
CANADA / JUDGMENT

Gully v. Gully

2018 BCSC 1590

COURT

Supreme Court of British Columbia

DECIDED

18 September 2018

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2018 BCSC 1590 Gully v. Gully

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gully v. Gully,

2018 BCSC 1590

Date: 20180918

Docket: S180948

Registry: Vancouver

Between:

Chan Kui Tina Gully

Plaintiff

And

Steven Yang Gully and Ledcor Construction Limited

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

D. Chen

Counsel for Defendants:

K. M. Jackson

Place and Date of Hearing:

Vancouver, B.C.

August 17, 2018

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2018

- [1] This is an application brought by Chan Kui Tina Gully for a declaratory order that her son Steven Gully holds his half interest in her property on a resulting trust in her favour, an order that her son cause his legal title in the property to be transferred to her, a declaratory order that Ms. Gully is the sole beneficial owner of the property, and an order that the certificate of judgment held by Ledcor Construction Limited ("Ledcor") be vacated from the title of the property.
- [2] In 1999 Ms. Gully purchased a home in Burnaby using proceeds of sale of the previous house owned by her and her husband ("Burnaby Property").
- [3] In 2015 Ms. Gully added her son Steven Gully as a joint tenant on the title of the Burnaby Property. She did so based on estate planning advice she received at the time, including to avoid the payment of inheritance tax on her death. She did not advise her son that he had been added as a joint tenant on title to the Burnaby Property.
- [4] Steven Gully has contributed in no way to the purchase or upkeep of the Burnaby Property.
- [5] In August 2017 Steven Gully and his company Atimi Software Inc. consented to judgment in favour of Ledcor in the amount of \$800,000. At the time Mr. Gully consented to the judgment in favour of Ledcor, he did not know that he was on title to the Burnaby Property.
- [6] In October 2017 Ledcor registered a certificate of judgment upon the undivided half interest of Steven Gully in the Burnaby Property.

I. IssueS

- [7] Ms. Gully relies on the law of resulting trust, and a number of associated arguments, to advance the proposition that Ms. Gully did not intend to gift her property to her son, and that her son maintains no beneficial interest in the property. In the result, she says that Ledcor cannot register its judgment against the Burnaby Property. These submissions give rise to two main issues to be determined on this application:
 - a) did Ms. Gully gift an interest in the Burnaby Property to Mr. Gully in 2015, and
 - b) can the certificate of indefeasible title registered with respect to the Burnaby Property be relied on by a third party, namely Ledcor, in the registration of a judgment?

A. Did Ms. Gully gift an interest in the Burnaby property to Mr. Gully in 2015

- [8] Ms. Gully challenges Ledcor's standing to argue against the presumption of resulting trust asserted in this case, submitting that the onus is on Mr. Gully, not Ledcor, to rebut the presumption of resulting trust. While the onus is on Mr. Gully, Ledcor's claim is asserted through the interest of Mr. Gully and, as such, I find that Ledcor is entitled to challenge the presumption of resulting trust. To find otherwise would allow Mr. Gully to be complicit in defeating the interest of Ledcor asserted under the Land Title Act, R.S.B.C. 1996, c. 250, by simply choosing to not to respond to the onus on him.
- [9] The Will that Ms. Gully executed at the same time the interest in the Burnaby Property was registered to Mr. Gully stated the following intention, "I declare that I contemplate naming my son and others as joint owners of some of my assets, or designated beneficiary of my RRSP, insurance and other investments, it being my intention that upon my death, such to belong to the named beneficiary, at law and in equity, and that such are not to be shared or allocated to other persons" [emphasis added].
- [10] In November 2017 Ms. Gully executed a new Will which disinherited Steven Gully. The 2017 Will states that Mr. Gully is disinherited because he has many personal debts. This Will was executed one month after the Ledcor judgement was registered on title. It is clear to me that the 2017 Will was executed in direct response to the Ledcor judgement.
- [11] In her affidavit sworn on this application, Ms. Gully asserts that she had no intention in 2015 to transfer any part of her interest in the Burnaby Property to Mr. Gully, and that the registration of joint tenancy was made solely to facilitate the transfer of the property to her grandchildren on her death. However this statement is contrary to the statement of intention found in the 2015 Will itself. While counsel for Ms. Gully urged me to accept her current statement as evidence of her intention 2015, in *Fuller v. Harper* 2010 BCCA 421 the Court of Appeal discussed how the evidence of a transferor's intention should be considered:
- [48] In *Pecore*, Rothstein J. also discussed the nature of the evidence to be considered. In general, evidence of the transferor's intention "at the time of the transfer 'ought to be contemporaneous, or nearly so' to the transaction" (at para. 56 referring to *Clemens v. Clemens Estate*, 1956 CanLII 3 (SCC), [1956] S.C.R. 286 at 294 citing *Jeans v. Cooke* (1857) 24 Beav. 513, 53 E.R. 456, and referring to Viscount Simonds' rule in *Shephard v. Cartwright* (1954), [1955] A.C. 431 (U.K. H.L.), at 445 citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153). He observed that the admissibility of evidence on post transfer conduct or statements has traditionally been "viewed with mistrust by courts... because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts" (para. 56). He also noted, however, that evidence by a party to the litigation may be admissible against that party for a limited purpose if it is found to be relevant to the issue of the transferor's intention at the time of the transfer (referring to *Taylor v. Wallbridge* (1879), 1879 CanLII 1 (SCC), 2 S.C.R. 616 cited in *Pecore* at para. 59).

- [49] In adopting this more liberal stance on the admissibility of post transfer conduct, Rothstein J. cautioned that the trial judge "must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention" (Pecore at para. 59). The assessment of the reliability of post transfer conduct admitted into evidence will include an assessment of the reasonableness of any inferences that are sought to be drawn from that conduct, including the inherent probability or improbability of competing explanations as to the transferor's intent: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at p. 209, §5.61. In short, the court must consider if the transferor had any rational purpose for the transfer other than a gift (Pecore at paras. 45-47).
- [12] I am satisfied that it was the intention of Ms. Gully to gift an interest in the Burnaby Property in favour of Mr. Gully when the joint tenancy was registered in 2015, as described in the 2015 Will. As such, I find that Mr. Gully does not hold the Burnaby Property on a resulting trust in favour of Ms. Gully.
- [13] Further, the registration of the interest of Mr. Gully on the title to the Burnaby Property places Mr. Gully in possession of the gift. Ms. Gully cannot unilaterally affect the interest of Mr. Gully. Where a gift has been delivered into the possession of a donee, acceptance is generally assumed. A donee has the right to unilaterally repudiate the gift upon learning of it: *LeClair v. Her Majesty the Queen*, 2011 TCC 323. However, there is no evidence of repudiation by Mr. Gully. Mr. Gully's failure to respond to this application cannot be taken as an act of repudiation.

B. Can Ledcor rely on the certificate of title

- [14] The starting point of the analysis is the Land Title Act. Ledcor relies on sections 23 and 29 to establish the proposition that an unrelated third party is not affected by unregistered charges, and is entitled to rely on the certificate of indefeasible title.
- [15] Section 23(2) of the Land Title Act states:
- (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
- [16] It is common ground that none of the exceptions stated s.23(2) are applicable in the case at bar.
- [17] Section 29(2) of the Land Title Act states:
- (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
- (a) a transfer of land, or

(b) a charge on the land, or a transfer or assignment or subcharge of the charge,

is not, despite the rule of law or equity to the contrary, affected by a notice, express, implied, or constructive trust, of an unregistered interest affecting the land or charge other than

[18] None of the exceptions stated s.23(2)(c)-(e) are applicable in the case at bar.

[19] Ledcor submits that the sections noted above of the Land Title Act operate conclusively in its favour. The operation of the registration of indefeasible title in our title system requires certainty. If third parties could be affected by unregistered interests, that would throw chaos into all systems which rely on certainty of title, including the operation of our lending systems.

[20] Ms. Gully submitted that she did not intend to gift the Burnaby Property to her son. I have found that she did intend to gift the Burnaby property to her son; however, even if I accepted that she did not intend the gift to her son at time she registered Mr. Gully's interest, this argument may have some bearing on a dispute between the family members, but by virtue of the Land Title Act it has no bearing on the interests of third parties such as Ledcor.

[21] Ms. Gully relies on *Pecore v. Pecore*, 2007 SCC 17, and other law, in support of the proposition that the presumption of a resulting trust may arise through the gratuitous transfer of an interest in land from a parent to a child. I have already found that no resulting trust arose on the facts before me. Further, this line of authority has no application in the case of third-party interests. In *Pecore* the contest was between beneficiaries of a parent's estate. As between competing beneficiaries, the presumption of resulting trust has relevance. However this law is not applicable in the case of a third party creditor claiming against a registered interest in land.

[22] Ms. Gully argues that the gift to Steven Gully was not perfected because he did not expressly agree to the transfer of the property in his favour, including that he did not sign any transfer documents. Again, while this argument may have relevance between Ms. Gully and Mr. Gully, this argument has no bearing on the interest of Ledcor. The land title registry has properly registered an interest in joint tenancy in favour of Mr. Gully. Ledcor is entitled to rely on that registration.

[23] Ms. Gully argues that it would be inequitable for Ledcor to receive any part of the Burnaby Property. She argues that Ledcor would receive a windfall if it was to execute against the Burnaby property. As I have found that Ledcor is entitled to register its judgment against property held by Mr. Gully, in respect of an obligation in the amount of \$800,000 which Mr. Gully jointly owes to Ledcor, it is difficult to see how Ledcor would be receiving a windfall in collecting on a judgment in its favour.

- [24] Ms. Gully took a risk in registering her son as a joint tenant on her property. Whether she was properly advised of that risk is not before me. However, once she made the decision to register an interest in the Burnaby Property in Mr. Gully's name, third party creditors of Mr. Gully became entitled to register judgments against Mr. Gully's interest in the Burnaby property.
- [25] Ledcor has advised the court, and I accept this statement of intent on its behalf, that it will not execute against the Burnaby Property while Ms. Gully is living in the home. Ledcor is not intending to dispossess Ms. Gully of her home while she is living in it.
- [26] Mr. Gully may be able to make an arrangement with Ledcor to satisfy its judgment, which will protect his mother's estate. However this cannot be accomplished through the application brought by Ms. Gully.
- [27] I dismiss the application of Ms. Gully with costs to the defendant Ledcor Construction Limited.

"Baker J."

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Prepared on 29 October 2026 · Esheria