
CANADA / JUDGMENT

Nafuran v. Tiojanco

2010 BCSC 1726

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1726 Nafuran v. Tiojanco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nafuran v. Tiojanco,

2010 BCSC 1726

Date: 20100512

Docket: S120547

Registry: New Westminster

Between:

Rosalinda Nafuran

Plaintiff

And:

Cesar Santos Tiojanco and Myrna Medrano Tiojanco

Defendants

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

Counsel for Plaintiff

M.J. Harding

Counsel for Defendants

R.J. Morton

Place and Date of Trial:

Vancouver, B.C.

May 3-6, 2010

Place and Date of Judgment:

New Westminster, B.C.

May 12, 2010

INTRODUCTION

- [1] Rosalinda Nafuran seeks a declaration that the condominium property in which she resides at suite 415-488 Kingsway, Vancouver, is held by the defendants in trust for her, that she is the lawful and beneficial owner of the property, and that the transfer of her interests in that property to the defendants is void.

BACKGROUND

- [2] Ms. Nafuran is a caregiver who immigrated to Canada from the Philippines at the end of 1990. In June 1996 she and a friend, Dolores Gonzales, purchased a condominium on Kingsway in Vancouver; the property which is the subject of this action. The original purchase price of approximately \$125,000 was almost entirely financed by a first mortgage in favour of Scotia Mortgage Corporation. Ms. Nafuran and Ms. Gonzales each owned a one half undivided interest in the property. Ms. Nafuran purchased her interest in the condominium with the assistance of the defendant, Cesar Tiojanco, who is a licensed real estate agent, also a native of the Philippines and fluent in Tagalog.
- [3] Mr. Tiojanco referred the plaintiff to a solicitor, Jeffrey Andrews, whose office was then located in Surrey, British Columbia, for assistance in completing the 1996 transaction. After the purchase, Ms. Nafuran lived in the condominium. At some point Ms. Gonzales moved to Terrace, British Columbia, and thereafter she only used the condominium when she returned to Vancouver visiting, primarily on weekends.
- [4] From 1996 until 1999, Ms. Nafuran had no further contact with Mr. Tiojanco. In June 1999, Ms. Nafuran was advised by the branch of the Bank of Nova Scotia at which her mortgage was then placed, that the bank was unwilling to renew the mortgage on the condominium at the expiry of its term. Ms. Nafuran then believed the value of the condominium was less than the outstanding balance payable on the mortgage.

- [5] Uncertain as to what to do, she contacted Mr. Tiojanco for assistance. He assisted her in making arrangements to transfer the mortgage to a Surrey branch of the Bank of Nova Scotia, where he apparently had some helpful contacts, for renewal. Mr. Tiojanco says that he then advised Ms. Nafuran that the bank had been reluctant to renew the mortgage because she had been late or missed payments, and that she must be careful to ensure that this did not happen in the future.
- [6] Ms. Nafuran says she was next contacted by Mr. Tiojanco in 2004, when he asked her if she was interested in selling her property, because property values were then high. She asked for time to think about it. He was leaving the country for the Philippines at the time. On his return he did not telephone Ms. Nafuran with respect to a potential sale of the property; she heard nothing further from him in that regard and no measures were taken to market the property.
- [7] The mortgage again matured in 2005 and the bank at that point was unwilling to renew the mortgage. In September 2005 Ms. Nafuran received a letter from counsel for the bank advising her that as of September 19, 2005, the amount outstanding on the mortgage was approximately \$108,000 and that interest was accruing thereafter at a daily rate of approximately \$15.64. Demand was made for payment of the principal and interest, failing which the bank would take foreclosure proceedings.
- [8] On receipt of that correspondence, Ms. Nafuran first sought the advice of Peter Appiah, the husband of a friend. When Mr. Appiah's advice was not helpful she called Mr. Tiojanco. She made arrangements to provide him with a copy of the Scotiabank letter of demand and met with him to discuss her options. That initial discussion subsequently led to the following steps.
- [9] On October 6, 2005, a form of transfer of freehold property under the Land Title Act was prepared by Jeffrey Andrews. The effect of that document would have been to transfer the title in the strata property from Rosalinda Nafuran and Delores Gonzales to Cesar Tiojanco and his wife Myrna Tiojanco. That document was not registered. Apparently, Ms. Gonzales could not be located and her consent to sell the property could not be obtained.
- [10] On October 14, 2005, Mr. Tiojanco paid \$111,074.61 to the bank's solicitors in trust and in exchange received an assignment from Scotia Mortgage Corporation of its mortgage charge against the condominium property.
- [11] Mr. Tiojanco then located Ms. Gonzalez and was put in touch with counsel acting on her behalf. He instructed Jeffrey Andrews to make an offer to Ms. Gonzalez's solicitors to buy her interest in the property. An offer was made on January 11, 2006. That offer refers to an appraisal estimating the market value of the condominium at \$175,000 and is an offer to purchase Ms. Gonzalez's equity in the property for \$20,000. After some negotiation, Mr. Andrews advised counsel for Ms. Gonzalez that Mr. Tiojanco accepted Ms. Gonzalez's offer to sell her interest in the property for the sum of \$25,000.

- [12] On March 13, 2006, Ms. Gonzalez executed a freehold transfer transferring her half interest in the property, said to have a market value of \$75,000, to Mr. and Mrs. Tiojanco. The proceeds of the sale flowed through the trust account to Mr. Andrews.
- [13] On May 15, 2006, Ms. Nafuran executed a transfer of her half interest in the property to Mr. and Mrs. Tiojanco. She did so by executing two documents. The first, a transfer of 49/100th interest in the property, said to have a market value of \$73,500 to Mr. and Mrs. Tiojanco, and the second a transfer of 1/100th interest in the property, said not to have any market value.
- [14] The statement of adjustments prepared by Mr. Andrews on that date indicates that the net sale proceeds to Ms. Nafuran would amount to \$15,000. That is an estimate of her equity in the property at that time. After deducting the payout of a judgment registered against the property, arrears in strata fees and property taxes, as well as mortgage payments to the date of transfer and fees, the net amount payable to Ms. Nafuran was \$1,886.18.
- [15] On the same day, Ms. Nafuran executed a document that was referred to as an "option-to-buy-back". That document provided that Mr. Tiojanco had purchased the mortgage on the property from the Bank of Nova Scotia and that Ms. Nafuran had stayed in the property without paying any mortgage, taxes or strata fees from October 15, 2005 to May 15, 2006. It indicated that on May 15, 2006 Mr. Tiojanco paid Ms. Nafuran \$15,000 and Ms. Gonzalez \$25,000 for their respective interests in the property.
- [16] The document gave Ms. Nafuran an option to repurchase her interest in the property within three years from May 15, 2006 to May 14, 2009, at its market value, to be determined in accordance with the procedure described in the agreement. It provided that Ms. Nafuran could continue to reside in the property in exchange for payment of rent in the amount of \$825 per month, plus utilities, for three years, and that Ms. Nafuran continued to own 1 percent of the property so that she could continue to reside in the property despite the condominium bylaw that required promises to be owner occupied.
- [17] Thereafter Ms. Nafuran made monthly payments to Mr. Tiojanco. She appears to have recognized the obligation to pay the amounts described in the "option-to-buy-back", but there is a dispute with respect to the nature of those payments.
- [18] In April 2008 Mr. Tiojanco was concerned with respect to the irregularity of payments and drafted a lease agreement for execution by Ms. Nafuran. That agreement set out the parties' obligations in more detail. It appears to have been executed by the parties on April 19, 2008, but on its face it describes an agreement that is said to be effective between May 1st, 2006, and May 31, 2009.
- [19] In January 2009 Mr. Tiojanco brought proceedings to evict Ms. Nafuran from the premises. He sought an order of possession from the Residential Tenancy Branch of the Ministry of Housing and Social Development and an order for rental arrears which he said amounted to the sum of \$7,097 by the end of May, and he sought continuing loss of rent in the sum of \$860 per month from June 2009 onward.

- [20] The application for that relief was dismissed on jurisdictional grounds as the dispute resolution office was of the view that it did not have jurisdiction, given Ms. Nafuran's claim that she had an ownership interest in the property.
- [21] By their counterclaim in this action the defendants seek an order for possession of the property and an order requiring the payment of rent during the holdover period.

POSITIONS OF THE PARTIES

Plaintiff's Position

- [22] The plaintiff says she went to Mr. Tiojanco for assistance in 2005 because he had previously acted as her agent and advisor. She says she has little experience in financial matters and relied heavily on his advice. She denies she expressed an interest in selling her property to Mr. Tiojanco at any point and says she was always of the view that she and Mr. Tiojanco would be partners in owning the property, and that he would be purchasing Ms. Gonzalez interest only.
- [23] In that regard, she makes the following claims: she says when she contacted Mr. Tiojanco in 2005 there was no discussion of the sale of property with him. She says she did not sign the October 6, 2005 freehold transfer form that appears to bear her signature as one of two transfers, and she did not speak to Mr. Andrews or meet with him at his office on that date. She says Mr. Tiojanco told her that he would purchase Ms. Gonzalez's interest in the property and that was the only plan she discussed with Mr. Tiojanco before going to see Mr. Andrews in the spring of 2006.
- [24] She says she was unaware Mr. Tiojanco had obtained an assignment of the Scotiabank mortgage, or paid off that mortgage until after this lawsuit was commenced. She says she went to see Mr. Andrews in March 2006 with Mr. Tiojanco for the purpose of arranging the transfer of Ms. Gonzalez interest to him. At that meeting she was not told anything about the documents she was signing. She was asked by Mr. Andrews if she would like him to review the documents with her, but she said it was not necessary because Mr. Tiojanco had explained everything. She claims not to have read or understood the effect of the freehold transfer, or the "option-to-buy-back". She claims not to have reviewed the statement of adjustments with Mr. Andrews. Ms. Nafuran was unaware of the appraisal of the property obtained by Mr. Tiojanco, and unaware of the status of his dealings with Ms. Gonzalez between October 2005 and May 2006.
- [25] Ms. Nafuran says she continued to make payments to Mr. Tiojanco from May 2006 onward because she understood he had made arrangements to pay the mortgage and she felt that, as the owner in occupation of the premises, she should be responsible for making the mortgage payments. She denies that she was paying rent to Mr. Tiojanco as a landlord. She denies being aware she continued to have a small interest in the property for appearances only. She denies she indicated to anyone else that Mr. Tiojanco was the owner of the property, that she had sold her interest to him, or that she was obliged to pay him rent.

- [26] She seeks to set aside the transfer of March 2006 to Mr. Tiojanco on the basis that the obligations he owed to her as a realtor in contract; and as a fiduciary, and on the basis of the doctrine of non est factum, saying that she was misled into believing that the transfer documents and other documents associated with the transfer were not what they appeared to be.

Defendants' Position

- [27] Mr. Tiojanco says that from the outset he suggested to Ms. Nafuran that one way she could get out of the property that she could apparently not afford to occupy was by selling it to him and, from the outset in September 2005, he advised her that he would be interested in purchasing the property from her and Delores Gonzalez. Initially he says he offered to pay the parties \$5,000 each for their interests, but as the situation developed and he learned more about the property and its value, he increased his offer.
- [28] He says he took Ms. Nafuran to Mr. Andrews in October 2005 with a view toward having her sign an agreement to sell the property to him and that he expected Mr. Andrews to give her independent advice.
- [29] He says the deal that was contemplated in October 2005 could not be completed because Ms. Gonzalez could not be located. He sought the assistance of Mr. Andrews in contacting Ms. Gonzalez and making a deal. He acknowledges that Mr. Andrews acted for him in completing the Gonzalez transaction, but says, in relation to the Nafuran transaction, he expected Mr. Andrews to act for Ms. Nafuran. He says Mr. Andrews refused to give him advice because he was acting for Ms. Nafuran.
- [30] Mr. Tiojanco says he offered more money to Ms. Gonzalez than to Ms. Nafuran because judgments were registered against Ms. Nafuran's interest in the property, and Ms. Nafuran was responsible for occupancy costs on an ongoing basis. He says that the difference in the amounts offered to the co-owners reflects fairly their varying obligations and interests in the property.
- [31] Mr. Tiojanco says the amount offered for the property was not substantially below the market appraisal and, given that the property was sold without commission, he did not obtain an unconscionable bargain. He also points to the fact that Ms. Nafuran obtained a lease and an option to purchase, and that she ought to have been willing to pay some price to achieve her objective of continuing to live in the premises.
- [32] He drafted the option to purchase document without the assistance of counsel, but that he presented it to Ms. Nafuran at Mr. Andrews' office before the transfer was complete. That document clearly spells out the history of transactions and the measures that he was taking. If he had any intention of misleading Ms. Nafuran he would not have presented that document to her for review in the presence of Mr. Andrews.

- [33] Mr. Tiojanco says he did nothing to mislead Ms. Nafuran. He was not a fiduciary but rather a party with whom she was negotiating an agreement to sell her property. He understood she was obtaining independent legal advice from Mr. Andrews. If the advice Ms. Nafuran received from Mr. Andrews was deficient, it was not as a result of any error or omission on his part.
- [34] Mr. Tiojanco called Marita Mallari as a witness. Ms. Mallari is familiar with both parties. After the transfer of title to the property to Mr. Tiojanco she was asked to assist him by regularly collecting rent from Ms. Nafuran. Ms. Mallari lives in the building at 488 Kingsway. Ms. Mallari attested to some difficulty in obtaining rent that eventually led her to advise Mr. Tiojanco that she could not continue to do this work for him. She testified that on one occasion in 2006 she was advised by Ms. Nafuran that, Mr. Tiojanco, had bought the apartment and that she was paying rent to him. Ms. Mallari's evidence in this regard is somewhat vague, but she was firm if her recollection that the plaintiff advised her Mr. Tiojanco had bought the apartment.
- [35] The plaintiff subpoenaed and called Mr. Jeffrey Andrews as a witness. Mr. Andrews' evidence was problematic. He has no recollection of many of the details of his meetings with the parties, and for the most part testified with respect to his usual practices.
- [36] He said Ms. Nafuran was referred to him by Mr. Tiojanco in October 2005 in relation to the first planned transfer. He would have acted for Ms. Nafuran in relation to that transaction. In the circumstances of this case he is certain he would have advised Mr. Tiojanco, that he required independent legal advice and that he could not act for him. Ms. Nafuran must have appeared in front of him and executed the transfer form dated October 6, 2005, because his signature appears to that form. He would not have signed it had he not witnessed her signature being affixed to the form.
- [37] He says he usually explains a statement of adjustments such as that which was prepared on October 6, 2005. While he would not have described to Ms. Nafuran what was meant by the word "transferor" on the document, he would have explained the nature of the transaction that was taking place at that time.
- [38] When the sale did not complete as planned, because Ms. Gonzalez could not be contacted, Mr. Andrews says he continued to act for Ms. Nafuran, but also assisted Mr. Tiojanco in his attempts to complete the purchase of the property. It is clear from the documentation, however, that from October 2005 through to the spring of 2006 Mr. Andrews increasingly was acting on behalf of Mr. Tiojanco. Initially, while it may be said that he acted on behalf of both parties, he ultimately acted solely on behalf of Mr. Tiojanco and did not take any apparent measure to protect Ms. Nafuran's interests.

- [39] On October 6, 2005, Mr. Andrews made a written settlement offer to purchase Delores Gonzalez' interest in the property. That offer appears to be an offer made by Rosalinda Nafuran. That letter was actually written on instructions from Mr. Tiojanco. Mr. Andrews then arranged for the assumption of the Scotiabank mortgage by Mr. Tiojanco, without informing Ms. Nafuran of his action, despite her interest in the mortgage and the ongoing negotiations with respect to the purchase and sale of the property.
- [40] On October 6, 2005, Mr. Tiojanco executed, and provided to Ms. Nafuran, a Disclosure of Interest in Trade document by which he disclosed that he was a licensed agent and proposed to acquire an interest in real estate, that is the property on Kingsway, for personal rental or other use.
- [41] In January 2006 Mr. Andrews again made an offer to Ms. Gonzalez through her solicitors, which appeared again to be an offer made by Ms. Nafuran, although it was actually an offer being made by Mr. Tiojanco. The offer would see Mr. Tiojanco pay the funds to Ms. Gonzalez, acquire her interest and register the property in his name. When an agreement was made to purchase Ms. Gonzalez' interest in the property, Mr. Andrews drafted a form of transfer conveying Ms. Gonzalez's interest in the property to Mr. and Mrs. Tiojanco without instructions from Ms. Nafuran.
- [42] When Ms. Nafuran executed the freehold transfer in May 2006, and at the same time executed the "option-to-buy-back", Mr. Andrews did not provide her with any advice with respect to the content of the documents, by his own admission, and on the evidence of all parties. He did not make it clear that he had acted for Mr. Tiojanco in the interim. He did not, apparently, make it known to Ms. Nafuran, that he had documents in his possession relating to the purchase of Ms. Gonzalez's interest and the appraised value of the property that ought to have been disclosed to Ms. Nafuran in order to permit her to make an informed decision with respect to the sale of the property to Mr. Tiojanco.

ISSUES

1. Whether there is any basis to set aside the transfer of Ms. Nafuran's interest in the condominium property to Mr. and Mrs. Tiojanco on May 15, 2006.
2. Whether it can be said that Mr. and Mrs. Tiojanco hold Ms. Nafuran's interest in the property in trust for her.
3. If not, whether any amount is owed to the Tiojancos as rent.
4. Whether the Tiojancos are entitled to an order for possession of the property.

APPLICABLE LAW

Fiduciaries

[43] The plaintiff says Mr. Tiojanco acted as a fiduciary to Ms. Nafuran and for that reason is precluded from profiting from his dealing with the real estate in question. The plaintiff relies upon the description of the circumstances in which a fiduciary duty can arise that were set out by the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99.

[44] In *Frame*, Wilson J., in dissent, commented on the categories of relationship in which a fiduciary obligation can arise and noted that the relationship of agent and principal is generally one in which a fiduciary obligation may exist. Madam Justice Wilson noted that fiduciary duty obligations generally have been imposed where:

- (1) the fiduciary has authority to exercise some discretion or power;
- (2) the fiduciary can unilaterally exercise that discretion or power; and
- (3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[45] While certain relationships usually give rise to fiduciary obligations, and other relationships do not, the circumstances of each case must be examined to determine whether a party can be said to have been acting as a fiduciary. The plaintiff in this case emphasizes the relationship of dependency and the fact that Ms. Nafuran looked to Mr. Tiojanco for advice and placed herself in his hands.

[46] The plaintiff relies upon the judgment of the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, where the court adopted the description of the three elements of a fiduciary relationship referred to above, but noted, at p. 599:

It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. ...

[47] The court then referred to a passage from the judgment of Justice Dawson in *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, at p. 488, as follows:

There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.

[48] The Court continued in the *Lac Minerals* case, at p. 600, as follows:

The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin* at p. 384 that: "... the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

- [49] It should be noted that in *Lac Minerals*, the majority of judges of the Supreme Court adopted Madam Justice Wilson's description of the common features in the cases in which fiduciary duties have been found to exist.
- [50] The plaintiff in this case emphasizes her vulnerability and her dependence upon Mr. Tiojanco. She does not, however, point to any specific power that Mr. Tiojanco could unilaterally exercise to affect her rights. The power alleged to have been exercised by Mr. Tiojanco was more in the nature of influence. He steered her toward Mr. Andrews and she alleges he gave her assurances that dissuaded her from making inquiries into the nature of the transaction which she authorized.
- [51] The plaintiff relies on *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, as authority for the proposition that a real estate agent purchasing a property from his client may breach a fiduciary obligation in doing so. The agent in that case took advantage of an opportunity to purchase property for which he was negotiating on behalf of the client. The property was purchased by the agent personally through his wife. The purchase was concealed and the client was misled.
- [52] That case would have application to the case at bar if I were to find that Ms. Nafuran retained Mr. Tiojanco to assist her in October 2005 by selling her property and that he was assisting Ms. Nafuran by purchasing Ms. Gonzalez's interest rather than negotiating on his own behalf to purchase Ms. Nafuran's interest from her.

Rectification

- [53] The plaintiff has provided the court with some authorities on the law of rectification. These include *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19. In that case the court held that rectification is available where there has been a unilateral mistake, provided that certain demanding preconditions are met. The right is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent or may be innocent. It is essential, however, that at the time of the execution of the written document the defendant knew or ought to have known of the error, and the plaintiff did not.
- [54] The plaintiff relies upon *performance industries* as authority for the proposition that want of due diligence is not a good defence to a claim for rectification. The court in *Performance Industries* held only that the conduct of the plaintiff himself must not amount to dishonest conduct. The plaintiff must not come to the court with unclean hands.

[55] The plaintiff relies upon similar descriptions of the prerequisites to a claim for rectification in *Milinx Marketing Group Inc. v. ABC Inc.*, [1999] B.C.J. No. 958 (S.C.) and *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315 (B.C.S.C.) and *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757, 30 B.C.L.R. 282 (S.C.).

Non Est Factum

[56] The plaintiff relies further on the doctrine of non est factum. The scope of that doctrine was considered by the Supreme Court of Canada in *Marvco Color Research Ltd. v. Harris*, [1982] 2 SCR 774. That rule permits an individual to argue that a document, although signed by him, was not the document he intended to execute. It is available when the plaintiff can establish that the document executed is fundamentally different, radically different, or totally different, from that which he intended to execute. It is generally not available to one who has been careless with respect to the instrument, as the courts are reluctant to permit the parties to disown their contracts by simply asserting that they did not understand what they signed.

[57] In the *Adera Financial Corp. v. Pan Asia Investment Inc.* (1984), 57 B.C.L.R. 50 (C.A.), our Court of Appeal summarized the effect of the *Marvco* decision by noting:

... the principle of non est factum could only rarely be established by a person of full capacity and, although it is not confined to the blind and illiterate, any extension of the scope of the plea must be kept within narrow limits; and in particular it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.

[58] That rule was followed and applied in *Van Der Ros v. Van Der Ros*, 2003 BCCA 270.

Misrepresentation

[59] Finally, relying on *Sorensen v. Kaye Holdings Ltd.*, [1979] 6 W.W.R. 193, 14 B.C.L.R. 204 (C.A.) and *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2009 BCSC 1460, the plaintiff says the contract to sell her interest in the condominium to the defendants is void as having been entered into on the basis of a misrepresentation. That misrepresentation is said to have consisted of the silence of Mr. Tiojanco when he knew that the contract was being entered into by Ms. Nafuran while she was under the misapprehension that she would become a partner of Mr. Tiojanco in the ownership of the condominium.

ANALYSIS AND CONCLUSIONS

[60] The evidence on the whole is inconsistent, in my view, with the claim advanced by Ms. Nafuran.

[61] I accept as a fact that Ms. Nafuran attended at the office of Mr. Andrews and executed a transfer form in his office in October 2005 that would have transferred her interest in the property to Mr. Tiojanco. I accept Mr. Andrews' evidence that he would not have witnessed that document had Ms. Nafuran not signed it in his presence. I also accept his evidence he

would have at least explained to Ms. Nafuran she was signing a form that would transfer her interest in the property to Mr. Tiojanco. I find she signed both the transfer form and statement of adjustments. It is plain from the face of the statement of adjustments that Ms. Nafuran is to receive a payment as the proceeds of the sale of her interest in the property.

- [62] There is nothing in the record consistent with Ms. Nafuran's recollection that it was intended Mr. Tiojanco would buy Ms. Gonzalez's interest in the property and thereafter hold the property together as a tenant in common with Ms. Nafuran. It would make little sense for Mr. Tiojanco to buy the half interest of Ms. Gonzalez in the property and assume the mortgage without purchasing Ms. Nafuran's share of the property. To do so would leave him with a half interest in the property, together with someone who had been having difficulty making mortgage payments.
- [63] The documents are consistent with Mr. Tiojanco's evidence that from the outset, the solution he proposed to Ms. Nafuran to the problems with which she was faced in 2005 was for him to purchase the property. The negotiations thereafter related solely to the amount that would be paid for the parties' respective interest in the property.
- [64] It is common ground the parties attended at the office of Mr. Andrews in May 2006 and Mr. Tiojanco then produced the option-to-buy-back document. If he had intended to mislead Ms. Nafuran with respect to his intentions he would not have produced a document summarizing the measures that had been taken to this date, including the differential price paid to the two owners for their interests in the property, and the assumption of the mortgage by Mr. Tiojanco. He would not have taken Ms. Nafuran to a lawyer, particularly one who had advised Mr. Tiojanco he would be acting on behalf of the vendor.
- [65] Mr. Tiojanco could not have known that Ms. Nafuran would decline the suggestion that the documents be reviewed. He could not have known that Mr. Andrews would have been so easily convinced to witness a transfer document without a thorough and appropriate discussion with the vendor of the nature and effect of the transaction. He could not have known in advance that Mr. Andrews would fail to review the "option-to-buy-back" document in detail with Ms. Nafuran.
- [66] Further, in my view, Mr. Tiojanco is justified in his view that the amount paid for the purchase of the property was not so unreasonable as to itself cause some concern with respect to the propriety of the transaction.
- [67] I find Mr. Tiojanco was not acting in a fiduciary capacity in relation to the interests of Ms. Nafuran. While he had acted as her agent in the past, and while she had accepted his advice in relation to the mortgage in 1999, I accept Mr. Tiojanco's evidence that when he was approached in 2005 by Ms. Nafuran he suggested to her that he would be interested in purchasing the property. Having identified himself as a purchaser, he did not undertake or agree to act on her behalf. He did not have any discretion to act in a manner that affected her interests and he could not have anticipated that those interests would not be protected by the solicitor to whom he referred Ms. Nafuran.

- [68] There is no basis on the evidence, in my view, for an order for rescission of the contract or its rectification. I cannot accept there was another agreement representing the true intentions of the parties that was not reflected in the written agreement to transfer Ms. Nafuran's interest in the property to Mr. Tiojanco. There is no reasonable explanation for the execution of the contracts by Ms. Nafuran and the payment of money to her, other than a transfer of some interest in the property from Ms. Nafuran to Mr. Tiojanco.
- [69] I cannot conclude that Ms. Nafuran intended to execute a document that was radically different from that which she signed in May 2006. Having rejected the invitation of Mr. Andrews to review these documents, Ms. Nafuran was careless with respect to the contents, and in my view she cannot rely on the doctrine of non est factum.
- [70] I cannot find the documents were signed as a result of a misrepresentation on the part of Mr. Tiojanco. Ms. Nafuran has not discharged the onus of establishing such a misrepresentation. Her allegation there was an understanding she and Mr. Tiojanco would own the property together is inconsistent, as I have noted, with all of the documentation subsequent to October 2005, and Ms. Nafuran's own conduct after the transfer of the property in May 2006.
- [71] I accept the evidence of Ms. Mallari that she was advised by Ms. Nafuran that Mr. Tiojanco was an owner of the property and that she was paying rent to him. I place little weight upon that evidence. It is equally consistent with Ms. Nafuran's description of the agreement, that I have rejected, that Mr. Tiojanco had acquired a half interest in the property and she was paying rent to him as one of two co-owners in occupation of the property and with Mr. Tiojanco's evidence that he was the sole owner.
- [72] Ms. Nafuran was clearly not well served by Mr. Andrews. If she was under any misapprehension with respect to the transfer and rental of the condominium, it was as a result of the fact that she did not receive clear and forceful advice from a solicitor with respect to the transactions. I cannot find Mr. Tiojanco liable for that fault. Nor does it go to the root of the agreement between the parties who are before me.
- [73] For these reasons the plaintiff's claim is dismissed.
- [74] The counterclaim is allowed.
- [75] I find that the plaintiff, as the defendant's tenant pursuant to the transfer agreement, is liable for rent on the basis that she continues to occupy the property pursuant to the option-to-buy-back document executed in May 2006.
- [76] There is no evidence before me of the consideration that led to the lease agreement of April 19, 2008, which purports to retroactively vary terms of the existing rent. It does not extend the term or afford any other consideration to the tenant other than that contained in the "option-to-buy-back" agreement. I find that the lease agreement of April 2008 to be void for lack of consideration. The parties' obligations in relation to rent are set out in the "option-to-buy-back" agreement. Under that agreement Ms. Nafuran was required to pay rent of \$825

per month, plus hydro, cable and telephone expenses. The agreement provided that rent could increase only to the extent of increases in property taxes and strata fees.

[77] If the parties are not able to agree to the amount owing as arrears in rent pursuant to the option-to-buy-back agreement, after making appropriate deductions for any overpayments that may potentially have been made by the plaintiff when she was asked to pay \$860 per month in rent, the parties will have leave to make further submissions with respect to the amount owing as rent, or the parties may jointly request in writing that the matter be referred to the registrar for assessment.

[78] The defendants will have their costs if costs are sought.

[Submissions]

[79] THE COURT: There will be an order cancelling the certificate of pending litigation against the property.

[Submissions]

[80] THE COURT: The status of the plaintiff in the circumstances, in my view, is as a tenant who is overholding. There is a lease agreement. Eviction measures have been commenced, but dismissed pending the outcome of this action. As owners of the property, given the judgment, the Tiojancos are entitled to take measures to seek the eviction of the plaintiff.

[81] The defendants seek an order for vacant possession in the pleadings. I see no reason to conclude that I do not have some discretion with respect to the date upon which the defendants will have their order for vacant possession. We are now halfway through May. It may be difficult to find premises to occupy in June. There will be an order for vacant possession of the premises as of July 1, 2010.

___ "Willcock J" ___

The Honourable Mr. Justice Willcock

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