
CANADA / JUDGMENT

Bergen v. Bergen

2012 BCSC 1026

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1026 Bergen v. Bergen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bergen v. Bergen,

2012 BCSC 1026

Date: 20120711

Docket: 8466

Registry: Rossland

Between:

Charlotte Dora Bergen and Walter Theodore Bergen

Plaintiffs

And

Robert Walter Bergen and Tamsin Jane Bergen

Defendants

Before: The Honourable Mr. Justice McEwan

Ruling

Counsel for the Plaintiffs:

J. Spencer

Counsel for the Defendants:

J. Gelber

Place and Date of Trial/Hearing:

Nelson, B.C.

December 5, 2011

Place and Date of Judgment:

Rossland, B.C.

July 11, 2012

- [1] In Reasons for Judgment given August 11, 2009 and indexed as *Bergen v. Bergen*, 2009 BCSC 1099, I directed that there be an accounting before the Registrar respecting the distribution of a fund of \$185,000 I had ordered to be held back out of the proceeds of sale of a property that was the substantial issue between the parties at the trial. For reasons that are not entirely clear, but may relate to the itinerant nature of the Registrar's function in Nelson and Rossland (now that the work has been removed from the local officer who used to do it, and placed in the hands of Masters), the matter has reverted, unattended, to this court.
- [2] I will not set out the facts of the case which are found in my earlier reasons. I found that the defendant, Robert Bergen held his 1/3 interest in a property his parents had purchased on a resulting trust for the plaintiff, who is his mother. She held a 1/3 interest until the death of her husband Walter Bergen, when she became the successor to his share. I ordered the property vested in her name alone. I found that the plaintiffs had advanced large sums of money to the defendant to build a house on the property. Essentially all of their savings went into the project and they were obliged to borrow a further \$175,000 to complete it. They moved into the house in 1999 and spent a further \$8,243.57 on it. Because Robert Bergen was gratuitously on title, he also signed the \$175,000 mortgage. The plaintiffs made all of the mortgage payments until 2006, when they left British Columbia to visit another son, who lived in Ontario. They intended to return, but immediately upon their departure the defendants took possession of the house and refused to leave. They were ordered out by the court, but they never did vacate the premises, and the hearing took place while they remained in possession.
- [3] Following this "ouster" the plaintiffs stopped paying the mortgage and the Bank moved to foreclose. The defendant paid the mortgage out for a total cost of \$185,182.00 using money derived from property owned by his wife, Tamsin Bergen. I had found in my Reasons that she had no liability as a defendant in this matter.
- [4] At the end of the case, the state of the accounting evidence was such that it appeared possible that the plaintiffs had so overpaid the defendant for the work he had done on the house that the mortgage ought not to be treated as a credit to the defendants in the accounting of the sale proceeds of the house.
- [5] The direction I gave was as follows:

- [63] If there were any obvious relationship between the value in the property and the amount the house cost to build, a credit to the defendant for the amount he spent to pay out the mortgage would go without saying. He simply took out the bank's position, which the plaintiffs would have been obligated to pay, had he not done so. It seems apparent, however, that claims for use and occupation, and for money paid in excess of value may have some impact on whether the defendant is entitled to all of that money or whether the Court should allow an offset. I therefore direct that from the net proceeds, otherwise payable to the plaintiffs, the sum of \$185,000 be held back, and paid into Court. I then direct that there be an accounting before the Registrar as to the actual amounts spent by the plaintiffs, the value of the defendants' occupation of the property and any other accounts the parties submit to the Registrar, upon notice to each other, for consideration and for a Report and Recommendation as to how the funds remaining in court ought to be distributed.
- [6] The property was sold on March 4, 2011 for \$500,000.
- [7] The plaintiff claims to be entitled to the \$185,000 hold back on two basis:
- (1) The defendant's occupation of the property for some 45 months after the "ouster" in 2006; and
 - (2) The total amount paid for the construction of the house, which exceeded the market value of the house when the mortgage is added to it.
- [8] The evidence at trial as to the amount paid by the plaintiffs to the defendant to build the house was conflicting. I was unable to reconcile the parties' figures given the state of their accounting. The plaintiff had the disadvantage of losing her husband before the matter could go to trial, and there was reason to believe that he had had a better grasp of the finances than the plaintiff did, at least until his final illness. In any event, the principal issue at trial was whether the plaintiff was entitled to the house and to conduct of sale so that she could get some of the plaintiffs' investment back.
- [9] I summarized the parties' positions at trial as follows:
- [45] Charlotte Bergen submits that the amount the plaintiffs put into the property was \$552,476, in addition to the \$89,000 they paid to buy the lot. They put another \$8,243 into it after Robert left the job and had an estimate of \$36,823 left to pay, in order to complete.
- [46] Robert says that, in fact he only got about \$450,000 from the plaintiffs. For present purposes it is not necessary to reconcile the difference. This is because either way the amount that went into the project is a long way out of line with the appraised value of the property.
- [10] Since the sale of the property, the defendant has engaged counsel and the plaintiff has changed counsel. This has generated a significant amount of material some of which tends to be a re-characterization and re-argument of what occurred before the court at the trial. I did not conceive of the Registrar's hearing coming back to this court, or of it being turned into an occasion for the court to re-explain its findings to new counsel, and I will not do so.

- [11] On the evidence the \$500,000 the property sold for corresponded reasonably to the value the appraisers had assigned to it. I had summarized this evidence as follows:
- [47] In April of 1999, Strand and Godfrey Appraisals found the market value "upon completion" to be \$355,000. This appraisal was commissioned for the purpose of obtaining the Toronto Dominion Bank Mortgage. Of significant interest is the evaluation found under "Cost Approach". After allocating \$100,000 to land value, the appraiser estimated the building costs at \$227,124, calculated as 2949 square feet at \$76.00 per square foot, or half the amount the defendant suggests he was quoted. A little over \$50,000 was allocated to extras for a total under the cost approach of some \$375,000.
- [48] In 2005 Strand and Godfrey appraised the property at \$420,000. The cost approach reflected an escalation in the price per square foot to \$150 for a new cost value of \$442,350.
- [49] In 2006 the property was assessed by Richard Turner, another local appraiser. He used the same per square foot cost of \$150 but measured the building at 2776 square feet, or \$416,000. His market appraisal was \$515,000.
- [50] The 2009 tax assessment values the property at \$521,000.
- [51] All of these figures suggest that it cost the plaintiffs considerably more for the defendant to build this house than it would have cost to pay someone to provide the materials and labour to build it. Robert's estimate of the cost, valuing his time appropriately in his terms, approaches one million dollars. He says that he intended to live in the house for a long time and that the immediate actual value was not a matter of concern to him.
- [12] I simply observe that the eventual sale does not represent a dramatic discount. This is not the case of a house once worth substantially more that has been caught in a bad market. The sale price reasonably bears out the inferences as to value available at trial.
- [13] At the heart of the issue for the Registrar was whether the discrepancy between the parties as to the actual cost could be reconciled on better information and what bearing that might have.
- [14] This did not imply a new hearing on new evidence. On November 29, 2010, I ruled that this was not a hearing where the whole question of what had been paid would be resubmitted to the court, but was an opportunity for the plaintiff to show that the disposition that would ordinarily obtain - credit to the defendant for repaying the mortgage, - should be adjusted on the basis that in paying out the mortgage he was paying back money over and above advances equalling or exceeding the whole value of the property. In that case, the inference would be that the \$175,000 that the plaintiffs borrowed should not have been necessary but reflected a gross failure on the part of the defendant to apply the earlier advances reasonably to improvements on the property.
- [15] As set out in the judgment, the defendant acknowledged receiving advances of some \$450,000 toward the construction.

[16] Having heard from both parties and reviewed the materials, I am of the view that the plaintiff's submission as to the plaintiff's total expenditures is not borne out on the evidence. Her claim is as follows:

The Plaintiffs grossly overpaid for the Rossland Property. They paid \$828,475:

- (a) \$89,000 for the land in 1999;
- (b) \$554,475 to the Defendants from 1997 to 2002 to build the house; and
- (c) a further \$185,000 from the sale proceeds into Court on account of a mortgage that this Court found would have been unnecessary had the Defendants been diligent or competent in their efforts on behalf of the Plaintiffs;

for property that sold in March 2011 for \$500,000. This represents a loss of \$326,475.

[from the plaintiff's submission]

[17] This is at odds with the materials that have been tendered. The gross claim asserted by the plaintiff at trial, was that \$552,475 had been advanced to the defendant on top of \$89,000 for the lot and some minor additional expenditures. There is no explanation for the addition of the \$185,000 over and above these alleged expenditures. This does not accord with the evidence that the plaintiffs expected to spend about \$300,000 to complete the house in addition to the purchase price of the lot. The transcript of the trial is not available to me but this is consonant with my recollection and with the plaintiff's 4th affidavit sworn October 8, 2010 where she deposes:

- 3. The land was originally purchased as a vacant lot by Walter and me in June of 1995 using our funds from the sale of our home in Kitchener, Ontario. The vacant land cost us \$89,000.00.
- 4. As we became short of funds to complete the home that we initially thought would cost \$300,000.00 to complete, we had to take out a mortgage. Therefore, there was a registered encumbrance: Mortgage No. KN55332 that was registered on June 24, 1999 as a first mortgage against the Property with the Toronto Dominion Bank. These funds were borrowed in order to complete the building of the home located on the property. The balance outstanding was approximately \$175,000.00. The Respondent, Robert Walter Bergen did pay out this mortgage after it went into foreclosure and the amount that he paid was \$185,182.00. Attached as Exhibit "A" to this my Affidavit is a copy of the letter date November 9, 2006 from Counsel for the Toronto Dominion Bank to Chris Cook, Robert's lawyer. Attached as Exhibit "B" to this my Affidavit is a copy of the letter dated December 20, 2006 from the lawyer for the Toronto Dominion Bank to the Notary refunding \$2,229.00. Therefore, amount was about \$185,000.00 not \$187,000.00.

- [18] A review of the plaintiff's summary setting out advances totalling \$552,475 also shows that the advances from and after June 24, 1999, when the mortgage was put in place, total just over \$175,000. It appears clear that those proceeds are included in the claim for \$552,475. That means advances of a little over \$377,475 in addition to those derived from the mortgage plus the \$89,000 cost of the land, or about \$466,475.00.
- [19] The defendant submits that if the deposit records he has produced are accepted, the sum of \$455,979.05 reconciles with payments made by the plaintiff to him and leaves others, like a cheque for \$20,000 the plaintiff says they paid the defendants on August 4, 1999, both unrecorded in the defendant's statements and undocumented in the plaintiffs' records. Having reviewed the extensive reconciliation prepared by the defendant, I am of the view that the plaintiff has been unable to establish the roughly \$100,000 difference left unreconciled at trial, and that the proper inference is that the defendant's accounting is generally accurate.
- [20] This does not mean that the plaintiff did not grossly overpay. The appraisal and valuation information tendered at trial suggests that to some extent the sale price reflects some inflation in property values that may mask the actual discrepancy between what was spent and what value was given, at the time the money was spent.
- [21] Taking the information presented all in all, however, I am not satisfied that the plaintiff has established a level of expenditure that should result in the defendant being deprived of credit for the payout of the mortgage.
- [22] I have been troubled by the question of whether the defendant should pay nominal rent for his 45 month occupation of the premises. In taking out the mortgage he put an end to payments the plaintiff would have had to make, which rent would have approximately offset. If that had happened the plaintiff would have been left with most of the mortgage to pay out after the defendant vacated. Paying the defendant back the entire advance, however, effectively negates any adjustment for use of the property. A registrar might have worked out a calculation taking account of interest foregone on the \$185,000, against rent foregone by the plaintiff and the degree to which various levels of rent would have impacted the ultimate payout of the mortgage had it not been paid by the defendant. Other imponderables include the consequences of foreclosure had the defendant failed to redeem it. I am not in a position to address such refinements but I think there should be some modest adjustment which attempts to balance these contingencies. I also note again that the plaintiffs stopped paying the mortgage only when it was clear that the defendant would not vacate the house voluntarily. I fix the "rent" adjustment at \$500 per month for 45 months or \$22,500, payable by the defendant to the plaintiff.
- [23] The defendant is therefore entitled to the payment out of the funds held in trust after deduction of the sum of \$22,500 and the taxed special costs of the action.

- [24] In summarizing the claims before the court in the original Reasons I made the following observations:
- [61] The state of the pleadings after the order for joinder leaves the plaintiff's claims for damages appended to a petition and not really properly framed. It was clearly the intention of the Order of Davies J., however, to get the issues that could be gleaned from both parties' pleadings before the Court expeditiously. At an interlocutory stage, the Court is sometimes called up on to assess procedural requirements in light of a rough estimate of what the case is "really" about. Here it was clear that this case was primarily about the ownership and right of possession of the property at issue. The claims for damages for trespass and aggravated damages, while apparently ancillary, are nevertheless matters which cannot be addressed without the specific analysis required for such claims. The Court cannot simply "throw something in" for trespass.
- [62] The question of whether there is a trespass at all, where the claim is against a 1/3 owner, the question of when the license the defendant had to enter on the property terminated, and the question of what effect Hinkson J.'s Order might have upon the concept of trespass in this case are all at large, as are a number of other matters I might consider. I do not think the pleadings or the submissions have really been directed to this aspect of the claim. I am also concerned, in view of the equities that remain to be assessed, whether a claim in trespass -- except as to the conduct that should more properly be described as a nuisance -- essentially overlaps the concept of adjustments for use and occupation. I simply adjourn the claim in trespass pending the sale of the property, and the further orders set out in these reasons.
- [25] That was a matter of judicial housekeeping, noting that the claims on the face of the pleadings, such as they were, had not all been advanced at trial. I was not encouraging anything by so doing, but simply noting a fact. This Registrar's hearing was not an occasion to raise those issues informally. Those claims would have to be advanced conventionally if they were to go ahead. I will therefore not address the claims for "trespass" "child care" or punitive or exemplary damages. The sole purpose in directing this hearing was to consider whether the plaintiff could show that the loss was so great that the defendant should not be credited with the money he paid to discharge the mortgage. I have found that the proof suggests otherwise. This was a ruinous collaboration for both parties. In my view fairness dictates that the loss be shared, as I have set out.
- [26] I make no order for costs of this hearing.

"T.M. McEwan"

The Honourable Mr. Justice McEwan

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