

CANADA / JUDGMENT

Daum v. Borsuk

2020 BCSC 2013

COURT

Supreme Court of British Columbia

DECIDED

18 December 2020

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2020 BCSC 2013 Daum v. Borsuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Daum v. Borsuk,

2020 BCSC 2013

Date: 20201218

Docket: S123372

Registry: Kelowna

Between:

Tyrone Harold Daum

Plaintiff

And

Glenna Borsuk, Golden Phoenix Real Estate Services Inc.,

Sandra Mary Lopez also known as Sandra Lopez-Savard,

Team 3000 Realty Ltd., Daniel Kaufman, David Heubner, Debra Van Beers,

The Notary Group, West Kelowna, Lina Caisley, Tim Janzen also known as Timothy Warren Janzen, 419194 B.C. Ltd., Janzen & Caisley Notary Corp. doing business as and under the trade name The Notary Group, West Kelowna, and Real Estate Council of British Columbia

Defendants

Ivano DeCotiis, Glenna Borsuk, Golden Phoenix Real Estate Services Inc.,

Sandra Mary Lopez also known as Sandra Lopez-Savard, Team 3000

Realty Ltd., Daniel Kaufman, David Heubner, Debra Van Beers, The Notary Group, West Kelowna, Lina Caisley, Tim Janzen also known as Timothy Warren Janzen, 419194 B.C. Ltd., Janzen & Caisley Notary Corp. doing business as and under the trade name The Notary Group, West Kelowna

Third Parties

Before: The Honourable Mr. Justice G.P. Weatherill

(Via Teleconference)

Reasons for Judgment

The Plaintiff on his own behalf:

T.H. Daum

Counsel for the Defendants and Third Party, Glenna Borsuk, Golden Phoenix Real Estate Services Inc., Sandra Lopez, Team 3000 Realty Ltd. and Ivano DeCotiis:

D. Rondeau

Counsel for the Defendants, Debra Van Beers, The Notary Group, West Kelowna, Caisley, Lina Caisley, Tim Janzen, 419194 B.C. Ltd., and Janzen & Caisley Notary Corp.

Q. Duong

Counsel for the Defendants,

Daniel Kaufman and David Heubner:

M. Hansen

Counsel for the Defendant,

Real Estate Council of British Columbia:

A. Murray, Q.C.

Place and Date of Trial/Hearing:

Kelowna, B.C.

October 16, December 4, 2020

Place and Date of Judgment:

Kelowna, B.C.

December 18, 2020

Introduction

- [1] The defendants and third parties apply to have this action ("the Action") summarily dismissed against them on three alternative bases:
- a) The Action is an abuse of process and should be dismissed in accordance with Rule 9-5(1)(d) of the Supreme Court Civil Rules;
 - b) The Action was commenced in breach of the terms of a settlement that was reached between the plaintiff and third-party, Ivano DeCotiis ("Mr. DeCotiis"), in a previous action and should be summarily dismissed in accordance with Rule 9-6; and alternatively,
 - c) The Action discloses no reasonable cause of action against them and should be dismissed in accordance with Rule 9-5(1)(a),
- (collectively the "Applications").
- [2] The defendants also seek an order of special costs against the plaintiff.

The Action

- [3] The plaintiff commenced the Action on April 17, 2019. It relates to a 26.5-acre property near Beaverdell, British Columbia (the "Property") that Mr. DeCotiis sold to the defendants Daniel Kaufman and David Heubner ("Purchasers") on April 18, 2017. Among other remedies, the plaintiff seeks an order setting aside the sale of the Property as being fraudulent. He claims that, despite the Property being registered in Mr. DeCotiis' name at the time, all parties involved in the sale, including the realtors, notaries and the Purchasers, either knew or should have known that he was the Property's beneficial owner and knew or should have known Mr. DeCotiis had no authority to sell it.
- [4] The plaintiff also sues the Real Estate Council of British Columbia ("RECBC") in negligence for what he claims was its failure to monitor the realtors and protect him from the alleged fraud.

The Defendants and Third Parties

- [5] For convenience, I will place the defendants into four categories:
- a) the Realtors:
 - i. Ms. Glenna Borsuk ("Ms. Borsuk") was the listing sales person who was associated with Golden Phoenix Real Estate Services Inc. ("Golden Phoenix") until April 10, 2017, when its brokerage licence expired. Ms. Borsuk listed the Property for sale on August 2, 2016. Ms. Borsuk became associated with Team 3000 on May 27, 2017, where she is currently employed as a realtor;
 - ii. Ms. Sandra Lopez-Savard ("Ms. Lopez-Savard") was a director of Golden Phoenix until September 14, 2016, when her association ceased in any capacity,

("Realtors").

b) the Purchasers:

The Purchasers, arms-length third parties, purchased the Property by way of a contract of purchase and sale dated December 16, 2016 ("First Purchase Contract").

c) the Notaries:

Mr. Janzen, 419194 B.C. Ltd., and Janzen & Caisley Notary Corp., doing business as and under the trade name The Notary Group, West Kelowna, were the notaries retained by the Purchasers to transfer the Property into their names ("Notaries").

d) The RECBC is a regulatory agency established pursuant to the Real Estate Services Act, S.B.C. 2004, c. 42 [RESA]. Its mandate is to protect the public interest by enforcing the licensing and licensee conduct requirements of RESA. It is responsible for licencing individuals and brokerages engaged in real estate sales, as well as rental and strata property management. The RECBC also enforces entry qualifications, investigates complaints against licensees, and imposes disciplinary sanctions under RESA.

[6] Mr. DeCotiis has been added as a third party to the Action by the Realtors, Purchasers, Notaries, and RECBC, who claim contribution and indemnity from him.

Background and History

[7] The plaintiff and Mr. DeCotiis have a long history as business acquaintances, partners, and friends. For the purposes of this case, their history begins when they became minority shareholders of a company known as Petromin Resources Ltd. ("Petromin"), a publicly traded junior resource company. They jointly initiated various lawsuits against Petromin seeking several forms of relief ("Petromin Litigation").

[8] In October 2015, the Property (which was then registered in the name of a third party who the plaintiff says held it in trust for him) was transferred to Mr. DeCotiis so that Mr. DeCotiis could borrow money to be secured by a mortgage on the Property ("First Mortgage"). The proceeds of the First Mortgage were used to finance the Petromin Litigation, which was the subject of a number of decisions of this Court including those reported at 2016 BCSC 364, 2016 BCSC 1408, and 2017 BCSC 514. In the end, none of the lawsuits were successful and the Petromin Litigation ended with significant costs being awarded against both the plaintiff and Mr. DeCotiis.

[9] The plaintiff and Mr. DeCotiis jointly decided to sell the Property. On August 2, 2016, Mr. DeCotiis signed an agreement listing it for sale for \$349,900. Golden Phoenix was the listing broker and Ms. Borsuk was the listing agent. One of the terms of the listing agreement was that Mr. DeCotiis had the authority to sell the Property and enter into the listing agreement. Another term was that he would disclose to Ms. Borsuk all third party claims and interests in the Property that he knew about. Although the plaintiff infers that the Property was listed

behind his back, the evidence is clear that he was intimately involved in the transaction and was included in relevant email communications between Ms. Borsuk and Mr. DeCotiis.

- [10] On December 12, 2016, the First Purchase Contract was entered into with the Purchasers agreeing to purchase the Property for \$265,000 with a vendor mortgage of \$185,000 ("Take Back Mortgage") for two years. The sale was set to close on February 15, 2017 ("First Closing Date"). It is evident that the Purchaser initially agreed to this sale.
- [11] At some point in January 2017, there was a breakdown in the relationship between the plaintiff and Mr. DeCotiis. The breakdown was triggered by Mr. DeCotiis' realization that the structure of the First Purchase Contract would not permit him to pass clear title to the Purchasers. With the amount of the Take Back Mortgage, commissions, and closing costs, there would be insufficient money left to pay out the First Mortgage. With Ms. Borsuk's assistance, he sought to renegotiate the terms of the First Purchase Contract to allow the closing to occur.
- [12] The plaintiff did not agree. The plaintiff sued Mr. DeCotiis on February 3, 2017, in an action filed in the Vancouver Registry under number S171057 claiming, among other things, that Mr. DeCotiis held the Property in trust for him ("Prior Litigation"). The plaintiff sent a copy of the filed notice of civil claim in the Prior Litigation to Ms. Borsuk, Golden Phoenix, and the Purchasers prior to the First Closing Date, putting them on notice of his claim to the Property. The plaintiff did not file a certificate of pending litigation ("CPL") on the Property's title.
- [13] Also on February 3, 2017, the Purchasers and Mr. DeCotiis signed an addendum to the First Purchase Contract extending the First Closing Date to March 31, 2017 ("Second Closing Date"). This was required to allow Mr. DeCotiis time to sort out how he could deliver clear title to the Purchasers, and if necessary, renegotiate the First Purchase Contract.
- [14] Despite the Prior Litigation, Mr. DeCotiis continued to insist that he had complete authority to renegotiate the terms of the First Purchase Contract and sell the Property, and that the plaintiff's suggestion to the contrary was false. The Realtors, Purchasers, and Notaries relied on Mr. DeCotiis' assurances and proceeded accordingly.
- [15] On March 29, 2017, a further addendum to the First Purchase Contract was entered into between the Purchasers and Mr. DeCotiis, reducing the purchase price to \$245,000 from \$265,000 and the Take Back Mortgage from \$185,000 to \$135,000 ("Final Purchase Contract"). The Second Closing date was extended to April 18, 2017 ("Final Closing Date"). The net cash to be received on the Final Closing Date would barely allow for the First Mortgage to be paid out, commissions to be paid, and title cleared.
- [16] Mr. DeCotiis retained Mr. Gerald Mazzei to represent him on the closing of the Final Purchase Contract. On April 13, 2017, five days prior to the Final Closing Date, and in order to satisfy Mr. Mazzei that he was indeed the owner of the Property and had authority to sell it, Mr. DeCotiis swore a statutory declaration stating the following:

- (1) I am the legal and beneficial owner of the Lands;
 - (2) I acquired the Lands from Peter Allan Proske and I did so for valuable consideration;
 - (3) I am the sole owner of the Lands and I have the lawful authority to sell the Lands without the consent of any third party.
- [17] The "Lands" referred to in the statutory declaration is the Property. To satisfy the Purchasers, Mr. Mazzei also had Mr. DeCotiis sign and provide the Purchasers with an indemnity agreement signed the same day agreeing to "indemnify, defend, protect" and save the Purchasers harmless from any "claim, action, liability, loss, damage or suit" arising from the Prior Litigation ("Indemnity Agreement").
- [18] Based on these assurances, the Final Purchase Contract closed as agreed on the Final Closing Date and the Purchasers took title to the Property. After paying the real estate commission, First Mortgage, legal fees, and other costs, Mr. DeCotiis received \$123.33 of the sale proceeds.
- [19] The plaintiff proceeded with the Prior Litigation and continued to maintain that the Property belonged to him and that he wanted it back. Mr. DeCotiis continued to maintain that he was the legal and beneficial owner of the Property, that he did not hold it in trust for the Plaintiff and that he had authority to sell it.
- [20] The Prior Litigation lasted for approximately one year. It was a hard-fought battle. In total, there were 12 separate applications brought and 47 affidavits filed. In February 2018, Mr. DeCotiis applied to have the action dismissed as an abuse of process. The application was set for two days and came on before Justice Baird in Vancouver. During discussions between the plaintiff and the Court, the plaintiff confirmed that what he really wanted was money, not the Property. He agreed with Justice Baird's suggestion that the parties should attempt to resolve the dispute.
- [21] During the second day of the hearing, a settlement was reached ("Settlement"). The Settlement is discussed in the court transcript and is documented in various documents including a consent dismissal order dated February 14, 2018 ("Consent Dismissal Order"), which required the parties to take certain additional steps to conclude the Settlement.
- [22] One of the Consent Dismissal Order's terms was that the plaintiff would execute a trust agreement confirming Mr. DeCotiis had no beneficial interest in the Property. It is evident that this trust agreement was required by Mr. DeCotiis for income tax purposes. Specifically, the Consent Dismissal Order provided:
3. the plaintiff, Tyrone Daum, will execute a trust agreement confirming that the defendant, Ivano DeCotiis, had no beneficial interest in the Beaverdell property as described ;

4. the defendant, Ivano DeCotiis will remain as the mortgagee under the vendor take back mortgage dated April 12, 2017, as between Ivano DeCotiis, as mortgagor, and David Heubner and Daniel Kaufman, as borrowers, until such time that the aggregate value of the periodic payments of \$710.13 and the amounts paid under paragraph 2 above, along with any funds paid by the plaintiff, Tyrone Daum, to the defendant, Ivano DeCotiis are equal to the total of \$15,000;
 5. The plaintiff, Tyrone Daum, will execute an indemnification agreement that indemnifies the defendant, Ivano DeCotiis, out of the funds received from the vendor take back mortgage for any amounts payable to Canada Revenue Agency arising from the April 18, 2017 sale of the Beaverdell property;
 6. after the defendant, Ivano DeCotiis, has received a total of \$15,000.00 under paragraphs 2 & 4 above, and has been indemnified as required by paragraph 5 above, DeCotiis will transfer the vendor take back mortgage described in paragraph 4 above at Daum's direction;
 7. the parties will execute a mutual release of any and all claims that they have or had against one another;
 8. the plaintiff, Tyrone Daum's, amended notice of civil claim is dismissed with each party bearing their own costs. . .
- [23] In sum, the Settlement was that the Take Back Mortgage of approximately \$135,000, would be paid firstly to Mr. DeCotiis until \$15,000 was received and then would be transferred to the plaintiff, who would receive the balance. The Prior Litigation (and Mr. DeCotiis' counterclaim wherein he claimed \$85,057.01 respecting the Petromin Litigation related expenses, damages for unjust enrichment, misrepresentation, defamation, and other relief) would be dismissed and mutual releases would be signed. The mechanics were that the Purchasers would continue to make the agreed upon monthly mortgage payments to Mr. DeCotiis and once they had paid him a total of \$15,000, the Take Back Mortgage would be transferred to the plaintiff.
- [24] As part of the Settlement the parties entered into a mutual release on February 16, 2018 ("Release"), that provided in part:

Tyrone Daum hereby agrees to release and forever discharge Ivano DeCotiis of and from any and all actions, causes of action, claims and demands, suits, debts, duties, sums of money whatsoever and wheresoever whether at law or in equity and whether known or unknown, suspected or unsuspected, which he has or hereafter may have, including in relation to those matters which are the subject of or which might have been raised in proceeding number 171057 Vancouver Registry in the Supreme Court of British Columbia between Tyrone Daum as plaintiff and Ivano DeCotiis as defendant and it is agreed that for the consideration herein, the releaser and releasee each agree not to take or proceed with any claim or take or proceed with any proceedings against any other person or corporation who might claim contribution or indemnity or any other remedy whatsoever from the persons or corporations released herein.

[Emphasis added]

[25] The Indemnity Agreement that was contemplated by paragraph 5 of the Consent Dismissal Order was signed on October 5, 2018. Also signed on October 5, 2018 (but back dated to October 9, 2015), was a form of trust agreement signed by both the plaintiff and Mr. DeCotiis, wherein Mr. DeCotiis confirmed that he held the Property in trust for the plaintiff ("Trust Agreement"). The evidence does not explain why the Trust Agreement was entered into nor the circumstances surrounding its preparation. It goes further than what was apparently contemplated by paragraph 3 of the Consent Dismissal Order. It is the Trust Agreement upon which the plaintiff now relies to ground the Action because he says it confirms what he maintained all along, that Mr. DeCotiis had no authority to sell the Property.

The Applications

- [26] The plaintiff took no steps to prosecute the Action until September 2020, when he delivered a list of documents and demanded production of various documents from the defendants.
- [27] In response, the Realtors and Mr. DeCotiis jointly filed a notice of application on September 24, 2020, seeking dismissal of the claim against them ("Realtor/DeCotiis Application").
- [28] On September 30, 2020, the RECBC joined in with an application of its own ("RECBC Application") seeking an order that the claim against it be struck on similar grounds as the Realtor/DeCotiis Application and further because it did not owe the plaintiff a duty of care, the claim against it should be struck under Rule 9-5.
- [29] The Purchasers and Notaries, while not filing applications of their own, support the Realtor/DeCotiis Application and seek orders that the Action be struck against them for the same reasons.
- [30] The thrust of the Applications is that the Action is an abuse of process--a flagrant breach of the Settlement and the terms of the Release. The applicants note that the Action pleads essentially identical facts as were plead in the Prior Litigation. Despite not being parties to the Settlement or Release, they hold them up as a shield to the Action. They say that the plaintiff is simply attempting to bypass their terms in an effort to extract additional compensation from them on an issue that has been settled in an action that the plaintiff agreed he would not commence and is barred from pursuing.
- [31] The Applications were heard together on October 16, 2020 and December 4, 2020, with all parties' counsel and the plaintiff appearing by telephone. The plaintiff, is self-represented and presently resides in the Philippines. He is unable to return to Canada because of the COVID-19 epidemic and appeared via Skype telephone.

Application for adjournment

- [32] At the outset of the hearing of the Applications on October 16, 2020, the plaintiff applied to have them adjourned ("Adjournment Application") citing various technical breaches of the Supreme Court Rules, including that the Applications exceed 10 pages contrary to Rule 8-1(4) and failure on the part of the defendants to provide him with a list of documents as required by the Rules. Additionally, he pointed out that Mr. DeCotiis had not filed a response to the third party notices against him. He asserted that the defendants were attempting to "sandbag" him, were "playing games", and were engaged in a "brainwashing program".
- [33] After hearing the plaintiff's submissions, I dismissed the Adjournment Application because I was not satisfied it had any merit. The plaintiff cannot argue that he has been prejudiced. The Applications are based on the pleadings, the Settlement, the Consent Dismissal Order, the Release, the Indemnity Agreement, and evidence with which he is quite familiar. Indeed, nothing in the material that was before me would be surprising to the plaintiff.
- [34] The issue the plaintiff seeks to litigate in the Action was the subject matter of the Prior Litigation and the plaintiff is well aware of the factual background and the relevant documents. He has never requested that any of the defendants provide him with a list of documents and, until very recently, did not request any specific documents. Notwithstanding his dilatoriness, he has been provided with all documents he has requested in any event.

Discussion

- [35] As best as I can determine, the plaintiff's position is that the Settlement and Release involved he and Mr. DeCotiis only. He says that the Prior Litigation had nothing to do with the Realtors, Notaries, Purchasers, or RECBC, and he is entitled to pursue separate causes of action against them. He says that the Trust Agreement confirms that he was the Property's beneficial owner all along.
- [36] His complaint against the Realtors, Notaries, and Purchasers is that they fraudulently or negligently participated in the sale of the Property despite knowing before the Final Closing Date that Mr. DeCotiis held it in trust for him and despite knowing he did not agree to the terms of the Final Purchase Contract. He points to emails and other evidence that confirms he was involved with Ms. Borsuk throughout, provided her with details of the Property, answered questions from prospective purchasers, and discussed vendor financing with her. He offers this evidence as proof that Ms. Borsuk knew he was the owner of the Property. Other than Mr. DeCotiis' assurance that he had the authority to sell the Property, he says that none of these defendants took any steps to determine where Mr. DeCotiis' authority came from. He asserts that these defendants willingly and knowingly participated in Mr. DeCotiis' fraud.

- [37] In response, Ms. Borsuk states that she communicated from time-to-time with the plaintiff on Mr. DeCotiis' instructions and with his consent. She understood from Mr. DeCotiis that the plaintiff was a friend and business associate of his, and, as such, was assisting with the paperwork. She also understood that the plaintiff was a prior owner of the Property and had knowledge of its history that would be useful to potential buyers.
- [38] During the course of the hearing before Justice Baird in the Prior Litigation, the plaintiff admitted that he agreed to the sale of the Property to the Purchasers but asserted that the price he agreed to sell it at was \$265,000, not \$245,000. It is noteworthy, that during that hearing, the plaintiff commented that his claim was not about the Property so much as it was about the money and a settlement would wipe the slate clean and everybody could get on with their respective lives. During that hearing, there were also discussions about adding the Realtors and Purchasers to the Prior Litigation if it did not settle.
- [39] The plaintiff asserts that because the Settlement and Release only involved Mr. DeCotiis, he cannot be "sandbagged" into being unable to sue anyone else. To the extent the Release prevents him from doing so, he wants it set aside.
- [40] Respecting his claim against the RECBC, he says that it was negligent by failing to administer RESA and that it is participating in a continuing fraud against him because it adopts the Realtors', Notaries', and Purchasers' positions in the Applications. He says that the RECBC must remain as a defendant at least until it produces a list of documents.
- [41] During submissions on October 16, 2020, the plaintiff acknowledged that the Action should be dismissed against Ms. Lopez-Savard and indeed, sometime before the hearing resumed on December 4, 2020, he filed a Notice of Discontinuance against her. But, he maintains, the Action should continue against the other defendants. He says that the third-party proceedings the defendants have filed against Mr. DeCotiis should not affect the Action despite the wording of the Release.

The Realtor/DeCotiis Application

- [42] Three reasons are advanced to dismiss the Action:
- a) it replicates claims made by the plaintiff in the Prior Litigation which was the subject matter of the Settlement, and thus is a flagrant breach of the Settlement and an abuse of process;
 - b) it is inconsistent with the terms of the Consent Dismissal Order which in part records the Settlement; and
 - c) it violates the terms of the Release by making claims against parties released by the plaintiff as part of the Settlement.
- [43] The Realtor/DeCotiis Application relies on Rule 9-5(1) (striking pleadings), Rule 9-6 (summary judgment), s. 10 of the Law and Equity Act, R.S.B.C 1996, c. 253, and the inherent jurisdiction of this Court to control its own process.

- [44] Alternatively, Mr. DeCotiis seeks a permanent stay of the Action pursuant to s. 8 of the Law and Equity Act on the basis that it is in breach of the terms of the Release.
- [45] The test for striking a claim under subrule 9-5(1)(a) is whether it is plain and obvious, assuming the facts pleaded are true, that the claim has no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. Although the material facts as plead in the notice of civil claim are assumed to be true for the purposes of an application to strike a claim, allegations based on assumptions and speculation must be subjected to a skeptical analysis in order to determine their true character: *Singh v. Nielsen*, 2016 BCSC 2420 at para. 6; *Young v. Borzoni*, 2007 BCCA 16 at paras. 30-31; *Kindylides v. Does*, 2020 BCCA 330 at paras. 29-36.
- [46] Rule 9-6 permits a defendant to apply to have an action dismissed on the basis that there is no triable issue. Rule 9-6(5)(a) and (d) are relevant and read:
- (5) On hearing an application , the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim. . . must. . . dismiss the claim accordingly,
- ...
- (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.
- [47] Section 10 of the Law and Equity Act provides:
- 10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.
- [48] Quite apart from the above, Rule 9-5(1)(d) permits the court to strike a claim, in whole or in part if it is an abuse of process. Abuse of process is a flexible doctrine by which the court exercises its inherent power "to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership*, 2020 BCSC 1345 at para. 19, citing *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 40. The doctrine engages the court's inherent power to prevent the misuse of its procedures: *Toronto v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37 [C.U.P.E.]; *Vanmills Establishment v. Coles*, [1992] B.C.J. No. 881 (S.C.) [Vanmills]; *Ladner v. Ladner*, 2004 BCCA 366. The doctrine also applies to prevent litigation from proceeding which would indirectly undermine a prior court order, including a consent order: *Daum v. Gorrell*, 2018 BCSC 225; *C.U.P.E.; Vanmills*.

- [49] The plaintiff's submissions were heavily focussed on the Consent Dismissal Order and why the doctrine of res judicata does not apply in this case. He referred me to *BriDawn Holdings Inc. v. Wabana*, 2019 NLSC 106, *Briman Management Ltd. v. Solehdin*, 2019 BCSC 1971, and *Dhillon v. Dhillon*, 2006 BCCA 524, as examples of where the doctrine was held not to apply in what he says were similar situations. He argued that res judicata does not apply to either the Consent Dismissal Order or the Action on the basis that there has been no judicial determination of any issues between himself and the defendants: *Town of Grandview v. Doering*, [1976] 2 S.C.R. 621 at 635-638.
- [50] Essentially, the plaintiff's case is that the Realtors, Notaries, and Purchasers should have known better than to participate in the process involving the sale of the Property in the face of the allegations set out in the notice of civil claim in the Prior Litigation that Mr. DeCotiis held the Property in trust for the plaintiff. He points in particular to the terms of the after-the-fact Trust Agreement as proof that, contrary to Mr. DeCotiis' position throughout, the Property was held in trust for the plaintiff and accordingly the Settlement, Consent Dismissal Order, and Release were all obtained by fraud. He says, in effect, that by Mr. DeCotiis signing the Trust Agreement he has come clean and now acknowledges the fraud.
- [51] In my view, the plaintiff's submissions miss the point. The Applications are not about res judicata; they are about whether the plaintiff is attempting to abuse the Court's process by suing the Realtors, Notaries, Purchasers, and RECBC on an issue between himself and Mr. DeCotiis that has been settled and in circumstances where he agreed he would not do so. During breaks in the hearing before Justice Baird, private negotiations took place that resulted in the Settlement. The evidence before me does not disclose to what extent compromises were made in arriving at it. The Trust Agreement was signed by both the plaintiff and Mr. DeCotiis some seven and a half months after the Settlement. Why it took that long or why both the plaintiff and Mr. DeCotiis signed it (as opposed to just the plaintiff) is not clear. But what is clear is that it was part of the negotiated Settlement between them.
- [52] The fact that the Consent Dismissal Order specifically required the plaintiff to enter into a trust agreement, which I accept was for income tax purposes, undercuts the plaintiff's arguments. The plaintiff cannot now suggest that the terms of the Trust Agreement confirm a fraud was perpetrated and that the Settlement, Consent Dismissal Order, and Release ought now to be set aside.
- [53] To repeat, the core issue in the Prior Litigation was the plaintiff's claim that Mr. DeCotiis held the Property in trust for him and had no authority to sell it. The plaintiff sought to have the Property returned to him. That issue was hotly contested and was ultimately settled. Placed in context, the Settlement put an end to the plaintiff's claim respecting the Property, who owned it, who had authority to sell it, Mr. DeCotiis' counterclaim, and the entire matter was resolved once and for all. Adding to the finality of the party's intentions that the matter was put to bed forever, the plaintiff agreed he would not make any further claims respecting the Property if to do so might result in a claim for contribution or indemnity, or any other remedy, against Mr. DeCotiis.

- [54] It would have been obvious to the plaintiff that by commencing the Action, third-party proceedings would be brought against Mr. DeCotiis. Mr. DeCotiis signed the Indemnity Agreement in favour of the Purchasers. As part of the Settlement, there is no question that the Consent Dismissal Order dismissed the Prior Litigation and the legal issue between the parties that was the subject of it was at an end. The net effect was that any claim of entitlement the plaintiff may have had to the Property was extinguished.
- [55] In my view the Realtor/DeCotiis Application must succeed. The core issue in this case is precisely the same issue that was the subject of the Settlement in the Prior Litigation. Namely, who owned the Property, the circumstances surrounding its sale, who was entitled to the sale proceeds, and the alleged breach of trust by Mr. DeCotiis. The plaintiff agreed not to bring claims against anyone who might make a claim against Mr. DeCotiis. He is, therefore, precluded from bringing the Action: *Taberner v. World Wide Treasure Adventures Inc.*, [1994] B.C.J. No. 1154 (B.C.C.A.) [Taberner]; *Browne v. McNeilly*, [2001] O.J. No. 970 at para. 10 [Browne]. The Action resulted in Mr. DeCotiis being third party to the proceedings and requires him to defend himself. It is a breach of the Release: *Taberner*, at para. 8.
- [56] Although the Realtors, Purchasers, and Notaries are not parties to the Release, they are, in my view, entitled to assert its protections as third-party beneficiaries under the Release. This issue was recently discussed by Madam Justice Warren in *The Owners of Strata Plan KAS3204 v. Navigator Development Corporation*, 2020 BCSC 1954 at paras. 49-50:

The doctrine of privity mandates that "a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it: *London Drugs*, per Justice Iacobucci for the majority, at 415-416.

Historically, there were only two exceptions to the doctrine of privity--agency and trust: *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228 at 237-240. In the 1990s, in *London Drugs and Fraser River Pile & Dredge Ltd.*, the Supreme Court of Canada recognized a third narrow, but principled exception to privity which allows a person who is not a party to a contract to rely on a benefit conferred by it. The application of the exception applies if two conditions are met. First, the parties to the contract must have intended to extend the benefit in question to the person seeking to rely on it. Second, the activities performed by the person seeking to rely on the contractual provision must come within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties.

(See also *Fraser River Pile & Dredge v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 at 126).

- [57] Firstly, the Realtors are entitled to rely on the Release as a result of the agency relationship with Mr. DeCotiis. Likewise, because of the Indemnity Agreement from Mr. DeCotiis, the Purchasers and Notaries (because of the agency between them and the Purchasers) are entitled to rely on the Release.

[58] Secondly, any objective interpretation of the Settlement documentation, particularly the Consent Dismissal Order and Release, in light of the circumstances surrounding the Settlement, make it clear that both the plaintiff and Mr. DeCotiis mutually intended to end the dispute over the ownership of the Property and its sale once and for all. A good example of the plaintiff's expressed intentions respecting the Settlement is found in the transcript of the hearing before Justice Baird where the plaintiff confirmed to the effect that all claims, disputes and issues related to the Property and/or its sale would be at an end and he would be able to get on with his life.

[59] Thirdly, the impugned activities performed by the Realtors, Purchasers, and Notaries fall squarely within the scope of the Settlement, namely the sale of the Property. I conclude on the evidence before me that the plaintiff and Mr. DeCotiis objectively intended the Release to cover all issues related to the sale of the Property including any involvement by or complaints against the Realtors, Purchasers, and Notaries. The wording of the Release says that the plaintiff and Mr. DeCotiis:

. . . each agree not to take or proceed with any claim or take or proceed with any proceedings against any other person or corporation who might claim contribution or indemnity or any other remedy whatsoever from the persons or corporations released herein. . . .

This broad provision was intended to prevent either party from launching any action against anyone respecting the sale of the Property. The allegations against the Realtors, Purchasers, and Notaries in the Action are precisely the type of claim the plaintiff contracted with Mr. DeCotiis that he would not make.

[60] To be clear, the claims against the Realtors, the Purchasers, and the Notaries all arise out of the same "lis" or matter that the plaintiff and Mr. DeCotiis resolved. The plaintiff acknowledged during the hearing before Justice Baird that he could have sought to add the Realtors, Purchasers, and Notaries in the Prior Litigation and chose not to. The claims advanced in the Action are ones that were raised with the Court and should, in my view, have been pursued in the Prior Litigation. Instead, what the plaintiff seeks to do in the Action is, in effect, double dip.

[61] I conclude that the Action is an abuse of process and should be struck on that basis.

[62] Although not necessary to decide, I would also dismiss the Action on the basis that it is bound to fail. It is a clear breach of the Settlement and Release. The role of the summary judgment provisions of Rule 9-6 is to prevent cases that are bound to fail. That is the fate of the Action. The plaintiff agreed he would not bring any proceedings or make claims against those who may claim contribution and indemnity or any other remedy against Mr. DeCotiis. Mr. DeCotiis is entitled to raise the terms of the Settlement and Release as a complete answer to the Action and is entitled to have the Action dismissed accordingly: Taberner, at paras. 1-8; Browne, at para. 10. All of the defendants, aside from RECBC which is addressed separately below, are entitled to seek full indemnity from Mr. DeCotiis. They relied on Mr. DeCotiis' representations and assurances as to his ownership and authority to sell the

Property. The Realtors insisted that Mr. DeCotiis seek competent legal advice to deal with the plaintiff's allegations, which is precisely what Mr. DeCotiis did. From that point on, Mr. Mazzei handled all matters. As mentioned previously, the plaintiff made no effort to file a CPL against the Property's title. There is nothing more the Realtors could or should have done.

- [63] The Purchasers' claim for indemnity is also bound to prevail because of the Indemnity Agreement they executed with Mr. DeCotiis.
- [64] The Notaries are entitled to seek indemnity from Mr. DeCotiis on the basis that, as agents of the Purchasers who are the beneficiaries of the Indemnity Agreement, they are entitled to be indemnified by the Purchasers for liability flowing from acts taken within their authority on the Purchaser's behalf: *Thompson, Osen and Sherban Ltd. v. Uncle Ben's Industries Ltd.*, [1974] B.C.J. No. 252 at paras. 17-18 (S.C.); *Tootan v. Atkinson, Noonan and Doody*, [1985] N.J. No. 216 at para. 9 (D.C.). This applies equally to unlawful acts where the agent was reasonably led to believe by his principal's representation that the act was lawful: *Adamson v. Jarvis* (1827), 4 Bing. 66 (U.K.). The only exception is where the agent has acted "manifestly unlawfully", meaning knowingly acting unlawfully: *Burrows v. Rhodes*, [1899] 1 Q.B. 816 (U.K.).
- [65] Here, Mr. DeCotiis was the registered owner of the Property and represented throughout that he had full authority to sell it. Other than the plaintiff's bald assertions, which were vehemently denied by Mr. DeCotiis, there was no evidence that he had an interest in the Property.
- [66] Respecting Team 3000, the evidence is that it was not a brokerage involved in any way in the listing or sale of the Property. Nor was Ms. Borsuk involved with Team 3000 until a month after the Closing Date. The plaintiff's claim against it is misguided and must be dismissed.

Claim against the Real Estate Council of British Columbia

- [67] The RECBC adopts the legal arguments put forward in the Realtor/DeCotiis Application and seek the same relief striking the Action, dismissing the Action, granting a permanent stay of the Action and prohibiting the plaintiff from amending the notice of civil claim. It too seeks special costs.
- [68] Alternatively, the RECBC seeks that the Action be struck pursuant to Rule 9-5(1)(a) on the basis that there is no reasonable prospect of the plaintiff establishing a private law duty of care in a negligence claim against it.
- [69] The RECBC filed third-party proceedings against Mr. DeCotiis on September 18, 2019.
- [70] The RECBC is a regulatory agency established pursuant to RESA. Its mandate is to protect the public interest by enforcing the licensing and licensee conduct requirements of RESA. It is responsible for licensing individuals and brokerages engaged in real estate sales, rental, and strata property management. The RECBC also enforces entry qualifications, investigates

complaints against licensees, and imposes disciplinary sanctions under RESA: *Alexander v. Real Estate Council of British Columbia*, 2011 BCHRT 104 at para. 5. The Law Society of British Columbia is an analogous body in that it oversees the licencing and conduct of lawyers in the Province.

- [71] In simple terms, the Action alleges that the RECBC should have been involved in the Property sale transaction, should have known that the plaintiff was making a claim that he was the Property's owner, and should have taken steps to stop a fraudulent transfer. The plaintiff complains that the RECBC was negligent by failing to properly administer the RESA and its regulations, rules, and bylaws and by failing to protect his interests respecting the Property. He does not allege any specific interactions or any direct relationship between himself and the RECBC, nor does he allege ever making a complaint to the RECBC before launching the Action.
- [72] I am amply satisfied that the plaintiff's claim against the RECBC is misguided and is bound to fail, and accordingly should be struck pursuant to Rule 9-5(1)(a).
- [73] To the extent that the plaintiff alleges a public duty of care, his claim against the RECBC is bound to fail because s. 128(2) of the RESA provides that RECBC is immune from such legal actions:
- s. 128(2) . . . no legal proceeding for damages lies or may be commenced or maintained against . . . the real estate council . . . because of anything done or omitted
 - (a) in the performance or intended performance of any duty, or
 - (b) in the exercise or intended exercise of any power. . .
- [74] In any event, even if the plaintiff could prove a breach of a statutory duty, that does not constitute negligence and there is no recognizable action for negligent breach of a statutory duty. Public bodies' decisions about what acts to perform under a statute are policy decisions that do not give rise to liability in negligence: *Holland v. Saskatchewan*, 2008 SCC 42 at paras. 9, 14.
- [75] In order for the plaintiff to maintain a negligence claim against the RECBC, he must establish that it was in a relationship of proximity to him such that it owed him a duty of care: *Walkom v. Law Society of British Columbia*, 2019 BCCA 321 at para. 58. The RECBC is a statutory regulator. The plaintiff is claiming that it owed him a private law duty of care. There is nothing before me that remotely suggests that the plaintiff can establish such a duty exists: *Cooper v. Hobart*, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Walkom*, at paras. 61-62.
- [76] Public authorities, such as the RECBC, have powers and duties to act in the public interest rather than in a manner designed to protect private interests affected by the scheme of regulation: *Wu v. Vancouver*, 2019 BCCA 23 at paras. 52, 58, 59, 63, 65, and 67, leave to appeal ref'd [2019] S.C.C.A. No. 90.

- [77] Here, there is no category of cases in which a duty of care has previously been recognized that is analogous to the relationship between the RECBC and the plaintiff. Further, the plaintiff has not established, or indeed attempted to establish, a novel duty of care under the Cooper framework. In order to create a duty of care, there must be sufficient proximity between the RECBC and the plaintiff. There is no relationship of proximity sufficient to establish a private law duty of care and, therefore, there is no basis for a claim in negligence.
- [78] Similar to the claims the plaintiff makes against the Realtors, Purchasers, and Notaries, the Action against the RECBC is misguided.
- [79] Accordingly, the RECBC Application is allowed and the Action is dismissed against it.

Summary

- [80] I conclude that the plaintiff is attempting to use this proceeding to do an end run around the Settlement, Release, and Consent Dismissal Order. This is the type of abuse of process Rule 9-5(1)(d) prohibits.
- [81] For the foregoing reasons, the Applications are allowed and the Action is dismissed.
- [82] The Purchasers filed a response to the Realtors/DeCotiis Application consenting to it and seeking an order discharging a CPL filed by the plaintiff against the Property after the Action was commenced. Particulars of the date the CPL was registered and its registration number are not in evidence. Upon filing an affidavit confirming those particulars and attaching a copy of the CPL, given that I have dismissed the Action and that there is no basis for it to remain on title, I am ordering the CPL be discharged.

Costs

- [83] The Applicants seek special costs against the plaintiff.
- [84] Special costs are warranted where a litigant's conduct is reprehensible. Frivolous and vexatious litigiousness, even where not amounting to "scandalous or outrageous" conduct, is reprehensible, and considered "misconduct deserving of reproof or rebuke": *Gichuru v. Smith*, 2014 BCCA 414 at paras. 78-79.
- [85] Pursuit of a claim that is barred by a prior settlement can constitute reprehensible conduct: *Spiegel v. Meilman*, 2017 BCSC 766 at para. 47.
- [86] Unproven allegations of dishonesty or fraud which go to the core of a professional's identity and reputation also amounts to reprehensible conduct: *Gill v. Century 21 Wedgewood Realty Ltd.*, 1995 CanLII 2610 at para. 7 (B.C.S.C.); *Gichuru*, at paras. 80-81.
- [87] I agree with the Applicants that the Action is a vexatious abuse of process and was made in circumstances that should attract special costs. The plaintiff makes serious and, I conclude, warrantless allegations of fraud and dishonesty that are deserving of rebuke.

- [88] The Realtors/DeCotiis applicants are awarded one set of special costs against the plaintiff.
- [89] The RECBC is awarded special costs against the plaintiff.
- [90] Although neither the Purchasers nor the Notaries filed applications of their own, they attended the hearing of the Applications and made submissions. Given that I have dismissed the Action in its entirety, they are entitled to Scale 3 costs.

Order

- [91] The plaintiff is residing in the Philippines at the moment and there is no timeframe when he expects to return to Canada. To ensure this matter can be finalized without delay, I order that the requirement to have the plaintiff's signature on the order to be drafted be dispensed with. Counsel are to provide the plaintiff with an entered copy of the order by email.

"G.P. Weatherill J."

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