
CANADA / JUDGMENT

MIG Group Ltd. v. Milani

2019 BCCA 382

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 382 MIG Group Ltd. v. Milani

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

MIG Group Ltd. v. Milani,

2019 BCCA 382

Date: 20191030

Docket: CA46163

Between:

MIG Group Ltd.

Appellant

(Petitioner)

And

Nima Ali Rirash a.k.a. Nima Ali Milani

Respondent

(Respondent)

Before:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Garson

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia,

dated June 7, 2019 (MIG Group Ltd. v. Milani, 2019 BCSC 912, New Westminster Docket H201486).

Oral Reasons for Judgment

Appearing on behalf of the Appellant:

F. Milani

Counsel for the Respondent:

R. Soni

Place and Date of Hearing:

Vancouver, British Columbia

October 30, 2019

Place and Date of Judgment:

Vancouver, British Columbia

October 30, 2019

Summary:

The appellant brought a foreclosure petition in relation to a mortgage registered against title to the respondent's property. The chambers judge struck the petition on the basis of issue estoppel, finding that the court had determined the mortgage to be invalid in family law proceedings between the respondent and a privy of the appellant. The appellant challenges the order to strike. Held: Appeal allowed. The court did not determine the validity of the mortgage in the family law proceedings. Consequently, the doctrine of issue estoppel does not apply.

- [1] D. SMITH J.A.: MIG Group Ltd. ("MIG") appeals an order striking a petition of foreclosure commenced by MIG with respect to a collateral mortgage registered against the title to real property in the name of the respondent, Nima Ali Rirash, formerly Nima Milani.
- [2] Ms. Rirash successfully applied for an order striking the petition on the basis of issue estoppel. She contended that all of the petitioner's claims were decided in the family law proceeding under the Family Law Act, S.B.C. 2011, c. 25, between herself and her former husband, Farshid Milani (the "Family Law Decision"): see *Milani v. Milani* (28 March 2018) New Westminster Docket E50984 (B.C.S.C. Chambers).
- [3] MIG appeals the order, submitting that the judge who granted the order quashing the petition erred in her interpretation of the judge's reasons in the Family Law Decision. Therefore, he submits, the judge erred in finding that MIG was estopped from commencing the underlying petition of foreclosure.

The Family Law Decision

- [4] A brief review of the Family Law Decision is necessary to provide the context for this appeal.

- [5] The judge found that the "known" family property included a condominium valued at \$400,000 in which Mr. Milani and Ms. Rirash resided during their marriage; two mobile homes, one in the Lower Mainland and one in Mexico, each valued at \$12,000; a motorcycle worth \$12,000; a vehicle worth \$4,000; and a truck worth \$3,000.
- [6] The judge found the total value of the net family property was \$163,000 (at para. 81). This finding reflected a net value of about \$120,000 for the condominium after deducting a first mortgage with a balance of about \$173,000 and a collateral mortgage in favour of MIG with a balance of approximately \$100,000.
- [7] The condominium was registered in the name of Nima Milani. When the parties purchased the condominium, MIG provided a loan of \$81,000 for the down payment. That loan was secured by a promissory note and a collateral mortgage registered against the title to the condominium. Both security instruments were signed by Ms. Milani (as she then was).
- [8] In the family law proceeding, Mr. Milani alleged that three loans from MIG, including the \$81,000 loan for the down payment on the condominium, were debts owed by Ms. Rirash to MIG. He claimed the other two loans were for (i) renovations to the condominium; and (ii) monies given to Ms. Rirash before the parties' separation. These latter two alleged loans were undocumented. Mr. Milani calculated the total amount of the three loans from MIG to be \$211,846.
- [9] In the Family Law Decision, Justice Harvey rejected most of Mr. Milani's claims with respect to the alleged loans. He found that MIG was "the alter ego of the claimant [Mr. Milani] and what is MIG's is therefore the claimant's" (at para. 76). He found that Mr. Milani, who was a director of MIG, effectively used the company's account as a personal bank account:
- [21] I conclude that MIG is nothing more than a bank account from which the claimant [Mr. Milani] has drawn money to fund his and the respondent's [Ms. Rirash's] lifestyle. There is no evidence of reporting to its purported owners or that MIG's funds have been used in ways other than to advance the claimant's own financial interest. MIG has never prepared financial statements accounting for the manner in which the claimant has steadily drawn upon it for the support of him and the respondent.
- [10] The principal issue in the family law proceeding became the validity of the three loans Mr. Milani claimed were owed to MIG. The difficulty for the judge in assessing those claims was Mr. Milani's lack of disclosure. In particular, Mr. Milani failed to provide adequate disclosure regarding MIG's principals, the nature of its business, and its financial circumstances including its assets and revenue, notwithstanding court orders compelling him to do so. Mr. Milani had access to that information but only disclosed "selective documents he believed would assist him in asserting that there were loans owing from the parties to MIG" (at para. 73). The judge also found much of Mr. Milani's testimony lacked credibility in the face of his demonstrated dishonesty about a number of matters.

- [11] Having found that, effectively, MIG was Mr. Milani's personal bank account, and in light of the inadequate disclosure by Mr. Milani of his interest in MIG, the judge turned to the circumstantial evidence of the parties' lifestyle. He found that during the marriage their lifestyle included "driving two BMW X5s, ownership, or usage, of a cabin cruiser, and some travel to Mexico" (at para. 26). He also found:
- [78] The claimant's [Mr. Milani's] lifestyle throughout the marriage belies all that he has told me. While it may not be that the parties lived lavishly, they lived comfortably and for the period following his divorce [from his first wife] until sometime in 2013 also were able to provide for the support of three children without the assistance of their mother. There was no evidence the mother contributed anything or that the claimant now contributes anything to the support of his children or has since 2013.
- [12] It was only during the trial that Ms. Rirash first became aware that Mr. Milani had commenced a foreclosure proceeding on behalf of MIG to effect a sale of the condominium while Ms. Rirash was still living there. Ms. Rirash had not been served with any documents regarding the foreclosure proceeding and the information about it was only revealed when it was "drawn out of [Mr. Milani] during his testimony" (at para. 39). With respect to that proceeding, Justice Harvey found:
- [46] The [foreclosure] petition amounts to a collateral assault on the respondent [Ms. Rirash] and is but another example of what I find to be the claimant's [Mr. Milani's] dishonesty. Without disclosing the foreclosure action, the claimant sought to have the \$81,000 characterized as his debt to MIG thus encroaching, presumably, on the respondent's entitlement to equity in the condominium.
- [Emphasis added.]
- [13] He rejected Mr. Milani's claim that Ms. Rirash owed MIG for the renovation costs and monies given to her before separation. He explained:
- [47] Other examples of what I find to be the claimant's [Mr. Milani's] dishonesty, are ... his embellishment of the interest payable on the \$81,000 loan and exaggeration of the extent and cost of the renovation said to have been done by the parties prior to the separation and funded by way of "the loan from MIG".
- [48] There is no evidence on which I can conclude the funds used for the renovation were a loan to the respondent [Ms. Rirash] or to the claimant. The same applies to moneys he gave the respondent prior to separation for living expenses. The withdrawals by the claimant were simply another example of him using MIG funds as his personal funds.
- [Emphasis added.]
- [14] None of the family property listed in para. 5 above was claimed to be excluded property. While not expressly stated, the judge also appears to have found Mr. Milani's interest in MIG was family property.

- [15] In dividing the family property, the judge began by making the following general comments:
- [65] The claimant [Mr. Milani] has made the otherwise simple task of property division highly problematic given the non-disclosure and obfuscation regarding MIG.
- [71] The big issue here [is] MIG. It is essentially, I find, the claimant's company. I place no credence in his explanations otherwise given: (1) his continual use of the funds for personal rather than business purposes; and (2) the parallel proceeding initiated against the respondent [Ms. Rirash] by the claimant's surrogate.
- [73] I am satisfied that there has been material non-disclosure by the claimant concerning the true nature of MIG and perhaps other property. At the trial's conclusion I was not satisfied the non-disclosure had been remedied.
- [75] If ever there was a case of non-disclosure skewing the proper result, this is such a case.
- [76] Regrettably, at least from my standpoint, MIG is not a participant in this proceeding such that I feel it is proper to make orders against it. If [it] were I would conclude that MIG is the alter ego of the claimant and what is MIG's is therefore the claimant's.
- [77] I have no idea what the totality of MIG's holding is. That is the claimant's fault, not the respondent's. I believe little, if anything, that the claimant has told me about MIG. I know that there is another piece of property in the name of another person funded by MIG. I know that MIG has accounts that have not been produced, specifically margin accounts and possibly other bank accounts.

[Emphasis added.]

- [16] Based on the state of the evidence before him, Justice Harvey found that the two alleged loans from MIG for the renovation costs and monies given to Ms. Rirash before separation were not loans from MIG, but monies withdrawn by Mr. Milani from MIG for his personal use. He found Ms. Rirash not to be liable for those alleged debts to MIG. He also found that MIG, as the alter ego of Mr. Milani, possessed assets equal to or in excess of those "known" assets that had been disclosed in the family law proceeding (at para. 80).
- [17] The judge explained his valuation of the net family property at \$163,000, absent Mr. Milani's interest in MIG, as follows:
- [70] None of the values offered were challenged by the non-owning party in cross-examination or submissions. The condominium has an agreed value of \$400,000 with a mortgage owing of approximately \$173,000, plus the amount owing on the promissory note, a guesstimate given the interest rate prescribed on the promissory note that the outstanding balance is currently close to \$100,000.

[81] The totality of the known assets, and again, here I exclude MIG's accounts, given I need to take into account the mortgage lawfully registered against the condominium as follows: the condominium I estimate the equity in which was approximately \$120,000; two trailer homes with a total value of \$24,000; a motorcycle worth \$12,000; a Toyota 4Runner [worth] \$4,000; and a GMC Terrain worth \$3,000. The total value, then, of the known assets, if I can put it that way, is \$163,000.

[Emphasis added.]

[18] In the result, Justice Harvey granted Ms. Rirash a vesting order to all of the known family property or the cash equivalent thereof, leaving Mr. Milani with the "residual value in MIG," which he found to be in an amount "no less than the value of the assets I identified as family property" (at para. 82). He ordered that Ms. Rirash retain the condominium and the GMC Terrain, and that Mr. Milani retain the two motor homes, the motorcycle, and the Toyota 4Runner. To equalize the value of the non-real estate assets, he ordered Mr. Milani to pay a lump sum of \$37,000 to Ms. Rirash.

[19] Justice Harvey further stated (at para. 86):

[86] Obviously, no finding I make in this proceeding is binding on a judge in another proceeding, but on the evidence before me it is my view that MIG and the claimant [Mr. Milani] are one and the same, which could possibly ameliorate the liability of the respondent [Ms. Rirash] if and when the foreclosure proceedings reach court.

[20] Mr. Milani appealed the Family Law Decision. He did not pursue his appeal within the prescribed time limits and was refused an extension of time to perfect his appeal, which was found to be devoid of merit. The appeal, therefore, stood as dismissed. A review of that decision also was dismissed: see *Milani v. Milani*, 2018 BCCA 466.

The Foreclosure Proceeding

[21] As Justice Harvey noted, MIG was not a party to the family law proceeding.

[22] Following the release of the Family Law Decision, Mr. Milani, on behalf of MIG, filed the underlying petition of foreclosure. In that proceeding, MIG alleged that Ms. Rirash owed it \$211,846 for three loans, including the outstanding balance of approximately \$100,000 on the collateral mortgage registered against the title to the condominium.

[23] Ms. Rirash applied to have the foreclosure petition quashed based on the principle of issue estoppel and/or the doctrine of *res judicata*. She contended that Justice Harvey, in the Family Law Decision, had addressed the matter of each of the three alleged loans from MIG and had found her not to be liable for any of them.

[24] In response to the application, MIG submitted that issue estoppel and *res judicata* were not applicable as: (i) MIG was not a party to the family law proceeding; (ii) MIG was an independent entity from Mr. Milani; and (iii) no order had been made against it in the Family Law Decision. Therefore, Mr. Milani submitted, the issue of the alleged debts to MIG

remained outstanding. In particular, he contended, Justice Harvey had left the status of the promissory note to be determined in another proceeding in which MIG was a party. In that regard, he argued, Justice Harvey had: (i) acknowledged the existence of both security instruments for the debt and their outstanding balance of approximately \$100,000 as owing to MIG, which he found was presumptively owed to MIG (at para. 70); and (ii) acknowledged that foreclosure proceedings had been commenced by MIG on that alleged outstanding debt (at para. 85).

- [25] Justice Burke found that, in the Family Law Decision, Justice Harvey had rejected Mr. Milani's claims that Ms. Rirash owed MIG a total debt of \$211,846 and had determined that MIG was the alter ego of Mr. Milani: see *MIG Group Ltd. v. Milani*, 2019 BCSC 912. She concluded, therefore, that MIG was estopped in the foreclosure proceeding from raising the issue of who was responsible for the outstanding balance on the collateral mortgage owed to MIG.
- [26] Justice Burke began her analysis by identifying the three requirements for issue estoppel as set out by Justice Newbury in *Cliffs Over Maple Bay (re)*, 2011 BCCA 180: (i) the same question has already been decided; (ii) the judicial decision that is said to create the estoppel was final; and (iii) the parties to the judicial decision or their privies were the same persons or their privies as the parties to the proceedings in which the estoppel is raised.
- [27] There was no dispute that the Family Law Decision was final. The identified issues focused on whether: (i) the same issue regarding the alleged debts to MIG had been decided in the Family Law Decision; and (ii) whether MIG was a privy of Mr. Milani in the foreclosure proceeding.
- [28] On the first issue, Justice Burke found that "the issues raised by the petitioner [MIG] are not distinct from those raised by Mr. Milani in the family law action" (at para. 19). She found that Justice Harvey had rejected Mr. Milani's claim that Ms. Rirash owed MIG the renovation costs and the monies given to her before the parties' separation. As to the \$81,000 promissory note from MIG, she found that "[a] consideration of the judgment as a whole, makes it clear that Harvey J. did not agree with [Mr. Milani's] position," namely that Ms. Rirash owed MIG over \$200,000 for all three alleged loans (at para. 27). She also noted that Justice Harvey found (at para. 71 of his reasons) that Mr. Milani's explanations for his use of funds from MIG and his instigation of the parallel foreclosure proceeding not to be credible.
- [29] On the second issue, Justice Burke found that MIG in the foreclosure proceeding was a privy to Mr. Milani based on Justice Harvey's finding that MIG was the alter ego of Mr. Milani. In her assessment, this degree of identification between the two parties and the two proceedings, and Justice Harvey's finding that MIG was Mr. Milani's company (at para. 71 of his reasons), made MIG and Mr. Milani privies, and found they were the same parties in both the family law proceeding and the foreclosure proceeding (at para. 32).

On Appeal

- [30] Mr. Milani, on behalf of MIG, is self-represented in this appeal. His factum and submissions were somewhat unfocused and at times difficult to comprehend. However, as I understand them, he takes issue with Justice Burke's interpretation of Justice Harvey's reasons, where she concluded that Ms. Rirash was not responsible for the outstanding balance on the collateral mortgage based on the Family Law Decision as a whole and Justice Harvey's characterization of the foreclosure petition as a collateral attack on Ms. Rirash (at para. 46 of his reasons). Mr. Milani also submits that as Justice Harvey found that MIG was Mr. Milani's company, the balance owing on MIG's collateral mortgage is an asset of MIG and, therefore, must be paid to MIG from the net proceeds of sale. He further contends that MIG is not a privy but an independent entity from his personal self.
- [31] Ms. Rirash maintains that Justice Burke correctly interpreted Justice Harvey's reasons. She submits that Justice Harvey absolved her from any liability for all three of the alleged debts to MIG, including the promissory note with an outstanding balance of approximately \$100,000. In that regard, she relies on the following comment by Justice Harvey, at para. 86, which I repeat for ease of reference:
- [86] Obviously, no finding I make in this proceeding is binding on a judge in another proceeding, but on the evidence before me it is my view that MIG and the claimant [Mr. Milani] are one and the same, which could possibly ameliorate the liability of the respondent [Ms. Rirash] if and when the foreclosure proceedings reach court.

[Emphasis added.]

- [32] She also submits this passage supports Justice Burke's finding that MIG was a privy for Mr. Milani.

Discussion

Was MIG a privy for Mr. Milani?

- [33] I shall address the issue of Justice Burke's finding that MIG was a privy for Mr. Milani first, as in my view, Justice Harvey's findings foreclose Mr. Milani's submission on this issue. Those findings include that: (i) Mr. Milani and MIG are one and the same and MIG is effectively Mr. Milani's personal bank account; (ii) Mr. Milani had the ability to comply with Justice Harvey's disclosure order but chose to provide the court with only selective documents and information regarding MIG; and (iii) Mr. Milani instigated the underlying foreclosure proceeding on behalf of MIG without notifying Ms. Rirash and for the purpose of effecting a sale of the condominium and thereby collect the amount outstanding on the promissory note.

[34] Mr. Milani's lack of transparency, disclosure, and credibility with the court in the family law proceeding, with respect to his interest in MIG, makes him the sole cause of the adverse findings by Justice Harvey on this issue. Mr. Milani presented no evidence to the contrary during the family law proceeding or in response to Ms. Rirash's application to quash the petition in the foreclosure proceeding. In these circumstances, I am of the view Justice Burke correctly found that MIG and Mr. Milani were privies.

Did the Family Law Decision determine liability for the promissory note?

[35] It was not disputed that Ms. Rirash received \$81,000 for the down payment on the condominium from MIG, or that the monies were secured by a promissory note and a collateral mortgage registered against the title to the condominium, both of which she signed. However, in contrast with the undocumented alleged loans for the renovation costs and monies given to Ms. Rirash before separation, Justice Harvey made no finding with respect to the validity of this loan allegedly from MIG to Ms. Rirash. Instead, he appears to have left the issue open to be determined in another proceeding where MIG was a named party.

[36] Justice Harvey did make findings with respect to the value of the assets he assigned to Ms. Rirash. Those findings (at paras. 70 and 81 of his reasons) indicate that, subject to an alternative finding in another proceeding that directly challenged the validity of the promissory note and collateral mortgage in the name of MIG, the equity in the condominium that he assigned to Ms. Rirash was net of the amounts owing on both the first mortgage and the collateral mortgage registered against the title to the condominium.

[37] The parties in the family law proceeding agreed that the value of the condominium was \$400,000. Justice Harvey found the balance of the first mortgage was about \$173,000 and the balance of the collateral mortgage to MIG about \$100,000. He calculated that, after deducting the balances of the two mortgages, Ms. Rirash would have a net equity in the condominium of about \$120,000. This amount was slightly lower than the actual amount of \$127,000. However, if Ms. Rirash's position as accepted by Justice Burke is correct, Ms. Rirash's net equity in the condominium would have been \$107,000 more than the \$120,000 found by Justice Harvey.

[38] In my view, Justice Harvey left the ultimate finding on the issue of whether Ms. Rirash or MIG was responsible for the promissory note to a proceeding in which MIG was a party. The foreclosure proceeding provides that opportunity. If Ms. Rirash does not pursue the issue further, then the balance on the promissory note would have to be paid out to MIG in order to discharge the collateral mortgage in the event of a sale. However, in the foreclosure proceeding, Ms. Rirash has the opportunity to challenge the validity of the collateral mortgage. That issue will be determined by the judge hearing that matter.

[39] In the result, I conclude that Justice Burke erred in finding that liability for the \$81,000 plus interest for the down payment on the purchase of the condominium was decided in the Family Law Decision.

[40] Accordingly, I would allow the appeal, set aside the order quashing the petition of foreclosure, and remit the issue of what party is responsible for the balance owing on the promissory note to the court below.

[41] GARSON J.A.: I agree.

[42] FISHER J.A.: I agree.

[43] D. SMITH J.A.: The appeal is allowed, the order striking the petition is set aside, and the matter is remitted to the court below in the foreclosure proceeding. To clarify, the only matter to go back to the court below is the matter of the foreclosure proceeding on the collateral mortgage and the validity of the promissory note.

[Discussion with appellant re: costs]

[44] D. SMITH J.A.: Costs follow the event.

"The Honourable Madam Justice D. Smith"

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