

CANADA / JUDGMENT

A.B. v. E.F.

2023 BCSC 1799

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1799 A.B. v. E.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.B. v. E.F.,

2023 BCSC 1799

Date: 20231013

Docket: S234156

Registry: Vancouver

Between:

A.B. and C.D.

Plaintiffs

And

E.F. and G.H.

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.

August 31, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 13, 2023

I. INTRODUCTION

- [1] In response to a fraudulent conveyance claim, the defendant, G.H., applies for an order striking the claim or, alternatively, that this Court issue certain case management directions. The defendant, E.F., supports the application. The plaintiffs oppose. There are confidentiality orders in place protecting the identity of all parties.
- [2] For the following reasons, I find that this claim should be stayed pending resolution of the underlying tort claims.

II. BACKGROUND

- [3] The plaintiffs are two women in their early 20s. They lived in a townhouse complex in Pemberton, BC when they were younger. The defendants E.F. and G.H. also lived together in the same complex. The parties' families became friends.
- [4] In 2011, the defendants moved out of the complex and into a new house in Pemberton. However, the families remained close and visited each other occasionally for dinners, birthdays, and other celebrations.
- [5] In or about February 2020, A.B. alleged that E.F. had sexually assaulted her. Later, C.D. alleged that E.F. also sexually assaulted her. On June 23, 2020, charges were laid against E.F., and a criminal trial occurred in June and July 2021.
- [6] On November 3, 2020, the defendants separated. On November 24, 2021, pursuant to a mediated separation agreement, E.F. transferred his interest in four properties that E.F. and G.H. previously owned as joint tenants (the "Four Properties") to G.H.

- [7] That same day, the plaintiffs filed individual personal injury actions against E.F. and G.H. (the "Tort Actions"). The Tort Actions allege that G.H. knew or ought to have known that E.F. was committing criminal acts and that G.H. is liable for breach of fiduciary duty, negligence, gross negligence, recklessness or wilful blindness. The plaintiffs also assert that the E.F. and G.H. should be held jointly and severally liable for any loss.
- [8] On November 25, 2021, E.F. was convicted of five of seven charges. On August 3, 2022, he was sentenced to 5.5 years in prison. E.F. has filed a Notice of Appeal, which has not yet been heard.
- [9] On June 7, 2023, the plaintiffs commenced the within action alleging that E.F. fraudulently transferred the Four Properties to G.H. The plaintiffs subsequently filed Certificates of Pending Litigation ("CPLs") against the Four Properties.
- [10] On July 20, 2023, counsel for G.H. wrote to counsel for the plaintiffs, stating as follows:

We write with respect to this action.

As your clients are aware, E.F. and G.H. were separated and working on a separation agreement since before the criminal trial. The transfer of the four properties set out and defined in the Notice of Civil Claim filed in the above-noted action was part of a global matrimonial settlement. The settlement was based on the relevant provisions of the Divorce Act and the Family Law Act and it was reached following a two-day arms length mediation.

None of the "badges of fraud" referred to in the case law related to the Fraudulent Conveyance Act are present. We therefore invite you to withdraw the above-mentioned action against our client on a without- costs basis based on our representations.

In the event that you are not prepared to accept these representations of counsel, we propose that you name a third-party referee, likely a senior well-respected member of the family bar, to review the settlement. The referee would have access to the settlement documentation and to both E.F. and G.H.'s family law lawyers. The referee would provide their opinion to you as to whether there is any basis to claim a fraudulent conveyance, without relaying any privileged information. We have been instructed to make this extraordinary offer to save the parties and the court time and expense while assuring your clients that there is no merit in their action.

Alternatively, we would agree, or will seek a court order, appointing a referee (amicus) in the course of the proceeding.

If your clients decline to proceed with the options outlined above, we reserve the right to bring this letter to the attention of the court.

Please note that our client expressly does not waive solicitor-client privilege, and nothing in this letter can be construed as an intention to waive.

(the "Proposal")

[11] The plaintiffs did not agree to the Proposal.

III. ANALYSIS

[12] The defendants seek the following relief:

- a) An order striking the Notice of Civil claim on the basis that it:
 - i. fails to disclose a reasonable cause of action, or
 - ii. is an abuse of process.
- b) In the alternative, an order that this proceeding be stayed pending the resolution of the Tort Actions.
- c) In the further alternative, an order that the Court appoint an independent referee or amicus to manage the possible need to disclose privileged materials.

A. Application to Strike

There is a Reasonable Cause of Action

[13] I find that this action does not fail to disclose a proper claim. The plaintiffs' invocation of the Fraudulent Conveyance Act, R.S.B.C. 1996 c. 163 [FCA] is sufficient to sustain the pleading.

[14] The FCA is a concise statute comprising only two sections:

Fraudulent conveyance to avoid debt or duty of others

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,
 - (b) a bond,
 - (c) a proceeding, or
 - (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[15] The FCA confers a right upon creditors: the right to void a wrongful disposition. To invoke the oft-cited principle, there should not be a right without a remedy. In this action, the plaintiffs are properly invoking their remedy.

[16] Their claim alleges that:

13. the day before his criminal conviction, E.F. transferred his interest in each of the [the Four Properties] to G.H., for nominal consideration.

...

16. The transfers of [the Four Properties] were made with the intent to delay, hinder, or defraud the plaintiffs of their just and lawful remedies, in particular the recovery of damages as against E.F.

[Emphasis added.]

[17] The claim seeks the following:

1(a) a declaration that the transfer of each of the Properties were fraudulent conveyances within the meaning of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, and are of no force and effect as against the plaintiffs;

1(b) an order that the plaintiffs are entitled to pursue their just and lawful remedies as creditors in the Civil Actions against the defendant E.F. as if he were still the legal and beneficial owner of the Properties, to the same extent as he was before the transfer of the Properties to the defendant G.H.

[18] A claim will only be struck if it is plain and obvious that the pleadings disclose no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[19] The pleading here respects the two-part test for a fraudulent conveyance remedy: *Finness Yachting Inc. v. Menzies*, 2015 BCSC 1322 at para. 18. Accepting the facts as accurate, there was a disposition of property coupled with an intent to delay, hinder, or defraud a creditor.

[20] The FCA does not require that the statutory right be pursued in the same proceeding that results or resulted in the plaintiff becoming a creditor. Indeed, a plaintiff is entitled to file a separate FCA claim even after becoming a creditor. Whether such a two-pronged approach is efficient is a different matter, which I consider in greater detail below. But there is no bar against structuring claims this way: *Jasmur Holdings Ltd. v. Callaghan*, 2019 BCSC 1966 [Jasmur].

- [21] It is also unnecessary for a person seeking a remedy under the FCA to have already been determined to be a creditor by the court. It is enough if the party can become a future creditor: *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521 at para. 87; *Jasmur* at para. 17; *Mawdsley v. Meshen*, 2012 BCCA 91 at paras. 73-76; *G.M.S. v. W.W.R.*, 2010 BCSC 1741 at paras. 36-44; *M.J.K. (Guardian ad Litem of) v. W.A.M.K. Estate*, 2012 BCSC 1346 at paras. 29-30, 34; and *Ahmed v. Rowe*, 2017 ONSC 2289 at paras. 35-37.
- [22] Put differently, while there may be procedural obstacles in pursuing a fraudulent conveyance action before judgment has been rendered in an underlying action, doing so is permissible: *Jasmur* at para 32; *Sable Mary Seismic Inc. v. Geophysical Service Inc.*, 2007 NSCA 124 at paras. 33 and 51.
- [23] The defendants rely on the following decisions to suggest that commencing a fraudulent conveyance action before attaining judgment is improper, but I find that these cases are distinguishable:
- a) The defendants rely on the following statement in *Jasmur*:
- [34] This section clearly injects a requirement that the decision to commence an action must be "reasonable". In the context of a fraudulent conveyance action that is dependant upon an underlying tort action, it is not reasonable to commence the FCA action before judgment is obtained in the underlying tort action.

This comment was made in the context of an argument that the claim should be dismissed on limitation grounds. This excerpt addresses the technical concept of "reasonableness" provided for in s. 6(4) of the (old) Limitation Act, R.S.B.C. 1996, c. 266. In this case, limitation periods are not in issue.

I do not read the decision in *Jasmur* as establishing a bright line rule for when a request for an FCA declaration can be brought. Instead, the court simply guided the proper interpretation and application of the limitation regime's reasonableness test.

- b) The defendants also rely on this Court's statement from *Mori v. Lobb*, 2021 BCSC 2266:

- [27] There is at least an argument that can be made that the claimant does not suffer any injury until the claimant is unable to satisfy any judgment against the respondent.

But this Court did not find that the fraudulent conveyance claims advanced by the plaintiff wife against her husband's sons in that case did not yet exist at law. Instead the Court determined that it was more convenient and efficient to stay the conduct of the FCA proceeding until the primary claim against the husband concluded. Indeed, the Court noted, "I am not deciding that the Proposed Respondents can never be joined in this proceeding, only that it is not appropriate to make that order at this time based on the present record.": *Mori* at para. 20. *Mori* should not be read as suggesting that fraudulent conveyance claims can never be advanced before judgment in an underlying action.

The Claim is Not an Abuse of Process

- [24] The defendants' next argument is that the claim should be struck as an abuse of process under Rule 9-5(1)(d). As the defendants acknowledge, they must show that it is plain and obvious that the pleading is an abuse of process: *Lougheed v. Wilson*, 2012 BCSC 169 at para. 58.
- [25] Rule 9-5(1)(d) allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice or where the court's process is used for an improper purpose: *Johnston v. Rykon Construction Management Ltd.*, 2020 BCSC 572 at para. 23.
- [26] The defendants argue that:
- a) It is unreasonable to commence an action under the FCA until after an underlying tort judgment, particularly where the FCA proceeding arises from the same facts and issues alleged in the underlying tort action;
 - b) In the Tort Actions, the plaintiffs have alleged that the claim against E.F. and G.H. is joint and several, while alleging in the present FCA pleading that the defendants' intent in transferring the Four Properties was to protect the assets by placing them in G.H.'s hands, which the defendants suggest is inconsistent;
 - c) The plaintiffs have unreasonably refused to accept counsel's assurances that the transfers were not made contrary to the FCA;
 - d) The plaintiffs seek to improperly compel the defendants to waive solicitor-client privilege to defend themselves in the present proceeding; and
 - e) The plaintiffs are using the present proceeding to obtain additional discovery for their Tort Actions.
- [27] I do not accept that the first three factors require dismissal on abuse of process grounds:
- a) Although it would have been possible to include an FCA claim in the original Tort Actions (as the plaintiffs conceded), it is not mandatory that such a structure be adopted, and the plaintiffs cannot be faulted for exercising their right to commence a separate proceeding;
 - b) There is no actual conflict created by the pleas against G.H. when one appreciates that the plaintiffs may fail in establishing joint and several liability, in which case the plaintiffs may need to rely on the FCA proceeding to access G.H.'s equity in the Four Properties; and
 - c) There is no obligation on the part of the plaintiffs to accept defence counsel's assurances, particularly before having the benefit of discovery.

- [28] However, the last two concerns do carry greater weight. It is evident, even at this early stage, that the defendants will likely have to produce privileged material to answer the FCA claims, given that the transfers occurred as part of a mediated settlement of a family law dispute in which the defendants were represented by counsel.
- [29] Plaintiffs' counsel admitted that he was hopeful that the discovery in the present action might aid in prosecuting their Tort Actions (although it was unclear how the plaintiffs intended to escape the strictures of the implied undertaking rule: *Taherkhani v. Este*, 2022 BCSC 372 at para. 24). Although these concerns are realistic, I do not find that they reach the level of concern required to justify outright dismissal of the claim on abuse of process grounds. Instead, I find that any prejudice can be managed using other tools, as discussed below.
- [30] In conclusion on this point, given that I find no element of intention to disrupt the administration of justice, I find that this FCA claim should not be struck as an abuse of process.

B. Stay of Proceedings

- [31] The defendants' next alternative argument is that this Court should exercise its discretion to stay the present proceeding until after the Tort Actions are resolved. The court has inherent jurisdiction to stay proceedings whenever it deems appropriate: *Mckenzie v. Mckenzie*, 1975 CanLII 1215 (B.C.S.C.) at 376, [1975] B.C.J. No. 1114 at para. 19.
- [32] The burden is on the applicant to show that "in all circumstances a stay is appropriate": *Peh v. The Owners, Strata Plan LMS 3837*, 2008 BCSC 291 [Peh] at para. 61; *Leifso v. BevCanna Enterprises Inc.*, 2023 BCSC 579 at para. 64. Judges should exercise their jurisdiction to grant a stay "cautiously after a consideration of all relevant factors, including the benefits of granting a stay and the possible prejudice that would be suffered or incurred by the parties" if a stay is granted or refused: *Peh* at para. 62. The fundamental question is whether granting the stay would be just and equitable: *Victoria Shipyards Co. Ltd. v. Lockheed Martin Canada Inc.*, 2022 BCSC 790 at para. 31. Judicial efficiency is also a key consideration: *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2001 BCCA 105 [Ainsworth] at para. 15.
- [33] A stay can be granted where a related proceeding has a material, if not conclusive, impact on the issues outstanding in the case at hand: *Ainsworth*.
- [34] I find that a stay of proceedings is justified in these circumstances.
- [35] In terms of avoiding prejudice to the defendants, a stay will:
- avoid any concern about "double dip" discovery, where the discovery in this proceeding is improperly used in support of the Tort Actions; and
 - defer the potential need to disclose privileged materials until after the core issues are addressed in the Tort Actions.

- [36] In terms of the potential prejudice of granting a stay on the plaintiffs, although the prosecution of their FCA claim will be delayed:
- a) There will be no prejudice to the plaintiffs if they do not succeed against either defendant in the Tort Actions;
 - b) There will be no prejudice if the plaintiffs are successful in the direct tort claims against both defendants;
 - c) There will be no prejudice if the plaintiffs are successful against E.F. in the Tort Actions and are also successful in establishing that G.H. is jointly and severally liable for E.F.'s conduct; and
 - d) There will be no prejudice if the plaintiffs are successful in the Tort Actions against E.F. and can recover the entire judgment(s) from E.F.
- [37] As such, there is only one core path down which any delay in advancing the FCA action may slow down the plaintiffs' recovery; that is if the plaintiffs
- a) succeed against E.F.;
 - b) fail in the direct tort claim against G.H.;
 - c) fail in establishing joint and several liability as against G.H.; and
 - d) are unable to recover from E.F.
- [38] On balance, I find that the helpful benefits of a stay outweigh the adverse effects by a large margin.
- [39] The plaintiffs rely on the decision in *Ahmed v. Rowe*, 2017 ONSC 2289 [Ahmed], in opposing a stay. Irrespective of the fact that granting a stay is an inherently discretionary exercise, I find that Ahmed provides little support for the plaintiff's position. In Ahmed, a vital aspect of the court's rejection of a stay was that "any additional production and discovery, based on the uncontradicted evidence, will be minimal": Ahmed at para. 44, and that during "examinations for discovery of the defendants on the fraudulent conveyance claim there will be little additional documentary production": Ahmed at para 30 (emphasis added). Here, the FCA claim is going to trigger material additional discovery. Counsel in Ahmed did not argue that privileged information would necessarily come out as part of the fraudulent conveyance claim.
- [40] As such, I conclude that the balance of convenience favours a stay. I note that this approach is consistent with that adopted by this Court in *Mori*.
- [41] However, given that there may be future developments, I would modify the proposed order slightly to provide that the present action is stayed pending the conclusion of the Tort Actions, or further order of this Court.

C. Appointment of a Referee

[42] The decision to grant a stay renders the defendants' last proposed alternative moot, i.e. their request to appoint a referee to manage the need to produce privileged material in the present proceeding.

IV. CONCLUSION

[43] The defendants' request that this matter be stayed is granted on the terms set out above. Unless there were discussions of which this Court is unaware, the defendants shall have their costs of this application in the cause.

"The Honourable Mr. Justice Branch"

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