
CANADA / JUDGMENT

Basi v. Levert

2008 BCCA 156

COURT

British Columbia Court of Appeal

DECIDED

15 April 2008

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2008 BCCA 156 Basi v. Levert

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Basi v. Levert,

2008 BCCA 156

Date: 20080415

Docket: CA034862

Between:

Sohan Basi and Sarjit Basi

Respondents

(Plaintiffs)

And

Stephan Levert

Appellant

(Defendant)

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

S. Levert

Appearing In-Person

G.B. Walker

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

January 18, 2008

Place and Date of Judgment:

Vancouver, British Columbia

April 15, 2008

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Mr. Levert appeals this order of Mr. Justice Cole made April 11, 2007:

The restriction on title referred to in the last paragraph of the Consent Order Hearing [] registered in the Land Title Office May 2, 2006 under No. BA284374 be and the same is hereby discharged be and the same is hereby revoked [sic].

[2] The order refers to a previous order made by the Supreme Court of British Columbia whereby a caveat and certificate of pending litigation registered against property owned by Mr. and Mrs. Basi were discharged, two mortgages and two assignments of rent were discharged, and a fresh order made that:

[] no other transaction, charge or dealing with the said lands and premises shall be registered against the said lands and premises subsequent to the [discharges] [] without further order of the court save for the registration of a mortgage of the said lands and premises for a sum not in excess of \$386,000.

[3] This latter order was treated for registration purposes as a caveat although it appears to have been made under s. 284 of the Land Title Act, R.S.B.C. 1996, c. 250.

- [4] The application leading to the order appealed was brought by Mr. and Mrs. Basi under Rule 18A of the Rules of Court. They are the plaintiffs in the action and the defendant Mr. Levert was plaintiff by counterclaim. Through the Rule 18A application they sought judgment on the substance of their claim and dismissal of Mr. Levert's counterclaim.
- [5] The trial dealt only with the "restriction on title" issue and the counterclaim of Mr. Levert to the extent he claimed an interest in land. The trial judge left for another day Mr. Levert's claim for damages. At the beginning of the summary trial, Mr. Levert's counsel contended that the matter was not appropriate for disposition under Rule 18A. The learned trial judge disagreed, and by reasons for judgment indexed at 2007 BCSC 196, made the order that is now appealed.
- [6] The genesis of the case is an option to purchase the property given to Mr. Levert by Mr. and Mrs. Basi. Mr. Levert had been introduced to Mr. and Mrs. Basi by their agent who was empowered to manage the rental of the property. Mr. Levert became the tenant and, shortly after, entered into an agreement with Mr. and Mrs. Basi whereby they gave him an option to purchase the property. It was a term of the agreement that the option "was open for exercise up to but not after the hour of twelve o'clock noon on the 4th day of December 2005". The agreement set the fifth business day following the delivery of notice exercising the option as the completion date.
- [7] In January 2005, Mr. Levert indicated to the plaintiffs, or their rental agent, that he wished to exercise the option to purchase. He reiterated this advice in June 2005. Mr. and Mrs. Basi commenced their action on August 19, 2005, contending that Mr. Levert had exercised the option but failed to perform under the agreement, and thus had no interest in the property. They also claimed for remedies relating to the tenancy and its termination. Mr. and Mrs. Basi, through their counsel, now agree that the communications in January 2005 and June 2005 did not amount to an exercise of the option to purchase.
- [8] Between January 2005 and July 2005, Mr. and Mrs. Basi became unhappy with the state of the property. On August 17, 2005, they received a letter from the City of Surrey requiring the property to be cleaned up within seven days, failing which the City would remove the debris and charge Mr. and Mrs. Basi for the costs.
- [9] Mr. Levert filed affidavits to the effect that any disorder on the property was the result of renovation work he was undertaking to improve the property which had been badly damaged when it was used as a drug house. He deposed that Mr. and Mrs. Basi knew of the renovations, as did their agent who attended the premises from time to time. Mr. and Mrs. Basi dispute these allegations. The state of the property and Mr. Levert's performance under his lease are at issue in the balance of the action that remains to be tried.

- [10] The trial judge found that in late August 2005, Mr. Levert had secured the necessary financing to enable him to purchase the property, and so advised Mr. and Mrs. Basi. But by then Mr. and Mrs. Basi were not interested in selling to Mr. Levert. Mr. Basi testified at his examination for discovery that, as of August 25, 2005, he was not prepared to sell the property to Mr. Levert.
- [11] On the premise that the property had been abandoned, and on the basis of its untidy state, Mr. and Mrs. Basi took possession of the property on September 1, 2005. This had the effect of preventing Mr. Levert from attending the premises with an inspector which, according to Mr. Levert, was required in order to secure the necessary financing to purchase the property. Mr. Levert did not seek a court order to permit him to attend the property. For their part, Mr. and Mrs. Basi's solicitor wrote to Mr. Levert's solicitor setting out their position that the option had been exercised. The solicitor said:

I wish to confirm my advice to you [] that on advice from me [Mr. and Mrs. Basi] take the following position:

- (a) The option has been exercised by your client but not performed according to the terms of the option and the same is therefore void.
- [12] Mr. Levert responded by registering a caveat against the property. On November 4, 2005, Mr. Levert filed a counterclaim alleging that Mr. and Mrs. Basi had repudiated the option agreement by taking possession of the property, evicting him, and advising him that they refused to comply with the option agreement. Mr. Levert claimed an order for specific performance and damages. He alleged:
16. During the term of the Residential Tenancy Agreement and prior to Levert completing the renovations to the Premises and exercising his options, the Plaintiffs wrongfully repudiated both the Residential Tenancy Agreement and the Purchase Option Agreement by wrongfully retaking possession of the Premises, evicting Levert and advising Levert that they refused to comply with the Purchase Option Agreement.
 17. As a result of the Plaintiffs' wrongful repudiation of the Residential Tenancy Agreement and Purchase Option Agreement, Levert has suffered special damages in respect of the costs of material and labour expended on the renovations to the Premises, particulars of which Levert is in the process of collecting, which particulars will be provided to the Plaintiffs as soon as Levert has same in hand.
 18. As a result of the wrongful repudiation of the Purchase Option Agreement by the Plaintiffs, Levert will incur additional costs in obtaining comparable property.
 19. In the alternative, as a result of the Plaintiffs' wrongful repudiation of the Purchase Option Agreement, Levert has suffered a loss of the increase in value and the opportunity to make a profit from the potential sale of the Premises.

[13] Mr. Levert sought as remedies an order for specific enforcement, an order for possession of the premises, a certificate of pending litigation, general damages, and special damages.

[14] Mr. and Mrs. Basi did not file a statement of defence to the counterclaim.

[15] On December 3, 2005, Mr. Levert's solicitor sent a notice on behalf of Mr. Levert to the solicitor for Mr. and Mrs. Basi. The notice purported to be an exercise of the option. It said:

This Notice is exercised subject to the express proviso that the undersigned, his agents and/or assigns, shall be granted unrestricted access to the Property for the purposes of inspection between the hours of 9:00 a.m. and 8:00 p.m. on Tuesday, December 6, 2005, Wednesday December 7, 2005, and/or Thursday, December 8, 2005 on six (6) hours notice delivered or provided by facsimile transmission to Mr. Graham B. Walker, the solicitor for Mr. Sohan Basi and Mrs. Sarjit Basi.

[16] Mr. and Mrs. Basi made no response to the December 3, 2005, letter. At no time did Mr. Levert tender the purchase price.

[17] This case poses many procedural irregularities. No statement of defence to the counterclaim was filed. Although Rule 25 of the Rules of Court would have allowed Mr. Levert to apply for judgment on his counterclaim, he did not do so, and the absence of a statement of defence to Mr. Levert's counterclaim was not an issue at the summary trial.

[18] Mr. and Mrs. Basi brought a Rule 18A application on a portion of the substance of the counterclaim, yet they had not filed a statement of defence to it. Rule 18A contemplates the filing of a defence to a counterclaim before a Rule 18A application is brought. The position of Mr. and Mrs. Basi at the summary trial was, contrary to their statement of claim, to the effect that Mr. Levert had not exercised his option to purchase in either January 2005 or June 2005. Before us and in the Supreme Court of British Columbia, they agreed that their actions in August and September 2005, amounted to a repudiation of the contract, but say it is of no matter because Mr. Levert, by filing his counterclaim and by sending the letter of December 3, 2005, elected to affirm the contract and thus preserved the option agreement which then remained open to be exercised, up to and including, December 4, 2005. They also say that the letter of December 3, 2005, was not a valid exercise of the option because it was conditional, and that Mr. Levert is not entitled to a remedy because he failed to tender the purchase price. However, neither of these allegations was pleaded. Although the statement of claim was not amended to reflect the new position of Mr. and Mrs. Basi, the parties appear to have proceeded on the premise that they knew the issues before them. The soundness of this proposition is not obvious on a reading of the transcript of the Rule 18A trial. Throughout the transcript are remarks indicating confusion as to the issue. Finally, at the end of the hearing on the second day of the trial, there is this exchange:

THE COURT: [] This is the other thing that bothers me, is that this lawsuit is started; it's premised on the fact there's been these attempts - two attempts by the defendant to exercise the option. Your position has been that those were flawed. And I think you're right. They were flawed.

But based on that, you started a lawsuit. And the basis of the lawsuit is two flawed offers to purchase. And because they made two flawed offers to purchase, you are asking for an order that there should be termination of the purchase option. On what basis could you get an order, when you --

COUNSEL FOR THE PLAINTIFF: Well, yes, I --

THE COURT: -- acknowledge --

COUNSEL FOR THE PLAINTIFF: Yes.

THE COURT: -- that the exercise of the option was flawed? You don't have a claim, do you?

COUNSEL FOR THE PLAINTIFF: Well, the --

THE COURT: At the time the writ was issued --

COUNSEL FOR THE PLAINTIFF: Yes, I agree.

THE COURT: -- your client did not have a claim.

COUNSEL FOR THE PLAINTIFF: And December the -- at the time the writ was issued?

THE COURT: A valid claim.

COUNSEL FOR THE PLAINTIFF: Yes, yes, on those -- on those things. But what I think is not -- what could I say? No objection has been taken to the fact that we have pleaded, and they have responded, to evidence which occurred after August the 25th, 2005.

THE COURT: But, see, what seems to me to be fundamentally unfair is that you start a lawsuit; acknowledge that you don't have a valid claim; and based on the fact that you take the position that the agreement is void, you're saying, Ah, but you didn't exercise that option in December, and therefore I'm going to amend my pleadings, because perhaps they were lulled into a false sense of security, or maybe somebody read the law, and decided that they didn't have to do that, because it would be fruitless. Which, again, the Court of Appeal seems to say.

You turn around, and then amend your pleadings, alleging a breach that took place, in part, I would think because you started this lawsuit. It doesn't seem to be right. Doesn't seem to be equitable.

[]

THE COURT: All right.

COUNSEL FOR THE PLAINTIFF: So I'm --

THE COURT: I'm sorry. I thought you were saying that because he failed to exercise the option by December --

COUNSEL FOR THE PLAINTIFF: That's right.

THE COURT: -- he's out.

COUNSEL FOR THE PLAINTIFF: That's right.

THE COURT: But that's not contained in your pleadings?

COUNSEL FOR THE PLAINTIFF: That's correct. And there's the problem. And my learned friend and I have dealt with it as though the pleading was there. If anything turned on that I would ask that -- I would ask for liberty, nunc pro tunc, to add that as a paragraph. If anything turns on that. In other words, that the repudiation, that any repudiation of the plaintiffs was not accepted.

THE COURT: Well, then, what -- so your sole claim is they failed to exercise their option by December, and that's not even in your pleadings.

COUNSEL FOR THE PLAINTIFF: That's right.

THE COURT: What do you say about that, sir?

COUNSEL FOR THE DEFENDANT: My Lord, it wasn't in the pleadings; I don't believe it was in the original outline, and we're here, we've argued this case. I've indicated that my position was that December doesn't matter.

THE COURT: Well, he says it does. Would you object to him amending his pleadings at this point in time?

COUNSEL FOR THE DEFENDANT: So he now claims that --

THE COURT: I don't know. It would be interesting [sic] what he is going to plead. What are you going to plead, sir?

COUNSEL FOR THE PLAINTIFF: I'm going to plead that the -- that if there were repudiation, that that repudiation was not accepted, and the defendant, accordingly, sought to exercise the option on December the 4th. And that exercise, not being in accordance with the terms of the option agreement, was invalid.

COUNSEL FOR THE DEFENDANT: My Lord, I don't -- I don't think I can consent to that amendment.

THE COURT: Very well. I'm not going to grant the amendment at this stage.

[]

THE COURT: There's been lots of time to get this thing in order. I really don't think much turns on it, in any event, because the fact is there was no attempt to exercise the option, and that's the position of the defendant. It's acknowledged that it wasn't exercised.

[Underlining added.]

- [19] Mr. Levert contended at trial, and repeats his submission before us, that he was not required to exercise the option or to tender the purchase monies because, in the circumstances, it was futile for him to do so. He relies upon *Lam v. Sumner*, 2006 BCCA 427, 231 B.C.A.C. 48, and *Laredo Development Ltd. v. I.R. Capital Corp.* (1993), 36 B.C.A.C. 263, 87 B.C.L.R. (2d) 170. In his affidavit evidence, he sets forth the difficulty he said he faced, although he stopped short of saying whether the effect of the repudiatory actions of Mr. and Mrs. Basi and his eviction was to diminish or eliminate his ability to tender the sale proceeds. He told us that the condition he attached to his exercise of the option was intended to remedy the problems caused by the actions of Mr. and Mrs. Basi which impaired his ability to purchase the property, but this statement is an expansion of his evidence at trial and is not alleged in that way in his affidavits.
- [20] The trial judge addressed the question of whether the letter sent December 3, 2005, was a valid exercise of the option agreement. He said it was not because it attached the condition permitting access for inspection and, he found further:
- [25] If I am wrong in this conclusion, however, I am also satisfied that the defendant cannot succeed in respect to his argument of having his ability to finance the project because of the failure of the plaintiffs to agree to the inspection of the subject property.
- [26] Mr. Levert, at para. 44(d) of his affidavit of March 24, 2006, stated that he "...overlooked the fact that in exercising the Option, I would have to tender prior to the documents being lodged for registration." His failure to understand the necessity to tender the purchase funds cannot be laid at the feet of the plaintiffs. Furthermore, Mr. Levert is in a very weak position when he argues that it was futile to tender because of the lawsuit that was commenced by the plaintiffs and the plaintiffs' letter of September 2, 2005. I am satisfied that the facts in *Lam* and *Laredo* are clearly distinguishable. Here, the lease agreement expired on the 31st of October, 2005 and the defendant knew that he would have to either obtain the consent of the plaintiffs or obtain a court order if he wished to inspect the property after that date. It was obvious from the conduct of the plaintiffs that they treated the option agreement to have expired or was of no effect. In addition, it was Mr. Levert's conduct of abandoning the property that led to the plaintiffs' early possession order, which order the defendant never attempted to set aside. Finally, Mr. Levert left it to the very last moment to exercise the option agreement and he could, if he wished to, have applied to the court in this action on short notice to give him the right to have the property inspected. Mr. Levert did not take those steps and can not now blame the plaintiffs for what is in effect his failure to take all reasonable steps necessary to obtain the financing and to tender the purchase price.
- [Emphasis added.]
- [21] This passage introduces further procedural confusion. In it, the trial judge referred to an early possession order that counsel for Mr. and Mrs. Basi had advised him was in place when there was no such order, and the passage includes a finding of abandonment of the property when that issue is contested by Mr. Levert and was not the subject of the trial.

[22] Mr. Levert contends that Mr. Justice Cole erred:

1. in finding that in order to obtain a remedy he was required to exercise the option to purchase the land, given the previous actions of Mr. and Mrs. Basi;
2. in finding that because he had not exercised the option he had no interest in the land; and
3. in making findings and relying upon the conclusion that he had abandoned the premises when the summary trial was conducted on the basis that this issue was not before the court.

[23] Specific performance is a special remedy available where a person seeks to enforce a contract to purchase a unique property. Here Mr. Levert did not have a contract to purchase the property. To have a binding contract, he would have had to exercise the option to purchase without condition, but he did not do so. It may be open to Mr. Levert to pursue his claim for damages for other matters of which he complains, but he cannot succeed in his claim for specific performance.

[24] For these reasons, I have concluded that although the process has been flawed, there is no possibility that Mr. Levert will succeed in his claim for specific performance and thus the order should not be set aside nor the restriction on title revived. I recognize that the reasons for judgment strayed into comment on the issue of abandonment when that issue was not before the court. However, as the appeal is from the order and not the reasons for judgment, this is not a reason to alter the substance of the order made in the Supreme Court of British Columbia. The balance of Mr. Levert's counterclaim for damages remains unresolved and the issue of abandonment may be considered as part of the remaining process.

[25] I would relieve Mr. Levert, however, from paying costs of the trial and of this appeal. The procedures followed were so flawed, with misinformation having been provided to the trial judge by counsel for Mr. and Mrs. Basi that was reflected in the reasons, I am of the view no order for costs should be made here or for the Rule 18A proceeding.

[26] For these reasons, I would allow the appeal only to the extent of setting aside the order of costs, and otherwise dismiss the appeal without costs.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Mr. Justice Donald"

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