

CANADA / JUDGMENT

Lipskaya v. Guo

2020 BCSC 2090

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2090 Lipskaya v. Guo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lipskaya v. Guo,

2020 BCSC 2090

Date: 20201231

Docket: E111512

Registry: Vancouver

Claimant 1: Viktoriya Lipskaya aka Victoriya Alexandovna Lipskaya

Claimant 2: Yu Guo

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Claimant 1, appearing on her own behalf

via teleconference:

V. Lipskaya

Counsel for Claimant 2 via teleconference:

J. Dubas

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 20, 2020; and

November 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2020

- [1] This is an application by Viktoriya Lipskaya for an order cancelling a Certificate of Pending Litigation ("CPL") registered by the respondent, Yu Guo, against property owned by her in Chilliwack, BC (the "Chilliwack Property"). She also seeks cancellation of two charges filed against the property under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA].

Background

- [2] Very briefly by way of background, the parties were married in April 2006 and separated in March 2010. On May 17, 2011, they filed a notice of joint family claim and on September 15, 2011 they obtained a final order granting them a divorce (the "Divorce Order"). They have one son born in 2006 who resides primarily with the respondent.
- [3] Pursuant to the Divorce Order, Ms. Lipskaya was required to pay minimal child support of \$1.00 per month and \$84.00 per month for s. 7 special expenses. On September 4, 2019, Mr. Guo obtained an interim order requiring Ms. Lipskaya to pay \$400 per month in child support and special expenses.
- [4] Mr. Guo has long maintained that the applicant has failed to disclose her actual income and that she has underpaid child support. He also alleges that he has incurred significant special expenses for their son and that the applicant has underpaid her share of those expenses.
- [5] Ms. Lipskaya remarried and with her new husband purchased the Chilliwack Property, although the property is registered in her name. Mr. Guo alleges that Ms. Lipskaya was able to buy that property because of the money she saved by failing to pay proper child support and special expenses.
- [6] On October 16, 2019, Mr. Guo brought a notice of application seeking to vary the terms of the Divorce Order and seeking an order for lump sum child support secured by the Chilliwack Property pursuant to the "doctrines of constructive trust, unjust enrichment, resulting trust and principles of restitution". In conjunction with these claims, Mr. Guo filed the CPL in issue against the Chilliwack Property as well as the two liens pursuant to the FMEA in respect of alleged arrears of child support.

- [7] The respondent's application was heard by Madam Justice Baker on November 12, 2019 and on December 5, 2019, she issued Reasons for Judgment indexed at 2019 BCSC 2095, in which she ordered Ms. Lipskaya to pay arrears of child support from July 19, 2019 (not back to 2016 as sought by Mr. Guo) and ongoing support at \$688 per month. Justice Baker also ordered the applicant to pay 54% of special expenses, as defined in her order, and \$100 per month for the child's advanced musical training.
- [8] However, Baker J. declined to order security for retroactive and prospective child support by way of a charge against the Chilliwack Property (at para. 56).
- [9] Mr. Guo has appealed Baker J.'s decision. Despite that decision, Mr. Guo maintains that Ms. Lipskaya owes significant amounts of arrears of child support and special expenses.
- [10] Also of note, Ms. Lipskaya and her new husband have now separated. They have had some discussions about division of property. The respondent alleges that any agreement whereby the applicant's new husband receives an interest in the Chilliwack Property is a fraudulent conveyance and/or a fraudulent preference.

Discussion

The CPL

- [11] A CPL is a mechanism by which a party may secure a claimed interest in land. It is not to be used as a form of pre-judgment execution in respect of a purely financial claim. The requirement that there be a claim for an interest in land stems from s. 215(1) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA].
- [12] In *Chen v. Jin*, 2019 BCSC 567, Madam Justice Murray set out the principles governing an application to cancel a CPL:
- [10] The key to s. 215(1)(a) is that the CPL must be grounded in a claim to an interest in land.
- [11] It is improper to file a CPL as leverage to secure a financial claim: *Drein v. Puleo*, 2016 BCSC 593 at paras. 8-10.
- [12] 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. Where a CPL fails to properly claim an interest in land, it should be cancelled on the basis that it does not meet that precondition: *Xiao v. Fan*, 2018 BCCA 143 at paras. 19 and 27.
- [13] The process for making this determination as set out by the Court of Appeal in *Xiao* is as follows:
- [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.

[13] See also *Bilin v. Sidhu*, 2017 BCCA 429 and *Berthin v. Berthin*, 2018 BCCA 57.

[14] Keeping these principles in mind, it is apparent that there are several problems with the CPL.

The Pleadings

[15] First, there are no pleadings that allege an interest in land on the part of the respondent. "Pleadings" are defined in Rule 1-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009, to mean "a notice of family claim, a response to family claim, a counterclaim and a response to counterclaim".

[16] This case was commenced by way of a notice of joint family claim. That is the only pleading and it does not allege an interest in the Chilliwack Property on the part of the respondent. Rather, the respondent advances his allegations of constructive trust, resulting trust, and unjust enrichment in his notice of application dated October 16, 2019. It is not open to a party to seek relief by way of notice of application that is not contained in the underlying pleadings, particularly where the relief sought is inconsistent with the relief sought in the underlying pleading.

[17] Mr. Guo submits that Rules 3-1(4) and (5) of the SCFR allow him to add his claims to the family law claim by way of a notice of application. However, it is clear from reading these rules that they do not apply to the claim Mr. Guo seeks to advance.

[18] While Rule 3-1(4)(a) does allow parties to apply for certain orders by notice of application where there is an existing family law case, it is limited to the orders listed in Rules 3-1(2.3) (b) and (2.4), neither of which include the claims that Mr. Guo seeks to advance.

[19] Rule 3-1(5) allows parties to add non-family law claims to a family law case. However, it also does not apply here because claims based on unjust enrichment for an interest in property are specifically included in the definition of "family law case" in R. 1-1, at paragraph (d) of the definition, and so are necessarily excluded from R. 3-1(5). Moreover, even if an unjust enrichment claim could somehow be added, the rule does not state that such a claim can be brought by a notice of application; rather, the rule would appear to presume that such claims would be brought as part of the originating pleading. In the case of a joint family claim which is how this case was commenced, Rule 2-2(4) sets out a specific process for claiming additional relief. Mr. Guo did not comply with Rule 2-2(4).

The Claim as Set out in the Application

[20] Second, even if the alleged interest in land could be raised by way of a notice of application, the notice here contains little more than bald assertions and does not set out material facts that would support finding a constructive trust and a corresponding interest in land.

Paragraphs 7 and 8 of the Orders Sought section of Mr. Guo's notice of application address the trust issue:

7. It be ordered and declared that pursuant to the provisions of the Divorce Act (Canada) and the Family Law Act and pursuant to the doctrines of constructive trust, unjust enrichment, resulting trust and principles of restitution that the interest of the Claimant 1 in the Property was obtained or accumulated by Claimant 1 not paying proper support for the child to Claimant 2 or that the Property was enhanced and maintained by the failure of Claimant 1 to pay proper child support to Claimant 2 and that Claimant 1 holds the equivalent of \$58,614.00 on an account of arrears of basic child support and special expenses for the parties child from January 2016 until November 2019 and pursuant to a constructive trust and resulting trust and that an amount of the equity of the Property equivalent to this amount be forthwith vested in Claimant 2 free of any claim from [Claimant 1]
8. It be ordered and declared that Pursuant to the provisions of the Divorce Act (Canada), the Family Law Act as secured and lump sum support and pursuant to the doctrines of constructive trust, unjust enrichment, resulting trust and principles of restitution that the interest of Claimant 1, in the Property would continue to be obtained or accumulated by Claimant 1 not paying proper support for the child to Claimant 2 or that the property would continue to be enhanced and maintained by the failure of Claimant 1 to pay proper child support to Claimant 2 in the future and that Claimant 1 holds the equivalent of \$82,023.00 on an account of future security of basic child support and special expenses for the parties child

[21] In the Factual Basis section of the notice of application, it is alleged at para. 21:

The failure of Claimant 1 to pay support for the Child at the expense of the Child and Claimant 2 has allowed her to accumulate her interest in the Property and to enhance it. This gives the Claimant 2 an interest in the property maintained, enhanced and acquired at his expense pursuant to the doctrines of constructive trust, resulting trust and unjust enrichment and based on broad principles of restitution. He is also claiming this interest as security for support that should have been paid to him.

[22] The Legal Basis section briefly restates the allegation that the Chilliwack Property was "maintained, accumulated and enhanced due to her failure to pay support". It then goes on to list various sections of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Federal Child Support Guidelines, SOR /97-175 [CSG], as well as "the Land Title Act, the Family Law Act, the Law and Equity Act, Fraudulent Conveyance Act and Fraudulent Preference Act, the inherent jurisdiction of the court and the Law of Restitution, Constructive Trust and Resulting Trust".

- [23] As can be seen, the only facts pleaded are that Ms. Lipskaya used money that should have gone towards child support to accumulate her interest in the Chilliwack Property. Again, this is little more than a bald assertion and is insufficient to maintain a CPL: see Chen at para. 12; Wai v. Chung, 2020 BCSC 34 at paras. 26-28.
- [24] Further, the legal basis set out in the notice of application is inadequate. It is not sufficient to simply cite the Divorce Act and the Family Law Act, S.B.C. 2011, c. 25 and the general doctrines of restitution, constructive trust, and resulting trust.
- [25] The importance of a properly drafted legal basis section has been commented on by numerous judges and masters of this Court. I refer in particular to the decision of Madam Justice Adair in Dupre v. Patterson, 2013 BCSC 1561, where she dealt with a similarly barebones notice of application, as well as the decision of Master Bouck in Zecher v. Josh, 2011 BCSC 311, where she explained the rationale behind requiring a proper legal basis is to give proper notice to the opposing party and to the court of the arguments to be advanced (at paras. 30-36).
- [26] Madam Justice Adair quoted at para. 49 from Fraser, Horn and Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. loose-leaf (Markham: LexisNexis, 2007), one of the leading texts on practice and procedure, where the authors say the following concerning the legal basis section of the notice of application (at pages 32-33):

The notice must set out the rule, enactment or other jurisdictional authority relied on for the orders sought and any other legal arguments on which the order sought should be granted. If appropriate, applicable cases may be cited. The argument to be made in chambers should be fully disclosed and should contain more than a cursory listing of the rules that might support the particular application.

- [27] While Dupre and Zecher addressed applications in the context of the Supreme Court Civil Rules, identical requirements exist under the Supreme Court Family Rules.
- [28] In my view, both the factual and legal bases set out in the notice of application are insufficient to support a claim to an interest in land and therefore, to maintain a CPL.

Using a CPL to Secure a Child Support Claim

- [29] Third, I am not satisfied that a CPL is available to secure a claim for retroactive child support. In V.B. v. K.B., 2013 SKQB 412, the court cancelled a CPL filed against a former spouse's property to secure alleged retroactive child support, saying at para. 72:

it is trite law that a claim for child support arrears cannot bring the title to or interest in land into question. A CPL can only be registered in respect of an estate or interest in land, the title to which could change as an outcome of the proceedings. A CPL is not a mechanism by which a litigant can secure performance of other obligations, as is alleged here.

- [30] I would add that it is well established that child support is paid for the benefit of the child, not the payee spouse: see e.g., *C.L.C. v. B.T.C.*, 2012 BCSC 736 at para. 102. It is therefore difficult to see how Mr. Guo can maintain a claim that he has been deprived of child support so as to give rise to a claim to a constructive or resulting trust in his favour.
- [31] Mr. Guo also seeks to maintain the CPL as security for his claim for retroactive and future child support and s. 7 expenses. However, Baker J. dismissed his application for security. It is useful to set out her decision on this point:
- [56] I decline to make any of these further orders sought. Ms. Lipskaya has paid all child support in accordance with the consent order, and has increased that payment amount voluntarily since September 2019. I have no evidence that she would not comply with the orders I have made. No security is appropriate. Further, Mr. Guo has not established any legitimate interest in Ms. Lipskaya's dispute with her husband and no orders with respect to their dispute or him personally are appropriate.
- [32] To allow Mr. Guo to use a CPL as security for child support would be to subvert Baker J.'s decision not to grant security.
- [33] Further, a CPL to be used to secure child support would be contrary to the legislative intent underlying the various statutory mechanisms regarding security for child support.
- [34] In particular, the respective child support regimes under the FLA and Divorce Act (via the CSG) provide specific tools for charging property as security for child support: FLA, s. 170(d); CSG, s. 12. Section 26 of the FMEA likewise allows child support arrears to be registered against property. These statutory tools all require some exercise of discretion, whether that be the court's in granting security for child support or the director's in enforcing a maintenance order. As such, using a CPL as a tool to obtain security for child support circumvents the legislative intention evinced in the FLA, CSG, and FMEA to limit the circumstances in which property can be charged in relation to child support obligations.
- [35] Mr. Guo also appears to seek to maintain the CPL on the basis that any dealings involving the Chilliwack Property between Ms. Lipskaya and her new husband in their family law matter amounts to a fraudulent preference and/or a fraudulent conveyance. However, these claims are not sufficient to maintain the CPL for the same reason noted above that the notice of application fails to plead adequate material facts and/or a proper legal basis.

Conclusion on the CPL

- [36] For these reasons, I find that the pleadings herein fail to disclose an interest in land and, accordingly, I order that the CPL filed against the Chilliwack Property under charge no. CA7813603 be cancelled pursuant to s. 215(1) of the LTA.

- [37] The applicant also seeks summary dismissal of the respondent's notice of application alleging constructive trust, resulting trust, unjust enrichment, and fraudulent conveyance and/or preference. With respect to the latter claims, she has filed evidence indicating how the property was paid for and the negotiations she has had with her husband over the disposition.
- [38] These claims are suspect for the reasons that I have already mentioned, namely that they are not supported in the pleadings. However, that is not to say that they could not be advanced if properly pleaded. I am not able on the record before me to determine the merits of those claims or, conversely, to determine that they should be dismissed summarily. I am therefore not prepared simply to dismiss the respondent's notice of application at this time.

The FMEA Liens

- [39] The applicant also seeks to cancel the charges filed against the Chilliwack Property pursuant to the FMEA on October 16, 2019. These charges were filed by the respondent, not the director of maintenance enforcement. He did so as additional security for his claim to arrears, which is the subject of his appeal, and because he takes the position that Ms. Lipskaya is approximately \$2,800 in arrears under the order of Baker J.
- [40] The claimant denies she is in arrears. She has produced a statement from Family Maintenance Enforcement Program ("FMEP") indicating that as of September 2020, she had overpaid FMEP by \$3,298.99. However, it is apparent that FMEP's calculation of an overpayment is based upon a payment of \$400 per month established pursuant to the interim order dated September 4, 2019, whereas the claimant was paying \$688 per month in accordance with Baker J.'s order.
- [41] It is not necessary to resolve this issue as there is no application before me dealing specifically with the alleged arrears.
- [42] What is before me is the issue of whether it was open to Mr. Guo to file charges against the Chilliwack Property pursuant to the FMEA. The answer to that question is no.
- [43] Mr. Guo has been registered with FMEP since at least June of 2014. Section 5(1) of the FMEA provides that, given that registration, the director of maintenance enforcement has exclusive authority to enforce a maintenance order. Section 5(1) states:

While a maintenance order is filed with the director, no person may enforce the order except

- (a) the director, or
- (b) the creditor, if authorized to do so under subsection (2).

- [44] Section 5(2) has no application here.

[45] Section 26 of the FMEA does authorize the registration of a notice of maintenance order in the land title office; however, s. 26(2) does not permit creditors who have registered a maintenance order with the director to apply for such a charge:

The creditor may apply for registration of a notice of maintenance order unless the maintenance order to which the notice relates is filed with the director.

[46] The combined effect of these provisions is that while the director of maintenance enforcement could have filed charges against the Chilliwack Property, it was not open to Mr. Guo to do so while he remained registered with FMEP.

[47] What then is the remedy for Mr. Guo's breach of the FMEA? He submits that the court has no jurisdiction to order the charges cancelled as that lies within the exclusive authority of the director. Mr. Guo cites s. 6 of the FMEA in support of his position. He says the only recourse would be for the director to remove him from FMEP, which neither he nor Ms. Lipskaya want.

[48] I disagree. Section 6 deals with the withdrawal of a maintenance order that has been filed with the director. It does not deal with charges registered in the land title office.

[49] Those charges are again addressed in s. 26. Section 26(10) provides:

On application by

- (a) the person against whose land a notice of maintenance order is registered, or
- (b) the creditor, if the director refuses to sign a discharge or postponement of a registered notice,

the court may make an order discharging or partially discharging the registered notice or an order postponing the registered notice to allow the registration of a charge.

[50] In my view, this section clearly empowers the court to make an order discharging the registration of a maintenance order from the title to property upon application of the person whose property is subject to the charge.

[51] While s. 26(10) does not identify the grounds upon which the court may order a discharge, I am satisfied that the filing of a charge in breach of the FMEA is a sufficient ground for doing so.

[52] I therefore order that the charges filed by Mr. Guo against the Chilliwack Property pursuant to the FMEA, under numbers CA7812839 and CA7812840, be cancelled.

Conclusion

[53] I make the following orders:

- a) The CPL filed against the Chilliwack Property under charge no. CA7813603 is cancelled pursuant to s. 215(1) of the LTA; and

- b) The charges filed against the Chilliwack Property pursuant to the FMEA, under numbers CA7812839 and CA7812840, are cancelled.
- [54] Ms. Lipskaya's notice of application also sought to vary the Divorce Order with respect to child support and special expenses. She has agreed that this issue should be adjourned until after the disposition of Mr. Guo's appeal from the order of Baker J. As I indicated to the parties, while I am not seized of any future variation applications, the parties may seek to bring such applications before me and I will hear them if I am available. Otherwise, they may be brought in ordinary chambers.
- [55] Ms. Lipskaya is entitled to her costs.
- "Skolrood J."

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