

CANADA / JUDGMENT

Edward Chapman, Limited v. FS Property Inc.

2022 BCCA 213

COURT

British Columbia Court of Appeal

DECIDED

31 May 2022

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2022 BCCA 213 Edward Chapman, Limited v. FS Property Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Edward Chapman, Limited v. FS Property Inc.,

2022 BCCA 213

Date: 20220531

Docket: CA47362

Between:

Edward Chapman, Limited

Appellant

(Petitioner)

And

FS Property Inc., and Fastboyz Ventures Ltd.

Respondents

(Respondents)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fenlon

The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated March 5, 2021 (Edward Chapman, Limited v. FS Property Inc., 2021 BCSC 384, Vancouver Docket H200295).

Oral Reasons for Judgment

Counsel for the Appellant:

R. Clark, Q.C.

Counsel for the Respondent, FS Property Inc.:

O.J. James

Place and Date of Hearing:

Vancouver, British Columbia

May 31, 2022

Place and Date of Judgment:

Vancouver, British Columbia

May 31, 2022

Summary:

The appellant appeals from the decision of a judge, upholding an order of a master granting the respondent leave to file a counterclaim in a petition proceeding. Held: Appeal allowed. The Rules do not permit a counterclaim to a petition. A counterclaim may only be filed in an action. The master had other remedies available, including converting the petition to an action and then permitting the filing of a counterclaim.

- [1] GRIFFIN J.A.: This appeal concerns whether it is within the discretion of a master to order that a party be at liberty to file a counterclaim in a petition proceeding, when the master has not ordered that the petition proceeding be converted to an action.
- [2] FS Property Inc. ("FS Property") brought an application in the court below, seeking an order that the foreclosure petition of the appellant, Edward Chapman, Limited ("Chapman"), be converted to an action and referred to the trial list, and granting FS Property leave to file a counterclaim in the converted action. The master refused the application to convert the petition to an action, but ordered that FS Property be permitted to file a counterclaim in the petition proceeding itself: 2020 BCSC 1350 ("Master's Reasons"). A judge dismissed the appeal from the master's order: 2021 BCSC 384 ("Judge's Reasons").
- [3] The petition was brought by Chapman to enforce a mortgage on property it had sold to FS Property. FS Property sought to advance a counterclaim for rent and operating expenses that it said Chapman owed for overstaying in the property for approximately seven months.

- [4] The master found that the proposed counterclaim for overholding rent was not a defence to the petition claim for relief. The petition was based on FS Property's default on the mortgage, and the proposed counterclaim did not go to the root of the validity of the purchase contract or mortgage. As such, it did not amount to a claim for "equitable set-off" in accordance with *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C.C.A.) and *Cam Net Communications et al. v. Vancouver Telephone Company Limited*, 1999 BCCA 751: Master's Reasons at paras. 5-6, 9. This conclusion is not challenged on appeal.
- [5] Nevertheless, the master found that the claim for payment of rent for overholding or damages, arose out of the "same commercial relationship as does the foreclosure": Master's Reasons at para. 7. The master decided to permit FS Property to file a counterclaim in the foreclosure proceeding, for these reasons:
- [10] The petitioner is entitled to an order nisi and to personal judgment. I will get into more of those details in a moment. However, there would be an inequitable result if the petitioner were allowed to collect on its judgment before FS Property Inc. had a chance to prove its counterclaim. The amount required to redeem may not be the full \$700,000 if the petitioner is liable to FS Property Inc. on the counterclaim: *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 (S.C.).
- [11] In my view, the counterclaim should be allowed to proceed as if it were a conventional action, but FS Property Inc. must move with alacrity to prepare its case and to bring the matter to trial. Whether by conventional trial or summary trial, the litigation must be conducted proportionally to the amount at issue.
- [6] The master granted a nine-month redemption period until May 14, 2021, granted personal judgment against FS Property, but stayed execution until May 14, 2021: Master's Reasons at para. 12.
- [7] The master clearly indicated that she wanted there to be an opportunity for the counterclaim to be determined before the expiry of the redemption period and before execution on the personal judgment. At the same time, she made it clear that she did not fetter the discretion of the court hearing any subsequent application for extension of the redemption period or further stay of execution on the personal judgment: Master's Reasons at para. 14.
- [8] In granting FS Property leave to file a counterclaim in the petition proceeding, the master relied on R. 22-1(7)(d) of the Supreme Court Civil Rules, which allows the court to order a trial of a petition proceeding or trial of an issue: Master's Reasons at para. 13. She added that the parties were entitled to examinations for discovery and discovery of documents in accordance with the Rules.

- [9] On appeal from the master's decision, the parties agreed before the judge that whether the master had jurisdiction to grant FS Property leave to file a counterclaim within the petition proceeding is a question of law, reviewable on the standard of correctness: Judge's Reasons at para. 16.
- [10] The judge determined that the master possessed the necessary jurisdiction to allow FS Property to file a counterclaim, but found that this authority was based on R. 16-1(18): Judge's Reasons at para. 40.
- [11] On appeal from the judge's decision to this Court, this Court's role is to determine whether the judge properly identified and then applied the appropriate standard of review: *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 33.
- [12] I agree with the judge's identification of correctness as the appropriate standard of review. However, I disagree with the judge's determination that the master's decision was correct.
- [13] The overall structure of the Rules distinguishes between proceedings commenced by petition, and those commenced by notice of civil claim. In essence, unless a proceeding falls within R. 2-1(2), or within another rule providing for a petition, or an enactment otherwise provides, the proceeding must be commenced by notice of civil claim. However, certain categories of disputes must be commenced by petition, as set out in R. 2-1(2) and elsewhere in the Rules (and some categories must be commenced by requisition, which is not in issue here).
- [14] There is no dispute that a foreclosure proceeding is one of those proceedings that is to be commenced by petition, as expressly provided for in R. 21-7.
- [15] As such, the hearing of the petition is governed by the Rules applicable to chambers proceedings: R. 22-1(1)(a). Rule 22-1(7)(d) permits a court to order that there be a trial of an issue, and that pleadings be filed. This is expressly incorporated into foreclosure proceedings by R. 21-7(5). Rule 22-1(7) provides:
- (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
 - (a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,
 - (b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,
 - (c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and
 - (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

- [16] Rule 16-1 provides for the type of pleadings that can be filed in a petition proceeding.
- [17] Further, R. 16-1(18) provides:
- (18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.
- [18] Rule 16-1(18) acknowledges the ability, under R. 22-1(7), to refer a petition proceeding to the trial list. This would involve converting the proceeding to an action, and giving directions for the filing of pleadings and any other necessary directions, as contemplated by R. 22-1(7).
- [19] But R. 16-1(18) also provides flexibility for a petition proceeding to employ some of the tools of an action for determination of issues within the petition proceeding itself, such as limited discovery. These tools can be borrowed and used selectively, while preserving the summary nature of the petition proceeding: see *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89 at para. 30.
- [20] In my view, R. 16-1(18) does not permit the filing of a counterclaim within a petition proceeding.
- [21] A counterclaim is provided for in R. 3-4. It is a form of pleading a claim, delivered within an action after a notice of civil claim has been filed. Rule 3-4(1) provides:
- (1) A defendant in an action who wishes to pursue a claim within that action against the plaintiff must, within the time set out for the filing of a response to civil claim under Rule 3-3 (3), file a counterclaim in Form 3 that accords with Rule 3-7.
- [22] The form of a counterclaim is a prescribed form under the Rules, Form 3. The beginning of the form itself incorporates the words:
- This action has been brought by the plaintiff(s) against the defendant(s) for the relief set out in the notice of civil claim filed in this action.
- [23] The logic of the Rules and Forms as a whole, make it clear that a counterclaim can only be advanced within an action. In my view, the decision of *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182, still applies, including the holding, at para. 60, that there would have to be an action (either by notice of civil claim or by order that the petition stand as a notice of civil claim), not a petition proceeding, in order for there to be a counterclaim.
- [24] To be clear, in my view, there is no such thing as a counterclaim to a petition.
- [25] The judge made an error in concluding that the master had authority to order that a counterclaim could be filed within the petition proceeding. I would therefore allow the appeal.

- [26] I do note that the concern of the master in this case is not unprecedented, namely, that there would be unfairness if the foreclosure proceeding completed, allowing for execution on the personal judgment and a short redemption period, before allowing for some time to determine the opposite party's related cross claim. A similar concern was expressed by McLachlin J., as she then was, in *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 (S.C.).
- [27] To address this concern, the master could have ordered a stay of all or part of the petition proceeding, or an extension of the redemption period within the petition proceeding, to allow for the filing of a new action by FS Property and some time for determination of that claim. This latter remedy was granted in *Rizkalla*.
- [28] In *Rizkalla*, the court commented on the difference between a defence to a mortgagee's foreclosure petition, and a counterclaim. It suggested an appropriate solution, as follows:
- [13] While the parties' respective claims are legally independent, in a practical sense they are closely related. A judgment for damages on a counterclaim could reduce the debt owed by the mortgagors to the bank, conceivably permitting them to redeem their property. In these circumstances, it is appropriate to grant the order nisi to which the plaintiff is entitled, but on terms which will permit the mortgagors to establish their claim before their property is finally foreclosed. The length of the redemption period in a foreclosure action is in the discretion of the court, to be determined according to the equities between the parties in all the circumstances of the case. In the case at bar, the circumstances support the fixing of a nine-month redemption period, during which the mortgagors may pursue their claims against the bank. Should further time be required, an application for an extension of the redemption period may be brought. I would also order a stay of execution of the personal judgments against the mortgagors during the redemption period which I have fixed: *Citadel Life Assur. Co. v. Abacus Cities Ltd.*, B.C.S.C., Vancouver No. H822964, 15th March 1983; *Zonailo v. Cypco Hldg. Ltd.*, B.C.S.C., Vancouver No. H824050, 18th March 1983 (not yet reported).
- [29] Another possible solution available to the master was to first convert the petition to an action, while granting FS Property leave to file its counterclaim.
- [30] This Court's judgment in *Cepuran v. Carlton*, 2022 BCCA 76 determined that the Saputo test, of whether there is a "triable issue", is no longer the test for determining whether a petition should be converted to an action and the matter referred to trial. Rather, the determination of whether a petition should be converted to an action is a discretionary decision that can take into account a variety of factors, including the object of the Rules.

- [31] In my view, it does not further the object of the Rules to create confusion as to whether a proceeding is a petition or an action. If a petition is breakfast, and an action is lunch, R. 16-1(18) does not create brunch. Rule 16-1(18) allows some tools on the menu of an action to be used to further the ends of a petition proceeding. But a proceeding must be one or the other, either a petition proceeding, or an action.
- [32] The master's reasons, respectfully, left the parties confused as to whether the counterclaim was an action, or a petition proceeding: see, e.g., paras. 11, 13. This was not efficient, as it meant that the parties would need continued direction from the court as to which procedures, by default, applied to the counterclaim--those applicable to an action, or those applicable to a petition. The result, unfortunately, would also leave other judges and masters, faced with subsequent applications in the matter, confused as to whether the proceeding was a petition or an action.
- [33] The appellant submits that the master made a second error, in that she failed to consider the implications of the Limitation Act, S.B.C. 2012, c. 13 when granting leave to FS Property to file a counterclaim.
- [34] The Limitation Act permits the bringing of a counterclaim after the expiry of the applicable limitation period: s. 22(1)(a). The appellant submits that here, the proposed counterclaim by FS Property, for overholding rent, faced a potential limitation defence if brought as a new action.
- [35] The issue of a limitation defence was not raised before the master and it would therefore not be appropriate for this Court to say the master erred in not considering it. In my view, these issues should not be considered at first instance in this Court.
- [36] To put it another way, the master cannot be criticized for not considering whether, despite the lack of a defence to the petition, the limitation period was a factor that made it in the interests of justice to convert the petition proceeding to an action and to then permit FS Property to file a counterclaim, in circumstances where there was a close relationship between the subject matter of the petition and the subject matter of the counterclaim, where doing so would not preclude the petitioner from obtaining summary relief, and where it could potentially alleviate the prejudice to FS Property that was of concern to the master.
- [37] In the result, I would allow the appeal. I would set aside the order of the master permitting the filing of a counterclaim within the petition proceeding.
- [38] MACKENZIE J.A.: I agree.
- [39] FENLON J.A.: I agree.
- [40] MACKENZIE J.A.: The appeal is allowed, and the order of the master permitting the filing of a counterclaim within the petition proceeding is set aside.

"The Honourable Justice Griffin"

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