

CANADA / JUDGMENT

Kamloops Estates Ltd. v. Avon Holdings Ltd.

2001 BCCA 685

COURT

British Columbia Court of Appeal

DECIDED

10 December 2001

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2001BCCA0685 Citation: Kamloops Estates Ltd. v. Avon Holdings Ltd. Date: 20011210 2001 BCCA 685 Docket: CA027393 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA BETWEEN: KAMLOOPS ESTATES LTD. PETITIONER (APPELLANT) AND: AVON HOLDINGS LTD., VILLAGE GATE RESORTS LTD., HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, B.P.Y.A. 138 HOLDINGS LTD. RESPONDENTS (RESPONDENTS) Before: The Honourable Mr. Justice Esson The Honourable Mr. Justice Donald The Honourable Madam Justice Saunders Peter Reardon Counsel for the Appellant William B. McAllister, Q.C. Counsel for the Respondent B.P.Y.A. 138 Holdings Ltd. Place and Date of Hearing: Vancouver, British Columbia November 8, 2001 Place and Date of Judgment: Vancouver, British Columbia December 10, 2001 Written Reasons by: The Honourable Mr. Justice Donald Concurring in by: The Honourable Mr. Justice Esson The Honourable Madam Justice Saunders Reasons for Judgment of the Honourable Mr. Justice Donald:

- [1] This is a mortgage case where the issue is whether payments received from the mortgagor, but not allocated by the mortgagee amongst various debts, are deemed at law to be appropriated to the mortgage debt. If they are then the foreclosure proceeding can be maintained. If not, then this action is statute barred having been brought more than six years after the cause of action arose.
- [2] The mortgage was granted by Avon Holdings Ltd. to the petitioner on 4 March 1983 for a debt of \$153,022.77. The security consisted of two strata lots in Whistler. Avon did not make any of the monthly instalments as provided in the mortgage agreement. The cause of action for enforcement of the mortgage began to run after the first instalment was missed. If nothing occurred to confirm the cause of action in the meantime the limitation expired in March 1989, six years later. This petition was filed on 3 August 1994.
- [3] In 1985 Avon granted another mortgage to the petitioner, this time on property on Seymour Street in the City of Kamloops. The principal of the petitioner, Reginald Humphreys, who was also a 50% shareholder of Avon, said that the Seymour Street mortgage was collateral to the Whistler mortgage and that therefore the payments made during the limitation period

on the Seymour Street mortgage confirmed the cause of action relating to the Whistler mortgage. The trial judge did not accept Mr. Humphrey's evidence and found no other credible evidence supporting the assertion that the Seymour Street mortgage was collateral.

- [4] The respondent B.P.Y.A. 138 Holdings Ltd. held a second mortgage on the Whistler properties. It foreclosed and took title subject to the petitioner's interest.
- [5] The appeal is brought from a decision rendered 14 June 2000 by Mr. Justice Burnyeat after a summary trial. He dismissed the action on the motion of B.P.Y.A.: [2000] B.C.J. No. 1197; 2000 B.C.S.C. 922. He held that the petitioner did not prove that Avon paid anything on account of the mortgage within six years of the commencement of the cause of action and the petition was therefore out of time: s. 3(6)(a) Limitation Act.
- [6] The trial judge rejected the petitioner's argument that the cause of action was confirmed within the terms of ss. 5(1)-(3) of the Limitation Act. Those provisions read as follows: 5 (1) If, after time has begun to run with respect to a limitation period set by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation. (2) For the purposes of this section,
- (a) a person confirms a cause of action only if the person
- (i) acknowledges a cause of action, right or title of another, or (ii) makes a payment in respect of a cause of action, right or title of another, (b) an acknowledgment of a judgment or debt has effect (i) whether or not a promise to pay can be implied from it, and (ii) whether or not it is accompanied by a refusal to pay, (c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money, and (d) a confirmation of a cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same account.
- (3) If a secured party has a cause of action to realize on collateral, either of the following is a confirmation by the payer or performer of the cause of action:
- (a) a payment to the secured party of principal or interest secured by the collateral, or (b) any other payment to the secured party in respect of that party's right to realize on the collateral, or any other performance by the other person of the obligation secured.
- [7] The confirmation was said by Avon to consist of payments it made to the petitioner from time to time within the six year period in question.
- [8] Avon owed various debts to the petitioner in addition to the mortgage on the Whistler properties. The petitioner's books did not show any allocation of the payments from Avon to any particular debt and, in fact, Mr. Humphreys gave evidence that he did not make any

allocation of the payments. In those circumstances the petitioner had to resort to the argument that the mortgage was the only outstanding debt when payments were received or, alternatively, that the mortgage was the oldest debt; in which case, on the authority of Clayton's Case (*Devaynes v. Noble*) (1816), 1 Mer. 572, [1814-23] All E.R. 1, (Eng.Ch.Div.), the law presumes that the oldest debt is paid first.

- [9] The law in this regard was concisely summarized by Mr. Justice Maczko in *Crescent Petroleum Ltd. v. Portserv Ltd.* (1997), 37 B.L.R. (2d) 118 at 121:
- [11] Where a debtor has a number of debts with a creditor and the debtor pays to the creditor an amount of money insufficient to cover the total amount of all the debts, the debtor has the right to declare which debt will be paid first. If the creditor accepts the money, he or she must abide by the debtor's appropriation. If the debtor does not make the appropriation, that right devolves upon the creditor. (Chitty on Contracts, 27th ed. (London: Sweet & Maxwell, 1994), pp. 1055-1057). Where the appropriation is not made by the creditor, the law will in certain circumstances substitute the presumption that the oldest debt will be paid first. This is sometimes referred to as the rule in Clayton's Case, a 19th century English decision cited more completely as *Devaynes v. Noble*, (1816) 1 Mer. 572, [1814-1823] All E.R. Rep. 1 (Eng.Ch.Div.).
- [10] The petitioner alleged that the payments which confirmed the cause of action came in the form of dividends declared and paid by Avon and rentals which it received from the Seymour Street property in Kamloops. The trial judge found that neither the petitioner nor Avon produced any record that the payments were to be applied to the Whistler mortgage account. It is not contended that the petitioner made any specific allocation of funds to that account.
- [11] On a review of the trial record it is plain, in my view, that the mortgage was not the only debt during the time in question. So it does not necessarily follow that the payments went to the Whistler mortgage. Nor does the evidence show that the Whistler mortgage is the oldest of the debts owed by Avon to the petitioner and consequently the facts will not support the application of Clayton's Case to the present matter.
- [12] As I said at the beginning of these reasons, the trial judge found that the Seymour mortgage was not collateral to the Whistler mortgage. He found that Mr. Humphreys changed his evidence when it suited his purposes:
- [44] Before the position was taken by BPYA that Kamloops was statute barred from enforcing the Mortgages, all the evidence given under oath by Mr. Humphreys at discoveries and in his sworn affidavits was clear that either no payments had been received by Kamloops or that any funds received by Kamloops had been applied against other debts owing from Avon to Kamloops or against other debts owing by Avon or Kamloops. [45] While Mr. Humphreys describes the Avon Mortgage on the Seymour Property as collateral to the indebtedness of Avon to Kamloops under the Mortgages, it is clear that the mortgage was not drawn to reflect that it was collateral. It is also clear that, when the Seymour Property was sold and the Avon

Mortgage was paid, there is no indication that Kamloops applied the funds received (approximately \$173,000) against the balance owing under the Mortgages. If the Avon Mortgage was truly collateral to the Mortgages, one would have expected that at least some of the balance owing under the Avon Mortgage would have been applied against the balances then owing under the Mortgages. Although the Seymour Property was sold long after the limitation had expired, the way the proceeds from the sale were disbursed at the request of Mr. Humphreys shows clearly that the Avon Mortgage was not collateral to the Mortgages. In the circumstances, I specifically make that finding.

[13] This is a finding fully supported by the evidence and I would not interfere with it.

[14] There being no valid argument supporting confirmation of the cause of action, the trial decision must stand and I would accordingly dismiss the appeal. "The Honourable Mr. Justice Donald" I AGREE: "The Honourable Mr. Justice Esson" I AGREE: "The Honourable Madam Justice Saunders"

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