

CANADA / JUDGMENT

Khural v. Gill

2021 BCSC 852

COURT

Supreme Court of British Columbia

DECIDED

5 May 2021

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2021 BCSC 852 Khural v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khural v. Gill,

2021 BCSC 852

Date: 20210505

Docket: S207458

Registry: New Westminster

Between:

Amitoz Kaur Khural

Plaintiff

And

Lalit Gill and Sukhwinder Sandhu

Defendants

Corrected Judgment: The front page of the judgment was corrected where changes were made on May 25, 2021;

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

J. Malik

Counsel for the Defendants:

R. Doran

Place and Date of Hearing:

New Westminster, B.C.

February 25, 2021

Place and Date of Judgment:

New Westminster, B.C.

May 5, 2021

- [1] On October 18, 2018, the plaintiff, Ms. Khural, commenced this civil claim concerning a contract of purchase and sale for a property in Surrey B.C. The plaintiff seeks a summary trial of her claims for damages based on the defendants' breach of the contract to buy the land; she also requests forfeiture of the defendants' deposit.
- [2] The plaintiff also seeks an order granting her vacant possession of the property, dismissal of the defendant's counterclaim, and an order removing a certificate of pending litigation filed against her title to the property.
- [3] The defendants, Ms. Gill and Mr. Sandhu, have counterclaimed and seek specific performance of the contract of purchase and sale or general damages in lieu of specific performance. In the further alternative the defendant claims damages for breach of the contract and seeks a certificate of pending litigation, declarations as to the plaintiff's unjust enrichment, or that the plaintiff holds funds in a constructive or resulting trust.
- [4] The defendants contend the issues in this action are not suitable for determination by summary trial. There is a five-day trial currently scheduled for September 13, 2021.

Background

- [5] The plaintiff is the registered owner of property at unit 17-12091 70th Ave., Surrey, B.C. ("Unit 17"). The defendants made an offer to purchase Unit 17 for \$449,000 and the parties entered into a contract of purchase and sale dated March 1, 2015 (the "contract").
- [6] The relevant provisions of the contract are as follows:
 - a) the sale will be completed on February 29, 2016 at the appropriate Land Title Office (the "LTO");
 - b) documents required to give effect to the contract would be delivered in registrable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4 PM on the completion date;

- c) time will be of the essence, and unless the balance of the cash payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the completion date, the seller may, at the seller's option terminate this contract and The amount paid by the buyer will be non-refundable and absolutely forfeited to the seller ; and
 - d) the buyer will bear all costs of the conveyance and, if applicable, any costs related to arranging a mortgage and the seller will bear all costs of clearing title.
- [7] The parties also included an addendum dated March 1, 2015 containing four terms. The addendum was attached and formed part of the contract. These terms were:
- (1) Buyer and Seller agree to extend the completion date further up to one year (28 Feb 2017) with all terms and condition as per addendum of rental agreement and rental agreement.
 - (2) Deposit made at the time of acceptance of offer and on or before 15 May 2015 is not refundable in case of buyer cancel or withdraw for any reason.
 - (3) Buyer will not assign the lease/rental agreement to any other person/party.
 - (4) Seven in no pages [sic] of rental agreement including addendum is part of contract of purchase and sale.
- [8] There was a tenancy agreement attached to the contract also signed on March 1, 2015 (the original Tenancy Agreement) by the plaintiff and the defendants. The original Tenancy Agreement provided for a one-year term ending February 29, 2016 with a monthly rent of \$2000. The Tenancy Agreement contained a rent-to-own clause as follows:

All items listed in this addendum will apply to "rent to own" and "yearly lease" tenants.

- [9] Other than this addendum, there is no reference in any of the written agreements connecting the contract and the original tenancy agreement.
- [10] Specifically, there is no mention in the contract or in the tenancy agreement referring to a credit to the defendant toward a portion purchase price of Unit 17 that was subsumed in the monthly rental payment. A new tenancy agreement was signed and entered into commencing March 1, 2017 and ending February 28, 2017.
- [11] The completion date for the contract was also extended to February 28, 2017.
- [12] There is no evidence that either party attended at the LTO to complete the contract on or before February 28, 2017.
- [13] On March 1, 2017 the plaintiff and defendant agreed to extend the defendants' tenancy in Unit 17 for six months ending September 30, 2017. On or about July 30, 2018 the plaintiff served the defendants with a "notice to end tenancy for cause". On September 13, 2018, the Residential Tenancy Branch convened a hearing to deal with the defendants' application for dispute resolution under the Residential Tenancy Act, S.B.C. 2002, c. 7, to cancel the two month notice to end tenancy. The arbitrator declined to hear the matter due to a lack of

jurisdiction and concluded the matter fell within the exclusive jurisdiction of the Supreme Court of British Columbia.

- [14] The defendants continue to occupy Unit 17 as month-to-month tenants.
- [15] These facts set out above are not contested. The issues to be resolved in the trial and on this application include the following:
- a) are the defendants entitled to specific performance of the contract by reason of the plaintiff's failure to complete the sale;
 - b) are the defendants entitled to damages in lieu of specific performance or damages for breach of contract;
 - c) was the plaintiff unjustly enriched by the payment of the deposit and or rents; does the plaintiff hold any of the rent payments or deposit in constructive or resulting trust for the defendant; or
 - d) did the defendants breach the contract;
 - e) is the plaintiff entitled to a declaration that the defendants breached the contract and forfeit the deposit;
 - f) should an order be issued requiring the defendants to vacate Unit 17 and should a writ of possession issue; and
 - g) are the defendants indebted to the plaintiff for unpaid rent?
- [16] For the reasons that follow, I am satisfied that a determination on this summary trial application will require an assessment of the credibility of the plaintiff, Mr. Khural and the defendant Ms. Gill. On that basis, that I am not able to find the facts necessary to decide the issues in this case I conclude this is not an appropriate case for a summary trial. Further, I order that the certificate of pending litigation on Unit 17 (the "CPL") be maintained until the full trial of this matter.

The Evidence

The Defendant, Ms. Gill

- [17] The defendant contends that in order to prepare herself to be ready to complete the contract on February 28, 2017, she had arranged mortgage financing for Unit 17 but that Mr. Khural had failed to provide her with the plaintiff's lawyer's identity or details.
- [18] Ms. Gill said that later the same evening Mr. Khural provided her with the plaintiff's lawyers information. It was following that exchange of information that there was a discussion about purchasing a different unit in the same complex at number 41-7077 125th St., Surrey, BC ("Unit 41") that is owned by that Mr. Khural; Ms. Gill was interested in this property because it had four bedrooms.

[19] The defendant contends that:

In February 2017, I called Mr. Khural about completing the purchase. Mr. Khural told me that he was very sick and could not speak to me. A couple of days later I called him again and he told me that the plaintiff's husband had just arrived from India. Mr. Khural advised me that they were a newly married couple so they had left for a honeymoon and were not in a position to sign any papers but that he would come and speak with me."

[20] At another meeting at Ms. Gill's house, she said that she and Mr. Khural came to "a verbal agreement" with Mr. Khural to purchase Unit 41. Ms. Gill said that her husband, Mr. Sandhu, had an ongoing personal injury claim for which settlement was near, and that:

Mr. Khural said he would wait until after the settlement to complete the paperwork and then we would be able to move into his Unit 41.

[21] In September 2017, the plaintiff entered into a rental agreement extending her tenancy, but she never received a copy of the document.

[22] Throughout her evidence, the defendant, Ms. Gill, insisted that the rent paid under the tenancy agreement for Unit 17 included the sum of \$650 per month towards the purchase price of Unit 17. However, in her first affidavit she said the rent payable for Unit 17 was \$2000 per month, but in her second affidavit she said the rent was \$2250 per month. At one point she said \$750 was to be applied toward the purchase price of Unit 17 from March 2015 to February 2016. Elsewhere, she said that the rent of \$2250 did not become payable until February 2016 and the \$600 credit to the purchase price began at that point.

[23] Ms. Gill contends that after July 2018, the agreement to rent remained \$2250 per month that included \$600 per month that would be paid towards the purchase price of Unit 17.

[24] Ms. Gill also contends that on July 10, 2018 Mr. Khural met Ms. Gill and discussed Mr. Khural's intention to sell Unit 17. Ms. Gill said:

Mr. Khural informed me that he would return the previous deposit that Mr. San do and I had paid in the sum of \$20,000, plus he would pay an additional \$70,000 to us as a bonus. I became very nervous because I did not believe him.

[25] At the end of July 2018, the plaintiff served the defendants with notice to end tenancy for cause.

[26] The defendant says that she has a counterclaim for \$20,000 or more for repayment of the down payment paid to Mr. Khural since the time she moved into Unit 17, including the payments she contends were made towards the purchase price.

[27] Ms. Gill was examined for discovery on November 18, 2019. She was asked questions about the original completion date of February 2016, which she said was extended for one year. She was also asked about the transfer of the purchase agreement from Unit 17 to Unit 41. This change was not put into writing. This exchange then occurred in the discovery:

Q. 230 So I'm going to try to fix the chronology here from what I understood your last bit of evidence to be. February 2017, the original - -

A. Close.

Q. 232 - - you and Mr. Khural have a discussion?

A. Yes

Q. 233 and you transfer the deposit to Unit 41. No closing date, but you agree on a price of Unit 41 of \$780,000?

A. Yes

Q. 234 And so as of February 2017 you're no longer purchasing Unit 17. You're now purchasing Unit 41?

A. Yes

The Plaintiff, Ms. Amitoz Kaur Khural

[28] The plaintiff said that she gave full authority to her father, Mr. Khural, to act as her agent in dealing with the defendants. The plaintiff confirms the sequence of events recited above except where there are conflicts with the defendants' assertions.

[29] The plaintiff concedes that she agreed to extend the lease from March 1, 2016 to February 28, 2017. She argued that there was a second extension agreement for six months ending September 30, 2017. This document is signed by the plaintiff and both defendants. After October 1, 2017 the defendants remained living in Unit 17 on a month-to-month tenancy.

[30] In August, September and October 2018 the defendants paid partial rent payments and paid nothing in November 2018. They continue to live in Unit 17 without paying rent.

[31] In July 2018, the plaintiff served the defendants with a one-month notice to end the tenancy for cause. A hearing on this question before the residential tenancy branch did not proceed; the arbitrator declined to exercise jurisdiction in the dispute. By November 2018 the defendants had paid intermittent and inconsistent amounts towards the rent.

[32] The plaintiff seeks general damages against the defendants for breach of the agreement. She seeks a declaration that the defendants were in breach and their deposit to be forfeited. The plaintiff does not make any claim for specific performance or damages in lieu of specific performance.

[33] The plaintiff contends that the completion date set for the contract was initially February 29, 2016 and extended by agreement to February 28, 2017. She argues that the original tenancy agreement included a 'rent-to-own clause', and that on February 29, 2016 the tenancy agreement lapsed and the tenants had failed to purchase the property in accordance with the terms of the contract due to a lack of funds.

- [34] She said that the defendants wanted to complete the contract in or about February 2017. She said her lawyer called the defendants about the completion but they did not contact her lawyer. This latter statement was based on the inadmissible hearsay from a conversation with her lawyer.
- [35] In any event, the defendants did not tender the purchase price or the Form A transfer for the plaintiff's signature on or before February 28, 2017. It is apparent from all of the evidence that neither the plaintiff nor defendant attended at the Land Title Office to complete the contract.

Mr. Harjinder Khural

- [36] Mr. Khural provided an affidavit confirming his authority to act on the plaintiff's behalf in dealing with the defendants over the sale of Unit 17.
- [37] He said no portion of the rents paid by the defendants were intended to increase the deposit on the contract or to decrease the amount owing at the time of completion. He said he assisted the defendants in locating a mortgage lender to help them finance the purchase of the property. He said he obtained the Form B from the strata corporation.
- [38] Mr. Khural says that Mr. Sandhu communicated to him on February 24, 2017 that he did not wish to complete the purchase of Unit 17. Mr. Khural also made the following assertion:
- Further, the defendants, Mr. Sandhu, requested that his \$20,000 deposit be returned upon the sale of Unit 17 as well as for an additional \$50,000 to be given as a result of the increase in value of Unit 17.
- [39] He expressly denied making an agreement to sell Unit 41 to the defendants; he did not own Unit 41 and did not make any agreement to sell that Unit to the defendants.

Analysis

Suitability for summary Trial

- [40] I have concluded that the affidavit material provided by both parties leaves me in a position where I cannot find the requisite facts to decide the issues advanced at this summary trial on the evidence presented.
- [41] Applications for summary trial are provided for in Rule 9-7(11)-(15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009:

Adjournment or dismissal

- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
- (a) adjourn the summary trial application, or

- (b) dismiss the summary trial application on the ground that
- (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
- (ii) the summary trial application will not assist the efficient resolution of the proceeding.

Judgment

- (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,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.
- [42] The plaintiff contends that this application accords with the principles set out in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215, 1989 CanLII 229 at para. 49 (C.A.) [*Inspiration Management*], where Chief Justice McEachern stated:
- [49] 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.
- [43] In *Gichuru v. Pallai*, 2013 BCCA 60 [*Gichuru*], the Court of Appeal elaborated:
- [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.
- [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:

- [44] The principles underlying summary trials require the party with the onus of proof to meet that onus on the affidavits filed. In *Inspiration Management* the court said:
- [54] The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to the law unless he has the opinion that it will be unjust to give such judgment.
- [45] The plaintiff contends this application is suitable for summary trial because the matter is not complex and centers on established principles of contract law, breaches of contract, and the removal of certificates of pending litigation. She contends that credibility is not a factor and that the cost of a five-day trial outweigh the amount of the deposit at issue and the defendants' underpayment of rent.
- [46] The plaintiff contends the defendants were obliged to take every reasonable step to put their best foot forward in terms of evidence on this application: see *Gichuru* at para. 32. The plaintiff recognizes that if the Court is unable to find the necessary facts to decide the issues it would be unjust to decide the claims in a summary judgment application.
- [47] She contends that it is too late for the defendants to now seek an examination for discovery; this application has been outstanding since December 20, 2020 and the notice of civil claim was filed October 18, 2018. It is not controverted that the plaintiff has been seeking a summary disposition of this matter since July 2020 and this date was scheduled in September 2020.
- [48] The plaintiff argued that the only written agreement concerning Unit 17 is the contract and the defendant's attempt to rely on other agreements, collateral agreements, or amending agreements must fail because of s. 59(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, that requires contracts respecting dispositions of land be in writing, failing which they are unenforceable.
- [49] She claims the defendant failed to tender the full purchase price of \$449,000 on February 28, 2017 and that she had abandoned the contract when accepting Mr. Khural's offer to sell Unit 41. She contends that the parole evidence rule should prevent the defendants relying on oral communications that would have changed the terms of the contract.
- [50] Last, the plaintiff contends that the current certificate of pending litigation ought to be discharged. I will discuss this issue in detail later in these reasons.
- [51] There is no issue that Mr. Khural was the plaintiff's agent and had authority from her to act on her behalf.

- [52] The plaintiff does not seek specific performance or damages in lieu of specific performance. The plaintiff's claim is confined to her common-law damages triggered by the defendants' breach of the agreement and depends largely on a finding that the defendants were in breach of the contract and that breach was accepted upon the filing of the notice of civil claim in this proceeding. She also seeks an order that the deposit is forfeited.
- [53] However, the plaintiff also seeks dismissal of the defendants' specific performance claim.
- [54] The plaintiff argued that I should draw an adverse inference from the fact that Mr. Sandhu did not provide an affidavit and did not deny some of the factual assertions made by the plaintiff.
- [55] The conflicts in the evidence on essential elements to the claims of both parties that I cannot resolve include the following:
- a) Mr. Khural said he met with the defendant, Mr. Sukhwinder Sandhu, "in or around February 2017" and introduced Mr. Sandhu to a mortgage lender at TD Bank to help the defendants acquire the property. He also obtained a Form B from the strata corporation; this document is essential to the transfer of a strata property.
 - b) On or about February 24, 2017, Mr. Khural met Mr. Sandhu at Unit 17 and Mr. Sandhu expressed to him " he did not want to complete on the sale".
 - c) Mr. Sandhu requested return of his \$20,000 deposit if the plaintiff sold Unit 17 to someone else plus an additional \$50,000 as a result of the increase in value of Unit 17.
 - d) The defendants assert they had an oral agreement with Mr. Khural to purchase Unit 41 and receive a credit from the deposit paid on Unit 17 to be held for the purchase of Unit 41.
 - e) Mr. Khural says he did not own Unit 41 and never made an oral agreement to sell Unit 41 to the plaintiff for \$780,000, nor did he agree that the defendants could use the previously paid deposit for Unit 17 as a deposit for the purchase of Unit 41. Mr. Khural denied ever suggesting he intended to or could sell Unit 41 to the defendants.
 - f) The plaintiff said that in or around February 2017, the defendants wanted to complete the contract but they did not contact the plaintiff's conveyancing lawyer. She said her conveyancing lawyer called the defendant regarding completion of the sale.
 - g) On February 28, 2017 the defendants did not tender the purchase price although the plaintiff was ready, willing and able to complete the contract at that time.
- [56] In this case, both parties contend the other committed anticipatory breaches of the contract. The contradictory evidence of both parties on this point cannot be resolved on the affidavit evidence as presented. In my view, this issue alone requires resolution at a trial with viva voce evidence and fulsome cross-examination.

- [57] In the absence of an anticipatory breach, if neither party attended the Land Title Office on the completion date in a state of readiness, willingness and ability to complete the contract, then the contract remained alive and either party is entitled to reset time of the essence.
- [58] It was the defendant's obligation to prepare the Form A transfer for the plaintiff's signature and to be ready, willing and able to pay the purchase price (subject to other terms and conditions of the contract, including payment of any mortgage balance owed by the plaintiff) in exchange for the Form A transfer.
- [59] There is conflicting evidence between the parties concerning the defendants' actions preceding the completion date and on the completion date. On this point, the plaintiff reported about information she received from her lawyer about completing the contract; this part of her affidavit is inadmissible in this summary trial. In my view the conflict on this point goes to an important issue in this case and cannot be resolved on the current state of the affidavits.
- [60] Ms. Gill's evidence concerning her belief that a separate agreement had been made concerning an offer to sell the defendants Unit 41 might suggest that she had abandoned the contract concerning Unit 17, but I do not accept that fact as evidence that the defendant had abandoned the contract. If the discussion concerning Unit 41 took place, according to the defendant, Mr. Khural initiated the discussion and could not be construed as an abandonment by Ms. Gill of her contractual rights under the contract. The issue raised by this suggestion cannot be resolved based on the evidence contained in the parties' affidavits.
- [61] Further, I do not accept that Mr. Khural reported to Ms. Gill that the plaintiff did not "wish" to complete the contract. If true, it would have provided some support for the defendants' conclusion that the plaintiff had repudiated the agreement before the prescribed completion date. There is uncertainty about the events in late February 2017 and neither party described their actions, if any, on the actual completion date set out in the contract. The plaintiff mentions a lawyer who might have contacted the defendants; she did not say who that lawyer was or when the contact was made. As noted above, the plaintiff's evidence on this point is hearsay and not admissible in a summary trial.
- [62] I am unable to conclude whether either party committed an anticipatory breach of the contract that would have freed the other party from performing the contract in accord with the term requiring completion to take place at the Land Title Office,
- [63] It was open to either party claiming specific performance, or damages in lieu of specific performance, to keep the contract alive until judgment on the question of specific performance was given: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 at para 205. See also *Norfolk v. Aikens*, 1989 CanLII 245 (B.C. C.A.) [Norfolk]; *Toor v. Dhillon*, 2020 BCCA 137 [Toor]; *Shaw Industries Ltd. v. Southin Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 (C.A.) [Shaw]; *Hundley v. Garnier*, 2012 BCCA 199 [Hundley]; and *Salama Enterprises (1988) Inc. v. Grewal* (1992), 90 D.L.R. (4th) 146, 66 B.C.L.R. (2d) 39 (C.A.) [Salama].

[64] Some of the principles emerging from these cases that are applicable to this analysis include:

- a) Time of the essence clauses can only be relied upon by a party ready, willing and able to close on the agreed completion date: Toor at para. 50.
- b) Parties cannot rely on unaccepted repudiations to justify failure to perform contractual obligations. An innocent party is not relieved from obligations to perform under the contract but is not required to strictly comply with the time requirements of the contract: Toor at para. 51.
- c) If one party has made clear to the other their intention not to complete, and the other party wishes to affirm the contract, the innocent party is required to perform: Norfolk at p. 19; Toor at para. 52.
- d) The defendant buyers were responsible for preparing the Form A transfer for signing by the plaintiff: Shaw at p. 12.
- e) The obligation to pay the purchase money and transfer the property is dependent on the willingness and ability of the plaintiff and defendant to make formal tender of the contract performance: Hundley at para. 75.
- f) Where it is unjust or inequitable to permit a party to insist on the time of the essence clause, the court can refuse impose that clause on the parties: Salama.

[65] Thus, it is essential in this case to determine whether either party breached the contract before the completion date or simply failed to follow the closing procedures set out in the contract including attending at the Land Title Office for the purpose of completing the contract. If either party breached the contract before the time for completion, then the obligation on the other party to tender did not exist, although that party must have been ready, willing and able to complete at the time or on a future completion date. The question of the plaintiff's entitlement to damages for breach of contract or the defendant's entitlement to a claim for specific performance or damages under the contract turns on findings of fact I cannot make at this stage.

[66] I am satisfied that it is likely that neither party tendered performance or attended at the Land Title Office to complete the sale. The defendant was neither willing ready or able to complete the contract on February 28.

[67] Neither party discussed what actually transpired on February 28, 2017; it is reasonably clear that the defendants had not sent a Form A transfer to the plaintiff for her signature and there is no evidence the defendants were in possession or control of funds necessary to complete the purchase on that day. It is also clear on the evidence that the plaintiff did not make herself available to the defendants or their solicitor to execute a transfer of the Unit 17.

- [68] If, as alleged by both parties the other repudiated the contract, neither of them accepted the others repudiation and the contract would have remained alive until the plaintiff accepted the defendants' repudiation by commencing this action.
- [69] Because I am not able to decide the question of which party, if either, breached the contract based on the conflicts in the parties' affidavits, I am not able to find the facts necessary to decide the issues of fact or law on all of the evidence presented. It is entirely possible that neither party was ready willing or able to complete on the completion date and the contract remained alive until the plaintiff repudiated with the filing of her Notice of Civil Claim. In my view, it would be unjust to decide those issues at this stage.
- [70] Further, the defendants assert that the agreement to buy Unit 17 also included an unwritten commitment to credit the defendants with a portion of the rental payments toward the purchase price. This position is steadfastly denied by the plaintiff although she concedes the contract refers to the rental agreement and the rental agreement mentions a "rent to own" term which refers indirectly to the contract. The rental agreement was signed by the plaintiff on March 1, 2015 and by the defendants on March 9, 2015 and provides:
- All [items] listed in this addendum will apply to "rent to own" and "yearly lease" tenants
- [71] The contract contained the following:
- " Pages of rental agreement including addendum is part of contract of purchase and sale. "
- [72] Nevertheless neither document referred to crediting portions of the plaintiff's rent payments to the purchase price due under the contract. This question that will involve consideration of s. 59 of the Law and Equity Act requires an assessment of the credibility of witnesses to determine whether there was a collateral unwritten oral agreement to this effect.
- [73] In the defendants' counterclaim, they seek remedies for specific performance; a claim for an accounting of the amount of the purchase price the defendants have paid; a declaration that the plaintiff has been unjustly enriched by the defendants payments to the plaintiff; and a constructive or resulting trust in favour of the defendants concerning the payments made by the defendants to the plaintiff.
- [74] If the defendants succeed on their contention that some rent money was paid money to the plaintiff to be applied toward the purchase price of Unit 17, and those payments unjustly enriched the plaintiff or represent trust funds held by the plaintiff for the benefit of the defendants, then the counterclaim might succeed. I am satisfied that the issues on the counterclaim are dependent on factual findings that cannot be made on this application in view of the conflicting evidence of the parties.
- [75] At any rate, if the payments were made towards the purchase price as asserted by the defendants, they would not appear to have formed part of the deposit paid and would not become forfeited in accordance with the terms of the contract paid under paragraph 2.

- [76] The defendants also contend that there was another collateral agreement entitling them to delay the contract completion date to some time after settlement of a personal injury claim Mr. Sandhu was litigating at the time. Presumably he intended to use the proceeds of that settlement to fund the purchase of Unit 17; there is no evidence concerning details of this claim or whether the claim was ever settled.
- [77] There was insufficient evidence to permit me to make a finding on this question. This paucity of evidence underscores the court's limitations in deciding this case on a summary trial basis
- [78] Secondary issues raised in the plaintiff's NOCC and the defendants' counterclaim are dependent on findings concerning the alleged breaches of the contract. Thus it would not be appropriate to address those issues before trial. This court should not engage in "litigation in slices" in the circumstances of this case: see Gichuru at para. 31.
- [79] In summary, I have taken into account the factors set out in Inspiration Management Ltd. including:
- a) the complexity of the matter;
 - b) the cost of moving the case forward to a conventional trial in relation to the amount involved;
 - c) whether the issues can be resolved justly on the evidence before the court;
 - d) whether credibility is a factor in determining the issues in dispute;
 - e) whether the application would result in litigation in slices; and
 - f) other matters which may arise for consideration.
- [80] Overall, I am satisfied there is considerable complexity in this case involving an interpretation of the contract, assessment of the responsibility of both parties to complete the contract, issues concerning collateral or additional agreements, the defendants claims for equitable remedies, and issues concerning remedies.
- [81] In my view, the cost of this matter proceeding to a conventional trial is not disproportionate considering the issues and the amounts involved. The defendants are seeking specific performance of the agreement and that claim involves significant differences in the outcomes.
- [82] As indicated, credibility is a factor in determining this dispute and I am not able to make those findings on the current affidavits. The issue cannot be resolved justly on the evidence before the court.
- [83] Finally, success for the plaintiff would not eliminate the need to consider issues concerning the deposit and ongoing contributions to the deposit in the face of the claims relating to unjust enrichment and breach of trust.

[84] The plaintiff's summary judgment application is dismissed.

The CPL

[85] The question of a removal of the defendants' certificate of pending litigation can be addressed at this time.

[86] Section 215(1) of the Land Title Act, R.S.B.C. 1996, c. 250, provides for certificates of pending litigation in the following terms:

215 (1) A person who has commenced or is a party to a proceeding, and who is

- (a) claiming an estate or interest in land, or
- (b) given by another enactment a right of action in respect of land,

may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.

[87] The plaintiff contends the defendant has renounced any claim to an interest in Unit 17 and thus has no claim for an interest in land. The proper analysis is informed by *Xiao v. Fan*, 2018 BCCA 143 [Xiao] where the Court of Appeal summarized:

[25] [*Bilin v. Sidhu*, 2017 BCCA 429] was recently discussed in [*Berthin v. Berthin*, 2018 BCCA 57], where Fenlon J.A. confirmed that it stands for the following propositions:

[40] *Bilin* stands primarily for the principle that the court has jurisdiction to cancel a CPL which fails to meet the threshold criterion of a pleading claiming an interest in land as required by s. 215 of the Land Title Act. But it also stands for the principle that where an interest in land is claimed, but the claim is contended to be without merit, the proper approach is to apply under the summary judgment rule to dismiss the claim, in which case the CPL may only be cancelled in conformity with s. 254 of the Land Title Act

[27] Accordingly, the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the Land Title Act is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be considered, and the test to be applied is whether there is a bona fide triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.

- [88] In the circumstances of this case, the plaintiff has not provided any details concerning the registration of the CPL. There is no evidence concerning the filing of this CPL other than the assertion in the notice of application. Although the plaintiff relies on Xiao, she does not mention or rely on Rule 9-6(4) in the legal basis of the application.
- [89] In any event, I am satisfied that the counterclaim meets the threshold test for maintaining a CPL; the defendants' pleadings disclose a triable issue of claim for an interest in Unit 17. There is no basis to conclude that the pleadings fail to disclose the necessary claim for an interest in land to justify maintaining a CPL registered against the title; no evidence is permissible on this part of that application.
- [90] The plaintiff's application can also be considered as part of her application for summary dismissal of a part of the claim under Rule 9-6(4) which permits the parties to rely on evidence, and if there is no triable issue of fact or law, then the CPL can be cancelled. I am satisfied that the defendants' counterclaim for a specific performance order and her entitlement to protect this interest with a CPL cannot be decided on the evidence presented in this summary trial for the reasons set out above. Thus I decline to cancel the CPL.
- [91] The application for cancellation of the defendant's CPL is dismissed.

"Armstrong J."

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