
CANADA / JUDGMENT

Bever v. Rennie

2016 BCSC 880

COURT

Supreme Court of British Columbia

DECIDED

18 March 2016

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2016 BCSC 880 Bever v. Rennie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bever v. Rennie,

2016 BCSC 880

Date: 20160318

Docket: S173227

Registry: New Westminster

Between:

Alea Nicole Bever

Petitioner

And

Clinton John Rennie

Respondent

Before: Associate Chief Mr. Justice Cullen

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

A. Shee

Counsel for the Respondent:

P. Roxburgh

Place and Date of Hearing:

New Westminster, B.C.

February 9 and 10, 2016

Written Submissions received

from the Petitioner:

February 26, 2016

Written Submissions received

from the Respondent:

March 7, 2016

Place and Date of Judgment:

New Westminster, B.C.

March 18, 2016

[1] THE COURT: This is an application brought by the petitioner pursuant to s. 6 of the Partition of Property Act, R.S.B.C. 1996, c. 347. That section reads as follows:

6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

[2] The respondent relies on s. 8 of the Act, which reads as follows:

8 (1) In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, then if any party interested in the property involved requests the court to order a sale of the property and a distribution of the proceeds instead of a division of the property, the court may order a sale of the property and give directions.

(2) The court may not make an order under subsection (1) if the other parties interested in the property, or some of them, undertake to purchase the share of a party requesting a sale.

(3) If an undertaking is given, the court may order a valuation of the share of the party requesting a sale in the manner the court thinks fit, and may give directions.

- [3] Ms. Bever and Mr. Rennie each own an undivided one-half interest in the property which is the subject of this application as joint tenants. They purchased the property located at 5192 235 Street in Langley on July 27th, 2011, for the sum of \$700,000. The property consists of a three-bedroom, one and a half bathroom house, with a two-car garage and a workshop located on a one-acre parcel.
- [4] There was an initial deposit of \$25,000, to which the petitioner contributed \$8,000 and the respondent \$17,000. The petitioner's portion of the deposit came from a loan from her father. The down payment, which included the initial deposit of \$25,000, amounted to \$154,781.97. In addition to the \$8,000 which he loaned to the plaintiff for part of the deposit, the father advanced a further \$129,781.97 as a loan to the parties to complete the down payment.
- [5] The balance of the purchase price was financed through a mortgage loan from Prospera Credit Union, which as at December 31st, 2015, has stood at \$493,403.98.
- [6] The parties funded the household expenses, including mortgage payments, through a joint account at the Bank of Montreal. A review of the statements from the joint account reveals that the petitioner contributed \$4,160 more than the respondent to that account. The petitioner equates that difference in contribution to the joint account to a difference in contribution to household expenses.
- [7] The respondent does not agree that the contributions equate. He deposes in an affidavit sworn December 4th, 2015, at paras. 6(a) and (b) as follows:

In response to paragraph 8 of Affidavit #1 of Alea Nicole Bever filed on August 7, 2015, the respondent says:

- a. Ms. Bever has provided a summary of our domestic joint bank account, which shows contributions made since August 2011. What it doesn't show is cash that I gave to her in regards to such items as 2012 property taxes, which shows she paid an extra \$4,000 in August and July of 2012, which would coincide with the taxes paid.
- b. Another example of unequal contributions to this account is December 2011 when she transferred \$3,000, but I am unaware why there is an additional \$1,000. The monies from this account where (sic) used for the property's Mortgage, insurance, taxes, utilities, maintenance, projects and groceries. This account was also used for vacations, gifts, dinners, entertainment and other items from funds that should have been for the mortgage. I confirm I always paid my portion of the expenses.
- [8] The parties' relationship was not simply economic. They lived in a common law like relationship at the house from July 2011 until approximately April 2013, when the petitioner moved out of the property and resided at her father's home.

- [9] In August of 2013, she retrieved most of her belongings from the property. In May of 2014, the respondent changed the locks on the property, explaining in his December 4th, 2015 affidavit that a friend who was checking on the property had misplaced the key. He deposed that the petitioner "always had access to the garage and had been in possession of two of the three garage remotes in August of 2013.
- [10] According to the petitioner, she was informed by the respondent by e-mail on June 5th, 2014, that "to attend at the property" she would need to give him 48 hours' notice and a 72-hour notice in order to have an appraisal done. The e-mail she referenced reads as follows:

Good afternoon Alea

Firstly, I would like to thank you for finally putting some effort into resolving the distribution of shared assets. In regards to access into the house I will be available June 9-12 & 16-19 after 4 pm and please provide 72hrs notice. Please advise your appraiser that I will require evidence of certification prior to entry. A few other notes. If you wish to finish organizing and packing your belongings or would like to move some of your stored items please provide 48hrs notice and would be more then (sic) willing to assist you. If you get some free time and would like to help with some of the yard maintenance let me know. Thanks again and have a great day...

Clinton

- [11] In response to the petitioner's contention that she was barred from access to the property, the respondent deposed that the 72-hour notice for the appraiser was in response to a request for dates so he "could clean and have the house in presentable order. " With regards to the 48-hour notice, he deposed:

I requested that Bever organize and pack some of her belongings. I also offered to assist her in moving, but required a little notice.

- [12] The petitioner deposed that she paid the entirety of the property insurance "from October 2013 to the present", amounting to \$1,324.44 up to July 31st of 2013. The respondent acknowledged that is the case, but indicated he asked the petitioner for invoices so he could pay one-half, but she did not forward them to her.
- [13] The petitioner contends that by changing the locks the respondent has effectively prevented her "from returning to the property to live and has limited her access, except at the respondent's convenience, to recover a number of items of personal property which remain at her residence". The petitioner references her piano, dining room set, barbecue, "and assorted other personal items and articles of clothing".

- [14] She seeks an accounting for occupational rent based on a notional monthly rental of \$2,100, of which she would be entitled to half. She also seeks an accounting for rental received by the respondent from a person to whom he has rented the workshop on the property and for the difference between what she claims to have paid her father in repayment of the loan he advanced as part of the down payment and what the respondent paid.
- [15] She deposed that she repaid her father \$85,000 on or about August 22nd, 2011. The \$85,000 included repayment of the \$8,000 which he loaned her for the initial deposit, and she claimed a total contribution of \$85,000 towards the property. She surmised the respondent repaid her father only the balance owing to him of \$52,781.97, and concluded that in the result, he paid a total of \$69,781.97, or \$15,218.03 less than she.
- [16] In the result, the petitioner sought an order that the property be immediately listed for sale and that the sale proceeds be divided equally between the parties, with the following amounts being paid to her from the respondent's share of the proceeds:
1. Occupational rent at market rates for the respondent's use of the property since August 2013. She calculated a rental rate of \$2,500 a month based on "Craigslist" rentals being sought for similar properties. She calculated the amount owing as 2,500 times 30 months, or \$75,000 times one-half, or \$37,500. The amount by which her contributions to the property exceeded the respondent's contributions, which she calculated as being \$20,040.25 as of July 31st, 2015.
- [17] In a subsequent affidavit sworn January 21st, 2016, the petitioner deposed further payments of \$6,214 per month for August to December of 2015 inclusive and \$6,992 for January of 2016, for a total of \$380.62 for the home insurance, one-half of which is \$190.31.
- [18] In his responsive affidavit of December 4th, 2015, the respondent deposed he contributed more to the mortgage payments than did the petitioner. He also submitted that the petitioner "had not contributed to the maintenance of the property, despite his request that she do so". He deposed that he did a number of things to increase the value of the property for resale, such as "painting the exterior of the house, fixing the driveway with new gravel, trimming hedges, replacing dead hedging, and other items", for which he received no assistance from the petitioner. He also deposed that he made a \$200 bi-annual payment for the residence's water supply, which is part of a community well. He details specific materials expenses he incurred for work done on the property and for appliances totalling \$4,913.26.
- [19] He also noted that, in a text message sent to him on May 11th, 2013, the petitioner appears to assert that the respondent owed her \$6,100. The exchange of texts reads as follows. The respondent:

Will you be around tonight so we can figure some numbers out?

The petitioner:

What do you need me there for? As previously discussed, you owe me \$6,100 and then you figure out your numbers (buyer versus seller) and let me know your offer.

- [20] The respondent questions how the amount the petitioner now claims to be owing of \$15,215.03, or the difference between what she paid for the down payment after repaying her father and what he paid after his down payment and repayment to her father, was. The respondent acknowledged receiving \$150 per month for rental of the shop.
- [21] In her responsive affidavit sworn January 21st, 2016, the petitioner denied recalling receiving cash payments from the respondent and noted "no significant deposits to either of her personal accounts that were not transfers from their joint account".
- [22] She denied having keys to the house after May of 2013, and deposed that the remotes to the garage were disabled after the locks were changed. The petitioner deposed that the current assessed value of the property is \$780,000, noting that the respondent's appraisal of 730,000 was "as of July 15, 2014, and hers of April 2015 was 750,000".
- [23] She seeks an up-to-date appraisal so that if the respondent "wishes to give an undertaking pursuant to s. 8 of the Partition of Property Act", it can be based on that. She deposes the current outstanding balance of the mortgage is \$493,403.98 as of December 31, 2015, and submits that it expires at the end of July of 2016, and as a result a time limit should be ordered in respect to the respondent's purchase of her interest.
- [24] She questions the legitimacy of all of the expenses claimed by the respondent in relation to the home maintenance, noting that the invoices are in the name of his company, which does renovations and landscaping.
- [25] In his second affidavit, dated February 5th, 2016, the respondent advanced as "good reason to the contrary for an order for sale of the property" that it is his family's primary residence, that he has an 18-month-old son, and that it will put significant strain on the family if required to leave.
- [26] He hopes to complete further renovations with respect to the property, and deposed that he is "undertaking to purchase the entire interest of the petitioner in the property at such value as the court may determine and in accordance with any directions the court may provide". He attests to being able to obtain a mortgage of \$560,000 "to ensure I am able to complete the undertaking".
- [27] The petitioner takes the position that the value of the property is \$780,000 based on a current assessment. However, she submits that in light of the adjustments given to her on any sale of the property, including occupational rent and additional contributions of over \$20,000, the respondent will be unable to finance the purchase of her one-half interest in the property.

- [28] She submits that s. 8 of the Act does not apply to preclude a sale in the circumstances of this case because it only applies where s. 6 does not mandate a sale subject to good reason to the contrary, that is, where the party seeking sale has an interest of one-half or more in the property.
- [29] The petitioner says because she has a one-half interest in the property, s. 6, not s. 8, applies, and the petitioner's undertaking to purchase her interest does not prevent the court from making an order for partition and sale. The petitioner says in any event, an undertaking to purchase by the other party interest must be unconditional and not subject to a tenuous prospect of financing as in the present case.
- [30] The petitioner says the reasons given by the respondent do not meet the standard in s. 6 of a good reason to the contrary to prevent the sale from taking place. It is the petitioner's position that there should be an up-to-date appraisal ordered to determine the current value of the premises and that if the respondent wishes to purchase her interest in light of the necessary adjustments, he should be given a limited time to do so given the expiry date of the mortgage in July 2016; and, that if he is unable to finance the purchase, that she be given conduct of the sale to ensure that it proceeds with dispatch.
- [31] The respondent takes the position that no occupational rent is owing as this is not a case of ouster. He relies on the decision in *Dacyshyn v. Semeniuk*, 2007 BCSC 71, and *Pidluberg v. Maslasz*, [1993] B.C.J. No. 999. He says this is a case where the petitioner simply chose to leave the property in the care of the respondent while she kept some of her belongings on the property and "has full access to this day".
- [32] He submits he paid his share of the loan to the petitioner's father and disputes that she has contributed more to the house expenses than he has. He opposes the order of partition and sale, and in the alternative he seeks an order based on his undertaking that he be able to purchase the petitioner's share of the premises. He does not oppose an order for an up-to-date appraisal.
- [33] I am satisfied that it is appropriate to make an order that an up-to-date appraisal of the property be conducted within two weeks of the date of this order by a certified appraiser agreed to by the parties. Thereafter, the respondent will have one month within which to make an unconditional offer to purchase the petitioner's one-half share of the property. If the respondent is unable to make a satisfactory offer within the allotted time, then the petitioner will be granted conduct of sale for the property.
- [34] It follows that I am not satisfied that the respondent has shown "good reason to the contrary" to prevent an order for sale pursuant to s. 6. While the fact that the property has become his family home for himself, his wife and his son understandably makes an order for sale of the house undesirable from his perspective, it does not engage the Court's discretion to decline to make the order mandated by s. 6.

[35] In *Ryser v. Rawlings*, 2008 BCSC 1050 at para. 27, Williams J. noted that the discretion under s. 6 is a narrow one. That paragraph reads in part as follows:

In *Bard v. Bird*, [1993] B.C.J. No. 1644 (C.A.), Wood J.A. observed that the court's discretion to order otherwise in such applications is a narrow one. Generally, the authorities suggest that something in the order of a significant hardship will have to be demonstrated.

[36] The circumstances outlined by the respondent in the present case do not, in my view, constitute a "significant hardship". Nor am I satisfied that s. 8 can operate so as to prevent an order of sale in the present case. As explained in *Ryser v. Rawlings*, s. 8 is subject to s. 6. Section 6 will trump s. 8. At para. 31, Williams J. held as follows:

In *Machin v. Rathbone*, 2006 BCSC 252 (CanLII), Johnston J. held that s. 6 trumps s. 8: the owner of at least one-half interest in the land retains the right to sell on the market, and is not deprived of this right by s. 8(2). At ¶24 he said:

It makes far more sense that the statute provide some protection to the owner of a majority interest, to enable that owner to avoid loss of his or her interest in land at the whim of a minority owner, than it does that the wishes of an equal owner could be thwarted as of right by the co-equal owner.

There, the Court ordered that before dividing the proceeds of the sale, amounts should be deducted to cover any costs incidental to the sale of the property. The respondents were entitled to bid on the open market sale.

[37] Although in the present case I have provided the respondent with an opportunity to purchase the petitioner's interest before the property is on the open market, it is not by virtue of s. 8; rather, it is a condition of the sale ordered pursuant to s. 6 that the respondent be able to make an offer before this property is listed for sale and subject to realtor's fees.

[38] I will deal now with the adjustments. The first is the occupational rent. As I understand it, the petitioner claims occupational rent from the respondent on the basis that she was constructively ousted from the premises, relying on the evidence back in April 2014 that the respondent changed the locks and that he required or requested her to provide 72 hours' notice for the appraiser to come and 48 hours' notice when she was planning to pick up her belongings.

[39] I do not view those actions as amounting to ouster. It appears clear that the petitioner left the premises of her own accord finally in August of 2013. What happened thereafter in terms of changing the locks or requiring her to provide some notice to attend the premises for particular purposes is simply a recognition of the reality that the petitioner and respondent had ordered their respective lives around her decision to leave the premises and his that he would remain to occupy and maintain them.

[40] After reserving judgment on this matter, but before delivering reasons, I requested that counsel make further submissions with respect to the issue of whether the respondent, by seeking and accepting payments from the petitioner related to the payment of the mortgage and other expenses of the house, engaged her right to claim occupational rent based on the reasoning of Huddart L.J.S.C. in *Bernard v. Bernard*, (February 26, 1987) Vancouver Registry, C862897. In that decision, Huddart L.J.S.C. held as follows in para. 14:

The starting point for the first is the general rule that there is no right to charge an occupying owner with an occupation rent. In *M'Mahon v. Burchell* (1826), 2 Ph. 127, 41 E.R. 889 (L.C.), Cottenham L.C. rejected a claim for occupation rent, saying at pp. 134-35:

for the effect would be, that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff; in other words, prevent the other from occupying them, except upon the terms of paying him rent. There is nothing in the Acts of Parliament to lead to that conclusion, which is contrary to the law as clearly established from the time of Lord Coke downwards.

A well recognized exception to that rule is that in a partition action, where the occupying owner claims for expenses, such as mortgage interest, taxes, insurance, repairs and improvements, he must submit to be charged with occupation rent.

[41] Her Honour Judge Huddart, as she then was, went on to conclude at para. 28 as follows:

In summary, I am persuaded that the correct view is that, in a partition action, outside of ouster and bailiff cases, an occupying owner will not be charged for his occupation unless he claims an allowance for his expenses. The latter exception to the general rule is well established and, to the extent British Columbia cases fail to recognize it, they should not be followed.

[42] In *J.E. v. W.S.*, 2005 BCSC 316, Mr. Justice Bernard held as follows at para. 14:

In this case, Ms. J.E.'s right to claim occupation rent arises only from the election by Mr. W.S. to claim for expenses. Just as Mr. W.S. will be entitled to claim the full value of Ms. J.E.'s share of expenses, so should Ms. J.E. be entitled to claim the full value of Mr. W.S.'s share of occupation rent. In my opinion, in a partition action, a reduction in occupation rent is not the answer to address any alleged inequities. It is apparent that within the context of family law proceedings there may be many reasons why considerable discretion might be exercised in the determination of occupation rent; however, these reasons do not arise in proceedings which are strictly property-related.

[43] In the present case, the respondent has sought expenses amounting to \$4,913.26 for various materials purchased to maintain or improve the premises. As well, however, the respondent has demanded, and the petitioner has consistently contributed, her one-half share of all other household expenses, including mortgage payments. She has as well performed some tasks relating to maintenance of the house in response to the respondent's request.

- [44] As I see it, having reviewed counsels' supplemental submissions, those circumstances fit comfortably with the concept underlying the exception to the rule against levying occupational rent as expressed in *Bernard v. Bernard* that I have quoted above.
- [45] in *Dacyshyn v. Semeniuk*, 2007 BCSC 71, Humphries J. was dealing with a claim for occupational rent by a daughter against her occupying mother where the daughter came into a one-half share of the premises via a gift from her father, who was estranged from her mother. Although the daughter had paid some expenses, taxes and maintenance fees for a relatively brief time during the mother's occupancy, Justice Humphries denied the occupational rent on the footing that there was no unfairness to her. She reasoned as follows at paras. 45 and 46:
- [45] The recurring theme underlying a claim for occupation rent is one of compensation - a kind of quid pro quo arising in the partition proceedings when the nature of the expenses claimed against the non-occupying tenant can be considered against the circumstances under which that other tenant was deprived of occupancy in order to do equity between the parties. The reason Huddart J. took it upon herself to look into the question of occupation rent on behalf of Mr. Bernard in the partition action was because she was of the view that it would be unfair not to do so.
- [46] Those circumstances simply do not exist in the situation before me. There is no unfairness to the plaintiff. There was no deprivation of occupancy. The plaintiff never lived in the premises, never sought entry to the premises, never left them voluntarily or involuntarily, never incurred rent as a result of leaving the premises, and was never deprived of rental income from the property. Her remedy was partition and a recovery of her half interest, and that has now been done, subject to relevant adjustments.
- [46] In my view, the circumstances in the case at bar are markedly different from those in *Dacyshyn* and lead to the opposite result. In the present case, unlike in *Dacyshyn*, the petitioner did live in the house, she did leave it, and she was deprived of occupancy, and she incurred rent expenses as a result of leaving the premises. She was also deprived of rental income from the property.
- [47] In addition in the present case, the respondent's claims for expenses, past and ongoing, throughout the currency of his exclusive occupation of the premises are no less cogent to the question of occupation than they would be if they were all currently claimed. In both cases, the petitioner is fixed with the obligation of making an equal contribution to the premises without receiving an equal benefit.
- [48] As submitted by counsel for the petitioner in his supplemental submissions, the reasons why the respondent is not making a greater claim for expenses is that the petitioner has largely paid her share of those expenses on an ongoing basis.

- [49] Accordingly, in my view, the petitioner is entitled to notional occupational rent. I would fix the reasonable rent at \$2,000 per month in view of the somewhat tenuous nature of the evidence of the property's rental value. The share of the notional rent due to the petitioner from the proceeds of sale is therefore \$30,000, which is one-half of \$2,000 a month for 30 months.
- [50] From that sum will be deducted the amount of \$4,913.26 divided by two, or \$2,306.63, representing expenses by the respondent and the petitioner's share of them. In the result, I will round down the figure owed by the respondent to the petitioner to \$25,000 on the basis that occupational rent is inherently a discretionary amount to achieve equity between the parties. It is not meant to be a precise accounting exercise.
- [51] As I understand it, the respondent has rented the large detached shop on the property for \$150 per month. The petitioner's claimed share of that is \$75 a month for 30 months, or \$2,250. As I have concluded that the respondent is liable to the petitioner for occupational rent, I am not satisfied that she should also get the additional benefit of the shop rental.
- [52] Dealing with the unequal loan repayment to the petitioner's father. I do not find the evidence on this point satisfactory. Neither the petitioner nor the respondent has provided any documentary evidence of the loan repayment. She says she repaid \$85,000, which was more than her share, but she does not explain why she did so. The respondent claims he repaid his share of the loan.
- [53] In those circumstances, I am unable to conclude that the respondent paid less than his one-half share to the petitioner's father, or to put it another way, that the petitioner paid more.
- [54] As the burden of proof lies on the petitioner to demonstrate that she made more of a contribution to the purchase of the premises than did the respondent, her claim for \$15,218.03 must fail.
- [55] Dealing with the insurance payments. There is no controversy that the petitioner has paid the insurance cost for the premises since October 2013. She is entitled to one-half the proceeds of the insurance payment which she has made up to the date of sale.
- [56] Dealing with an unequal contribution to the household expenses. The petitioner claims to have contributed \$4,160 more to the joint account than has the respondent. The respondent claims to have made cash payments not reflected in the joint account.
- [57] In my view, a fixing of contributions based solely on the contributions to the joint account is problematic as it is dealing with a relatively small discrepancy. There is too little certainty that what is reflected in the joint account represents all the expenses paid for the maintenance of the house over the nearly five years since its purchase.
- [58] In the result, the order will go as follows. There will be an order for sale of the premises. The petitioner will have conduct of sale. Before the property is listed for sale, there will be an appraisal done by a certified appraiser agreed to by the parties. Within one month of the

appraisal, the respondent, if he wishes to purchase the property, must make an unconditional offer. When the premises are sold to a third party, the proceeds will be divided equally between the parties after payment of mortgage, the applicable realtor's fees, and payment of \$25,000 to the petitioner as notional occupational rent. Thus, one-half of the expenses incurred by the respondent. Also, one-half of the insurance payments made by the petitioner from October 2013 to the sale of the house will also be paid to the respondent.

[59] Each party will bear their own costs.

[60] Is there anything further, counsel, that I need to address?

[61] MR. SHEE: No, My Lord. I just wanted clarify because I think I heard it differently a few times. The adjustment for occupational rent is \$25,000 inclusive of the expenses that the respondent is claiming and the rental expenses for the workshop, and then on top of that is the insurance?

[62] THE COURT: Yes. The way it works is \$25,000 for occupational rent. The workshop rental --

[63] MR. SHEE: Is included in that?

[64] THE COURT: Yes, that is right. Exactly.

[65] MR. SHEE: But the insurance is on top of that?

[66] THE COURT: Exactly.

[67] MR. SHEE: All right. Thank you, My Lord.

[68] THE COURT: Anything further, counsel?

[69] MR. ROXBURGH: Thank you, My Lord.

[70] MR. SHEE: Thank you.

[71] THE COURT: Thank you.

"A.F. Cullen ACJ."

Associate Chief Justice Cullen

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