

CANADA / JUDGMENT

Freshwest Equities Trading Corp. v. Dosanjh

2015 BCSC 1996

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1996 Freshwest Equities Trading Corp. v. Dosanjh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Freshwest Equities Trading Corp. v. Dosanjh,

2015 BCSC 1996

Date: 20151102

Docket: H14-1392

Registry: Victoria

Between:

Freshwest Equities Trading Corp.

Petitioner

And

Peter Singh Dosanjh, 678664 B.C. Ltd., Ronald David Millard,

Fisgard Capital Corporation, V.W.R. Capital Corp., Armada

Mortgage Corporation and Slegg Construction Materials Ltd.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment re Costs

Counsel for the Petitioner:

Aurora Faulkner-Killam

Counsel for Respondent, Ronald David Millard:

Bruce Collingwood

Written Submissions:

August 31,

September 18, 21, 2015

Place and Date of Judgment:

Vancouver, B.C.

November 2, 2015

Background

- [1] This foreclosure proceeding was commenced in April 2014 by Freshwest Equities Trading Corp. ("Freshwest"). Most of the properties secured by the Freshwest's mortgage were disposed of by the time the foreclosure was commenced, and the last property was disposed of in August 2014. Accordingly, after that disposition, the only remaining issue was the personal liability of the various respondents who had executed the mortgage.
- [2] At the hearing of the amended petition in March 2015, Ronald Millard was the only respondent to oppose the granting of personal judgment against him. He sought to have the matter referred to the trial list, contending that there were various bona fide issues that should be decided at trial: that he was a guarantor who had been discharged by material changes to the mortgage; that he had signed the mortgage under duress; and that, if judgment was granted, the amount should be reduced by certain recoveries from the secured properties.
- [3] I issued reasons for judgment on June 4, 2014, indexed as Freshwest Equities Trading Corp. v. Dosanjh, 2015 BCSC 952 (the "Reasons"). I rejected that there were any bona fide triable issues relating to the guarantee and duress arguments. However, I accepted Mr. Millard's arguments on one aspect of the accounting issues without finding any need to refer the matter to the trial list.
- [4] Judgment was therefore granted in favour of Freshwest against Mr. Millard. The Reasons awarded costs against Mr. Millard on Scale B, consistent with a contested foreclosure matter:
- [100] Freshwest indicated in its argument that it wished to seek increased costs against Mr. Millard by reason of the somewhat convoluted procedures that led to this hearing. I do not consider that any such costs are warranted and, accordingly, costs are awarded against Mr. Millard in favour of Freshwest on Scale B.

- [5] Freshwest now seeks increased costs on Scale C until February 25, 2015, and double costs thereafter on the basis of an offer to settle delivered to Mr. Millard on February 25, 2015 (the "Offer"). In the alternative, Freshwest seeks costs on Scale B to the date of the Offer and double costs thereafter. Finally, Freshwest seeks a summary accounting of the increased and double costs.

Discussion

- [6] The issues raised require a consideration of the scale of costs and the double costs Freshwest seeks.

Scale of Costs

- [7] Appendix B of the Supreme Court Civil Rules, B.C. Reg. 168/2009, addresses party and party costs. Section 5 provides that costs in uncontested foreclosure matters must be assessed under Scale A. This hearing was not, of course, uncontested. Accordingly, having awarded judgment against Mr. Millard, it was open to the Court to award costs on either Scale B or C.

- [8] Section 2 of Appendix B provides:

2(1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.

- (2) In fixing the scale of costs, the court must have regard to the following principles:

- (a) Scale A is for matters of little or less than ordinary difficulty;
 - (b) Scale B is for matters of ordinary difficulty;
 - (c) Scale C is for matters of more than ordinary difficulty.
- (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
- (a) whether a difficult issue of law, fact or construction is involved;
 - (b) whether an issue is of importance to a class or body of persons, or is of general interest;
 - (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

- [9] The history of this proceeding indicates that the path to judgment was not a particularly straightforward one. Despite commencing the foreclosure in April 2014, Freshwest took no steps in the proceeding until January 2015 when an amended petition was filed. The affidavit evidence filed at that time by Freshwest's principal, Owen Williams, also provided an updated accounting of the debt.

- [10] Mr. Millard's counsel took exception to Freshwest being able to proceed in the foreclosure given that it was only seeking personal judgments. Thereafter began an unfortunate exchange between counsel concerning the proper procedure in bringing the issues forward, with Mr. Millard taking the position that the matter was not suitable for a summary disposition.
- [11] Mr. Millard's later affidavit contains the substance of the defences addressed in the Reasons. Additional issues were raised by Mr. Millard in his evidence and addressed by his counsel during argument, but they were abandoned prior to the conclusion of the hearing: Reasons, para. 14. Similarly, issues concerning Freshwest's accounting of the mortgage debt were raised at the hearing and addressed in the Reasons at paras. 92-99, as I will discuss in more detail below.
- [12] The approach of the Court in determining the appropriate scale of costs was addressed in *International Energy and Mineral Resources Investment (Hong Kong) Company Limited v. Mosquito Consolidated Gold Mines Limited*, 2012 BCSC 1475. Madam Justice Fisher stated:
- [12] Many of the cases that deal with increased costs were decided under former Rules where there were five scales of costs. Scale 4 was for matters of more than ordinary difficulty or importance and Scale 5 was for matters of unusual difficulty or importance. These higher two scales have now been rolled into Scale C, which is for matters of more than ordinary difficulty. The earlier cases are still applicable but they must be considered with some caution. In *Meghji v Lee*, 2012 BCSC 379, Johnston J. said this at para. 59:
- ... it was perhaps easier to grant that a case was more than ordinarily complex in deciding whether to grant costs on scale 4 instead of 3, but not so complex as to warrant costs on scale 5. Now, assuming that scale B represents ordinary difficulty, it should perhaps cover a broader range than ordinary difficulty did under the former rules. Otherwise, the range of "more than ordinary difficulty" becomes so broad that there is little on which to base a principled distinction of ordinary from more than ordinary.
- [13] I agree with this, but at the same time, it is important to note that Scale C does not require that a matter be of unusual difficulty or importance.
- [14] The factors relevant to assessing the degree of difficulty under Appendix B are well known: see *Boogaars v Anderson*, [1991] BCJ no 983 (SC); *Bradshaw Construction Ltd. v Bank of Nova Scotia* (1991), 54 BCLR (2d) 309 (SC); *F.S.M. v Clarke*, 2000 BCSC 432; *Mort v Saanich School Board No. 63*, 2001 BCSC 1473. They include:
- (a) the length of the trial;
 - (b) the complexity of the issues involved;
 - (c) the number and complexity of pre-trial applications;

- (d) whether or not the action was hard fought with little or nothing being conceded along the way;
 - (e) the number and length of examinations for discovery;
 - (f) the number and complexity of expert's reports;
 - (g) the extent of the effort required in the collection and proof of the facts.
- [15] In addition to this list are the considerations set out in Appendix B, s. 2(3), the relevant ones here being (a) whether a difficult issue of law, fact or construction is involved, or (b) whether an issue is of importance to a class or body of persons, or is of general interest. Whether an issue is of importance means that the litigation must be important to the public at large or to other litigation of a similar nature, as opposed to the individual litigants: *Bradshaw Construction Ltd.; Carpenter Fishing Corp. v Canada*, 2002 BCSC 627.
- [13] I accept that Freshwest was frustrated by how Mr. Millard presented his defence. He presented arguments during the hearing that were later abandoned. He did not raise the duress defence in a timely manner and served some materials late in the day. He refused to agree to a summary determination of the issues.
- [14] However, I do not consider that any of the factors in s. 2(3) of Appendix B were engaged during the hearing. Specifically, none of the issues of fact or law were particularly complex, and the issues raised by Mr. Millard are typically seen in foreclosure proceedings. While one might describe this contest as "hard fought", at the end of the day, there was an exchange of affidavit material leading to a two-day hearing on the winnowed list of issues. Both sides made concessions to decrease the number of issues at the hearing.
- [15] No additional circumstances have arisen since the hearing when Freshwest first indicated it would be seeking increased costs. In the Reasons, I exercised my discretion to award costs on Scale B, rather than Scale C. Freshwest has not raised any further facts or circumstances in its written argument that require a reconsideration of that decision.
- [16] Accordingly, the only issue that must be addressed is whether Freshwest is entitled to double costs as a result of the Offer.

Double Costs

- [17] Freshwest refers to its Offer of February 25, 2015, approximately one month after Mr. Millard received the amended petition materials and approximately one month before the hearing.
- [18] Under the Offer, Freshwest agreed to release Mr. Millard from all claims in the proceeding in exchange for his "immediate payment" to Freshwest of \$90,000, inclusive of all interest, taxes, and costs. Mr. Millard does not dispute that this is an "offer to settle" as defined in Rule 9-1(1).
- [19] Accordingly, Freshwest seeks double costs from the date of the Offer: Rule 9-1(5)(b).

- [20] Rule 9-1(4) provides that the court may consider such an offer when exercising its discretion in relation to costs. Factors that may be considered in relation to such an order are found in Rule 9-1(6):
- (6) In making an order under subrule (5), the court may consider the following:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [21] The object of Rule 9-1 is to facilitate and encourage the early settlement of disputes by rewarding a person who makes a reasonable settlement offer and by penalizing a person who does not accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29.
- [22] The Offer was open for acceptance at the time of the hearing and remained open for acceptance up until the delivery of the Reasons. Accordingly, the Offer must be assessed within this timeframe. Further, the Offer must be assessed by reference to the knowledge and circumstances of the party receiving it: *Wong v. Lee* 2011 BCSC 1087 at para. 22. It should not be considered with the benefit of a "hindsight" analysis in relation to the ultimate result: see *Bailey v. Jang*, 2008 BCSC 1372 at para. 24.
- [23] Clearly, the Offer in the amount of \$90,000 was substantially below the judgment obtained by Freshwest.
- [24] The arguments of both parties principally focused on the issue of whether the Offer ought to reasonably have been accepted by Mr. Millard: Rule 9-1(6)(a). In *Wong*, Madam Justice Dardi discussed the court's approach to the issue of the reasonableness of any offer:
- [23] The Court of Appeal in *Hartshorne* at para. 27 affirmed that the reasonableness of an offer is to be assessed "by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a 'nuisance offer'), whether it could be easily evaluated, and whether some rationale for the offer was provided". These considerations are not intended to be exhaustive, nor will each of the factors necessarily be relevant in a given case: *Stuart v. Hugh*, 2011 BCSC 575 at para. 26.
- [25] Freshwest says that Mr. Millard's defence was not proportionate to the issues or the evidence and did not reasonably accord with the law. In substance, Freshwest says that Mr. Millard should not have defended the claim at all. Freshwest says that any realistic evaluation of his argument should have led Mr. Millard to conclude he was never in a position to succeed.

- [26] Mr. Millard contends that the position he took on the application was reasonable and that the arguments he raised were legitimate. He argues that while the Offer could be easily evaluated in terms of its amount, no rationale for the offered amount was provided by Freshwest.
- [27] I do not agree with Freshwest that Mr. Millard had no chance of success, despite my ultimate rejection of his arguments on the guarantee and duress. While I agree that Mr. Millard's evidence on these issues was somewhat "thin", in all the circumstances, they were legitimately raised. A determination of these issues required substantial analysis of the evidence in the context of the many case authorities cited by both parties.
- [28] Overall, I do not consider Mr. Millard to have been unreasonable in raising those issues. If he succeeded in his arguments to meet the relatively low threshold to send these issues to the trial list, he would have had an opportunity to marshal further evidence toward possibly succeeding in avoiding liability under the mortgage altogether.
- [29] There were further issues relating to any assessment of the Offer arising from Freshwest's accounting of the mortgage debt.
- [30] Freshwest argues that its claim was "easily assessable and calculable". This is arguable to a point. Attached to Mr. Williams' first affidavit were calculations of the mortgage debt. Mr. Millard raised numerous issues regarding that accounting, which led to Mr. Williams swearing his second affidavit on January 19, 2015. In that second affidavit, Mr. Williams conceded that his initial calculations contained some errors, particularly as to the interest charged.
- [31] However, by his second affidavit, Mr. Williams continued to assert that he was entitled to add the amount of \$67,410.43 to the mortgage debt. He had personally advanced these monies to the corporate respondents. When one of the mortgaged properties was sold, this amount was repaid to Mr. Williams personally, rather than reducing the mortgage debt. In argument, Freshwest asserted that it was entitled to this further amount, but admitted it would concede this point if the issue was referred to the trial list.
- [32] In the Reasons, I found that Mr. Millard was correct in his assertion, and that the accounting should be amended to reflect a reduction in the disputed amount: paras. 95, 99. Accordingly, this disposition was not known to Mr. Millard until the Reasons were released.
- [33] Another point, in relation to the Offer, is that Mr. Millard says that he did not have the resources to allow him to "immediately" pay \$90,000 to Freshwest, even if he had considered the Offer to have been reasonable. There is difficulty in considering that statement as it was not in evidence by way of Mr. Millard's further affidavit. That statement only arose in the recent written submissions of Mr. Millard's counsel.
- [34] In response, Freshwest introduced evidence of three titles to real property in Mr. Millard's name as of June 2015. This evidence was unhelpful as the titles were not accompanied by any values and also refer to various mortgages. In the circumstances, it is impossible to

discern whether there is any equity in those properties, or whether Mr. Millard could quickly have sold or mortgaged them to immediately pay \$90,000 under the Offer. As well, there is no evidence of any value in the various companies in which Mr. Millard is involved so as to conclude, as Freshwest argues, that he "clearly has assets".

- [35] Even so, accepting that Mr. Millard did not have these funds, it occurs to me that this type of offer from a petitioner does present some difficulties. This is not akin to a motor vehicle case where a plaintiff might make an offer to a defendant. The defendant will likely be represented by ICBC, and will have immediate funds available to them allowing them to accept and pay any reasonable offer.
- [36] Freshwest's Offer was to accept an immediate cash payment from Mr. Millard. However, if he was truly without the means to pay that amount "immediately", then his refusal to accept that offer could hardly be said to be unreasonable. In my view, it cannot be the case that an impecunious defendant might be subject to double costs simply by reason of not being able to pay the amount that a plaintiff will accept.
- [37] If the offer had been to accept a default judgment from Mr. Millard, with Freshwest then taking its chances on realizing on exigible assets, one might more readily conclude that acceptance of the offer would have been reasonable. Freshwest might have been willing to do that to avoid the delay and expense of a contested hearing. In that event, if such a defendant knowingly puts forward unmeritorious defences, double costs might be appropriate under Rule 9-1(6).
- [38] Mr. Millard also refers to other factors that might be considered by the Court. Firstly, he refers to arguments concerning the appropriateness of Freshwest proceeding under Rule 21-7, the foreclosure rule. These arguments either could have been or were raised and then withdrawn at the hearing. I do not consider that they are properly raised now as a factor in relation to costs.
- [39] Mr. Millard also refers to Freshwest's substantial delay in bringing forward the application in January 2015, during which time interest on the mortgage debt continued to accrue. I do not accept this argument. It was to Mr. Millard's benefit to have Freshwest delay in seeking personal judgment against him until all the real property was disposed of and the true deficiency was known. This didn't happen until August 2014. In any event, it was also open to Mr. Millard to address the matter of his liability at any time and before Freshwest proceeded directly against him.

Conclusion

- [40] I am not prepared to find that Mr. Millard acted unreasonably in refusing to accept the Offer. In addition to asserting reasonable arguments in support of referring the matter to the trial list, there were other issues related to the accounting that were validly raised. I do not consider that Mr. Millard's arguments were meritless, as argued by Freshwest. He had some prospect of success.
- [41] I do not base my decision on Mr. Millard's assertions that he was unable to pay the amount offered in any event, given that this statement was not in evidence. If this was in evidence, that factor would have further supported my decision.
- [42] My initial conclusion as to Mr. Millard being required to pay party and party costs on Scale B stands. Those costs may be assessed before the Registrar in the usual fashion, failing agreement between the parties.

"Fitzpatrick J."

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