
- [24] Pursuant to s. 257(1)(a)(i) of the Act, the Court may cancel a CPL and order the posting of security if it is satisfied the damages will provide adequate relief. In this case, I find damages will provide adequate relief to the plaintiff and therefore it is appropriate to cancel the CPL.
- [25] The difficult issue is determining the amount of security. Pursuant to s. 257(3), the Court has to take into consideration the probability of success in the action in respect to which the CPL is registered. While the authorities suggest that a defendant does not in every case have to post security equal to the estimated damages, the potential for substantial damages is a factor to be taken into account in affixing the amount of security. Another factor is the financial worth of the party called upon to post security: *Park & Tilford Canada Inc. v. Festival Markets Inc.*, [1986] 6 B.C.L.R. (2d) 160 (S.C.).
- [26] I cannot determine on the evidence before me which side is likely to succeed. This litigation has arisen in the context of a family relationship, and, as is often the case in family disputes, the alleged agreement is not properly documented. The final result will likely turn on issues of credibility. The plaintiff would appear, on the limited evidence before me, to have an arguable case.

[27] The Disputed Properties have been sold for \$1.1 Million. If the plaintiff is successful, some or all of that money belongs to him. Taking all matters into account, I order that the CPL be cancelled upon the defendants posting security of \$750,000. I note that if the plaintiff obtains a greater award at trial, the evidence indicates that the defendants have other assets which might be attached to satisfy such a judgment.

[28] Costs of the application will be in the cause. "R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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Prepared on 25 October 2026 · Esheria