

CANADA / JUDGMENT

1137086 BC Ltd. v. Kwok

2020 BCSC 2239

COURT

Supreme Court of British Columbia

DECIDED

24 September 2020

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2020 BCSC 2239 1137086 BC Ltd. v. Kwok

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1137086 BC Ltd. v. Kwok,

2020 BCSC 2239

Date: 20200924

Docket: S188757

Registry: Vancouver

Between:

1137086 BC Ltd.

Plaintiff

And

Kuen Yu Joseph Kwok, aka Joseph K wok, aka Joseph Guo, aka Ken Yu Joseph Guo, aka Joseph Kuen Yu Kwok, aka Kun Yu Kwok, aka Kuen Kwok, Brianna Qiu, aka Qun Qiu, aka Brianna Qun Qiu, Brianna Qiu Personal Real Estate Corporation and Royal Pacific Realty Corp.

Defendants

Before: The Honourable Mr. Justice Bernard

Oral Ruling Re Application for Security for Costs

In Chambers

Counsel for the Plaintiff:

R.J. Carter

Counsel for Brianna Qiu Personal Real Estate Corp., Brianna Qiu and Royal Pacific Realty Corp.:

S.G. Cordell

Place and Date of Hearing:

Vancouver, B.C.

September 14 and 18, 2020

Place and Date of Ruling:

Vancouver, B.C.

September 24, 2020

A. Introduction

- [1] THE COURT: The defendants/applicants Brianna Qiu, Brianna Qiu Personal Real Estate Corporation and Royal Pacific Realty (collectively "the Realtors") seek the following orders:
- 1) The plaintiff shall post security for the Realtors' costs in the amount of \$88,000 within seven days of the date of the order.
 - 2) The action shall be stayed until security is posted.
 - 3) If security is not posted, the Realtors shall have liberty to apply to have the action dismissed, despite the stay.
 - 4) The Realtors shall have their costs of this application.
- [2] The parties have agreed to a 15-day trial, and the Realtors say a conservative estimate of their costs and disbursements is between \$66,000 and \$88,000, with the final figure likely at the upper end.
- [3] The plaintiff opposes all relief sought, principally on the basis that the applicants have failed to meet the onus of establishing a prima facie case that the plaintiff will be unable to pay its costs should the plaintiff's claim fail.
- [4] The applicants say they have met that onus, and having done so, the plaintiff has failed to meet its burden to show that it has exigible assets which could satisfy an award of costs against it.
- [5] It is not contentious that the plaintiff holds clear title to real property in Richmond, British Columbia, with an assessed value of \$228,000; however, the applicants' position is that in the absence of evidence from the plaintiff of its overall financial position to show, for example, that it can pay its own legal fees and property taxes (to avoid a tax sale), the plaintiff has failed to meet its burden and security for costs should be ordered.

B. Background

- [6] In this civil action the plaintiff seeks judgment against the Realtors for damages allegedly suffered by reason of breach of warranty of authority, misrepresentations, and negligence in relation to a contract of purchase and sale of commercial real estate at 668 Whiting Way, Coquitlam, BC ("Whiting Way") entered into in November 2017.
- [7] Under that contract, the plaintiff was the buyer; Tigercare Development & Constructions Inc. was the seller; Royal Pacific Realty Corp. was the broker; the broker's licensee was Brianna Qiu; the purchase price was \$7 million; and the deposit was \$350,000.
- [8] The contract was signed by the defendant Joseph Kwok, as the seller's authorized representative. Subsequently, the owner asserted that Mr. Kwok was unauthorized to sell the property and the transaction with the plaintiff did not complete. The plaintiff says that shortly thereafter (in December 2017) the owner entered into a contract of purchase and sale in relation to Whiting Way with a third party, for a price of \$11.6 million.
- [9] Mr. Kwok did not respond to the notice of civil claim, and default judgment was obtained against him. In relation to the realtor defendants, the plaintiff alleges that they breached their warranty of authority and negligently misrepresented that they had the authority to act on behalf of the seller in entering into the contract.
- [10] The Realtors assert that they have "many strong defences" to the plaintiff's claims. For the purposes of the instant application, the plaintiff concedes that the defences the Realtors have raised meet the requisite threshold of being "arguable."

C. Evidence

- [11] A British Columbia company summary for the plaintiff shows: it was incorporated on October 10, 2017; it has its records office in Richmond, British Columbia; it filed its last annual report on October 10, 2019; and, it has two directors: Li Li Yuan and Maowei Zhang.
- [12] An assessment roll report from BC Assessment shows: the plaintiff is the current owner of unencumbered land in Richmond, British Columbia (the "Richmond Property"), it purchased this land on October 13, 2017 in a \$240,000 cash sale: and, the land's 2020 assessed value is \$228,000.
- [13] A draft bill of costs for the Realtors shows cost estimates ranging from \$67,187.55 to \$89,350.85 for the anticipated 15-day trial.
- [14] In the affidavit of director Maowei Zhang, Mr. Zhang deposed as follows: the plaintiff is a holding company used to purchase commercial real estate with long-term investment potential; in November 2017 the plaintiff attempted to purchase the Whiting Way property as a commercial real estate investment; its assets include the aforementioned Richmond property, which it intends to hold for the long term in order to profit from its expected increase in value over time; the Richmond property has an assessed value of \$228,000 free of

any charges or encumbrances on title; and, the plaintiff maintains sufficient cash to meet minimal annual expenses, such as property taxes, associated with the Richmond property.

- [15] In the affidavit of Yong He Zheng, Mr. Zheng deposed: he is a business associate of Maowei Zhang and "fully aware of the events pertaining to the plaintiff entering into a contract of purchase and sale" of Whiting Way; on Mr. Zhang's behalf he viewed Whiting Way with the defendant Qiu and then informed Mr. Zheng it appeared to be a good investment opportunity; he participated in the offer and counteroffer leading to a signed contract of purchase and sale for \$7 million; the plaintiff paid a \$350,000 deposit as required by the contract; and, he was subsequently informed by Ms. Qiu that the plaintiff did not want to complete on the contract.

D. Legal Framework

- [16] The governing legal principles are helpfully summarized by Madam Justice Griffin in *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2009 BCSC 965, at paras. 9-15:

APPLICABLE LEGAL PRINCIPLES

- [9] This application is governed by the provisions of s. 236 of the Business Corporations Act, S.B.C. 2002, c. 57, which reads as follows:

If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

- [10] The court also has inherent jurisdiction to order a party to post security for costs.
- [11] The first stage of the legal test on an application for security for costs is the requirement that the applicant make out a prima facie case that the respondent would be unable to pay the applicant's costs if the respondent's claim fails: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 1999 CanLII 5860 (BC SC), 36 C.P.C. (4th) 266 B.C.S.C., 91 A.C.W.S. (3d) 362; *Kropp v. Swaneset Bay Golfcourse Ltd.* (1997), 1997 CanLII 4037 (BC CA), 29 B.C.L.R. (3d) 252, 90 B.C.A.C. 170; and *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993) 1993 CanLII 1669 (BC CA), 76 B.C.L.R. (2d) 231 (C.A.), 25 B.C.A.C. 95.
- [12] If the applicants do meet this requirement, the respondent may resist an order for security for costs by showing that it has sufficient exigible assets to satisfy an award of costs: *Scopeset Technology Inc. v. Astaro Corp.*, 2004 BCSC 830.
- [13] As well, the respondent to a security for costs application can resist an order for security for costs if it can show there is no arguable defence to its claim: *Scopeset* at para. 15.

- [14] In addition, there are other factors which may touch upon the exercise of the court's discretion in determining whether or not to grant an order requiring a party to post security for costs. Potentially relevant on the facts of this application are the following factors:
- a) Where the court is satisfied that ordering security for costs would unfairly stifle a valid claim, the court may refuse to order security: Kropp at para. 17;
 - b) Where the security for costs application is brought against a defendant advancing a counterclaim, and the counterclaim is sufficiently intertwined with the defendant's defence of the main claim: *Gray v. Powerassist Technologies Inc.*, 2001 BCSC 1208, 10 C.P.C. (5th) 148 (B.C.S.C.), and *Scotford Electrical & Technical Services Ltd. v. Blue Mountain Log Sales Ltd.*, 2005 BCSC 538, 10 C.P.C. (6th) 237 (B.C.S.C., Master); and
 - c) Where the financial hardship that may give rise to the respondent's inability to pay costs is due to the very actions of the applicants at issue in the respondent's claim: *Tour-Mate Technologies Corp. v. Syntronix Systems Limited et al.*, [1993] B.C.J. No. 599 (S.C.); and *Middlekamp v. Fraser Valley Real Estate Board*, [1993] B.C.J. 2965 (S.C.).
- [15] Finally, if the court concludes a security for costs order is warranted, the court has discretion as to the quantum of security.

E. Discussion

- [17] It is the first and second stages of the legal test in an application for security for costs that are in issue here. As to these stages and the shifting burden, the applicants rely on the following of the oft-cited passage in *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, [1993] B.C.J. No. 507 (C.A.):
- [16] The making of an order under s. 229 of the Company Act is discretionary. However, once the applicant for security has shown that the plaintiff will not be able to pay costs should the claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence. This principle was established in *Malahat Marble Prod. Ltd. v. Anderson* (1955), 1955 CanLII 566 (BC CA), 14 W.W.R. 697 (B.C.C.A.) by O'Halloran J.A. when he said:

It is conceded by its counsel that the respondent company has no assets from which appellants could recover costs except the marble and marble products the subject-matter of the action. But in the statement of claim it is alleged that the possession of such marble and marble products was taken over (pars. 7 and 9) by appellants; hence, if appellants should be successful on the trial, then on respondent's own pleading there could be no assets from which appellants could recover their costs. With deference appellants have therefore made out a case within sec. 259 unless it is evident on the record before the court that they have not an arguable defence; and in this respect see *Sanford Mfg. Co. v. McEwen* (1912), 1912 CanLII 603 (PE SCTD), 12 E.L.R. 119, 11 D.L.R. 734 (P.E.I.) and *Pure Spirit Co. v. Fowler* (1890), 25 Q.B.D. 235, 59 L.J.Q.B. 537.

- [18] In relation to meeting the initial burden, the applicants say, firstly, that the Richmond property owned by the plaintiff should not be considered because it is a "fluid and readily portable" asset. They say "it could quickly and easily be sold or have a mortgage placed on it, all without notice to the realtors". The applicants also argue that the plaintiff is "effectively a shell corporation which is not actively conducting business, and apparently has no non-portable assets."
- [19] As to the former, the applicants cite *Zymtech Development Inc. v. Sport Central Enterprises Ltd.*, 2004 BCSC 309 [Zymtech], for the proposition that the assets of a corporation that are fluid and readily portable should not be taken into account in a security for costs application. At paras. 58-60 the Court said:
- [58] Although the decision involves a foreign corporation and the difficulties in realizing on an award of costs, the following comments are applicable on this application for security for costs and, indeed, in almost all instances. At para. 19, p. 5, the Honourable Mr. Justice Warren states as follows:
- While a foreign plaintiff with assets within the jurisdiction may not necessarily be obliged to post security for costs, much depends upon the nature of the asset within the jurisdiction. Where the assets are fluid and readily portable as I understand is the case here, then little may turn upon such assets. More important in my view is the apparent merit to a defence and the balance of convenience. Thus, if the defence is not spurious and an obvious delaying tactic the court should then look to the balance of convenience.
- [59] By deleting the words "foreign plaintiff" and substituting the words "corporate plaintiff", the words quoted are equally applicable here.
- [60] Shares are fluid in the sense that they are easily and readily marketed or portable.
- [20] As to the latter, the applicants cite *Natco International, Inc. v. Photo Violation Technologies Corp.*, 2008 BCSC 1527 at para. 18; and *Basant Enterprises Ltd. v. Chhokar Kainth Holdings Ltd.*, [1987] B.C.J. No. 1402 at 1-2, for the proposition that if a corporation is a shell company or is not actively conducting any business, then that is a factor which weighs in favour of granting security for costs.
- [21] The plaintiff does not take issue with the validity of these propositions but says they do not arise here because real property is not a fluid and readily portable asset, and the plaintiff is not a shell company. I agree with the plaintiff.
- [22] The term "fluid" when used to describe assets, suggests either cash or assets that can be quickly and easily converted into cash. Real property is not reasonably categorized as a fluid asset simply because it can be sold or encumbered. Similarly, there is no definition of "portable" that can reasonably be used to describe land. "Portable" means easily carried or moved. In an asset context, the term may reasonably apply to assets such as cash, shares, and chattels, but not to real property. As noted in *Zymtech*, little weight could be given to the plaintiff's shares in resisting security for costs because they were fluid; that is, they were

easily and readily marketed or portable.

- [23] As to whether the plaintiff is a shell company, the evidence is that the plaintiff is an active holding company for the acquisition of commercial real estate with long-term investment potential. The plaintiff says it acquired the Richmond property for this purpose. Similarly, when it attempted to purchase Whiting Way by entering into a contract of purchase and sale for \$7 million and paying a deposit of \$350,000, it was with the intention of holding this property for the same business purpose. Based upon this evidence and the case law cited by the applicants, I am not persuaded that the plaintiff is merely a shell company: that is, a company that is nothing more than a shell, holding no real assets.
- [24] The applicants also argue that even if the Richmond property is an exigible asset worth \$228,000, as the plaintiff's only asset it may be sold or encumbered to pay the plaintiff's own legal fees in this litigation, notwithstanding director Zheng's assertion that the plaintiff "intends to retain this property as a long-term holding property in order to profit from its expected increase in value over time."
- [25] The plaintiff says these concerns of the applicants are purely speculative. I agree; in the absence of some evidence supporting these concerns, by reasonable inference or otherwise, they cannot be considered.
- [26] Returning, then, to the first stage of the legal test, I find that the applicants have not made out a prima facie case that the plaintiff would be unable to pay the applicants' costs if the plaintiff's claim were to fail. The applicants' own evidence establishes that the plaintiff owns unencumbered real property with a value that exceeds, by threefold, the mid-range of the applicants' estimated costs. This property is an immovable and exigible asset within the territorial jurisdiction of this court. The applicants' speculation as to what the plaintiff might or could do with this property is an unsound basis for undermining this asset in an effort to make out a prima facie case that the plaintiff would be unable to pay the applicants' costs if the claim were to fail.
- [27] This resolves this matter; however, even if the applicants had met their burden at stage one, I am satisfied the application would fail at stage two because the plaintiff has shown it has exigible assets that could satisfy an award of costs against it.

F. Disposition

- [28] For all the foregoing reasons, the application is dismissed.
- [29] The respondent to this application shall have its costs of the application, payable in any event of the cause.

"Bernard J."

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