

CANADA / JUDGMENT

## Hu v. Lee

2023 BCSC 1038

### COURT

Supreme Court of British Columbia

### DECIDED

16 June 2023

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2023 BCSC 1038 Hu v. Lee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hu v. Lee,

2023 BCSC 1038

Date: 20230616

Docket: E201018

Registry: Vancouver

Between:

Irene Juan Hu

Claimant

And:

Daryl Lee

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

The Claimant, appearing in person:

I. Hu (May 8, 2023 only)

The Respondent, appearing in person:

D. Lee

Place and Date of Hearing:

Vancouver, B.C.

May 8 and 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 16, 2023

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## Introduction

- [1] The claimant, Irene Juan Hu, commenced a family claim against the respondent, Daryl Lee, alleging that the parties were spouses within the meaning of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. An order was made by consent on March 24, 2021, before Justice Brundrett, ordering that the issue of whether Ms. Hu and Mr. Lee were spouses be tried first, in advance of the other issues in this case.
- [2] In July 2022, I heard the trial of this issue over 14 days (the "First Trial"). Both parties were self-represented. I issued reasons, indexed at 2022 BCSC 1550, on September 2, 2022 (the "Reasons"). I found that Ms. Hu had not met the burden of proving that her and Mr. Lee lived together in a marriage-like relationship for at least two years, and therefore their relationship did not meet the definition of spouses under the FLA.
- [3] The parties were to return before me for the continuation of the trial on May 8, 2023, for 10 days. The outstanding issues to be addressed were set out in the Reasons:
- [184] My review of the notice of family claim sets out that the outstanding issues for the claimant are:
- Whether any of Ms. Hu's cash and belongings were left in the Crestline Residence and not returned by Mr. Lee;
  - Whether the claimant has a claim in restitution by quantum meruit and/or unjust enrichment; and
  - Whether the claimant has a claim for an express, resulting, and/or constructive trust.
- [185] My review of the counterclaim sets out that the outstanding issues for the respondent are:
- Whether Ms. Hu owes any payment to Mr. Lee for unpaid rent;
  - Whether damages for trespass and breach of contract should be awarded; and
  - Whether there is a claim for punitive damages.
- [4] I note that the notice of family claim does not claim for an express trust but only a declaration of a resulting and/or constructive trust in Ms. Hu's favour. As such, I will not address any claim for an express trust.
- [5] On May 5, 2023, Ms. Hu applied to have me recuse myself from hearing the continuation of the trial (the "Recusal Application"). At the conclusion of the submissions, I advised the parties that I would give oral reasons on May 8 at 2:00 p.m.
- [6] On the morning of May 8, 2023, Ms. Hu filed a further application (the "May 8 Application"). This application was served on Mr. Lee when he arrived at the courthouse at 2:00 p.m. In this application she sought the following relief:

1. Order to get a legal aid Lawyer to represent me.
2. A order to let Daryl Lee disclose all of his communication with his handwriting expert. including the 20 samples of his signature original or a picture of the originals, not processed.
3. A order for examination for discovery on Daryl lee
4. A order to reschedule the trial.
5. A order of an award of \$98000 for loss of dignity, and human right due to judges bias and discrimination.
- [7] The factual basis in support of the May 8 Application was that I, as the trial judge, had "made a judgment that is blatantly unreasonable with about 50 error[s] in it". The legal basis referenced three cases.
- [8] The oral reasons on the Recusal Application were given at 2:00 p.m. on May 8, 2023. The reasons were published and are indexed at 2023 BCSC 794 (the "Recusal Reasons"). Following the pronouncement of these reasons, Ms. Hu was permitted to make submissions on the May 8 Application. Mr. Lee opposed all of the relief sought.
- [9] I gave short reasons from the bench dismissing the May 8 Application and advising that I would provide more comprehensive reasons as part of the reasons issued on the continuation of the trial.
- [10] I advised the parties that the continuation of the trial would commence after the afternoon recess. Ms. Hu objected on the basis that she had "nothing to say anymore" because she was "muted" and that I would not hear her. She began to pack up her belongings as if to leave.
- [11] I suggested that Ms. Hu think seriously about what she would like to do over the afternoon recess and then provide her decision to the Court. I advised Ms. Hu that if she decided not to make submissions or call evidence on the outstanding issues in her claim, I would then move to hearing the counterclaim filed by Mr. Lee. I advised that after hearing Mr. Lee's counterclaim, the matter would be adjourned, I would give my reasons, and this will be the end of the trial.
- [12] Ms. Hu was not present following the afternoon recess. Mr. Lee was given the option of proceeding on the counterclaim or returning on May 9, 2023 to deal with the counterclaim. Mr. Lee opted to return on May 9, 2023.
- [13] On May 9, 2023, Ms. Hu was not in attendance. Mr. Lee made a short opening and then gave evidence on his behalf. He did not call any witnesses. His evidence and submissions were completed by 2:30 p.m. on May 9, 2023.

[14] On May 10, 2023, I was advised by the Registry that Ms. Hu was seeking to book a Judicial Case Conference and another trial date in this action. I issued the following memorandum to the parties on May 10, 2023, in which I stated:

I have been advised that Ms. Hu phoned Scheduling on May 9, 2023 to tentatively book a trial date on June 3, 2024 for ten days. She further called on May 10, 2023 to book a Judicial Case Conference which was tentatively booked for July 24, 2023 at 9:30 a.m. I have instructed registry staff not to permit the filing of a notice of Judicial Case Conference and the notice of trial.

The continuation of this trial was set for May 8 to 19, 2023. On the afternoon of May 8, 2023, when the trial was scheduled to continue, Ms. Hu left the courtroom. I warned her that the trial would continue in her absence. The trial continued and I reserved my reasons on May 9, 2023.

The reasons I will be providing on the continuation of the trial will deal with the outstanding issues in the notice of family claim, as well as the counterclaim filed by Mr. Lee.

## Issues

[15] I will address the following issues:

1. The reasons for dismissing the May 8 Application.
2. The decision on the remaining issues in the notice of family claim.
3. Whether the respondent has proven the damages claimed in the counterclaim.
4. Whether an award of punitive damages should be made.
5. What costs should be awarded in the action and counterclaim.

## Issue 1: The Reasons for Dismissing the May 8 Application

[16] I advised the parties that I would provide more detailed reasons for the dismissal of the May 8 Application in these reasons. I am doing so since I want the parties to clearly understand the reasons why that application was dismissed.

[17] The Supreme Court Family Rules [Rules], require applications to be filed and served at least eight business days before the date set for the hearing of the application: R. 10-6(7). The May 8 Application was filed on the morning of May 8, 2023, and served on Mr. Lee on the afternoon of May 8, 2023, just after he entered the courtroom. The May 8 Application was not properly served.

[18] In addition, R. 10-6 of the Rules requires that the factual basis for the application be briefly summarized and that the legal arguments on which the orders are sought be provided. The May 8 Application did not assert a factual basis for most of the orders sought and the legal basis was deficient.

[19] Although the May 8 Application was not properly served and did not comply with the Rules, I agreed to hear submissions from the parties on the merits of it, since Ms. Hu is representing herself.

[20] I will deal with each of the orders sought.

### Order for the Appointment of a Legal Aid Lawyer

[21] Ms. Hu seeks an order that I direct Legal Aid to appoint a lawyer on her behalf. There was no evidence that the outstanding issues Ms. Hu faces are of the nature Legal Aid would cover. It was my view that I did not have the power to order Legal Aid to appoint a lawyer. In the Court of Appeal decision in *M.P.W. v. Victoria (City)*, 2023 BCCA 111, the self-represented appellant sought an order that the Court appoint a state-funded counsel for him. The Court noted:

[16] That leaves the appellant's application for the appointment of counsel. The appellant has raised valid concerns about the ability of persons with disabilities to navigate the judicial system and to advocate on their own behalf. Counsel for the City candidly admits that the appointment of counsel for the appellant would likely be of assistance to both him and the Court.

[17] However, the appellant has not cited any authority on which this Court could make such an order. Unlike in criminal matters, in which s. 684 of the Criminal Code, R.S.C. 1985, c. C-46 specifically authorizes the court to appoint counsel for an accused person, there is no similar statutory authority in the civil context.

[18] There is also authority under the Family Law Act, S.B.C. 2011, c. 25, s. 203, for the Court to appoint counsel for children in a high-conflict family law dispute. However, under that section, the Court can allocate the costs of the lawyer between the parties. It does not contemplate a publicly-funded lawyer.

[19] The Court also has the authority to appoint amicus to assist the Court. However, as doing so effectively amounts to the Court ordering the expenditure of public funds, such orders will only be made in exceptional circumstances when the appointment of amicus is essential to the Court fulfilling its obligations: *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286 at para. 85.

[20] Apart from statute, there is no legal rule or general principle of law supporting court ordered appointment of state-funded counsel, at either trial or on appeal, for individuals involved in largely private litigation. It would of course be open to the legislature to implement a program for providing legal assistance to persons with disabilities who are engaged in the justice system. However, that is a legislative and policy choice for government.

- [21] In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, the Supreme Court of Canada noted at para. 21 that "general access to legal services is not a currently recognized aspect of the rule of law". State-funded counsel for an appeal is exceptional. In the civil context, it has been allowed where the right to security of the person under s. 7 of the Charter is engaged (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at para. 2). That is not this case.
- [22] I would note as well that despite the appellant's disability, he has to date been able to advance his appeal, albeit aided by a flexible application of the governing time limits. Further, even a cursory review of the factum filed by the appellant demonstrates a detailed understanding of the evidence at trial and an ability to articulate and advance his arguments on appeal. Justice DeWitt Van-Oosten made similar observations in her reasons at paras. 43-45.
- [23] In summary, there is no basis upon which the Court can grant the application to appoint counsel for the appellant.
- [22] I do not have the power to make the order sought.

### **Delivery of the 20 Sample Signatures**

- [23] Ms. Hu seeks an order to have Mr. Lee provide 20 sample signatures. The request is too late, being that the application was made on the day that the continuation of the trial was scheduled. The issue of the delivery of the signatures that Mr. Lee provided to DocuFraud is dealt with in the Recusal Reasons at paras. 62-63.

### **Order for Mr. Lee to Attend for a Second Discovery**

- [24] Ms. Hu seeks an additional examination for discovery of Mr. Lee. This issue is addressed in the Recusal Reasons at paras. 64-66. It is not appropriate to order on the first day of the continuation of the trial that a party attend a further discovery in these circumstances.

### **Order to Adjourn the Continuation of the Trial**

- [25] Ms. Hu seeks an adjournment of the continuation of the trial. The continuation of the trial was ordered on October 12, 2022. The test for adjourning trials is set out in *Navarro v. Doig River First Nation*, 2015 BCSC 2173:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff*

at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (Sidoroff at para. 11; Toronto-Dominion Bank v. Hylton, 2010 ONCA 752 at para. 36 (Toronto-Dominion Bank)).

[26] In Navarro the Court set out a number of factors that should be considered:

[19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (Cal-Wood Door at para. 13; Graham v. Vandersloot, 2012 ONCA 60 at para. 12 (Graham)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (Graham at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (Graham at para. 12).

[20] Other factors or considerations include (in no particular order of priority):

- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); Sidoroff at para. 10);
- the reasonableness of the request (Dhillon at para. 16);
- the grounds or explanation for the adjournment (Dhillon at para. 16; Toronto-Dominion Bank [v. Hylton, 2010 ONCA 752] at para. 38);
- the timeliness of the request (Dhillon at para. 16);
- the potential prejudice to each party (Dhillon at paras. 16-17);
- the right to a fair trial (Dhillon at para. 16);
- the proper administration of justice (Dhillon at paras. 16 and 39; Toronto-Dominion Bank at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (Toronto-Dominion Bank at para. 38); and
- the fact of a self-represented litigant (Toronto-Dominion Bank at para. 39).

[27] It is my view, based on the history of this litigation, that an order adjourning the continuation of the trial would be prejudicial to Mr. Lee. Ms. Hu provided no legitimate basis for the granting of the adjournment, nor why it was brought so late. I was not persuaded that the reasons given by Ms. Hu were reasonable. In my view, the motive of the claimant is to try and obtain a new trial date before a different judge. I had ruled that there was no bias and dismissed the Recusal Application. As such, I exercised my discretion to not permit the adjournment of the continuation of the trial.

### Order for an Award of \$98,000 for Loss of Dignity

[28] Ms. Hu advised during her submissions that she was not seeking this award from Mr. Lee, but was seeking that the Supreme Court of British Columbia pay her this amount on the basis that I, as a judge of the Court, was biased and had discriminated against her. This is not a remedy available to Ms. Hu in this action. It is not a basis for an adjournment of the trial.

### Issue 2: The Decision on the Remaining Issues in the Notice of Family Claim

[29] Ms. Hu did not call any further evidence nor make any further submissions in respect to the outstanding issues in the notice of family claim. I will deal with each of the outstanding claims.

### Return of Personal Belongings and Cash

[30] In the First Trial, Ms. Hu asserted that some of her personal belongings remained at Mr. Lee's home (the "Crestline Residence"). Mr. Lee denied any further belongings were left. The evidence supported that in June and July 2019, a truck attended at the Crestline Residence and a number of Ms. Hu's personal belongings were removed.

[31] A photograph taken January 23, 2020, was produced by Ms. Hu showing the various boxes and other contents of hers in Apartment 10-4268 Maywood, Burnaby, BC ("Apt. #10").

[32] There was further evidence that Ms. Hu emailed Mr. Lee on March 5, 2020 stating:

I'd like you return the cash money

And all my stuff in the house

[33] Mr. Lee replied on March 6, 2020 stating:

I don't know what your talking about.

You have been here numerous times

to take your stuff. I don't think there is

much left here. You wanted to pick up

your vacuum cleaner yesterday. I told you I would drop it off. You came up unannounced and I found you rifling

thru my file cabinet in the garage.

We will arrange for you to pick up anything left that is yours. But I will arrange for police to attend.

[34] There were further emails exchanged on March 9, 2020, in which Ms. Hu claimed that she had left various items and Mr. Lee advising that she could collect various items.

- [35] Based on the evidence, I am unable to conclude whether any of Ms. Hu's personal belongings remain in Mr. Lee's possession.
- [36] Ms. Hu testified at the First Trial that on March 5, 2020, when she picked several of her items, she noticed that cash she had been saving inside a vase for a long time had disappeared. The vase was returned to her but the money was not there. Ms. Hu raised this issue in closing submissions in the First Trial and I advised that it would not be decided at that time. Mr. Lee denied any knowledge of this cash. Ms. Hu elected not to lead any evidence at the continuation of the trial.
- [37] As such, I am not persuaded that Ms. Hu has established that any of her personal belongings remain in the possession of Mr. Lee.

#### Unjust Enrichment claim

- [38] A claim for unjust enrichment requires three elements, as set out in *Kerr v. Baranow*, 2011 SCC 10 [Kerr] at para. 32:
- 1) the defendant is enriched;
  - 2) the plaintiff suffers a corresponding deprivation; and
  - 3) there is no juristic reason for the defendant's enrichment.
- [39] There is no evidence that the Mr. Lee was enriched by the minimal services provided by Ms. Hu. From my review of the trial notes from the First Trial, Ms. Hu gave the following examples of work she claims she had done:
- Ms. Hu claims Mr. Lee asked her to do some research in September 2018 and Mr. Lee testified that he did not use any research;
  - In May 2018, Ms. Hu cleaned the pool filter at the Crestline Residence that had not been cleaned for many years. The cleaning took more than two hours;
  - In December 2018, Ms. Hu assisted Mr. Lee clean up water caused by a leak in the Crestline Residence;
  - Ms. Hu would sometimes accompany Mr. Lee when he went to different places dealing with property management issues;
  - In July 2019, when Mr. Lee was in Montreal, Ms. Hu managed the properties alone; and
  - Ms. Hu assisted Mr. Lee in advertising for the rental properties he owned, and assisted in finding tenants and renting out the various apartments.
- [40] Ms. Hu also testified that she attended school on a full-time basis from September 2018 to July 2019.

[41] Mr. Lee testified that Ms. Hu did some management of 110-1383 Marinaside, which was a condo owned by Mr. Yung. His evidence was that this was the only property that Ms. Hu assisted with. She did not assist in the management of any other properties. Mr. Lee did not agree that Ms. Hu had done any work for any of the tenants. Mr. Lee and Mr. Campbell testified that when Mr. Lee was back in Montreal, Ms. Hu was banned from entering the Crestline Residence: Reasons at paras. 167-169. There is no evidence that supports that Mr. Lee asked Ms. Hu to manage all of his properties. There were no particulars of the total number of hours that Ms. Hu carried out work for Mr. Lee.

[42] I further note that any services provided occurred while Ms. Hu was living rent free at the Crestline Residence. The one service she did provide for the Crestline Residence was cleaning the pool filter. I note that the Ms. Hu gave evidence that her daughters came over and occasionally used the pool. The evidence respecting the apartments that Mr. Lee owned with his brother was that on occasion Ms. Hu helped find some tenants, picked up cheques, and accompanied Mr. Lee while he was doing maintenance work. The evidence in the First Trial does not support a claim of unjust enrichment.

#### Resulting Trust/Constructive Trust claim

[43] The notice of family claim states:

In the further alternative, a declaration of resulting and/or constructive trust in favour of the claimant over rental income collected by the respondent contrary to an agreement between the parties as to their respective entitlement to said rental income.

[44] In *Pecore v. Pecore*, 2007 SCC 17 at paras. 20-22, Rothstein J. described resulting trusts in the following terms:

20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

21 Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor: see *Waters' Law of Trusts*, at p. 378. In the context of the parent-child relationship, the term has also been used because "the father was under a moral duty to advance his children in the world": A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (6th ed. 2004), at p. 575 .

22 In certain circumstances which are discussed below, there will be a presumption of resulting trust or presumption of advancement. Each are rebuttable presumptions of law: see e.g. *Re Mailman Estate*, [1941] S.C.R. 368, at p. 374; *Niles v. Lake*, [1947] S.C.R. 291; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 451; J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 115. A rebuttable presumption of law is a legal assumption that a

court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see Sopinka et al., at pp. 105-6.

[Emphasis added by Rothstein J.]

[45] The allegation advanced does not fall within the concept of a resulting trust since at no time did Mr. Lee place any property in the name of Ms. Hu, nor did Ms. Hu place any property in the name of Mr. Lee.

[46] The evidence at the First Trial does not support that Mr. Lee and Ms. Hu had agreed to how the rental income collected would be distributed. Ms. Hu relied on a document dated October 1, 2019. In the Reasons, I made the following finding in respect to this document:

[84] There is a second document dated October 1, 2019 which Ms. Hu testified she wrote out and then Mr. Lee typed and signed. This typed note states:

### **To Whom It May Concern**

Please be advised that I am taking the full rent of apartment 5-4268 Maywood Street, Burnaby, apartment 2 and basement room in Marpole 1387 West 70th avenue, Vancouver BC. Irene is entitled to the full rent of apartment 3 in Marpole 1387 West 70th avenue, Vancouver BC, and she has the right to stay in apartment 10-4268 Maywood Street, Burnaby BC and she has my consent to sublet these 2 apartments if she wishes. That is for as long as I've not completed building a float home for her in Granville Island yet.

Deposite and rent paid for #3 - 1387 West 70th ave, Vancouver BC

Deposite and rent paid for #10 - 4268 Maywood Street, Burnaby

Signature

Daryl Lee

[85] This note was also analysed by Ms. Petty who opined that the signature on it was not Mr. Lee's signature.

[86] I agree with Mr. Lee that the language, the grammar, and the spelling mistakes are all consistent with Ms. Hu's writing style and not his. I accept that this is Ms. Hu's work product and that Mr. Lee did not sign it.

[47] Ms. Hu did not provide any further evidence on this issue. The evidence does not support a binding agreement between the parties. As such, I am unable to find that Ms. Hu has any type of constructive trust claim against Mr. Lee.

## Quantum Meruit Claim

[48] Quantum meruit may be available to recover money for services supplied by one party in circumstances where the party performing the services has not been compensated. However, it is not a cause of action, it is a means of assessing liability: *K.L.W. v. R.D.W.*, 2022 BCSC 44 at para. 64. Quantum meruit may be available in a restitutionary claim or in a contractual claim: *Gregory N. Harney Law Corporation v. Angleland Holdings Inc.*, 2016 BCCA 262 at paras. 73-75, leave to appeal to SCC ref'd, 37325 (20 July, 2017). As explained by Justice Iyer in *Dr. Richard Benson Inc. v. Lauren Bramley MD Inc.*, 2021 BCSC 2352 at para. 74, aff'd 2022 BCCA 385:

Contractual quantum meruit permits a plaintiff to recover if there is an enforceable contract that only lacks a binding term about price. If so, the court will determine a reasonable price for the services provided based on the cost to the plaintiff of providing the services: *Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215. If there was no contract at all, the equitable principle of unjust enrichment (or restitutionary quantum meruit) permits the plaintiff to recover the value of the benefit the plaintiff provided to the defendant: *Gregory N. Harney Law Corporation v. Angleland Holdings Inc.*, 2016 BCCA 262.

[49] Ms. Hu gave limited examples of the assistance she provided Mr. Lee. I am not persuaded on the evidence of Ms. Hu in the First Trial that she has met the requirements for a quantum meruit claim. I have found no agreement between the parties regarding the renting of the units and no unjust enrichment; quantum meruit is not available to Ms. Hu.

## Conclusion

[50] Since Ms. Hu decided not to call any evidence at the continuation of the trial and the evidence at the First Trial was insufficient to prove the outstanding claims, the outstanding claims are dismissed.

Issue 3: Whether the Respondent has Proven the Damages Claimed in the Counterclaim

## Relief Sought in the Counterclaim

[51] The counterclaim was filed on July 31, 2020. Circumstances have changed since the filing of the counterclaim such that Mr. Lee is no longer pursuing some of the claims.

[52] The counterclaim set out that Mr. Lee sought the following orders:

1. An order of immediate possession of:
  - a. Ap. #3 - 1387 W 70th Avenue, Vancouver, British Columbia ("Suit 3 Vancouver");
  - b. Apt #5 - 4268 Maywood, Burnaby, British Columbia ("Suite 5 Burnaby");
  - c. Apt #10 - 4268 Maywood, Burnaby, British Columbia ("Suite 10 Burnaby")

pursuant to Rule 10-1 of the Supreme Court Civil Rules.

2. Judgement for unpaid rents.
3. An accounting for the rents the Respondent has collected.
4. Damages for trespass.
5. Damages for breach of contract.
6. Punitive damages.
7. Costs, including special costs.

[53] At the continuation of the trial, Mr. Lee agreed that he was not seeking the orders of immediate possession set out at para. 1, since he was now in possession of all three apartments.

[54] Mr. Lee continued to seek judgement for unpaid rents respecting Apt. #10 and Apt. #3 -1387 W 70th Avenue, Vancouver, British Columbia ("Apt. #3"), set out at para. 2, but is not advancing any claims respecting Apt. #5 - 4268 Maywood, Burnaby, British Columbia ("Apt. #5").

[55] Mr. Lee stated he was not pursuing an "account for the rents the Respondent has collected", set out at para. 3.

[56] With regard to damages for trespass set out at para. 4, Mr. Lee only seeks damages as applicable to Apt. #10 during the period of January 2020 to July 2020, since he had given Ms. Hu access to Apt. #10 prior to this period. That permission was revoked in January 2020 when they were separated and she moved into the Apt. #10. He agreed that he took no steps to prevent Ms. Hu from using Apt. #10 prior to December 2019. He further agreed that since he was seeking that Ms. Hu pay rent for Apt. #10, there were no other damages for trespass he was claiming.

[57] With regard to damages for breach of contract set out at para. 5, Mr. Lee agrees that the contract was the residential tenancy agreement entered into for Apt. #3 and the damages being claimed was the unpaid rent.

[58] In regard to punitive damages set out at para. 6, the only particulars in support of punitive damages that Mr. Lee advanced was the actions of Ms. Hu in forging two documents.

[59] Finally, at para. 7, Mr. Lee is seeking costs of the counterclaim, but was not able to provide any particulars in support of a claim for special costs.

[60] In summary, the issues that remain to be determined in the counterclaim are:

- a) Whether Mr. Lee is entitled to judgement for unpaid rents respecting Apt. #10 and Apt. #3;
- b) Whether punitive damages should be awarded against Ms. Hu; and

- c) What costs should be ordered.

#### Relevant Background

#### Apt. #3

- [61] Ms. Hu, as tenant, and Mr. Lee, as landlord, entered into a residential tenancy agreement dated April 15, 2017 for the rental of Apt. #3. The material terms of this agreement included:
- Clause 3: A fixed length of time giving the tenant the right to occupy the premises from May 1, 2017 to April 30, 2018;
  - Clause 4: Rent of \$1,280.00 monthly payable on the first day of each and every calendar month;
  - Clause 5: Security deposit of \$640;
  - Clause 11: That the tenant was not permitted to sublet without the written consent of the landlord.
- [62] Ms. Hu confirmed in her evidence at the First Trial that she had rented Apt. #3. She further testified that she did not live at Apt. #3, but subleased it. She remained living at her rental house on West 59th until approximately August 30, 2017. Mr. Lee further testified that Ms. Hu did not live in Apt. #3, but had a number of different tenants living there. Ms. Hu testified that she had a series of short-term rentals, including Airbnb rentals, but Mr. Lee asked her to stop renting on a short-term basis. Ms. Hu then arranged for long-term tenants. It is not clear that Mr. Lee gave written consent as the landlord to allow Ms. Hu to sublet, as required by the tenancy agreement, but it is clear he was aware of the subletting and did not take any steps to stop Ms. Hu from doing so.
- [63] Mr. Lee received cheques of \$1,280 for the first month's rent and \$640 for the security deposit from Ms. Hu. For a period of time, Ms. Hu was regularly paying the rent for Apt. #3, but then she stopped.
- [64] On March 6, 2020, Mr. Lee advised Ms. Hu that the outstanding amount for the rent on Apt. #3 was \$16,640. Ms. Hu did not pay the arrears in rent.
- [65] Mr. Lee served a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities respecting Apt. #3 on Ms. Hu on March 11, 2020. Mr. Hu sought to dispute the notice at the Residential Tenancy Branch ("RTB"). An RTB hearing occurred on May 7, 2020.
- [66] On May 11, 2020, Arbitrator I. Borba of the RTB issued reasons in which she ordered the adjournment of the hearing on the basis that "the landlord and tenant are providing conflicting information about their agreement regarding the rental unit" and that Ms. Hu had raised questions surrounding jurisdiction between the RTB and this Court.

[67] In regard to the agreement, Ms. Hu had provided the RTB with copies of two documents which she further tendered at the First Trial. One of the documents was a residential tenancy agreement dated October 1, 2019, allegedly for the rental of Apt. #3. Arbitrator Borba made a number of orders including:

- I order that pursuant to Rule of Procedure 3.14, at least 14 days before the reconvened hearing, the tenant shall provide the following new evidence to substantiate the authenticity of the October 01, 2019 tenancy agreement:

- o a written account of why the agreement was created, by what means the document itself was created and printed, where (exact location) and when (time of day and date) the agreement was signed and witnessed and by whom;

- o a copy of the original document certified to be a true copy of the original by a Member of the Law Society of BC or Society of Notaries Public of BC, or, evidence to corroborate the tenant's claim the document was stolen;

- o financial records to substantiate clause #4, namely the tenant's pre-payment of monthly rent from the period of December 1, 2019 to December 31, 2023 to the landlord;

- o all costs associated with compiling this evidence shall be at the tenant's expense.

[68] Mr. Lee testified that Ms. Hu never complied with this or any of the orders made by Arbitrator Borba.

[69] In regard to the issue of jurisdiction, Ms. Hu claimed that the matter should be properly resolved before this Court, due to her claim to have a common law relationship with the landlord, Mr. Lee. Arbitrator Borda agreed to hear submissions of jurisdiction at the subsequent RTB hearing.

[70] The RTB hearing was reconvened on June 30, 2022, and Arbitrator Borba issued reasons on July 3, 2020. Ms. Hu had filed the notice of family claim and presented it to the RTB. As a result of the notice of family claim being filed, which included a claim that related to Apt. #3, Arbitrator Borba concluded that the RTB had no jurisdiction to hear the matter, in accordance with s. 58 of the Residential Tenancy Act, S.B.C. 2002, c. 78.

[71] Mr. Lee provided a summary of the monthly payments that were in arrears as part of the RTB proceeding. This summary supports that in 2019, Ms. Hu made rent payments of \$1,280 in January, April, and May 2019, but no other payments. She made no rent payments in 2020. Mr. Lee testified that Ms. Hu never pre-paid the rent, as is set out in the disputed October 1, 2019 tenancy agreement. Mr. Lee submits that the amount outstanding for the rent for Apt. #3 is \$21,760.

[72] Mr. Lee testified that Ms. Hu was subleasing Apt. #3 to tenants. From September 1, 2019 the tenants were paying Ms. Hu the amount of \$1,600 per month. The same tenants were subleasing Apt. #3 in April 2020. Mr. Lee testified that he found out that Ms. Hu was trying to lease out Apt. #3 when he saw a rental ad for the unit in September 2020. He went in and changed the locks.

[73] Mr. Lee was able to regain possession of Apt. #3 in September 2020.

### Apt. #10

[74] Apt. #10 was the apartment in which Mr. Lee's father and caregiver lived. Mr. Lee's father passed away in the first week of October 2018. Ms. Hu had expressed an interest to move into Apt. #10. Mr. Lee agreed to give her access to this apartment and she and/or Mr. Lee moved some of her belongings into it. Mr. Lee says that in anticipation of Ms. Hu renting Apt. #10, he drafted up a residential tenancy agreement dated November 20, 2018 for her to sign. Ms. Hu never signed the residential tenancy agreement.

[75] The parties then went on a cruise together. While on the cruise Ms. Hu wrote out a document and I quote from paras. 143-144 of the Reasons:

[143] Ms. Hu claimed that she told Mr. Lee on November 27, 2018, while they were still on the cruise, that she would rent his father's apartment from him. She then drafted up a note on Prince Cruises letterhead that read:

I, Daryl Po Keung Lee have made a contract with Irene Juan

Hu to rent the apartment at #10-4268 Maywood Street. The rent starts

from December 1, 2018. When all Daryl Lee's belongings are removed

from the apartment, Irene Hu will start to pay rent in full.

Signed by Daryl Lee.

[144] The parties agreed that Mr. Lee changed the note by deleting the reference to the belongings being removed and that Irene would start to pay rent. Mr. Lee added that "A tenancy agreement will be signed by both Daryl & Irene when they return to Vancouver." Mr. Lee claims that his plan was for her to move into apartment #10 ("Apt. #10") of the Burnaby Building. Ms. Hu claims that she did not want to move into this apartment as it was in a bad condition and not livable. She claims that Apt. #10 was an apartment she would manage and a place to "protect her belongings". She was going to rent it to somebody else.

[76] Mr. Lee testified that Ms. Hu would occasionally stay at Apt. #10 because it was close to where she was attending school. He was not sure how often she stayed there. She did have some of her cats staying there for a period of time. Ms. Hu denied staying at Apt. #10 in October and November 2018. Ms. Hu testified that she was planning to rent Apt. #10 out, but

was not able to because it still had Mr. Lee's belongings in it. He agreed that he did not move out his father's belongings. After the parties separated in December 2019, Mr. Lee emailed Ms. Hu on December 31, 2019, specifically putting her on notice that:

Plse find a place and move yr belongings out of my father's apartment 10 at 4268 maywood st. in Burnaby. Leave his belongings there.

[77] Ms. Hu moved into Apt. #10 in January 2020. Ms. Hu did not pay any rent.

[78] On March 6, 2020, Mr. Lee emailed Ms. Hu stating:

Further, you are in my fathers apt 10 in metrotown. Please do not remove any of his belongings or furniture. Find other accommodation and move your belongings out.

[79] Ms. Hu remained in Apt. #10 until the end of July 2020 when she moved to West Vancouver. Ms. Hu had placed an ad seeking to rent out Apt. #10 and offering viewings at certain times. Mr. Lee saw the ad, attended at the set time and stopped anyone from entering the apartment. He testified that is how he regained possession of it.

[80] Mr. Lee submits that Ms. Hu should pay rent from December 1, 2018 until July 2020, a total of 19 months, at the rent that was set out in the draft tenancy agreement of \$1,280. This amount totals to \$24,320.

## Analysis

[81] On the issue of the unpaid rent for Apt. #3, I find that there was a tenancy agreement entered into. Ms. Hu agreed to pay \$1,280 for the rental. She did initially pay that monthly amount, but ultimately, she stopped paying. There is no evidence that supports she had pre-paid the rent. As such, I find that Ms. Hu is liable for unpaid rent for Apt. #3 owed to Mr. Lee for 17 months at \$1,280 per month, for a total amount of \$21,760.

[82] There was no tenancy agreement signed for Apt. #10. It is clear that Mr. Lee had agreed to allow Ms. Hu the use of that apartment. It is not clear to me on the evidence how often Ms. Hu used Apt. #10 prior to January 2020. I am not prepared to find that Ms. Hu owes any rent for the occasional use of this apartment when the parties were in a dating relationship together and she did so with the express permission of Mr. Lee.

[83] I find that the situation changed at the end of December 2019. The relationship had ended. Ms. Hu moved into Apt. #10 and stayed there without the agreement of the owner. There was no tenancy agreement that permitted her to do so. There was no basis for Ms. Hu to move into Apt. #10 and live there rent free. Mr. Lee is entitled to occupational rent for that period. The rent amount in the draft residential tenancy agreement was \$1,280. I accept that this is a reasonable amount. I would award Mr. Lee the occupational rent for Apt. #10 at \$1,280 for January to July 2020, for a total sum of \$8,960.

- [84] I see no other basis to award any further amounts to Mr. Lee. The claim advanced for damages in trespass was the claim for the unpaid rent for Apt. #3. There is no claim for damages for trespass respecting Apt. #10 for the period of December 2018 to December 2019, since Ms. Hu had the permission of Mr. Lee to use Apt. #10. For the period of January to July 2020, Mr. Lee has been compensated for the trespass by Ms. Hu as a result of the award of occupational rent.
- [85] The total amount awarded to Mr. Lee for rent owed for Apt. #3 and Apt. #10 is \$30,720.
- [86] Mr. Lee is entitled to pre-judgment interests on this amount in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

#### Issue 4: Whether an Award of Punitive Damages should be Made

- [87] Mr. Lee asserts the basis for the claim for punitive damages is that Ms. Hu forged two documents and tendered them in court. He argues that this behavior merits an award of punitive damages.
- [88] The Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, set out the purposes of punitive damages:

36 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

- [89] In *Whiten*, the Supreme Court of Canada set out the factors to be used to assess the blameworthiness of a defendant's conduct at para. 113:

- (1) whether the misconduct was planned and deliberate;
- (2) the intent and motive of the defendant;
- (3) whether the defendant persisted in the outrageous conduct over a lengthy period of time;
- (4) whether the defendant concealed or attempted to cover up its misconduct;
- (5) the defendant's awareness that what he or she was doing was wrong;
- (6) whether the defendant profited from its misconduct; [and]

whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or was irreplaceable.

[Citations omitted.]

- [90] The objective of such damages are described as "to punish the defendant, deter the defendant and others from similar conduct, and mark the community's collective condemnation of what has happened": *McKnight v. Hutchison*, 2022 BCCA 1550 at para. 162.
- [91] Courts should only resort to an award of punitive damages in exceptional circumstances where the conduct is deserving of full condemnation and punishment: *West Bros. Frame & Chair Ltd. v. Yazbek*, 2019 BCSC 1844 at para. 224; *Whiten* at para. 94.
- [92] The quantum of the damages must be proportionate to the blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff, the potential harm directed specifically at the plaintiff, and the need for deterrence: *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2009 BCSC 400 at para. 79, see also *Whiten* at paras. 112-125.
- [93] I am not convinced that the actions of Ms. Hu in respect to the two forged documents are deserving of an award of punitive damages. I am not persuaded that I received the full story behind how the forged documents were created, but I am persuaded that the judgment awarded to Mr. Lee in this proceeding will accomplish the principles of punishment, deterrence, and denunciation considering Ms. Hu's current financial situation.

### Issue 5: What Costs Should be Awarded in the Action and Counterclaim

- [94] Mr. Lee was successful in the First Action and in his counterclaim, although he received less than what he claimed. He was also successful in having the remaining issues advanced in the notice of family claim dismissed. Mr. Lee is entitled to his costs of the proceeding from Ms. Hu.
- [95] In his counterclaim, he advanced a claim for special costs.
- [96] Special costs are awarded against an unsuccessful party as punishment for reprehensible litigation conduct. The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.), where Lambert J.A., writing for the Court, determined that the threshold for awarding special costs is "reprehensible" conduct during the litigation, which includes "scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke". He further explained this standard:
- [23] the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs....Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.
- [97] Special costs have been awarded in a wide range of circumstances, which include:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;

- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

Mayer v. Osborne Contracting Ltd., 2011 BCSC 914 at para. 11 (citations omitted).

[98] As this list indicates, reprehensible conduct can include conduct by a litigant who abuses the court's process, misleads the court, and carries out persistent breaches of the rules of court.

[99] I am not persuaded that the actions of Ms. Hu crossed the threshold such that an award of special costs should be made.

## Conclusion

[100] I make the following orders:

1. The claimant's claims for the return of personal belongings, unjust enrichment, quantum meruit, constructive trust, and resulting trust are dismissed.
2. The respondent is granted judgment against the claimant in the amount of \$30,720 for unpaid rent (the "Arrears").
3. The respondent is entitled to pre-judgment interest on the Arrears.
4. The respondent is not entitled to punitive damages.
5. The respondent is entitled to costs of the proceeding and the counterclaim from the claimant.
6. The respondent is not entitled to special costs.
7. The claimant's signature on the form of the order is dispensed with.
8. The respondent shall serve on the claimant a copy of the filed order by email.

"Forth J."

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