

CANADA / JUDGMENT

Kononova v. Tchoubarov

2022 BCSC 736

COURT

Supreme Court of British Columbia

DECIDED

6 May 2022

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2022 BCSC 736 Kononova v. Tchoubarov

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kononova v. Tchoubarov,

2022 BCSC 736

Date: 20220506

Docket: S2013580

Registry: Vancouver

Between:

Yanina Kononova, Project Pacific Holdings Ltd.,

Relaize Co. and DV-Building Group Co.

Plaintiffs

And

Oleg Anatoliy Tchoubarov, Sea Green Enterprises Ltd.,

Poseidon Fishing Inc., Aurora Fishing Co. Ltd.,

Northern Fjord Equipment Corp. and John Kitchen

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

S. Batkin

A. Moore

Counsel for the Defendants Oleg Anatoliy Tchoubarov, Sea Green Enterprises Ltd., Aurora Fishing Co. Ltd., and Northern Fjord Equipment Corp:

M.D. Carter

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 25, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 6, 2022

- [1] In this action the plaintiffs allege, amongst other things, that in 2018 the defendant, Oleg Tchoubarov along with his companies, the defendants, Sea Green Enterprises Ltd., Aurora Fishing Co. Ltd and Northern Fjord Equipment Corp., with the assistance of the defendant John Kitchen, conspired to and did misappropriate approximately \$700,000 from the plaintiffs (the "Misappropriated Funds").
- [2] The plaintiffs allege that Mr. Tchoubarov spent all or a portion of the Misappropriated Funds on the maintenance or improvement of his residence located in North Vancouver, British Columbia (the "Capilano Road Property") and as a result has been unjustly enriched. On the basis that this unjust enrichment gives rise to an interest in land, a remedial constructive trust, the plaintiffs filed a Certificate of Pending Litigation ("CPL") against the Capilano Road Property when they commenced this action.
- [3] Mr. Tchoubarov disputes that the plaintiffs' claims give rise to an interest in land. He seeks an order dismissing all portions of the plaintiffs' claims with respect to the Capilano Road property. He contends that it is plain and obvious or beyond doubt, that the plaintiffs' claim seeking the remedy of a constructive trust over his property arising from alleged use of the Misappropriated Funds, cannot succeed.

Applicable Law

Rule 9-6(4)

- [4] Mr. Tchoubarov brings his application for summary judgement pursuant to Rule 9-6(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. To succeed in this application, he must demonstrate that there is no genuine issue of material fact requiring trial on the issue of the plaintiffs' claims for an interest in the Capilano Road Property. He must put his best foot forward in terms of the evidence he presents: *Canada v. Lameman*, 2008 SCC 14, at para. 11;

International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited, 2011 BCCA 149, at paras. 14-15.

- [5] To rule in Mr. Tchoubarov's favour in this application this Court must be satisfied that it is plain and obvious or beyond doubt that the plaintiffs' claims will not succeed. This Court must not determine any issue of fact or law and its function is limited to a determination as to whether a bona fide triable issue arises on the materials before the Court in the context of the applicable law. If there is any doubt as to whether there is a triable issue, the application should be dismissed. *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, at para. 8.

Legal Basis of the Plaintiffs' Claim for an Interest in Land

- [6] In the notice of civil claim, the plaintiffs claim that as a result of the alleged misappropriation the defendants have been enriched and the plaintiffs have suffered a corresponding deprivation in the absence of a juristic reason, giving rise to a claim in unjust enrichment. They seek a constructive trust over the Capilano Road Property as a remedy for unjust enrichment.
- [7] A constructive trust is a discretionary remedy available in claims for unjust enrichment. The court may consider this remedy if damages are not an adequate remedy and there is a nexus between the plaintiff's contributions and the property at issue: *Moore v. Sweet*, 2018 SCC 52, at para. 89; *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350.
- [8] The nexus between the plaintiff's contributions and the property at issue must be sufficiently substantial and direct. A minor or indirect contribution will not be sufficient: *Kerr v. Baranow*, 2011 SCC 10, at para. 50.

Position of the Applicant

- [9] Mr. Tchoubarov contends that the criterion required to ground a constructive trust are not satisfied in this case. That is, he contends that he and Sea Green have sufficient assets to satisfy any judgment that may be granted against them and that there is no substantial and direct connection between the Misappropriated Funds and the Capilano Road Property. On this basis, Mr. Tchoubarov submits that the plaintiffs' claims that they have a beneficial interest in the Capilano Road Property raises no genuine issues for trial and should be dismissed.

Issues

- [10] The only issues to be decided in this application include the following:
- a. Whether or not there is a genuine issue of material fact concerning whether Mr. Tchoubarov and Sea Green have sufficient assets to satisfy any judgment against them; and

- b. Whether or not there is a genuine issue of material fact concerning whether Mr. Tchoubarov used the allegedly Misappropriated Funds for the benefit of the Capilano Road Property.
- [11] For the reasons that follow I do not find that Mr. Tchoubarov has demonstrated that it is plain and obvious or beyond doubt that the plaintiffs' claims for a constructive trust over the Capilano Road Property will not succeed.

Analysis

- [12] In the affidavits filed in this application Mr. Tchoubarov has not provided sworn evidence that the Misappropriated Funds were not used for the purpose of improving the Capilano Road Property or to make mortgage payments on this property. In addition, his evidence concerning the timing of improvements made to the Capilano Road Property is inconsistent.
- [13] In his first affidavit dated February 4, 2022, Mr. Tchoubarov swore that he had not made any improvements to the Capilano Road property since 2014 - that is before the events in 2018 giving rise to this claim - other than normal maintenance. In his third affidavit dated April 20, 2022, Mr. Tchoubarov swore, contrary to the evidence in his first affidavit, that he completed some improvements to the Capilano Road Property in 2015, and in 2020 (which was after he became involved with the plaintiffs) including removing some trees and installing pavers in the front yard and installing a roof above his patio in the back yard.
- [14] The plaintiffs have pleaded that their funds were used to improve or maintain the Capilano Road Property. In this application they have provided evidence which suggests that significant improvements have been made to this property since the alleged misappropriation of the Misappropriated Funds including:
- a. between August 2019 and September 2020, numerous full-grown evergreen trees were removed from the front yard;
 - b. between 2017 and 2022, a number of large grey pavers were installed on a significant portion of the 16,332 sq. ft. lot; and
 - c. between 2017 and 2022, what appears to be a substantial covered outdoor kitchen was installed in the back yard.
- [15] Again, Mr. Tchoubarov did not provide any evidence that he did not use any of the Misappropriated Funds to complete these renovations.
- [16] Mr. Tchoubarov also swore that since 2016 he has obtained a CIBC mortgage on the property and has only made regular monthly payments. His affidavit does not state what the source of funds for these payments, including indicating whether he paid his regular monthly mortgage payments using any of the Misappropriated Funds.

- [17] In summary, the affidavit evidence does not establish that Mr. Tchoubarov did not use the Misappropriated Funds to either make mortgage payments on, or to pay for significant improvements to, the Capilano Road Property.
- [18] With respect to evidence concerning the ability to satisfy any judgment that may be granted against the defendants, Mr. Tchoubarov has sworn that he and his company Sea Green have sufficient assets to satisfy any judgment.
- [19] There is evidence which suggests that Mr. Tchoubarov and Sea Green may not have the ability to satisfy a judgment including, for example, the following:
- a. On March 23, 2021, Rona Inc. initiated a small claims action against Mr. Tchoubarov and Sea Green seeking \$6,295.98 for purchases of construction materials; and
 - b. Mr. Tchoubarov continues to carry a second mortgage on the Capilano Road Property, paying \$8.99 percent interest, claiming only to make substantial interest only payments. There is no evidence that he has sought lending from a commercial lender at lower rates despite apparently having a significant amount of equity in the property.
- [20] The plaintiffs contend that an additional basis to refuse Mr. Tchoubarov's application is his failure to comply with his discovery obligations in this case, including failing to attend at discovery and to produce documents.
- [21] Mr. Tchoubarov has failed to attend at a scheduled examination for discovery on two occasions - including most recently, a discovery scheduled for April 5 and 6, 2022. Where the discovery process has not yet completed and there is a reasonable prospect further discovery will reveal the existence of a triable issue summary judgment should not be granted: *Xiao v. Fan*, 2020 BCSC 69, at paras. 48-49.
- [22] In this case, no discovery of Mr. Tchoubarov has been completed. I consider that there is a reasonable prospect that discovery will further reveal the existence of triable issues concerning the plaintiffs' claim for a constructive trust.
- [23] In addition, Mr. Tchoubarov has not complied with two orders of this Court requiring him to produce documents that may show how the Misappropriated Funds were used. Courts have recognized that it is inequitable to allow partial summary judgment on the basis of an alleged lack of evidence from the Plaintiffs concerning use of the Misappropriated Funds: *Topp v. Costco Wholesale Canada Ltd.*, 2012 ONSC 3354, at para 24.
- [24] In my view, Mr. Tchoubarov has not put forward sufficient evidence on which this Court can conclude that there is no genuine issue of material facts concerning the plaintiffs' claim for a constructive trust. Mr. Tchoubarov has simply not put his best foot forward.

Conclusion

[25] Mr. Tchoubarov has not met his burden of showing that there are no triable issues as to the use of the Misappropriated Funds or with respect to the defendants' ability to satisfy a judgment.

[26] As a result, I dismiss this application.

"Mayer J."

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