

CANADA / JUDGMENT

British Columbia (Civil Forfeiture) v. Vo

2015 BCSC 600

COURT

Supreme Court of British Columbia

DECIDED

17 April 2015

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2015 BCSC 600 British Columbia (Civil Forfeiture) v. Vo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Civil Forfeiture) v. Vo,

2015 BCSC 600

Date: 20150417

Docket: S099519

Registry: Vancouver

An Action under the Civil Forfeiture Act in Rem Against:

The Lands and Structures Situated at 2565 East 41st Avenue, Vancouver, British Columbia and having the Legal Description of Parcel Identifier: 006-594-638, Lot J, Block 13, Plan 21142, District Lot 394, New Westminster Land District (The East 41st Property") and the Lands and Structures Situated at 2975 East 44th Avenue, Vancouver, British Columbia and having the Legal Description of Parcel Identifier: 010-716-882, Lot 27 Block 10, District Lot 50, Plan 7103, New Westminster Land District (The "East 44th Property") and the Fruits and Proceeds thereof (Collectively, the "Properties")

Between:

Director of Civil Forfeiture

Plaintiff

And

Hong Thu Thi Vo and Thanh Le

Defendants

Before: Master Taylor

Reasons for Judgment

Counsel for the Plaintiff:

L. Martz as Agent for B. Wagner

Counsel for the Defendant H. Vo:

J.L. Straith

Place and Date of Hearing:

Vancouver, B.C.

March 17, 2015

Place and Date of Judgment:

Vancouver, B.C.

April 17, 2015

- [1] This is an application by the defendant, Hong Thu Thi Vo, to whom I will refer to as Ms. Vo, or the defendant.
- [2] Ms. Vo's application is brought pursuant to Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 where she seeks to strike portions of the plaintiff's pleadings which refer to resulting trust in the defendant's second further amended notice of civil claim.
- [3] The Rule invoked herein reads:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,
- and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Background Facts

- [4] These are the background facts as taken from the applicant's notice of application:

[5] In December 2009, the Director of Civil Forfeiture (the "Director") commenced an action for forfeiture of property situated at 2565 East 41st Avenue, Vancouver (the "East 41st Property") against the registered owner, the defendant Ms. Vo. The Director also charged the defendant's personal residence at 2975 East 44th Avenue, Vancouver (the "East 44th property") as being subject to forfeiture.

[6] In December 2012, the plaintiff made an application to amend its pleadings to add a Mr. Le as a defendant. On October 4, 2012, Mr. Justice Williams pronounced reasons for judgment on the Director's application heard February 2012. On January 3, 2013, the Court released a corrigendum and amended Judgment of Mr. Justice Williams.

[7] On January 7, 2013, Ms. Vo filed an appeal of that decision. That appeal was heard by the Court of Appeal and a judgment rendered by the Court of Appeal in June 2013. The Court of Appeal ruled that the Director either had to add Mr. Le as a defendant or not claim a "resulting trust". The judgment of the Court of Appeal is found at 2013 BCCA 279. Portions of the judgment are reproduced here commencing at paragraph 13:

[13] Paragraph 5 of Part 3 of the amended notice of civil claim alleges:

When Mr. Le advanced Ms. Vo \$300,000 gratuitously, a resulting trust arose in his favour over the \$300,000 and its proceeds. Alternatively, Ms. Vo and Mr. Le's arrangement manifested an intention that Ms. Vo would hold the East 41st Avenue Property in whole or in part for the benefit of [Mr.] Le.

[14] Paragraph 6 of Part 3 of the amended notice of civil claim alleges:

The Credit Union [which holds a mortgage against the Property] and Mr. Bui [who holds a second mortgage against the Property] are uninvolved interest holders, since they did not benefit or know of the unlawful acts.

[15] At para. 56 of his reasons for judgment the chambers judge summarized the appellant's position before him, respecting the resulting trust initially asserted by the respondent:

Ms. Vo argues that there was never a resulting trust, and that the \$300,000 was a loan from Mr. Le to Ms. Vo. In fact, she says, considering Ms. Vo paid the money back, it is clear that this transfer of money was a loan, and not a trust. She points to statutory presumptions that she argues the Director has failed to rebut.

[16] The notice of civil claim, as amended, still seeks the appellant's interest in the 41st Property. But on his application to amend his pleadings, the respondent contended that the interest of Mr. Le was extinguished when the appellant paid the sum of \$300,000 to Mr. Le's fiancée, Ms. Ha.

[17] As the pleadings presently stand, the respondent seeks to affect what he has described as Mr. Le's resulting trust interest in the 41st Property. If such an interest continues to be alleged, Mr. Le must be named as a defendant in the proceedings pursuant to s. 4 of the Act. If such an interest is no longer alleged, the respondent must amend his notice of civil claim

to delete that allegation. He then faces the prospect that any interest that Mr. Le may have in the 41st Property will not be defeated by the proceedings where he is not named as a defendant.

- [18] I would therefore allow this aspect of the appeal to the extent of ordering that the respondent must either add Mr. Le as a defendant in the proceedings, or amend his notice of civil claim to remove any allegation that Mr. Le has a resulting trust interest in the 41st Property within 14 days.
- [8] On June 21, 2013, the Director filed its amended notice of civil claim adding Mr. Le as a defendant and the additional allegations in paragraphs four through eight related to a resulting trust in the loan by Mr. Le used by Ms. Vo to purchase the East 44th Property and in particular adding Mr. Le as a defendant claiming that Ms. Vo held an interest in the East 44th Property in trust for Mr. Le.
- [9] In October 2014 Mr. Justice Joyce allowed the plaintiff to conduct further discoveries of the defendant Ms. Vo, subject to specific restrictions on the scope of the examination for discovery.
- [10] The plaintiff made further application to add an additional defendant, Nguyen, and further amended his notice of civil claim to add money laundering allegations against Ms. Vo and Mr. Le. The application for adding the new defendant and the amendments sought by the Director were dismissed by Master Scarth on December 4, 2014.
- [11] On January 14th Master Scarth struck portions of paragraphs 20 of Part 1: Facts, and all of Paragraph 5 of Part 3: Legal Basis. The Director was given leave to amend those paragraphs.
- [12] Prior to the further examination of the defendant Ms. Vo, ordered by Mr. Justice Joyce, she brought an application to strike the "resulting trust" amendments of the Director. That application was successful, however the Director was given leave to amend two paragraphs of his notice of civil claim.
- [13] On January 27, 2015 the Director filed a second further amended notice of civil claim making lengthy amendments to Part 1: Facts paragraph 20 and Part 3: Legal Basis paragraph 5.
- [14] On January 30, 2015 the Director sought an order for further document discovery of Ms. Vo. That application was dismissed by Master Caldwell.
- [15] On February 26, 2015 the Director was given leave to file a discontinuance of the action against Mr. Le without prejudice to Ms. Vo's application to strike portions of the Directors second further amended notice of civil claim.
- [16] Counsel for Ms. Vo maintains that counsel for the Director has made an agreement with counsel for Mr. Le to seek leave of the Court to discontinue the claim against Mr. Le after discoveries of Ms. Vo are concluded.

- [17] Ms. Vo insists that after years of the Director applying to add allegations of a resulting trust regarding Mr. Le and attempting to add other parties to the actions as a means of expanding the scope of the discovery of Vo, the Director has still not sought any relief against Mr. Le as required by the Order of the Court of Appeal of June 2013.
- [18] The defendant Ms. Vo submits that since the Director has been given specific instructions by the Court of Appeal to either add Mr. Le as a defendant or remove the allegations of resulting trust, the additional amendments contained in the second further amended notice of civil claim of the Director are frivolous, vexatious, and embarrassing and will likely delay the trial of the matter further. The matter is currently set for trial for three weeks commencing August 10, 2015.

The Pleadings

- [19] It is alleged that Ms. Vo received \$300,000 from Mr. Le in 2005 and 2006; that Mr. Le provided the money which was obtained from the sale of substances proscribed by the Controlled Drugs and Substances Act, S.C. 1996, c. 19 ; and that Ms. Vo agreed to hold the money for Mr. Le in return for compensation.
- [20] It is alleged that in December 2006, Ms. Vo purchased the East 41st Property together with a mortgage from Vancouver city Savings Credit Union with the money she was holding from Mr. Le. The purchase price is said to be \$550,000.
- [21] On October 7, 2009, a search warrant was executed on the East 41st Property at which time a commercial marijuana grow operation with 805 marijuana plants and 39 high intensity lights was located.

The Proposed Amendments

- [22] The amendments the plaintiff seeks are as follows:
20. In July 2009, Ms. Vo sold a property at 3241 Clive Avenue, Vancouver, BC (the "Clive Avenue Property") and paid \$300,000 of the proceeds to Ms. Ha (the "2009 Payment"), The 2009 Payment was not a re-payment of any of the monies advanced earlier by Mr. Le and Mrs. Ha for the purpose of acquiring the East 41st Property. Rather, the 2009 Payment was the originating payment in a separate transaction, a loan made from Ms. Vo to Mr. Le and Mrs. Ha for the purpose of purchasing another real property, which property would subsequently be (and in fact was) registered in the name of Mrs. Ha.
- 20a. Further, or in the alternative, the 2009 Payment was not for value.
- 20b. Further, or in the alternative. Mr. Le had actual or constructive notice of the origins of the funds from which Ms. Vo sourced the 2009 Payment.
- 20c. Because
- (i) both Ms. Vo and Mr. Le contributed funds used to acquire the East 41st property,

(ii) the equity in the East 41st Property was leveraged or otherwise used to acquire and maintain ownership of the East 44th Property.

(iii) any payment to Mr. Le was not for value.

(iv) any payment to Mr. Le was with notice as to the unlawful source of the funds, and/or because,

(v) the 2009 Payment related to a separate transaction entirely,

the 2009 Payment did not change the status of the equity in the East 41st Property or the East 44th Property.

20d. Ms. Vo remains the legal owner of the. East 41st Property.

20e. The East 44th Property was sold in March 2013 and by agreement between the Plaintiff and Ms. Vo, \$200,000 of the proceeds of its sale were deposited to Ms. Vo's solicitor's trust account pending resolution of this proceeding. Until this proceeding resolves, Ms. Vo remains the legal owner of the remaining \$200,000 proceeds of sale of the East 44th Property .

20f. Ms. Vo therefore, continues to hold on behalf of Mr. Le: (a) title to the East. 41st Property and (b) the proceeds of sale of the East 44th Property, both in proportion to the funds contributed by Mr. Le. and, or in the alternative, in further proportion to the risk faced by Mr. Le when the East 41st Property was used to secure or maintain ownership of the East 44th Property,

20g. Ms. Vo has not provided Mr. Le with any return from the acquisition of the East 41st Property. Ms. Vo has not provided Mr. Le with any return from the acquisition and subsequent sale of the East 44th Property.

20h. There is no juridical reason for Ms. Vo to continue to hold exclusive legal title of the East 41st Property or the proceeds of sale of the East 44th Property, as the contributions of Mr. Le were not gratuitous and have not been satisfied by repayment or otherwise.

20i. Further, or in the alternative. Mr. Le continues to be deprived of his interest in the East 41st Property and the proceeds of sale of the East 44th Property. Further, or in the alternative, Mr. Le continues to suffer deprivation in the form of the risk of forfeiture given Ms. Vo's custodianship of the East 41st Property and the East 44th Property.

[Underline in original]

The Legal Basis for the Proposed Amendments

[23] In justification of the proposed amendments, the plaintiff has set out the following proposed amendments to the Legal basis for the claim:

5. Mr. Le's beneficial interest in the East 41st Property was acquired with income derived from unlawful activity, and is therefore proceeds of unlawful activity as that phrase is used in s. 3(1) of the Act. This unlawful activity included production of a controlled substance, namely cannabis/marijuana, contrary to s. 7 of the CDSA; fraudulently consuming, using and diverting electricity contrary to s. 326(1) of the Criminal Code; and money laundering, contrary to s. 462.31 of the Criminal Code.

5a. When Mr. Le transferred funds to Ms. Vo in Canadian currency totalling \$300,000. or such other amount as may be proven at trial, a presumption of resulting trust arose on the transfer taking place that Mr, Le intended to retain the entire beneficial interest in that fund. Ms. Vo must rebut this presumption at trial and rebuttal will take place if she is able to prove that Mr. Le to the contrary intended that she take the whole or part of the beneficial interest for her own personal benefit. Due to the presumption over the entirety of the \$300,000 fund, Mr, Le retained by force of law a beneficial interest, either in the whole or part, of the East 41st Property, depending on how far the advanced funds were used to finance the purchase of the East 41st Property.

5b. When the equity in the East 41st Property was used to secure a \$200,000 loan of funds to Ms. Vo tendered by her for purchase of the East 44th Property, the whole or part of the East 44th Property, commensurate with the extent of the resulting trust in the East 41st Property, became impressed with the presumption of a resulting trust in favour of Mr. Le that arose as described in paragraph 5a. above.

5c. Further, or in the alternative, by using equity from the East 41st Property, with or without Mr. Le's knowledge or assent, to secure funds used to acquire the East 44th Property, and/or to maintain ownership of title to the East 44th Property. Ms. Vo used proceeds of unlawful activity (to wit, the East 41st Property) to acquire the East 44th Property, an act which by itself rendered the East 44th Property proceeds of unlawful activity within the meaning of the Act.

5d. Further, or in the alternative, when proceeds of unlawful activity were converted into ownership of the East 41st Property, the East 41st Property itself became an instrument of unlawful activity, to wit, an instrument of money laundering.

5e. Further, or in the alternative., when the equity in the East 41st Property was leveraged to acquire or maintain ownership of the East 44th Property, the East 44th Property itself became an instrument of unlawful activity, to wit, an instrument of money laundering.

5f. In the alternative, to the extent Ms. Vo repaid any funds to Mr. Le any repayment took place with Mr. Le's knowledge sufficient, to exclude him from being an uninvolved interest holder within the meaning of the Act.

5g. In the alternative, to the extent Ms. Vo repaid any funds to Mr, Le, any repayment took place in circumstances where Mr. Le is not entitled to relief from forfeiture of the remaining beneficial interest he holds in the East 41st Property and the proceeds of sale of the. East 44th Property.

5h, To the extent Mr Le fails to establish himself as an uninvolved interest holder within the meaning of the Act, his entire beneficial interest in the East 41st Property is subject to forfeiture.

5i. To the extent Mr. Le fails to establish himself as an uninvolved interest holder within the meaning of the Act, his entire beneficial interest in the proceeds of sale of the East 44th Property is subject to forfeiture.

5j To the extent Mr. Le fails to establish sufficient grounds to warrant, relief from forfeiture within the meaning of the Act his beneficial interest in both the East 41st Property and the proceeds of sale of the East 44th Property are subject to forfeiture without any relief from forfeiture,

[Underline in original]

The Defendant's Objections to the Proposed Amendments

[24] The Defendant raises the following objections to the proposed amendments:

1. "The proposed amendments are frivolous, vexatious, embarrassing and will likely delay the trial of the matter further specifically as they now attempt to open the issues of money laundering without Mr. Le ever being put in a position of jeopardy by the Director seeking relief against him."
2. "The current solution of making the amendments to the pleadings, using the leave given to amend his pleadings in regard to the resulting trust allegations as an opportunity to adding in allegations of money laundering and unlawful sources of funds which were specifically dismissed in the application of the director, and then discontinuing the action against Mr. Le, expecting the amended pleadings to be left intact, is the very definition of an abuse of process."
3. "An in rem claim cannot exist in isolation without reference to the in personam liability."

The Director's Position

[25] The Director takes the position that where leave to amend will be granted unless it is plain and obvious that the proposed amendments disclose no reasonable cause of action (British Columbia (Director, Civil Forfeiture) v. Vo, 2012 BCSC 1476), the same applies to an application to strike portions of pleadings. The applicant bears a heavy onus and must show that the abuse of process is plain and obvious: Hare v. Lit, 2013 BCSC 33. Thus, maintains the Director, the current pleadings are appropriate unless it is plain and obvious that they do not disclose a cause of action, in which case they should be struck out. The Director also takes the position that the current application is premature in that it should be made at trial rather than by way of interlocutory application.

Are the Proposed Amendments Frivolous, Vexatious or Embarrassing as Against Ms. Vo?

- [26] Ms. Vo takes the position that the resulting trust amendments and amendments dealing with the allegation of money laundering is prejudicial to her, although the allegation of money laundering is made against Mr. Le.
- [27] Ironically, the Director points out, Mr. Le is not arguing against the amendments, only Ms. Vo, yet the money laundering allegation is new as against Mr. Le. Surely, says the Director, if Mr. Le has not instructed counsel to argue this position for him, it is not open to Ms. Vo to make the argument.
- [28] The Director also submits that the allegations of resulting trust are not new as they pertain to Ms. Vo. The allegations of resulting trust have been contained within the Director's pleadings since the commencement of the pleadings.
- [29] Accordingly, I can find no rational reason for striking out the amended pleadings as I am unable to say they are frivolous, vexatious or embarrassing to Ms. Vo.

Are the proposed Amendments an Abuse of the Process of the Court?

- [30] In order to comprise an abuse of process of the court, the proceedings must be unfair to the point that they are contrary to the interests of justice and constitute a misuse of procedure such as to bring the administration of justice into disrepute: *Hare v. Lit* (supra).
- [31] Ms. Vo alleges the Director abused of the process of the court "by using a leave opportunity to address the deficiencies in his pleading dealing with a claim of a 'resulting trust' to bring in though the back door an allegation of money laundering and receipt of unlawful proceeds, knowledge and willful blindness to receipt of illicit funds when those specific amendments had been sought in a specific application to have general amendments made to the pleadings on December 4, 2014".
- [32] I take this opportunity to note that Ms. Vo has been examined for discovery by counsel for the Director, and to further note that it is not uncommon to amend pleadings following examinations for discovery.
- [33] Obviously, the proposed amendments have arisen due to the examination for discovery of Ms. Vo, the order of the Court of Appeal and the order of Master Scarth. I find nothing in the proposed amendments that conflicts with the orders of either the Court of Appeal or Master Scarth such that an abuse of the process of the court occurs by way of a misuse of procedure that would bring the administration of justice into disrepute.

Can an in rem Claim Exist Without Reference to the in personam Liability?

- [34] In short, Ms. Vo takes the position that, importing principles of Admiralty Law, there cannot be an in rem remedy without an in personam claim.
- [35] I quote from the defendant's written submissions:

34. in reality, there are a few times when in rem proceedings lie in this Court but they do exist in the matrimonial area. This new area of civil forfeiture and the admiralty law field. In Canadian maritime law there is a well-developed body of law that applies and which is relevant to the determination in this application.
35. In rem proceedings have arisen in the admiralty law context and has been adopted into aviation in aid of remedies given the nature of mobile chattels involve namely ships and aircraft that move between jurisdiction. [sic]. An in rem action is a powerful tool to bring the asset and the parties into the jurisdiction.
37. Arguably, the Civil Forfeiture Act is a hybrid of these concepts but the underlying foundation of an in rem action applies unless specifically excluded by application of statutory provision which it is not.
38. For example, section 3(2) of the Civil Forfeiture Act allows for an order forfeiting to the government property that is the instrument of unlawful activity. That does not require arguably, in personam liability because there is clear statutory language that holds that when instrument is of unlawful activity the Director can seize that item such as a vessel used for smuggling.
39. The Defendant Applicant submits that in this case, we are dealing with section 3(1) deals [sic] with the interest in property which arguably gives rise to in personam liability as there is no exclusion in the statutory language.
42. The Defendant Applicant submits that this in rem claim cannot exist in isolation without reference to the in personam liability and therefore we need to look at the principles as laid down in Canadian maritime law with respect to this issue. This is especially so as section 3(1) specifically deals with the whole of an interest or portion of an interest in property.
43. It is a clear fundamental principle of any in rem proceeding that there must be in personam liability. In rem jurisdiction allows the court to seize and hold the object for some legal purpose, in this case the provisions of the Civil Forfeiture Act.
46. It is well settled principle of admiralty law that in rem jurisdiction cannot exist without in personam jurisdiction. The relevant procedure provisions of that is set out in section 43 of the Federal Courts Act.
- 59 Under Civil Forfeiture Act the remedy provides for an in rem claim against the subject property but that requires either clear statutory language to exclude in personam liability and/or a process that would modify the common law rule.
60. In the case at bar, there is simply no statutory wording to avoid or restrict the in personam liability requirement and there can be no basis for the pleadings as amended in the 2nd Further Amended Notice of Civil Claim.

- [36] The nature of the defendant's submissions is unique. In essence, the defendant seeks to have all of the plaintiff's pleadings struck by virtue of a novel legal argument with no basis other than in aviation and maritime law, where movable chattels are the subject of an arrest or seizure.
- [37] As well, certain statements of law are made without reference to a legal authority, such as: section 3(1) of the Civil Forfeiture Act, S.B.C. 2005, c. 29, gives rise to an in personam liability as there is no exclusion in the statutory language; or, it is a clear fundamental principle of any in rem proceeding that there must be in personam liability.
- [38] The application of aviation and maritime law to the law of civil forfeiture in British Columbia definitely contains new propositions of law, which have been made without authority. And, it certainly does not meet the "plain and obvious" test.
- [39] Counsel for the Director advised me at the hearing of this application that the pleadings are essentially the same as those that were before the Court of Appeal, except for the changes mandated by the Court of Appeal. Surely, if the issue of the need for in personam pleadings before an in rem claim could be made, that matter would have been before the Court of Appeal for its determination of that legal argument.
- [40] Having said all of the above, I find no basis in fact or law for the argument advanced. As a matter of fact, all pleadings or claims by the Director are claims in rem and are so stated in the style of cause.

Summary

- [41] In summary, I find that the amendments by the Director of Civil Forfeiture in the second further amended notice of civil claim are proper and appropriate, and that they are not frivolous, vexatious, embarrassing or an abuse of the process of the court. As well, I reject the defendant's argument regarding the need for an in personam claim to justify an in rem remedy in these proceedings.
- [42] Lastly, I am of the view that the Director should have his costs of this application in any event of the cause, but not forthwith.

"Master Taylor"

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