

CANADA / JUDGMENT

Cadwell Estate v. Martin

2020 BCSC 2091

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2091 Cadwell Estate v. Martin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cadwell Estate v. Martin,

2020 BCSC 2091

Date: 20201231

Docket: S217213

Registry: New Westminster

Between:

Shane Cadwell as Executor of the Estate of Ruth Cadwell

Plaintiff

And

Billie Lisa Martin and Scott Russell Martin

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

R.P. Dueckman

Counsel for the Defendants:

T.E. Watkins

Place and Date of Trial/Hearing:

New Westminster, B.C.

October 27 and 28, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 31, 2020

Introduction

- [1] In 2004, William (Bill) and Ruth Cadwell advanced \$170,000 to their daughter Billie Martin and son-in-law Scott Martin in order to assist them in purchasing property located in Maple Ridge, B.C.
- [2] Bill Cadwell died in 2007 and Ruth Cadwell in 2019. Their son, Shane Cadwell, Billie Martin's brother, is the executor under Ruth Cadwell's will. He brings this action on behalf of the estate to recover the \$170,000 plus interest from Billie and Scott Martin. He submits that the \$170,000 was always intended by his parents to be an investment which was repayable either on the sale of the property or upon their death.
- [3] The Martins deny the money claimed is owing. They submit that there was an agreement with Bill and Ruth Cadwell that the Cadwells would reside in the basement suite of the house in exchange for a nominal rent which would be used to pay down the amount owing. The Martins submit that the \$170,000 was repaid in full pursuant to this agreement.
- [4] The plaintiff applies for a summary trial pursuant to Rule 9-7 of the Supreme Court Civil Rules. The notice of application refers to Rule 9-6, but it is common ground this was an error; the application is for a summary trial, not summary judgment.
- [5] There are numerous factual disputes between the parties. The matter is complicated by the fact that both Bill and Ruth Cadwell are deceased, resulting in a number of hearsay statements attributed to them in the record. The affidavits submitted by both parties are also rife with self-serving opinion and argument. Nonetheless, the plaintiff believes the matter is suitable for determination by summary trial. The defendants agree that aspects of the claim can be determined summarily, but that certain other aspects may require a full trial.

Background

- [6] I will set out the basic background facts based upon the admissible evidence and, in doing so, I will highlight where the parties differ. I will then address the evidence in more detail as needed when dealing with the issues that arise.

- [7] Bill and Ruth Cadwell had five children, all of whom have unfortunately been drawn into this litigation. In addition to their son Shane, their daughters Pamela and Nicole Cadwell have both sworn affidavits in support of the plaintiff's claim. Another daughter, Laureen Malfet, has sworn an affidavit in support of the defendants.
- [8] As noted at the outset, Bill and Ruth Cadwell provided \$170,000 to Billie and Scott Martin in early 2004. The money was advanced by way of a bank draft dated January 31, 2004 payable to Scott Martin. While the parties dispute the proper characterization of the payment, for ease of reference I will describe it as the "Loan". No written agreement was entered into at the time to record the terms upon which the Loan was made, but it is common ground that the money went towards the Martins' purchase of property located at 24303 McClure Drive, Maple Ridge (the "McClure Property").
- [9] The purchase of the McClure Property completed on February 26, 2004. The property was registered solely in the names of the Martins.
- [10] A house was then constructed on the property, which included a two-bedroom basement suite. Construction completed in the fall of 2005. In October 2005, the Martins moved into the house and Bill and Ruth moved into the basement suite.

The 2004 Letter

- [11] In November 2004, after the Loan had been made, but before the new house was completed, Scott Martin prepared a letter dated November 9, 2004, addressed to Bill and Ruth Cadwell with respect to the McClure Property (the "2004 Letter"). The 2004 Letter is typed, with handwritten notes or amendments added to it. It is common ground the notes are Ruth's handwriting.
- [12] The 2004 Letter begins by stating that it is written in regard to the McClure Property. The first substantive paragraph, as originally typed, states:

Should we (Billie and Scott Martin) decide to sell this house and property while either or both Bill Cadwell and Ruth Cadwell are alive, we (Billie and Scott Martin) will give Bill and Ruth Cadwell the sum of \$170,000 (One hundred and seventy thousand dollars and zero cents). We will also include reasonable bank rate interest on this sum of money.

- [13] In that paragraph, Ruth crossed out the words "while either or both Bill Cadwell and Ruth Cadwell are alive" and added "or Their Estate" in the margin adjacent to "will give Bill and Ruth Cadwell the sum of \$170,000".

- [14] The typewritten text of the next paragraph states:

This money will be paid to Bill and Ruth Cadwell separately (divided equally between them) if both are alive at the time of the sale of the house (\$85,000 plus interest to Bill Cadwell and the same to Ruth Cadwell).

[15] Ruth crossed out the words "if both are alive at the time of the sale of the house" and added in the words "or 170,000 plus Interest to either survivor or to the estate of Bill & Ruth Cadwell should they be deceased".

[16] The next two paragraphs remained unchanged:

This money will be paid directly to the survivor (\$170,000 plus interest) should either Bill Cadwell or Ruth Cadwell die before the house is sold.

Should we (Billie and Scott Martin) both die, and are survived by either or both of Bill Cadwell or Ruth Cadwell. The funds (170,000 plus interest) will be made available to them from our estate and paid as noted above if the house is sold by the executor.

[17] The typewritten text of the next paragraph states:

This agreement is written by us (Billie and Scott Martin) and is in effect and binding upon us (Billie and Scott Martin) only while either Bill Cadwell or Ruth Cadwell or both are alive.

[18] Ruth crossed out the words "only while either Bill Cadwell or Ruth Cadwell or both are alive" and wrote:

Money left as investment to estate of Bill and Ruth Cadwell on their demise. To be equally divided to their surviving children Laureen, Pamela, Billie, Nicole, Shane. Any monies paid to William & Ruth Cadwell will be deducted from the principle [sic] amount. Interest to be calculated annually.

[19] Scott Martin deposes that he drafted the letter "for discussion purposes". He says that while Bill and Ruth did not agree with certain aspects of what he proposed, as reflected in Ruth's notes, they did agree on a monthly rent of \$1,200, including utilities, to be applied against the principal of the Loan.

The Wills

[20] Bill and Ruth both had wills prepared in September 2006. They are largely identical in form, with only small differences in the named executors. Each left the residue of their respective estates to the other. Both wills then contain the following provisions, which are stated to apply in the event that the other spouse is deceased:

I HEREBY DIRECT MY TRUSTEE THAT:

- (i) At the date of preparation of this my Last Will and Testament my daughter BILLIE LISA MARTIN and my son-in-law SCOTT MARTIN owe my said [husband/wife] and I the sum of ONE HUNDRED AND SEVENTY THOUSAND (\$170,000) DOLLARS, together with interest at a reasonable bank rate as agreed, which was loaned to them to purchase their residence located at 24303 McClure Drive, Maple Ridge, British Columbia on or about the 31st day of January, 2004 (hereinafter referred to as the "Martin Loan");

(ii) In the event that the Martin Loan or any part of the Martin Loan remained outstanding as at the date of my death THEN I HEREBY DIRECT MY TRUSTEE to take whatever steps may be necessary to collect the Martin Loan or any part of the Martin Loan that remains outstanding as at the date of my death and any costs associated with the said collection will be added to the amount owing under the Martin Loan;

(iii) Once the Martin Loan has been paid back in full to my Estate, together with the costs associated with collecting the Martin Loan, if any, I HEREBY FURTHER DIRECT MY TRUSTEE to pay or transfer and rest and residue of my Estate equally to my children LAUREEN MALFET, PAMELA CADWELL, BILLIE LISA MARTIN, NICOLE CADWELL LEITER and SHANE CADWELL then living in equal shares per stirpes or to pay or transfer all the said residue to the survivor or survivors of them provided that if any of my said children have predeceased me and any issue of such deceased child is living at my death, such issue will take in equal shares per stirpes the share of the residue of my Estate to which such deceased child would have been entitled if living at my death

The Loan Schedule

- [21] The Martins produced a schedule (the "Loan Schedule") they allege reflects the agreement with Bill and Ruth that \$1,200 per month in nominal rent and utilities would be applied against the Loan. The Loan Schedule shows the \$1,200 being applied each month beginning October 1, 2005, with a declining balance through to May 1, 2017, when the balance is zero. The Loan schedule is not dated, but the Martins allege it was prepared in October 2005. They also allege that each page of the Loan Schedule was initialed by Bill Cadwell to signal his agreement. The initials "WC" do appear on each page however, the plaintiff alleges that the document is a forgery.
- [22] Billie Martin deposes that Bill reviewed the document with them shortly before they moved into the McClure Property. She says that her friend, Kelly Jorgensen, was also present. Ms. Jorgensen swore an affidavit in which she states that she initialed the document along with Bill. She also recalls this occurring shortly before the Martins moved to the McClure Property.
- [23] The plaintiff relies on the opinion evidence of two expert witnesses in support of his position that the Loan Schedule was forged. The first, Brenda Petty-Rushing, is an expert in document examination. Ms. Petty-Rushing was asked to compare the signature and initials of Bill Cadwell that appear on his will to the initials that are alleged to be his on the Loan Schedule. After describing her methodology for doing the comparison, Ms. Petty-Rushing opines that the initials on the Rent Schedule are not genuine and were not written by Bill Cadwell.
- [24] While Ms. Petty-Rushing also opines about issues with the font used in the typewritten Loan Schedule, the plaintiff obtained another expert report on that issue from Thomas Phinney, an expert in font identification. The essence of Mr. Phinney's opinion is that the Loan

Schedule was prepared on a computer using a font known as Calibri. Calibri is a type of font used in Microsoft word processing applications. It did not come into general use until January 2007. While some advance release systems may have had access to this font, Mr. Phinney also opined that the formatting used in the Loan Schedule was consistent with Microsoft Word 2007.

- [25] Keeping in mind that the Martins allege the Loan Schedule was prepared in October 2005, Mr. Phinney states:

The document could theoretically have been created in May to October 2005 by someone with a pre-release version of Windows, using an advanced application such as InDesign (or Illustrator), who went out of their way to change the font styling in multiple ways, which coincidentally match a version of Word which wasn't yet available at that time. For an alleged document creator who might reasonably have access to the software in question, it is highly probably not the case. For anyone who was not a user of publishing programs such as InDesign, we may eliminate the possibility that they created this document in that time frame.

[Emphasis in original.]

- [26] Scott Martin addresses Mr. Phinney's report in his affidavit:

26. Until 2008, I was the principal of C.R. Martin heating, which had up to 80 employees at times. We were one of the first HVAC businesses in the Lower Mainland to have an online presence, and I did the information technology work myself. We had a small business server designed and built for us by Raxxos.com at a cost of about \$10,000 in 2003. I had at one point considered a career in IT, and I did some coding myself and used the server to test my software code. It was important that our website e-commerce platforms would be ready to function with any new Windows software coming on to the market, so it was important to us to have the early release candidates for any potential new releases.
27. Accordingly, I did download early versions of operating systems and programs that were not commercially available, even before their "official" pre-release. This included a copy of Microsoft's Longhorn operating system (a forerunner of Vista) with an ISO creation date of April 1, 2005 This may [be] why I had a font on my computer not available to the general public in 2005.
28. The Phinney report lists the official pre-release dates of various Microsoft products, but this software was also accessible through other unofficial channels and was passed around by developers. The timeline in the Phinney report identifies the font in the repayment agreement as Calibri 0.9.8, which he says was first released [by] Microsoft on December 19, 2005 I suspect that version was available through unofficial leaks earlier than that. However, it is also possible that I prepared the repayment agreement for Bill to approve after December 19, 2005. Bill was still competent when he signed his will nine months later in September 2006 and for some time thereafter.

[27] The plaintiff submits that Scott Martin's explanation in his affidavit is inconsistent with evidence he gave on examination for discovery and is not credible.

[28] In her first affidavit, Billie Martin states:

5. I am aware that it has been suggested this document could not date from October 2005 or earlier because of the font used. I suppose it is possible that I am mixing up a discussion with my father about the loan repayment arrangement with the actual execution of the document at a later date. However, I am absolutely certain that my father did review and initial this document in my presence and in the presence of Kelly Jorgensen, and I deny absolutely any suggestion that we created this document after his death.

[29] The Martins also sought to rely on an affidavit sworn by Kelly Massey who operates a technology support company. It was her company that Scott Martin used to design the system for his company as described at para. 26 of his affidavit (see para. 26 above). I agree with the plaintiff that this affidavit purports to provide expert opinion evidence but does not comply with the requirements for such evidence as set out in Rules 11-2 and 11-6 of the Supreme Court Civil Rules. As such, I decline to consider the evidence.

[30] One other document that purports to address the Loan is a letter dated December 15, 2006 from Scott Martin addressed to Bill and Ruth Cadwell. It is titled "Regarding the loan for the suite" and it states:

As requested, we acknowledge that you loaned us \$170,000 to build a basement and add the suite to our house so that you can live there. This can be considered a receipt for that money.

Ruth's question about what would happen to the loan should we all perish this week in our drive up to my parents for Christmas? Is answered as follows.

If the house needs to be sold for any reason, you will be reimbursed fully for any outstanding money still owing. Deductions from the loan apply only for the time you spent as tenants per the repayment agreement.

[31] Scott Martin deposes that he prepared this when Bill and Ruth were going to accompany the Martins on a trip to visit Scott's parents for Christmas and Ruth was worried about what would happen to the balance owed to them under the Loan if something happened to them on the trip.

Legal Framework

[32] The plaintiff seeks judgment by way of a summary trial brought pursuant to Rule 9-7. A threshold issue on any such application is whether the matter is suitable for summary determination.

[33] In terms of suitability, the critical question facing the court is whether it can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily, by reference to

factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, the cost of taking the matter forward to a conventional trial, the course of the proceedings, and any other matters which arise for consideration: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at 211 and 215, and *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31.

- [34] Conflicts in the evidence do not necessarily mean that a matter is not suitable for a summary trial if there is other admissible evidence upon which the court can find the necessary facts: *Inspiration Management* at 216.
- [35] As I noted at the outset of these reasons, given that both Bill and Ruth Cadwell are deceased, there is considerable hearsay evidence about statements attributable to them. A useful summary of the principles governing the treatment of such evidence can be found in the decision of Mr. Justice Voith, as he then was, in *Gutierrez v. Gutierrez*, 2015 BCSC 185. That was a resulting trust case in which both parties, who were siblings, sought to rely on out-of-court statements made by their deceased father. Mr. Justice Voith discussed the court's approach to considering such statements at paras. 31-34:
- [31] Since Mr. Gutierrez is deceased, his direct evidence is no longer available to the court and so the requirement of necessity is met; *R. v. Blackman*, 2008 SCC 37 at para. 34.
- [32] In *Khelawon*, the Court addressed the need for threshold reliability and observed that "the central underlying concern is the inability to test hearsay evidence" and that a principled approach should be adopted in order to identify "those cases where this difficulty is sufficiently overcome to justify receiving the evidence"; at para. 61. The Court then identified two scenarios where this might be the case: where the truth and accuracy of the statement can still be sufficiently tested despite an inability to cross examine the declarant under oath in court, or where the circumstances are such that there is no concern about the trustworthiness of the statement; at paras. 62-63. The Court then noted:
- [92] When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not
- [33] Here, the Deceased did not leave a sworn or taped statement, nor were there early opportunities to cross examine him under oath, and so the first *Khelawon* circumstance, the presence of adequate substitutes, does not apply; *Khelawon* at para. 106. Turning to the second circumstance, inherent trustworthiness, I must consider whether there are "indicia of trustworthiness sufficient to displace the general exclusionary rule"; *Blackman* at para. 38.

[34] A number of factors can be considered when assessing the threshold reliability of a hearsay statement, including:

- 1) the presence or absence of a motive to lie (Blackman at para. 42; Khelawon at para. 67);
- 2) independent corroborative evidence that "goes to the trustworthiness of the statement" (Blackman at para. 55; Khelawon at para. 67; R. v. Couture, 2007 SCC 28 at para. 83);
- 3) timing of the statement relevant to the event, contemporaneity (Khelawon at para. 67);
- 4) the declarant's mental capacity at the time of making the statement (Khelawon at para. 107);
- 5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (Couture at para. 89; Khelawon at para. 86).

The Parties' Positions

- [36] The plaintiff submits that the evidence is clear that Bill and Ruth Cadwell always considered the Loan to be an investment to be repaid to them or their estate. While there was some discussion about converting it to a loan, there was never an agreement to that effect. The plaintiff submits that, in the circumstances, the payment by Bill and Ruth gives rise to a presumption of resulting trust, citing MacKinnon v. Donauer, 2017 BCCA 437. The plaintiff says the defendants have failed to rebut that presumption by establishing that the funds were meant as a gift or as a loan. Alternatively, the plaintiff submits that the defendants were unjustly enriched by the payment from Bill and Ruth.
- [37] The plaintiff further submits that the defendants have failed to prove an agreement on the part of Bill and Ruth to apply nominal rent against the principal of the loan. The plaintiff alleges that the defendants are relying upon a forged document in support of such an agreement.
- [38] The defendants submit that there is evidence to support an agreement between Bill and Ruth and the Martins for repayment of the loan by application of a nominal rent of \$1,200 per month. The Martins steadfastly deny that the Loan Schedule was forged.
- [39] Alternatively, the defendants submit that if there was no agreement reached for repayment of the Loan, then the Loan must properly be characterized as a demand loan in which case the limitation period for commencing an action on the Loan started to run immediately following the advance of the funds on January 31, 2004 and has expired: Kong v. Saunders, 2014 BCCA 508 at para. 20.

Discussion

- [40] For the reasons that follow, I have concluded that this matter is not suitable for determination by way of a summary trial.
- [41] The central issue in dispute is the nature of the agreement between Bill and Ruth Cadwell and the Martins. Specifically, was the \$170,000 paid by the Cadwell's to the Martins an investment in the McClure Property or a loan and what, if any, agreement was reached about repayment of those funds?
- [42] There is some documentary evidence relevant to the first question, particularly the November 9, 2004 letter prepared by Scott Martin and marked up by Ruth, as well as Bill and Ruth's wills. However, both the plaintiff and the defendants rely extensively on hearsay statements allegedly made by Bill and Ruth, as described or interpreted by the Cadwell siblings.
- [43] For example, in her affidavit, Nicole Cadwell deposes that Bill called her and said that he and Ruth were "investing in a house with the Martins together", that they "would own the house together with the Martins", that Bill was angry that the Martins had "closed the deal without them", and that the Martins "assured them that their 'investment' was safe".
- [44] Nicole Cadwell also states in her affidavit:
- [9] I can say absolutely that no form of rent or repayment in the matter expressed by the Defendants was ever discussed in my presence, or to me, or was ever mentioned. I never heard the alleged claim by the Defendants until after my mother died and was unable to defend herself.
- [45] Similar statements are made by Shane Cadwell. He states in his first affidavit:
11. The Defendants always explicitly referred to it as an "investment". They repeatedly insisted that my parents' money was safe, and insisted that they were not trying to take my parents' investment, and repeatedly stated that they would pay it back if my parents asked for it.
 12. In 2006, my parents went in to see a lawyer to protect their investment and drafted their respective wills I went to the lawyer with them to get their wills done. They brought the email with my mother's notes on it. My parents gave me copies of their wills afterwards, which I read. My parents told me that the agreement set out in the wills was not what they understood or wanted, but it was as close to the email correspondence as their lawyer could get with some of the terms of the payback still in dispute. At that time, all of the discussions involving payback indicated that the Martins wouldn't have to pay out the investment until my parents moved out, died or got a new place on their own. However, my father was sick with cancer, my mother wanted peace in the family, so she never pursued the money back or asked for a final agreement on what would happen once she moved out. She explicitly trusted the Martins, and believed the dispute was just about when she would get her money back.

13. My parents told me they still owned part of the house until they were paid out, and this was echoed by the Defendants, who still always called it an "investment", and said the basement suite was "hers".

[Emphasis in original.]

[46] Pamela Cadwell gives similar evidence. She states in her first affidavit:

3. I recall later on after they had moved in, I was visiting my parents while my father had cancer, probably in 2006. I remember my father and Mr. Martin having an argument with Scott Martin upstairs yelling down and my sister, Billie Martin, downstairs in my parents' suite. My father was yelling about how he was supposed to be on title, and how he wanted his money back. Ms. Martin yelled down "too bad, so sad, we lied". Ms. Martin later came to apologize to my father and said not to worry, that his "investment" was safe, and that they weren't going to do anything with it.
4. Throughout this period, the Martins always reassured my mother and everyone else that he "investment" was safe, and that they weren't going to do anything with it, but they always worked to discourage my mother from leaving the house and asking for the money back

[47] Billie Martin disputes many of these statements. She says in her first affidavit that she does not believe her father would have said the things described by Nicole. She then states: "Bill and Ruth had declined our offer to make them owners on title proportionate to their contribution of funds, saying they did not want the financial responsibilities of ownership".

[48] With respect to Pamela's evidence, Billie states:

20. Paragraph 3 of Pamela's affidavit is a self-serving fabrication; there was no such argument and our father never asked to be on title or to be repaid his money. Neither he nor Ruth ever expressed any desire to live anywhere else after they moved into the basement suite, even though they had four other adult children to turn to if they were not content with their arrangements with us.

[49] Billie Martin also disagrees with much of what Shane states in his affidavit, describing it as "a self-serving reconstruction of events made up by Shane years after the fact".

[50] As noted above at para. 19, Scott Martin acknowledges that he and Billie did not reach an agreement on all terms with Bill and Ruth, but he alleges there was an agreement about payment of nominal rent of \$1,200 per month.

[51] In terms of discussions about the "investment", Scott states in his affidavit:

36. After May 2017, I noticed a remarkable and aggressive transformation in the attitudes of Billie's siblings towards us, particularly the plaintiff Shane. When we confronted him, he was upset at the news that the loan had been repaid in full. He suggested to Billie and I that the loan was still owing, or even that his mother was an owner of the house. He was not happy when we explained this was not the case. I do not have a high opinion of Billie's

siblings, all of whom have addiction and substance abuse issues and who appear to have been counting on an inheritance to solve their various financial problems.

37. At about this same time we began to hear Ruth enquiring about her "investment" in our house. It was apparent to us she was parroting enquires from the plaintiff or from Billie's siblings. We would gently remind Ruth that the monies were a loan, and that the loan had been repaid, but we would also reassure her she had a home with us for life. Ruth would seem satisfied, but after another visit (usually from the plaintiff or Nicole) the cycle would start over again.
- [52] These excerpts from the evidence illustrate the problem I alluded to above in para. 5, namely that the affidavits relied on by both the plaintiff and the defendants are rife with self-serving opinion and argument.
- [53] Understanding what Bill and Ruth's intentions were is an important element in determining the proper characterization of the Loan. Again, due to the fact that they are both deceased, hearsay evidence about statements attributed to them is inevitable. As discussed by Voith J. in Gutierrez, while the necessity element of the test for admitting hearsay evidence is met in the circumstances, the Court must still be satisfied as to the reliability of the evidence.
- [54] Here, reliability turns in large measure on the credibility of the Cadwell siblings, as well as Scott Martin, who give starkly divergent versions of what Bill and Ruth are alleged to have said about the Loan. However, it is not possible to meaningfully engage in that analysis on the evidence in the record given the numerous problems with the evidence I have identified.
- [55] The second key issue of whether there was an agreement reached for the Martins to repay the Loan through the application of nominal rent raises similar concerns. The evidence of the parties is in direct conflict on this point.
- [56] The plaintiff submits that the conflict can be resolved by reference to the expert opinion evidence of Ms. Petty-Rushing and Mr. Phinney, which together establish that the Loan Schedule is a forgery. The plaintiff says that it was open to the defendants to obtain their own expert opinion evidence to the contrary, but they did not do so. As such, the opinions of Ms. Petty-Rushing and Mr. Phinney stand as uncontradicted.
- [57] The difficulty with the plaintiff's position is that it requires the Court to make a finding that Scott Martin created a false document and that either he or Billie Martin forged Bill's initials on that document. It also requires a finding that the Martins lied to the Court by filing false affidavits. They have denied both allegations and have submitted evidence from Ms. Jorgensen, an apparently independent witness, who deposes that she witnessed Bill Cadwell initial the Loan Schedule.
- [58] The expert opinion evidence supports the plaintiff's position; however, neither the credentials of the experts nor their opinions have been tested by cross-examination. In the circumstances, I am not prepared simply to accept the opinion evidence as determinative.

- [59] Given the evidentiary issues that I have identified above regarding the proper characterization of the Loan and the veracity of the Loan Schedule, it is my view that the plaintiff's claim cannot be determined on this summary trial and requires a conventional trial. Even if I were able to find the facts necessary to determine the issues, it would not, in my view, be just to do so. In particular, I am reluctant to make findings of fraud or perjury on a summary trial: see, e.g., *R. v. Harris*, 2003 BCSC 1257 at paras. 29-31. This is not to say that such findings can never be made on a summary trial; rather it is not appropriate to do so here given the evidentiary record.
- [60] I am similarly unable to find for the defendants based on their argument in the alternative that the Loan was a demand loan in respect of which the limitation period has expired. For the reasons set out above, the proper characterization of the Loan is not something that can be determined summarily. This defence, along with the plaintiff's claims, requires a trial.
- [61] Before closing, I would note that the strongest factor favouring a determination by summary trial is the principle of proportionality. This principle dates back to the early days of summary trials, as is reflected in *Inspiration Management* and, more recently, in *Hryniak v. Mauldin*, 2014 SCC 7. It is also enshrined as a fundamental objective of the Supreme Court Civil Rules (Rule 1-3).
- [62] The amount of money at issue in this action--\$170,000--is not an insignificant amount. However, it is also an amount for which it may be difficult to justify a full trial. The ultimate return to either the plaintiff, on behalf of Ruth's estate, or to the Martins, will be diminished by the cost of continuing to litigate. Nonetheless, this concern alone is not sufficient to support judgment by way of summary trial here given the numerous conflicts in the evidence and the serious allegations of fraud levelled against the Martins.
- [63] I would add that, whatever the intention of Bill and Ruth in advancing the Loan, it is doubtful that they would look kindly upon the residue of their estate being dissipated through acrimonious litigation involving their children.

Conclusion

- [64] The plaintiff's application is dismissed. Costs will be in the cause.

"Skolrood J."

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