
CANADA / JUDGMENT

Liu v. Wang

2009 BCSC 1792

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1792 Liu v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Liu v. Wang,

2009 BCSC 1792

Date: 20091224

Docket: S067985

Registry: Vancouver

Between:

Daqing Liu

Plaintiff

And

Shaoming Wang and Qing Ju

Defendants

Before: The Honourable Mr. Justice Schultes

Corrected Judgment: The text of the judgment was corrected at paragraphs 1, 2, 9, 20 and 45 on January 4, 2010

Reasons for Judgment

Counsel for the Plaintiff:

L. J. Grenier

Counsel for the Defendant, Qing Ju:

G. E. Edwards

Place and Date of Trial:

Vancouver, B.C.

June 23, 2009

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2009

1. Overview

- [1] In this summary trial the defendant, Ms. Qing Ju, is applying to dismiss the plaintiff's claims against her, which arise from a transfer to her by the other defendant, Mr. Shaoming Wang, of Mr. Wang's interest in their former matrimonial home.
- [2] The plaintiff is a judgment creditor of Mr. Wang. He alleges that this transfer between the defendants amounted to a fraudulent conveyance or fraudulent preference and seeks to have it set aside.

2. Relevant Facts

a. Dealings between Ms. Ju and Mr. Wang

- [3] Ms. Ju and Mr. Wang were married in 1994. Their son was born in 2000. They separated in May of 2004. Mr. Wang initially left the home but in November of that year he returned and, after making threats to Ms. Ju that caused her to leave with their son, took over possession of it.
- [4] Despite being out of the home, Ms. Ju continued to pay the mortgage on it for another year and a half.
- [5] Mr. Wang operated a business through a company called Grand East Supermarket Inc. ("Grand East"). In August 2005, he began a divorce action against Ms. Ju.
- [6] Ms. Ju had previously begun a debt action against Mr. Wang and Grand East for withdrawing money from their joint U.S. dollar account and subjecting her to liability under their joint line of credit. These claims were subsumed into a claim by her for reapportionment of family assets in the divorce action. The amount of the debt claims had been approximately \$450,000 in Canadian funds.
- [7] Ms. Ju's statement of defence in the divorce action stated that Mr. Wang "was being sued by his business partners for fraud." In an affidavit filed shortly after, Ms. Ju deposed that "this matter is urgent as I am aware that creditors are trying to register judgment on the family home."

- [8] In her examination for discovery in the present action, she acknowledged having been aware, before the transfer of the home, that creditors were seeking to register judgments against it, as well as of the existence of an injunction restraining him from disposing of assets. She said that she had received this information from her lawyer.
- [9] In March 2006 the bank at which the defendants held the joint line of credit began foreclosure proceedings against the home.
- [10] On August 22, 2006, by a consent order, Ms. Ju and Mr. Wang were granted a divorce and Mr. Wang's interest in the matrimonial home was transferred to Ms. Ju in full satisfaction of all property claims between the parties. Ms. Ju does not receive spousal support or child support under the order and Mr. Wang is not in contact with his son.
- [11] The home was transferred to Ms. Ju on September 19, 2006. The consideration described in the transfer document was "\$1 and mutual love and affection." At the time of the transfer, Ms. Ju had to pay three judgments, totalling about \$70,000, incurred by Mr. Wang through his business that were registered against the title.
- [12] After taking possession of the home, Ms. Ju had to pay \$100,000 for renovations, because Mr. Wang had been using it as a multi-family rental property. This use reduced the value of the home by about \$200,000.
- [13] In November of 2006, she entered into a contract to sell the home, with a closing date of December 29, 2006. The sale price was \$1,678,000. In March of 2006, her realtor had estimated the value of the house as being \$1.3 - 1.4 million.
- [14] Just before completion, the purchaser's solicitor discovered a certificate of pending litigation registered against the property. That certificate related to the present action by the plaintiff. In order to allow the sale to complete, Ms. Ju's solicitor agreed to hold the amount of the plaintiff's claim in trust, pending the resolution of it.
- [15] Mr. Wang made an assignment into bankruptcy in December of 2007.

b. The Plaintiff's Claims

- [16] On July 19, 2006, the plaintiff commenced a debt action against Mr. Wang. Ms. Ju had no specific knowledge of this action. It related to \$306,000 that the plaintiff had invested in Grand East.
- [17] On December 1, 2006, the plaintiff took default judgment in his action against Mr. Wang.
- [18] On December 11, 2006, the plaintiff began the present action to set aside Mr. Wang's conveyance of his matrimonial home to Ms. Ju. It is common ground that this date was more than 60 days after the conveyance had occurred.

c. The Mareva Injunction

- [19] On September 23, 2005 other creditors of Mr. Wang obtained a Mareva injunction against him, Grand East, and other companies and individuals, restraining them from disposing of any assets.
- [20] A subsequent order of May 6, 2006, which extended the injunction against Grand East and Mr. Wang, may have been in place at the time of the transfer of the matrimonial home. This order provided that the injunction was to expire 14 days after an inspector had made a report to the parties, but no evidence was provided about whether or when such a report was made. In addition, this order was never entered and only the clerk's notes of its terms have been placed in evidence.

3. Applicable Law

a. Fraudulent Conveyance

- [21] The relevant sections of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA] provide:

Fraudulent conveyance to avoid debt or duty of others

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies

(a) a disposition of property, by writing or otherwise [...]

is void and of no effect against a person [...] whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.
- [22] Therefore, for the transfer of the matrimonial home in this case to constitute a fraudulent conveyance, the plaintiff must prove that it was done "to delay, hinder or defraud creditors."
- [23] If that is proven, it will be set aside unless the property was transferred "in good faith and for good consideration" to Ms. Ju, who must have had "no notice or knowledge of collusion or fraud."
- [24] "Good consideration" in this context means "valuable consideration": *China Software Corp. v. Leimbiger* (1990), 49 B.L.R. 173 (B.C.S.C.) [*China Software Corp.*]. The settlement of a matrimonial dispute may constitute good consideration: *MGM Grand Hotel Inc. v. Wang* (1997), 33 R.F.L. (4th) 25 (B.C.S.C.).

- [25] Where there is good and valuable consideration, the transferee's knowledge of the transferor's fraudulent intent does not void the transfer unless the transferee was actually a party to carrying out the fraudulent intent and purpose: *Meeker Cedar Products Ltd. v. Edge et al.* (1968), 68 D.L.R. (2d) 294 (B.C.C.A.).
- [26] Although the term "fraudulent intent" is often used, the only required intent is to delay or hinder creditors, regardless of whether it is "dishonest": *Royal Bank of Canada v. Clarke* 2009 BCSC 481 [Royal Bank of Canada].
- [27] This required intent may be proven circumstantially and the factors giving rise to an inference of such intent are often described as "badges of fraud": *Mega Cranes Ltd. v. Toutant*, [1999] B.C.J. No. 336 (B.C.S.C.) at para. 45.
- [28] A presumption of fraudulent intent arises from a close relationship between the transferor and transferee and suspicious surrounding circumstances only when there has been no consideration for the transfer: *Gresham v. Gresham* (1993), 75 B.C.L.R. (2d) 197 (B.C.C.A.).

b. Fraudulent Preference

- [29] The relevant sections of the Fraudulent Preference Act, R.S.B.C. 1996, c.164 provide [FPA]:

Transfers which prejudice creditors

3. Subject to section 6, a disposition of property by a person at a time when the person is in insolvent circumstances, is unable to pay the person's debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor, if made
- (a) with intent to defeat, hinder, delay or prejudice creditors or some of them, and
 - (b) to or for a creditor with intent to give the creditor preference over other creditors or some of them.

[...]

Sales and transfers in good faith

6(1) Nothing in sections 3, 4 and 5 applies, if the money paid, or the property disposed of bears a fair and reasonable relative value to the consideration, to a sale in good faith, to a payment made in the ordinary course of business to innocent persons, to a payment to a creditor, or to a disposition in good faith of property of any kind made in any of the following circumstances:

- (a) in consideration of a present actual payment in good faith in money;
- (b) by way of security for a present actual advance of money in good faith;
- (c) in consideration of a present actual disposition in good faith of any property.

[Emphasis added.]

[30] Insolvency is determined by reference to both a legal and commercial test: *Rae v. McDonald* (1896), 13 O.R. 352 (H.C.J.) at 357:

I adopt the following definition found in *Bump's Law and Practice of Bankruptcy*, 10th ed., p. 813.

A debtor is legally insolvent when he has not sufficient property subject to execution to pay all his debts if sold under legal process, and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business.

[31] Proof of indebtedness may be insufficient in this regard, if it is equally consistent with an unwillingness to pay as an inability to pay: *Crestwood Kitchens Ltd. v. Camco Ltd.* (1982), 47 C.B.R. (N.S.) 103 (B.C.S.C.).

[32] Sections 4 and 5 of the FPA have the effect of deeming that the person disposing of property intended give a preference to that creditor over the others if a proceeding is brought to set aside the disposition within 60 days of it having been made. The parties agree that these sections do not apply in the present action, because of the timing of its commencement in relation to the impugned transfer.

[33] Therefore, for this transfer to constitute a fraudulent preference, the plaintiff must prove:

1. That Mr. Wang was "in insolvent circumstances...unable to pay [his] debts in full or [knew] that he...was on the eve of bankruptcy";
2. That the transfer was made "with intent to defeat, hinder, delay or prejudice creditors or some of them"; and,
3. That the transfer was made to Ms. Ju "with intent to give her preference over creditors, or some of them."

[34] There must be a concurrent intent on behalf of the transferor and transferee to, respectively, give and receive a preference: *Adams v. Bank of Montreal* (1901), 32 S.C.R. 719.

[35] Even if these facts have been proven, this transfer will not amount to a fraudulent preference if it is properly characterized as being "in consideration of a present actual disposition in good faith of property" and if Mr. Wang's transferred interest "bears a fair and reasonable relative value to the consideration."

4. Discussion

a. Was there a Fraudulent Conveyance?

[36] I think the resolution of the plaintiff's claim under the FCA turns on the adequacy of the consideration provided by Ms. Ju in exchange for Mr. Wang's interest in the home. If this consideration can be properly characterized as "valuable consideration" then the FCA does not apply.

- [37] In this regard, I conclude that the indication in the transfer document that the consideration for "\$1 and mutual love and affection" is not indicative of the actual consideration provided. It seems clear, both from the explicit language of the divorce order and the surrounding circumstances, that the basis on which the home was transferred was to resolve the property claims in the divorce action.
- [38] The relevant provision of the consent divorce order described the transfer as being "in full and final satisfaction of all property claims between the parties." This involved the exchange of something of value, namely Ms. Ju forgoing her right to pursue a reapportionment of assets based on the debts she said had been wrongfully incurred by Mr. Wang on their joint bank account and line of credit, in return for his interest in the property.
- [39] The amount Ms. Ju was claiming for the debt was \$450,000 in Canadian funds. Based on her realtor's most recent estimate of the value of the home as approximately \$1.3 - 1.4 million, the equity in the home was less than \$800,000 and Ms. Ju would have been entitled, pursuant to s. 56 of the Family Relations Act R.S.B.C. 1996 c. 128 to a half interest in that amount in the absence of any reapportionment.
- [40] Ms. Ju also had to pay out \$70,000 in registered judgments against Mr. Wang in order to obtain clear title and she also paid the mortgage herself for a year and half without sharing in the rent that Mr. Wang had collected during that time.
- [41] I think it is clear therefore that she was giving up a claim that had a greater potential value than the interest in the home that she was receiving[1].
- [42] For these reasons I think that there was good consideration as that term is used in s. 2 of the FCA.
- [43] Although this finding with respect to consideration is sufficient to resolve the matter, I will go on to say that it seems highly unlikely that the resolution of the divorce action was intended to be used by Mr. Wang as a vehicle for defrauding his creditors, or that Ms. Ju participated in any way in such a scheme.
- [44] I find on the evidence that Ms. Ju was not a part of Mr. Wang's business endeavours[2] and that she was completely estranged from him by the time the impugned transfer was carried out. Mr. Wang's threats to her, his lack of contact with his son since the separation, and the negative effect of his management on the value of the home are convincing factors on this issue.
- [45] This absence of any basis to infer that the transferred property could ever benefit Mr. Wang again is a key distinguishing feature from the cases relied on by the plaintiff[3]. In each of those decisions, there was evidence of some type of continuing relationship between the transferor and the transferee, such that the court could infer that the transferor continued to benefit in some way from what had been transferred.

- [46] As I have found, that is not the case here and I think Mr. Wang would have to have been absurdly bloody-minded to put the property permanently beyond his own reach, for the benefit of a spouse from whom he was estranged, just to frustrate his creditors.
- [47] I think that a more plausible inference is that, whatever problems may have been arising in his business dealings, the family law proceedings were a more immediate concern and that he saw fit to give priority to resolving them.
- [48] Given my findings, it is not necessary to determine the precise extent of Ms. Ju's knowledge of the existence and efforts of the creditors who were pursuing Mr. Wang, including the Mareva injunction.
- [49] It seems clear from the material in the family law proceeding and her examination for discovery that she had some knowledge, but having found that she provided good consideration for the family home and that the transfer was not a scheme to delay or hinder creditors, even on Mr. Wang's part, that knowledge is not significant in the outcome of this action.

b. Was this a Fraudulent Preference?

- [50] As a threshold issue, I think that the evidence falls short of establishing that, at the time of the transfer, Mr. Wang was "in insolvent circumstances, [was] unable to pay [his] debts in full, or [knew] that he...[was] on the eve of insolvency", to as to place this transfer within the scope of the FPA.
- [51] Mr. Wang did not make his assignment into bankruptcy until December 2007, more than a year after the transfer of his interest in the home to Ms. Ju. His statement of affairs filed at the time of the assignment lists some significant debts to government departments and financial institutions in addition to what was owed to the creditors who had pursued the Mareva injunction or who had registered judgments against the title.
- [52] As I have indicated, Ms. Ju was aware of creditors who were seeking to register judgments on title and she ultimately had to pay out three of them in order to clear it, but there is no evidence that these judgments had resulted from Mr. Wang's inability, as opposed to unwillingness, to pay. Indeed, the Reasons for Judgment for the extension of the Mareva injunction (*Jiang v. Grand East Supermarket Inc.* 2005 BCSC 1769) refer to allegations of fraud against Mr. Wang, Grand East, and other corporate defendants, by his having induced the plaintiffs to invest in a supermarket, hence the remedy of restraining him from disposing of any assets.
- [53] Because of this finding, it is unnecessary for me to consider whether there was a concurrent intent to give and receive a preference by means of the transfer, or whether the good faith exception in s. 6 of the FPA was available.

5. Conclusion

- [54] The plaintiff has failed to prove that the defendant Qing Ju participated in any fraudulent conveyance or preference with respect to the transfer to her of Mr. Wang's interest in their former matrimonial home. Accordingly, this action is dismissed as against Ms. Ju.
- [55] At the conclusion of the hearing, counsel for Ms. Ju requested the opportunity to speak to costs in the event that her application was successful. Counsel may do that by written submissions or at a further appearance, as they prefer.

"The Honourable Mr. Justice Schultes"

- [1] I realize that the home sold for more than her realtor had estimated and that this provided her with a windfall, but the relevant time for assessing the value of the consideration passing to Mr. Wang is at the time he transferred the home.
- [2] In an attempt to show an ongoing business relationship between the defendants, the plaintiff relied on an article from a Chinese newspaper that purported to link them in shady business dealings in that country at a time after the transfer. This article is hearsay and there is no basis on which to assess the source of the information it contains or the reliability of that information. Accordingly, I will not give the article any weight.
- [3] *Dexia Credit Local v. Rogan*, 2008 BCSC 1406; *Jennings v. Chow*, 2008 BCSC 110; *Selaive v. Meyer Estate*, 2003 BCSC 1335; *Verizon Information Services Canada Inc. v. Bubble Boy's Powerwashing Ltd.*, 2005 BCSC 1496; *China Software Corp.*; *Royal Bank of Canada*.

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