
CANADA / JUDGMENT

McCarty v. McCarty

2018 BCSC 686

COURT

Supreme Court of British Columbia

DECIDED

30 April 2018

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2018 BCSC 686 McCarty v. McCarty

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCarty v. McCarty,

2018 BCSC 686

Date: 20180430

Docket: S156600

Registry: Vancouver

Between:

Daniel Britt McCarty

Plaintiff

And

Joel Halldorson McCarty and Diedre Lynn Taylor

Defendants

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

Plaintiff Acting on own Behalf:

D. McCarty

Counsel for the Defendants:

J.A. Hall

Place and Date of Trial:

Vancouver, B.C.

April 9-13, 2018

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2018

- [1] The Plaintiff sues his brother Joel McCarty ("Joel") and Joel's wife, Diedre Taylor, relating to a number of times when he advanced funds to Joel and now claims that there was a "resulting trust...to the extent, proportionality, of his contributions" to two properties in Port Moody. The action is defended on the basis that any funds advanced were in the nature of loans, that any loans have been repaid, and that there is no resulting trust arising from the dealings between the parties. As well, the Defendants counterclaim for damages arising as a result of the filing of Certificates of Pending Litigation against the two properties.

BACKGROUND

- [2] The Plaintiff is the older brother of Joel. The Plaintiff stated at Trial that he provided Joel with financial assistance from time to time. The advances he made included \$800.00 advanced in 2001.
- [3] On June 27, 2001, the Defendants purchased property at 2329 Henry Street, Port Moody ("2329"). The Plaintiff states that he provided funds to the Defendants to assist in that purchase including an advance of \$1,300 so that a down payment for the purchase of 2329 could be made. The purchase price for 2329 was \$225,000.
- [4] In evidence was an October 2002 "Agreement of Purchase & Sale" ("Agreement") regarding a boat and an outboard motor. The Plaintiff and the Defendants signed it. The Agreement provided: "The parties agree that the purchase price includes; \$1,800 personal loan paid by Joel McCarty and Deidre Taylor June of 2001 plus the assumption of the loan on the Honda motor as of October 1, 2002."
- [5] On either September 2 or September 20, 2003, the Plaintiff assumed the liability of the Defendants to Honda Canada Finance Inc. ("Honda Canada"). A September 20, 2003 Assumption Agreement described the Plaintiff as the "Assignee" and the Defendants as the "Buyers". The Defendants state that this transaction assisted Joel in making a successful proposal to his creditors and that the assumption of debt was accompanied by the transfer to the Plaintiff of the ownership of the boat and the motor which was the subject matter of the financing that had been arranged by the Defendants with Honda Canada, and the repayment of monies that had been advanced by the Plaintiff to Joel as is set out in the Agreement. The Plaintiff claims that the assumption of the Honda Canada indebtedness was part of a transaction whereby a beneficial interest in 2329 for the Plaintiff was acknowledged and

states that he would only have assumed the liability of the Defendants to Honda Canada on the basis that he was obtaining a beneficial interest in 2329 at the same time.

- [6] The recollection of the parties about a discussion at Honda Canada differs. Regarding their discussion at Honda Canada, the Plaintiff testified that he required "My name on title with \$16,500 equity.", that Joel indicated that he was not prepared to do that, that he stated that he threatened to leave Honda Canada and that he stated to Joel: "You either give me the equity in the house or I'm walking. It's that simple." At Trial, the Plaintiff quoted Joel as saying: "I need you to sign this now" and that he then said: "I said okay, you agree then." The Plaintiff confirmed that he did not have any discussion with Ms. Taylor at the time and that she was not present when the discussion with Joel occurred. Joel denies that any such discussion took place at that time or later.
- [7] Also in evidence was a copy of the Agreement with a number of stipulations relating to the Agreement in the handwriting of the Plaintiff including that Joel was to provide the PID number for 2329, that "britt's [the Plaintiff's] name on title and next renewal bank mortgage" for "Equal & Full equity in house" and \$16,500 "Equity in 2329 Henry". While there was considerable evidence at Trial as to whether and when what was written on the Agreement was added, I cannot be satisfied that the additions were agreed to by the Defendants or either of them.
- [8] At his Discovery, the Plaintiff conceded that neither of the Defendants were there when his handwriting was added and that the handwriting was added to a copy of the Agreement that had already been signed by the Defendants. While the Plaintiff agreed with the statement that: "this handwriting is your effort to record what you say was your agreement that you reached with Joel that day?", I am satisfied that the Plaintiff has not proven on a balance of probabilities that either Joel or Ms. Taylor agreed to what was set out on the Agreement in the handwriting of the Plaintiff. In this regard, the Plaintiff at no time followed up with documentation of what he added in his handwriting on the Agreement.
- [9] In his July 21, 2016 Examination for Discovery, Joel stated that he did not advise the trustee under his proposal to creditors of any amounts owing to the Plaintiff. I am satisfied that this is consistent with the Agreement being in satisfaction of any amounts owing by Joel to the Plaintiff at that time. Consistent with what was set out in the Agreement is the fact that, after the transfer of the boat and the motor, the Plaintiff appears to have taken possession and to have spent money relating to the boat and motor. In evidence were copies of invoices for repairs undertaken on the motor by the Plaintiff: January 9, 2006 (\$815), August 9, 2009 (\$71.27), July 28, 2010 (\$269.10), May 8, 2014 (\$12.21), and September 13, 2014 (\$171.76). Also in evidence was a June 3, 2014 ICBC Insurance Statement in the name of the Plaintiff relating to the utility trailer that was used from time to time to move the boat and motor.

- [10] As the first pre-authorized debit against the bank account of the Plaintiff from Honda Canada was on September 2, 2013 in the amount of \$223.26, I find that, while some documentation was signed by the Defendants at a later date, the Honda Canada documents that were necessary to facilitate the Plaintiff assuming the liability of the Defendants were signed by the Plaintiff on September 2, 2013.
- [11] The indebtedness of the Plaintiff to Honda Canada was paid out by June of 2006.
- [12] On June 27, 2008, the Defendants purchased 2331 Henry Street in Port Moody ("2331") for \$740,000. The purchase was financed by way of a \$569,500 mortgage on 2331 and a new \$520,000 mortgage over 2329. The new mortgage over 2329 was applied to repay an existing mortgage against 2329 and the remainder being applied to the purchase price of 2331. The Plaintiff submits that the \$520,000 mortgage constituted "...a mortgage of the Plaintiff's equity in 2329 Henry".
- [13] Referring to the "transactions described above" as set out in the Notice of Civil Claim, the Plaintiff claims that the Defendants hold 2329 and 2331 "...on a resulting trust for the Plaintiff to the extent, proportionality, of his contributions."
- [14] On January 26, 2011, a \$80,000 mortgage in favour of Fang Liu, the wife of the Plaintiff, was registered in the Land Title Office as a second mortgage behind first mortgages in favour of The Toronto-Dominion Bank against 2329 and 2331. The Plaintiff states that this mortgage was obtained by the Defendants without the understanding of Fang Liu that the funds advanced by her were used for a mortgage in favour of the Defendants rather than for a down payment on a house that the Plaintiff and his wife intended to purchase. The Plaintiff states that the availability of those funds became known to the Defendants after receiving a June 8, 2010 email that he sent to a number of relatives advising that their "old home" had been sold and that "we will sell it when I am finished [repairs] and then I will build a new house on the Island". The Defendants state that the Plaintiff and Fang Liu were well aware that the \$80,000 was being advanced to them and that the funds advanced were to be secured by a mortgage over 2329 and 2331.
- [15] From time to time, the \$80,000 mortgage was extended and the interest rate under the mortgage was modified.
- [16] There is nothing in evidence to suggest that the Plaintiff or his wife ever raised in writing or otherwise that the \$80,000 advanced to the notary who registered the mortgage was used by her for a purpose other than what was originally intended by them and that the \$80,000 received should have been available to the Plaintiff and his wife and should not have been advanced to the Defendants. In any event, the Plaintiff in his August 12, 2015 Notice of Civil Claim does not allege that the \$80,000 mortgage in favour of his wife was a transaction which produced the "resulting trust" relating to 2329 and 2331.

[17] 2331 had been a rental property with the Defendants residing at 2329. In March of 2015, the Plaintiff and Joel met to discuss 2331 and the possibility of the Plaintiff working at 2331 to power-wash and re-stain the cedar deck, to remove and replace the deck membrane over the garage, and to repair and repaint some of the dry wall. Joel followed up on that discussion by sending the Plaintiff a March 31, 2015 summary of their discussion ("Memorandum"). The Memorandum set out various scenarios regarding 2329 and 2331 including the possibility that the Plaintiff would receive 50% of the profit on a sale if the two properties were subdivided into three lots; would receive a salary and a portion of the profit if approval of combining the properties into one lot occurred; would receive a salary and 50% of the profit on a sale of the two properties which would be valued at \$700,000 for 2329 and at \$900,000 for 2331; or would be "paid on a predetermined rate" if the plan to fix up the two properties proceeded. The Memorandum also provided:

Joel agrees to provide Britt with an opportunity to secure 1 of the 2 projects Joel has been awarded at start of the summer. The value of this is to be negotiated as trade off for Britt's assistance in maximizing the money generated from unloading the properties as noted above.

- [18] The Plaintiff did not respond to the Memorandum to indicate that it was inaccurate or that it did not represent the agreement that had been reached with Joel.
- [19] The Plaintiff undertook considerable work on 2331 and claims that he spent 137 hours which equals \$6,165 at the rates that were agreed to by Joel. The Plaintiff also claims out-of-pocket expenses in the amount of \$634.88 and fuel costs to commute to 2331 of \$736.13. The Plaintiff received two cheques relating to his work at 2331: an April 2, 2015 \$500 cheque for relating to "supplies to repairs 2331 Henry" and a May 2, 2015 \$1,500 cheque relating to "2331 Henry".
- [20] The evidence of Joel was that he had two employment opportunities in 2015, that he took one opportunity himself, that he introduced the Plaintiff to the principals of the other project, and that the Plaintiff was subsequently employed on that project. The Defendants submit that the value to the Plaintiff of his employment on the second opportunity that had been available to Joel was to be set off against the work that the Plaintiff had undertaken on 2331 so that no further funds are owing to the Plaintiff and, in any event, the Plaintiff is not entitled to an interest in either 2329 or 2331 as a result of his labour.
- [21] In the August 12, 2015 Notice of Civil Claim, the Plaintiff does not refer to the work that he undertook at 2331 as establishing that the Defendants held 2329 and 2331 "...on a resulting trust for the Plaintiff to the extent, proportionally, of his contributions". As well, there is no claim for unjust enrichment relating to the work that the Plaintiff undertook at 2331.

- [22] In the Summer of 2015, the Defendants arranged for sales of 2329 and 2331. On learning of the sales, the Plaintiff filed August 12, 2015 Certificates of Pending Litigation against 2329 and 2331. Because of these filings, the Defendants were not in a position to complete the sales of 2329 and 2331 that had been arranged. An action by the proposed purchaser of 2329 was commenced in the Provincial Court of British Columbia (Small Claims Court) and a claim for damages of \$20,216 was advanced.
- [23] The Defendants made application on September 1, 2015 to cancel the Certificates of Pending Litigation. On September 1, 2015, Master Baker made an order cancelling the Certificates of Pending Litigation and requiring the Defendants to post security in the amount of \$500.
- [24] After the Certificates of Pending Litigation were discharged, the properties were sold with the prices paid for 2329 of \$750,000 and \$898,000 for 2331.
- [25] On January 19, 2016, the Defendants paid \$5,000 to settle the action that had been commenced in the Provincial Court of British Columbia relating to 2329.

DISCUSSION AND CASE AUTHORITIES

- [26] On the question of whether there is a resulting trust or a constructive trust, D. Smith J.A. made this statement on behalf of the Court in *Kerr v. Barnow*, 2009 BCCA 111:

A resulting trust is an equitable doctrine that, by operation of law, imposes a trust on a party who holds legal title to property that was gratuitously transferred to that party by another and where there is evidence of a common intention that the property was to be shared by both parties. In these circumstances, the law raises a rebuttable presumption of a resulting trust to the transferee.

A constructive trust is an equitable remedy that provides proprietary relief for property in the name of another, where a claim of unjust enrichment is established by the non-owning party and a monetary award based on quantum meruit would not be adequate. The three-fold elements of unjust enrichment include enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment. The onus of proof is on the plaintiff to establish each of the elements of the claim: *Rathwell*; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Peter v. Beblow*, [1993] 1 S.C.R. 980.

(at paras. 42-43)

- (a) Was There a Resulting Trust?

- [27] It is clear that a resulting trust exists only where there is an agreement or a common intention, expressed or implied, to share an asset: *Brundage v. Campbell*, [1993] 2 W.W.R. 186 (B.C.C.A.).
- [28] I cannot conclude that there was a resulting trust.

- [29] First, the approach that the Plaintiff took regarding funds that he advanced to Joel is inconsistent with what he now alleges. In his materials produced at Trial, the Plaintiff refers to various amounts advanced and repaid as being "loans". The Plaintiff attached the May 25, 2001 statement from his credit union indicating that the \$800 advanced on May 24, 2001 to the Defendants was a "Loan", that the \$1,300 advanced to the Defendants towards a down payment on 2329 was a "Loan", and that a \$300 repayment by the Defendants of \$800 was described as a repayment of a "Loan". Advances of \$100 and \$1,200 for "Down Payment on 2329" were also described in the materials presented by the Plaintiff as a "Loan[s]". As well, a December 5, 1997 cheque from Joel was cashed by the Plaintiff with the cheque indicating that the purpose of the cheque was "Loan Repay".
- [30] Second, the Plaintiff was examined for discovery on July 20, 2016. Regarding the amounts advanced to Joel and to Ms. Taylor, the Plaintiff invariably referred to the money advanced as money that he "lent". The advances in June of 2001 were described by the Plaintiff as follows: "I lent him money and made it to pay his rent. Then I lent him money in June for his down payment."
- [31] Third, at his Discovery, the Plaintiff confirmed that there was no discussion in June of 2001 about "any equity in any house". In this regard, he stated: "In June - and even during the year we never discussed equity in his house, nothing like that". For the year 2001, the Plaintiff confirmed that he was simply owed money by Joel. He also confirmed that, prior to meeting with Joel at Honda Canada, there was no discussion between him and Joel about equity in 2329.
- [32] I cannot find that there was "common intention" required to establish a resulting trust. While the Plaintiff may well have understood that the Defendants held an interest in 2329 and/or 2331 in a trust for him, there is nothing before me which would allow me to conclude that the Defendants had a common intention that this would be the case. I am satisfied that the Plaintiff has not proven on a balance of probabilities that the notations on the Agreement were made to reflect an agreement that had been made between the Plaintiff and Joel, that the additions were made in the presence of Joel, or that Joel subsequently acted in accordance with the additions that had been added to the Agreement. In any event, I cannot conclude that any agreement was reached regarding the interest of Ms. Taylor in 2329 and/or 2331.
- [33] I find that the Agreement sets out the only agreement between the Plaintiff and the Defendants. I am satisfied that what was signed by the Plaintiff and the Defendants is clear. The transfer of the boat and the motor covered by the agreement with Honda Canada constituted a purchase by the Plaintiff with the purchase price including the forgiveness of previous loans made by the Plaintiff to Joel plus the assumption of the loan undertaken by the Defendants with Honda Canada. I have concluded that funds that were previously been advanced by the Plaintiff to Joel and/or to the Defendants constituted loans only, that all loans were repaid as a result of the Agreement, and that no transaction between the Plaintiff and Joel and/or the Defendants constituted the creation of a resulting trust as is claimed by

the Plaintiff.

(b) Was There a Constructive Trust Arising From a Claim for Unjust Enrichment?

[34] To establish a constructive trust, there must be: (a) an unjust enrichment of one person; (b) a corresponding deprivation of the other; and (c) no juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; and *Peter v. Beblow*, [1993] 1 S.C.R. 980.

[35] The claim to a "trust" is made solely on the basis of transactions other than the \$80,000 mortgage and the work that was undertaken by the Plaintiff on 2331 in the spring and summer of 2015. The Plaintiff acknowledged that he had received the Memorandum but that he made no efforts to dispute its contents. As well, the Plaintiff admitted that he had obtained the employment from the second project that had been awarded to Joel at the start of the summer. At no time did the Plaintiff state that he had not been fully compensated by the \$2,000 that he received in April and May of 2015 and by the employment opportunity provided on the recommendation of Joel. While I might have concluded that the three elements to prove unjust enrichment had been proven by the Plaintiff so that a constructive trust would be available for him, no such claim relating to the work that had been undertaken by the Plaintiff on 2331 was set out in the Notice of Civil Claim. I am satisfied that the agreement that was set out in the Memorandum should prevail.

[36] The claim of the Plaintiff for a "resulting trust" relating to 2329 and 2331 is dismissed.

COUNTERCLAIM OF THE DEFENDANTS

[37] In anticipation of the completion of the sales of 2329 and 2331, the Defendants moved to Vancouver Island anticipating that the sale proceeds would be available so that they could purchase a new home there. The amounts set out in the Counterclaim relate the continuing costs of 2329 and 2331 as well as the costs on Vancouver Island which were incurred as a result of the delay relating to the availability of funds from the sales of 2329 and 2331. The Defendants claim \$17,901.77 by way of Counterclaim arising out of expenses which were incurred as a result of the filing of the Certificates of Pending Litigation against 2329 and 2331 That amount is made up as follows:

(a)

Smalls Claims settlement:

\$5,000.00

(b)

Travel costs from Victoria to Port Coquitlam relating to the action of the purchaser of 2329:

\$302.68

(c)

Mortgage payments on 2331 for two months:

\$6,644.00

(d)

Storage of household goods for two months:

\$262.50

(e)

Vacant house insurance for two months:

\$472.00

(f)

Rent for the Sooke apartment for two months:

\$2,400.00

(g)

Home depot credit cost:

\$432.00

(h)

Property tax (Aug. 15/Oct. 30):

\$891.54

(i)

Liu interest (Aug. 15/Oct. 30):

\$1,497.00

TOTAL

\$17,901.72

[38] If there is no legal basis for filing a CPL, an application can be made under s. 256 of the Land Title Act, R.S.B.C. 1996, c. 250 to discharge the CPL. In this case, that was what was done and the application of the Defendants resulted in the order of Master Baker.

[39] If it can be shown that a CPL was filed for an improper purpose, a claim for damages for abuse of process can be made. In *Palmer v. Palmer*, 2015 BCCA 438, Chiasson J.A. on behalf of the Court, made these statements in that regard:

The judge correctly stated the law:

[45] The tort of abuse of process is made out when a party shows a misuse or perversion of the Court's process for an exterior or ulterior purpose. *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*, [1984] 59 B.C.L.R. 333 (S.C.), aff'd [1986] 6 B.C.L.R. (2d) 291 (C.A.).

In addition to *D.K. Investments Ltd.*, the appellant relies on *Guilford Industries Ltd. v. Hankinson Management Services Ltd.* (1973), 40 D.L.R. (3d) 398 (B.C.S.C.), and *Hundal v. Border Carrier Ltd.*, 2012 BCSC 447, to support his contention that the CPL was filed for an improper purpose.

The respondents assert that conduct that supports a claim for abuse of process must be more than using the litigation process for a purpose for which it is not designed and must be malicious or nefarious. I do not think attempting to label conduct is of assistance. Essentially, the issue is a question of fact.

In the cases to which we have been referred, the judges made clear findings that the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable. In *Hundal*, Fenlon J., as she then was, stated:

[104] In considering whether Mr. Hundal had an unlawful or malicious purpose in filing the CPL, I set aside the question of whether the constructive trust pleaded by Mr. Hundal is Border Carrier's claim rather than his personally, and further set aside the question of whether there was any real prospect of recovery of an interest in property rather than an award of damages if unjust enrichment could be established. The question I am left with is not whether the plaintiff properly framed and pleaded his cause of action in unjust enrichment, but whether he framed his case in this way knowing that there was no basis for a claim against Mr. Bains' home and for the improper purpose of filing a CPL to inconvenience Mr. Bains and obtain an advantage in the litigation: *Seville Properties Ltd. v. Coutre, et al*, 2005 BCSC 1105. [Emphasis added.]

In the result, she concluded the plaintiff had acted maliciously and awarded damages for abuse of process.

(paras. 48-51)

[40] Although the Court in *Palmer* concluded that the Certificate of Pending Litigation should not have been filed, the Court also concluded that parties had relied on their lawyer but that "...does not absolve them from responsibility, but it is a relevant factor in assessing whether they acted improperly." and that the appellant took no immediate steps to remove the CPL. The Court concluded that it would not interfere with the conclusion of the learned trial judge that the claim for abuse of process was not made out on the facts.

[41] In *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*, [1984] B.C.L.R. 333 (B.C.S.C.), Finch J. (as he then was) made this statement:

The essence of the tort of abuse of process is the misuse or perversion of the Court's process for an extraneous or ulterior purpose. There must be a purpose other than that which the process was designed to serve: see *Guilford Industries Ltd. v. Hankinson Management Services Ltd., Gibraltar Contracting Ltd. and Smith*, [1974] 1 W.W.R. 141, 40 D.L.R. (3d) 398 (B.C.S.C.), and the authorities cited there. An action for specific performance has as its narrow purpose the completion and fulfilment of contractual obligations undertaken by the parties. On a broader ground, it is one means of enforcing the orderly conduct of commercial transactions. Here, the plaintiff's purposes were completely outside the ambit of any legitimate object such an action might have had. The plaintiff did not wish to complete the agreement it had made with the defendant. It knew it had no claim to fixtures other than the building. The action was commenced, and manipulated, by the plaintiff to coerce the defendant to sell at a lower price than that bargained for, or to obtain for the plaintiff from Acton benefits which the plaintiff could not otherwise obtain. The means of coercion was delay of the agreement's completion (at para. 113)

- [42] While Master Baker concluded that an order should go discharging the Certificates of Pending Litigation that had been filed against 2329 and 2331, I am satisfied that I am not bound by the conclusion that he reached when dealing with the claim for abuse of process.
- [43] In dealing with this claim for damages, I cannot be satisfied that the filing of the Certificates of Pending Litigation was extraneous to and was substantially unsupportable regarding the Notice of Civil Claim that had been filed. I cannot conclude that there was not basis for a claim against 2329 and 2331 or that there was any improper purpose for the filing of a Certificates of Pending Litigation for a purpose that was completely collateral to the claims advanced. While not proven in these proceedings, the Plaintiff had an equitable claim to an equity position in 2329 and 2331 and the only way that he had to protect that position was to file Certificates of Pending Litigation against 2329 and 2331. In this regard, I also take into account that the Plaintiff acted on the advice of his solicitor prior to commencement of the Notice of Civil Claim and the filing of the Certificates of Pending Litigation. Here, the Plaintiff did not use the ability to file a Certificate of Pending Litigation as a misuse or perversion of the process of the Court. Rather, the filings were legitimate attempts on behalf of the Plaintiff to protect his claim.
- [44] As I cannot conclude that the Certificates of Pending Litigation filed against 2329 and 2331 were filed for an improper purpose, the claim of the Defendants for damages for abuse of process is dismissed.
- [45] The security in the amount of \$500 posted by the Defendants will be released to them or to their counsel.

SUMMARY

- [46] The claim of the Plaintiff is dismissed as is the Counterclaim of the Defendants.

[47] The parties will be at liberty to speak to the question of costs.

"Burnyeat J."

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Prepared on 29 October 2026 · Esheria