
CANADA / JUDGMENT

Joshi v. Joshi

2013 BCSC 1169

COURT

Supreme Court of British Columbia

DECIDED

2 July 2013

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2013 BCSC 1169 Joshi v. Joshi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Joshi v. Joshi,

2013 BCSC 1169

Date: 20130702

Docket: S127285

Registry: Vancouver

Between:

Surinder Kumar Joshi

Plaintiff

And

Parveen Joshi and Raman Joshi

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

Ghulam Murtaza

Counsel for the Defendant Parveen Joshi:

Lars F. Kushner

Appearing on his own behalf

Raman Joshi

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 21, 2013

Receipt of Further Materials:

May 31 and June 7, 2013

Place and Date of Judgment:

Vancouver, B.C.

July 2, 2013

[1] The plaintiff, Surinder Kumar Joshi, has applied under Rule 9 - 7 (Supreme Court Civil Rules, B.C. Reg. 168/2009) for an order (1) that he is entitled to a 60% interest in a property located at 6933 Prince Edward St., Vancouver, British Columbia (the "Home"), (2) that the Home be listed for sale and (3) that he receive 60% of the proceeds from that sale. The defendant Mrs. Parveen Joshi argues that the application is not suitable for summary disposition. She seeks an order that this action be transferred to the New Westminster Registry so that it can be heard at the same time as an ongoing family law proceeding, bearing Action No. E042365 (the "Family Dispute"), between the defendants, Parveen and Raman Joshi.

Background and Issues

- [2] The following facts are relevant. Mr. Surinder Joshi is the father of the defendant Raman Joshi. Raman Joshi is the husband of Parveen Joshi. Raman and Parveen Joshi have three children. I have, for ease of reference, referred to each of the parties by their first names throughout the balance of these reasons.
- [3] In or about October 28, 2004, Surinder and the defendants bought the Home. Surinder has deposed that he paid 60% of the down payment for the Home and that it was agreed that he would thereby acquire a 60% interest in the Home. The relevant Form A Freehold Transfer document, filed on October 28, 2004 under registration number BW494541, reflects that 60% interest. The defendants, Parveen and Raman, under the terms of the Freehold Transfer, own a 40% interest in the Home.
- [4] For the next seven years or so, Surinder and his wife lived in the Home with the defendants and their children. Surinder and his wife left the Home near the end of 2011 under circumstances that are in dispute.

- [5] For all practical purposes, Raman supports the present application of his father and his evidence aligns with that of his father.
- [6] Parveen raises two central issues in opposition to this application. Her response to civil claim asserts that she never voluntarily agreed to Surinder obtaining a 60% interest in the Home in 2004 and that she was coerced into that agreement through both economic and physical duress on the part of Raman. Parveen has also deposed, in her Affidavit of April 18, 2013, that Surinder has not, in the period since 2004, made any mortgage payments on the Home and that, accordingly, a 60% division of the proceeds from the sale of the Home would unjustly enrich Surinder.
- [7] At the time that I initially heard this application, the affidavits of Surinder and Raman, on the one hand and Parveen, on the other, were inconsistent on this latter issue. Surinder and Raman deposed that Surinder had, in fact, been making his 60% share of the mortgage and other payments throughout. I was advised that the List of Documents that Surinder had delivered contained financial records which supported his sworn evidence. I allowed Surinder to file a further affidavit which would attach and explain these financial records and I permitted Parveen to file a further affidavit in response to that material.

Analysis

- [8] Rule 9-7(15) provides, in part:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application[.]
- [9] The factors which are relevant to determining whether a matter is suitable for summary disposition have been expressed numerous times. They were recently confirmed in *Gichuru v. Pallai*, 2013 BCCA 60, 42 B.C.L.R. (5th) 91 where Justice D. Smith, for the court, said:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [10] Several of the foregoing factors are engaged in this case. In particular, there is a conflict in the evidence on whether Surinder has paid 60% of the mortgage on the Home on an ongoing basis since 2004, a central issue in the case.
- [11] In the supplemental affidavit that was filed by Surinder, he deposed:
- [3] The arrangements to pay my share of the mortgage payments were as follows:
- a. It was agreed upon between myself and the Defendants that I will pay all the utility bills on behalf of all the parties each and every month and I have paid the utility bills up till now.
 - b. It was further agreed that I shall pay property tax on behalf of all the parties. I have paid the Property tax by myself and from my own money since we purchased the Property.
 - c. It was also agreed that my wife will take care of Defendants' young children and do the household work and her contributions will be adjusted towards my share of mortgage payments.
 - d. It was also agreed that I shall pay my share of the mortgage payment after adjusting the Defendants' share of property tax, utility bills and home phone/cable payments made by me.
 - e. It was agreed that if one of the parties has difficulty in arranging contributions towards mortgage payments in a particular period of time, then he/she can make up for any shortage later on.
 - f. It was agreed between the parties that any rent from the basement suite will go towards the mortgage payments of the Property, regardless of who collects the rents from the tenant. [Emphasis in original.]
- [12] Thereafter, Surinder's supplemental affidavit cross references aspects of the foregoing "arrangement" and numerous supporting documents to establish that he has paid his 60% share, and indeed more than his 60% share of the mortgage payments on the Home.

- [13] Parveen, in her affidavit, broadly contests the existence of the "arrangement" that was described by Surinder and she further disputes the specific contributions that Surinder asserts he has made.
- [14] Thus, by way of example, she disputes that Surinder paid phone and cable bills and says that it was her husband, Raman, who did so. She disputes that there was any agreement relating to mortgage shortfalls and asserts that she and Raman made all mortgage payments. She argues that there was no agreement that rent from a downstairs suite in the Home was to be applied to mortgage payments. She disputes numerous further amounts that are referred to and relied on by Surinder.
- [15] I consider that the foregoing conflicts between the parties are relevant and that they cannot be resolved on the basis of the materials before me. With this conclusion in hand, I do not consider it prudent or appropriate to address the balance of the other factual issues that arise in the materials of the parties. I am further influenced in my conclusions by the fact that the amounts in dispute are relatively significant. I was advised there is in excess of \$500,000 equity in the Home. Accordingly, I do not consider that the matter can be resolved under Rule 9-7.
- [16] There are, however, aspects of this application which trouble me. First, the allegations of duress made by Parveen in her pleadings are markedly more severe than the circumstances described in her affidavit material. Second, this action and the related Family Dispute appear to be progressing quite slowly. The Family Dispute, which was scheduled to be heard in September, 2013 for a period of eight days, has now been adjourned and no date has been set for the trial of the instant action.
- [17] Furthermore, though Raman and Parveen attended at a Judicial Case Conference before Master Scarth in February 2013, at which time counsel for Parveen expressed an intention to add Surinder to the Family Dispute, that had not yet occurred when the parties appeared before me.
- [18] The progress of this action is concerning for various reasons. Surinder, who is an elderly gentleman, has not resided in the Home for approximately 18 months. He has deposed that he has continued to make various types of payments towards the Home but that he is no longer able to do so. In particular, I was advised that he is no longer able to make the mortgage payments on the Home and that the mortgage is now in default.
- [19] At the same time, Parveen continues to enjoy the Home with her children. There is little apparent incentive for her to change this state of affairs in the near future. She also asserts that Raman is not providing her with any support for herself or her children. If this is correct, it is a matter that she must address separately; but it has little to do with Surinder's entitlement to a share of the proceeds in the Home--whatever that amount may be.

- [20] Counsel for Parveen urged that I transfer this action to the New Westminster Registry so it can be heard at the same time as the Family Dispute. I am not prepared to do so. I was not provided with the pleadings from the Family Dispute and I am not certain what issues it raises. Although the issue of what entitlement each of Surinder, Parveen and Raman has to the Home is an issue that is common to both actions, the Family Dispute is likely to raise a number of matters that have nothing to do with Surinder. Surinder has also deposed that it would be difficult for him to attend at trial in New Westminster.
- [21] I am directing that the parties to both actions set down a Case Management Conference within two weeks of receipt of these reasons so that the issue of the extent to which, if at all, these two actions should be heard together can be determined and so that a schedule can be put in place that will ensure some relatively early resolution of the issues raised by this action.
- [22] The plaintiff's application is dismissed.

"Voith J."

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