

CANADA / JUDGMENT

Bostan v. Pita King Mediterranean Food Ltd.

2015 BCSC 12

COURT

Supreme Court of British Columbia

DECIDED

7 January 2015

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2015 BCSC 12 Bostan v. Pita King Mediterranean Food Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bostan v. Pita King Mediterranean Food Ltd.,

2015 BCSC 12

Date: 20150107

Docket: S144186

Registry: Vancouver

Between:

Ibrahim Halil Bostan

Plaintiff

And:

Pita King Mediterranean Food Ltd.,

Mouayad Abdul-Ahad Said a.k.a. Mouyad Said,

Amar Abdul Ahad,

Rajaa Aziz,

Truong Quan Holdings Company Ltd., and

L. Quan Holding Company Inc.

Defendants

Before: Master Muir

Reasons for Judgment

Counsel for the Plaintiff:

J. Dubas

Counsel for the Defendants, Pita King Mediterranean Food Ltd., Mouayad Abdul-Ahad Said a.k.a. Mouyad Said, Amar Abdul Ahad, Rajaa Aziz:

A. Sodagar

Place and Date of Hearing:

Vancouver, B.C.

December 12, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 7, 2015

I. Background

- [1] The action arises from an alleged oral contract said to have been entered into between the plaintiff and Amar Abdul Ahad ("Mr. Ahad") acting on his own behalf and as agent for Rajaa Aziz ("Ms. Aziz") and Pita King Mediterranean Food Ltd. ("Pita King").
- [2] Troung Quan Holdings Company Ltd. and L. Quan Holding Company Inc. are the landlords of the leased premises from which Pita King operates a restaurant (the "Leased Premises"). They have not filed a response to the notice of civil claim and were not before me. I do not know if they have been served with the notice of civil claim. There is no suggestion that they are related to the other defendants other than as lessors of the premises in question.
- [3] Pita King had been operating a donair restaurant in the Leased Premises on Expo Boulevard in Vancouver.
- [4] Mr. Ahad ran the restaurant business and has a 30% interest in the Pita King company.
- [5] Mouayad Abdul-Ahad Said (Mr. Said) is Mr. Ahad's father, and is the director of Pita King. He also has a 30% interest in the company.
- [6] Ms. Aziz is the wife of Mr. Said and the mother of Mr. Ahad. She owns a 30% interest in Pita King.

- [7] The claim, distilled, is that the plaintiff and Mr. Ahad agreed that the plaintiff and his friend Irem ("Irem") would receive a 50% interest in a new company and business in return for an investment of funds and their help in running a new restaurant. The leased premises of Pita King would be assigned to the new company and the new company would then operate a pizza restaurant in those premises.
- [8] The plaintiff claims he advanced funds of approximately \$80,000 and provided labour to the new business worth at least \$30,000, but the defendants wrongly terminated him and Irem. The plaintiff claims breach of contract, breach of trust, unjust enrichment, an entitlement to a share of any profits earned by the business, a declaration that those profits are held in trust for the plaintiffs, and a constructive trust over properties alleged to have been acquired, enhanced or maintained by those profits, including the Leased Premises and five properties owned by Mr. Said and Ms. Aziz. He also seeks an accounting and a tracing of the profits.
- [9] Based on the constructive trust claim, certificates of pending litigation (CPLs) were registered against the five properties owned by Mr. Said and Ms. Aziz as well as the Leased Premises.
- [10] The defendants seek:
- a) dismissal of the plaintiff's claim to constructive trust over the properties, being:
 - i. 503 - 9373 Hemlock Drive, Richmond, B.C., V6Y 0A9, legally described as PID 027-655-466, Strata Lot 80, Section 10, Block 4, North Range 6, West New Westminster District, Strata Plan BCS3091, together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on form V ("Hemlock Drive"),
 - ii. 2368/2372 Harrison Drive, Vancouver B.C., V5P 2P8, legally described as PID 010-039-431, Lot 33, Block 26, Fraserview Plan 8574 ("Harrison Drive"),
 - iii. 407 - 535 Smithe Street Vancouver, B.C. V6B 0H2, legally described as PID 028-315-090, Strata Lot 20, District Lot 541, Group 1, New Westminster District, Strata Plan BCS3925, together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on form V ("Smithe Street"),
 - iv. 1407 - 1212 Howe Street, Vancouver, B.C., V5P 2P8, legally described as PID 012-145-688, Strata Lot 117, District Lot 541, Strata Plan VR 2282, together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on form 1 ("Howe Street"),
 - v. 208 - 1680 West 4th Avenue, Vancouver, B.C., V6J 1L9, legally described as PID 028-022-254, Strata Lot 17, District Lot 526, Group 1, New Westminster District, Strata Plan BCS3541, Together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on form V ("West 4th"), and

vi. 601 Expo Boulevard, Vancouver B.C., V6N 1P9, legally described as PID 027-925-684, Strata Lot 447, False Creek Group 1, New Westminster District, Strata Plan BCS3437, together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on form V (the "Leased Premises").

- b) cancellation of the CPLs on those properties, being certificates CA3757376, CA3757349, CA3757337, CA3757345, CA37457358, and CA3757364, either outright or with nominal security,
- c) alternatively, an order that the plaintiff undertake to abide by any order for damages payable as a result of the CPLs being registered,
- d) the plaintiff post security for the fulfillment of the undertaking and the action be stayed pending the security being posted, and
- e) special costs or alternatively, costs.

II. The Notice of Civil Claim

- [11] The notice of civil claim which is the foundation for the CPLs registered against the properties is seriously flawed.
- [12] The claim as stated is that Mr. Said and Mr. Ahad are the same person and married to Ms. Aziz. It further stated that Mr. Ahad was the owner of the Hemlock Drive property and that he and Ms. Aziz owned the other properties, other than the Leased Premises.
- [13] Mr. Ahad is said to have negotiated the deal with the plaintiff and defaulted on it, for himself, Ms. Aziz and Pita King.
- [14] Thus, other than as the alleged alter ego of Mr. Ahad, there is no direct claim against Mr. Said in the notice of civil claim.
- [15] The plaintiff has since filed an amended notice of civil claim that rectifies these issues.
- [16] The defendants assert, however, that the CPLs rely on the original notice of civil claim and that it must establish a bona fide claim to the properties or the CPLs must fall.
- [17] In support, the defendants rely on *Howard v. Rohland*, 2014 BCSC 1851, in which Master Baker noted:
 - [51] The primary legal basis for Jennifer's position in this respect is *BCG Forex Services Corp. v. Chen*⁸, followed in subsequent cases⁹. In *Forex Spencer J.* held:

⁸ Mr. Prince pointed out that at the time the certificate was filed the statement of claim had not been amended. I accept his proposition that the certificate can only be sustained by the pleadings as they existed at the time it was filed. Although it may be inconvenient to re-file a certificate of *lis pendens* if a statement of claim is amended, the wording of section 215(1) of the Land Title Act appears to require that.

[18] Section 215(1) of the Land Title Act, RSBC 1996, c. 250, provides:

215 (1) A person who has commenced or is a party to a proceeding, and who is

- (a) claiming an estate or interest in land, or
- (b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.

[19] Thus, the original notice of civil claim must contain claims that can sustain the registration of the CPLs. The defendants submit that the notice of civil claim is clearly deficient and cannot sustain the CPLs registered against title to any of the properties.

[20] Although the notice of civil claim is clearly flawed, it does, in my view, advance a trust claim to the properties in question, other than the Leased Premises.

[21] It is said that in addition to the alleged breach of contract that Mr. Ahad breached a fiduciary duty to the plaintiff, that he, Ms. Aziz and Pita King were unjustly enriched and took profits stemming from that breach and used them to purchase or improve certain properties owned by them. A constructive trust is claimed accordingly. It is not for me at this juncture to weigh this claim, but simply to ascertain if there is a triable issue. At its simplest, the notice of civil claim does sustain the registration of the CPLs against the properties other than the Leased Premises.

[22] The claim advanced against the Leased Premises is that the defendants represented by Mr. Ahad leased this property for the restaurant. Funds from the plaintiff were used to improve the premises, it is alleged this in an unjust enrichment and a constructive trust is claimed. Although in my view this is quite a stretch, at its simplest, the notice of civil claim does sustain the registration of the CPL.

[23] I therefore decline to order the CPLs be removed on this basis.

III. Summary Judgment

[24] The defendants seek a summary dismissal of the plaintiff's claim for constructive trust over the properties. They rely on Rule 9-6, the Summary Judgment rule of the B.C. Supreme Court Civil Rules, B.C. Reg. 168/2009.

[25] Rules 9-6(4) and (5) provide:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
 - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
 - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[26] The defendants rely on the principles for granting summary judgment set out in *Atha v Thompson*, 2008 BCSC 1075 by Mr. Justice Wilson, as follows:

[27] On the governing principles to be applied in a resolution of a summary judgment application, this court, in *Progressive Construction Ltd. v. Newton* (1980), 1980 CanLII 493 (BC SC), 25 B.C.L.R. 330 (B.C.S.C.) said this at para. 14:

... On all such applications the issue is whether on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point that making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

[28] The court also said this, at para. 11:

... The procedure under R. 18(6) is designed to provide machinery whereby the defendant can, at an early stage, get rid of an action in a summary way by showing that it has no merit. If the plaintiff can meet that attack, which must be based on sworn evidence, by simply pointing to the allegations in the statement of claim, the rule will be robbed of practically all utility in getting rid of cases based on allegations which cannot be supported by evidence. [my emphasis]

[29] In *Progressive*, the plaintiffs have filed a statement of claim. The defendants filed a statement of defence and initiated the summary judgment application supported by affidavits. The court found that those affidavits dealt substantially with all of the major allegations in the plaintiffs' statement of claim. If those affidavits stood alone, said the court,

they would establish there was no merit in the action. However, the plaintiffs conducted cross-examinations on those affidavits. The testimony elicited on those cross-examinations cast doubt on the reliability of some of the critical testimony of the defendants. Credibility was a material aspect in that case. Whether or not the defendants were credible could only be determined by a trial. The defendants' application was dismissed.

[30] In *Carnahan v. Coates* (1990), 1990 CanLII 2299 (BC SC), 47 B.C.L.R. (2d) 127 (B.C.S.C.), the test was stated in these words:

An order for summary judgment can be granted only if the plaintiffs are bound to lose. Matters of fact cannot be weighed. Inferences from the facts must be viewed in the light most favourable to the plaintiffs. In other words, the defendants are required to establish that there is no bona fide triable issue of fact or law. [authorities omitted]

This test is only slightly less stringent than that required under Rule 19(24).

[33] It is not the function of the court to weigh evidence, or choose between conflicting versions of an event, on a summary judgment application.

[34] In this case, there is no suggestion that it is necessary to resolve conflicts in the evidence to decide this application. Nor is there any suggestion of a want of credibility or creditability on the part of the proposed witnesses in the litigation. Indeed, the plaintiffs have conducted an examination for discovery of the defendant and have raised no issue of her credibility.

[35] In my view, there is a difference between weighing evidence and determining whether there is evidence to support a given proposition. That is what I take from the court's comments in *Progressive* (above) at para. 11.

[27] I should note that the plaintiff applied for an adjournment of this application from Master Scarth before this was referred to me. That application was denied.

[28] The plaintiff raised before me that the application was premature and unfair to the plaintiff as he has not conducted examinations for discovery or obtained complete document disclosure.

[29] The defendants, however, point to correspondence commencing in June 2014 and running through October 2014 where their position regarding the plaintiff's claim and the CPLs is clearly set out, along with the warning that an application would be brought for removal of the CPLs. No substantive response was provided by the plaintiff. The responses provided said only that counsel was getting instructions or considering the matter.

[30] In my view, if the plaintiff required further evidence to support his claim for a constructive trust and a proprietary interest in the properties at issue, it was incumbent upon him to pursue that evidence expeditiously and bring his best case to this application. He has had ample opportunity to do so.

- [31] Turning to the evidence, Mr. Said clarifies that he and his son are not the same person, that he is Mr. Ahad's father and that Ms. Aziz is his wife. His evidence is that he has never had any business dealings with the plaintiff, and only met him once.
- [32] Mr. Said says he was an incorporator of Pita King and is a director and 30% shareholder, but otherwise has nothing to do with the company, which is managed by Mr. Ahad.
- [33] Mr. Said further says that he has never taken any money from Pita King by dividends or otherwise. He attaches title searches for the properties in issue, other than the Leased Premises, which show they were all purchased prior to the matters at issue in this action and that they are all owned by Mr. Said or Mr. Said and Ms. Aziz.
- [34] Ms. Aziz's evidence is essentially the same except she is a 20% shareholder in Pita King and is not a director or officer. She too says she has never taken any funds from Pita King.
- [35] Mr. Ahad confirms the relationship with his parents. He says he is a 30% shareholder in Pita King and that he operates and makes all the decisions for that company.
- [36] Mr. Ahad says that Pita King has never been profitable enough for him to take a salary from the company and that he has never taken funds from the company.
- [37] Mr. Ahad confirms that his parents own the properties in issue, other than the Leased Premises.
- [38] He then provides evidence about the deal with the plaintiff. It is his evidence that the plaintiff failed to pay the amount required under the agreement (if there was one), that the plaintiff basically ran the business into the ground when Mr. Ahad was out of the country, that he told the plaintiff and Irem to pay the money required and they refused - saying he should take the money over time from the (non-existent) income from the restaurant.
- [39] Mr. Ahad says he told the plaintiff and Irem that if they did not pay the money they were through. They refused to do so and Mr. Ahad reconfigured the equipment to sell pitas and told the plaintiff they were not in business together anymore.
- [40] Just as in *Progressive Construction Ltd.* referred to above, it is my view that without more these affidavits would establish there was no merit to the claim for a constructive trust with respect to the properties of Mr. Said and Ms. Aziz. The evidence of all three is that no money has been taken by them from the restaurant. Thus, there is nothing to trace, no funds are impressed with a trust, no funds were used to improve the properties in issue other than the Leased Premises and no constructive trust arises.
- [41] I must then consider what evidence is brought by the plaintiff. I must not weigh the evidence provided, but consider whether there is any evidence in support of the alleged constructive trust.

- [42] The plaintiff brings no such evidence. He "assumes" and is "very concerned" that the defendants have used funds from Pita King to improve and acquire properties. He is "quite concerned" that Mr. Ahad has some undisclosed interest in his parents' property. There is no evidence whatsoever brought in support of these claims.
- [43] Thus, I conclude that the plaintiff's claim to a constructive trust over the properties owned by Mr. Said and Ms. Aziz has no basis, there is no genuine issue for trial and these claims are therefore dismissed.
- [44] As there is no basis for these claims, the CPLs are without foundation and are void. I order they be struck from the register.
- [45] There is no evidence advanced by any of the defendants, however, with respect to the alleged improvements to the Leased Premises and as a result I have no basis to come to any conclusion with respect to that claim or the CPL on that title.

IV. Hardship and Inconvenience

- [46] The defendants also sought relief under ss. 256 and 257 of the Land Title Act for orders that the CPLs be removed on the ground of hardship and inconvenience.
- [47] The defendants, however, brought no evidence of hardship or inconvenience being experienced by them. That is a condition precedent to the ability of the court to order a cancellation of a CPL or an undertaking or security with respect to a CPL. It is not sufficient to simply argue that title is being interfered with and that the owners are unable to sell, refinance or otherwise deal with the property. Some evidence of hardship and inconvenience must be advanced. See, for example, the reasons of Mr. Justice Esson in *Mahood v. High Country Holdings Inc.* (1997), 88 B.C.A.C. 231.
- [48] Thus, I would not have allowed the application on this basis. This is of no present moment to the properties owned by Mr. Said and Ms. Aziz, as the CPLs have been dealt with in the summary judgment above. That decision, however, could be set aside on appeal. As to the Leased Premises, the owners are not before me. There is therefore leave to re-apply under ss. 256 and 257 of the Land Title Act with proper evidence of hardship if necessary.

____ "Master Muir" ____

Master Muir

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Prepared on 28 October 2026 · Esheria