

CANADA / JUDGMENT

Kainth v. Kurji

2024 BCSC 101

COURT

Supreme Court of British Columbia

DECIDED

22 January 2024

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2024 BCSC 101 Kainth v. Kurji

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kainth v. Kurji,

2024 BCSC 101

Date: 20240122

Docket: S219927

Registry: Vancouver

Between:

Daljit Singh Kainth

Plaintiff

And

Shemilla Kurji Trustee of the Estate of Karim Kurji, Shemilla Kurji, and K.I.N.S. Investments Ltd.,
Marcon Davie Properties Ltd. dba Marcon Davie Limited Partnership, Beechinor Baker Hall Law
Firm

Defendants

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:

M. Spieker

Counsel for Marcon Davie Properties Ltd.:

T. Boyd

Place and Date of Hearing:

Vancouver, B.C.

January 9, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2024

[1] The defendant Marcon Davie Properties Ltd., dba Marcon Davie Limited Partnership ("Marcon") seeks an order dismissing the plaintiff's claim against it under Rule 9-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 or in the alternative, pursuant to Rule 9-7.

[2] For the reasons set out below, I grant the application.

Background

[3] The plaintiff claims in this action that he was the partner and joint venturer of the defendants Shemilla Kurji and Karim Kurji (together, the "Kurjis") with respect to the purchase of a development unit in a residential development complex. He says that the Kurjis assigned their interest in the contract to the defendant K.I.N.S. Investments Ltd. ("KINS"), which excluded him from benefiting in the sale. He claims damages against these alleged former partners.

[4] The plaintiff also joined as defendants Marcon, which is the developer and vendor, and Beechinor Baker Law Firm (the "Law Firm"), who acted for Marcon on the conveyance.

[5] On September 7, 2023, the Law Firm filed an application seeking an order dismissing the claim against it on the basis that the claim was meritless. The plaintiff subsequently discontinued its claim against the Law Firm.

The Contract and Assignment

[6] On July 18, 2017, Marcon, as vendor, and the Kurjis, as purchasers, entered into a contract (the "Contract") for the purchase and sale of proposed Strata Lot 13, in the Mirabel residential development located in the West End neighbourhood of Vancouver (the "Unit"). The plaintiff is not a named or signatory party to the Contract.

[7] Shemilla Kurji acted as the real estate agent on behalf of the purchasers, which is documented in the Contract.

- [8] On July 18, 2017, Marcon, as vendor, and the Kurjis, as purchasers, entered into an addendum to the Contract, giving the Kurjis the right to add KINS as a purchaser at the time of completion (the "KINS Addendum").
- [9] On July 19, 2017, Marcon, as vendor, and the Kurjis, as purchasers, entered into another addendum to the Contract, giving the Kurjis the right to add the plaintiff as a purchaser at the time of completion (the "Kainth Addendum").
- [10] The plaintiff is not a signatory or named party to the Kainth Addendum and the addendum does not grant any rights to the plaintiff. On its express terms, the Kainth Addendum reserves to the Kurjis, as purchasers, the right to add the plaintiff to the Contract at the time of the completion.
- [11] At some point after, the defendant Karim Kurji died.
- [12] On May 26, 2021, Marcon, as vendor, Shemilla Kurji and the Estate of Karim Kurji, as assignors, and KINS, as assignee, entered into an assignment and consent agreement by which the Contract was assigned to KINS. This step was authorized by the express terms of the KINS Addendum.
- [13] On or about September 27, 2021, Marcon, as vendor, conveyed the Unit to KINS, as purchaser, pursuant to the terms of the Contract and the Assignment and Consent Agreement. The Law Firm acted for Marcon on the conveyance. Sikander Visram acted for KINS.

The pleadings

- [14] In his notice of civil claim filed November 15, 2021, the plaintiff pleads the following facts about Shemilla Kurji's role as agent for the plaintiff:
 - 12. Shemilla Kurji also agreed to act as Realtor and agent for the Plaintiff and as business partner, to share any Realtor fees with the Plaintiff concerning purchase sale transactions of the Property. This agreement of agency was verbal and not placed in writing.
 - 17. The Defendant Shemilla Kurji, failed in her responsibilities as Trustee of her husband's estate and in her duties as Realtor for the Plaintiff.
- [15] With respect to Marcon and its role in the assignment to KINS, the plaintiff pleads the following facts:
 - 19. The Vendor or Trustee for the Vendor and their counsel at Beechinor, Baker, Hall improperly complied with this assignment and request. The Vendor or Trustee for the Vendor and their counsel jointly and severally negligently failed to recognize the conflict and inconsistency in the assignment of the Contract of Purchase and Sale Addendum, and negligently failed to give import to the source of the Deposit paid by the Plaintiff, and negligently failed in a minimal duty to communicate with the Plaintiff the nature of the mismatch and, or advise that Independent advice and representation be sought.

22. As a result of the breach of contract and breach of agency representation and duties, and as a result of the director's acts or omissions of Shemilla Kurji, and further as a result of the Acts or omission of the Vendor or Trustee for the Vendor and their counsel, or employees under their charge for which they are vicariously responsible for, at Beechinor, Baker, Hall, the Defendants have jointly and or severally caused a circumstance whereby the Plaintiff was unable to complete on the Property, and has thereby suffered a loss in his investment opportunity.

[16] The plaintiff pleads a claim in breach of fiduciary duty and agency duty against the defendant Shemilla Kurji in the legal basis of his NOCC.

[17] The plaintiff pleads the following legal basis for his claim against Marcon:

Negligence

5. Vendors and their counsel have a duty towards parties of a Contract of Purchase and Sale of real estate reasonably anticipated to be affected by the transaction, in particular to ensure that assignments are made with the consent of original purchasers or otherwise by court order or performed contract. The Plaintiff relied upon the standard of care in the case of the Law Firms and their employees and or agents being that of special skill, knowledge and attention to detail concerning Contract of Purchase and Sale and Assignments. The Plaintiff had a reasonable expectation of relying upon such skills and knowledge so as to be reasonably contemplated in the closing transactions, along with an expectation to be contacted or consulted prior to accepting a purchaser assignment, the failure of which has resulted in damages from dissolution of the Joint Venture which he may be unable to recover from the Defendant Kurji.

[18] The matter is scheduled for a four-day trial commencing April 15, 2024.

Dismissal of claims under Rule 9-6 - Summary Judgment

[19] Rule 9-6(5)(a) provides that summary judgment is available to an applicant where there is no genuine issue for trial. Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court must pronounce judgment or dismiss the claim accordingly.

[20] Pursuant to Rule 9-6, a defendant can challenge a claim upon a limited review of the evidence in which a defendant can succeed by showing that the plaintiff's case is unsound or by adducing sworn evidence that is a complete answer to the plaintiff's case: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48.

[21] The test for awarding judgment under Rule 9-6(5) is whether the claim is so factually without merit that it is manifestly clear that there is no genuine issue to be tried. If the court reaches this conclusion, there is no discretion and the claim must be dismissed: *Edgar v. The British Columbia Institute of Technology*, 2015 BCSC 710 at para. 9.

Is the plaintiff's claim in negligence bound to fail?

- [22] The NOCC pleads a claim in negligence against Marcon. As such the plaintiff must prove Marcon owed a duty of care to the plaintiff. A duty of care is established where there is a sufficiently proximate relationship between the plaintiff and the defendant that makes the injury to the plaintiff reasonably foreseeable. What is necessary to support a duty of care is that the relationship between the plaintiff and the defendant bears the requisite closeness and directness, such that it falls within a previously established category of proximity or is analogous to one: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at paras. 26 and 47.
- [23] The only basis in the NOCC on which the plaintiff alleges that Marcon owed him a duty of care is his allegation that he was a party to the Contract. This is demonstrably false. In oral submissions, counsel submitted that this claim includes a claim based on a duty of care owed to potential parties to a contract. This was not pleaded, and no basis in law was provided for such a duty. There is no law recognizing the existence of a duty of care between the vendor in a purchase and sale agreement and a non-party to that agreement.
- [24] The plaintiff was not a party to the Contract or any agreement with Marcon in respect of the Unit. The Kurjis entered into an addendum to the Contract with Marcon to give them the contractual right to add the plaintiff as a purchaser on completion. However, they never elected to exercise that right.
- [25] Marcon completed the transaction in accordance with the contractual terms of the Contract and with the assistance of its legal counsel, the Law Firm. Marcon cannot be liable to the plaintiff for completing the transaction in accordance with its contractual obligations.
- [26] The claim against Marcon is devoid of merit and bound to fail. It is therefore dismissed under Rule 9-6.

Dismissal of claims under Rule 9-7 - Summary Trial

- [27] Rule 9-7(2)(a) provides that a party may apply to the court for judgment, either on an issue or generally, in an action in which a response to civil claim has been filed.
- [28] Rule 9-7(15) provides that, on hearing a summary trial application, the court may grant judgment 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.

[29] In deciding whether a matter is suitable for summary trial, the court may consider a number of factors, including 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, and the course of the proceedings: *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at para. 65, rev'd in part on other grounds 2022 SCC 27.

Is the claim against Marcon suitable for resolution by summary trial?

[30] This matter is appropriate for resolution by summary trial. The sole issue is whether Marcon owed the plaintiff a duty of care. This is not a complex issue and a full trial will not bring any greater clarity to the evidence. The issue can be decided on the affidavit evidence before the Court.

[31] There is no unfairness in determining this matter by way of summary trial. The plaintiff estimates the value of his claim is \$100,000. The parties should not be required to incur further expense to pursue and defend this claim through the conventional trial process.

[32] In an affidavit filed on January 5, 2024 (one court day before this hearing), the plaintiff now deposes that an unknown person acting as agent for Marcon on July 19, 2017, advised the plaintiff at the sales centre of his rights as a joint purchaser and how those rights could be protected in the form of the Kainth Addendum.

[33] Present during the alleged discussion were the Kurjis, including Shemilla Kurji, who was at the time allegedly acting as the plaintiff's real estate agent. The plaintiff pleads that Shemilla Kurji was his real estate agent, and he has also deposed on a prior application that she was his realtor. He also previously deposed that he did not receive updates from Marcon, its own realtor, or Shemilla Kurji as the realtor for Karim Kurji and the plaintiff.

[34] The plaintiff now deposes that he believed that the unnamed and unknown agent for Marcon became an implied agent for him and that he relied upon their advice in this role. This is despite his prior evidence and the pleadings stating that Shemilla Kurji was his realtor and that he relied upon her advice in accepting the Kainth Addendum as protecting his rights.

[35] The plaintiff's new and late evidence contradicts his pleadings and his previous evidence. His credibility is seriously put into question. I do not believe that he subjectively understood that the Marcon agent was acting on his behalf in the role of a dual agent, as his counsel now argues. I also do not accept that the Marcon agent made such statements to the plaintiff, because he would have pleaded those facts much earlier on and deposed as to those circumstances in his earlier affidavit. This would be a very memorable conversation, if it occurred. The plaintiff provides no explanation as to why this new fact pattern is being disclosed three years after filing the NOCC and only one day before the hearing of Marcon's application.

- [36] In any event, even if this alleged brief encounter with a person whom the plaintiff knew to be Marcon's agent occurred as described, in the presence of the plaintiff's own agent as alleged, it would not create an implied agency relationship. An agency relationship may be implied where it is reasonable for the party asserting an agency relationship to infer from the conduct of the other party that he or she consented to an agency relationship: *Siemens v. Howard*, 2018 BCCA 197 at paras. 11-14.
- [37] A party is obligated to lead the best evidence available to it on an application under Rule 9-7. Therefore, even if I accepted the plaintiff's evidence as to what took place, and I read the NOCC as broadly as the plaintiff now asks me to do and infer he pleads a claim of breach of fiduciary duty resulting from an implied agency relationship, the plaintiff's claim would fail on the evidence before me. No reasonable person in the circumstances would believe an implied agency was created.
- [38] Judgment is granted in favour of Marcon. The plaintiff's claim is dismissed.

Conclusion

- [39] The defendant's application is granted under both Rules 9-6 and 9-7.

Costs

- [40] Marcon is entitled to its costs on this application and the proceeding at Scale B.

"Wilkinson J"

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Prepared on 29 October 2026 · Esheria