

CANADA / JUDGMENT

Guy v. Kent

2006 BCSC 946

COURT

Supreme Court of British Columbia

DECIDED

20 June 2006

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2006 BCSC 946 Guy v. Kent

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Guy v. Kent,

2006 BCSC 946

Date: 20060620

Docket: H060105

Registry: Vancouver

Between:

Bob Guy

Petitioner

And:

Roselyn Dale Kent

Respondent

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Petitioner

Brian C. Markus

The Respondent

Appearing in Person

Date and Place of Hearing:

April 27 and 28, 2006

Vancouver, B.C.

[1] This is an appeal from an order nisi made by Master Bishop on March 30, 2006. A draft copy of the order nisi prepared by Mr. Markus, counsel for Mr. Guy, sets out the following declaration and orders:

THIS COURT DECLARES THAT:

1. A form of Agreement (the "Mortgage") dated the 3rd day of October, 1996, made between Western Heritage Mortgage Corporation as Mortgagee, and the Respondent Roselyn Dale Kent as Mortgagor, and duly modified and transferred to Bob Guy on June 11, 1999, as an unregistered mortgage charging the following:

PID: 003-989-933

Lot 4 Sec 10 Tp 22 NWD Plan 50104

and

PID: 003-989-925

Lot 3 Sec 10 Tp 22 NWD Plan 50104

and

1983 Travelaire Mobile Home

Model No. B36FKM

Serial No. S360T8182

and

All rights to Campsites Nos. 57 and 58

of the Cultus Lake Holiday Park

Associations as requested by the

Membership Certificates

(the "Lands and Premises")

ranking in priority to the interests in the Lands and Premises of the Respondent, her respective heirs, executors, administrators, successors and assigns, and all persons claiming by, through or under her;

THIS COURT DECLARES AND ORDERS THAT:

2. there has been default under the Mortgage and that the last date for redemption shall be September 30, 2006 (the "Redemption Date");
3. the amount of money due and owing under the Mortgage and the amount of money required to redeem the Lands and Premises on this day is the sum of \$77,117.59, together with interest at a daily rate, which is currently \$23.24, to accrue to and including the date of payment, plus the assessed costs of the Petitioner of and in connection with this proceeding (the "Amount Required to Redeem");
4. upon the Respondent paying into the Vancouver Registry of this Honourable Court at 800 Smithe Street, Vancouver, British Columbia, or to the solicitors for the Petitioner, or if no such solicitor exists, to the Petitioner the Amount Required to Redeem before pronouncement of Order Absolute or an Order approving a sale of the Lands and Premises, then the Petitioner shall reconvey the Lands and Premises free and clear of all encumbrances in favour of it or by any person claiming by, through or under it, to the said Respondent or Respondents who made payment;
5. if the Lands and Premises shall not be redeemed, the Petitioner shall be at liberty to apply for an Order Absolute and upon pronouncement of an Order Absolute then the Respondent, and her heirs, executors, administrators, successors and assigns, and all persons claiming by, through or under her shall henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption in or to the Lands and Premises, and shall immediately deliver to the Petitioner vacant possession of the Lands and Premises;
6. the Respondent shall pay to the Petitioner the sum of \$77,117.59, plus the Petitioner's assessed costs of and in connection with this proceeding;
7. the Petitioner is at liberty to apply to this Court for an Order directing an inquiry, assessment or accounting to be held of any amounts due to the Petitioner pursuant to the mortgage for principal, simple or compound interest, taxes, utilities, insurance expenses, legal or collection expenses, costs, charges or otherwise which are not included in the Amount Required to Redeem, whether such amounts become due before or after the date of pronouncement of this Order, and for an Order varying the Amount Required to Redeem and the Judgment in this Order accordingly;
8. the assessed costs of and in connection with this proceeding are awarded to the Petitioner;
9. the Petitioner's costs to and including this Order be assessed on a party and party scale 2 basis, and the Petitioner is at liberty to apply for an Order that any of its costs after this Order be assessed on a different basis;
10. the approval as to the form of this Order by the Respondent is hereby dispensed with. (Emphasis added)

- [2] The Cultus Lake Holiday Park Association ("the Association") is the registered owner in fee simple of Lots 3 and 4, Section 10, Township 22, New Westminster District, Plan 50104 ("Lots 3 and 4"). The holiday park was developed in two phases in 1976 and 1977, and the original campground Holiday Park bylaw was adopted in 1981. The Holiday Park is not a strata subdivision. The Association became the registered owner in 1981.
- [3] The Cultus Lake Holiday Park is a 227-site holiday park located at 1436 Frost Road in the Columbia Valley. The park is owned and operated by the Cultus Lake Holiday Park Association, a non-profit association under the Society Act, R.S.B.C. 1996, c. 433. It is zoned CHP (Campground - Holiday Park) and operated as an association.
- [4] The members of the Association have long term rights to the use of certain campsites. It is considered a "holiday park". This designation has higher design standards, and users have longer tenure of their sites or lots.
- [5] Generally, no structures are permitted on the sites. All sites must be recreational camping sites. Recreational vehicles ("RV") can be placed on the site, and also a small storage shed within the dimensions set out in the bylaws of the Association.
- [6] To become a member of the Association, one must be accepted by the board of directors, and each member is then issued a membership card. The Association is limited to 225 members. A member may nominate a third person upon termination of their use of the site, but that new person must be approved by the board of directors. A member can be removed as a member of the Association for non-payment of fees. No member is to use their site as a permanent or principal place of residence. Only RVs are allowed. There are no mobile homes allowed on the sites.
- [7] The respondent, Roselyn Dale Kent, is a member of the Association, and has the right to use sites 57 and 58 at the Holiday Park. She apparently has an RV.
- [8] On October 3, 1996, the respondent entered into a "mortgage" with Western Heritage Mortgage Corporation. That mortgage was then transferred from Western Heritage to Bob Guy. Mr. Guy now claims the amount of \$77,117.59 plus daily interest at \$23.24 owing to him by the respondent on default of the mortgage.
- [9] The respondent points out that there can be no mortgage against lands that have never been owned by her.

Background

- [10] In January 1993, the respondent, then known as Roselyn Dale Reich, and her husband, Terry Reich, lived at 43600 Bracken Drive, in Sardis, British Columbia. The legal description of their home was Lot 72, Section 72, Township 23, NWD, Plan 84228. That was their matrimonial home, in joint tenancy.

- [11] On January 18, 1993, the Reichs entered into a mortgage with Canada Trustco for \$120,000.00. That mortgage was registered as number BG024787. They renewed that mortgage in July 1995.
- [12] Some months prior to that on February 1, 1995, Aaron Acceptance Corporation had an appraisal done on campsite lots 57 and 58 at the Cultus Lake Holiday Park. For the two lots, the appraisal was estimated at \$90,000.00. In the appraisal it was noted that "membership in park sells for \$19,000.00 to \$40,000.00...".
- [13] On October 3, 1996, the respondent, now known as Roselyn Dale Kent, signed a mortgage purportedly on Lots 3 and 4 with Western Heritage to secure a loan for \$58,500.00, at 9.5% interest, with monthly payments of \$494.00. The mortgage was drawn up in Form B, the prescribed form for real property mortgages under the Land Title Act, R.S.B.C. 1996, c. 250. It purported to charge Ms. Kent's "freehold" interest in Lots 3 and 4. On that same date, she also entered into an agreement with Western Heritage with regard to that same loan of \$58,500.00 at the same rate of interest.
- [14] On October 8, 1996, John Motiuk, the lawyer for Western Heritage, wrote a letter to Bob Guy confirming the transfer to Mr. Guy of Western Heritage's interest in the "first mortgage" with regard to Lots 3 and 4. The letter enclosed a transfer that was unsigned. It listed Ms. Kent as the "registered owner" of the property. Mr. Motiuk's letter promised a certificate of title with regard to the premises.
- [15] Meanwhile, from November 1996 up to and including October 1997, Ms. Kent was making monthly payments to Western Heritage, unaware that Bob Guy had been assigned the debt. Her payments were \$494.00 a month up to and including May of 1997. From June to October 1997 her payments were \$445.00 a month. It is assumed those payments were transferred over to Mr. Guy by Western Heritage.
- [16] Toward the end of 1997, Ms. Kent was having trouble meeting her payments, but when she contacted Western Heritage, she was told on the telephone that they had nothing to do with it and not to bother them. She made no payments from November 1997 until apparently June 1999.
- [17] The file indicates that on October 3, 1997, the mortgage "matured", and was extended to March 15, 1998.
- [18] It appears that around this time, in late 1997, Mr. Motiuk contacted Ms. Kent and suggested to her that she sever the joint tenancy of her matrimonial home on Bracken Drive, to protect her interests. At no time was Mr. Motiuk the lawyer for Ms. Kent. She had her own lawyer, Mr. Robertson.
- [19] On December 11, 1997, Ms. Kent signed a transfer severing the joint tenancy with regard to the matrimonial home on Bracken Drive. That transfer was registered December 18, 1997. On that same date, there is a letter from Mr. Motiuk in which he refers to Ms. Kent's lawyer, not meaning himself. Also on that same date, December 18, 1997, there was a registration of

a mortgage against the Bracken Drive property, that also being signed by Ms. Kent on December 11, 1997, in the same amount as the prior loan, \$58,500.00. The application for registration was made by Mr. Motiuk. Bob Guy appeared as the mortgagee. That was registered as number BL426376, and was registered subject to four certificates of lis pendens. There was also an order for sale of the property by Canada Trustco by this time.

- [20] At no time was there any registration of any mortgage against Lots 3 and 4, in spite of Mr. Motiuk's letter of October 8, 1996, to Mr. Guy that a first mortgage would be registered against these two lots. But there was now a mortgage registered against Ms. Kent's matrimonial home. It is also clear from Mr. Motiuk's letter of December 18, 1997, when he refers to "Mrs. Kent's lawyer" that clearly he was not acting as her lawyer.
- [21] The lawyer who signed the mortgage in 1996 for Ms. Kent also swore the affidavit for Mr. Dyck in 1998, Mr. Dyck being the agent for Bob Guy in 1998.
- [22] On February 12, 1998, there is a letter from Mr. Markus to Ms. Kent, informing her that he was acting on behalf of Mr. Guy. His letter refers to the first mortgage against "1432 Frost Road" (that being Lots 3 and 4) and the letter goes on to say that the mortgage is "registered in the New Westminster/Vancouver Land Titles on December 18, 1997 under #BL426376". The letter further stated the amount owing was \$61,475.62 plus interest. A copy of Mr. Markus's letter was sent to Western Heritage as well as to Mr. Guy. That letter is clearly in error. There was no first mortgage ever registered against the property on Frost Road. The mortgage number cited in the letter of Mr. Markus is the mortgage registered against the former matrimonial home on Bracken Drive.
- [23] On April 6, 1998, the file indicates that there was a title search by Mr. Markus with regard to Lots 3 and 4, which clearly indicated that the registered owner of the property was Cultus Lake Holiday Park Association.
- [24] On May 12, 1998, Robert Dyck swore an affidavit as the agent for Mr. Guy, confirming that Ms. Kent was in default on the loan.
- [25] Also on May 12, a petition against Ms. Kent by Mr. Guy was signed, indicating an amount owing of \$62,646.02 as of April 30, 1998, with per diem interest at \$15.20 a day, at 9.25% interest per annum, calculated half-yearly, not in advance. That petition was registered in the New Westminster Registry as number S046692. It refers to a declaration of (unregistered) mortgage on Lots 3 and 4, plus a declaration of an agreement with regard to a "mobile home" and campsites 57 and 58. The mortgage is described as "a first mortgage against the lands and premises". It describes the respondent's interest as "an unregistered lease". The petition also indicates, "in addition to the mortgage, the defendant agreed to pledge her campsites 57 and 58 as additional security plus her "mobile home" 1983 Travelaire...".
- [26] On that same date, May 13, 1998, Mr. Markus also filed a certificate of lis pendens with regard to Lots 3 and 4.

- [27] Mr. Guy's initial petition was heard in New Westminster on June 16, 1998. Prior to that, on June 12, there had been an appearance by the respondent through her counsel, David Robertson. On June 16, 1998, Master Nitikman granted an order nisi for foreclosure. Mr. Markus appeared on behalf of the petitioner.
- [28] That first order nisi raises some questions. Was the first order nisi ever set aside and the action discontinued? If not, then this second proceeding to obtain another order nisi could be an abuse of process, and/or res judicata.
- [29] Meanwhile, the matrimonial home sold January 14, 1999, for \$215,000.00. Canada Trustco had commenced an action against Ms. Kent and a number of other defendants. On January 25, 1999, Bob Guy had entered an appearance in that action. Following the sale of the property, on April 21, 1999, \$48,090.00 was paid into court from the proceeds of the sale of the matrimonial home, and a further amount of \$2,064.00 was paid into court from those proceeds on September 26, 2000.
- [30] On April 15, 1999, there appeared as part of the principal of the mortgage funds owing by Ms. Kent to Mr. Guy an additional \$2,500.00, which represented the untaxed legal fees of Mr. Markus for work done for his client, Mr. Guy, for the New Westminster petition and obtaining the order nisi there. The \$2,500.00 does not amount to party and party costs, scale 2; this is a lump sum and not available as an advance.
- [31] The only evidence in the file of that is Mr. Markus's bill dated July 30, 1999, with regard to the June 1998 petition showing \$2,500.00 plus disbursements and taxes for a total of \$3,557.92. But the \$2,500.00 had been added to the amortization schedule for Ms. Kent's loan three-and-a-half months earlier, on April 15, 1999.
- [32] Prior to that, on December 18, 1998, fees that had been paid to Mr. Motiuk in the amount of \$635.05 were also added into the principal amount of the loan owing by Ms. Kent. This amount appears to relate to fees and disbursements charged by Mr. Motiuk for the severance of the Bracken Drive joint tenancy and the mortgage of that property in favour of Mr. Guy; also not chargeable or claimable. A bill for legal services dated December 9, 1997, appears in the file and shows an amount owing of \$500.00 with a handwritten annotation increasing the total due to \$635.05. No evidence explained the discrepancy in the dates of these transactions.
- [33] Earlier, on May 27, 1999, Mr. Markus had written a letter to Mr. Robertson, the lawyer for Ms. Kent, indicating an agreement between Mr. Guy and Ms. Kent to modify the mortgage. This would be a three year term beginning October 30, 1997, at 11% interest, with monthly payments of \$644.00. An amortization schedule was included which showed principal owing of \$70,207.94, with interest to begin April 15, 1999, and a maturity date of April 15, 2000.

- [34] A modified "mortgage" was signed by Ms. Kent on June 11, 1999. That document sets out "nil" under the heading of "additional or modified terms". There is no money amount on the document. It refers to Lots 3 and 4 as the property subject to the mortgage. On the next page, the amount of \$70,193.24 at 11% interest appears as the balance due on April 1, 2002. What appears to be a first draft of this mortgage showed the transferee to be Western Heritage, but that did not end up on the signed document.
- [35] Meanwhile, on September 3, 1999, CIBC served a notice of motion against Ms. Kent, with a notice to Mr. Guy and a number of other interested parties. On September 28, 1999, Mr. Justice Josephson made an order that \$24,045.00 would be paid to CIBC out of the monies paid into court. Apparently that amount represented Ms. Kent's share of the matrimonial home, with an indication that Terry Reich was bankrupt by that time.
- [36] Mr. Guy received nothing from the sale of the matrimonial home, in spite of the mortgage registered against the Bracken Drive property. And in spite of the order nisi that was obtained in New Westminster.
- [37] Ms. Kent's payments to Mr. Guy from June 1999 were as follows: there were monthly payments of \$644.00 from June to December 1999; in 2000, Ms. Kent paid the full amount of \$644.00 for each of the 12 months, for a total of \$7,728.00; the same occurred in 2001; in 2002, she paid \$644.00 a month with the exception of August, when she paid only \$322.00, for a total that year of \$7,406.00; in 2003, the amount of \$7,084.00 was paid; in 2004, \$5,672.00 was paid; in 2005, the amount paid was \$5,230.00. The total amount that she has paid to date is \$50,990.00.
- [38] The remainder of the monies from the sale of the matrimonial home paid into court were paid out on February 7, 2000, by order of Mr. Justice Taylor. \$24,045.36 was paid to Sliman, Stander & Co. in trust.
- [39] On January 24, 2006, Mr. Markus sent Ms. Kent a letter regarding a "2nd and inter alia first mortgage" over Lots 3 and 4. The letter indicates that the "unregistered mortgage" is in default, and the total amount owing as at January 24, 2006, including a discharge fee, interest adjustment, and legal fees and disbursements, is \$76,148.76, with interest accruing at \$22.03 per day. The letter enclosed a notice of intention to enforce security relating to Lots 3 and 4 as required by s. 244(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
- [40] On February 24, 2006, this second petition of Mr. Guy was issued, this time in the Vancouver Registry. Mr. Guy also filed a certificate of pending litigation against Lots 3 and 4 on February 24, 2006. The respondent filed her response and notice opposing the relief sought on March 21, 2006. The petitioner's outline of relief and facts was filed March 29, 2006. That sought an order nisi from the "owner", Ms. Kent, of "residential/recreational property at 1436 Frost Road" (which is the civic address of Lots 3 and 4).
- [41] On March 30, 2006, Master Bishop issued the order nisi, and this appeal was launched on April 13, 2006.

Position of the Parties

- [42] Ms. Kent says that the purported mortgage against Lots 3 and 4 is invalid because she has never held title to that land. In addition, she states in her response to the petition that she does not own the RV purportedly described in the petition and draft order nisi. The recreational vehicle is not a mobile home nor is it of the make and model specified. She seeks to have the order nisi of foreclosure set aside.
- [43] Mr. Markus argues that Ms. Kent's interest in Lots 3 and 4 is akin to a long-term, unregistered lease granting her exclusive use of the property, which is a mortgageable interest on which Mr. Guy is entitled to foreclose. He relies on a definition of land as being "all the borrower's present and future interest in the land, including all benefits of that interest."

Analysis

- [44] The land in Lots 3 and 4 comprises the entire holiday park owned solely by the Association. The park has over 225 campsites. Lots 3 and 4 do not correspond to campsites 57 and 58. Those two sites are two of the over 225 sites within Lots 3 and 4.
- [45] There is no evidence the registered owner of Lots 3 and 4, the Association, was ever named as a party to these proceedings or given proper notice of an action affecting their property. Correct parties must be joined.
- [46] There is no evidence that Ms. Kent has an interest or estate in land associated with Lots 3 and 4. She is a member of the Cultus Lake Holiday Park Association. Her use of campsites 57 and 58 is subject to the Association's bylaws, which, among other things, permit the Association to cancel a membership should the member fail to meet his or her obligations to the Association. Would-be occupants must be approved by the Association's board before they will be permitted to become members. There is no evidence that such membership constitutes ownership or a registrable interest in the land on which a member's campsite is located.
- [47] A recreational vehicle is not a mobile home. An RV is not a fixture. A mobile home can be.
- [48] No declaratory relief was sought based on evidence that the "mobile home" was affixed to the land and formed part of the security, the land itself. There was no such evidence. This was an RV which the respondent denies owning.
- [49] For the petitioner to describe an RV as a "mobile home" is misleading. For starters, an RV has wheels.
- [50] At best, this appears to have been attempts to draw an unenforceable mortgage on lands owned by an innocent third party. A purported mortgagor cannot pledge an interest in land she does not own or in which she does not have a valid interest. Mortgage documents were not drawn at the instance of the respondent.

- [51] There was little to indicate to the Master that this was anything other than an ordinary mortgage charging Lots 3 and 4. The Master would have relied upon facts stated in the petition and submitted by counsel. A number of years ago, in *The Advocate*, (1983) 41: 583-96, McEachern C.J. wrote an article "On Foreclosure Practice". In that article he reminded us that "Chambers practice relies upon the professionalism of the bar." In quoting another judge, the article commented on the volume of applications before a chambers judge, which "does not permit the judge to read all the material." Thus the reliance on the statements of counsel. In my view, the order nisi would not have been made had the Master known all the facts.
- [52] The order nisi is invalid and must be set aside. The appeal of Master Bishop's order of March 30, 2006, is allowed.
- [53] Costs are awarded to the respondent, in a fixed amount of \$500.00, inclusive of all disbursements, payable forthwith.

"N. Morrison, J."

Madam Justice N. Morrison

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