

CANADA / JUDGMENT

# Fuzi v. Kiss

2020 BCSC 1779

## COURT

Supreme Court of British Columbia

## DECIDED

23 October 2020

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2020 BCSC 1779 Fuzi v. Kiss IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Fuzi v. Kiss, 2020 BCSC 1779 Date: 20201023 Docket: S189326 Registry: Vancouver Between: John Fuzi Plaintiff And Kamillia Maria Kiss in her personal capacity, and as Executrix of the Estate of Terezia Fuzi Defendant And John Fuzi Defendant by Counterclaim Before: The Honourable Madam Justice Wilkinson Oral Reasons for Judgment In Chambers Counsel for the Plaintiff (Applicant), appearing by teleconference: S.F. Ross Counsel for the Defendant (Respondent), appearing by teleconference: K. Vimalasan Place and Date of hearing: Vancouver, B.C. October 5, 2020 Place and Date of Judgment: Vancouver, B.C. October 23, 2020

[1] THE COURT: These are my reasons for judgment on the application. As they were delivered orally they have been edited for distribution.

## Background

- [2] This is an application brought by the plaintiff in this estate claim. Terezia Fuzi (the "Deceased") died on July 12, 2018, leaving a will dated April 5, 2008 (the "Will"). By the Will, the Deceased appointed the defendant as the executor of the Will and trustee of her estate (the "Estate"). The spouse of the Deceased died in or about 1984. The Deceased had two children: the defendant and the plaintiff's father. The defendant is named as the sole beneficiary under the Will.
- [3] On August 22, 2018 the plaintiff filed a notice of dispute with respect to the Estate, alleging the Will was made at a time when the Deceased lacked testamentary capacity. On August 27, 2018, the plaintiff filed a notice of civil claim which is the current action. On February 28, 2019, the defendant filed a response to the claim and a counterclaim.
- [4] In the counterclaim, amongst other relief, the defendant sought a declaration pronouncing for the force and validity of the Will in solemn form of law and an order granting probate of the Will to the defendant as named executor.

- [5] On May 8, 2019, the plaintiff amended his claim to allege, among other things, that the two witnesses to the Will did not "sign" their names. The plaintiff says the Will was not witnessed properly as it was not signed by the two people whose names are listed as witnesses, or in the alternative even if they did write their names on the signature page such writings do not constitute valid signatures as they were not intended to be their mark in the place of their normal signatures.
- [6] The defendant responded by amending her counterclaim to plead section 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], which grants the court a broad curative power to order that a "record or document or writing or marking on a will or document" be fully effective, despite non-compliance with the statutory requirements.
- [7] The plaintiff brings this application seeking an order pursuant to Rule 9-5(1) of the Supreme Court Civil Rules to strike those portions of the defendant's amended counterclaim seeking relief pursuant to s. 58 of WESA as they say the pleading is bound to fail since such relief must be commenced by an application within an existing proceeding or by petition pursuant to Rule 25-14(2). In the alternative, they submit the pleadings are bound to fail since a s. 58 application must precede a proof in solemn form application. Related to the orders to strike sought, the plaintiff further seeks an order striking the paragraphs in Part 3 of the amended counterclaim as they are ancillary to the s. 58 relief sought.

## Issues

- [8] The following issues are before me for determination on this application:
- a) Is the defendant's WESA s. 58 claim bound to fail due to the process set out in Rule 25-14(2) regarding WESA s. 58 relief?
  - b) Is the defendant's WESA s. 58 claim bound to fail if it is inconsistent with her action to prove the Will in solemn form?
- [9] I find that the answer to both of these questions is no, for the following reasons which are based primarily on the position taken and submissions made by the defendant. The process set out in Rule 25-14(2)
- [10] Rule 9-5(1) of the Rules provides that the court may wholly or partially strike out a pleading if it discloses no reasonable claim, it is unnecessary, frivolous, vexatious, may delay the fair trial or hearing of the proceedings, or is an abuse of the process of the court. In order to strike it must be plain and obvious that the claims made cannot succeed.
- [11] Rule 25-14(2) provides as follows:
- (2) To apply to the court for any of the following orders:
    - (a) an order under section 30 of the Wills, Estates and Succession Act determining the value of a deceased's interest in a spousal home within the meaning of that Act;

- (b) an order under section 33 of the Wills, Estates and Succession Act relating to a spousal home within the meaning of that Act;
- (c) an order under section 58 of the Wills, Estates and Succession Act respecting deficiencies in a document that does or may disclose a testamentary intention or testamentary disposition of a deceased;
- (d) an order under section 59 of the Wills, Estates and Succession Act rectifying a will, a person
- (e) may, if there is an existing proceeding within which, under these Supreme Court Civil Rules, it is appropriate to seek that order, apply for that order in accordance with Part 8 by notice of application in Form P42 in that proceeding, or
- (f) must, if there is no existing proceeding within which it is appropriate to seek that order, apply by petition in Form P43. [Emphasis added.]

- [12] The plaintiff submits that Rule 25-14(2) provides that a person may only seek WESA s. 58 relief if it makes a separate application within an existing estate claim, and in this case the plaintiff's claim, or files a separate petition seeking s. 58 relief. He says there is no other process under which s. 58 relief may be sought. He cites *Naidu v. Yankanna (Estate)*, 2018 BCSC 878 in support of his position on the proper interpretation of the process mandated by Rule 25-14(2).
- [13] In *Naidu*, the court struck portions of the plaintiff's claim seeking a declaration that a deceased lacked capacity. The procedural rule there under Rule 25-14(4) was similar to that in Rule 25-14(2). Validity of a will in that case could only be decided in a proof in solemn form petition since there was no pre-existing proceeding. Therefore, the claim was bound to fail due to the plaintiff not bringing the claim under the proper procedure. Here, however, there is a pre-existing proceeding under which it is appropriate to seek the s. 58 order. The issue before me is therefore different than that before the court in *Naidu*.
- [14] The defendant cites the decision of this Court in *Horton v. Bruce*, 2017 BCSC 712 for the proposition that a s. 58 order may be sought and granted at trial and does not require the bringing of a separate application within the same proceeding. In that case, at the trial of the proceeding, the plaintiff sought and was granted a curative order under s. 58 of WESA, a declaration that the estate of the deceased proceed as an intestacy under the WESA distribution scheme, and appointment of the plaintiff as administrator.
- [15] It is not plain and obvious that Rule 25-14(2) prohibits the defendant's counterclaim for s. 58 relief. By choosing to use the word "may" in Rule 25-14(2)(e) and not "must", the drafters intend for different meanings. "May" is permissive, "must" is directive. The intention of the wording is likely to provide the defendant with an option to seek a s. 58 order at trial, or separately by way of application within an existing proceeding. The plaintiff's position here is that the plaintiff started a proceeding in which it is appropriate to seek such an order, it is just that the defendant cannot seek the order at trial by reason of Rule 25-14(2). This would appear to contradict the overriding object of the Rules, which is to secure the just, speedy,

and inexpensive determination of every proceeding on its merits.

- [16] The parties agree that there has been no judicial consideration of the Rule 25-14(2) in this context.
- [17] It is not plain and obvious to me that the defendant's WESA s. 58 relief sought cannot be made at the trial of this estate claim by reason of the procedure set out in Rule 25-14(2). I further find that Rule 25-14(2) does not preclude the defendant from seeking WESA section 58 relief at trial in these circumstances. Inconsistent pleadings pursuant to Rule 3-7(6)
- [18] The plaintiff also submits the defendant's WESA s. 58 pleadings are bound to fail since an order curing a deficiency is a pre-requisite to a proof in solemn form proceeding. Therefore, such relief must be sought by way of application, prior to the proof in solemn form action. Otherwise, they submit, the defendant will be pleading inconsistent claims.
- [19] This fails to recognize the defendant's reason for making the pleading. It was only when the plaintiff amended his notice of civil claim to make allegations regarding the witness signatures that the defendant amended her counterclaim to add the s. 58 relief.
- [20] This relief is sought in the alternative. The defendant's primary position is that the Will is valid and complies with the requisite formalities set out in s. 37 of WESA. I agree with the defendant that the court will only need to consider s. 58 relief if the court finds that the Will does not comply with the witness signature formalities. This requires determination of the intention of the witnesses: *Bolton v. Tartaglia et al*, 2000 BCSC 576 at para. 13. What the witnesses intended is a question of fact best determined in this instance by the trial judge where the execution of the Will and other considerations will be at issue.
- [21] Furthermore, the issues relevant to the witnessing of the Will, being issues relevant to the execution of the Will, are directly linked to proving the Will in solemn form. As the defendant submits, to hear and determine a WESA s. 58 application prior to the trial of this case is putting the cart before the horse.
- [22] The plaintiff in his reply submissions took the position that the defendant could apply for an order consolidating the matters such that a s. 58 application could be ordered to be heard during the trial of the action. This is inconsistent with his position that the curative claim must precede and be determined prior to the proof in solemn form claim.
- [23] The parties agree that there is limited jurisprudence regarding the issue of whether a party can assert as a primary position that a will is valid and complies with the requisite formalities while asserting in the alternative that s. 58 of WESA can rectify the alleged defect.
- [24] I do not find that the s. 58 WESA related pleadings are inconsistent pleadings pursuant to Rule 3-7(6).

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## Conclusion

- [25] I therefore dismiss the plaintiff's application. Costs
- [26] At the end of the hearing I asked counsel to provide me with their written submissions on costs.
- [27] Both parties seek an award of special costs in their favour no matter the outcome. The plaintiff seeks special costs primarily due to the novelty of the issues raised by him and early communication regarding his position the claim was brought improperly. The defendant seeks special costs due to what she alleges is the plaintiff's reprehensible conduct for insisting upon making this application in the face of refusing the defendant's offer to have the section 58 issue determined by way of affidavit evidence on application. Yet the plaintiff took the position in this application that the section 58 issue must be heard by way of application, the process for which requires the issue to be determine on affidavit evidence.
- [28] The defendant previously proposed the parties seek direction from the court pursuant to Rule 25-14(8) and the parties bear their own costs. The plaintiff refused this, taking the position that it was open to the defendant to seek such direction on its own.
- [29] The plaintiff also agreed in his submissions that the court, if the s. 58 application would otherwise be required to be determined by way of separate application, could direct the issues to be heard together on its own motion under Rule 25-14(8).
- [30] Ultimately, the issues at stake in relation to the curative relief under s. 58 are live issues raised in the pleadings and would need to be determined if the plaintiff's claim regarding the witness signatures are successful.
- [31] I do not see this as reaching into the realm of reprehensible conduct. There is an aspect of the matter being novel, however, ultimately the order sought would likely have resulted in further applications by the defendant to consolidate the s. 58 application with the trial of the matter
- [32] I do, however, award costs in any event of the cause to the defendant in this application. "Wilkinson J."

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