

CANADA / JUDGMENT

Mountainview Market Ltd. v. Sandu

2015 BCSC 2460

COURT

Supreme Court of British Columbia

DECIDED

31 December 2015

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2015 BCSC 2460 Mountainview Market Ltd. v. Sandu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mountainview Market Ltd. v. Sandu

2015 BCSC 2460

Date: 20151231

Docket: 137610

Registry: Vancouver

Between:

Mountainview Market Ltd., Baljinder Bahi and Talraj Bahi

Plaintiffs

And

Gurdaval Singh Sandu and Manjit Kaur Sandu

Defendants

- and -

Docket: 157957

Registry: New Westminster

Between:

Gurdaval Singh Sandu and Manjit Kaur Sandu

Petitioners

And

Mountainview Market Ltd., Baljinder Bahi and Talraj Bahi

Respondents

Before: The Honourable Mr. Justice Tindale

Reasons for Judgment

Counsel for plaintiffs:

P.A. Roxburgh

Counsel for defendants:

F.L. Lamer

Place and Date of Hearing:

Vancouver, B.C.

January 20 & July 3, 2015

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2015

[1] These proceedings involve a dispute by the parties concerning lands and premises located at 19209- 80th Avenue in the City of Surrey, Province of British Columbia legally described as:

PID; 010-750- 029

Lot 1, Section 27, Township 8

New Westminster District Plan 77058

(the "Property")

[2] There are two separate court files in the Supreme Court of British Columbia in relationship to the Property namely:

- i) A Notice of Civil Claim filed in the Vancouver Registry No. S 137610 (the "Vancouver Action") on October 11, 2013 by Mountainview Market Ltd., Baljinder Bahi and Talraj Bahi seeking relief from Gurdaval Singh Sandu and Manjit Kaur Sandu.
- ii) A petition filed in the New Westminster Registry No. 157957 (the "Petition") on January 14, 2014 by Gurdaval Singh Sandu and Manjit Kaur Sandu seeking relief from Mountainview Market Ltd., Baljinder Bahi and Talraj Bahi.

BACKGROUND

- [3] Mountainview Market Ltd. ("Mountainview") is a body corporate under the laws of British Columbia and operates a gasbar and convenience store on the Property.
- [4] Baljinder Bahi and Talraj Bahi (the "Bahis") are, respectively, the daughter and son-in-law of Gurdaval Singh Sandu and Manjit Kaur Sandhu (the "Sandus").
- [5] The Bahis are the principals of Mountainview.
- [6] The Sandus are the registered owners of the Property.
- [7] On December 2, 2013 Mountainview and the Bahis filed an Amended Notice of Civil Claim in the Vancouver Action.
- [8] On December 19, 2013 the Sandus filed a Response to Civil Claim in the Vancouver Action.
- [9] On November 7, 2014 the Sandus filed a Notice of Application in the Vancouver Action seeking the dismissal of that action and costs.
- [10] On January 9, 2015 Mountainview and the Bahis filed a Notice of Application in the Vancouver Action seeking leave to amend their Amended Notice of Civil Claim filed on December 2, 2013.
- [11] On January 20, 2015 I began to hear both the November 7, 2014 and January 9, 2015 Notice of Applications in the Vancouver Action as well as the Petition. At that time Mountainview and the Bahis brought an application to adjourn the November 7, 2014 Notice of Application. The basis for the adjournment application was to allow Mountainview and the Bahis to conduct an examination for discovery on the Sandus.
- [12] The hearing of the November 7, 2014 and January 9, 2015 Notice of Applications in the Vancouver action continued on July 3, 2015 as well as the Petition.

POSITION OF THE PARTIES

November 7, 2014 Rule 9-7 and January 9, 2015 Notice of Applications

- [13] The plaintiffs in the Vancouver Action in their Amended Notice of Civil Claim allege in part the following facts:
 - a) In June 2002 Mountainview commenced leasing the Property from the Sandus for a rate of \$1,800 per month (the "2002 Lease").
 - b) In or about March 2003, the Sandus agreed to sell the Property to Mountainview and/or the Bahis on the following terms:
 - i) Mountainview and/or the Bahis would purchase the Property for \$650,000 by making installment payments of at least \$1,200 per month

ii) Mountainview and/or the Bahis continued to pay rent of \$1,800 per month until the purchase price was paid in full; and

iii) Mountainview and/or the Bahis would take over payment of taxes, water, and utility payments for the Property.

(the "2003 Agreement")

c) Mountainview and or the Bahis made all payments required under the 2003 Agreement. By April 2006, they had made payments totaling over \$170,000 in respect of the 2003 Agreement.

d) In or about January 8, 2006, the Sandus and Mountainview and/or the Bahis signed a Contract of Purchase and Sale formalizing the 2003 Agreement (the "Contract"). The Contract included, inter alia, the following terms written and oral:

i) Mountainview and/or the Bahis would pay a further \$400,000 for the Property (the "Purchase Balance");

ii) The Sandus would transfer legal title to the Property to Mountain View and or the Bahis;

iii) The closing date for the transaction would be April 20, 2006.

e) On or about February 8, 2006 Mountainview and or the Bahis delivered a cheque in the amount of \$50,000 to Mr. Sandu in respect of the Purchase Balance. On or about March 12, 2006, at Mr Sandu's request, Mountainview and or the Bahis delivered a second cheque in the amount of \$150,000 to Mr. Sandu in respect of the Purchase Balance. The \$50,000 cheque was cashed by Mr. Sandu.

f) Mountainview and/or the Bahis obtain approval for a mortgage loan to be registered against the Property in order to pay the remainder of the Purchase amount.

g) On April 20, 2006, the Sandus breached and repudiated the 2003 Agreement and Contract by failing to complete the sale and purchase of the Property in accordance with the terms of that agreement.

h) By April 20, 2006, the Sandus had received in excess of \$220,000 in payment under the 2003 Agreement and Contract.

i) Pursuant to the 2003 Agreement and Contract, the Sandus held the Property as bare trustees for the benefit of Mountainview and/or the Bahis.

j) On April 30, 2006 Mountainview and or the Bahis and the Sandus reached agreement, partly in writing and partly orally, with respect to Mountainview's and or the Bahis' interest in the Property and the 2003 Agreement (the "2006 Accord"). The 2006 Accord was signed by the Sandus and by the Bahis in their personal capacity and/ or as the principals of Mountainview, and provided that:

- i) The Sandus would pay the sum of \$377,750 to purchase Mountainview's and or the Bahis' interest in the Property, which some reflected both Mountainview's and/ or the Bahis' prior payments and increase value of the Property; and
 - ii) Mountainview and/or the Bahis would not demand performance of the 2003 Agreement and Contract.
 - k) In or about April, 2007, and in or about October 2007 Talraj Bahi demanded payment of the sum due under the 2006 Accord.
 - l) To date, the Sandus have refused or neglected to pay any part of the sum due under the 2006 Accord.
 - m) Mountainview and/or the Bahis have paid over \$70,000 for improvements to the Property.
 - n) On or about October 4, 2013 the defendant Gurdaval Singh Sandu with the knowledge and consent of the defendant Manjit Kaur Singh, caused to be delivered a "Notice of Default" to the Bahis falsely asserting, inter alia, that the Bahis had leased the Property on a month-to-month basis since 2003; that they owed rent pursuant to the lease; and that they were in default under the lease.
- [14] The plaintiffs in the Vancouver Action by way of their Notice of Application dated January 9, 2015 seek to further amend the Notice of Civil Claim. In part the plaintiffs no longer wish to allege that the Sandus pursuant to the 2003 Agreement and Contract hold the Property as bare trustees for the plaintiffs.
- [15] The plaintiffs seek an amendment to allege that with regard to the 2006 Accord part of the agreement was that Mountainview and/or the Bahis would continue to lease the property month-to-month at \$2,000 per month. And that since May 2006 Mountainview and/or the Bahis have accepted payments by way of \$2,000 credits towards their lease.
- [16] The Sandus argue that the Vancouver Action must be dismissed summarily under Rule 9 - 7 of the Supreme Court Civil Rules B.C. REG. 168/2009 ("SCCR") for the following reasons:
- a) The document identified as the 2003 Agreement and Contract cannot form the basis of a specific performance action because it never became executory and because the plaintiff failed to close within the deadlines originally imposed under the agreement;
 - b) The claim for specific performance would have been limitation barred no later than April 20, 2012 which was more than a year before the Vancouver Action was commenced;
 - c) There is no evidence that any trust over the Property was ever created;
 - d) The document relied upon as the 2006 Accord is, on its face, so cryptic and devoid of content that it is incapable of forming the basis of any contractual obligation;

- e) On the evidence of the Bahis and on the face of the Amended Notice of Civil Claim the plaintiffs allege that a settlement in the amount of \$377,750 was payable by April 30, 2006. This would result in the plaintiffs' claim being limitation barred no later than the end of April 2012.
- [17] The Sandus argue that the proposed amendments by the plaintiffs in the Vancouver Action constitutes a complete reversal of position because initially the plaintiff took the position that there was no lease between the parties and now they are suggesting that there is a lease.
- [18] The Sandus argue that if the plaintiffs seek to enforce the 2003 Agreement and Contract then they cannot assert that they have any right of set-off or any right at all under the 2006 Accord. They also argue that the plaintiffs have taken no steps to prosecute their claims.
- [19] The Sandus argue that it is trite law that on an application pursuant to Rule 9 - 7 the court may make findings of credibility. They also argue that the test is whether it would be unjust to render judgment on the basis of the evidence before the court.
- [20] The Sandus argue because the Vancouver Action was commenced on October 11, 2013 the Limitation Act, R.S.B.C. 1996, c. 266 (the "Limitation Act") applies to this claim. Given the nature of the claims which are for breach of contract pursuant to section 3 (5) of the Limitation Act the limitation period is six years.
- [21] The Sandus argue that any claim for specific performance of the Contract must fail because the conditions precedent to the sale had not all been removed by the imposed deadline of January 15, 2006.
- [22] The Sandus argue that a "bare trust" cannot arise on the facts of this case. Given the amendments that the plaintiffs in the Vancouver Action are proposing they are clearly in agreement with that proposition.
- [23] The Sandus argue that the document which the plaintiffs say encompasses the 2006 Accord was not signed by them. While the Sandus obtained an expert report as to the authenticity of their signatures on that document they did not rely on that report for the purposes of this application.
- [24] That document can be found in the 1st affidavit of Gurdaval Singh Sandu attached as exhibit E. The Sandus in addition to arguing that they did not sign this document also argue that the document does not contain wording which would be sufficient to constitute a binding agreement.
- [25] In terms of the plaintiffs' claim for improvements to the Property the Sandus argue that the Bahis agreed to pay rent and be responsible for repairs and maintenance expenditures and therefore there is no contractual entitlement to reimbursement for those repairs and maintenance expenditures.

- [26] The Sandus argue that there is no basis for the Unlawful Interference Claim of the plaintiffs in the Vancouver Action because the plaintiffs themselves have admitted that there was a lease.
- [27] The Sandus argue that the plaintiffs' claim for "Further Losses" cannot succeed as there is no evidence of any such further losses.
- [28] The Sandus argue that the proposed further amendments by the plaintiffs are an abuse of process intended to impede and delay the dismissal of the claim. And despite the adjournment of this application from January 20, 2015 the plaintiffs have not provided any further evidence establishing that there was a binding agreement of purchase and sale in place on April 20, 2006. The Sandus deny agreeing to the 2006 Accord and Mr. Sandu testified that he repaid the amount he received from the Bahis up until April 2006.
- [29] The Sandus argue that the evidence of the Bahis has changed because they realize that their action would be limitation barred. The Sandus argue that the alleged agreement that the plaintiffs would remain in possession of the Property, without paying rent because of the amount owing under the 2006 Accord is not credible.
- [30] The plaintiffs in the Vancouver Action seek to further amend their Notice of Civil Claim to reflect a contract which settled a dispute among family members over the purchase of the Property. They argue that the Sandus Rule 9 - 7 application is based on the unamended pleadings.
- [31] The plaintiffs argue that the Notice of Civil Claim must be amended to determine the real issues between the parties. They note that the Rule 9 - 7 application was brought at a time when they were changing lawyers. The proposed amendments to the pleadings are a direct result of new counsel reviewing the file and aligning the pleadings with the facts.
- [32] The plaintiff Baljinder Bahi is the daughter of the Sandus. In her second affidavit made on January 14, 2015 she deposes to the following in relationship to the 2006 Accord at paras 15 - 17:
- (15) Based on my settlement discussions with the Applicants and upon signing the Settlement Agreement, it was my understanding that the Applicants would pay the monies owed in accordance with the Settlement Agreement by applying a credit to the lease of the 80th Avenue Property.
- (16) Therefore, since May, 2006, I have accepted monthly payment of the Settlement Agreement by way of \$2000 credit towards the lease under the Settlement Agreement.
- (17) My husband and I continued to operate Mountainview and raise our family on the 80th Avenue Property for several years without issue until we were served with the Notice of Default.

- [33] The plaintiffs in the Vancouver Action argue that the Sandus' conduct is consistent with the above noted agreement because from April 30, 2006 until October 4, 2013 they have not collected rent.
- [34] Finally, the plaintiffs in the Vancouver Action argue that the Sandus' evidence should not be believed when they say that they asked for rent because the Sandus could not remember when these demands were made and it is inconsistent with their conduct in not collecting rent for over six years.

THE PETITION

- [35] The petitioners argue that the respondent by their own admission have failed to pay rent since April 2006. They argue that the Petition was commenced under the Commercial Tenancy Act, R.S.B.C. 1996 c. 57 on January 14, 2014 and they are entitled to rent for the six years preceding that date and for every month thereafter. They claim \$168,000 for rent not paid.
- [36] The petitioners further argue that the respondents have made default under the lease and have had an opportunity in the Vancouver Action to respond as to why they have not paid the rent. The petitioners argue that for the same reasons that they argued in their November 7, 2014 Notice of Application in the Vancouver Action the respondents have failed to give an adequate explanation for the default.
- [37] The petitioners therefore argue that an order should be made requiring the response to deliver up possession of the Property to them.
- [38] The respondents simply argue that the substantive issue in relation to the petitioners Rule 9 - 7 application in the Vancouver Action directly relates to the matters in the Petition. Either the respondents have been paying rent for the Property by a reduction in the amount owed to them under an agreement they reached with the petitioners or they have not.
- [39] The respondents further argue if a lease agreement is found to exist it is between the petitioners and Mountainview only.

DISCUSSION

January 9, 2015 Application

- [40] The issues on the Vancouver Action and the Petition are intertwined with one another.
- [41] At the crux of a determination of the Vancouver Action and the Petition is whether or not the parties reached an agreement in 2006 which has been referred to as the 2006 Accord. In particular whether or not since May, 2006, Mountainview and or the Bahis have accepted monthly payments on account of the 2006 Accord by way of \$2,000 credit towards their rent obligations.

- [42] In order to determine the real question in issue between the parties it is necessary to determine the plaintiff's January 9, 2015 application to amend their Notice of Civil Claim in the Vancouver Action.
- [43] In *Forliti (Guardian ad litem of) v. Woolley* 2003 BCSC 1082 in discussing the principles with respect to amendments stated the following at paras 13-14:
- (13) The general principles with respect to amendments were set out by McLachlin J. (as she then was) in *Victoria Grey Metro Trust Company v. Fort Gary Trust Company* (1982), 30 B.C.L.R. (2d) 45 at pages 46 - 47 (S.C.):

Before addressing the proposed pleadings, I refer to the principles which govern the granting of amendments to pleadings. The basic rule, set out expressly in the former rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties... However, the court will not allow useless amendments... It may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial... If there is any doubt, it should be resolved in favor of permitting the pleadings to stand... While these cases deal with striking out claims already pleaded, consistency demands that the same considerations apply to the question of amendment to permit new claims.

(emphasis added)

(See also *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1986), 6 B.C.L.R. (2d) 347 at 354. (S.C.)).

- (14) *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, concerned an application, pursuant to Rule 19 (24), to strike a statement of claim because it disclosed no reasonable cause of action. As noted by McLachlin J. in *Victoria Grey*, and by Lysyk J. in *Quintette*, the test on such an application would be similar or analogous to the test to be applied on an application to amend a statement of claim. At [paragraph] 52, Wilson J. held:

The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

- [44] In my view in order to determine the real question at issue between the parties the proposed amendments to the Notice of Civil Claim in the Vancouver Action which I have summarized earlier in these reasons and which can be found in the 1st affidavit of Talraj Bahi attached as exhibit A should be allowed.

- [45] The Sandus argued their November 7, 2014 Rule 9 - 7 application as if the amendments had been made. Also if it is accepted that any payments owing by the Sandus pursuant to the 2006 Accord were made by way of \$2,000 credit towards Mountainview and/or the Bahis' lease then a limitation argument will not necessarily arise.
- [46] The Sandus fully argued that the proposed amendments would amount to an abuse of process because the plaintiffs in the Vancouver Action are only proposing those amendments to defeat the arguments that the Sandus have made on the Rule 9 - 7 application. I am not in agreement that the amendments would amount to an abuse of process for reasons which I will discuss later in these reasons.
- [47] Given the position of the Sandus on their November 7, 2014 Rule 9 - 7 application that the Vancouver Action must fail even if the evidence of the Bahis is accepted and for the reasons mentioned above I cannot find that there is any prejudice to the Sandus if these amendments are made.
- [48] Pursuant to Rule 6 - 1 (1) of the SCCR I grant leave to the plaintiffs in the Vancouver Action to amend the Notice of Civil Claim as proposed in the draft Amended Notice of Civil Claim attached as exhibit A to the 1st affidavit of Talraj Bahi. The plaintiffs will have seven days to serve the Further Amended Notice of Civil Claim on the Sandus.
- [49] The Sandus will have 21 days to respond to the Further Amended Notice of Civil Claim.

November 7, 2014 Rule 9 - 7 Application

- [50] There are significant differences in the evidence between the Sandus and the Bahis involving the events of 2006.
- [51] Rule 9 - 7 (15) of the SCCR reads as follows:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.
- [52] Rule 9 - 7 (17) of the SCCR reads as follows:
- (17) If the court is unable to grant judgment under sub rule (15) and considers that the proceeding ought to be expedited, the court may order the trial of a proceeding generally or on an issue and may

- (a) an order that the parties attended a case planning conference,
 - (b) make any order that may be made under Rule 5 - 3 (1), or
 - (c) make any other order the court considers will further the object of the Supreme Court Civil Rules.
- [53] The determination of the November 7, 2014 Rule 9 - 7 Application is complicated by the conflicting evidence of the parties.
- [54] In the decision of *Kim Le v. Haro Pacific Enterprises Co. Ltd. et al* 2005 BCSC 134 the court data follows at paras 27 - 30:
- [27] In *Macmillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, a case with many factual similarities to the present one, the court concluded that the chambers judge had not erred in giving judgment under Rule 18A despite the fact that there were conflicts in the affidavit evidence. The plaintiff alleged that he had an agreement with the defendants, collateral to the written agreement between the parties, which entitled him to receive shares as part of his compensation. The parties have filed affidavits which gave conflicting versions of events, but the chambers judge concluded that judgment could be given based on the extensive documentary evidence before her.
- [28] On appeal, the plaintiff argued that the matter was not suited to summary trial because a fair determination of the issue required the chambers judge to make findings of credibility with respect to the validity of promises of shares which were alleged to be collateral to the written agreement. Speaking for the court, Oppal J.A. noted at para 22:
- [T]he mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.
- [29] After citing *Inspiration Management and Orangeville Raceway*, Oppal J.A. concluded that the trial judge was alive to the conflicts in the evidence but properly resolved the conflict by making reference to and relying on the extensive documentary evidence before her.
- [30] In *McAllister Industries Ltd. v. McNestry Management Ltd.*, [1996] B.C.J. No. 1129 (S.C.) (Q.L.), Hall J. (as he then was) considered the appropriateness of the matter before him for a summary trial. At para. 14, he noted that assessing credibility involved more than merely observing the witness in the box, but rather "The court must consider a body of evidence to decide whether or not apparent differences can be resolved by reviewing and comparing other evidence in the case and deciding whether the evidence of a witness generally accords with written documents and the evidence of other witnesses." Hall J. also noted that in cases such as this, where documentary evidence is available, "issues of credibility become perhaps more capable of resolution short of an assessment of the parties' manner of giving

evidence."

- [55] The most glaring conflict between the parties is the written agreement of April 30, 2006. The Bahis say this document encapsulates the agreement that the parties reached with regard to Property. Baljinder Bahi deposes that her parents the Sandus sign this agreement in front of her. The Sandus say that the written agreement is a forgery. The Sandus did not rely on their expert report in that regard in this hearing.
- [56] There are other documents such as a Contract of Purchase and Sale dated January 8, 2006 which is signed by all parties which would tend to corroborate the Bahis' version of events in 2006. That being the parties had come to an agreement with regard to the sale of the Property and Mr. Sandu backed out of the deal which necessitated further discussions which resulted in the 2006 Accord.
- [57] The Sandus however argue that the plaintiffs were never in a position to complete the sale as it was subject to the buyers arranging satisfactory financing by January 16, 2006. While there is certainly evidence that the plaintiffs sought financing through a mortgage broker the documents suggest that was not until April of 2006.
- [58] There are also inconsistencies with the positions that Mountainview and the Bahis have taken throughout this litigation. For instance they initially suggested that the Sandus were holding the Property in trust for them. They have abandoned that position. It is also somewhat troublesome that very late in the litigation process the Bahis deposed that there was an agreement that they would not pay rent as a form of credit towards the 2006 Accord.
- [59] Despite this late revelation regarding the nonpayment of rent as a credit this explanation is consistent with the fact that the Sandus did nothing to collect rent that they say was owing from 2006 until 2013. The Sandus' evidence in that regard is vague and of limited assistance.
- [60] Interestingly Mr. Bahi provided two cheques one in the amount of \$50,000 on February 8, 2006 and another in the amount of \$150,000 on March 12, 2006 to Mr. Sandu. There is a disagreement between the parties as to whether or not a 100% interest in the Property would be sold or only a 75% interest. The Sandus argue that the discussions between the parties were that the plaintiffs in the Vancouver Action would acquire a 75% interest in the Property. The plaintiffs on the other hand argue that the discussions were that they would acquire 100% interest in the Property and it was only when Mr. Sandu discovered that the value of the Property had increased that he failed to complete the sale. In that regard Mr. Sandu at para. 8 of his 1st affidavit made on August 28, 2014 states the following:

Later, probably shortly before April 20, 2006, the Plaintiffs approached me to ask whether I would agree to sell all of my interest in the lands contrary to all of the discussions that have taken place before. My wife and I refused to do so, whereupon the Plaintiffs demanded that they be reimbursed all of the funds they paid on account of the acquisition price from 2003 to 2006, which I did. I had received 2 cheques, one in the amount of \$50,000 and another in the amount of \$150,000 on account of the purchase price. I had deposited the cheque in the amount of \$50,000

and reimbursed the money, as well as prior payments received between 2003 and 2006. I also returned to the Plaintiffs the cheque in the amount of \$150,000 that had not been deposited.

- [61] The plaintiffs agreed that Mr. Sandu provided a payment to them in the amount of \$100,000. Mrs. Bahi was not sure what the \$100,000 payment was on account of.
- [62] Despite the fact that there are numerous documents that have been put into evidence on this application and extensive affidavit material which included transcripts from the examination for discovery of the parties I am unable to resolve the numerous conflicts in the evidence between the parties. The documentary evidence is of little assistance as it is capable of supporting either sides version of events.
- [63] It is for this reason that I am unable to say that the conduct of the plaintiffs in the Vancouver Action including the amendments to their Notice of Civil Claim amount to an abuse of process. That determination will have to be left until the credibility issues between the parties can be resolved.
- [64] The Sandus have also argued that the document alleged to have been signed on April 30, 2006 is too vague to constitute a contract. In my view the determination as to whether or not a contract was reached between the parties will have to be made on all of the evidence once the credibility issues are resolved.
- [65] A just and fair result as to whether or not an agreement was reached between the parties on April 30, 2006 cannot be achieved by proceeding summarily.
- [66] I accept the position of the Sandus that the Limitation Act is the applicable act for the purpose of this proceeding however if it is accepted that the parties reached an agreement on April 30, 2006 and that payments were being made or at least credits were being given between the parties the limitation period would not have begun to run until October 4, 2013.
- [67] Further the evidence of the plaintiffs is that part of the 2006 Accord includes a term that they would not demand performance of the Contract of Purchase and Sale signed in January 2006 by the parties. If that evidence is accepted there may be a postponement argument with regard to the limitation period for the plaintiffs' claim for specific performance of the 2006 Contract of Purchase and Sale.
- [68] I do not accede to the Sandus' argument that the plaintiffs' claims are limitation barred on this summary proceeding.
- [69] I also do not accede to the Sandus' argument that the claim for improvements made by the plaintiff's to the Property should be dismissed. Until the credibility issues are resolved it cannot be determined whether or not a claim in unjust enrichment exists.
- [70] Likewise until the credibility issues are resolved between the parties it cannot be determined if a claim in Unlawful Interference exists.

- [71] I will however dismiss the plaintiffs' claim for a declaration that the Sandus hold the Property as bare trustees for the plaintiffs. There is clearly no evidence in that regard and the plaintiffs have abandoned that claim.
- [72] Because of the extensive credibility issues between the parties and because the documentary evidence is capable of supporting the various versions of the parties, I order that the Vancouver Action proceed by way of a trial.

THE PETITION

- [73] In light of my decision that the Vancouver Action must proceed by way of trial to resolve the credibility issues between the parties and determine whether or not there was an agreement between the parties to offset rent payments it is premature to hear the Petition. The central issue on the petition is whether or not the respondents have failed to pay rent. That issue cannot be determined until the issues in the Vancouver action have been resolved.
- [74] I did adjourn the Petition generally until such time as the Vancouver Action has been resolved.

CONCLUSION

- [75] I grant leave to the plaintiffs in the Vancouver Action to amend their Notice of Civil Claim in accordance with their Notice of Application filed January 9, 2015.
- [76] The plaintiffs will have seven days to serve the Further Amended Notice of Civil Claim on the Sandus. The Sandus will have 21 days to respond to the Further Amended Notice of Civil Claim.
- [77] I dismiss the plaintiffs' claim in the Vancouver Action for a declaration that the Sandus held the Property as bare trustees for the plaintiffs.
- [78] I order that the remainder of the Vancouver Action proceed to trial.
- [79] I adjourn the Petition generally until such time as the Vancouver Action has being resolved.
- [80] The Plaintiffs will have their costs in the cause for their Notice of Application filed January 9, 2015.
- [81] With regard to the Sandus' Notice of Application filed November 7, 2014 in my view while the plaintiffs have been largely successful had the plaintiffs applied to amend their pleadings in a more timely manner the Notice of Application filed November 7, 2014 may not have been necessary. I order that the parties bear their own costs with regard to this application.

"R.S. Tindale, J."

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