
CANADA / JUDGMENT

Bosa Properties (Claremont) Inc. v. Mossabeh

2010 BCSC 1326

COURT

Supreme Court of British Columbia

DECIDED

21 September 2010

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2010 BCSC 1326 Bosa Properties (Claremont) Inc. v. Mossabeh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bosa Properties (Claremont) Inc. v. Mossabeh,

2010 BCSC 1326

Date: 20100921

Docket: S097789

Registry: Vancouver

Between:

Bosa Properties (Claremont) Inc.

Plaintiff

And

Masoud Mossabeh

Defendant

Before: The Honourable Mr. Justice Nathan Smith

Reasons for Judgment

Counsel for the Plaintiff:

G. S. McAlister

Counsel for the Defendant:

A. Morrison

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 30, 2010

Place and Date of Judgment:

Vancouver, B.C.

September 21, 2010

- [1] The plaintiff is the developer of a condominium project in which the defendant agreed to buy a unit prior to construction. The defendant paid one quarter of the purchase price in a series of deposits, but did not complete the purchase when the building was finished.
- [2] The plaintiff seeks damages for breach of the agreement of purchase and sale, including, but not limited to, the amount of the deposit. The defendant applies on summary trial for a declaration that the contract is unenforceable and for orders that his deposit be returned and the action against him dismissed. The issues are whether the matter is suitable for summary trial and, if so, whether the contract is enforceable when the registered owner of the property was a different corporation than the one named as vendor in the agreement of purchase and sale.
- [3] The agreement of purchase and sale was dated November, 22, 2006. The total purchase price was \$586,900. The defendant was required to pay a deposit of 10 per cent of the purchase price on presentation of the offer, subsequent deposits totalling another 15 per cent, and the balance of the purchase price on completion. The defendant paid deposits totalling \$146,725.
- [4] The vendor in the agreement was the plaintiff Bosa Properties (Claremont) Inc. ("Bosa Claremont") but the registered owner of the property was Bosa Properties (Coquitlam) Inc. ("Bosa Coquitlam"). A disclosure statement issued pursuant to the Real Estate Development Marketing Act, S.B.C. 2004, c.41 (REDMA) said that Bosa Coquitlam was the registered owner, but held the "the beneficial interest in trust" for Bosa Claremont.
- [5] The date of October 23, 2009 was ultimately set as the completion date and the plaintiff's solicitor prepared a Land Title Act transfer form executed by Bosa Coquitlam as transferor, but the purchase did not complete. In its statement of claim, the plaintiff alleges that the defendant wrongly breached and repudiated the agreement, resulting in damages in excess of the amount of the deposit.
- [6] In its statement of defence and counterclaim, the defendant says the contract is unenforceable because the named vendor was not the registered owner. He relies on s. 6 of the Property Law Act, R.S.B.C. 1996, c. 377 (Property Law Act), which says:

6 (1) A person who transfers land, or who makes an agreement, or assignment of an agreement, for the sale of land by which the purchase price is payable by installments or at a future time, must register his or her own title in order that a person to whom all or part of the land is transferred and a person claiming under the agreement or assignment can register their instrument under the Land Title Act.

(2) An action must not be brought on the agreement or assignment referred to in subsection (1) by a person who fails to comply with this section.

[7] The statement of defence raises other issues, including alleged breach of an agreement by the plaintiff to provide financing, misrepresentation, and failure to deliver the disclosure statement as required by REDMA, but on the present application the defendant relies only on s. 6 of the Property Law Act. His counsel says that if he is successful on this application, the defendant will not need to pursue the other issues.

[8] This application was set down and argued prior to the coming into force of the new Supreme Court Civil Rules, B.C. Reg. 168/2009, on July 1, 2010. The summary trial procedure, formerly set out in Rule 18A, is now in Rule 9-7. There has been no substantive change to the specific provisions at issue on this application and I will refer to the new Rule, except when quoting from earlier cases.

[9] Rule 9-7(2) allows a party to apply for judgment "either on an issue or generally." Rule 9-7(15) says that the court may grant judgment unless:

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

[10] Cases decided under the former Rule make it clear that, where judgment is sought on a single issue, the court must proceed with caution. In some cases, the resolution of a single issue, one way or the other, will effectively dispose of the entire action or greatly reduce the length of a subsequent trial on the remaining issues. But in *North Vancouver (District) v. Lunde* (1998), 162 D.L.R. (4th) 402 at 413, 60 B.C.L.R. (3d) 201, the Court of Appeal said:

[33] With respect, it seems to me that if the answer to an issue sought to be tried under Rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue.

- [11] In *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138, [2002] B.C.J. No. 377 [Bacchus], Southin J.A. said of the former Rule 18A:
- [6] This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.
- [7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".
- [12] However, this court has recently given judgment on a single issue in cases involving pre-construction condominium sale contracts: *Dwane v. Bastion Coast Homes Ltd.*, 2009 BCSC 726, 95 B.C.L.R. (4th) 333; *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2009 BCSC 1670, [2009] B.C.J. No. 2423, aff'd 2010 BCCA 300; *Pinto v. Revelstoke Mountain Resort Ltd. Partnership*, 2010 BCSC 422, [2010] B.C.J. No. 561 [Pinto]. All of those cases involved allegations by plaintiff/purchasers that a developer had not complied with the disclosure provisions of REDMA. That is one of the issues raised by the defendant in this case, but is not dealt with on this application.
- [13] Whether it is appropriate to decide a single issue under Rule 9-7 always depends on the facts and the precise nature of the issues raised in a specific case. In *Pinto*, for example, I said:
- [23] In this case, the other issues raised by the statements of claim are alternative, rather than additional claims. The damages sought for breach of contract and/or misrepresentation are in an amount equal to the deposits that the plaintiffs seek to recover in the statutory claim. There are no counterclaims or third party proceedings. The facts necessary to decide if the plaintiffs are entitled to the statutory remedies are all before the court, are not in disputed, and are not intertwined with other issues. I therefore find it is appropriate to proceed under Rule 18A.
- [14] In this case, I do not find the matter to be quite so straightforward. I accept that success by the defendant on the summary trial will bring the litigation to an end, subject only to possible appeal. But, if the defendant is not successful, his other defences will still be open and will still have to be dealt with at trial. In those circumstances, I am not persuaded that the elimination of this one issue will significantly shorten the trial.
- [15] Even on the single issue –the applicability of s. 6 of the Property Law Act–I find that I do not have sufficient facts before me to decide what may be an important question of law. The plaintiff relies on the decision of the Court of Appeal in *Coal Harbour Properties Partnership v. Liu*, 2004 BCCA 283, 48 B.L.R. (3d) 237, for the proposition that s. 6 does not make a contract unenforceable where the named vendor has the power to compel the registered owner to transfer title to the purchaser.

- [16] In Liu, the named vendor was a partnership, but title was held by a company that was one of the partners. The Court held that the contract was enforceable because the partnership's execution of the sales agreement bound the partner to transfer title. The plaintiff here argues that Bosa Coquitlam, as a "bare trustee", would likewise have been bound to transfer title according to the wishes of the plaintiff.
- [17] None of the cases on s. 6 that have been cited to me involved a trust. If the plaintiff is correct, as a matter of law, that Liu can be extended to apply to trusts, the court would still need to know the facts surrounding the trust in each case. There is no evidence before me as to the exact relationship between the two Bosa companies or the terms of the trust, other than the reference in the disclosure statement to the fact that Bosa Coquitlam holds the property as trustee. Evidence on these matters could have been provided by the plaintiff and a party should not normally be permitted to defeat a summary trial application on the basis of the gaps in its own evidence that it could easily have filled.
- [18] However, a decision in this case may have importance beyond these parties. I take judicial notice of the fact that pre-construction contracts for sale of condominiums are an increasingly common source of litigation in this court, presumably as a result of a falling real estate market. The trust issue may arise in other such cases and the court should not decide the point of law in a factual vacuum.
- [19] A trial judge will be in a better position to decide the trust question on the basis of all of the facts, or to decline to decide the issue if the case can be decided on other grounds. Referring to the "unsettled" questions of law that were raised in Bacchus, Southin J.A. said:
- [25] The orderly development of the common law is not enhanced by this Court addressing issues of law of the nature of these issues unless the case at hand, in all its aspects, requires it to do so.
- [20] The same caution is required in the circumstances of this case and I conclude that it would be unjust to decide this single issue under Rule 9-7. The defendant's application is dismissed, with costs in the cause.

"Nathan Smith J."

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