

CANADA / JUDGMENT

Dixon v. Morgan

2020 BCCA 200

COURT

British Columbia Court of Appeal

DECIDED

14 July 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 200 Dixon v. Morgan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dixon v. Morgan,

2020 BCCA 200

Date: 20200714

Docket: CA46851

Between:

Adele Louise Dixon

Respondent

(Petitioner)

And

Joshua William Ivor Morgan

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Goepel

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
March 19, 2020 (Dixon v. Morgan, Victoria Registry Docket S192431).

Counsel for the Appellant,
appearing via teleconference:

D.J. Mildenberger

Counsel for the Respondent,
appearing via teleconference:

M.W. Hundleby

Place and Date of Hearing:

Vancouver, British Columbia

June 26, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 14, 2020

Summary:

The appellant applies to stay an order for sale of his residence pending the disposition of his appeal. His mother, the respondent, was granted the order for sale pursuant to the Partition of Property Act. Held: the order for sale is stayed until hearing of the appeal. The grounds of appeal are arguable and, although the respondent will suffer some harm by way of delay, the appellant will suffer irreparable harm if the sale is not stayed. The balance of convenience and the interests of justice favour the stay.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] The parties are mother and son. In July 2016, they purchased as tenants in common a two-level residential property on Glenridge Drive, in Victoria, British Columbia (the "Residence"). Ms. Dixon occupied the ground floor suite until she moved out of the Residence in May 2017. Mr. Morgan, his wife, and three children continue to occupy the upper level.
- [2] In June 2019, Ms. Dixon brought proceedings pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 (the "PPA") seeking the sale of the Residence. On March 19, 2020, Madam Justice Choi ordered that Residence be sold; that Ms. Dixon have conduct of the sale; and that, after payment of the mortgage, taxes and fees, \$296,667 of the proceeds be distributed to Ms. Dixon, with the remainder to the parties equally.

- [3] Mr. Morgan appealed and now applies for an order pursuant to s. 18 of the Court of Appeal Act, S.B.C. 1996, c. 77 that the sale be stayed pending the disposition of the appeal.

THE CHAMBERS HEARING

- [4] The evidence at the hearing consisted of two affidavits sworn by Ms. Dixon, and affidavits from Mr. Morgan, Mr. Morgan's wife, Sandra Morgan, and Mr. Morgan's father, Ivor Morgan, who is the ex-husband of Ms. Dixon and has lived in the downstairs suite since Ms. Dixon vacated the premises. In addition, Ms. Dixon was cross-examined on her affidavits in advance of the hearing and a transcript of that cross-examination was also before the judge. The chambers judge found that some portion of the affidavits in support of Mr. Morgan's position, including the affidavits of Sandra Morgan and Ivor Morgan, contained inadmissible evidence including hearsay, double hearsay and speculation. She held that little weight could be placed on those portions of the affidavits.
- [5] Ms. Dixon's evidence was that she and Mr. Morgan purchased the Residence for both their benefit. Mr. Morgan and his family were to live on the main floor while Ms. Dixon was to live in the ground floor suite, where Mr. Morgan and his family could provide her with assistance when needed. Prior to the purchase, Ms. Dixon owned her own home while Mr. Morgan and his family had for the past 10 years lived in co-operative housing.
- [6] The parties purchased the Residence for \$524,900. Since Ms. Dixon had funds from the sale of her previous home, she paid the deposit and down payment while Mr. Morgan was to make the ongoing mortgage payments. On closing, Ms. Dixon paid \$285,467.25 towards the purchase price. A five-year mortgage for \$250,000 was taken out in the name of both Ms. Dixon and Mr. Morgan on which Mr. Morgan made the payments.
- [7] In May of 2017, Ms. Dixon moved to an assisted living facility. In October of 2018, she said she wished to move back but Mr. Morgan refused to allow her to do so. This was denied by Mr. Morgan who said he never refused to allow Ms. Dixon to return to the live in the Residence.
- [8] Ms. Dixon now says said that her relationship with Mr. Morgan has so deteriorated that she no longer wished to live in the Residence. Ms. Dixon says she sought the order for sale because she needed the equity from her half-share of the property for her daily expenses.
- [9] Mr. Morgan, on the other hand, argued he is the beneficial owner of Ms. Dixon's one-half interest in the property through gift or agreement. He deposed that Ms. Dixon's motivation to purchase the property was to protect herself from her own destructive behaviour, from others who had taken advantage of her, and to ensure she could leave an estate for her children. He said he would never have purchased the Residence with Ms. Dixon if it was just a co-ownership arrangement that she could collapse at any time.

- [10] Mr. Morgan also argued that the case was not suitable for disposition by petition. He submitted that on the relevant facts and applicable law, there was a bona fide triable issue whether he is the beneficial owner of some or all of Ms. Dixon's half-interest and given those circumstances, the petition had to be converted to an action: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247.

THE JUDGE'S REASONS

- [11] The chambers judge found that Ms. Dixon was the legal and beneficial owner of a one-half interest in the Residence and ordered the property to be sold. She explained her decision as follows:
- [27] First, I find there is no bona fide triable issue to convert the petition into an action. There is no evidence, even on Mr. Morgan's affidavit, as to the terms of any agreement, oral or otherwise, between the parties respecting the Property.
- [28] Second, the law is clear that if the court finds that Ms. Dixon owns a one-half legal and beneficial interest in the Property, the court must order the sale of the Property pursuant to s. 6 of the Partition of Property Act unless the court sees good reason to the contrary.
- [29] I reject Mr. Morgan's argument that his situation amounts to a "good reason" not to order the sale. Mr. Morgan deposes that he was prejudiced by moving into the Property because he gave up his tenure at a cooperative housing development. I also do not find any reliance or prejudicial action taken by him as set out in s. 59(3)(c) of the Law and Equity Act. In any event, there is no written contract between the parties respecting the Property.
- [30] Third, there is no evidence that Ms. Dixon gifted her beneficial interest in the Property to Mr. Morgan. Much of the affidavits in support of Mr. Morgan's position focused on Ms. Dixon's spending habits as well as the relationships between the parties and Mr. Morgan's sister Genai. Further, there is no evidence that Ms. Dixon had the required intent or took the required action to part with her share of the Property as per *McKendry* [v. *McKendry*, 2017 BCCA 48]. Ms. Dixon, therefore, owns a one-half legal and beneficial interest in the Property.
- [31] Fourth, the cases cited by Mr. Morgan are significantly factually distinguishable from the case at bar. For example, in *Lona Enterprises Ltd. [v. Eurocan Industries Inc.]*, 2018 BCSC 842], the parties had a written agreement respecting the sale of the property in question. In the case at bar, the parties do not have a written agreement, and there is no evidence they had an oral agreement either.
- [32] Fifth, Mr. Morgan seems to assert that Ms. Dixon does not require the money from her share of the Property because she has savings from the sale of her previous home. Even if this would amount to a "good reason" not to order the sale of the Property, which it does not, I find that Ms. Dixon's savings have been further depleted since the sale of her previous home. I accept that, in addition to the amount that Ms. Dixon has paid towards the purchase of the

Property, which is not disputed, she has also paid \$10,000 in repairs to the home, \$1,200 in property taxes for 2018, and \$26,124.27 for Mr. Morgan's car. She also paid at least 50% of the 2017 property taxes. I note that Ms. Dixon is not seeking the return of these funds relating to the car loan. I make these findings only to reflect that, whatever proceeds remained from Ms. Dixon's previous home after the purchase of the Property, her capital was further depleted by these other amounts in addition to her daily living and other expenses. I, therefore, accept that she has now much less than the \$100,000 left from the proceeds from her previous home. In any event, I do not accept the argument that Ms. Dixon must show that she has few funds before a sale of the Property can be ordered.

- [12] The chambers judge gave Ms. Dixon sole conduct of sale notwithstanding she had only sought an order for joint conduct. She also gave directions as to how the net sales proceeds should be distributed.

POSITIONS OF THE PARTIES

- [13] Mr. Morgan says his appeal has sufficient merit to warrant a stay and that the interests of justice require it. He says the chambers judge erred by not applying the settled law on when a chambers matter should be converted to an action. He says that the reasons show the chambers judge impermissibly weighed evidence on whether an agreement with respect to the Residence existed. He argues the affidavit evidence did not contain hearsay or speculation and was not contradicted. He further submits that to the extent the evidence was hearsay, it was, in any event, admissible on the question as to whether Mr. Morgan had shown there existed a bona fide triable issue: *Progressive Construction Ltd. v. Newton* (1980), 25 B.C.L.R. 330 (S.C.) at paras. 14-17.
- [14] Mr. Morgan further argues that the chambers judge erred in fettering her discretion in applying s. 6 of the PPA. He says her emphasis on the word "must" is contrary to the reasoning of this Court in *Sahlin v. Nature Trust of British Columbia Inc.*, 2011 BCCA 157 at paras. 22-24.
- [15] Mr. Morgan also argues the chambers judge erred in ordering sole conduct of the sale to Ms. Dixon when she had only sought joint conduct. Lastly, the appellant says the chambers judge erred in the division of the proceeds of the sale given that the mortgage was paid solely by Mr. Morgan. He submits the reduction in principal should be to his credit.
- [16] Mr. Morgan submits that if the sale is not stayed he will suffer irreparable harm. The Residence has been his family home for 4 years. His equity in the Residence is his only financial asset. If the stay is not granted and the residence is sold before the appeal is heard, even if he is ultimately successful on the appeal, the Residence will have been lost and his family forced to find new accommodation. He submits that appeal dates are available in October and November of this year which will limit any prejudice to Ms. Dixon arising from the stay. In addition, he says he is prepared to pay Ms. Dixon \$1,000 a month toward her expenses while the stay is in place.

- [17] Ms. Dixon submits the chambers judge did not err. She notes her income is limited to CPP disability benefits and due to her health needs, her living expenses outstrip her income. She says her ability to recover her portion of the proceeds from the sale of the property in a timely manner directly affects her health and well being, as she is currently unable to afford the physiotherapy she requires to treat her multiple sclerosis. She says she cannot live at the property because of her disability and the breakdown in her relationship with her son.
- [18] Ms. Dixon says Mr. Morgan is benefitting from delays in execution of the court ordered sale at her expense because she contributed half of the purchase price while the mortgage paid by Mr. Morgan of \$1,000 per month is far less than rental accommodations. She says he also collects rent from the ground floor suite.
- [19] The respondent continues to deny that she gifted her interest in the property to the appellant, and wishes to move forward with the sale.
- [20] Ms. Dixon submits that if a stay is granted, conditions should be placed on the stay including that Mr. Morgan will pay all mortgage, insurance, property tax and maintenance costs; that he will indemnify her for consequences of arrears or defaults of mortgage, insurance, property taxes, maintenance costs and use; and that Mr. Morgan should pay her \$1,500 a month until disposition of the appeal.

APPLICABLE TEST

- [21] Section 18 of the Court of Appeal Act provides as follows:

18 (1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

- [22] Smith J.A. succinctly described the general principles for granting a stay of proceedings in *Gill v. Darbar*, 2003 BCCA 3 (Smith J.A. in Chambers) at para. 7:

The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a precondition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.)

- [23] The court's power to grant a stay is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation or to prevent irreparable damage or where there are other special circumstances: *Roe, McNeill & Co. v. McNeill* (1994), 49 B.C.A.C. 247 at para. 6 (Legg J.A. in Chambers), citing *Contact Airways Limited v. De Havilland of Aircraft of Canada Limited*, (1982), 42 B.C.L.R. 141 at 142 (C.A.). The onus lies on the applicant to establish the right to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 (D. Smith J.A. in Chambers) at para. 9 and *Re Taylor* (1986), 4 B.C.L.R. (2d) 15 at 16 (Craig J.A. in

Chambers).

- [24] The test commonly applied by this Court on a stay application is the three-part test from *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. The elements of the test are generally the same as those applied when deciding whether to grant an interim injunction: that there is some merit to the appeal in the sense that there is a serious issue to be resolved; that the applicant would suffer irreparable harm if the application were denied; and that the balance of inconvenience favours a stay.
- [25] The ultimate question on any application for a stay concerns the interests of justice. In *Coburn v. Nagra*, 2001 BCCA 607, Justice Saunders explained:
- [7] Whether the criteria for an injunction is two part or three may be a topic of debate for scholars. In British Columbia the common test for injunctions has been two-pronged since *B.C. (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), with the issue of irreparable harm being subsumed into the discussion of balance of convenience (or inconvenience). As Madam Justice McLachlin (now C.J.C.) noted in *Wale*, the distinction is likely without practical effect. The question in most cases is the relative weight of the convenience and inconvenience of the order sought, always considering the paramount measure, the interests of justice.

DISCUSSION

- [26] The merit threshold is a low one as the Court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious. The appropriate question is whether there is a serious question to be tried, not whether the applicant can establish a strong *prima facie* case: *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 at para. 18 (Bennett J.A. in Chambers). I am satisfied in the circumstances of this case that Mr. Morgan meets the merit criteria. The grounds of appeal are arguable.
- [27] I find that if the sale is not stayed and the premises are sold prior to the hearing of the appeal, Mr. Morgan would suffer irreparable harm. He would be forced to leave his residence of 4 years to find new accommodation for himself and his family. The sale would render his appeal moot, leaving only in issue the question of how the proceeds of the sale would be divided.
- [28] While I acknowledge that Ms. Dixon will also suffer some harm by way of delay, I note that she left the premises in 2017 and took no steps to enforce her rights until commencing the petition in 2019. The appeal can be heard this Fall. A further short delay will not materially change her situation. I find that the balance of convenience favours the stay.
- [29] As a term of the stay, and to partly ameliorate the effects of the stay on Ms. Dixon, I order that Mr. Morgan continue to make all mortgage payments pending the hearing of the appeal. He will also keep the insurance in good standing. I also order as a condition of the stay that Mr. Morgan, commencing July 20, 2020, pay Ms. Dixon \$1,000 on the 20th day of each month until the appeal is heard.

[30] The parties should take steps to expedite the appeal in order to bring this matter to an early conclusion.

[31] The order for sale is stayed until hearing of the appeal. Whether the stay and imposed terms will continue past the hearing will be for the division hearing the appeal to determine.

"The Honourable Mr. Justice Goepel"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0200.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/dixon-v-morgan-2020>

Prepared on 25 October 2026 · Esheria