

CANADA / JUDGMENT

Kainth v. Brar

2022 BCSC 1552

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1552 Kainth v. Brar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kainth v. Brar,

2022 BCSC 1552

Date: 20220817

Docket: S223161

Registry: Vancouver

Between:

Prabhjeet Singh Kainth and Balwinder Kaur Basra

Petitioners

And

Manpreet Kaur Brar

Respondent

Before: The Honourable Justice Gibb-Carsley

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners (by video):

J. Burg

Counsel for the Respondent (by video):

C. Kooner

Place and Date of Hearing:

Vancouver, B.C.

August 9, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2022

- [1] THE COURT: These are my reasons for judgment in this matter. As I am giving them orally, I reserve the right to edit them for style, but the substance will not change.

Introduction

- [2] The petitioners and respondent were family friends who purchased an investment property in May 2021 in Maple Ridge, British Columbia. Only a month after the purchase of the property, the relationship soured, at least in part because the respondent and her family moved into the property contrary to the expectations of the petitioners. Both parties are now in agreement that the property is to be sold.
- [3] The petitioners seek an order that they have sole conduct of sale of the property. They say the respondent has been delaying the sale of the property, and if there is joint conduct of sale, the respondent will delay the process further. The petitioners say there is urgency in selling the property given their view that the housing market is in decline.
- [4] The respondent opposes the application on the basis that she does not want to be excluded from the sale process. She says she also wants to move the process along, and because she and her family are living at the property, they should be included in the decisions regarding the sale because a decision both impacts them more than it does the petitioners, and also, they are in a better position to make decisions about the sale.

Issue

- [5] The only issue before the court is whether the petitioners should be awarded sole conduct of sale of the property.

Facts

- [6] The petitioners, Mr. Prabhjeet Singh Kainth and Ms. Balwinder Kaur Basra, are a married couple who currently reside in Calgary, Alberta. The respondent, Ms. Manpreet Kaur Brar, and her husband, Mr. Balraj Brar, entered into an agreement with the petitioners on March 16, 2021, to purchase the property located at Lot 14, Section 23, Township 12, New Westminster District Plan 15267 (the "Property"). The closing date of the transaction was May 5, 2021.
- [7] Mr. Kainth and Mr. Brar are both realtors. The parties purchased the Property as an investment property, and each put in \$100,000 as a purchase deposit. The parties are responsible for 50 percent of the mortgage, and each hold a 50 percent interest in the Property as joint tenants. On May 6, 2021, the respondent and her family moved into the Property to the surprise of the petitioners. The respondent and her family have been living at the Property ever since. In June 2021, only a month after the parties purchased the Property, Mr. Kainth visited the Property to conduct repairs. During that visit, the relationship between the parties broke down.
- [8] As will be described below, there is copious correspondence between the parties and between the parties' counsel. The correspondence shows a growing conflict between the parties and an escalating desire by the petitioners to resolve the conflict by a number of means, including selling the Property.
- [9] The respondent and her family do not pay market rent for living in the Property, but do pay certain expenses related to the Property. The petitioners stopped paying their portion of the mortgage on March 7, 2022.
- [10] The Property was appraised on June 20, 2022, at \$1 million.

Previous Court Order

- [11] The petitioners filed a petition on April 14, 2022, that culminated in a consent order of Master Hughes on June 15, 2022 (the "Hughes Order"). The Hughes Order provided:
- 1) The parties were to obtain an appraisal for the Property;
 - 2) The parties were given the opportunity to buy the other party's share in the Property;
 - 3) A process for selecting a realtor to list and sell the Property; and
 - 4) The Property would be listed for sale within 14 days of an appraisal being provided to the parties.
- [12] Notably, the parties did not contemplate a time limit for the appointment of an independent real estate broker to sell the Property, which led to the sale process stalling and ultimately, the petitioners bringing this petition. Neither party exercised the right to buy out the other party's share in the Property.

- [13] As a result of the delay perceived by the petitioners in appointing a listing realtor after the Hughes Order, the petitioners filed the current petition on July 26, 2022. The original purpose of the application was to obtain a court order to appoint a realtor and to give the petitioners sole conduct of sale.
- [14] After filing the application, on July 21, 2022, the parties agreed that Mr. Anthony Filippelli would be appointed as the listing realtor. The respondent also consented to all other orders sought by the petitioners except the order requesting that the petitioners would have sole conduct of sale.
- [15] This matter was on the chambers list on July 27, 2022, but not heard that day due to scheduling. The next date available to counsel was August 9, 2022.

Parties' Positions

- [16] The petitioners assert that the respondent has shown a consistent pattern of delay in making efforts to sell the Property. They point to unanswered correspondence and slow decisions as proof of the respondent's unwillingness to move forward with a sale. They also point to what they say is a consistent pattern of the respondent only responding meaningfully to the petitioners when litigation is threatened or commenced.
- [17] The petitioners say if they do not have sole conduct of sale, the sale of the Property will be further delayed because they expect it will be difficult, if not impossible, for the parties to come to agreements quickly regarding the many decisions to be made when selling the Property, such as the price, listing time, showing times and conditions of sale.
- [18] The petitioners say it is urgent that the Property be sold based on their view, supported by expert evidence, that the real estate market in Maple Ridge appears to be in decline. Delaying the sale of the Property in a falling market causes them economic harm and prejudice.
- [19] The respondent says she and her husband are motivated to sell the Property and have not delayed the process. She objects to any suggestion that she has not complied with court orders and says that she has been reasonable at each step of the process.
- [20] Further, the respondent says that it is important that she is involved in the decision-making process for the sale of the Property because she and her family live at the Property in British Columbia, while the petitioners live in Alberta. Further, given the respondent and her family live at the house, showings of the Property and closing dates will impact and potentially inconvenience her more than it will the petitioners. As such, she says she and her husband must be involved in the decisions related how the sale is conducted.

Law and Analysis

[21] As set out above, when the petition originated, the parties were not in agreement as to who should be the listing real estate agent and appeared unable to move ahead on the Hughes Order. Subsequent to the petition being filed, the parties agreed that Mr. Filippelli will be the listing realtor and have also agreed to a commission structure. The only remaining issue is whether the petitioners should be granted sole conduct of sale.

Law

[22] While the issue of my jurisdiction to award sole conduct of sale was not directly put before me on this application, I find my authority to award sole conduct of sale to a party is found in the court's ability to give directions under s. 6 of the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA], which provides:

6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

[Emphasis added.]

[23] Given the petitioner originally applied for sale under s. 6 of the PPA and the respondent consented to that element of the order, I find that I have jurisdiction to provide directions under s. 6 of the PPA in respect of how the Property is to be sold, including appointing a person to have sole conduct of sale.

[24] If I am wrong that my jurisdiction arises from s. 6 of the PPA, there appears also to be authority to direct a person to have sole conduct of sale under Rule 13-5(4)(a) of the Supreme Court Civil Rules, which provide that when the court orders the sale of a property:

(4) The court may give directions for the purpose of effecting a sale, including directions:

(a) appointing the person who is to have conduct of sale.

[25] Based on the two foregoing routes to jurisdiction, I am satisfied I am able to direct that one party may have sole conduct of sale of the Property.

[26] In *Durrani v. Lehal*, 2018 BCSC 2489 [Durrani], Justice Fitzpatrick set out the following factors for consideration when deciding who should have conduct of sale:

[48] In *Dhillon v. Kumar*, 2014 BCSC 2366, Master Keighley sets out common sense considerations in terms of deciding who should have conduct of sale:

As to whether the claimant should be given sole conduct of sale, while there is no singular test for granting sole conduct of sale, the Court should consider all factors including the willingness of a party to facilitate sale, the inability of the parties to agree on routine aspects of sale and the inability of the parties to cooperate: *McLachlan v. McLachlan*, 2013 BCSC 1733.

[27] Durrani sets out three factors the court may consider when determining whether to award one party sole conduct of sale:

- willingness of the party to facilitate a sale;
- inability of the parties to agree on routine aspects of the sale; and
- inability of the parties to cooperate.

[28] The parties put several cases before me in which courts consider various circumstances in determining the appropriateness of directing that one party has sole conduct of sale. A brief summary of the considerations is as follows:

- 1) Sole conduct of sale has been awarded when the other party has caused unnecessary delay: *Dunford v. Sale*, 2007 BCSC 1422;
- 2) Sole conduct of sale has been awarded where the other party is not adversely affected: *Lashman v. Spencer*, 2022 BCSC 96;
- 3) Sole conduct of sale has been awarded to a party based on concerns that the other party may thwart the marketing and sale process on the basis that they live at the property: *Dixon v. Morgan*, 2020 BCSC 1329;
- 4) Sole conduct of sale has been awarded to a party where the other party would merely suffer financial or personal inconvenience: *Tseng v. Tseng*, 2021 BCSC 27; *Eckhart v. Ball*, 2019 BCSC 1530; and
- 5) It is common practice for trial courts to make orders of joint conduct of sale since both parties have a profound interest in the terms of any sale, even where there is evidence that the parties have difficulty in cooperating: *Etemadi v. Maali*, 2021 BCSC 395.

[29] I now turn to the analysis of the specific circumstances of this petition.

Analysis

[30] In my view, there has been a pattern of delay or at least pattern of reluctance on the part of the respondent in moving forward with the sale of the Property. The question before me is whether that delay is of such degree to warrant awarding the petitioners sole conduct of sale of the Property.

[31] The petitioners initially pled that the respondent's actions were contemptible in that she failed to follow the orders of the court in moving forward with the sale of the Property. The petitioners withdrew the contempt argument, in my view properly. I do not find the respondent's actions are contemptible. The time taken to respond to the petitioners'

demands to move forward with the process do not contravene the terms of the Hughes Order. However, as I will explain below, given the totality of the evidence before me, I find that while their actions are not contemptible, they nonetheless support a finding that she has consistently delayed moving forward with the sale of the Property.

- [32] The evidence supporting my conclusion includes the numerous unanswered emails sent by counsel for the petitioners to the respondent's counsel requesting that the process of sale move forward. Specifically, after the Hughes Order, it took 20 days for the respondent to respond to the suggested realtors proposed by the petitioners. It took an additional four days, or 24 days in total, to approve the realtor. I note that Mr. Brar is a licensed realtor and, accordingly, I would expect he would have knowledge as to licensed realtors in British Columbia. In my view, this illustrates the lack of the respondent's willingness to facilitate the sale and the inability of the parties to agree on routine matters, both factors to be considered by the court as set out in Durrani.
- [33] While the delayed response regarding the selection of the realtor is within the four corners of the Hughes Order, in my view it is not within the spirit of advancing a prompt sale of the Property. While the respondent's actions are not contemptible, I would characterize them as foot-dragging.
- [34] I also accept the evidence supports the petitioners' counsel's argument that the respondent only moved the process forward when litigation was threatened or commenced. The evidence is that it took the first application to result in a consent order before Master Hughes and took this petition to result in the appointment of the realtor and the realtor's commission structure. In my view, this demonstrates a reluctance on the part of the respondent to sell the Property. Again, I find that this shows the inability of the parties to agree and supports an order that the petitioners have sole conduct of sale.
- [35] Objectively, I can understand potential reasons that the respondent is not moving the process forward, given she and her family reside at the Property. As such, selling the Property will be disruptive to them. Both parties would have an interest in selling the Property to realize gains from the sale. However, in my view, the respondent's desire to realize a gain from the sale of the Property may be tempered by the disruption of selling the Property given she and her family currently reside there. I conclude that delaying the sale of the Property more generally prejudices the interests of the petitioners as compared to the respondent.
- [36] While it is difficult if not impossible to predict how the real estate market will move, it is clear that the petitioners are motivated to sell the Property and have concerns the real estate market is in decline. The petitioners provided expert evidence of the realtor, Mr. Filippelli, that stated that between May 2022 and June 2022, the median selling price of a detached home in Maple Ridge declined by approximately \$70,000. Accordingly, at least according to Mr. Filippelli, delay in the sale of the Property results in a lower sale price.

The Inability of the Parties to Cooperate

- [37] It is clear from the evidence that there have been conflicts since at least June 2021, only a month after the Property was purchased. While it is not clear that the petitioners' upset over the respondent and her family moving into the Property resulted in the immediate wish of the petitioners to sell the Property, the correspondence demonstrates an attempt by the petitioners to resolve the situation that ultimately culminates in their desire to sell. The record shows the inability of the parties to cooperate, which is one of the Durrani factors that favours awarding sole conduct of sale.
- [38] A text on November 24, 2021, from Mr. Kainth to the respondent does not demand the Property be sold, but expresses Mr. Kainth's desire to resolve the matter or he will take court action. Likewise, a demand letter on December 16, 2021, sent by the petitioners to the respondent set out four options for the respondent. One of the options was to sell the Property. The following other three options were also presented:
- 1) The respondent would buy out the petitioners' share of the Property;
 - 2) Rent the Property to a third party and distribute the rent between the parties; or
 - 3) The respondent would pay 50 percent of the market rent to the petitioners.
- [39] The petitioners again attempted to resolve the situation by presenting options to the respondent on March 1, 2022, when Mr. Kainth visited the Property. One of those options included selling the Property. There was no resolution to the issue other than the petitioners stopped paying the mortgage on the Property on March 7, 2022. By the time the filing of the first petition on April 14, 2022, which I note is four months ago, there can be no doubt that the petitioners wanted to sell the Property.
- [40] In my view, the evidence from April 14, 2022, onward demonstrates the respondent's reluctance to move the sale of the Property forward with any urgency. The correspondence exchanged between the parties since April 14, 2022, demonstrates the respondent's delay. On April 14, 2022, the petitioners filed and served a petition requesting, amongst other things, the Property be sold and the petitioners be given sole conduct of sale. On April 28, 2022, two weeks later, the respondent's new counsel advised he was in the process of being retained. On May 3, 2022, the respondent's counsel requested a two and a half week extension to file response materials.
- [41] On May 4, 2022, the petitioners' counsel refused to grant an extension and stated the sole reason the petitioners obtained a lawyer was the respondent's unwillingness to cooperate. On May 5, 2022, the petitioners' counsel again emailed the respondent's counsel advising they wished to move the sale forward, especially given the apparent recent spike in interest rates and declining property values.

[42] On May 17, 2022, the petitioners' counsel emailed the respondent's counsel stating again they wanted to move the matter forward, and the respondent's materials were due on May 5, 2022, pursuant to the Supreme Court Civil Rules.

[43] On May 30, 2022, respondent's counsel emailed the petitioners' counsel including the following in his message:

My client would like to secure the just, speedy and inexpensive determination of the proceeding on its merits.

However, the email does not address the merits of the petitioners' concerns or advance the sale process.

[44] As noted above, on June 15, 2022, the parties appeared before Master Hughes. After the Hughes Order, further correspondence demonstrates a reluctance on the part of the respondent to move the sale process forward. There were several emails sent from petitioners' counsel to the respondent's counsel that were either not responded to at all, or the response did not advance the sale process. Specifically, I am referring to emails of June 14, 16, 30, July 4 and July 11, 2022. The general substance of these email exchanges was several attempts by the petitioners to move the sale of the Property forward, met with either silence or non-response from the respondent.

[45] I will mention what is perhaps a minor point, but, in my view, exemplifies the inability of the parties to cooperate effectively. On May 17, 2022, the respondent advised counsel for the petitioners that she would no longer accept service by email. However, up until that point email had been the manner of service the parties had used. This request had the potential to cause further delay of moving the sale of the Property forward and does not, to me, appear to be for a justified purpose.

[46] The respondent has demonstrated a pattern of delay in moving the sale of the Property forward in a meaningful fashion when there is not the threat of court order. While past behaviour is not always determinative of future behaviour, I am concerned that if the respondent has the opportunity to delay the sale of the Property by not agreeing with the petitioners on certain aspects of the sale, she may.

[47] Selling real estate involves making decisions promptly to respond to the fluid nature of the sale. I accept the petitioners' counsel's submissions that decisions need to be made when conducting the sale including: setting and adjusting the listing price; making decisions on when and how long to show the Property; dealing with offers and counter-offers; and dealing with conditions of sale. Disharmony and disagreement could lead to delay or derailment of the sale process. I also note that Mr. Kainth is a realtor and so has professional experience in selling houses. This provides me comfort that he should be well equipped to protect the interests of both parties, which is primarily maximizing the sale price in making the decisions and selling the Property.

- [48] I acknowledge the respondent's counsel's argument that many, if not all, of the cases put before me involve situations where the parties did not agree that the property was to be sold. In those cases, the court was primarily faced with determining if the property should be sold at all, and the issue of conduct of sale was secondary. I find that the same principles apply in both situations as both involve the inability of adversarial parties to move forward the sale of jointly owned property without the assistance of the court. While there may be some inconvenience to the respondent and her family in not having control over the process, I note that personal or financial inconvenience is not a sufficient reason to prevent owners from legitimately realizing on their interests: *McRae v. Seymour Village Management Inc.*, 2014 BCSC 714.
- [49] In respect of any potential unfairness to the respondent by the court awarding sole conduct of sale to the petitioners, my concerns are ameliorated by three factors:
- 1) The petitioners wish to have a clause in the order that provides that the sale of the Property will be subject to the approval of this court unless otherwise agreed to by the parties in writing;
 - 2) During submissions the petitioners indicated that they are willing to provide a transparent process for the respondent should they be granted sole conduct of sale. This would involve the petitioners providing information and documents requested by the respondent from the petitioners to be provided on request. I will also order that the petitioners will inform the respondent of all offers to purchase the Property; and
 - 3) The order presented by the petitioners also sets out that Mr. Filippelli must provide 24-hour notice to the respondent before showing the Property. In my view, this provides some protection to the respondent's privacy rights and makes the process somewhat less intrusive for the respondent and her family.
- [50] Ordering that the petitioners have sole conduct of sale with these safeguards provides balance between moving forward with the sale of the Property and giving some protection to the interests of the respondent and her family.

Conclusion.

- [51] I wish to thank counsel for their helpful and well-organized submissions. I will read the order, and then I will hear counsel on the issue of costs. This court orders that:
- 1) By consent, Anthony Filippelli, real estate agent at Royal LePage West Real Estate Services, is appointed as the listing agent to market and list the lands located at 24921 Dewdney Trunk Road, Maple Ridge, BC, V4R 1X4 (the Property), for sale within 14 days of being appointed unless otherwise agreed to by the parties in writing;

- 2) By consent, the parties may pay Mr. Filippelli a commission of not more than \$6,000 and the buyer's agent no more than 3.15 percent of the first \$100,000 of the purchase price and 1.15 percent of the balance of the gross selling price from the proceeds of sale;
- 3) The petitioner shall have exclusive conduct of sale;
- 4) Upon the written request of the respondent, the petitioners will provide information and documents relating to the sale process and details of the sale of the Property to the respondent within two days of receiving a request from the respondent;
- 5) The petitioner will inform the respondent of all offers to purchase the Property;
- 6) By consent, any person or persons in possession of the Property, including the respondent or her agent, shall on or after August 17, 2022, permit Mr. Filippelli to inspect or appraise the Property and the interior thereof and show the Property and the interior thereof to prospective purchasers and their agents between the hours of 10:00 a.m. and 8:00 p.m. on any day including Sunday and holidays and to post signs on the Property indicating that the Property is offered for sale, provided that Mr. Filippelli provide 24 hours' notice to the respondent;
- 7) By consent, Mr. Filippelli may install and operate a SentriKey real estate device at the Property in order to facilitate inspections, appraisals and showings of the Property, provided that Mr. Filippelli provide 24 hours' notice to the respondent;
- 8) By consent, the sale of the Property will be subject to the approval of this court unless otherwise agreed to by the parties in writing; and
- 9) By consent, this order may be executed and delivered by facsimile or other electronic signature and counterparts, and each executed counterpart shall be deemed to be an original, and such counterparts shall together constitute one and the same document.

[SUBMISSIONS ON COSTS]

Costs

- [52] I thank both parties for their submissions on costs.
- [53] In my view, given that the petitioners have been substantially successful in their application, I see no reason to depart from the ordinary rule that costs are awarded to the party that substantially succeeded.
- [54] I acknowledge counsel for the respondent's submission that the petitioners' application included an application for contempt that was not pursued by the petitioners. In my view, however, the petition was required to be brought by the petitioners, perhaps unnecessarily, in order to advance the process of selling the Property.

[55] As such, I find it appropriate that costs are payable by the respondent to the petitioners in any event of the cause. I will not order them forthwith, the reason being that, in my view, it should be assessed as part of the costs when the matter which is scheduled for September 14, 2022, is completed. To summarize, the petitioners are entitled to their costs of this application in any event of the cause, and that will be determined in the calculation of costs after the September 14, 2022 hearing.

"Gibb-Carsley J."

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