
CANADA / JUDGMENT

0981352 B.C. Ltd. v. Sarpal

2021 BCSC 417

COURT

Supreme Court of British Columbia

DECIDED

10 March 2021

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2021 BCSC 417 0981352 B.C. Ltd. v. Sarpal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0981352 B.C. Ltd. v. Sarpal,

2021 BCSC 417

Date: 20210310

Docket: S190230

Registry: Vancouver

Between:

0981352 B.C. Ltd.

Plaintiff

And

Indu Sarpal

Defendant

And

Avtar Singh Gill

Defendant by Counterclaim

And

Pranav Kaintura, and Century 21 Coastal Realty Ltd.

Third Parties

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment on Costs

Counsel for the Plaintiff:

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J.K. Bienvenu

R.N. Hira

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Written Submissions of the Plaintiff:

December 10, 2020

Written Submissions of the Defendant:

December 18, 2020

Written Reply Submissions of the Plaintiff:

December 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 10, 2021

[1] In reasons for judgment indexed at 2020 BCSC 1881, I found for the plaintiff, 0981352 B.C. Ltd., in this action. I awarded it damages in the amount of \$485,575.36, and granted liberty to the parties to file written submissions as to costs, which they have done.

Background

[2] In this case, the parties entered into a contract of purchase and sale of property. The defendant, Indu Sarpal, made three separate deposit payments for a total of \$600,000. At the completion date for the purchase and sale of the property, the defendant failed to pay the balance of the agreed upon price, and the plaintiff retained the three deposit payments.

- [3] On February 6, 2019, the defendant filed an amended counterclaim and filed a certificate of pending litigation ("CPL") against the property. Until then the defendant had not asserted an interest in the property, asserting instead that she was entitled to rescission of the contract of purchase and sale based on her assertion of equitable fraud. The filing of that certificate placed an agreed-upon sale of the property to a third party in jeopardy.
- [4] On February 27, 2019, the plaintiff filed an application to remove the defendant's CPL No. 7337302.
- [5] On March 19, 2019, the plaintiff and the defendant agreed to adjourn the plaintiff's application to cancel the CPL registered against title to the property on the basis that the defendant would voluntarily discharge the CPL from title, without prejudice to the parties' rights under the Land Title Act, R.S.B.C. 1996, c. 250 (the "Application Adjournment Agreement").
- [6] Pursuant to the Application Adjournment Agreement, the defendant discharged the CPL from title to the property and agreed not to register a new CPL without leave or consent.
- [7] Pursuant to the Application Adjournment Agreement, upon the sale of the property and on condition of the defendant discharging the CPL from title to the Property, the plaintiff directed its conveyancing solicitor to transfer \$600,000 to the defendant's counsel, McQuarrie Hunter LLP, in trust. The \$600,000 was subsequently paid in trust to McQuarrie Hunter LLP. Of this, \$114,424.64 was released to the plaintiff, for a balance of \$485,575.36 remaining in trust exclusive of interest.
- [8] Between November 30, 2018 and May 21, 2019, the plaintiff paid \$60,192.63 in interest to Business Development Bank of Canada mortgage No. CA3436870.

The Positions of the Parties

- [9] The plaintiff seeks an order for special costs, or, in the alternative double costs.
- [10] The defendant contends that an appropriate award of costs to the plaintiff is at Scale B of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].

Special Costs

- [11] Ordinarily, costs are awarded to the successful party at Scale B of the Rules.
- [12] Special costs can be awarded where a litigant has engaged in reprehensible conduct. In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (B.C.C.A.), Mr. Justice Lambert explained that term as follows:

17 it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense,

must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[13] In *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181, Madam Justice Saunders explained:

[53] In rare circumstances an entirely meritless claim may attract special costs as observed in *McLean v. Gonzales-Calvo*, 2007 BCSC 648, but those circumstances invariably have an extra element, for example, a case that was utterly without hope so as to amount to misconduct or an abuse of process. In circumstances of an extant appeal which, if successful, would support the litigant, and where the result may seem clear in hindsight but was not so clear as to attract extra costs from this court, I consider special costs as a sanction for lack of merit generally are to be eschewed for their potential to chill members of the community from solving disputes in the forum designed for that very purpose. This is an access to justice and openness of the court processes issue.

[14] Examples of conduct attracting awards of special costs include where:

- a) a party filed a CPL on a property for tactical reasons, when it had no legitimate interest in the land: *Basha Sales Co. Ltd. v. Adera Equities Inc.*, 2017 BCSC 1715 [Basha Sales];
- b) a party misled the court through the course of their evidence: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73; and
- c) a party made a failed allegation of fraud which was obviously unfounded: *Rana v. Nagra*, 2013 BCSC 184.

Discussion

[15] The plaintiff says that an award of special costs is warranted because the defendant:

- a) wrongfully filed a CPL for tactical reasons; having no interest in the land against which the CPL was filed;
 - b) adduced misleading evidence from the defendant and her husband; and
 - c) made meritless allegations of equitable fraud.
- (i) The CPL

[16] The defendant asserts that at the time she filed her amended counterclaim and registered the CPL on title to the property, she was relying on *Samji (Trustee) v. Chatur*, 2013 BCSC 1915, as authority for the CPL she filed.

[17] In that case, Madam Justice Gerow wrote:

- [60] The test for determining whether a person has an interest in land for the purposes of a CPL is whether there is an arguable case or a triable issue. The issue is whether the plaintiff is claiming an interest in land, not whether the plaintiff can prove an interest in land: *Drucker Inc. v. Hong*, 2011 BCSC 905 at paras. 19 and 29.
- [61] When the interest in land is based on a constructive trust, the question is whether there is a triable issue in that respect, not whether the plaintiff will be successful in proving it is entitled to a constructive trust. It is enough to establish a constructive trust is a possible remedy: *First Leaside Wealth Management Inc. v. Phillips*, 2012 ONSC 5443 at para. 21.
- [18] The defendant contends that in filing the CPL, it was her theory that the plaintiff's use of the deposits to pay down its mortgage gave rise to her claim for an interest in the property through a constructive trust based on unjust enrichment.
- [19] It is clear from the decision of the Court of Appeal in *Wilson v. Fotsch*, 2010 BCCA 226 at paras. 46-48, that a debtor-creditor relationship between the defendant claiming back a deposit does not preclude a remedial constructive trust. The inability to collect on a monetary award as a basis for a remedial trust presumes that a purely monetary claim may give rise to a constructive trust.
- [20] While I doubt that the defendant appreciated the niceties of a remedial constructive trust, I accept that her counsel did.
- [21] At that time her pleadings alleged only that she contended that the contract of purchase and sale of the property should be rescinded and the deposit payments returned. The defendant had not pleaded that she had an interest in the property against which the CPL at the time it was filed. However, she had what appears to have been a reasonable case for a remedial constructive trust on the facts upon which she relied in this case.
- [22] As matters unfolded, the defendant was made aware that only some of the deposit monies were used for the mortgage or to otherwise maintain the property, but she did not agree to release from trust more than double the amount paid against the mortgage.
- [23] On May 21, 2019, Madam Justice Matthews released her judgment in *Nouhi v. Pourtaghi*, 2019 BCSC 794 [Nouhi], in which she determined that the inadequacy of money needed to be expressly pleaded to support a remedial constructive trust.
- [24] I find that once the defendant was aware of the limited use of the deposit funds she ought to have released all but the amount used for the mortgage or to otherwise maintain the property. Thus, while filing the CPL may not have been for the improper purpose of frustrating an impending sale of the land against which she registered the CPL, her retention of funds for which she had no basis for a claim of remedial constructive trust could be seen as misconduct.

- [25] In *Basha Sales*, Mr. Justice Macintosh found that the unsuccessful plaintiff filed CPLs to protect an interest in land, which they did not have, to put commercial pressure on the defendants. I find that here, the plaintiff had a basis upon which to file a CPL when she did so, even though her pleadings were inadequate as later determined in *Nouhi*.
- [26] While her conduct after the CPL was lifted amounted to misconduct, I am not prepared to find that that conduct alone warrants an award of special costs. It is, however, a factor to be considered in determining whether such an award is appropriate for the other reasons advanced by the plaintiff.

(ii) Adducing Misleading Evidence

- [27] The plaintiff accepted that not every case in which evidence adduced by a party is rejected will result in an award of special costs. But the plaintiff contends that where, as in this case, the theory of the defence and counterclaim is wholly rejected on the basis of credibility, or the lack thereof, such an award is appropriate.
- [28] In *Unternaher v. Wheat Sheaf Inn Ltd.*, 114 B.C.A.C. 299, [1998] CanLII 6498 (B.C.C.A.), Madam Justice Prowse found:
- [11] I now turn to the issue of costs. The trial judge found that two of the respondents who gave evidence at trial concocted their evidence with respect to whether there was a system in place for snow removal on the corporate respondent's premises - a critical issue with respect to liability. One of the witnesses was a shareholder and employee of the corporate respondent; the other was employed from time-to-time by the corporate respondent. A third witness for the defence also admitted to lying by suggesting that Mr. Unternaher was intoxicated to a significant degree prior to his fall. Despite his findings that these witnesses had not been truthful in giving their evidence, the trial judge concluded that the conduct of the respondent, by which I take him to mean the corporate respondent, was not reprehensible and not deserving of an order of special costs. He granted Mr. Unternaher ordinary costs at scale 3.
- [12] In my view, the conduct of the corporate defendant's employees in lying, and thereby attempting to mislead the court with respect to the issue of liability, was conduct which should have attracted an award of special costs. In essence, by lying, they sought to deprive Mr. Unternaher of the damages to which he was ultimately found to be entitled in compensation for his injuries. Their actions, in my view, are attributable to the corporate respondent and constitute reprehensible conduct calling for an award of special costs within the meaning of the relevant authorities, including *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, a decision of this Court. The evidence of the third witness who lied is also to be deplored, but there is no evidence that she did so at the behest of the respondents and I do not rely on her conduct in concluding that the trial judge erred in failing to award special costs. I would allow this ground of appeal.

- [29] In *Basha Sales*, Macintosh J. awarded special costs where an unsuccessful plaintiff had pleaded and maintained pleas of breach of fiduciary duty and breach of duty of honest performance where there was no factual or legal foundation for doing so. The plaintiffs employed CPLs not to protect an interest in land, which they did not have, but instead to put commercial pressure on the defendants. In so doing, Macintosh J. commented upon "high stakes commercial litigation" as follows:
- [11] The thorny question on this application is when does hard fighting in high stakes commercial litigation cross a line so as to incur the penalty of special costs? When does a party's prosecution or defence of a case go offside from a costs viewpoint? The cases tell us that such conduct can arise in any number of ways. The judge on the costs assessment must look at everything that happened, when it happened, and, if it is possible to know, why it happened. Generally speaking, so long as the losing party was only trying to legitimately advance a bona fide claim or defence, a vigorous prosecution or defence will not be penalized, and the losing side will pay costs at the ordinary scale. That must remain the case in costs awards as a matter of the long-standing policy in this country, whereby court access is encouraged by relatively low costs tariffs. Special costs must not be awarded too easily. If they were, bona fide claims or defences would be unduly discouraged. However, when the unsuccessful party pleads the case irresponsibly, or even recklessly, or takes steps highly prejudicial to the other side, when those steps appear to lack legal foundation, the consideration of special costs must arise.
- [30] The defendant contends that her defence and counterclaim were in the context of high stakes commercial litigation and thus should not attract an order for special costs. She says the plaintiff "repeatedly state[d] that but for the defendant advancing her defence and counterclaim and filing the CPL, this litigation would have been unnecessary." She says that in doing so, the plaintiff mischaracterizes the conduct of this action. The defendant asserts that the trial was largely necessary because the plaintiff pursued an inflated damages claim at least until the start of trial.
- [31] I do not accept that this was the position taken by the plaintiff. It is true, as the defendant contends, that the plaintiff commenced its action and originally pursued a claim for damages in excess of what it recovered at trial. However, I find that the real reason that it was necessary for the action to proceed to trial was the defendant's defence and counterclaim, which were conceded by her to "have had little chance of success" being not only "difficult", but "high risk" as well.
- [32] The defendant referred to my reasons for judgment in *Wang v. Jiang*, 2020 BCSC 1759, for the proposition that special costs must not be awarded simply because a court accepts the evidence of one party over another. In that case, I wrote:

- [19] While special costs must not be awarded simply because a court accepts the evidence of one party over another, such costs can be awarded where a party has deliberately concocted evidence in an attempt to mislead the court. Such conduct was described as "a grave matter" by Madam Justice Southin in *Brown v. Lowe*, 2002 BCCA 7.
- [33] The plaintiff relies upon my finding in my earlier reasons for judgment in this action that the evidence of Ms. Sarpal and Mr. Purba was inconsistent with the other evidence and not credible. I would go further and say that the defendant's agent Mr. Purba went well beyond mere untruthfulness or lack of credibility and provided testimony that the defendant ought to have known was untrue, amounting to reprehensible conduct deserving of rebuke.
- [34] The defendant further contends that up until the time of the trial in this action, the plaintiff asserted an entitlement to inflated damages of almost double the recovery it achieved, which she says influenced her to maintain her "prima facie reasonable but difficult defence and counterclaim." She says that an award of special costs, in the circumstances, would have a chilling effect upon litigants "by putting more pressure on a defendant to settle for an inflated amount where the defence is difficult, novel or rests solely on the credibility of a defendant or its key witness."
- [35] While it may be fair to decline an award of special costs, where an extant appeal which, if successful, would support the litigant, or where the result may seem clear in hindsight, that is not the case here. An order for special costs in this case will not, as the defendant contends, "have a chilling effect on anyone pursuing a weak or difficult counterclaim or defence that falls to be determined solely or largely on the credibility of the principal".
- [36] In this case, the defendant and her husband advanced a defence and counterclaim based upon the dishonesty of her agent, and such defences and counterclaims should not be placed in the category of weak or difficult defences or counterclaims. Defences and counterclaims such as the one in this case are to be discouraged.
- [37] I find that the misleading evidence adduced from the defendant and her husband to support the defence and counterclaim is deserving of an award of special costs.

(iii) Meritless Allegations of Fraud

- [38] The defendant's defence and the basis for her counterclaim were that an equitable fraud had taken place. She argued that the plaintiff's agent, Mr. Gill, had knowledge of the defendant's mistake and sought to take advantage of it for his own and his client's financial benefit. This defence was rejected.

- [39] The plaintiff concedes that not all allegations of fraud attract a sanction of special costs. But it argues that a litigant alleging fraud has a duty to assess the merits and prospect of success of the allegation as the claim and proceedings unfold. Failure to do so can result in an award of special costs against the party who failed to fulfil their obligation to assess their claims: see for example *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 (S.C.) at para. 8.
- [40] In *Cimolai v. Hall et al*, 2007 BCCA 225 at para. 68, Mr. Justice Donald referred, with approval, to the decision of Mr. Justice Joyce, in *Hung v. Gardiner*, 2003 BCSC 285. In *Hung*, Joyce J. addressed the question of when it can be said that a plaintiff acted reprehensibly in pursuing unmeritorious claims:
- [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations
- [41] In *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2019 BCSC 540 Madam Justice Norell commented:
- [16] An allegation of fraud must be made cautiously and have some evidentiary basis; mere belief and speculation is not sufficient. The allegation should be abandoned if evidence obtained through discovery or at trial does not support it. However, the fact that an action is weak or is dismissed, is not by itself sufficient to award special costs. There must be something to make the conduct in pursuing the action reprehensible, such as obviously unfounded allegations or an improper motive [Cites omitted].
- [42] The plaintiff contends that in this case, it should have been clear to the defendant that but for the false version of events given by its agent, there was no evidence of fraud or wrongdoing on the part of the plaintiff or its agent. Instead, the plaintiff asserts, the defendant continued to pursue the allegation of equitable fraud for the improper purpose of defeating its legitimate claim for which there was no proper defence.
- [43] I agree that the defendant in this case had no genuine belief in the truth of the allegations she made, and no reasonable basis upon which to make the allegations.
- [44] I find that the pursuit of the meritless allegations of equitable fraud by the defendant was also reprehensible and also warrants an award of special costs to the plaintiff.

Double Costs

[45] Notwithstanding my conclusion with respect to special costs, I will address the plaintiff's alternative claim for double costs.

[46] Rule 9-1(5)(b) provides:

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

(b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

[47] Rule 9-1(6) provides:

(6) In making an order under subrule (5), the court may consider the following:

(a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

(b) the relationship between the terms of settlement offered and the final judgment of the court;

(c) the relative financial circumstances of the parties;

(d) any other factor the court considers appropriate.

[48] On June 26, 2019, the plaintiff made a formal offer ("the offer") to settle this case for \$650,000, all inclusive. The offer was open for acceptance until July 3, 2019. The plaintiff was successful in obtaining judgment for the monies held in trust, plus interest and costs. It submits that the judgment, inclusive of interest and party and party costs, exceeds the \$650,000 formal offer, and ought to reasonably have been accepted and entitles the plaintiff to double costs.

[49] Pursuant to Rule 9-1(6)(a), the issue is not whether the offer is reasonable but whether it was unreasonable for the party to refuse it. The defendant argues that given the time that the offer was open for acceptance, it was not unreasonable for her not to accept the offer.

[50] Whether an offer to settle should reasonably have been accepted is assessed not by reference to the award that was ultimately made but under the circumstances existing when an offer was open for acceptance, considered from the perspective of the person receiving the offer.

[51] The test has both a subjective and objective component. The court is entitled to consider the reasons why a party declined to accept an offer to settle, and must consider whether those reasons are objectively reasonable.

[52] In *Stevens v. Creusot*, 2020 BCSC 1263 at para. 43, Madam Justice Fitzpatrick listed some of the relevant factors to be considered. She mentioned the timing of the offer, whether it had some relationship to the claim as opposed to simply being a "nuisance offer", whether it could be easily evaluated, and whether some rationale for the offer was provided.

[53] Here, the offer was made when the examinations for discovery of the parties had not yet been conducted and were set for the following week.

[54] I find that during the short period of time during which the offer was open for acceptance, a reasonable person in the defendant's shoes could not be expected to accept that offer.

[55] I would not, therefore, award the plaintiff double costs based upon the offer to settle, had I not made an award for special costs.

"The Honourable Chief Justice Hinkson"

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Prepared on 29 October 2026 · Esheria