

CANADA / JUDGMENT

0742848 B.C. Ltd. v. 426008 B.C. Ltd.

2020 BCCA 179

COURT

British Columbia Court of Appeal

DECIDED

24 June 2020

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2020 BCCA 179 0742848 B.C. Ltd. v. 426008 B.C. Ltd.,

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

0742848 B.C. Ltd. v. 426008 B.C. Ltd.,

2020 BCCA 179

Date: 20200624

Docket: CA46655

Between:

0742848 B.C. Ltd.

Appellant

(Plaintiff)

And

426008 B.C. Ltd., 0714185 B.C. Ltd., Andrew A. Bury,

Andrew A. Bury Law Corporation, Manjit Claire,

Manjit Claire Personal Real Estate Corporation, Kurtis Claire,

RE/MAX Real Estate Services, Andrews Realty Ltd., David N. Andrews,

Neil Hahn, and Garnett Wilson Realty Advisors Ltd.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 2019 (0742848 B.C. Ltd. V. 426008 B.C. Ltd., 2019 BCSC 1869, Vancouver Registry Docket S1812158).

Appearing as a representative for

the Appellant, 0742848 B.C. Ltd.

(via videoconference):

D. McCargar

Counsel for the Respondents,

426008 B.C. Ltd. and 0714185 B.C. Ltd. (via videoconference):

A.H. Sabur

Counsel for the Respondents, Andrew A. Bury and Andrew A. Bury Law Corporation (via videoconference):

V.G. Critchley

Counsel for the Respondents, Manjit Claire, Manjit Claire Personal Real Estate Corporation, Kurtis Claire, RE/MAX Real Estate Services, Andrews Realty Ltd. and David Andrews (via videoconference):

S.G. Cordell

Counsel for the Respondents, Neil Hahn and Garnett Wilson Realty Advisors Ltd.

(via videoconference):

K. Paciorek

Place and Date of Hearing:

Vancouver, British Columbia

June 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 24, 2020

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Griffin

Summary:

The appellant appeals an order in chambers dismissing his application to extend time to file his notice of appeal. The appellant also contends that the chambers judge should have recused himself because he was a former law partner of counsel for the respondent. Held: appeal dismissed. The appellant has not shown that the chambers judge erred in law or principle or misconceived the facts in dismissing the application. There was no basis for the chambers judge to recuse himself in this case. It had been more than 8 years since the judge and the lawyer had practised together, during which time they had no business dealings and very little contact.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] The appellant, 0742848 B.C. Ltd. ("074") applies pursuant to s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 to vary the February 25, 2020 order of Mr. Justice Abrioux, dismissing the application of 074 to extend the time to appeal the orders of Madam Justice Horsman, pronounced on November 1, 2019, in which she struck or dismissed certain of the appellant's claims. The notice of appeal was filed seven weeks late.
- [2] On a s. 9(6) review, the Court will intervene only if the chambers judge erred in law or principle or misconceived the facts. The division does not hear the application afresh or substitute its views for the views of the chambers judge: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at paras. 7 and 12.

BACKGROUND

- [3] The background facts are set out in the reasons of Madam Justice Horsman, which are indexed at 2019 BCSC 1869, and those of Justice Abrioux, which are indexed at 2020 BCCA 67. I need not repeat them in detail.
- [4] The claims advanced in the underlying action arise out of an ongoing foreclosure proceeding involving land owned by 074 in Squamish, British Columbia (the "Property"). Donald McCargar is the sole director and shareholder of 074 and appeared on its behalf on the present application.

- [5] The defendants in the action are the mortgagees, their legal counsel, realtors retained by the mortgagees to assist in the sale of the Property, and an appraiser retained to provide an evaluation of the Property. 074 alleges that the defendants collectively and individually, throughout the foreclosure proceeding, acted negligently and in bad faith in their marketing, appraisal and attempted sale of the Property, and that they conspired to reduce the value of the Property.
- [6] The defendants applied pursuant to Rule 9-5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR] to strike the claims on the basis that the notice of civil claim disclosed no reasonable cause of action, was scandalous, frivolous and vexatious or alternatively, an abuse of the court process. The defendants all say that they do not owe a duty of care to the plaintiff 074 in the context of a foreclosure proceeding, that the conspiracy pleading is speculative, and that the notice of civil claim is an abuse of the court's process to the extent that it undermines the foreclosure proceedings. The defendants further submitted the plaintiff's claim should be dismissed pursuant to Rule 9-6 of the SCCR.

TRIAL COURT REASONS

- [7] At paras. 7-18 of her reasons, Justice Horsman set out the factual background. She then turned to the notice of civil claim which was filed on November 9, 2018. She summarized the claim at paras. 20-23:
- [20] The notice of civil claim advances causes of action against all of the defendants in negligence and conspiracy. The notice of civil claim generally alleges that all defendants "breached their duty of care and were grossly negligent" [notice of civil claim, Part 1, para. 22]. The particulars of the claims in negligence as against each group of defendants may be summarized as follows.
- i. The plaintiff alleges that the Realtors were negligent in failing to take adequate and reasonable steps to market the Property in a businesslike manner and in accordance with the standards expected of competent realtors. It is alleged that the Realtors had no valid reason to drop the list price to \$5.9 million on June 18, 2018, and also that the Realtors encouraged and entertained an offer for \$5.3 million prior to June 16, 2018 [notice of civil claim, Part 1, paras. 22, 25].
 - ii. The plaintiff alleges that Mr. Bury was negligent through his participation in the acceptance of the \$5.3 million offer, the selection of the Realtors to list the Property, and his selection of, and direction to, Mr. Hahn. It is alleged that Mr. Bury deliberately abused his authority in the foreclosure proceedings in order to cause financial loss to the plaintiff [notice of civil claim, Part 1, para. 23].
 - iii. The plaintiff alleges that the Mortgagees breached their duty of care to exercise their power of sale in good faith [notice of civil claim, Part 1, para. 25].

iv. The plaintiff alleges that Mr. Hahn was negligent in failing to conduct an appraisal of the Property in an accurate manner [notice of civil claim, Part 1, para. 26].

- [21] The notice of civil claim also alleges that all of the defendants committed the tort of civil conspiracy in deliberately and unlawfully colluding and conspiring to sell the Property quickly for less than its market value [notice of civil claim, Part 1, para. 17]. The particulars of the conspiracy in para. 20 of Part 1 of the notice of civil claim essentially replicate the negligence allegations that I have summarized above. It is alleged that the defendants entered into negotiations with a potential buyer prior to April 16, 2018, failed to adequately market the Property, manufactured incorrect appraisal evidence, and advocated for court approval of an offer that the defendants knew to be less than the market value of the Property.
- [22] There is an additional allegation of trespass against Mr. Bury and Mr. Hahn. The plaintiff alleges that Mr. Bury trespassed on the Property to conduct an inspection in December 2017 without the plaintiff's authorization [notice of civil claim, Part 1 para. 23(vi)]. Mr. Hahn's attendance on the Property in February 2018 is alleged to be a trespass because the Order for Conduct of Sale only permitted access to the Property for the purpose of an appraisal on or after April 16, 2018 [notice of civil claim, Part 1 para. 20(vi)].
- [23] The relief sought by the plaintiff in Part 2 of the notice of civil claim includes (at para. 1) judgment against the defendants, jointly and severally, for pecuniary damages arising from the difference between \$10 million and "the realized sale price of the Property".
- [8] Justice Horsman's analysis starts at para. 25 of her reasons with a discussion of the tests under Rules 9-5(1) and 9-6 of the SCCR. She then turned at para. 30 to the defendants' submission that they did not owe to the plaintiff, in the circumstances of a foreclosure proceeding, a duty of care. She first reviewed the framework for analyzing the existence of a duty of care in negligence set out in the judgment of the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79. She then considered in regard to each set of defendants whether it was plain and obvious that they did not owe a duty of care to the plaintiff, having regard to the *Anns/Cooper* framework. She concluded at para. 79 that the notice of civil claim did not disclose a reasonable claim in negligence against any of the defendants and she granted the defendants' applications to strike the negligence claims pursuant to Rule 9-5(1)(a) of the SCCR.
- [9] Justice Horsman next dealt with plaintiff's claims in conspiracy (paras. 81-93). She found that the notice of civil claim did not allege there was an agreement between the defendants and did not particularize the concerted actions said to have been taken by the defendants in pursuance of an agreement. She noted there was no indication whether the alleged conspiracy took the form of a lawful action which was designed to cause injury to the plaintiff as its predominant purpose, or an unlawful action taken by the defendants with knowledge that the action would injure the plaintiff. There was no allegation of actual damage suffered by the plaintiff because damage will only crystallize, if at all, once the

Property is sold for less than \$10 million. Given the absence of material facts in the notice of civil claim, she held that the claim of conspiracy must be struck as disclosing no reasonable claim. She gave the plaintiff, however, the opportunity to amend its claim against the mortgagees, realtors and lawyers, with leave to the plaintiff to file an amended pleading after the foreclosure proceedings had concluded. In regards to the appraisal defendants, she held that they were protected by witness immunity and accordingly, she did not give leave to the plaintiff to file an amended pleading in conspiracy against those defendants.

[10] Justice Horsman then went on to consider the plaintiff's claims in trespass against the lawyer and the appraiser at paras. 94-103. She held that the mortgage and security agreement provided clear authority for the mortgagees and their agents to enter the Property and, in her view, both the lawyer and appraiser had clear legal authority to access the Property as agents of the mortgagees. She held that the trespass claims had no chance of success at trial and accordingly dismissed the trespass claims pursuant to Rule 9-6 of the SCCR.

[11] Justice Horsman summarized her conclusions as follows:

[108] For these reasons, I prefer to rest my decision on the grounds I have already stated; that is, there is no reasonable claim of negligence against any of the defendants; the trespass claims against the Bury and Hahn Defendants and conspiracy claims against the Hahn Defendants do not raise a genuine issue for trial; and the conspiracy claim against the remaining defendants should [be] struck with leave to amend. If the plaintiff does ever file an amended conspiracy claim at the end of the Foreclosure Proceeding, it would be open to the defendants to raise an abuse of process argument at that time.

[109] In summary, I make the following orders:

- a) The plaintiff's negligence claims against all defendants are struck pursuant to Rule 9-5(1)(a) of the SCCR, and the claims are dismissed.
- b) The plaintiff's trespass claims against the Bury Defendants and the Hahn defendants are dismissed pursuant to Rule 9-6 of the SCCR.
- c) The plaintiff's conspiracy claim against the Hahn Defendants is dismissed pursuant to Rule 9-6 of the SCCR.
- d) The plaintiff's conspiracy claims against the Mortgagees, the Realtors and the Bury Defendants are struck pursuant to Rule 9-5(1)(a) of the SCCR.
- e) The plaintiff has leave to file an amended pleading alleging a cause of action in conspiracy against the Mortgagees, the Realtors and the Bury Defendants after the conclusion of the Foreclosure Proceeding.

- f) The preceding term of this order is without prejudice to the right of these defendants to apply for dismissal of an amended claim on any ground, including that the claim constitutes an abuse of court process.
- g) The plaintiff's conspiracy claims against the Mortgagees, the Realtors and the Bury Defendants are stayed until such time as the plaintiff has filed an amended pleading after the conclusion of the Foreclosure Proceeding.

THE APPEAL

- [12] Justice Horsman's reasons were released on November 1, 2019. The time limit for bringing an appeal is 30 days, commencing on the day after the order appealed from is pronounced: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 14(1). The notice of appeal was filed on January 20, 2020, some seven weeks late. 074 then brought an application to extend the time to file its notice of appeal.
- [13] Justice Abrioux, citing *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.), set out the criteria governing whether an extension of time ought to be granted at para. 23 of his reasons:
 - 1) Was there a bona fide intention to appeal?
 - 2) When were the respondents informed of the intention?
 - 3) Would the respondents be unduly prejudiced by an extension of time?
 - 4) Is there merit in the appeal?
 - 5) Is it in the interest of justice that an extension be granted?
- [14] The respondents' submitted that there was no bona fide intention to appeal during the appeal period. Furthermore, they argued there is no merit to the appeal.
- [15] Justice Abrioux noted that the failure to inform the respondents of an intention to appeal within the time required was not necessarily fatal: *Chaube v. Campbell*, 2004 BCCA 85 at para. 9 (Levine J.A. in Chambers). He found that an indication of an intention to appeal had been provided four days after the expiry of the appeal period, and there was an explanation as to the reason why the notice of motion to extend the time was not filed until January 20, 2020. He further found that in the circumstances of this case, the defendants would not be unduly prejudiced if an extension of time was granted.
- [16] Justice Abrioux was of the view that the overriding considerations on the application were the merits of the appeal and whether it was in the interests of justice to proceed. At para. 32, he referenced authorities stating that an extension of time should not be granted if the appeal was without merit:

- [32] On the merit criterion, the threshold question is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit": *Stewart v. Postnikoff*, 2014 BCCA 292 at para. 6 (Goepel J.A. in Chambers). An extension of time to file a notice of appeal should not be granted if the appeal is without merit: *Franks v. British Columbia (B.C. Benefits Board)*, 1999 BCCA 165, aff'd 1999 BCCA 407, leave to appeal ref'd, [1999] S.C.C.A. No. 361 (Proudfoot J.A. in Chambers).
- [17] At paras. 34-45, Justice Abrioux reviewed in detail Justice Horsman's analysis of the claims. He found that the appellant had demonstrated no error in her analysis. He held that the appeal was without merit and accordingly dismissed the application to extend the time to file the appeal.

THE REVIEW

- [18] Before us, 074 has largely repeated the submissions made before Justice Abrioux. As noted in the introduction, our task is not to hear the application afresh or substitute our views for the conclusion of the chambers judge. On a s. 9(6) review, the Court will intervene only if the chambers judge erred in law or principle or misconceived the facts. The appellant has not shown any such errors.
- [19] One further issue arose in the course of the review. At the hearing before Justice Abrioux, it was disclosed that counsel for one of the respondents had been a former partner of Justice Abrioux. Justice Abrioux indicated on the record that he and this lawyer had not been law partners since his appointment to the bench some 8.5 years ago, had had no business dealings since, and very little contact. Mr. McCargar told Justice Abrioux that he would like to proceed and the matter then went forward.
- [20] Mr. McCargar now takes a different position. He suggests that Justice Abrioux should have recused himself and erred in placing the onus on a self-represented litigant to make the decision.
- [21] In *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, the Supreme Court of Canada set out the test for reasonable apprehension of bias at para. 20:

The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

... what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]

(*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting).)

- [22] I do agree with Mr. McCargar that the decision was one for the judge: *Makowsky v. John Doe*, 2007 BCSC 1231 at para. 31, aff'd 2008 BCCA 112. That said, a judge should only recuse themselves if required to do so by established legal principles. This point was articulated by Groberman J. (as he then was) in *De Cotiis v. De Cotiis* 2004 BCSC 117:
- [9] The awkwardness of the situation and the importance of the court avoiding any appearance of bias leads the court to err, if at all, on the side of caution in these matters. That is, in my view, a salutary position.
- [10] There is, however, another aspect of these matters that must not be forgotten. It is the duty of a judge to hear cases that come before him or her, and the party should not be able to unilaterally choose not to have a matter heard by a particular judge simply because that party would prefer that another judge hear the case. If one party, without sound reason, is able to unilaterally determine that a particular judge will not hear a case, it also tends to bring the administration of justice into disrepute.
- [11] I do not suggest that the Defendants are engaging in "judge shopping" in this case. Nonetheless, it is my duty to determine whether or not I ought to recuse myself, not by simply agreeing to refrain from hearing the matter because an objection is raised, but by reference to established legal principles.
- [23] There is no prohibition against a judge hearing a case being argued by a former law partner: Canadian Judicial Council's Ethical Principles for Judges, (Ottawa: Canadian Judicial Council, 1998) at p. 47, article E.19. While it is generally accepted that a judge should not hear a case being argued by one of his former partners for a reasonable period of time after the judge is appointed to the bench, in this case, it had been more than 8 years since Justice Abrioux and the lawyer had practised together. Given those circumstances, an informed person, viewing the matter realistically and practically -- and having thought the matter through would not think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly. On these facts there was no basis for Justice Abrioux to disqualify himself.
- [24] I would dismiss the review application.
- "The Honourable Mr. Justice Goepel"
- I AGREE:
- "The Honourable Madam Justice Bennett"
- I AGREE:
- "The Honourable Madam Justice Griffin"

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Prepared on 29 October 2026 · Esheria