
CANADA / JUDGMENT

Evans v. Dumitrean

2019 BCSC 203

COURT

Supreme Court of British Columbia

DECIDED

20 February 2019

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2019 BCSC 203 Evans v. Dumitrean

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Evans v. Dumitrean,

2019 BCSC 203

Date: 20190220

Docket: S176979

Registry: Vancouver

Between:

Myles Christopher Evans

Plaintiff

And

Gabriela Dumitrean also known as

Gabriela Peever

Defendant

And

Myles Christopher Evans

Defendant by way of Counterclaim

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim, Myles Christopher Evans:

L. T. Self

Defendant appearing in person:

G. Dumitrean

Place and Date of Hearing:

Vancouver, B.C.

January 18, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2019

I. Introduction

- [1] The defendant, Gabriela Dumitrean, applies for leave to file a further amended counterclaim. The plaintiff, Myles Evans, opposes any further amendment on the basis that the defendant is now advancing a claim against another piece of property owned by him that she had not claimed in the two previously filed counterclaims.

II. Background Facts

- [2] The parties lived together for a period of under two years. Ms. Dumitrean concedes that they were "not in a common law relationship."
- [3] Mr. Evans purchased a property in Port Alberni prior to the beginning of the relationship (the "Port Alberni Property"). The parties never resided at the Port Alberni Property together.
- [4] Starting in August or September 2015, the plaintiff, the defendant and her two children from an earlier relationship lived at a rental property located in Port Coquitlam.
- [5] Eventually, the parties agreed that they should try and locate a property to purchase. On June 27, 2016, the parties signed a contract for purchase and sale of a property located on Kanaka Way, Maple Ridge (the "Kanaka Property") for \$580,000. There was an addendum to the contract of purchase and sale that changed the buyers' names from Mr. Evans and Ms. Dumitrean to Mr. Evans only.
- [6] Ms. Dumitrean claims the down payment for the Kanaka Property was approximately \$100,000, and she, through the assistance of her mother, provided \$10,000. She says Mr. Evans provided the rest of the down payment. The remainder of the purchase price was financed through a mortgage.

- [7] Mr. Evans claims that he obtained the deposit for the Kanaka Property by drawing down on an existing line of credit he had secured against his Port Alberni Property. He claims the rest of the money for the purchase was financed through a mortgage. He acknowledges that \$10,000 for the purchase came from the defendant's mother but says that this amount was to be considered a loan if he and the defendant broke up.
- [8] The parties disagree on what the arrangement was going to be after they jointly signed the purchase agreement.
- [9] The Kanaka Property was registered solely in the name of Mr. Evans.
- [10] The parties and the defendant's two children, moved into the Kanaka Property in September 2016.
- [11] Ms. Dumitrean's evidence is that the initial monthly mortgage payments were \$3,068. She claims she paid one-half of that amount. She claims that the amount was broken down as follows:
- a. Approximately \$869.40 (bi-weekly) towards the Kanaka Property's mortgage;
 - b. Approximately \$356 towards the Kanaka Property's strata fees;
 - c. Approximately \$252 towards Kanaka Property's property taxes;
 - d. Approximately \$266.07 towards a line of credit on the Port Alberni Property; and
 - e. Approximately \$576.49 towards the renovations to the Port Alberni Property.
- [12] Mr. Evans disputes the amounts although concedes that during the period the parties resided together, except for December 2016, Ms. Dumitrean paid one-half contribution towards the mortgage, strata fees, insurance, taxes, utilities, and loan payments. Mr. Evans claims that Ms. Dumitrean ceased making any payments in any form starting around May 1, 2017, to which Ms. Dumitrean appears to agree.
- [13] The parties separated on March 20, 2017. The defendant and her two children remained in possession of the Kanaka Property.
- [14] The plaintiff obtained a court order that the defendant and her children vacate the Kanaka Property on September 1, 2017, after which the plaintiff gained possession of the Kanaka Property.
- [15] Mr. Evans alleges that the defendant caused damage to the property and his personal belongings. Ms. Dumitrean claims for damage to some of her property.
- [16] The Kanaka Property was sold in January 2018.

III. Litigation to date

- [17] The notice of civil claim was filed on July 25, 2017, and sought orders respecting the Kanaka Property and damages caused by the defendant.
- [18] The response to civil claim has not been filed.
- [19] On July 25, 2017, Mr. Evans filed a without notice of application for an order that Ms. Dumitrean vacate the Kanaka Property and for sole possession (the "July Application").
- [20] On July 26, 2017, the July Application, the supporting affidavits, and the notice of civil claim were served on the defendant.
- [21] On July 28, 2017, the parties appeared before Mr. Justice Voith who made orders including that the July Application be heard on August 4, 2017.
- [22] Ms. Dumitrean filed a counterclaim on August 4, 2017 (the "First Counterclaim"), in which she claimed that she and Mr. Evans purchase the Kanaka Property together and that she "has paid for 50 percent financially". Her relief sought was: "\$10,000 Damage deposit invested in the [Kanaka Property] [and] Payments invested in the Principle [sic] for the months of September 1, 2016 to April 31, 2017".
- [23] On August 4, 2017, Mr. Justice N. Smith heard the July Application and ordered the following:
1. The Defendant vacate the [Kanaka Property] by September 1, 2017.
 2. In the interim, until the Defendant vacates the Kanaka Property, she shall not damage any personal property owned by the Plaintiff
 3. Within 48 hours, the Defendant shall return to the Plaintiff his 1981 Monte Carlo luxury sport motor vehicle, his customized 1985 Honda TRX 250R vintage racing quad recreational vehicle and the motor lift.
 4. Counsel for the Plaintiff shall inform the Defendant when the Plaintiff will have his agents attend to retrieve those items as set out in paragraph 3 so that she will not be at the Kanaka Property at the time the items are retrieved
 5. When the Kanaka Property is sold, \$10,000 from the net sale proceeds shall be paid out to either the Defendant or her mother and the parties shall each have liberty to apply to the court if there are any disputes with respect to the payment.
 6. Any other relief sought by the Plaintiff is adjourned.
 7. Costs of this application shall be costs in the cause.

- [24] On May 10, 2018, Mr. Evans served a notice of application seeking a variety of relief including that the defendant be held in contempt for failing to comply with N. Smith J.'s order, occupational rent, and return of or compensation for property belonging to the plaintiff (the "May Application").
- [25] On May 22, 2018, the defendant filed her second counterclaim (the "Second Counterclaim") in which she provided a lists of background facts, particulars of certain relief claimed, which included, in part, a claim for \$4,212.80 for what is described as "mortgage overcharge".
- [26] The May Application was heard on June 6, 2018 before Mr. Justice Crabtree. He ordered that:
- a. The trial of the matter be set for three days commencing on September 17, 2018 in Chilliwack before him;
 - b. A trial management conference be held in July before him; and
 - c. The exchange of list of documents to be used at the trial and a trial brief.
- [27] On August 2, 2018, Mr. Evans served his list of documents.
- [28] On August 3, 2018, Master Caldwell ordered that the trial management conference take place on September 11, 2018, and that trial briefs be exchanged no later than September 4, 2018.
- [29] On August 7, 2018, the plaintiff filed his trial brief.
- [30] On August 23, 2018, the defendant filed her trial brief in which she set out the particulars of what she was claiming, which accords with the relief she is seeking in the proposed amended counterclaim. In particular, she was claiming: "Increasing the percentage of equitable interest in the Kanaka property that has been realized and clarified since the sale of this property."
- [31] On August 28, 2018, Ms. Dumitrean served an application (the "August Application") to file a further amended counterclaim (the "Third Counterclaim"). The amendments provide for an amended statement of facts, particulars of domestic violence, and relief claimed. The application was returnable on September 4, 2018.
- [32] On September 4, 2018, the August Application was adjourned to the trial management conference on September 11, 2018.
- [33] Ms. Dumitrean served a list of documents dated September 1, 2018, and September 6, 2017 (which should be dated 2018).
- [34] At the trial management conference on September 11, 2018, the trial dates for September 17, 2018, were struck. The August Application was directed to be set in regular Chambers.

- [35] On September 19, 2018, plaintiff's counsel wrote advising that the list of documents were deficient and specifically set out the categories of documents sought. Many of the documents related to the specific claims made under Part 2 of the Third Counterclaim. These documents have not yet been produced.
- [36] On October 18, 2018, a notice of trial was filed setting the matter for trial on December 2, 2019, for 10 days.
- [37] On October 25, 2018, the parties appeared before Master Bouck who ordered that the August Application be adjourned to a mutually convenient long chambers date. The date of January 18, 2019 was secured.
- [38] In the fall of 2018, the plaintiff's counsel requested dates to conduct a discovery of Ms. Dumitrean, who agreed to the date of November 29, 2018. An appointment to examine her for discovery on that date was served.
- [39] Ms. Dumitrean then advised the plaintiff's counsel she could not attend the scheduled discovery due to medical issues. The plaintiff's counsel demand medical evidence to support this but the defendant was not prepared to produce any medical information. As a result, the plaintiff's counsel refused to adjourn the discovery.
- [40] On November 29, 2018, the plaintiff had the discovery appointment marked for non-attendance.
- [41] In December 2018 and January 2019, the plaintiff's counsel or her assistant attempted to contact Ms. Dumitrean but she did not respond.
- [42] Ms. Dumitrean explained that she has been suffering from medical issues and is scheduled for three surgeries in January, February, and March. She advised that by April she would be recovered and able to attend a discovery.

IV. Discussion

1. The Rules

- [43] In order to respond to a notice of civil claim, Rule 3-3(3)(a)(i) of the Supreme Court Civil Rules [Rules] provides:
- (3) Unless the court otherwise orders, to respond to a notice of civil claim, a response to civil claim under this rule must be filed and served within the following period:
- (a) in the case of a notice of civil claim that is served on a person,
- (i) if the person was served anywhere in Canada, within 21 days after that service,
- [44] Rule 3-4(1) provides that the same time set out under R. 3-3(3) applies to filing counterclaims, when a defendant in an action wishes to pursue a claim within that action against the plaintiff.

[45] The Third Counterclaim is well outside the time limit.

[46] Rule 22-4(2) allows a court to extend or shorten a period of time provided for in the Rules, even if the application for extension has been made after the time period has expired.

[47] In considering whether to grant Ms. Dumitrean's application for leave to file an amended counterclaim, there are two issues that must be considered:

1. Is the matter in the proposed counterclaim "related or connected with the subject matter of" the plaintiff's claim?
2. Should the court exercise its discretion to extend the period of time for issuance of the counterclaim?

(Smith v. British Columbia, 2010 BCSC 928 at para. 15)

2. Relation to the Plaintiff's Claim

[48] It is clear that, for the most part, the issues raised in the Third Counterclaim have been raised in the first two counterclaims filed. The matters relate to events that are alleged to have taken place during the time period that the parties lived together and while Ms. Dumitrean was residing in the Kanaka Property after the separation.

[49] I have no hesitation in concluding that the Third Counterclaim relates to or is connected with the subject matter of the plaintiff's claim.

3. Discretion to Extend the Time Period

[50] As summarized by Madam Justice Grey in Smith, the following should be considered:

[18] The court has discretion under Rule 3(2) to extend a time period set out in the Rules, and will do so if it is "just and convenient".

[19] In *Squamish Indian Band v. Canadian Pacific Ltd.*, [1998] B.C.J. No. 1726 (S.C.), Saunders J. (when she was a member of this Court), held that the following factors should be considered in making any determination of whether it is just and convenient to extend the time to permit a counterclaim to be filed:

- a) What was the length of the delay between receiving the statement of claim and proposing the draft counterclaim;
- b) What were the reasons for delay;
- c) Whether the counterclaim would be time barred but for s. 4(1) [now s. 22] of the Limitation Act;
- d) The connection between the proposed counterclaim and the plaintiff's claim;

- e) Whether there will be prejudice to the defendant, such as would arise if denial of the application to file a counterclaim would prevent the defendant from making full answer and defence to the claim brought against it; and
- f) Whether there will be prejudice to the plaintiff by permitting the proposed counterclaim, such as if the counterclaim would require additional investigation and potentially delay the trial of the matter.

[51] I will review each of these factors in turn.

a) Length of Delay

[52] The plaintiff commenced this action on July 25, 2017. Ms. Dumitrean filed the First Counterclaim within the time required by the Rules. The Third Counterclaim is sought to be filed well in advance of the now scheduled trial date. The delays from the filing of the application on August 28, 2018, to the date of hearing of the application on January 18, 2019, cannot be attributed to Ms. Dumitrean but to challenges in getting the matter heard in court.

b) Reasons for the Delay

[53] Ms. Dumitrean explained that she has been dealing with this litigation with little to no legal advice or assistance. In the summer of 2018, she sought guidance from the civil Chambers pro bono counsel. That lawyer recommended that she amend her counterclaim and that she prepared and served the notice of application on August 28, 2018.

[54] The first principle listed in the Canadian Judicial Council's Statement of Principles on Self-Represented Litigants and Accused Persons (2006) provides:

Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and accommodating.

[55] The Supreme Court of Canada has specifically endorsed the Statement in *Pintea v. Johns*, 2017 SCC 23 at para. 4. Ms. Dumitrean attempted to set out the nature of the claims she advances in the two earlier filed counterclaims but needed assistance for the legal basis for the claims.

[56] Mr. Evans' position is that the defendant could have sought legal advice earlier and it is her fault that she failed to do so. He further points out that the defendant is not an "inexperienced self-litigant" since she has represented herself in these proceedings and has represented herself in lengthy family law proceedings with her ex-husband that have been ongoing for years.

[57] The fact that she is representing herself in another family law proceeding does not demonstrate that she has the necessary legal knowledge or expertise to properly set out the correct legal basis for the claims she is making in this proceeding. It is clear that in the First and Second Counterclaims she failed to do so.

- c) Would the Counterclaim be Time Barred but for Section 22 of the Limitation Act

[58] Section 22 of the Limitation Act, S.B.C. 2012, c. 13, provides:

Counterclaim or other claim or proceeding

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
 - (b) third party proceedings may be brought;
 - (c) claims by way of set off may be advanced;
 - (d) new parties may be added or substituted as plaintiffs or defendants.
- (2) Nothing in subsection (1) gives a person a right to commence a court proceeding under subsection (1) (a) or (b) in relation to a claim for contribution or indemnity after the expiry of a limitation period applicable to that claim.
- (3) Subsection (1) does not enable a person to make a claim against another person if a claim by the other person
- (a) against the first mentioned person, and
 - (b) relating to or connected with the subject matter of the proceeding,
- is or will be defeated by the first mentioned person pleading a provision of this Act as a defence.
- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.
- (5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.

[59] Based on the information provided there does not appear to be any expiry of the limitation period for any of the claims being advanced in the Third Counterclaim: see Limitation Act at ss. 3, 6-8.

- d) The Connection between the Counterclaim and the Plaintiff's Claim

- [60] The claims are all interconnected in that they relate to the arrangements made between the parties, events that occurred when they were living together, and actions taken after the separation.
- e) Prejudice to the Defendant
- [61] I am satisfied that the defendant would experience prejudice if she was not permitted to amend and file the Third Counterclaim. She is setting out the grounds of relief based on advice that she received after filing her previous two counterclaims.
- f) Prejudice to the Plaintiff
- [62] Mr. Evans was unable to point to any specific prejudice if the amendments were allowed.
- [63] The statement of facts is more detailed in the Third Counterclaim but this simply provides the defendant's summary of the facts of the relationship. There can be no prejudice to the plaintiff in having those facts itemized. In fact, the defendant concedes that the parties were not in a common law relationship in the Third Counterclaim.
- [64] Ms. Dumitrean has provided a list of facts under the heading of domestic violence. The defendant had claimed compensation for abuse in the Second Counterclaim. As such, the listing of the particulars of the domestic violence from the defendant's perspective cannot be prejudicial to the plaintiff. I further note the particulars of the allegations of domestic violence have already been set out in the affidavits of the defendant previously filed.
- [65] The defendant also makes a claim in the Third Counterclaim for an equitable interest in Port Alberni but clarifies it to indicate that: "This amount totals \$4,212.80, the Defendants equitable interest in the Port Alberni property." The very same amount is claimed in the Second Counterclaim as "\$4,212.80 against Myles Evans for "mortgage overcharge".
- [66] The defendant confirmed in her submissions in Court that this is the only claim she is making in respect to the Port Alberni Property.
- [67] In the Third Counterclaim the defendant lists a variety of claims for equipment, personal belongings, defamation, loss of wages, installation of hydro meter, loss of food from fridge, installation of deadbolts and locks, and moving expenses. These same items in the same amounts were claimed in the Second Counterclaim.
- [68] The defendant explained that she saw a pro bono lawyer and received advice on how to properly word her claims. The new relief sought is for:
- a. A Declaration that Myles Evans has been unjustly enriched;
 - b. In the alternative, an award of general and special damages against Myles Evans in an amount to be assessed;
 - c. The common law and equitable remedy of tracing with respect to the Sale Proceeds received by Myles Evans;

- d. Return or reimbursement for certain property of the Dumitrean family;
- e. Damages, special damages, aggravated damages, punitive damages;
- f. Costs and special costs; and
- g. Interest pursuant to the Court Order Interest Act, R.S.B.C. 1996. C. 79.

[69] The examinations for discovery have not taken place. They will take place in April 2019 with a trial date in December 2019. The amendments will not result in a delay of the proceedings.

[70] I see no prejudice to the plaintiff in allowing the defendant to make the amendments, subject to one limitation: that the only amount being claimed against the Port Alberni Property is the return of the \$4,212.80 the defendant says she contributed. The defendant has confirmed that she is not seeking an equitable interest in the Port Alberni Property.

[71] Given the claims are being brought within the limitation period, the majority of the claims were identified in the Second and Third Counterclaims, and that there is no identified prejudice to the plaintiff, I find it is just and convenient to extend the time for filing of the Third Counterclaim.

4. Pre-Trial matters

[72] It was clear during the hearing of this application that some pre-trial orders should be made so that this matter could be kept on track for a trial in December 2019.

[73] The defendant advised that due to medical issues and surgeries that were being planned the earliest she could attend a discovery would be in April 2019.

[74] She agreed she was available to be examined for discovery on April 12, 2019 at 10:00 a.m. at a court reporter's office. An order was made for her discovery to take place on that day.

[75] I advised her that if she could not attend due to a medical issue she would need to provide medical evidence, such as a letter from her doctor, confirming that she was not able to attend. That letter would have to be provided to Mr. Evans' counsel.

[76] Ms. Dumitrean requested the opportunity to examine Mr. Evans for discovery and an order was made that his discovery take place on April 15, 2019, at 10:00 a.m. at a court reporter's office. Ms. Dumitrean was to serve an appointment to examine for discovery on Mr. Evans' counsel. She was advised that it was her responsibility to hire a court reporter to attend at the discovery. She was warned that she may have to pay a deposit up front to the court reporter's office.

VI. Conclusion

[77] The defendant is granted leave to file the Third Counterclaim except that under Part 2 paragraph 3, the words shall read: "Myles Evans must pay to Gabriela Dumitrean the amount of \$4,212.80 for payments she made to the Port Alberni Property". The defendant is not entitled to amend to seek an equitable interest in the Port Alberni Property. The remainder of the amendments sought are granted.

[78] Costs of this application will be in the cause.

"Forth J."

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