

CANADA / JUDGMENT

Choung v. Heo

2018 BCSC 2086

COURT

Supreme Court of British Columbia

DECIDED

26 November 2018

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2018 BCSC 2086 Choung v. Heo IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Choung v. Heo, 2018 BCSC 2086 Date: 20181126 Docket: S151284 Registry: Vancouver Between: Hong Geun Choung also known as Harry Choung, Jin Bang, 1013256 B.C. Ltd. and 692886 Enterprises Ltd. Plaintiffs And Kang Nam Heo also known as Kevin Heo, Joon Heo, Eun Heo also known as Christina Heo and also known as Christina Eun Heo, Yoon Seok Heo, Shannon Motel Ltd., N.R.S. Westburn Realty Ltd. doing business as Coldwell Banker Westburn Realty and Chung Nam John also known as Chung-Nam John and also known as Nam John Defendants

- and - Docket: S151601 Registry: Vancouver Between: Kang Nam Heo, Eun Heo, Joon Heo and Yoon Seok Heo Plaintiffs And 1013256 B.C. Ltd., 692886 Enterprises Ltd., Hong Geun Choung and Jin Hee Bang Defendants Before: The Honourable Mr. Justice Myers Ruling on Costs Counsel for the Plaintiffs in Action No. S151284 and the Defendants in Action No. S151601: Jeffrey P. Scouten Counsel for the Defendants In Action No. S151284 and the Plaintiffs in Action No. S151601: Krista M. Johanson Place and Dates of Hearing: Vancouver, B.C. October 18, 2018 Written submissions: October 28 and November 1, 2018 Place and Date of Judgment: Vancouver, B.C. November 26, 2018

- [1] This is a ruling on costs following a trial judgment, which is indexed as 2018 BCSC 1167. For ease of reference I will refer to the individual parties' names only.
- [2] Mr. Heo owned and operated the Shannon Motel in Fort Nelson, British Columbia. Mr. Choung purchased the motel from Mr. Heo in September 2014, for \$2.2 million, financing the purchase with a \$1.3 million mortgage from Mr. Heo at 5%. For the first five years, the mortgage required only interest payments. Mr. Choung made no payments.
- [3] Mr. Heo brought foreclosure proceedings. Mr. Choung then launched his action seeking rescission of the contract, claiming that Mr. Heo fraudulently misrepresented that the motel generated undisclosed cash income. On Mr. Choung's application the foreclosure application was moved to the trial list and the actions were ordered to be heard at the same time.

- [4] I concluded that Mr. Heo knowingly misrepresented that there were unrecorded cash sales, but that Mr. Choung did not rely on the representations. I therefore dismissed Mr. Choung's action for fraud and allowed Mr. Heo's foreclosure action.
- [5] Mr. Heo asks for special costs based on the mortgage document. Alternatively, he asks for double costs pursuant to two offers to settle. Mr. Choung says that I should not exercise my discretion to allow special costs and that the ordinary costs of the proceedings be apportioned because he was successful in proving the misrepresentation.
- [6] I will deal first with the issue of apportionment of costs. Reliance is a constituent element of fraud. The Court of Appeal has made it clear that components of a case of action are not to be treated as divisible elements for the purposes of awarding costs. Rather, the issue is whether the cause of action has been proved: *Briante v. Vancouver Island Health Authority*, 2017 BCCA 148 at para. 205 and following.
- [7] Turning to special costs, the mortgage contained the following clause: 11.3 The net proceeds of any sale or lease, or both, under the provisions of this Mortgage, will be applied, subject to the claims of all creditors (if any) ranking in priority to this Mortgage, as follows:
- (a) first, in payment of all costs, charges, and expenses of and incidental to the appointment of the Receiver and the exercise by it of all of any of the powers enumerated in this mortgage, including the reasonable remuneration of the Receiver and all amounts properly payable to it;
 - (b) second, in payment to the Lender of all costs and charges owing under this Mortgage, and Interest and arrears of Interest remaining unpaid under this Mortgage; These expenses and costs include the Lender's cost of taking and keeping possession of the Lands, the cost of the time and services of the Lender or the Lender's employees for so doing, the Lender's legal fees and disbursements on a solicitor and own client basis, unless a court allows legal fees and disbursements to be paid on a different basis, and all other costs and expenses incurred by the Lender to protect the Lender's interest under this Mortgage. These expenses and costs will be added to the Principal Amount and will bear interest at the Interest Rate until fully paid. [Emphasis added.]
- [8] The recognition in the clause that the court can order costs on a different basis than solicitor and own client costs is no doubt meant to parallel the provision to the same effect in s. 18.2 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which came into force April 14, 1986. I note that although the mortgage term specifies solicitor and own client costs, Mr. Heo is claiming special costs, which are normally less.
- [9] The courts have looked at a number of factors to determine whether to enforce a cost provision in a mortgage. In *Valley Mortgage and Investment Co. v. The Lakers Golf Club Ltd.*, 2005 BCCA 28, the court stated:

- [5] Factors to consider in whether an order for special costs should be granted include any delay in the proceedings caused by the mortgagor, the mortgagor's equity in the subject property, and the inequity in permitting the mortgagor to have the benefit of contractual interest rates while the mortgage is in default while not bearing the burden of contractual costs: see *Saskatchewan Trust Co. v. Kalanj* (1989), 39 B.C.L.R. (2d) 385 (B.C.S.C.).
- [10] In *Security Pac. Bank Can. v. Crippen Engr. Ltd.*, 1987 CanLII 2486 (BC SC) at para. 2, MacDonald J. said that the complexity of the proceedings was another relevant factor and in awarding solicitor and client costs noted that the proceeding was a "far cry from the usual foreclosure of a single dwelling". He also noted that the provision of the Law and Equity Act was directed at the inequity of mortgage terms being dictated. He did not say dictated by whom, but he no doubt meant to refer to large financial institutions or a situation where there is unequal bargaining power.
- [11] In my view this is an appropriate case for special costs. The property was commercial and the transaction was for the sale of a business. The mortgage terms were negotiated by intelligent and educated people who were not inexperienced in business. Lawyers were involved. There was no inequality of bargaining power.
- [12] While there is no evidence as to the whether the mortgage rate was advantageous, as I have said, it was an interest-only mortgage for five years. Pending the determination of this action, Mr. Choung remained in possession of and operated the motel.
- [13] I do not think the foreclosure and fraud actions should be considered separately. Essentially, the fraud action was the answer to the foreclosure action; in fact, the allegation of fraud was made in the response to the foreclosure petition. Mr. Choung asked for the petition to be referred to the trial list and to have the two actions tried at the same time.
- [14] Lastly, although not argued by Mr. Choung, I have considered whether the finding that Mr. Heo knowingly made the misrepresentation should disentitle him to special costs (a different consideration than whether ordinary costs ought to be awarded, as set out above). I conclude it should not. While there was dishonesty in Mr. Heo's misrepresentation, Mr. Choung was equally dishonest in his allegation through to the end of trial that he relied on it.
- [15] Having ordered special costs, it is not necessary for me to deal with the issue of double costs for the proceedings after the offers to settle were served. "E.M. MYERS, J."

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