
CANADA / JUDGMENT

Lang v. Lang

2021 BCSC 2401

COURT

Supreme Court of British Columbia

DECIDED

9 December 2021

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2021 BCSC 2401 Lang v. Lang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lang v. Lang,

2021 BCSC 2401

Date: 20211209

Docket: S193813

Registry: Victoria

Between:

Martin Richard Lang

Plaintiff

And

Renata Sofia Lang, Renata Sofia Lang as attorney for Richard

Josef Lang and Renata Sofia Lang as Executor for the Estate

of Richard Josef Lang

Defendants

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

In Chambers

Counsel for the Plaintiff (appearing via teleconference):

B.A. Marlatt

Counsel for the Defendants (appearing via teleconference):

A.J. Broadley

Place and Date of Hearing:

Chilliwack, B.C.

September 2, 2021

Place and Date of Judgment:

Victoria, B.C.

December 9, 2021

- [1] This action involves several claims by the plaintiff, Martin Lang, against his sister, Renata Lang, in her personal capacity, her capacity under a power of attorney from their late father, Richard Josef Lang, as well as in her capacity as executor of their father's estate.
- [2] This application is under s. 252 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] to cancel the certificate of pending litigation ("CPL") registered by the plaintiff against property on Normandy Road in Victoria, B.C. (the "Property"), which is registered in the name of Renata Sofia Lang. The Property is the residence of Sofia.
- [3] For the sake of clarity and meaning no offence to the parties, I will refer to them by their first names as both share the same last name.

FACTUAL SUMMARY

- [4] Richard died on September 23, 2017. He was the father of the adult parties and of another daughter, Michele Wake, who is not a party to this litigation.
- [5] In his will dated May 14, 2015 (the "2015 Will"), he named Renata as executor with the residue of his estate to be left to Martin and Michele. Renata was not named as a beneficiary.
- [6] In 2002, Renata deposed to having purchased the Property for approximately \$265,000 as a home for her and her children following the breakup of her marriage. Renata contributed approximately \$30,000 and Richard contributed approximately \$50,000 to the down payment. Renata became the registered owner of a 1/100 interest in the Property and Richard became owner of a 99/100 interest in the Property.
- [7] On December 6, 2006 the Property was transferred by Richard and Renata to themselves in joint tenancy.

- [8] Renata deposed in her Affidavit #1 that Richard had told her "he was not going to have a large estate because he would give his property away before he died including giving [Renata] the Property".
- [9] After purchase of the Property, Renata deposed to having made monthly payments to Richard of \$1,000 towards the purchase price of the Property and Richard also received rent from tenants in the basement suite, which ranged from "about \$1,200 to \$1,600 per month".
- [10] On November 4, 2014, Richard transferred his interest in the Property to Renata.
- [11] After the Property was transferred to Renata, Richard made his Will dated May 14, 2015.
- [12] In September 2015, Richard moved into the basement suite while Renata and her family resided upstairs. Also, in her Affidavit #1, Renata deposed:
6. There was a property tax advantage to be had if the [Property] was in his name while he lived there as well as the potential for government grants for seniors if he needed to upgrade his suite while he lived there. I transferred the [Property] into his name for these reasons.
- [13] Renata continued at para. 7:
7. In January 2017 my father told me that I no longer needed to provide him with any more payments towards the [Property] and that I had long ago paid him back for it. This happened before he showed any signs of illness or had any idea that he might have cancer.
- [14] In early 2017, Richard received a cancer diagnosis. Renata deposed in para. 8 that prior to the diagnosis:
8. My father was outwardly healthy and active, working out two to three times a week at the Commonwealth Games Pool around this time.
- [15] I continue quoting from Renata's Affidavit #1:
9. In March 2017 my father was still doing well but was aware he was sick. He was concerned that the title to the [Property] did not align with his previous estate plan so we made arrangements to see a notary to transfer the [Property] back to me. My father met with the notary alone to sign the transfer papers. Attached hereto as "Exhibit B" is a true copy of the Waiver and Acknowledgment that my father signed when he made this transfer.
- [16] The Waiver and Acknowledgment stated, in part, as follows:
- I have read and understand the nature and effect of the documents.
- I have satisfied myself as to all legal and tax implications regarding the documents and the transaction.
- I confirm no funds are being paid to me on this transaction.

I have satisfied myself as to any estate issues regarding this transaction, and I have completed my Will and Estate planning accordingly.

I confirm all of my children are aware of this transaction, and are in agreement with the same.

I am aware that, upon registration of the transfer documents, I will no longer hold any interest in the property, and RENATA SOPHIA LANG will hold a 100% interest.

- [17] Exhibits "C" and "D" to the same affidavit are unwitnessed documents signed by Richard. Exhibit C is dated August 31, 2017 and instructs Renata to make four gifts totalling \$175,000 to his grandchildren and also gifts vehicles to Renata. Exhibit D is dated March 10, 2017 and gifts \$230,000 to Michele Wake.
- [18] After gifting money to grandchildren and Michele Wake and transferring the Property back to Renata, at the time of his death on September 23, 2017, Richard had a remaining estate of almost \$30,000 which he left to Michele and Martin in equal shares. Renata was granted probate of the Will on December 19, 2018.
- [19] In the spring of 2019, Renata decided to sell the Property and began to prepare to downsize and relocate, since her children had left the nest and Richard had passed away. Renata listed the Property for sale in November 2019.
- [20] Renata deposed that since the CPL was filed against title, she has been paying for the storage of belongings at \$200 per month in anticipation of a sale of the Property. She has continued to incur the carrying costs of owning the Property.
- [21] Renata has also deposed that since early March 2020, Martin has not taken any action she was aware of to move this lawsuit forward.
- [22] On December 18, 2019, Martin filed a caveat against the title of the Property and on the same day, counsel for Martin advised counsel for Renata that the plaintiff "is prepared to remove the caveat upon acceptable undertakings pertaining to the sale proceeds".
- [23] On August 30, 2019, Martin issued a notice of civil claim seeking accountings of Renata's use of the power of attorney; and as executor of Richard's estate, seeking payments by Renata to the estate for specific amounts; and challenging both the document of August 31, 2017 and the payment of the value of the vehicles transferred to Renata.
- [24] On January 24, 2021, Martin issued an amended notice of civil claim in which he also sought an order "that the defendant in her personal capacity holds the [Property] in trust for the estate of the deceased" and a CPL registered against title to the Property, which effectively negated any possibility of selling the Property while the CPL was on title.
- [25] Martin deposed in his Affidavit #1 filed April 27, 2021 that he was not aware of the Waiver and Acknowledgment until after this action was commenced, and was now aware Richard had transferred the Property to Renata in March of 2017.

- [26] Martin attached to his affidavit reports from Victoria Hospice dated September 2017 (Exhibit "T"), which record Richard hallucinating and being aggressive while a patient.
- [27] Renata also attached to her affidavit letters from two doctors to the effect that Richard was actively involved in discussions about his diagnosis, prognosis and advanced care planning. His naturopathic physician, Dr. Neil McKinney, stated that "While cancer did overtake him physically, he was mentally competent at all times I had contact with him" from April 26, 2017 until Richard died.

LEGAL BASIS

- [28] The relevant provisions of s. 252 of the LTA applicable to this case state:

Cancellation of certificate of pending litigation

252 (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

- [29] In *Dhillon v. Dasta*, 2019 BCSC 729 [Dhillon], Justice Dillon discussed the intent of s. 252 at para. 14:

A certificate of pending litigation ("CPL") is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the issues in dispute can be resolved (*Berthin v. Berthin*, 2018 BCCA 57 at para. 32). However, the plaintiff must pursue an action diligently. Section 252 of the [LTA] is intended to keep property from being tied up in dormant litigation.

- [30] Also in *Dhillon*, Justice Dillon stated at para. 17:

The court retains a discretion not to cancel the CPL even if the statutory conditions have been met (*Lawn Genuis Manufacturing (Canada) Inc. (Drainmaster)* [2016 BCSC 1915] at paras. 12 and 22). However, once the statutory conditions are met, prejudice to the landowner is presumed and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest that cancellation of the CPL would be unjust (*Motz* at para. 12; *Lawn Genuis Manufacturing (Canada) Inc. (Drainmaster)* at para. 12; *West Harbour Electric Ltd.* at para. 30). Factors relevant to exercise of the court's discretion include: whether an acceptable explanation has been given for the delay, whether no prejudice would in fact be incurred, and whether the plaintiff's claim for an interest in land has a reasonable prospect of succeeding (*Motz* at para. 12).

- [31] In addition to making submissions on the law and facts as they relate to s. 252 of the LTA, Martin has submitted that the transfer of the Property created a resulting trust and Renata exerted undue influence over Richard having transferred the Property to Renata.

ANALYSIS

- [32] I refer to the factors listed in *Dhillon* for consideration of the s. 252 application:

Has an Acceptable Explanation Been Given for the Delay?

[33] It is apparent that no steps were taken in this case for one year prior to this application being made by Renata. In Dhillon, prejudice to the property owner is presumed. In his affidavit, Martin has not given a reasonable explanation for the delay other than to refer to a proposal made by him to cancel or release the CPL upon receiving "acceptable undertakings pertaining to the sale proceeds" upon which there was no agreement. The intent of that proposal had to have been a commitment from Renata to agree to hold the proceeds of sale in trust pending an agreement or order relating to distribution of the sale proceeds. In that case, Renata would not have access to the sale proceeds and would be continuing to be prejudiced in that she would not be able to purchase another home. The prejudice is not outweighed by other factors and there is no evidence that cancellation of the CPL would be unjust as the claim made by Martin can continue.

[34] Martin further submits that prior to this application being filed, he was never asked to release the CPL. This is no explanation for delay.

[35] I conclude Martin has not provided a satisfactory explanation for the delay.

Will there be Prejudice to Renata if the CPL is not Cancelled?

[36] Were the CPL not cancelled, Renata would continue to face payments for the items she removed from the Property pending a sale and would have ongoing financial obligations in maintaining the Property with, as per her affidavit, a poor chance of being able to rent the basement suite for a short term.

Does Martin have a Reasonable Chance of Success in Establishing an Interest in the Land?

[37] Previously in these reasons, I referenced a quote from para. 14 of the Dhillon decision, i.e.:

A certificate of pending litigation ("CPL") is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the issues in dispute can be resolved (Berthin v. Berthin, 2018 BCCA 57 at para. 32). [Emphasis added.]

[38] I also refer to the words of Justice McIntosh in Drein v. Puleos, 2016 BCSC 593 at paras. 8 and 10:

[8] Ms. Drein's position before me was that she will lift the CPL at the approval of sale hearing on condition that \$75,000 of the sale proceeds otherwise payable to the Puleos is held in trust pending resolution of her claim. An essential requirement for a CPL is that it is to protect an interest in land (see s. 215(1)(a) of the Land Title Act, R.S.B.C. 1996, c. 250). Ms. Drein's position causes me to suspect that she is not really asserting an interest in land and is instead using the CPL only as leverage to secure her financial claim against the Puleos. That would not be a lawful purpose for employing a CPL (see Drucker, Inc. v. Hong, 2011 BCSC 905 at para. 19; see, as well, D.K. Investments Ltd. v. S.W.S. Investments Ltd., [1984] B.C.J. No. 3077 (S.C.) at paragraphs 107-111, affirmed (1986), 6 B.C.L.R. (2d) 291 (C.A.)).

- [10] A reader will infer, from what is written above, the Court's concern about a party seeking to use a CPL as a bargaining tool to extract prejudgment payment of a financial claim. If the CPL was allowed to remain on the terms proposed by Ms. Drein, she would be obtaining a pre-trial enforcement of her monetary claim before she has established her case. As tempting a tactic as that might appear, that is not what CPLs are intended to protect. They are designed to preserve land claims pre-trial by preventing the land from passing to innocent third parties pre-trial, thereby undermining the claim. If the claim in essence is not for an interest in land, CPLs are not intended to be one of the weapons in a claimant's war chest.
- [39] In the amended notice of civil claim, Martin seeks an order declaring "that the defendant in her personal capacity holds the [Property] in trust for the estate of the deceased". Further, at para. 11 of the amended notice of civil claim, Martin alleges that Richard "did not have the requisite capacity to transfer the entirety of his interest in the [Property] to the defendant", and that Renata holds the Property in trust for the estate of the deceased.
- [40] Alternatively, Martin alleges in para. 12 that Renata exercised undue influence over Richard in order to obtain the Property and that as a result, Renata holds the Property in trust for the estate.
- [41] Martin has not claimed to be entitled to an interest in the Property, nor does he claim to have a valid interest in land to protect. Rather, he claims an accounting of Renata's dealings under the power of attorney and as executor of the estate; and for payment of various sums paid out to family members and assets, including vehicles, retained by Renata.
- [42] Martin's proposal that he would release the CPL upon receiving appropriate undertakings regarding the sale proceeds is effectively an attempt to secure proceeds of sale before judgment. It would be another matter if Martin were intending to preserve an existing interest in the land and was seeking a CPL to preserve that interest, be it an ownership stake, option, or other charge against the Property. That is not the case and, on that basis, the claim made by Martin cannot be considered a claim that has a reasonable likelihood of success.

Undue Influence

- [43] In support of his claim that Richard was unduly influenced by Renata, Martin's affidavit refers to an incident in June 2017 when Richard was hospitalized due to cancer. Records from Victoria Hospice dated September 2017, shortly before Richard died, indicate that Richard was hallucinating, "had difficulty holding a train of thought" and was not able to make responsible decisions for his care. At that time, Richard was receiving treatment and care for cancer and was close to death.
- [44] The Property was transferred to Renata in 2014. There is no evidence that Richard was incapable of handling his affairs in 2014. To the contrary, Renata has attached to her affidavit correspondence from a physician who was providing care for Richard's cancer in

2017 and stated "there was no evidence of head injury or cognitive decline at any time", and a naturopathic physician who wrote "he was mentally competent at all times I had contact with him". Although all of the opinions included in the affidavits are hearsay, there is no evidence before me which would lead to the conclusion that the plaintiff has a reasonable prospect of success in a trial on the issue of Richard's competency.

Resulting Trust

- [45] Martin claims a resulting trust alleging Richard gratuitously transferred the Property to Renata, relying on *Pecore v. Pecore*, 2007 SCC 17 which found there is a rebuttable presumption of a resulting trust between a parent and an adult child.
- [46] In *Pecore*, Rothstein J. found at para. 22 that a rebuttable presumption of law "is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption", and at para. 23 where "evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive".
- [47] Rothstein J. further stated at paras. 41 and 53 of *Pecore* in reference to a gratuitous transfer of funds and the burden on a transferee to rebut the resulting trust:
- [41] There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.
- [53] Of course, the presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.
- [48] In the present case, evidence which tends to rebut a resulting trust includes:
- Renata originally contributed approximately \$30,000 to the purchase of the Property and has resided in the Property since the purchase, at times with Richard residing in the basement suite.
 - When making his Will in 2015, Richard did not include Renata as a beneficiary, as he had previously transferred the Property to her in November 2014.
 - Richard's estate plan included his desire to make significant gifts to his family prior to his death.
 - The reason title was transferred back to Richard in 2015 was to allow for reduced property taxes for a senior and the availability of government grants for renovations which benefited seniors.
 - Renata provided care for her father for a considerable period of time.

[49] Based upon the above, I find that Renata has rebutted the presumption of resulting trust.

CONCLUSION

[50] Renata is entitled to an order under s. 252 of the LTA cancelling the CPL registered against the Property by Martin.

COSTS

[51] Renata has been successful in obtaining the relief she sought and is entitled to her costs of this application on Appendix B.

"Jenkins J."

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