

CANADA / JUDGMENT

Martenyi v. Advance Yacht Sales Ltd.

2012 BCSC 906

COURT

Supreme Court of British Columbia

DECIDED

20 June 2012

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2012 BCSC 906 Martenyi v. Advance Yatch Sales Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Martenyi v. Advance Yacht Sales Ltd.,

2012 BCSC 906

Date: 20120620

Docket: 09/3315

Registry: Victoria

Between:

Mathew Martenyi

Plaintiff

And

Advance Yacht Sales Ltd. and John Robert MacLucas

also known as Rob MacLucas

Defendants

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Corrected Judgment: The text of this judgment was corrected at paragraph 1 and 35 on June 22, 2012

Counsel for the Plaintiff:

D.R. McLeod

The Defendant John Robert MacLucas in person and on behalf of Advance Yacht Sales Ltd.

Place and Date of Trial:

Victoria, B.C.

June 5, 2012

Place and Date of Judgment:

Victoria, B.C.

June 22, 2012

- [1] The plaintiff applies pursuant to Rule 9-7 for judgment following a summary trial. The individual defendant, Mr. MacLucas, who also appears for Advance Yacht Sales Ltd., is unrepresented, and applies to have the action dismissed.
- [2] A preliminary objection was taken to the filing of an affidavit from Patrick Guy as it is on information and belief. The affidavit was originally drafted for use in an interlocutory application, and refiled by Mr. MacLucas on this summary trial. The affidavit attaches a letter containing some comments from a yacht broker about normal practices used in selling boats. It is indeed hearsay and not admissible on this summary trial (*L.E.W. v. United Church of Canada* 2005 BCSC 564).
- [3] The plaintiff, who lives in the United States, alleges that he provided the defendant Advance Yacht Sales Ltd. ("Advance"), a company owned by Mr. MacLucas, with about \$25,000 (US) as good faith money to allow him to be considered as a purchaser for a yacht named the Grey Starling, moored in Sidney B.C. The yacht was owned by a Mr. Saari, and Advance acted as the broker.
- [4] Advance, according to Mr. MacLucas, was a business name used by Sidney North Saanich Marine Sales Ltd, which he owned at the material time.
- [5] The plaintiff says he decided not to buy the yacht after taking a ride on it, asked for the return of his money and never received it. Instead, the defendant bought the yacht himself, taking advantage of the deposit money, and then sold it to other buyers, presumably at a profit.
- [6] The plaintiff alleges that the defendants misappropriated his money, and goes so far as to allege fraud (although it appears that this allegation was made to allow their claim to proceed in spite of Mr. MacLucas' bankruptcy, of which they were given no notice).
- [7] The defendant maintains the money was a deposit on the purchase of a yacht, and according to the contract, the purchase was not completed on the relevant date and the deposit is therefore forfeited.

[8] The problem from the defendant's point of view is that no copy of the signed agreement can be found, despite all efforts to locate it. The defendant deposes that he has seen a signed agreement but cannot find it.

[9] However, the defendant says the evidence supports his version of the dealings - this was an agreement to purchase, it was not merely a provision of good faith money.

EVIDENCE BEFORE THE COURT

[10] These events took place in the summer of 2005.

[11] The evidence put forward by the defendant is as follows.

[12] At the end of June, 2004, Advance agreed to market a vessel for the owner through North Saanich Marine Sales Ltd., another company owned by Mr. MacLucas. The plaintiff expressed an interest in 2005.

[13] The defendant faxed a copy of a "Yacht Purchase and Sale Agreement" ("the draft agreement") to the plaintiff on August 24, 2005. The plaintiff agrees that he received a copy of this draft agreement.

[14] The purchase price for the vessel was to be \$80,000, with completion on September 18, 2005 and a deposit of \$8000 to be paid before August 31, 2005. There are documents to support the amount of \$8,000 wired to the defendant by the plaintiff on August 25, 2005. The draft agreement provided that the sale was subject to a sea-trial, marine survey, mechanical inspection and time spent with vendor.

[15] The defendant says the plaintiff conducted a sea trial on September 13, 2005. The plaintiff deposes that he did not; he merely went along for a ride on the boat. The boat was not put through a "shake-down", which is what he considers a "sea trial" to be.

[16] The defendant attached a receipt from "Secure Yacht Services" dated September 14, 2005, for "Seatrial 'Pirate ship' 'Grey Starling' with Matthew 1400-1900, 3 ½ hours". This is not direct evidence that the plaintiff conducted a sea trial, although this invoice was sent to "Advance Yachts" and can form part of the record on that basis.

[17] Mr. MacLucas deposes that the plaintiff did not complete the purchase of the yacht on September 18, 2005, but said he wanted to complete it later. The owner was told of this and it was agreed that the plaintiff would come to Sidney on November 19, 2005 to do so.

[18] The plaintiff sent another \$17,500 (US) to Sidney North Saanich Marine Sales Ltd, another of Mr. MacLucas' companies, on November 17, 2005.

[19] Mr. MacLucas deposes that on November 19, 2005, the plaintiff contacted Mr. MacLucas and told him he had been denied entry into Canada as a result of conviction for possession of marijuana, and would not be able to complete the purchase until he could sort that out. He asked Advance to take over the contract to see what could be salvaged.

[20] Mr. MacLucas deposes that Advance therefore moored the vessel and agreed to buy it from the owner at the price the plaintiff had been going to pay shortly after November 19, 2005. Mr. MacLucas agrees that part of the purchase money came from the plaintiff's deposit. However, he says Advance also paid for moorage, carrying costs, surveying costs, another sea trial.

[21] Advance sold the vessel to new owners in March of 2006 for only \$70,000. Mr. MacLucas says Advance suffered a loss and was unable to return any money to the plaintiff.

[22] The plaintiff demanded an accounting and Mr. MacLucas was not forthcoming. The plaintiff sent an email, apparently sometime in June of 2007 saying:

I have been patient beyond any semblance of reasonableness and have waited to wrap this matter up for many many months. I have even been willing to consider the one and only attenuated recap of what has happened to either the monies I placed with you or the boat for which it was intended. ...

But I cannot get you to respond---WHY? Are you not aware that you are a fiduciary for the \$25,000 I placed with you? Are you not aware that you had an obligation to account for the funds - or deliver the boat- over a year and a half ago? Are you not aware that - at a minimum - you could've and should've at least informed me that you had found a buyer and was about to sell it last year for nearly 30% less than I was about to purchase it for - PRIOR TO ACTUALLY SELLING IT.

You really leave me no alternative but to pursue this whole fiasco in a business like manner. Which means that our communication must henceforth be in writing and with verification of all that has transpired since my wiring into your account in 2006 of the nearly \$25,000 US.

[23] A demand letter followed on September 6, 2007.

[24] The plaintiff tried to deal with the matter through the B.C. Yacht Broker's Association, but although this consumed a large amount of time, the association eventually said the dispute was outside its mandate. An action was commenced in July of 2009.

[25] In his lengthy and detailed reply affidavit, the plaintiff denies nearly every statement made by Mr. MacLucas in his affidavit. He denies that there ever was any agreement. He received the faxed agreement from Mr. MacLucas but never signed it, never made an offer, and never entered into an agreement of purchase and sale. He did not take the boat on a sea trial, he did not obtain any surveys or inspections. He paid an initial deposit and then sent an additional amount of \$17,500, merely as a show of good faith. His intended return to Sidney on November 19, 2005 was just to have another look at the boat, not to complete a purchase. When he advised Mr. MacLucas of his marijuana conviction, he told him he would not be able to proceed further with the purchase of the boat. He did not say he could not complete the purchase.

POSITIONS OF THE PARTIES

- [26] The plaintiff says the defendants have misappropriated his money.
- [27] "Misappropriation" means using money for a purpose other than that intended by the parties, or turning it to a wrong purpose, or the failure to account when called upon to do so (see *Valastiak v. Valastiak* 2009 BCSC 204 @ para. 15 and cases cited therein).
- [28] The plaintiff says the absence of a written agreement should be considered as proof that none exists, that there never was an agreement, and that the money was good faith money only, intended to be returned once the plaintiff decided, after going for a ride on the boat, not to purchase it.
- [29] Mr. MacLucas says the evidence supports his position that there was an agreement, whether or not a copy of the actual written document can be found.
- [30] He relies on term 6 of the Agreement which he faxed to Mr. Martenyi in order to support his position that the money was forfeited. That terms says:

TIME OF ESSENCE:

Time shall be of the essence. Unless the Total Price including Tax is paid on or before the Closing Date, the Seller, at the Seller's option, may cancel this Agreement and in such event any deposit paid by the Purchaser shall be absolutely forfeited to the Seller, not as a penalty but as liquidated damages.

- [31] Somewhat inconsistently, Mr. MacLucas also takes the position that all of the money was applied to the purchase of the vessel in the hopes of reselling it at a profit so that he could return the plaintiff's money. As he sold at a loss, there was no money to return.
- [32] The defendant MacLucas says the money was either forfeited when the agreement did not complete on September 18, 2005, or alternatively, if there was any wrongdoing, it was on the part of Advance, not himself personally. He says any claim against himself is inadequately pleaded.
- [33] Mr. MacLucas says he cannot be found liable unless there is a separate cause of action pleaded against him. He relies on *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.* 2010 BCCA 329, although he did not specify what passages support his position. Counsel for the plaintiff merely submitted the case was inapplicable without further elaboration.
- [34] The Court brought to the attention of both parties numerous disputed facts that each allege is important to their case, in order to understand how this matter could be decided on a summary trial. As is becoming common, I am urged to make a decision of some sort because the parties cannot afford a full trial. Nevertheless, even when a vigorous interpretation of Rule 9-7 is used, the court still has to have a basis upon which to fairly ascertain the facts necessary to make a decision.

- [35] No discoveries have been done. There are many questions of fact that are in dispute. Did the plaintiff take the boat for a sea trial? Was it only a ride on the boat or was it one of the "subject to's" on the agreement? If the deposit money was advanced as good faith only why did the plaintiff pay another \$17,500 after the "ride" or the "sea trial"? Did the plaintiff ask for an extension to complete after September 18, 2005? Was there a new date of November 19, 2005 set to complete the purchase? Did the plaintiff call Mr. MacLucas and tell him he could not enter Canada and ask him to try to salvage the deal, or did he merely tell him he would not proceed further?

DISCUSSION

- [36] Despite all of these contentious factual matters, the main point of dispute is whether there was a signed agreement or not, because without it, the defendants have no grounds upon which to allege the deposit money was forfeited.
- [37] The plaintiff says the case stands or falls on the absence of the document.
- [38] Mr. MacLucas has only his own statement that he recalls seeing a signed Agreement at some point. Neither party has a copy. The plaintiff demanded the records of the Yacht Broker's Association to see if they had a copy of a signed agreement in their files, since they had been involved for some period of time. They did not.
- [39] Unless there was a signed Agreement, the defendants have no defence to advance to support keeping the deposit money. They took the plaintiff's deposit, as well as the additional \$17,500 (US) which they knew, even on their own evidence, was to be put towards the purchase of a boat for the plaintiff. They did not use the money for that purpose, and instead kept it for their own purposes.
- [40] There is no reference in subsequent correspondence to forfeiting money or to the term of the agreement. Mr. MacLucas kept saying he would account for the money. As far as time being of the essence in any event, even on Mr. MacLucas' evidence, the agreement was extended at least once in order to help the plaintiff complete the purchase.
- [41] Mr. MacLucas says the evidence as he sets it out must lead to an inference that there was a signed agreement. Thus he will have to convince a court that there was a written agreement and that it allowed forfeiture of the deposit.
- [42] The courts will accept secondary evidence of a written agreement if the written agreement is not available (see *Bank of British Columbia v. Smart*, 35 BCLR (2d) 21).
- [43] Whether Mr. MacLucas's evidence will carry the day that the parties were operating under a signed agreement is not at all clear, and many questions remain unanswered on both sides. The court is left in a position of guessing and trying to construct a workable and cohesive position for either party.

- [44] However, there is no dispute that the deposit required by the agreement, even if Mr. MacLucas convinces a court that a written agreement in the terms of the draft agreement existed, was only \$8,000, and the factual contradictions relate only to that amount.
- [45] Therefore, even if the agreement turns up, or if Mr. MacLucas convinces a court that there was one, there is no justification for keeping the \$17,500 (US). That amount may well have been a further payment on the boat, but it was not a deposit and neither Mr. MacLucas nor Advance had any reason to keep it once they knew the plaintiff was not going to buy the boat. The plaintiff has established that that amount was misappropriated.
- [46] This is not a situation where Mr. MacLucas can hide behind his company, which is apparently no longer in existence. It is clear from Mr. MacLucas' affidavit and the documents attached that he took the money himself, applied it to the boat which he bought from the original owner in his own name, together with a woman named Sue Adams, and he transferred the boat to the new owners personally for an undisclosed price. Mr. MacLucas deposes that the price was \$70,000 but there is no documentation to support that amount.
- [47] While the court is aware that "litigating in slices" is an unsatisfactory approach, the two amounts in issue are discrete and there is no defence to the retention of the \$17,500 (US). Therefore the plaintiff will have judgment in the amount of \$17,500 (US) against both defendants, jointly and severally, at the appropriate rate of conversion.
- [48] The remaining dispute over the "deposit" amount of \$8,000 will have to be referred to the trial list, in view of the court's inability to find the facts necessary to adjudicate upon it without hearing the witnesses. It is unfortunate that the plaintiff will have difficulty in pursuing his claim without the ability to enter Canada.
- [49] The plaintiff seeks special costs. I do not think a basis has been established for special costs. However, despite the amount of the judgment, which is within the limit of Small Claims Court, the plaintiff should have his costs at Scale B because of the wrongful misappropriation of the funds and because the initial claimed amount was, with justification, over \$25,000.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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Prepared on 29 October 2026 · Esheria