
CANADA / JUDGMENT

Maussion v. Maussion

2021 BCSC 530

COURT

Supreme Court of British Columbia

DECIDED

29 March 2021

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2021 BCSC 530 Maussion v. Maussion

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Maussion v. Maussion,

2021 BCSC 530

Date: 20210329

Docket: S210704

Registry: New Westminster

Between:

Patrick Maussion

Plaintiff

And

Isabelle Josiane Christine Patricia Maussion, both in her personal capacity

and as Executor of the Estate of Rolande Maussion, Deceased

Josiane Annick Podwinski and

Christian Maussion

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

S. Payne

Counsel for the Defendant, I. Maussion:

J. Roberts

Place and Date of Hearing:

New Westminster, B.C.

March 9, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 29, 2021

- [1] The defendant, Isabelle Josiane Christine Patricia Maussion (the "Defendant") seeks summary dismissal of the plaintiff's claim as against her, pursuant to s. 6(1) of the Limitation Act, S.B.C. 2012, c. 13. Although not referenced in her Notice of Application, I presume the Defendant relies upon Rule 9-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] The plaintiff opposes the application.

The Background

- [3] This matter arises out of the estate litigation involving the plaintiff, who is one of four children of the late Henri Maussion and Rolande Maussion ("Decedents"). The Decedents died on May 12, 2012, and September 12, 2016, respectively.
- [4] The Defendant is named as the executor of the estate of Rolande ("Estate"), and in her personal capacity. The other two defendants, Josiane Podwinski and Christian Maussion, are siblings of the plaintiff and the Defendant.
- [5] The within action was commenced on January 31, 2019 and involves, inter alia, claims by the plaintiff that the Defendant, using a power of attorney provided to her by the two Decedents: sold property owned by the Decedents at 110-20120 56th Avenue, Langley, B.C. ("56th Avenue Property"), resulting in net proceeds of \$240,000; and received, by way of resulting trust, the Decedents' interest in property located at 19955 48th Avenue, Langley ("48th Avenue Property"), by way of separate transfers executed on July 5, 2004 and February 7, 2005, wherein the Decedents transferred the entirety of their interest in the 48th Avenue Property to the Defendant without consideration.
- [6] The plaintiff alleges that the Decedents intended that the 48th Avenue Property would form part of their Estate, of which the plaintiff is a 14% beneficiary of the residue.

- [7] Further, the Notice of Civil Claim ("NOCC") alleges that at no time did the Decedents intend to gift any portion of the 48th Avenue Property to the Defendant who, it is alleged, was a trustee for the Decedents' interest in the property.
- [8] In or about November 2016, the 48th Avenue Property was sold resulting in \$800,000 net proceeds, which the plaintiff alleges the Defendant subsequently wrongfully retained for her own use and benefit. The plaintiff alleges those funds should form part of the residue of the Estate.
- [9] It is conceded that the proceeds from the 56th Avenue Property and 48th Avenue Property comprise the vast majority of the former holdings of the Decedents. It is alleged in the NOCC that the Defendant was, at all times, a trustee of the Estate and was subsequently in breach of her fiduciary duty by acting contrary to the interests of the Estate.
- [10] The NOCC further alleges that the last will and testament of Rolande ("Will") did not make adequate or just and equitable provision for the plaintiff. The plaintiff seeks a greater share than that currently provided in the Will.
- [11] The plaintiff seeks a declaration as against the Defendant that she holds the sale proceeds in trust for the Estate.
- [12] The Defendant denies the claims, stating that the transfer of the 48th Avenue Property were gifts to her but, in any event, the plaintiff's claims against her are statute-barred.
- [13] The Defendant notes that, on November 7, 2011, a lawyer acting for the plaintiff wrote to the Defendant ("2011 Letter"), as follows:

We are advised that you are the Power of Attorney for Henry and Rolande Maussion (the "Donors"). We are also advised that you exercised this Power of Attorney to affect a sale of their residential home at 110 - 20120 56th Avenue, Langley, British Columbia, in or about August of 2011 (the "Sale").

Our clients are concerned over the management of the Donors' affairs, and whether such management is in keeping with your duty to act in the Donors' best interests. We note that as Power of Attorney, you are required to maintain accurate and current records of the Donors' accounts and to keep all money and property of the Donors separate and apart from your personal property. In this regard, we request that you produce an accounting of the Donors' financial affairs since the time you began to exercise your authority as Power of Attorney, which we expect would include an accounting of the Sale proceeds.

- [14] The Defendant produced no response to that inquiry, but suggests the contents raise the same matters as are now alleged in the NOCC. Hence, according to the Defendant, the plaintiff was aware as early as 2011 of the claims now raised.
- [15] Further, the Defendant refers to a letter of plaintiff's new counsel on January 17, 2017 ("January 2017 Letter"), which reads:

Further to our conversation of today's date, I confirm that we are investigating the transfer of the real estate at 19955-48 Avenue, Langley, BC, from Mr. and Mrs. Maussion to Isabelle in 2005. I should review the file to see if there was evidence of an intention to gift.

Please provide me with a copy of the file. For your convenience, I enclose a copy of the transfer.

Janet Atkinson appears to have prepared the will. Was she a member of your firm in 2009?

[16] Mr. Einarsson's correspondence was responded to at length in a letter dated February 8, 2017 ("February 2017 Letter"), the essence of which is that counsel for the Defendant stated:

We are instructed that the house transfer was a gift of Mr. Maussion's one-half interest to his daughter Isabelle. Our file review suggests there is no evidence of a trust transfer and no reason why there would be a transfer to Isabelle except if it was a gift. Our opinion is that this transfer falls outside of the estate. Should the estate or your clients wish to pursue this matter in litigation, the arguments that would be faced would in my legal submission be:

No evidence of a trust

Independent evidence of a gift from witnesses that Isabelle would call at trial.

Laches and limitation arguments

The Issue

[17] Is the plaintiff's claim statute barred?

Position of the Parties

[18] The Defendant argues that the plaintiff, by implication, was aware of his potential claim as early as November 7, 2011, when his counsel wrote the Defendant inquiring about the power of attorney in the sale of the 56th Avenue Property. Regardless, the Defendant says that the January 2017 Letter makes clear the plaintiff was aware of the circumstances giving rise to his alleged claim as against the Defendant. This action was commenced on January 31, 2019, more than two years following the date that the plaintiff is said to have learned of the claim.

[19] The plaintiff argues that the commencement of the limitation period begins from the receipt of the February 2017 Letter, which, for the first time, made him aware of the Defendant's denial of a resulting trust in favour of the Estate for the 48th Avenue Property, and her declared ownership of the sale proceeds of the 56th Avenue Property.

Discussion

The Law

[20] The matter is governed by the Limitation Act. Section 6 sets out the following:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

(2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.

[21] The Defendant says that the general discovery rules under s. 8 govern. Section 8 reads as follows:

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[22] The plaintiff argues that s. 12, which relates to the discovery of the particular claim, is applicable. Section 12 reads as follows:

12 (1) In this section, "fraud or trust claim" means

- (a) a claim based on fraud, or fraudulent breach of trust, to which a trustee was a party or privy,
- (b) a claim to recover from a trustee trust property, or the proceeds from the trust property, if
 - (i) that property is or those proceeds are in the possession of the trustee, or
 - (ii) that property was or those proceeds were previously received by the trustee and converted to the trustee's own use, or
- (c) any other claim arising out of the fiduciary relationship between a trustee and a beneficiary if the trustee
 - (i) wilfully conceals from the beneficiary the fact that

(A) injury, loss or damage has occurred,

(B) the injury, loss or damage was caused by or contributed to by an act or omission, or

(C) the act or omission was that of the person against whom the claim is or may be made, or

(ii) wilfully misleads the beneficiary as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.

(2) A fraud or trust claim is discovered when the beneficiary becomes fully aware

(a) that injury, loss or damage had occurred,

(b) that the injury, loss or damage was caused by or contributed to by the

- (i) fraud,
 - (ii) fraudulent breach of trust,
 - (iii) conversion, or
 - (iv) other act or omission
- on which the claim is based,
- (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
- (3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

[23] There is a difference between the two sections regarding discoverability of the claim. For claims generally under s. 8, "a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known" factors giving rise to the claim. Where claims are based on fraud or recovery of trust property, discoverability is governed by s. 12(2) noting that "a fraud or trust claim is discovered when the beneficiary 'becomes fully aware'" of the factors giving rise to the claim.

[24] The Defendant relies upon my decision in *Robinson v. Kuypers*, 2020 BCSC 770 [Robinson], which, she argues, is analogous to the situation here. In *Robinson*, the plaintiff and her parents were parties to an agreement which provided the parents with a life interest in the property. The agreement also provided that the plaintiff, according to a joint tenancy created on October 2007, would be entitled to the whole of the equity upon the death of the parents.

[25] The parents were to remain in exclusive occupancy of the subject property for so long as one of them was living and in occupation of the property. During their occupation, the parents were responsible for all costs associated with its use.

[26] It was undisputed that in mid-August 2014, the plaintiff in *Robinson* received a without-prejudice letter from counsel for her parents requesting her consent and cooperation in returning her legal one-third interest in the property back to her parents, based upon the proposition that she held that interest in resulting trust for the benefit of her parents. The plaintiff declined to do so and, more or less concurrent with that demand, her parents severed the joint tenancy with the plaintiff creating a tenancy-in-common, with the parents owning two-thirds of the property and the plaintiff owning one-third. The plaintiff was made aware of the severance of the joint tenancy no later than August 17, 2014.

- [27] The parents took no steps to recover the one-third interest of the plaintiff as tenant-in-common.
- [28] Following the death of her parents, the plaintiff brought an action seeking to enforce the agreement that she would receive the whole of the property upon the death of the last of her parents. That action was commenced well past two years since the time that she received notice of the severance of the joint tenancy. Following the death of her father in 2019 and while her mother still remained in the property, the action was begun.
- [29] The wording of the amended notice of civil claim filed on the plaintiff's behalf in Robinson made clear that the relief sought was grounded upon the wrongful severance of the joint tenancy. Given that assertion, I concluded that the notification of the transfer of the parents' interest from joint tenancy into tenancy-in-common was sufficient at law to commence the running of time under the Limitation Act. Hence, the action against the trust (which owned the parents' interest in the property) and the parents was statute-barred.
- [30] In this case, the Defendant argues that the 2011 Letter makes clear the plaintiff was aware of the circumstances underlying this litigation in 2011, and the running of time should commence as of the date of that letter. Alternatively, the Defendant argues that the January 2017 Letter makes clear the plaintiff was aware of the circumstances giving rise to the claim against the Defendant and, as such, the action having commenced more than two years following that date should be statute-barred.
- [31] There is no doubt that an action which is statute-barred may be dismissed pursuant to Rule 9-6: see *Tinaburri v. North Vancouver (District)*, 2014 BCSC 661, wherein Madam Justice Baker noted, at para. 107:
- [107] Although caution must be exercised in dismissing an action on a summary basis because of the expiry of a limitation period, where an action has clearly been commenced out of time, dismissal pursuant to Rule 9-6 is warranted.
- [32] The plaintiff argues that until the Defendant made clear in the February 2017 Letter that she did not hold either properties or the net sale proceeds from the properties in trust for her parents or the Estate, the limitation period did not begin to run.
- [33] In support of that proposition, counsel referred me to *Bacic v. Bacic Estate*, 2010 BCSC 728 [Bacic], and *Lennox v. Lennox*, 2019 BCSC 938 [Lennox].
- [34] In *Bacic*, Mr. Justice Butler, as he then was, noted beginning at para. 57:
- [57] The defendant's argument presumes that the limitation period began to run once the plaintiff knew the Parkview property was not registered in his name, contrary to the trust obligation. However, this argument fails to take into account the language of s. 6(1) of the Limitation Act. This is an action to recover trust property from a trustee and so the running of time "is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the

trustee on which the action is based." (emphasis added). There is no allegation here of fraud, fraudulent breach of trust or conversion. The plaintiff's action is based on the trustee's failure to transfer the Parkview property to him and the denial of the existence of the trust. Accordingly, the limitation period is postponed until the plaintiff became aware that his right to have the Parkview property registered in his name would not be honoured by Ms. Tomas or by Mr. Tomas as the administrator of Miljenko's estate.

- [58] In Rankin, Bouck J. was faced with a claim that had some similarity to the present situation. He accepted the defendant's concession that the limitation period began to run when the trustee denied the existence of the trust and applied that reasoning to all of the trust claims advanced by the plaintiff. He stated as follows at 245:

Although the contest is over property acquired prior to the separation on 12th July 1968, the defendant concedes that time began to run for limitation purposes when he refused to acknowledge he was holding the property in trust for the plaintiff. This occurred on 3rd March 1971 when the defendant filed his defence to the 1970 amended statement of claim and denied any trust obligation.

- [59] In *Vandenbosch v. Vandenbosch* (1988), 32 B.C.L.R. (2d) 190 (C.A.) at 194, Esson J.A. commented on the postponement provision in s. 6(1). He accepted, without having to decide the issue, that, depending on the circumstances of the case, the limitation period under that section commences to run when a trustee denies the existence of a trust:

For the purposes of this appeal, I need consider only s. 6(1)(b). In my view that section, which expressly deals as does s. 3(2) with an action to recover trust property, must be read together with s. 3(2). When those two provisions are read together, we find that s. 3(2) fixes the 10-year period but does not fix the time at which that period begins to run. That is fixed by s. 6(1)(b), and is of course something which depends upon the facts of the particular case. I express no view as to what is the applicable date in this case. Merely by way of illustrating a possibility, I note that, in a somewhat similar case, Bouck J. accepted counsel's suggestion that it was when the defendant refused to acknowledge he was holding the property in trust for the plaintiff: *Rankin v. Irving* (1983), 47 B.C.L.R. 242 at 245, 14 E.T.R. 261 (S.C.).

- [35] The plaintiff says the same circumstances exist here. The claim is founded on a breach of trust and, as such, the running of time only commences when the plaintiff knew (not ought to have known) of the factors giving rise to support a claim. In *Lennox*, a similar conclusion was reached by Madam Justice Horsman.
- [36] In *Lennox*, the petitioner and respondent entered into a separation agreement providing for the sale of the subject property and division of the proceeds. However, the property was not sold, and the petitioner, while out of the country, subsequently transferred his interest to the respondent. There was no consideration for the transfer. Almost 10 years later, the petitioner filed a petition seeking partition and sale of the property together with a declaration of trust that the respondent held one-half the property in trust for him under the law of resulting trust.

- [37] The respondent raised a limitation defence saying that the action was barred by the limitation period because the petitioner's claim either arose when the parties separated or, alternatively, as of the date of their divorce, and is subject to a two-year limitation period.
- [38] Commencing at para. 44, Horsman J. noted:
- [44] In considering the application of the Limitation Act, it is important to be clear about the nature of the petitioner's claim. His fundamental claim is that the respondent holds his interest in the Property in trust and has declined to return the Property to him on demand as the terms of the trust required. This is a "trust claim" within the meaning of s. 12 of the Limitation Act.
- [45] Section 12(2) of the Limitation Act sets out the discoverability rules relating to a trust claim. In relevant terms, s. 12(2) provides that a trust claim is discovered when the beneficiary becomes fully aware that the injury, loss or damage had occurred, that it was caused by an act or omission of the person against whom the claim is brought, and that having regard to the nature of the injury, loss or damage, a court proceeding was appropriate.
- [46] In the present case, the triggering event for the operation of the limitation period was the point in time that the petitioner became fully aware that the respondent denied existence of the trust and would refuse to transfer his interest in the Property back to him: *Bacic v. Bacic Estate*, 2010 BCSC 728 at paras. 57-58.
- [47] The petitioner's evidence is that until February 2017 the parties were engaged in discussion of a potential buy-out of his interest. It was only once the petitioner realized that the respondent did not recognize the trust and refused to effect a transfer that he filed this petition in March 2017. This was well within the applicable limitation period. The respondent has not adduced evidence to suggest that the petitioner was fully aware of the respondent's denial of the existence of the trust at an earlier date.
- [39] With that, the limitation defence was dismissed.
- [40] The Defendant seeks to distinguish those two cases by arguing that, in each of them, the claiming party was claiming as a beneficiary under a trust. Uniquely, here, the plaintiff does not allege the benefit of a trust in his favour, but rather in favour of the Decedents, i.e. his mother and father.
- [41] No issue was taken to the standing of the plaintiff either in the response to civil claim or in these proceedings.
- [42] I agree with the plaintiff that the matter is addressed in *Drummond v. Moore*, 2012 BCSC 496 and *Doucette v. McInnes et al*, 2007 BCSC 289. In both instances, non-executors have been found to have standing to challenge joint tenancies and inquire about assets that did not form part of an estate.

- [43] Noting the plaintiff is the biological son of the Decedents and, under the terms of the Will, entitled to 14% of the residue, the plaintiff has a clear and distinct interest in the value of the Estate and also in whether the Estate has been deprived of the value of assets which ought to be included in it.
- [44] In my view, the 2011 Letter addresses a totally different issue than is raised in the NOCC.
- [45] In 2011, both the plaintiff and one of his brothers, another beneficiary of the Estate, raised concerns over the management of their parents' affairs through the use of the power of attorney executed in favour of the Defendant. Nothing in the 2011 Letter, in my view, gives rise to the notion that the plaintiff was aware of the allegations which now underpin the claim made in the NOCC. As to the January 2017 Letter, it too is a mere inquiry as to the circumstances surrounding the transfer of the 48th Avenue Property and, in my view, does not give rise to any inference other than the plaintiff was aware of the transfer from his parents to the Defendant in 2005.
- [46] It was not until the February 2017 Letter, wherein it was asserted on behalf of the Defendant, that the transfer of the 48th Avenue Property was a gift and, for the first time, the Defendant denied the existence of a trust or that she held any interest in the 48th Avenue Property as a result of the operation of the doctrine of resulting trust. The response contains no suggestion that consideration was given by the Defendant to her parents for the transfer of property into her name.
- [47] In the result, I find this matter is governed by the principles in *Bacic* and *Lennox*. Actual notice to the plaintiff of the Defendant's denial of any but a legal interest in the property was given in the February 2017 Letter. In the result, the action was properly commenced within the two-year limitation period.
- [48] Accordingly, the application is dismissed. The plaintiff will have the costs of this application in any event of the cause.

"Harvey J."

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