

CANADA / JUDGMENT

Buksh v. Dominion Lending Drake Entrust Mortgage Services Ltd.

2018 BCSC 579

COURT

Supreme Court of British Columbia

DECIDED

10 April 2018

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2018 BCSC 579 Buksh v. Dominion Lending Drake Entrust Mortgage Services Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buksh v. Dominion Lending Drake Entrust Mortgage Services Ltd.,

2018 BCSC 579

Date: 20180410

Docket: S31137

Registry: Chilliwack

Between:

Mustak Ahmed Gani Buksh

Anita Buksh

Plaintiffs

And

Dominion Lending Drake Entrust Mortgage Services Ltd.

Dominion Lending Centres Drake Financial

Drake Financial Ltd.

Euro-Canadian Mortgage Corp.

Elite Mortgage Corp.

0819583 B.C. Ltd.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 42 on April 11, 2018

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiffs:

S. Visram

Counsel for the Defendants:

E. Heath

Place and Date of Hearing:

Chilliwack, B.C.

March 27, 2018

Place and Date of Judgment:

Chilliwack, B.C.

April 10, 2018

- [1] The defendants apply for a declaration that the plaintiffs are vexatious litigants and an order pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 433, that the plaintiffs must not, without leave of the court, commence legal proceedings, in any court, against the defendants or their counsel.
- [2] The grounds on which the defendants contend that the plaintiffs are vexatious litigants may be summarized as follows:
- (a) the plaintiffs brought this action to determine issues which have already been determined by this court more than once;
 - (b) by court order made January 25, 2017, this action was determined to be an abuse of process and the plaintiffs' claims against the defendants dismissed;
 - (c) the issues raised and the actions taken by the plaintiffs since the January 25, 2017 order raise the same issues that the plaintiffs repeatedly roll forward into this and other actions; and
 - (d) the plaintiffs now threaten to bring further proceedings against not only the defendants but against the lawyers who have acted for the defendants.
- [3] The plaintiffs Mustak Buksh and Anita Buksh are husband and wife. Mr. Buksh is a mortgage broker, contractor, licensed property manager, and a real estate agent. Mrs. Buksh is a hairdresser.

- [4] The defendants are a group of related corporations in the financial services and mortgage industry that were called The Mortgage Centre. From approximately 2008 to 2010, Mr. Buksh was employed as an independent contractor by the defendant Drake Financial Ltd. ("Drake") which had a management contract to manage investment funds for the defendants Euro-Canadian Mortgage Corp. ("Euro-Canadian") and Elite Mortgage Corp. ("Elite"). Warren Merkel was at the time (but has not been for some years), the principal and director of Drake, and an officer of Euro-Canadian and Elite. In October 2013 Drake terminated its management contract with Euro-Canadian and Elite.
- [5] Mr. and Mrs. Buksh, and sometimes, just Mr. Buksh, during the time Mr. Buksh worked with Mr. Merkel, purchased property in Alberta known as the Wildwood property, and property in Chilliwack, B.C., known as the Vance Road property. Both the Wildwood and Vance properties were partially constructed. The Wildwood property had been financed by Euro-Canadian, and the Vance property had been financed by Elite. Mr. Buksh purchased the Vance Road property, and both Mr. and Mrs. Buksh purchased the Wildwood property. Mr. Buksh planned to complete construction of the Wildwood and Vance properties, but in order to do so, required mortgage financing from Euro-Canadian or Elite. Mr. Buksh refers to the arrangement as a joint venture between him and the mortgage company, whereby he would assist the mortgage company by completing construction, and when the property was sold, they would both benefit from the sale proceeds.
- [6] Mr. Buksh started having difficulty financing the construction and making the mortgage payments, and obtained additional financing by mortgaging four properties that were owned by Mr. Buksh and his wife, including three properties in Kamloops, and their personal residence in Surrey.
- [7] Mr. Buksh alleges that he and Mrs. Buksh never knowingly consented to the registration of the inter alia mortgage against their personal residence in Surrey. Mr. Buksh also alleges that Mr. Merkel made various representations to him, which amounted to a verbal agreement, the terms of which included that there would be no foreclosure proceedings until he had completed construction of the Wildwood and Vance properties, and both properties were sold. Mr. Buksh also alleges that Mr. Merkel represented to him that interest would not be charged on any of the mortgages, until the Wildwood and Vance properties were sold.
- [8] There are four separate legal proceedings between the plaintiffs and some or all of the defendants, including the proceeding at bar:
1. In December 2013 the defendant Euro-Canadian commenced foreclosure proceedings against the plaintiffs in the Court of Queen's Bench of Alberta (action no. 1301-14878) regarding the Wildwood property;
 2. On December 12, 2013 Euro-Canadian commenced foreclosure proceedings against Mr. Buksh regarding the Vance Road property (New Westminster Reg. No. 157463);

3. On December 20, 2013 Elite commenced foreclosure proceedings against the plaintiffs (New Westminster Reg. No. 157668) regarding the inter alia mortgage over the four properties owned by the plaintiffs in Surrey and Kamloops; and
 4. On June 7, 2015 the plaintiffs commenced the within proceedings against the defendants.
- [9] In the Elite foreclosure proceedings, Master Caldwell ordered on June 17, 2014 that by no later than September 17, 2014, the parties conduct examinations for discovery, and Mr. and Mrs. Buksh could apply to examine further witnesses.
- [10] On September 10, 2014, Mr. Merkel advised that he would not be examined for discovery without court order. However, Mr. and Mrs. Buksh did not apply for an order that Mr. Merkel be examined by them.
- [11] On October 13, 2014 Elite applied for an order nisi, a one day redemption period, personal judgments against the plaintiffs, and an order for conduct of sale. Mr. Buksh opposed the order nisi on the basis of verbal agreements or representations by Mr. Merkel that the foreclosure proceedings would not move forward until three other properties owned by him and financed by Euro Canadian were sold. Mr. Buksh also alleged that Mr. Merkel represented and agreed that Euro Canadian would not foreclose on the Wildwood or Vance properties until certain conditions were met.
- [12] Master MacNaughton (as she then was) found that Mr. Buksh's failure to obtain a court order to secure Mr. Merkel's attendance so that he could be examined prior to the September 17, 2014 deadline set by Master Caldwell, and his failure to apply to vary Master Caldwell's order by extending the September 17, 2014 was of " particularity of note because the Buksh's entire response to the foreclosure proceeding is based on their allegations of unwritten assurances and representations that were made by Mr. Merkel. Mr. Merkel's evidence would be key in that regard."
- [13] Master MacNaughton concluded that the inter alia mortgage was a valid mortgage and granted the order nisi. She found that there was no joint venture agreement between the defendants and Mr. Buksh, and no oral side agreement between him and Mr. Merkel that Elite would not foreclose on the properties until other properties were sold.
- [14] Orders approving the sale of the four properties were made between December 23, 2014 and February 25, 2015.
- [15] On January 15, 2015 Euro-Canadian applied for an order nisi and a one day redemption period with respect to the Vance property. Mr. Buksh opposed the application and alleged that his signature had been forged on the appendix to the purchase and sale agreement, Mr. Merkel agreed that he did not have to make mortgage payments, and that no interest would accrue on the mortgage. He argued that the matter should be transferred to the trial list, and sought an order that Mr. Merkel attend for an examination for discovery.

- [16] In written reasons dated March 25, 2015 (indexed as 2015 BCSC 454) Mr. Justice Jenkins found that a settlement agreement entered into between Mr. Buksh and Euro-Canadian pursuant to which Euro-Canadian paid Mr. Buksh \$110,000 for all issues relating to the New Home Warranty Program and Mr. Buksh's purchase of the Vance property, was a complete defence by Euro-Canadian, and granted the order nisi on the terms sought.
- [17] In Euro-Canadian's foreclosure proceedings in Alberta, on July 8, 2015, Master Farrington found the mortgage to be valid and enforceable, granted a one day redemption period. The lands have since been offered for sale and sold.
- [18] In the within proceeding the defendants filed a notice of application on June 16, 2016 for the following orders:
1. Pursuant to Rule 9-5(1)(b) that this action be struck in its entirety as unnecessary, scandalous, frivolous or vexatious;
 2. Further or alternatively, pursuant to Rule 9-5(1)(d), that the notice of civil claim in this action be struck in its entirety as an abuse of process of the court;
 3. Pursuant to s. 18 of the Supreme Court Act, that the plaintiffs are found to be vexatious litigants;
 4. Further or alternatively, pursuant to Rule 9-5(1)(b) and (c) that the plaintiffs' claims be dismissed; and
 5. Special Costs.
- [19] The orders sought in paragraphs 1 and 2 of the notice of application were heard before Mr. Justice N. Brown on October 26, 2016. As in the foreclosure proceedings which I have outlined, Mr. Buksh alleged fraud, misrepresentation, forgery of documents, and breaches of various parol agreements and joint venture agreements. In reasons for judgment dated January 25, 2017 (indexed as 2017 BCSC 121) Mr. Justice Brown granted the defendants' application and struck the notice of civil claim in its entirety as an abuse of the court's process and dismissed the plaintiffs' claims against the defendants with costs.
- [20] Mr. Justice Brown detailed the history of the foreclosure proceedings between the parties, and included the entirety of the reasons for judgment of Master MacNaughton and Mr. Justice Jenkins. He found that the plaintiffs' claims were considered and disposed of in the foreclosure proceedings before Master MacNaughton, Master Farmington and Mr. Justice Jenkins, and should be struck on the basis of the doctrine of estoppel by res judicata. It would be an abuse of process to allow the plaintiffs to pursue claims that were rejected in prior proceedings. Even if the doctrine of res judicata did not apply, the plaintiffs' claims are statute barred.

- [21] On February 23, 2017 the plaintiffs filed a notice of appeal in the Court of Appeal from the January 25, 2017 order of Mr. Justice Brown. To date, the plaintiffs have taken no further steps in the Court of Appeal.
- [22] On April 24, 2017, Euro-Canadian filed a notice of application returnable May 30, 2107 for an order absolute regarding the Vance Road property. The notice of application and supporting material were served on Mr. Buksh.
- [23] On May 26, 2017, Deepak Gautam who was then representing Mr. Buksh, (the plaintiffs have had five different lawyers representing them, and at times they have represented themselves) informed Euro-Canadian that he was instructed by Mr. Buksh to apply to have the order nisi in respect of the Vance Road property set aside. Mr. Neufeld, counsel for the defendants, informed Mr. Gautam that the order nisi in relation to the Vance Road property was a final order and that the appeal period had expired.
- [24] On May 30, 2017 Master Keighley adjourned the application for an order absolute to June 7, 2017 and ordered Mr. Buksh to provide his responding material no later than noon on June 5, 2017.
- [25] On June 7, 2017 Master Caldwell made an order absolute in relation to the Vance Road property.
- [26] On June 8, 2017, Mrs. Buksh e-mailed Marlene Bernier, legal assistant at Valley Law Group LLP, solicitors for the defendants, with the following:
- "this letter is to inform you that Ahmed and [sic] will be filing a claim and an appeal on yesterday's hearing, and involved Perjury, Fraud, and misleading information. we are going to seek legal advise - please do not do anything else regarding 3877 Vance Road, Chilwack until you get a response from our chosen Lawyer.
- [27] The e-mail further demanded a copy of the \$110,000 cheque relating to the release and settlement, and "failure to send this check will be reported to the Law Society and an application to court".
- [28] On June 12, 2017 the defendants filed a requisition for a hearing on the balance of the relief sought in the notice of application filed June 17, 2016, namely, an order pursuant to s. 18 of the Supreme Court Act that the plaintiffs be declared vexatious litigants.
- [29] On September 1, 2007 Mr. Buksh applied before Mr. Justice Brown for an order that he be allowed to examine Mr. Merkel for discovery, prior to the hearing of the defendants' s. 18 application. The terms of the orders made by Mr. Justice Brown include the following:
- "3. If the plaintiffs, or their agent or counsel, examine Warren Merkel for discovery in these proceedings, any evidence obtained during the course of such examination for discovery is not admitted by the defendants to be relevant to the application and the plaintiff must demonstrate its relevance at the hearing of this application."

- [30] Mr. Buksh deposes in his affidavit sworn November 2, 2017 that he spoke to Mr. Merkel who informed him that he would attend an examination for discovery and that there was no need to obtain a court order.
- [31] By letter dated September 27, 2017 counsel for Mr. Buksh delivered to Martin Sennott, counsel for Mr. Merkel, an appointment to examine Mr. Merkel for discovery on October 20, 2017.
- [32] Mr. Sennott replied by e-mail dated October 5, 2017 stating that Mr. Merkel is not required to attend the examination as he is not a party to the litigation, and would not be attending. On October 20, 2017 Mr. Sennott advised Mr. Buksh or his counsel that Mr. Merkel would not be attending without court order. The defendants also advised that they would oppose any application to examine Mr. Merkel for discovery.
- [33] Mr. Buksh contends that Mr. Merkel has "key evidence in this matter", that his attempts to examine him for discovery "have consistently been thwarted".
- [34] The plaintiffs argue that the application to have them declared vexatious litigants should be dismissed for the following reasons:
1. The defendants' notice of application fails to set out the factual basis in its notice of application, and the space provided for completing the factual basis is blank;
 2. No facts are pled in the legal basis of the notice of application that would support a declaration that the plaintiffs/respondents are vexatious litigants.
- [35] However, I will not dismiss the application on those grounds for these reasons:
1. While the space in the notice of application for the facts is blank, the notice of application sets out the material to be relied on, namely, affidavit #1 of Marlene Bernier, sworn June 16, 2016, which consists of two volumes, part 1 and part 2, each part being contained in a large three ring binder. Ms. Bernier in her affidavit sets out the history of the foreclosure proceedings, correspondence, and attaches all of the relevant documents; and,
 2. The notice of application was before Mr. Justice Brown on October 26, 2016, and there is no suggestion that he was unable to determine the facts.
- [36] The plaintiffs argue that at the time they commenced the within proceedings, they were self-represented and did not understand the concept of res judicata, until it was explained to them by their present counsel. However, as I have noted, the plaintiffs have had five different counsel representing them at various times, and at times, the plaintiffs are self-represented. While this may be the only action that the plaintiffs or either of them have commenced against the defendants, Mr. Buksh admittedly feels that "a great injustice" was done to him and to his wife by the orders of Master MacNaughton and Mr. Justice Jenkins, and that this proceedings was an "attempt to bring to the attention of the court the evidence form Mr. Merkel which was never presented to the court".

- [37] The defendants rely on the following authorities relating to applications under s. 18: Bryfogle v. School District No. 49 et al, 2007 BCSC 457; and Semenoff Estate v. Semenoff, 2017 BCCA 17.
- [38] The plaintiffs rely on the following authorities: Hokhold v. Gerbrandt, 2017 BCSC 1249 at para. 20; Holland v. Marshall, 2010 BCSC 1560; Green v. Proline Management Limited, 2017 BCSC 1656; Gonzalez v. Mulgrave Independent School Society, 2017 BCSC 882; and Nayyar v. Manufacturers Life Insurance Company, 2016 BCSC 1587.
- [39] While the plaintiffs argue that they are not guilty of legal bullying, or attempting to put pressure on other parties to gain advantages in other proceedings as was the case in Gonzales v. Mulgrave, and that they have paid all of the costs that have been order against them, each case must still depend on its facts.
- [40] While the remedy under s. 18 is a serious limitation that must be exercised cautiously, bearing in mind the right of every person to access to justice, the defendants do not seek an order preventing the plaintiffs from bringing an action against all persons or parties.
- [41] I find that that this proceeding is vexatious for the same reasons that Mr. Justice Brown found that the proceeding is an abuse of process. The plaintiffs or either of them tend to raise or roll forward the same issue relating to the verbal agreements Mr. Buksh alleges he made with Mr. Merkel in this proceeding, former proceedings and proposed applications and proceedings against the defendants and/or their counsel.
- [42] I find the plaintiffs to be vexatious litigants and order that the plaintiffs or either of them, must not, without leave of the court, institute a legal proceeding against any of the defendants, or their counsel Wayne Neufeld or Eric Heath.
- [43] The defendants are entitled to their costs of this application.

"Loo J."

The Honourable Madam Justice Loo

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