

CANADA / JUDGMENT

Liao v. Vandepol

2014 BCCA 57

COURT

British Columbia Court of Appeal

DECIDED

31 January 2014

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2014 BCCA 57 Liao v. Vandepol

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Liao v. Vandepol,

2014 BCCA 57

Date: 20140131

Docket: CA041041

Between:

Morris Liao, Li Chu Liao, Branko Pajic, and Durda Pajic

Respondents

(Petitioners)

And

Gerrit Vandepol

Appellant

(Respondent)

And

0935312 B.C. Ltd., Vandepol Canada Inc., Carola Vandepol,

Damrak Investments Ltd., and Occupants

Respondents

Before:

The Honourable Madam Justice Garson

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Willcock

Application to vary: An order of the Court of Appeal of British Columbia,
dated September 6, 2013 (Liao v. Vandepol, Vancouver Registry No. CA041041)

Oral Reasons for Judgment

No one appearing on behalf of the Appellant:

Counsel for the Respondent:

S.R. Andersen

Place and Date of Hearing:

Vancouver, British Columbia

January 31, 2014

Place and Date of Judgment:

Vancouver, British Columbia

January 31, 2014

Summary:

The appellant, Mr. Vandepol, applies to vary an order for security for costs. In ordering costs, the chambers judge concluded that the appeal was almost entirely devoid of merit. The appellant did not comply with that order but, instead, applied for an extension of time to file his Notice of Application to Vary an Order of a Justice. His application was granted with an order that the application be heard on a certain date. The appellant adjourned that hearing without the respondent's consent. The appellant did not appear at the hearing before this Court but filed an affidavit saying he could not attend. The basis of Mr. Vandepol's application to vary the order, was that he lacked the funds to comply and the judge erred in his assessment of the strength of the appeal.

Held: Application dismissed. The appellant's affidavit should be treated as an application to adjourn. The application is declined as it is not in the interests of justice to adjourn the matter further. There is no basis to conclude that the chambers judge erred in his appraisal of the appeal's merit. In the circumstances of this case, it is appropriate to grant the appellant an extension of time to post the ordered security; however, should he fail to comply with the extension his appeal shall stand dismissed.

- [1] GARSON J.A.: Mr. Vandepol set this application to vary an order made by a justice of this Court for hearing today pursuant to s. 96 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. On January 29, 2014, the Court of Appeal Registry received an affidavit sworn by Mr. Vandepol deposing to the fact that he would be unable to attend today's hearing "as [he] was on a flight to Europe today at 6 p.m. to deal with a family matter." He gave no further explanation for his inability to attend court. He asked that his application be adjourned to a date after March 3, 2014, the date of his return. He also stated in this affidavit that if the Court was unwilling to adjourn the hearing "please accept this material as what I would have said to the court had I been here in person."
- [2] Mr. Andersen, counsel for the respondents on the appeal and on this application, advised the Court that he was unaware of Mr. Vandepol's request for an adjournment, (if that is what it is), prior to being so advised by the Court at today's hearing. He submitted that the hearing should proceed, despite Mr. Vandepol's absence. He noted that he was in the Supreme Court with Mr. Vandepol on January 29, 2014, in connection with the underlying foreclosure proceedings but at that time Mr. Vandepol made no reference then to his inability to attend today's hearing.
- [3] The Order that Mr. Vandepol seeks to vary is an order for security for costs made by Mr. Justice Groberman (in chambers) on September 6, 2013. The terms of the order are as follows:
1. on or before October 7, 2013, Gerrit Vandepol deposit with the Registrar of the Court of Appeal security for costs of this appeal in the amount of \$7,500.00;
 2. the appeal be and is hereby stayed until the security so ordered is deposited;
 3. if the security is not deposited as ordered, the Petitioners/Respondents Morris Liao, Li Chu Liao, Branko Pajic and Durda Pajic are at liberty to apply for an order that the appeal be dismissed as abandoned.
- [4] Mr. Vandepol did not comply with this order. Instead, he applied on October 21, 2013, for an extension of time to file and serve his Notice of Application to Vary an Order of a Justice. His application for an extension of time to file this application to vary Mr. Justice Groberman's was heard by Madam Justice MacKenzie. She made the following order:
1. The Appellant file and serve his Notice of Application to Vary an Order of a Justice (the "Application") on or before 4:00 p.m. on October 28, 2013.
 2. In regard to the Application, the Appellant file and serve his motion book on or before 4:00 p.m. on November 12, 2013. If the Registry refuses to accept the motion book for filing, the Appellant will have until 4:00 p.m. on November 18, 2013 to remedy any such defects.
 3. The appeal will be struck as dismissed without a further hearing if the Appellant fails to comply with either of the deadlines set out in paragraphs 1 or 2 of this Order.

4. The Application will be scheduled for 1 hour and will be heard at 10:00 a.m. on January 15, 2014 or such other date as counsel may agree to in writing.
5. If the Appellant has counsel, then his counsel will attend the hearing of the Application.
6. The Application of the Respondents/Petitioners filed October 11, 2013 is adjourned generally.
7. Approval as to the form of this Order by Gerrit Vandepol is dispensed with.
- [5] Despite Madam Justice MacKenzie's order that the application be heard on January 15, 2014, we are told by Mr. Andersen that Mr. Vandepol adjourned the hearing, without Mr. Andersen's consent, to today's date.
- [6] In these circumstances we determined to treat Mr. Vandepol's affidavit as an application for adjournment. We then concluded that it was in the interests of justice to decline that adjournment and we proceeded today to hear the application to vary this security for costs order made by Mr. Justice Groberman.

Nature of the Application

- [7] The order made by Mr. Justice Groberman, in chambers, was an order for security for costs. The underlying appeals are in respect to a summary judgment on a promissory note (appealed without leave) and an associated order within a foreclosure proceeding (appealed with leave) on the appellant's personal covenant on a mortgage.
- [8] The appellant says he is without funds and the order that is the subject of this application deprives him of his right to bring a meritorious appeal. Mr. Justice Groberman decided that the appeal was "almost completely devoid of merit". He ordered that Mr. Vandepol post \$7,500.00 as security, as already noted. He stayed the appeal pending the payment of that security. Also, as already noted, Mr. Vandepol has not complied with the order.
- [9] The order for security for costs relates to two separate orders but they were made in one proceeding: Supreme Court Action number. H13048. I turn to the underlying facts and chambers proceedings.

Background Facts

- [10] The lands that are the subject to this foreclosure and related proceedings were purchased on February 29, 2012, for \$1,675,000. The purchaser was a numbered company referred to in these proceedings as 935. 935 was formed by Vandepol and the petitioners for the purpose of acquiring the lands.
- [11] The purchase was financed by a first mortgage in favour of Pacific Coast Mortgage Investment Corporation in the amount of \$1.1 million with monthly payments (interest only) of \$8,025.00. The respondents, Mr. Liao and Mr. Pajic, were covenantors on that first mortgage.

- [12] The respondents (petitioners below) provided the balance of the purchase price by way of a second mortgage on the principal amount of \$300,000.00 together with a promissory note in the amount of a \$400,000.00, payment of which was guaranteed by Mr. Vandepol.
- [13] Mr. Vandepol contributed \$5,000.00 of his own funds to this purchase.
- [14] The agreement between the parties was that Mr. Vandepol would be entitled to collect on the rents from the land. He would be responsible for the operation of the property. 935, the purchaser, entered into a written lease of the land to Vandepol Canada Inc. The monthly rent, \$12,025.00 payable to 935 was intended to cover 935's mortgage payment obligations owning on the first and second mortgage. Vandepol Canada Inc. rented out the residential property to Vandepol and his daughter. The farm buildings were rented to third parties for storage purposes. There is a dispute on the evidence as to the amount of rent that was generated by the lands. What is not in dispute is that Vandepol did not pay the rent to 935. 935 had no other source of income, and therefore it defaulted on the mortgage payments.
- [15] When 935 ran out of money a further promissory note in the amount of \$50,000.00 was also guaranteed by Mr. Vanderpol in respect of a further advance by the respondents. ("the July promissory note")
- [16] The Petitioners filed their petition on April 16, 2013, seeking in respect to the second mortgage, among other things, an order nisi, an order declaring that the amount due and payable under the mortgage was \$387,000.00 plus per diem interest of \$98.63 interest at 12%., judgment against 935, judgment against Gerit Vanderpol pursuant to his covenant, and an order for judgment against 935 and Vandepol for default under the promissory notes dated May 16, 2012 and July 10, 2012. The petitioners also sought the appointment of a receiver.
- [17] On June 7, 2013, Madam Justice Brown granted all relief sought in the petition. She made four orders which may be summarized as follows:
- a) The Order Nisi - she granted an order nisi and an order that 935 and Vandepol pay the Petitioners the sum of \$427,718.00 on their personal covenants plus costs.
 - b) Conduct of Sale - she made a separate order for immediate sale granting conduct of sale to the Petitioners.
 - c) Judgment on the promissory notes - (the claim on the promissory notes was included in the foreclosure petition) In a third order, pursuant to the promissory notes dated May 16, 2012, and July 10, 2012, she ordered 935 and Vandepol be jointly and severally liable to pay \$620,050.41 plus interest. (Only the orders made against Mr. Vandepol personally are under appeal.)
 - d) Order appointing a receiver - in the fourth order she appointed a receiver to collect the rents.

- [18] In her reasons for judgment, Madam Justice Brown noted that Vanderpol and Vanderpol Canada Inc. opposed the application. They had argued that the applications should be referred to the trial list or alternatively they should have the opportunity to cross-examine Mr. Liao on his affidavit.
- [19] She recounted that Mr. Vanderpol asserted that he and the petitioners reached a new agreement in September 2012, and that no moneys were currently payable under the mortgage and notes. She noted that the issue before her was whether there was a bona fide triable issue, or whether on the evidence there was a dispute as to the facts or law which amounted to a defence to be tried. After reviewing the evidence of the alleged amending or extension agreement the judge concluded that there was no enforceable agreement to vary the terms of the mortgage and promissory notes, and that there was no agreement in writing as was required by s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253. She concluded that there was not a triable issue and refused to refer the petition to the trial list.
- [20] At the chambers hearing before Madam Justice Brown, Mr. Vanderpol had argued about the rate of interest, (he said it amounted to a criminal rate of interest, however, the Supreme Court chambers judge was satisfied that it did not); and also that there were some negotiations towards refinancing the arrangements between the parties. Mr. Vanderpol refers to a memorandum and draft agreements that he says evidence in writing the extension agreement. The respondents acknowledge that negotiations towards an extension took place but they deny that any agreement was concluded. In refusing to refer the matter to the trial list, the chambers judge found as a fact, that no agreement was reached to renegotiate the loans.
- [21] On July 5, 2013, Mr. Vandepol filed a Notice of Application for Leave to Appeal. The relief he sought was an order vacating the Order Nisi of June 7, 2013, and orders setting aside the orders appointing a receiver, granting judgment on the promissory notes, and as to conduct of sale.
- [22] On September 6, 2013, the application for leave to appeal came on before Mr. Justice Groberman.
- [23] First, Mr. Justice Groberman decided that Mr. Vanderpol did not require leave to appeal the summary judgment granted on the promissory notes. He made consequential orders regarding the filing of the appeal record and other matters. This order is not the subject of this application.
- [24] With respect to the foreclosure, Mr. Justice Groberman noted that an order in a foreclosure proceeding does require leave (s. 7 Court of Appeal Act and Rule 2.1(vii)). He noted that because Mr. Vandepol no longer sought any relief to stay or otherwise affect the foreclosure proceeding he considered that the only question remaining on appeal was Mr. Vandepol's liability on the personal covenant. Largely because the associated appeal of the judgment on the promissory notes was proceeding as of right, Mr. Justice Groberman granted leave. He explicitly limited leave to the judgment on the personal covenant. No leave was granted

from the "order nisi of foreclosure except to the extent that that order includes judgment on that personal covenant." (at para 11).

[25] Then he turned to the cross application for security for costs.

[26] Mr. Justice Groberman gave brief reasons on this application:

[14] This is an application for security for costs. The law on security for costs of the appeal is fairly straightforward. In general the onus lies on the appellant to demonstrate why security should not be granted. At least where an individual appellant is involved, the Court will often decline to order security for costs where a meritorious appeal would be stifled by the order of security.

[15] I am satisfied from the background of this case and from the affidavit of Mr. Vandepol that he does not have easy access to assets or income that would allow him to post security for costs. If this were a meritorious appeal, I would therefore not make an order for security for costs.

[16] I have heard a great deal of argument this morning on the merits of the appeal. It is not an appeal that has no prospect whatsoever of success but it is almost in that category. The appeal will be a very, very difficult one to succeed on. On the face of it, the trial judge made a discretionary order to decide a matter summarily rather than referring to the trial list. The reasons that she gave, particularly the absence of an agreement in writing as required the Law and Equity Act, R.S.B.C. 1996, c. 253, appear on their face to be very sound reasons.

[17] I have granted leave to appeal the judgment of the personal covenant on the basis that it is closely intertwined with an appeal for which leave is not needed. I have concluded that, while there may be an iota of merit in the appeal, it is an appeal almost completely devoid of merit. I am not convinced that ordering security for costs would prevent an otherwise meritorious appeal from proceeding.

[18] In the circumstances, notwithstanding that Mr. Vandepol has limited ability to raise funds, I am ordering security for costs. Security has been sought in the amount of \$15,000. I am prepared to grant partial security in this case, and I am ordering that security in half that amount: \$7,500.

[19] The normal order of this Court is that proceedings are stayed until the security is deposited. That security shall be deposited by the close of business on October 7, 2013. The proceedings are stayed until such time as the security is deposited.

[20] I know that the respondent has asked for a guillotine order, i.e. an order dismissing the action in the event that security is not furnished. That is not the usual order of this Court. I am making an order only that security be deposited. In the event that security is not deposited by that date, then Mr. Andersen is at liberty to apply in chambers to have the appeal dismissed for non-compliance.

- [27] The order for security for costs applies to both the appeal (as of right) on the promissory notes, as well as the appeal on which leave was granted on the order nisi on the personal covenant.
- [28] The appellant says that he should not be required to pay security for costs.
- [29] He argues that he should not be precluded from pursuing a meritorious appeal for the reason that he is without financial ability to post security. He says that the partnership dispute (that is the dispute with the respondents) resulted in his inability to generate income from the business on the property. He argues "It is just not fair for the petitioner/applicants to take away the appellants ability to generate income and demand security for costs with respect to an appeal that is important not only to the applicant, but to the practice of law in British Columbia". This statement is made despite the evidence that the income was income of 935, as I understand it, intended to cover its mortgage commitments.
- [30] Mr. Vandepol also argues in his affidavit in support of his adjourn application and in his chambers brief that the Supreme Court judge erred in granting summary judgment on the promissory notes because he had a meritorious defence to that claim. He says that his counsel was unaware until the hearing before Madam Justice Brown that the claim on his guarantee on the notes was included in the foreclosure proceeding. He contends, as already noted, that he had a good defence to the claims referring again to the agreements in writing that evidence the extension. These arguments made before Madam Justice Brown were also repeated again before Mr. Justice Groberman, but without success.
- [31] Mr. Justice Groberman concluded that the appeal was almost entirely devoid of merit. This Court will only discharge or vary an order of a single justice, pursuant to s. 9(6) of the Court of Appeal Act if the justice was wrong in law, he misconceived the facts, or certain relevant information was not brought to his attention.
- [32] It is not alleged that Mr. Justice Groberman erred in law. Rather as I understand Mr. Vanderpol's argument, he says that the judge erred in his appraisal of the strength of the appeal. I see no basis on which to find that Mr. Justice Groberman erred in principle or misapprehended the facts relevant to the strength of the appeal.
- [33] I would dismiss the application to vary Mr. Justice Groberman's order requiring Mr. Vanderpol to post \$7,500.00 as security for costs.
- [34] The time has long since passed for Mr. Vanderpol to post the security. Mr. Andersen in commendably fair submissions indicated that one possible order this court might make is to grant Mr. Vanderpol a short extension to post the security.
- [35] I am of the view that it is appropriate to grant Mr. Vanderpol a further indulgence by extending the time to post security to February 14, 2014. In doing so, however, the appeal itself will continue to be stayed. This Court generally frowns upon so called "guillotine orders" However, in the unusual circumstances of this case, it is my view that it is unfair and unnecessary to require the respondents to re-attend in chambers, and apply once again to

strike this appeal, in the event that Mr. Vanderpol fails to comply with the order I would make today. Accordingly, I would order that this appeal should stand dismissed in the absence of compliance with Mr. Justice Groberman's order by February 14, 2014.

[36] I would order that it is not necessary to obtain Mr. Vandepol's approval of the form of this order and I would ask Mr. Andersen to forthwith draft and enter this order and notify Mr. Vandepol of the terms of this order.

[37] A. MACKENZIE J.A.: I agree.

[38] WILLCOCK J.A.: I agree.

[39] GARSON J.A.: It is ordered that there be an extension of time for Mr. Vandepol to post security to February 14, 2014.

[40] This appeal will stand dismissed if he fails to post the security ordered by Mr. Justice Groberman on or before the close of business on February 14, 2014.

[41] It is not necessary to obtain his approval on this order, and I also require Mr. Andersen to forthwith draft and enter the order and to immediately notify Mr. Vandepol of the terms of the order.

[42] I will also order that the order may be served by email. Mr. Andersen has indicated that he has Mr. Vandepol's email address.

"The Honourable Madam Justice Garson"

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