

CANADA / JUDGMENT

Laventure Estate v. Ovelson

2022 BCCA 136

COURT

British Columbia Court of Appeal

DECIDED

6 April 2022

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2022 BCCA 136 Laventure Estate v. Ovelson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Laventure Estate v. Ovelson,

2022 BCCA 136

Date: 20220406

Docket: CA47727

Between:

Robert Laventure, Executor of the Estate of Victor Phileas Laventure also known as Victor Joseph Laventure, Deceased

Respondent

(Plaintiff)

And

Carol Josephine Ovelson

Appellant

(Defendant)

Before:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated August 6, 2021 (Laventure v. Ovelson, Kelowna Docket S127152).

Oral Reasons for Judgment

Counsel for the Appellant:

G. Douvelos

Counsel for the Respondent:

T.M. Young

S.M. Lefebvre

Place and Date of Hearing:

Vancouver, British Columbia

April 6, 2022

Place and Date of Judgment:

Vancouver, British Columbia

April 6, 2022

Summary:

The respondent obtained a personal judgment against the appellant in a foreclosure proceeding. Several years later, the appellant applied to set aside the judgment and declare the mortgage invalid. Her application was dismissed as an abuse of process. She did not bring any appeals of the orders made in the foreclosure proceeding. When the respondent was unable to collect on the judgment after several years, the respondent brought a new claim seeking to enforce the personal judgment. The purpose of the action was to avoid the expiry of the 10-year limitation period to enforce a judgment. The respondent brought a summary trial application in respect of the new claim. In defence, the appellant again challenged the validity of the mortgage, but the judge held that these defences could not be raised. The appellant appeals on the basis that equity required the judge to have considered her defences to the enforceability of the mortgage, in the fresh action to renew the personal judgment. Held: Appeal dismissed. It would be an abuse of process to allow the appellant to re-litigate the validity of the mortgage in the claim to enforce the personal judgment against her. Special costs are not ordered.

[1] GRIFFIN J.A.: The appellant, Carol Ovelson, appeals from an order granting personal judgment against her. The order was made in a claim seeking to enforce a personal judgment that had been obtained against the Ms. Ovelson in an earlier mortgage foreclosure proceeding. The earlier judgment in the foreclosure proceeding had only been partially paid after sale of the subject property to arm's length buyers.

- [2] The new claim was brought in part to avoid the expiry of any limitation period for the enforcement of the judgment. These kinds of proceedings are commonly referred to as "actions to renew a personal judgment."
- [3] The issues raised on this appeal start with this question: can a judgment debtor raise new defences against a claim seeking to enforce a personal judgment where the defences were either not raised at the time the judgment was initially granted or were raised and dismissed? In my view, in the circumstances of this case the answer is clearly "no." For the reasons that follow, I would therefore dismiss the appeal.

Background

- [4] A brief history of the proceedings is as follows.

The Sale of the Property

- [5] On October 1, 2007, Ms. Ovelson, entered into a contract to purchase a property near Armstrong, British Columbia (the "Property") from Victor Laventure for nearly \$1.4 million. Ms. Ovelson paid a \$110,000 deposit and the balance of the purchase price was financed by a "vendor take-back mortgage."
- [6] Mr. Laventure died eight days after entering the contract with Ms. Ovelson. The respondent, Robert Laventure, is the executor of Mr. Laventure's estate.
- [7] Despite Mr. Laventure's death, the executor carried out the sale of the Property to Ms. Ovelson, and the transaction completed on November 1, 2007. The transaction and Land Title Office registration were carried out in Mr. Laventure's name. Ms. Ovelson was fully informed of the situation, was represented by counsel, and participated in the transaction without objection.
- [8] Probate was granted for Mr. Laventure's estate in April 2008. The filed Statement of Assets, Liabilities and Distribution listed the Property as an asset of the estate, which Ms. Ovelson later suggested was improper.

The Foreclosure Proceeding

- [9] Ms. Ovelson defaulted on the mortgage on November 1, 2009. The executor initiated a foreclosure proceeding on October 15, 2010. Ms. Ovelson's response to the petition raised no substantive defence, other than asserting that the interest claimed by the petitioner contravened the Interest Act, R.S.C. 1985, c. I-15.
- [10] On August 23, 2011, Master Young, as she then was, granted an order nisi in the original foreclosure proceeding. This order included an order of personal judgment against the Ms. Ovelson in the amount of \$1,286,686 plus interest.

- [11] Ms. Ovelson did not redeem the mortgage. The Court then made an order in the foreclosure proceeding on February 28, 2012, approving sale of the Property to third parties for \$800,000.
- [12] Ms. Ovelson did not appeal any of the orders made in the foreclosure proceeding.
- [13] Despite not appealing the order nisi, Ms. Ovelson brought an application in the foreclosure proceeding in 2020 to have the order nisi and subsequent orders and transactions declared a nullity and set aside.
- [14] The application was dismissed on October 15, 2020, with reasons of Justice Marchand, as he then was, indexed as 2020 BCSC 1527. It is worth noting the various arguments advanced by Ms. Ovelson that were dismissed by Marchand J. She argued that it was impossible for a deceased person, Mr. Laventure, to transfer title of the property to her and it was fraudulent for the executor to complete the sale without first transferring the property to Mr. Laventure's estate and obtaining probate, so the transfer was a nullity, rendering all subsequent transactions and orders a nullity. Ms. Ovelson relied on various provisions of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA], the doctrine of *ex turpi causa*, and the inherent jurisdiction of the court.
- [15] Justice Marchand had some sympathy for Ms. Ovelson's argument that the executor failed to follow the proper process. He acknowledged that the executor may have made mistakes, but he rejected the argument that the executor committed fraud or acted with an intent to deceive. In this regard, Marchand J. also noted that Ms. Ovelson was fully aware of Mr. Laventure's death, she had legal counsel, and she signed the transfer of title, witnessed by her lawyer (at para. 27).
- [16] In addition, Marchand J. found that even if the executor intended to defraud or deceive, Marchand J. had no jurisdiction to now void the sale of the property to a third party or void the subsequent court orders and transactions. He found that the order nisi was a final order that is now immune to attack by Ms. Ovelson's application, citing *Ba-Oose Inc. v. HSBC Bank Canada*, 2011 BCCA 511.
- [17] In *Ba-Oose*, this Court noted that the granting of an order nisi affirms the legality and enforceability of the mortgage and the mortgage cannot be attacked in a subsequent proceeding (at para. 22). Justice Marchand, at para. 34 of his reasons, held that the logic of *Ba-Oose* applied to Ms. Ovelson's subsequent application within the foreclosure proceeding.
- [18] In addition, Marchand J. rejected the applicability of ss. 387 and 388 of the LTA, which provide that sales of land procured by fraud or material false representations are void. He noted that these provisions do not apply because the purchasers of the Property were good faith purchasers for value, who purchased the Property through a court-approved process, and who had no notice of the fraud newly alleged by Ms. Ovelson (at paras. 35-38).

- [19] Justice Marchand considered that any mistakes by the executor were innocent, and thus *ex turpi causa* did not apply (paras. 39-40).
- [20] Further, Marchand J. rejected Ms. Ovelson's arguments based on equity, the LEA, and the court's inherent jurisdiction. He held:
- [41] Ms. Ovelson has cited no authority regarding the scope of s. 5 of the LEA or the court's inherent jurisdiction to do justice between the parties. She has also not cited any authority to demonstrate that the court ought to assist her in the circumstances of her case. That is not surprising. The equities simply do not support the orders that she seeks.
- [42] Ms. Ovelson entered a binding vendor-financed contract to purchase the property on October 1, 2007. She was represented by counsel.
- [43] Ms. Ovelson was aware that Mr. Laventure died prior to the property being transferred into her name. She had ample time to discuss this with her counsel prior to closing the transaction.
- [44] Ms. Ovelson took possession of the property on November 2, 2007 but defaulted on the mortgage when it came due two years later. She enjoyed use of the property for several years, including after defaulting on the mortgage.
- [45] Ms. Ovelson was given notice of the foreclosure proceedings. In fact, she filed a response and participated throughout. For the most part, she was represented by counsel.
- [46] Despite having:
1. full knowledge that the transaction and LTO registration were completed in the name of Mr. Laventure;
 2. the probate documents;
 3. the Form 17 transfer of the mortgage to the petitioner; and
 4. legal advice,
- Ms. Ovelson did not raise allegations of fraud or other impropriety at any time leading up to the court-approved sale.
- [47] The only substantive issue raised by Ms. Ovelson in opposition to the order nisi was that the "[i]nterest claimed by the Petitioner under the mortgage contravenes [s. 8(1)] of the Canada Interest Act, R.S.C. 1985, c. I.15."
- [48] The only issues raised by Ms. Ovelson in opposition to the sale to the Horsfields were that the proposed sale price was below market value and, if the court approved the proposed sale, she needed more time to move.
- [49] Ms. Ovelson did not appeal either the order nisi of foreclosure or the order approving the sale of the property.

- [50] The property has now been sold to good faith purchasers for value who have been in possession of the property for more than eight years. She has not given them notice of her application and comes to court with absolutely no plan to deal with their vested interests.
- [21] Justice Marchand reviewed Ms. Ovelson's arguments based on "the equities" and concluded:
- [57] At the end of the day, I simply fail to see how it is unfair to Ms. Ovelson to hold her to a deal she wanted and completed, especially after she received the benefit of the deal (ownership of the property) but then failed to live up to her obligations under the deal (payment of the balance of the mortgage).
- [58] I also fail to see how voiding the transactions and orders would be fair to Mr. Laventure's estate and beneficiaries. Contrary to Ms. Ovelson's bald assertions that the petitioner wrongfully converted the property for his own benefit, the petitioner's unequivocal evidence is that all proceeds of the court-approved sale have been appropriately distributed to Mr. Laventure's beneficiary grandchildren through the terms of a trust. The estate is clearly entitled to the benefit of the deal Mr. Laventure struck with Ms. Ovelson.
- [59] Finally, I fail to see how voiding the transactions and orders would be fair to the Horsfields. They are innocent third parties who purchased the property transparently through a court-approved sale process without notice of any of the concerns Ms. Ovelson has raised in her application.
- [22] Thus, Marchand J. rejected each of Ms. Ovelson's arguments made in the foreclosure proceeding and dismissed her application.
- [23] In addition, Marchand J. awarded special costs against Ms. Ovelson, finding that she had pursued a meritless and frivolous claim and had been reckless with the truth (at paras. 64, 69, 70). Her application was described as a "badly misguided exercise in futility" (at para. 76).
- [24] Ms. Ovelson did not appeal the order made by Marchand J. dismissing her application.

New Action to Renew the Personal Judgment

- [25] The executor took steps to execute on the personal judgment over the years, but Ms. Ovelson did not pay the balance owing.
- [26] The executor filed a notice of civil claim on March 17, 2020, seeking to renew the personal judgment against Ms. Ovelson so as to avoid any limitation bar (the "renewal action"). This is because the former Limitation Act, R.S.B.C. 1996, c. 266, s. 3(3)(f) established a 10-year limitation period to bring such an action. (I note that the former Limitation Act has since been repealed, and the current section is s. 7(a) of the new Limitation Act, S.B.C. 2012, c. 13).
- [27] The claim to renew the personal judgment was filed in the Kelowna Registry of the Supreme Court of British Columbia.

- [28] Ms. Ovelson's amended response to civil claim in the renewal action raised many of the same defences to enforcement of the judgment against her, challenging the validity of the mortgage, as she raised in her application that was dismissed by Marchand J. in the foreclosure proceeding. She also pleaded a new defence based on s. 70 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [ITA]. Section 70(5)(a) of the ITA deems that a taxpayer has disposed of capital property immediately before the taxpayer's death. As with her other defences, this defence is aimed at attacking the validity of the mortgage that gave rise to the personal judgment against her in the foreclosure proceeding.
- [29] The executor then brought a summary trial application pursuant to R. 9-7 of the Supreme Court Civil Rules seeking judgment for the net balance owing on the personal judgment against Ms. Ovelson, plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [30] The summary trial application was heard by Justice Betton on August 3, 2021, and judgment was granted in favour of the executor on August 6, 2021.
- [31] In granting judgment, Betton J. relied on *Gooch v. E.M.F. Holdings Ltd.*, 2013 BCCA 148. That case addressed whether limitation periods applied to steps taken against property in a foreclosure proceeding after the order nisi was granted. The Court held that limitation defences did not arise in respect of the property claims once the foreclosure proceeding was brought, distinguishing the situation from a cause of action based on judgment on a personal covenant. With respect to the latter, the Court in *Gooch* held:
- [20] It is undisputed that a judgment on such a personal covenant is final, and gives rise to a new cause of action based on the judgment, as opposed to the covenant. The mortgagee must pursue this new claim in a new action, which is subject to a ten-year limitation period: *Young v. Verigin*, 2007 BCCA 551, 72 B.C.L.R. (4th) 332.
- [32] In *Young v. Verigin*, 2007 BCCA 551, this Court affirmed the longstanding proposition that a party who has obtained a domestic, or local, personal judgment (as distinguished from a foreign judgment), may bring a new action to enforce the judgment, effectively reviving it and starting the running of the limitation period afresh, so long as the new action is brought within the 10-year limitation period. In some circumstances, there may be a defence raised that the new action is an abuse of process, but the onus lies on the defence to prove this. There is no onus on the plaintiff to show that the plaintiff took steps to collect on the judgment in the ensuing years.
- [33] As noted by Justice Pearlman in *University of British Columbia v. Kapelus*, 2012 BCSC 486, in the context of defending an action to enforce a personal judgment:
- [54] In order to support a finding of abuse of process, there must exist "some reasonably obvious aspects of vexation or oppression, or unfairness or dishonesty, in sufficient depth to awaken the conscience": *Federal Business Development Bank v. Holm*, [1995] B.C.J. No. 2416 at para. 8 (S.C.).

[34] Justice Betton found that the personal judgment granted in the foreclosure proceeding was final and that Ms. Ovelson had not shown any grounds for concluding that the new proceeding was an abuse of process. As such, Betton J. granted the judgment sought (at paras. 15-17).

Issues

[35] On appeal, Ms. Ovelson advances two arguments:

- a) that because the action to renew the personal judgment is a new claim, Ms. Ovelson is at liberty to raise any defence that she could have raised in the foreclosure proceeding to challenge the validity of the mortgage, including all of the defences that were dismissed by Marchand J., and that Betton J. erred in not permitting this; and
- b) that she should have succeeded on the additional, newly argued defence that the mortgage was invalid by operation of s. 70 of the ITA.

Analysis

[36] In my view, Ms. Ovelson's arguments must fail.

[37] The time and place to challenge the validity of the mortgage was at the application in the foreclosure proceeding for an order nisi. Ms. Ovelson did not raise her many arguments attacking the validity of the mortgage then, even though the same arguments were available to her. She also did not appeal the order nisi.

[38] Further, when Ms. Ovelson did subsequently attack the validity of the mortgage, after the order nisi and within the foreclosure proceeding, based on equitable principles, Justice Marchand considered her various challenges and dismissed them.

[39] On appeal, Ms. Ovelson relies on "equity" to suggest it is unfair that she should not be permitted to challenge the validity of the mortgage in defence of the new claim.

[40] In my view, there is nothing about filing the new claim to enforce the personal judgment that gives rise to an equitable right to re-litigate defences that have been raised before, or could have been raised before.

[41] I agree with the analysis of Marchand J. that there is nothing unfair about upholding the mortgage in circumstances where Ms. Ovelson knew about Mr. Laventure's death before she completed the transaction to purchase the Property, she had the benefit of owning the Property until she defaulted on the mortgage, and she had the opportunity to raise all of her defences in the foreclosure proceeding. Ms. Ovelson points to no facts or authority that persuade me there is anything unfair about denying her the right to re-litigate the validity of the mortgage. Principles of equity underlie the doctrine of abuse of process, and, in this case, support the conclusion that it would be an abuse of process to allow Ms. Ovelson to challenge the validity of the mortgage in the claim to enforce the personal judgment against her.

[42] I would therefore dismiss the appeal.

[43] DEWITT-VAN OOSTEN J.A.: I agree.

[44] VOITH J.A.: I agree.

[45] GRIFFIN J.A.: The appeal is dismissed. Do the parties wish to address costs?

[Submissions on costs]

[46] GRIFFIN J.A.: The executor seeks special costs of the appeal, due to the inherent lack of merit in the appeal. He argues that the appeal is an abuse of process.

[47] There is some strength to the executor's position. Ms. Ovelson's position in this appeal was by and large a repeat of the position she took before Marchand J., which was found to constitute an abuse of process. However, I note that Betton J. did not find the defences advanced to this new claim to warrant special costs, nor were they sought. There was nothing reprehensible about the conduct of Ms. Ovelson in advancing this appeal. I would not order special costs.

[48] DEWITT-VAN OOSTEN J.A.: I agree.

[49] VOITH J.A.: I agree.

"The Honourable Justice Griffin"

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