
CANADA / JUDGMENT

Bouchard v. Camaray Motels, Inc

2016 BCSC 2602

COURT

Supreme Court of British Columbia

DECIDED

30 September 2016

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2016 BCSC 2602 Bouchard v. Camaray Motels, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bouchard v. Camaray Motels, Inc.,

2016 BCSC 2602

Date: 20160930

Docket: S151207

Registry: Vancouver

Between:

Paul Emile Joseph Bouchard

Plaintiff

And

Camaray Motels, Inc., Camaray Motel USA, Inc.

Florence Marie Bouchard and Maurice Leo Joseph Bouchard

Defendants

Before: The Honourable Mr. Justice Dley

in Chambers

Oral Ruling

Counsel for the Plaintiff:

G. Trotter

Counsel for the Defendants:

R. Morton

Counsel for Diane Irvine:

D. Herbert

Counsel for Denise Cahill:

D. Magnus

Place and Date of Hearing:

Vancouver, B.C.

September 29, 30, 2016

Place and Date of Ruling:

Vancouver, B.C.

September 30, 2016

- [1] THE COURT: For the sake of clarity have referred to the various parties by their first names.
- [2] Florence Bouchard ("Florence") is 92 years of age and, as a result of advanced dementia, is not competent to make appropriate decisions regarding her financial or personal affairs.
- [3] Florence has six children, all of whom agree that their sister, Denise Cahill, should be appointed as committee of the person.
- [4] Paul Bouchard ("Paul") has commenced a lawsuit claiming that he had an agreement with Maurice to purchase a family motel located in Oroville, Washington. Included as defendants in the action are his brother Maurice and Florence. Maurice is the litigation guardian in that action.
- [5] Maurice claims that he is owed significant sums of money from the operation of the motel over the past number of years.
- [6] The issues to be determined at this hearing are who should be appointed as the committee of the estate and, accordingly, the litigation guardian.

Background Facts

- [7] Florence's main asset is her shareholding in the company that owns the motel in Oroville. The gross value of that holding is estimated to be in the range of \$1 million to \$1.4 million. She also has savings of about \$130,000.
- [8] Florence is resident in a care home. Her annual income is about \$23,000. Her monthly expenses are \$1,420 or just over \$17,000 per annum.

- [9] Florence's finances have generally been administered by Maurice over the past 32 years. He is an accountant, and he has been named as the executor in Florence's Will. Maurice says that he has been granted a Power of Attorney, but is unable to produce such an appointment.
- [10] As a result of Florence's diminished capacity, her day-to-day needs have been looked after by Denise. Denise lives close by and has been in constant contact with her mother.
- [11] Diane lives in Nanaimo and sees her mother about six times a year.
- [12] The motel which is the subject of the litigation has been in the family for a long time and Maurice has been the one person responsible for its administration. At various times, Maurice has asserted that the motel operation owes him anywhere from \$536,000 to \$1.95 million.
- [13] In the action that Paul has commenced against Florence, the corporate entities holding the shares of the motel and Maurice, Paul alleges that he is owed money for work done to improve the motel. He also seeks to enforce a purported agreement that he entered into with Maurice for the purchase of the corporate shares. Paul has alleged that Maurice misrepresented himself as the authorized agent of Florence and further seeks damages for defamation against Maurice.
- [14] Maurice filed a consent to act as litigation guardian for Florence and instructed counsel to file a response to the entirety of the claim.
- [15] Paul supports the appointment of Diane as the committee of the estate.
- [16] The other three siblings supported the appointment of Denise.
- [17] Although Diane is of the view that she can work with Denise as the committee, Denise does not share that optimism. Denise says that there will be too much discord if they have to work together.
- [18] During the course of this hearing, counsel for Maurice advised that he takes no position with respect to the appointment.
- [19] The options for appointment of the committee of the estate are:
- 1) Diane;
 - 2) Denise;
 - 3) Diane and Denise; or
 - 4) the Public Guardian and Trustee.

Discussion

- [20] The applications before me are as follows:

- 1) Paul seeks to remove Maurice as the litigation guardian;
 - 2) Diane seeks to be appointed as the litigation guardian; and
 - 3) Denise seeks to be appointed as the litigation guardian if Maurice is removed from that capacity.
- [21] The Affidavits from attending physicians make it clear that Florence is incapable of managing herself or her affairs.
- [22] Denise has been looking after the day-to-day care of her mother. All of the siblings supported her capabilities in continuing to provide ongoing care. It is appropriate that Denise be the committee of the person.
- [23] The issue of committeeship is with respect to the estate, which for all intents and purposes has to date been provided for by Maurice. He has handled Florence's financial affairs with her approval for the past 32 years. It is apparent that Florence trusted him to handle those matters when she was capable of providing competent instructions. Her faith in his conduct is further confirmed by his designation as executor in her Will.
- [24] A litigation guardian must be "indifferent" to the outcome of the litigation. Indifference is a prerequisite to ensure that the best interests of the disabled person are paramount. There can be no conflict of interest with the interests of the disabled person. The litigation guardian must be able to provide a neutral, unbiased assessment of the litigation facing the disabled person and must be able to provide an unclouded opinion as to the appropriate course to follow. *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38 at para. 20.
- [25] The factors to consider in designating a committee include the following:
- 1) whether the appointment reflects the patient's wishes, which would be confirmed from when she was capable of forming such a wish;
 - 2) whether the immediate family members are in agreement with the appointment;
 - 3) whether there is any conflict between family members or between the family and the patient and whether the proposed committee would be likely to consult with immediate family members about the appropriate care;
 - 4) the level of previous involvement of the proposed committee with the patient, and usually preference is given to family members;
 - 5) the level of understanding of the proposed committee with the patient's current situation and whether that person would be able to cope with future changes;
 - 6) whether the proposed committee will provide a level of support to the patient;

- 7) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
- 8) whether a proposed committee has breached a fiduciary duty owed to the patient or engaged in activity which diminishes confidence in that person's ability to properly handle the patient's affairs;
- 9) who is best to advocate for the patient's medical needs;
- 10) whether the proposed committee has an appropriate plan of care and management for the patient and for the patient's affairs and best able to carry those out; and
- 11) whether division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than ideal for the patient.

Stewart (Re), 2015 BCSC 2321 at para. 29.

- [26] Paul's lawsuit places Maurice in an untenable position with respect to being indifferent to the outcome. There are claims made against Maurice that might cause him to compromise or, at the very at least, cloud what must be an unbiased or neutral assessment of the litigation. That does not mean that in every case the defendant is automatically disqualified from being a litigation guardian for a disabled co-defendant. Each case is to be assessed on its own circumstances.
- [27] It is premature to examine the merits of the claims put forward by Paul. That can only be done after a thorough analysis of the evidence. Nonetheless the pleadings must guide the quest to ensure that there is indifference on the part of the litigation guardian. If the pleadings suggest a reasonable possibility of a conflict arising, then presumptively the litigation guardian cannot be indifferent and cannot be allowed to continue in that role.
- [28] The pleading that claims damages against Maurice for misrepresenting himself to be an agent of Florence is intertwined to some degree with the claim that there was a contract negotiated between Paul and Maurice for the sale and purchase of the motel. Based on those pleadings, it might be appropriate for Florence to third-party Maurice on the basis that he had no authority to sell her shares. The conflict, therefore, becomes clear or, again, at the very least may cloud the litigation guardian's assessment of the litigation vis-a-vis what is in Florence's best interests.
- [29] I am, therefore, satisfied that it is appropriate to remove Maurice as the litigation guardian.
- [30] Although it would appear that Denise and Paul share the same view of the claim he has against Maurice and the other defendants, it does not necessarily mean that the other siblings are all aligned against Paul.

- [31] I find it troubling that there is a desire to carve out pieces of Florence's estate well before she has passed away. Motivation for a resolution of the claim is of concern, particularly in light of the correspondence authored by Dan Bouchard.
- [32] I make reference to the emails sent by Dan on February 12, 2014 and March 2, 2014. In the February 12 email, Dan writes to Maurice with respect to the motel. He refers to Paul and Paul's interest in purchasing the motel. In the email Dan refers to some of the points that Paul has made and sets out some of the considerations that should be taken into account by Maurice in determining who and how the motel should be sold.
- [33] The email concludes:
- Paul is not our baby brother anymore. He has evolved into a mature businessman and wants to invest. As well the rest of us could use some money, the little bit left. Myself I invested in my education but teacher pay has lagged behind for years. I am having to substitute to supplement my pension because of extra expenses on the house and some trips as well that I deserve. So let us keep it in the family. I am 100 percent behind Paul. PS: talk to the others. I have not, but I did see Paul's side.
- [34] On March 2, Dan said the following:
- Paul: I am so much on the fence. However, I will be right up front. I spoke with Maurice, Denise and Janet. I think we should hold off on the sale of the motel. Maurice is looking to give us our inheritance, but the timing is not right. Sorry, as I know you feel differently.
- [35] Whether the desire to take the inheritance is limited to Dan or to others he has named in his correspondence, the fact that such a discussion has taken place lends further concern for leaving the committee of the estate amongst family members. In normal circumstances, it is preferable to have a trusted family member act as litigation guardian: Gronnerud at para. 21. The question is whether a family member or combination thereof can effectively carry out the duties required of a litigation guardian as designated through the appointment as committee of the estate.
- [36] There is evidence that Diane is seen to have sided with Paul. There is a suggestion that she and Paul were going to divide the ownership of the motel, with Diane receiving 10 percent of the shares. There is a suggestion that there may be other family members that are beholden to others. It is apparent that the other siblings view Diane as having sided with Paul. Her appointment would not be viewed by other siblings as having the capacity to be indifferent. For that reason, her appointment would exacerbate the existing conflict between the family members. The appointment must be in Florence's best interests.
- [37] By reason of Diane siding with Paul, the suggestion that she has a 10 percent interest in ownership if Paul is successful and the conflict that she would have with her siblings results in a finding that she cannot be regarded as being indifferent.

[38] Denise, on the other hand, is viewed by Paul and Diane as having sided with Maurice. Reference is made to Denise's acknowledgment in her Affidavits that she tends to accept Maurice's side in the dispute and part of that tendency is a result of her close relationship with him. Denise, however, has said that in spite of her views, she will nonetheless take on the role as litigation guardian and only consider the best interests of Florence.

[39] Regardless of what Denise says, her appointment would also exacerbate the existing family conflict. Exacerbation of family conflict is a factor weighing against an appointment: *Stubban v. Stubban*, 2002 BCCA 398 at para. 14.

[40] Denise's appointment may also place her in a conflicting position as it related to her participation in the history relevant to the sale of the motel.

[41] Evidence has been produced in the form of two purported statements signed by Florence. The first seems to have been executed on May 12. Someone had written out the statement and Florence had apparently signed it. It reads:

I, Florence Bouchard, on this 12th day of May, 2014, do not want to sell the Camaray Motel in Oroville, Washington. I want to leave the motel in the family as it is now.

Her signature is apparently witnessed by Paul.

[42] There was a follow-up document dated May 14, 2014. Similarly, it is apparently written by someone else and signed by Florence. It reads:

Please be advised that I rescind my written and signed note by Paul Bouchard which I signed today. I wish to sell the motel to the managers Clive and Sandy Andrews effective February 6, 2013. I wish for my son Maurice Bouchard to complete the sale.

It is witnessed by Denise, Daniel and Maurice.

[43] As a result of her affixing her confirmation as a witness to this document, Denise may very well be required to give evidence. Being a witness to a central issue while at the same time being a litigation guardian in these circumstances is to be avoided.

[44] As a result, neither Diane nor Denise is to be appointed individually as a committee of the estate.

[45] If they are unable to be indifferent separately, it is unrealistic to expect that a joint appointment will change that capability. It is also apparent that they cannot be appointed jointly since there will be acrimony that will likely interfere with and cloud the unbiased and neutral capacity required to assess the litigation. That assessment must be made only in Florence's best interests.

- [46] It has been suggested that Denise be appointed on an interim basis to allow for a possible resolution of Paul's claim. It is suggested that such a course would save on the public guardian's fees. In the event that the matter does not resolve, then the public guardian would be appointed at a later date to oversee the litigation on behalf of Florence. It is said that the saving of the fees is in Florence's best interests.
- [47] At first blush the saving of fees is always an attractive option. However, in this instance it is imperative that Florence's interests be protected during every step of the litigation process. Unfortunately that will incur costs to the estate, estimated as somewhere between \$45,000 to \$60,000, but the fees are a small price to pay in exchange for an assurance that Florence's best interests are respected.
- [48] The result is that the only party that is capable of providing the assessment necessary to preserve Florence's best interests is the Public Guardian and Trustee. Although there has been concern expressed about the costs associated with such an appointment, in these circumstances those costs are justifiable in balancing the benefits to Florence.
- [49] It is essential that Florence's interest in the litigation be considered and assessed by a party that is uninterested in the outcome. In these circumstances, only the Public Guardian and Trustee is capable of providing that assistance. Therefore, the Public Guardian and Trustee shall be appointed as the committee of the estate and accordingly designated as the litigation guardian.
- [50] With respect to costs, in the ordinary fashion a successful party is awarded costs.
- [51] Submissions have been made that because of Maurice's conduct, special costs should be awarded against him. In particular, it is argued that if Maurice had not opposed Paul's application to have him removed as a committee, much of the material before this court would not have been required.
- [52] With respect, I disagree. The issues before this court likely would not have changed because of the conflict within the family. It would have been preferable for Maurice to have conceded at the outset what was so plain and obvious, and that is that he was in a conflict and unable to provide the indifferent service that is required of a litigation guardian.
- [53] The fact that he has conceded at the outset of this hearing to taking no position is an acknowledgment that the application was properly brought and the appropriate relief was sought to have him removed.
- [54] However, to impose special costs when a concession is made even at this late date would have a chilling effect on the conduct of parties to litigation. The result may very well be that if there was going to be an automatic award of special costs, concessions would not be made, hearings would be prolonged and all parties would incur extra costs.
- [55] As a result, Paul will be awarded costs at Scale B against Maurice with respect to his application.

[56] With respect to the applications of Denise and Diane, I note that they are not parties to the civil claim. Their applications were discrete and focused on the best interests of Florence. Regardless of the outcome, I am satisfied that they are entitled to be awarded special costs to be paid out of the estate. However, those costs are to be paid out of the funds realized from the sale or disposition of the motel. Florence's savings as they now are of about \$130,000 are not to be used for the payment of those costs.

[57] That concludes my decision. Any questions, counsel?

[58] I will leave it to counsel as to how to proceed. I do not think anyone needs a lecture from the bench as to how problematic these kinds of cases can be to relationships within a family. I suspect if Florence was able to comprehend what was going on, she would be horrified that her family was taking the positions that they have through the course of this litigation. I would encourage the parties if they can to enter into settlement discussions. A judicial settlement conference is probably the most beneficial, but I will leave that to the parties.

"S.D. Dley J."

DLEY J.

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