

CANADA / JUDGMENT

Amero v. Fehner-Lee

2015 BCSC 1420

COURT

Supreme Court of British Columbia

DECIDED

12 August 2015

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2015 BCSC 1420 Amero v. Fehner-Lee IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Amero v. Fehner-Lee, 2015 BCSC 1420 Date: 20150812 Docket: H132626 Registry: New Westminster Between: Karla Margaret Amero Plaintiff And Linda Beverly Fehner-Lee Defendant Before: The Honourable Mr. Justice Leask Reasons for Judgment Counsel for Plaintiff: R.W. Perrick Counsel for the Defendant: D.L. Cayley Written Submissions: Plaintiff Defendant Plaintiff's Reply April 24, 2015 June 2, 2015 May 29, 2015 Place and Date of Judgment: Vancouver, B.C. August 12, 2015

Introduction

- [1] My oral judgment on this matter was delivered on March 31, 2015. During the trial I had offered to deal with the expense issues tentatively slated to be referred to the Registrar according to Abrioux, J's Order of August 26, 2014. At the conclusion of my delivery of the oral reasons, I offered to deal with the expense issues and costs that morning. After a discussion with counsel, it was agreed that they would make written submissions on those issues and I would endeavour to resolve them without the necessity of a further hearing. These reasons are the result of my receiving and considering the written submissions of counsel. Costs
- [2] The plaintiff submits that she should have her costs because she was the successful party. In support of her position she relies on a letter from her counsel to counsel for the defendant dated February 11, 2015. That letter began with the following statement: "Further to our court appearance yesterday, I wish to confirm that my client's position remains that the mortgage for \$375,000 was/should have been sufficient to complete the construction of the home "
- [3] Counsel for the defendant submits that: "Success at trial was, by any metric, mixed"
- [4] He further submits: "In short, the plaintiff was successful on one of the two issues decided at trial, and was unsuccessful on the other."
- [5] His final submission is: "Given the mixed success at trial, Ms. Fehner-Lee submits that the parties should bear their own costs of the proceeding."

- [6] I am satisfied that, on the matter contested at trial, the plaintiff was the successful party. Her counsel lead no evidence and made no submissions contesting her liability for her share of the outstanding principal of the RBC mortgage of \$375,000. On the other hand, the defendant gave false evidence under oath in an attempt to deceive the Court and deprive her sister of a portion of her inheritance. The plaintiff is therefore entitled to her costs of the trial. I am not satisfied that the concession implicit in counsel's letter of February 11, 2015 was made prior to the commencement of trial on February 10, 2015. Therefore, with the exception of the issues listed below, each party will bear their own costs of all pre-trial matters.
- a) Application to cancel CPL
- [7] On September 6, 2012 Bowden, J. cancelled the plaintiff's CPL's and ordered her to pay the defendant's costs in any event of the cause.
- [8] I confirm that Order.
- b) Application for payout of sale proceeds
- [9] On January 18, 2013 Fitzpatrick, J. ordered a distribution of the sale proceeds on the basis proposed by the defendant and ordered the plaintiff to pay double costs to the defendant.
- [10] I confirm that Order.
- c) Adjournment of Trial
- [11] On the morning of September 29, 2014, the first scheduled trial date, counsel for the plaintiff applied for an adjournment of the trial, which was granted. Williams, J. was critical of plaintiff's counsel but adjourned the question of costs to the trial judge. Counsel for the defendant submits that, if costs are ordered, the award should be in the defendant's favour. His position, however, is that, in light of the alleged mixed success at trial, each party should bear its own costs. Counsel for the plaintiff says costs should be awarded to the plaintiff because she was successful in her application and the application was necessary because of the defendant's failure to attend a scheduled examination for discovery.
- [12] In all the circumstances of this case, including at least one very important admission obtained from the defendant at the examination for discovery, the plaintiff should have her costs of the application.
- d) Reinstatement of the Trial
- [13] The parties were obliged to file trial certificates by January 26, 2015. Both failed to do so. In the event, counsel for the defendant attended and obtained an order reinstating the trial date. Counsel for the plaintiff did not attend but consented to the Order. Master Muir remitted the question of costs to the trial judge. Counsel for the defendant suggests that an Order for the plaintiff to pay \$800 (Inclusive of taxes and disbursements) to the defendant would be fair. Counsel for the plaintiff agrees.

- [14] It is so ordered. Funds held in Trust
- [15] Of the total funds held in trust, \$5,875.06 is held on account of line of credit interest and \$18,845.08 is held on account of mortgage interest. Counsel for the plaintiff submits that, based on the Court's Reasons for Judgment, both sums should be released to his client.
- [16] Counsel for the defendant doesn't really dispute the above analysis. Instead, he makes this point: It is important to note that, while sums are held in trust by defendant's counsel in relation to the discrete accounting issues, those sums held in trust are, as expressly provided for by the Order of Madam Justice Fitzpatrick, "without prejudice for the parties to claim different or additional sums in this proceeding".
- [17] On this basis, Counsel for the defendant makes claims for:
- a) amounts related to maintaining the property ("Monthly Expenses");
 - b) amounts relating to work performed by the defendant on the property ("Additional Work");
 - c) work performed by the defendant in preparing the property for sale ("Preparatory Work"); and
 - d) rent free occupancy of the property from February 2010 to December 2012 ("Occupational Rent").
- [18] The plaintiff's position is that none of these issues except "monthly expenses" were intended to be dealt with by the expense holdback. As to the "additional work" the plaintiff's position is that these items come within the terms of the agreement between the defendant, Mr. Lee and their father. The defendant would never have asked her father to contribute toward these expenses and the plaintiff stood in her father's shoes. As to the "preparatory work" the plaintiff says that it was not mentioned in the defendant's pleadings and therefore can't be raised now. As to the claim for "occupational rent", the plaintiff asserts that as a part-owner of the property she has a right to occupy.

Analysis

- [19] Dealing with the issues in reverse order:
- (i) Occupational Rent
 - a) This is a matter that could never have been referred to the Registrar; it was not an "accounting" matter; it required a judicial determination as to the defendant's entitlement; as both parties have made written submissions to me on this issue, I will resolve it;
 - b) it was not pleaded;
 - c) as a $\frac{1}{4}$ tenant in common, the plaintiff has a right of occupation; Therefore this portion of the defendant's claim is dismissed.
 - (ii) Preparatory Work

- a) This is a matter that could never have been referred to the Registrar; it was not an "accounting" matter; it required a judicial determination as to the defendant's entitlement; as both parties have made written submissions to me on this issue, I will resolve it
 - b) it was not pleaded;
 - c) according to the agreement between the defendant, Mr. Lee and her father, her father would not have been liable for these expenses and therefore the plaintiff is not liable;
 - d) as to the defendant's unjust enrichment claim, I am not satisfied on the evidence that the expenditure of these funds increased the value of the subject property; Therefore this portion of the defendant's claim is dismissed. (iii) Additional Work
 - a) This is a matter that could never have been referred to the Registrar; it was not an "accounting" matter; it required a judicial determination as to the defendant's entitlement; as both parties have made written submissions to me on this issue, I will resolve it;
 - b) according to the agreement between the defendant, Mr. Lee and her father her father would not have been liable for these expenses and therefore the plaintiff is not liable;
 - c) as to the defendant's unjust enrichment claim, I am not satisfied on the evidence that the expenditure of these funds increased the value of the subject property; Therefore this portion of the defendant's claim is dismissed. (iv) Monthly Expenses
- [20] Under this heading the parties have a number of small disputes concerning utility payments and other operating expenses of the jointly owned property. These disputes are well suited to being resolved by the Registrar.
- [21] At a Registrar's hearing on August 25, 2014 a number of these disputes were resolved. The defendant received \$3,288.34 from the trust funds with the consent of the plaintiff.
- [22] The remaining disputed items are: Utility Amount in dispute Plaintiff's position Shaw Internet \$110.52 It never worked and she paid her own. Shaw TV Cable \$428.80 - \$388.50 = 40.30 One month disputed after defendant cut off the plaintiff's cable access. Hydro \$1,032.50 - \$103.25 = \$929.25 She paid for her own hydro but is prepared to contribute 10% for common areas. Terasen gas \$1989.21 - \$994.61 = \$994.60 She paid 50% of claimed amount and asserts Defendant's son living rent free in suite is liable for the balance House Insurance \$2,455.44 Plaintiff offers to pay \$444.60 for April 2012 - December 2012 after she was named in the policy.
- [23] In the defendant's counterclaim she seeks judgment against the plaintiff for the sum of \$22,558.84. Of this \$9,976.95 was for payments on the Royal Bank Mortgage and \$8,377.47 is for the plaintiff's share of the additional work. Based on my trial judgment the plaintiff is not liable for the payments on the Royal Bank Mortgage; based on my ruling on this application the plaintiff is not liable for the additional work. Subtracting these two sums leaves a balance claimed of \$4,204.42. The plaintiff consented to the defendant receiving payment of \$3,288.24 from trust on September 8, 2014. Subtracting this sum from the balance claimed

leaves a balance of \$916.18. Counsel for the plaintiff's submission on this application concedes that the defendant is entitled to \$444.60 toward the costs of house insurance. This further reduces the claim to \$471.58. In her Reply Submissions, plaintiff's counsel suggests dividing a balance in trust of \$3,219.13 between the parties. Giving the defendant \$1,609.57 of those funds leaves her with \$1,178 more than she was entitled to claim in her counterclaim. This appears to me to be a satisfactory result.

Conclusion

- [24] The plaintiff is entitled to costs on Scale B for the trial of this matter and her application to adjourn the first trial date. She is also entitled to costs on Scale B for the present determination on costs and hold back funds.
- [25] The defendant is entitled to costs on Scale B for the September 6, 2012 application to cancel the plaintiff's CPL's. She is also entitled to double Scale B costs for the January 18, 2013 application for distribution of the sale proceeds. In addition, she is entitled to \$800 for her counsel's attendance to obtain an order reinstating the trial date.
- [26] As to the funds held in trust, the plaintiff is entitled to: \$75,500 Trial Judgment \$5,875.06 Line of Credit Interest \$18,845.08 Mortgage Interest \$1,609.56 Division of remaining Holdback funds \$101,829.70 Total
- [27] Each party will be entitled to one-half (1/2) of the accumulated interest on the trust funds.
- [28] As the parties have not provided Bills of Costs or suggested exact monetary amounts for their cost claims, it is not possible for the Court to determine those amounts. The parties have these options:
- 1) counsel can agree on the cost sums;
 - 2) they can schedule a hearing before the Registrar;
 - 3) they can send me written submissions concerning amounts; or
 - 4) they can schedule another hearing before the Court. "Leask, J."

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