

CANADA / JUDGMENT

Berthin v. Berthin

2020 BCSC 1188

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1188 Berthin v. Berthin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berthin v. Berthin,

2020 BCSC 1188

Date: 20200811

Docket: S162376

Registry: Victoria

Between:

Wayne Douglas Berthin

Plaintiff

And:

Helen Claire Berthin,

Roy Lyn Sherrod and Patsy Spikes Sherrod

Defendants

Before: The Honourable Mr Justice G.R.J. Gaul

Reasons for Judgment: Costs

Counsel for the Plaintiff:

K. Hauer

Counsel for Defendant Helen Berthin:

Counsel for the Defendants Roy and Patsy Sherrod:

N. Lott

J. Hall

W.C. Vaughan

Place and Date of Hearing:

Victoria, B.C.

October 23 - 25, 2019

Place and Date of Judgment:

Victoria, B.C.

August 11, 2020

- [1] Wayne and Helen Berthin's unenvious litigation odyssey started in 2011. In the summer of 2015 Roy and Pasty Sherrod unwittingly became entangled in the dispute.
- [2] By my count there are no less than 19 reported decisions of either this court or the Court of Appeal that have addressed the myriad of issues that have needed judicial intervention. Over time the dispute has narrowed to a protracted contest over the sale to the Sherrods of a residential property on Kiowa Road in Saanich, B.C. that was once owned by the Berthins (the "Kiowa Property").

Background Facts

- [3] Mr. and Mrs. Berthin were married in May 1978. On account of a marital breakdown, Mrs. Berthin commenced a family law action in April 2011. That action went to trial in 2014 and resulted in an order that, amongst other things, directed the sale of the Kiowa Property. Initially Mr. Berthin had conduct of sale of the property; however, a May 2015 consent order changed that and granted Mrs. Berthin sole conduct of sale.
- [4] In the summer of 2015 Roy and Patsy Sherrod made an offer to purchase the Kiowa Property. The offer was accepted with a closing date in September.
- [5] On 10 September 2015 Master Bouck granted an order confirming the sale of the Kiowa Property. The order also vested title to the property in the Sherrods.
- [6] Mr. Berthin attempted on multiple occasions and in multiple ways to reverse the sale of the Kiowa Property. All of those efforts failed. He also unsuccessfully attempted on more than one occasion to register a certificate of pending litigation ("CPL") on the title to the Kiowa Property after it had been sold to the Sherrods.

- [7] The substantive issues in the family law proceeding came to an end in the fall of 2017 when Mr. and Mrs. Berthin reached an out-of-court settlement of the action. That was not, however, the end of the litigation involving the Kiowa Property.
- [8] On 6 June 2016 Mr. Berthin launched the present civil action against Mrs. Berthin and the Sherrods seeking amongst other things, "an order setting aside the registration of the vesting order for fraud and failure of consideration". One of the principal claims in the action was that Mrs. Berthin and the Sherrods made a collateral agreement whereby the Sherrods would pay less than the full purchase price for the Kiowa Property. In the Statement of Facts portion of the Notice of Civil Claim, Mr. Berthin alleges:
19. In doing the above [making the collateral agreement] and causing the property to vest when she knew the full purchase price set out in the vesting order had not been paid, Ms. Berthin committed a fraud. The Sherrods were participants in the fraud, and in particular they colluded with Ms. Berthin to circumvent the payment provisions of the vesting order.
- [Emphasis added]
- [9] On the same day as he started his lawsuit against the defendants, Mr. Berthin also had a CPL registered on the title to what was by then the Sherrod's Kiowa Property.
- [10] Mr. Berthin's 29 June 2016 response to the defendants' demand for particulars included the following:

In negotiating the collateral arrangement, the Sherrods may have led the Defendant Helen Berthin to believe that the \$10,000 was a necessary and bona fide holdback against which they would draw down the reasonable and necessary costs to remove chattels and debris if the plaintiff failed to remove these from the property on his own after closing. However, after closing the Sherrods obstructed the plaintiff from removing chattels and debris so as to create a pretext for keeping the full \$10,000. Furthermore, the sum of \$10,000 greatly exceeded the actual costs, if any, incurred by the Sherrods in the removal of chattels and debris and the Sherrods never accounted for the sum.

Prior to closing, the Sherrods instructed their solicitors, Mullen Demeo, to prepare a statement of adjustments showing the \$10,000 shortfall in the purchase price as a "holdback" knowing that same was fraudulent, and the statement of adjustments did not accurately reflect the purchase price ordered by the court.

The Defendant, Helen Berthin, instructed her solicitors, McKimm & Lott, to prepare a letter requesting the registration of the vesting order knowing that the payment terms in the vesting order had not been fulfilled and would not be complied with on closing. The Defendant Helen Berthin did so in order to facilitate the fraudulent registration of the vesting order.

The Sherrods instructed their solicitors, Mullen Demeo, to complete a Land Title Act Form 17 with the vesting order and letter of McKimm & Lott attached to it, and to submit these documents for registration to the Land Title Office, knowing that the payment terms in the vesting order had not been complied with and would not be complied with. The Sherrods did so in order to facilitate the fraudulent registration of the vesting order.

[Emphasis added]

- [11] On 28 July 2016 Mr. Berthin filed an Amended Notice of Civil Claim. In doing so he maintained his allegations that Mrs. Berthin and the Sherrods had committed fraud in registering the vesting order for the Kiowa Property. The amended prayer for relief included "an order setting aside the registration of the vesting order for fraud and / or failure of consideration and restoring title to Mr. Berthin and Ms. Berthin subject to Mr. Berthin's family law claims. The new paragraph 19 in the Statement of Facts claimed:
19. In doing the above [making the collateral agreement], and causing the property to vest when they knew the full purchase price set out in the vesting order had not or would not be paid, Ms. Berthin and the Sherrods committed a fraud. In particular, Ms. Berthin and the Sherrods colluded to circumvent the payment provisions in the vesting order.

[Emphasis added]

- [12] In August of 2016 Mrs. Berthin applied to dismiss Mr. Berthin's action pursuant to Supreme Court Family Rule 9-5. The Sherrods applied for similar relief in an application they filed around the same time. In the alternative, they sought to dismiss Mr. Berthin's action by summary judgement (Rule 9-6), or summary trial (Rule 9-7). In a cross application, Mr. Berthin sought summary judgment against the defendants pursuant to Rule 9-6 and an order that the Sherrods convey the title to the Kiowa Property back to himself and Mrs. Berthin. The applications came before Mr. Justice Johnston who proceeded to hear the applications to strike the action. The applications for a resolution of the action by summary judgement or summary trial were adjourned. Justice Johnston ruled in favour of Mrs. Berthin and the Sherrods and consequently dismissed Mr. Berthin's action. An appeal brought by Mr. Berthin was successful and in reasons indexed at 2018 BCCA 57, the Court of Appeal reinstituted his action. On the issue of whether it was an error to dismiss Mr. Berthin's fraud claim, Madam Justice Fenlon explained:
22. With great respect, I am of the view that the judge erred in dismissing the fraud claim on the basis that it disclosed no reasonable cause of action. The judge fell into error because he assessed the pleading against the requisite elements of the tort of civil fraud, rather than equitable fraud relied on by Mr. Berthin. The error occurred no doubt in part because the notice of civil claim unhelpfully failed to use the phrase "equitable fraud". However, counsel for Mr. Berthin made submissions at the hearing based on equitable fraud and in my view the facts and averments pleaded are capable of supporting that cause of action.

[13] The trial of Mr. Berthin's resuscitated action was set to commence on 17 December 2018. In his Trial Brief filed 2 October 2018, Mr. Berthin framed one of the issues in dispute as follows:

Was the failure to disclose to the Land Registrar that the transaction was proceeding on revised terms that has not been approved by the Court done with the intent to deceive? Yes it was.

[Emphasis added]

[14] At Mr. Berthin's request the trial was adjourned on 13 December 2018.

[15] The five-day trial was rescheduled to occur during the assize of 21 October 2019. However, on 10 September 2019, Mr. Berthin filed the present application seeking:

- (1) Pursuant to Rule 9-4(1) an order that a point of law in these proceedings be heard and disposed of before the trial.
- (2) Pursuant to Rule 9-4(1), a finding that the Plaintiff cannot recover the property in question and thus the Plaintiff's action as pled is bound to fail.
- (3) Pursuant to Rule 9-4(2) a finding that the decision on the point of law above substantially disposes of the whole action and thus the action is dismissed.

[16] On 9 October 2019, Mr. Berthin's application came on for hearing in chambers. Counsel for Mr. Berthin submitted the action could and should be dismissed and that the issue of costs be adjourned to a later date so that counsel could make submissions on that issue, including what if any impact offers to settle that had been made might have on the issue. As best I can determine, the entire matter was adjourned to be heard on another date.

[17] At the outset of the hearing before me the parties confirmed they wished to have Mr. Berthin's action dismissed. There was, however, no agreement on the issue of costs.

Issue

[18] As the parties agree this action should be dismissed, the only remaining issue for me to decide is whether Mr. Berthin should pay the defendants' costs, and if so whether those costs should be assessed as ordinary "party and party costs" or "special costs".

Position of Mr. Berthin

[19] Mr. Berthin maintains that his action was a justifiable one at the outset and would still be, if he amended his pleadings. His Notice of Application that is before me indicates:

16. Although Mr. Berthin retains an arguable, even robust claim for return of some portion of the \$10,000, should he amend his pleadings to seek that, in his view having [a] 5-day Supreme Court [trial] to determine that matter would be a most wasteful exercise. He does not wish to amend his pleadings to pursue some portion of \$10,000 as the amount involved does not justify proceeding further with this action.

- [20] In maintaining that his claims against Mrs. Berthin and the Sherrods continue to have merit, Mr. Berthin submits each party should bear their own costs of this action. In the alternative, he proposes that he pay the defendants' party and party costs on the Scale B.
- [21] Mr. Berthin opposes an order that he pay either of the defendants increased costs or special costs. In support of this position he submits the allegations of fraud and collusion made against the defendants were for no improper purpose and that his desire to obtain the return of the Kiowa Property has always been genuine one that he believed had merit. Although he acknowledges the litigation between himself and the defendants has been lengthy and has involved many court appearances, he says this fact alone does not amount to an abuse of process warranting an order of special costs.

Position of Mrs. Berthin and the Sherrods

- [22] The defendants jointly submit that as the action against them has been dismissed in its entirety, they are entitled to their costs. Moreover, on account of what they contend were the serious and unfounded allegations of fraud and collusion levelled against them, Mr. Berthin should be made to pay their special costs.
- [23] The defendants also contend that Mr. Berthin's insistent and unreasonable pursuit of the return of the Kiowa Property, in the face of multiple judicial decisions indicating that such a remedy was no longer possible, amounts to unconscionable conduct on his part. The defendants claim Mr. Berthin framed and launched the current fraud-based action against them solely for the improper purpose of obtaining a CPL against the Kiowa Property and that all of this conduct amounts to an abuse of process, justifying increased costs up to special costs.

Discussion

- [24] Rule 16-1(7) of the Supreme Court Family Rules provides that costs must be awarded to the successful party unless the court otherwise orders. Mr. Berthin's action has been dismissed in its entirety. He did not obtain any of the relief he was seeking in the action. In my opinion there is no question that Mrs. Berthin and the Sherrods have been the successful parties to this litigation and that Mr. Berthin should pay their respective costs.
- [25] Having reached this conclusion, I find the offers to settle that Mr. Berthin made to the defendants, contained in Exhibit 1, are of no consequence or importance. Those offers proposed results that were less than the results the defendants have now obtained or contained terms and conditions that made the offers of questionable validity.
- [26] The real question for me to decide is whether the court should order Mr. Berthin to pay more than the defendants' ordinary Scale B costs?

Special Costs

- [27] The seminal case in this province on the issue of special costs is *Garcia v. Crestbrook Forest Industries*, [1994] B.C.J. No. 2486 (C.A.) where Mr. Justice Lambert explained:
17. Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, 84 B.C.L.R. (2d) 1, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, 74 B.C.L.R. (2d) 311, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung*, 77 B.C.L.R. (2d) 314, in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.
- [28] The defendants submit that the serious allegations of fraud and collusion that Mr. Berthin directed against them, and that he has pursued up to the present, warrants a judicial rebuke and an award of special costs.
- [29] In cases involving unproven allegations of fraud made maliciously, recklessly or without foundation, an order for special costs will regularly result (see: *Garbutt v. Burbank*, 2000 BCSC 14). However, the order is not a given. In *Hamilton v. Open Window Bakery Ltd.*, 1 S.C.R. 303, Arbour J. explained:
26. In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at para. 219.

- [30] Mr. Berthin asserts that his action against the defendants is founded on the legal principles of equitable fraud. Madam Justice Fenlon addressed this argument in the portion of her reasons that I have reproduced at paragraph 12. While she accepted that there could be such an argument, she also observed that Mr. Berthin's pleadings "unhelpfully failed" to clearly articulate this claim. Of importance in my view, is that fact that having been informed of this deficiency in his pleadings, Mr. Berthin took no steps to amend them to clarify the serious fraud allegations he was making against Mrs. Berthin and the Sherrods.
- [31] Mr. Berthin's claim that Mrs. Berthin and the Sherrods acted in a fraudulent manner when they had the vesting order filed and that it amounted to misleading the Registrar of Land Titles was groundless and scandalous, and in my respectful view amounts to the "reprehensible conduct" referenced in the jurisprudence.
- [32] Mr. Berthin is a former lawyer. He had competent legal counsel representing him when the sale of the Kiowa Property to the Sherrods was being completed. I am satisfied that prior to the sale closing, Mr. Berthin knew, through his counsel, that the Sherrods would be holding back \$10,000 because of the debris at the property that needed to be cleaned up. I am further satisfied that holdback would not have been necessary had Mr. Berthin done the work himself in the time he had been given to complete that work. In my opinion it was because of Mr. Berthin and his inability or refusal to attend to the items on the property that the holdback became necessary. In other words, it was Mr. Berthin and not Mrs. Berthin or the Sherrods who created the situation that required the allegedly fraudulent holdback.
- [33] I accept that Mrs. Berthin did not intentionally or unintentionally misrepresent anything to anyone when she agreed to the \$10,000 holdback. I agree with the submissions of counsel for Mrs. Berthin that Mrs. Berthin was simply trying to complete a real estate conveyance in the face of efforts on Mr. Berthin's part to thwart the sale. Moreover, I am satisfied that Mr. Berthin was aware of what was being proposed with respect to the holdback. Consequently, to suggest there was skullduggery or fraudulent conduct on the part of Mrs. Berthin or the Sherrods is not only patently wrong, it is inexcusable.
- [34] The same can be said of the Sherrods. They acted appropriately in their efforts to purchase the Kiowa Property. They and their legal counsel who assisted with the conveyance followed all of the rules. Additionally, they ensured that Mr. Berthin was made aware of the proposed holdback in advance of the sale closing. In my opinion it was unconscionable for Mr. Berthin to allege the Sherrods were acting fraudulently when he knew what was being proposed and knew there was no fraud.
- [35] As I have noted previously in these reasons, Mr. Berthin failed on more than one occasion to successfully register a CPL against the title to the Kiowa Property. Appeals from the Registrar of Land Title's refusal to register a CPL were denied and a further appeal from those decisions was unsuccessful. A history of Mr. Berthin's fruitless efforts to register a CPL can be found in *Berthin v. British Columbia (Registrar of Land Titles)*, 2015 BCSC 247; *Berthin v. British Columbia (Registrar of Land Titles)*, 2016 BCSC 247; and *Berthin v. British*

Columbia (Registrar of Land Titles), 2016 BCSC 1350. The unsuccessful appeal from the later two decisions is indexed as *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181.

- [36] In my opinion the sole reason why Mr. Berthin framed his pleadings in the present action to include a claim based on fraud was to obtain the CPL that he had failed to obtain previously. Moreover, he persisted in his claims and his attempt to regain the Kiowa Property long after he knew or clearly ought to have known that he was not going to obtain that relief and that his claim was bound to fail. In this regard I note what Madam Justice Saunders concluded in *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181:
13. By these two appeals Mr. Berthin seeks to compel the Registrar of Land Titles to register a certificate of pending litigation in his favour, thereby, he says, to start to unwind the court ordered sale of his former home. He also appeals the orders for costs.
14. As I see this matter, and notwithstanding Mr. Berthin's success in his first appeal of the trial order, there is no possibility that Mr. Berthin can obtain title to the property, given there was no certificate of pending litigation registered before the trial order and no stay of the vesting order before title transferred under it to Mr. and Mrs. Sherrod. The appeals from the order for sale and the vesting order have been dismissed and leave to appeal to the Supreme Court of Canada has been denied. This means, in my view, that the appeals must be dismissed as moot because the issue of Mr. Berthin having an interest in land which may be claimed in proceedings to support a certificate of pending litigation has been overtaken by the now unassailable order vesting title to the property in the Sherrods.

[Emphasis added]

- [37] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Madam Justice Gropper helpfully summarized the applicable legal principles when deciding whether to award special costs:
73. I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;

- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[Emphasis added]

- [38] In my opinion commencing an action principally to obtain a CPL when there is no legal justification for it, is the type of improper motive Justice Gropper references in *Westsea* that renders Mr. Berthin's conduct reprehensible. Continuing to prosecute the case against the defendants knowing there was no evidence of fraud and also knowing that he was not going to get the Kiowa Property returned to him only exacerbated the egregiousness of the conduct.
- [39] In *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724, Madam Justice Balance addressed the appropriateness of an award of special costs in a case involving a plaintiff who alleged the defendants had engaged in fraudulent conduct and conspiracy. In awarding special costs, Justice Balance concluded:
7. The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: 307527 B.C. Ltd. v. Langley, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271; *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.
- [40] In my opinion these observations of Justice Ballance are apposite to the case before me. As I have already noted, the serious allegations Mr. Berthin made against the defendants were without foundation. As a former lawyer and with legal counsel assisting him, he must have known this. Additionally, I am satisfied that he had ample information at his disposal to conclude that Mrs. Berthin and the Sherrods had not colluded or committed any fraud.

Conclusion

- [41] In conclusion, I find that the serious allegations of fraud and collusion that Mr. Berthin made against Mrs. Berthin and the Sherrods were clearly without foundation or merit. Moreover, Mr. Berthin's allegations cast an unjustified veil of inappropriate behaviour over

Mrs. Berthin and the Sherrods. I find he recklessly did so as well with respect to the lawyers who were advising the defendants and assisting them with the conveyance of the Kiowa Property. All of this in my view constitutes unacceptable behaviour that calls for an award of special costs.

[42] In my opinion, Mr. Berthin's unjustified assertion that Mrs. Berthin and the Sherrods had colluded and committed fraud could only have been for the purposes of obtaining the registration of a CPL against the Kiowa Property, something he had been pursuing for an extended period of time. In my view, the allegations were included in Mr. Berthin's pleadings solely for the purpose of improperly securing the CPL. This was clearly an improper motive on Mr. Berthin's part and amounts to an abuse of the court's process that warrants a judicial rebuke.

Order

[43] In the result:

- a) Mr. Berthin's action is dismissed.
- b) The defendant Mrs. Berthin is entitled to her costs of this action, to be assessed as special costs.
- c) The defendants Mr. and Mrs. Sherrod are entitled their costs of this action, to be assessed as special costs.

"G.R.J. Gaul, J."

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