
CANADA / JUDGMENT

Peng v. Wang

2018 BCSC 1231

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1231 Peng v. Wang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peng v. Wang,

2018 BCSC 1231

Date: 20180724

Docket: S146837

Registry: Vancouver

Between:

Zezhen Peng and

Cobblestone Enterprises Inc.

Plaintiffs

And

William Yongli Wang, Simon Wong

and 0760549 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for the Plaintiffs/Applicants:

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Place and Date of Hearing:

Vancouver, B.C.

June 14 and 15, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2018

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INTRODUCTION

- [1] The plaintiffs, Zezhen Peng and Cobblestone Enterprise Inc. ("Cobblestone") apply to have their claim against the defendants and the counterclaim brought by one of the defendants, William Yongli Wang, determined by way of summary trial. Mr. Wang, who is the principal defendant, argues that the issues are not suitable for summary trial. Simon Wong and 0760549 B.C. Ltd. ("076"), who are the other defendants, say that to the extent there are issues concerning them, they are not suitable for determination by summary trial.
- [2] The purpose of the summary trial process under Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 3/2016, is to provide an avenue for the affordable and timely resolution of claims proceedings, without compromising trial fairness. Ultimately, the determination of suitability for summary trial is a discretionary decision. For the reasons that follow, I am of the view that the issues in this proceeding are not suitable for determination by summary trial.

BACKGROUND

- [3] I set out the following background information to provide context for determining the issue of suitability for summary trial. I am not making any findings of fact.
- [4] Mr. Peng is a businessman and investor who currently resides in China. In the summer of 2013, through his company, Cobblestone, he entered into a contract to purchase 10 of 20 strata lots ("Strata Lots") in a development in Campbell River ("Development").
- [5] Mr. Wong is the principal of 076, which owned the Strata Lots. At the time, Mr. Wong was also a real estate agent with Global Realty, a mortgage broker. He and Global Realty acted as dual agents on the transaction between Cobblestone and 076. It is not clear when Mr. Wang learned of Mr. Wong's ownership interest in the Strata Lots.
- [6] Mr. Wang and Mr. Wong had known each other for some time. Mr. Wang had lent Mr. Wong money and, by 2013, Mr. Wong owed Mr. Wang approximately \$633,000.
- [7] Mr. Wang met Mr. Peng in July 2013 and developed an acquaintance. Mr. Wang showed Mr. Peng the Strata Lots. There is conflicting evidence about whether or not Mr. Wang did so in order to persuade Mr. Peng to buy them, and whether Mr. Wong had asked Mr. Wang to do so.
- [8] Mr. Peng agreed to have Cobblestone incorporated to purchase the Strata Lots. There is conflicting evidence about whether Mr. Wang represented that he (or he and Mr. Wong) would purchase other strata lots in the Development either through Cobblestone or independently. Mr. Peng spent substantial periods in China and retained Mr. Wang to assist with the incorporation of Cobblestone and purchase of the Strata Lots, as well as other matters relating to his business interests in BC, paying him a monthly fee of \$2,000.
- [9] Mr. Wang incorporated Cobblestone, with Mr. Peng and his wife as its sole owners. Mr. Peng says this was a surprise, as he had expected Mr. Wang to be an owner. Mr. Wang also prepared a contract for purchase and sale of the Strata Lots and a document giving him power of attorney for Mr. Peng. He sent them to Mr. Peng in China, requesting his signature. There is conflicting evidence about whether or not Mr. Wang insisted that Mr. Peng execute the power of attorney. Mr. Peng did sign it, but the document was not valid as it was not notarized. There is also conflicting evidence relating to Mr. Wang signing documents using Mr. Peng's name instead of his own with the power of attorney.
- [10] Mr. Wang also provided Mr. Peng with a copy of a cheque for \$100,000 paid by Mr. Wang to Global Realty, representing the deposit on the Strata Lots. Mr. Peng later reimbursed Mr. Wang for this amount. Mr. Peng deposes that he understood that Global Realty would hold the \$100,000 in trust. Mr. Wang and Mr. Wong acknowledge that this did not occur - Mr. Wong returned the cheque to Mr. Wang as a set off against the amount Mr. Wong owed Mr. Wang.

- [11] There is conflicting evidence over whether Mr. Wong acted as a dual real estate agent for the transaction, with his own interest in the sale, without disclosing the circumstances to Mr. Peng.
- [12] Unbeknownst to Mr. Peng, the Strata Lots were mortgaged to Primex Investment Ltd. ("Primex"), with Mr. Wong as guarantor. As a result of default on the mortgage payments, Primex commenced foreclosure proceedings and obtained an Order Nisi of foreclosure on November 23, 2013. This occurred before the transaction between Cobblestone and 076 was completed.
- [13] Although he was unaware of the foreclosure, Mr. Peng decided not to proceed with the transaction. He informed Mr. Wang of this in December 2013. Mr. Wang's counterclaim alleges that Mr. Peng breached the contract by not completing the purchase of the Strata Lots.

THE PRESENT APPLICATION

[14] In his notice of application, Mr. Peng claims that:

- Mr. Wang was Mr. Peng's agent and "attorney-in-fact," and therefore owed Mr. Peng a fiduciary duty, which he breached by making false representations, executing contract documents regarding the purchase of the Strata Lots without authority, and by purporting to bind them to a contract with 076 and/or Mr. Wong, while accepting an undisclosed benefit from Mr. Wong;
- Mr. Wong also owed a fiduciary duty to Mr. Peng because he was acting as his real estate agent, and he breached that duty;
- Mr. Wang fraudulently misrepresented to Mr. Peng that he had paid the \$100,000 deposit in trust when he had actually paid it to Mr. Wong and, as both Mr. Wang and Mr. Wong benefited from the deceit, they are liable to Mr. Peng; and
- Both Mr. Wang and Mr. Wong made false representations to Mr. Peng to induce him to enter into the contract to purchase the Strata Lots.

[15] The defendants say that the central issues in this case turn on the alleged misrepresentations made by Mr. Wang to Mr. Peng. These include the following evidentiary disputes on material facts that cannot be resolved from the affidavit evidence:

- a) The nature and extent of Mr. Wang's representations about who owned the Development containing the Strata Lots;
- b) Whether Mr. Wang actively convinced Mr. Peng to purchase the Strata Lots;
- c) What representations Mr. Wang made about the economic growth potential of Campbell River and the Strata Lots' potential increase in value;

- d) What representations Mr. Wang made to Mr. Wong about whether he would purchase the other 10 strata lots for sale in the Development and what he represented to Mr. Peng about whether he would own shares or be a director of Cobblestone
 - e) Whether Mr. Wang insisted that Mr. Peng provide him with a power of attorney;
 - f) Whether Mr. Peng obtained independent legal advice about the terms of the power of attorney and the contract for purchase and sale of the Strata Lots;
 - g) What representations Mr. Wang made to Mr. Peng about the meaning of documents, and in particular the addendum that extended the completion date; and
 - h) Whether Mr. Wang signed documents on behalf of Mr. Peng with or without Mr. Peng's express authorization.
- [16] Counsel for the plaintiffs conceded that credibility is a central issue for some of their claims and that those cannot be resolved by summary trial. However, she submitted that two of the plaintiffs' claims against Mr. Wang are based on undisputed facts:
- (1) the claim of fraudulent misrepresentation arising from Mr. Wang's representation to Mr. Peng that he had paid the \$100,000 to Global Realty when he had actually retained it as partial reimbursement of a debt Mr. Wong owed him; and
 - (2) the claim of breach of fiduciary duty based on the fact that Mr. Wang was acting as Mr. Peng's agent when negotiating for the purchase of the Strata Lots but did not disclose to Mr. Peng that Mr. Wong was an owner of 076 and also did not disclose what had transpired with the \$100,000 deposit.
- [17] The plaintiffs also say that one of their claims against Mr. Wong and 076 can be decided on undisputed facts. They say that, since Mr. Wong and 076 knew that Mr. Wang was Mr. Peng's agent, they breached their duty to ensure that Mr. Peng was aware of the potential conflict between Mr. Wang's agency relationship with Mr. Peng and his acquisition of the \$100,000 deposit.
- [18] Counsel for the plaintiffs reserved the right to pursue all of their other claims against the defendants if they are not successful on the claims they have identified as suitable for summary trial.

SUITABILITY FOR SUMMARY TRIAL

- [19] Rule 9-7(11) provides that a summary trial application may be dismissed where the court determines the issues raised are not suitable for summary disposition or the summary trial will not assist in the efficient resolution of the proceeding. The powers of the court hearing a summary trial application are set out in Rule 9-7(15):
- (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. . .

[20] In *Davies v. Canada Shineray Suppliers Group Inc.*, 2016 BCSC 1853, Fleming J. summarized the applicable principles as follows:

32 *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) remains the leading authority on the principles to be applied in deciding the issue of suitability for summary trial. Chief Justice McEachern, writing for the Court of Appeal, identified some of the factors the court may consider in determining whether it would be unjust to give judgment, including the amount involved, the complexity and urgency of the matter, any prejudice likely to arise by reason of delay, the cost of taking the case forward to conventional trial, and the course of the proceedings to date. Other factors include whether the summary trial would take considerable time, whether credibility is a critical factor and has cross examination occurred, and whether the summary trial may create unnecessary complexity in the resolution of the dispute or "result in litigating in slices": *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369.

See also *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 28-35.

- [21] The onus of demonstrating the matter is not suitable for summary trial is on the summary trial application respondents: *Morin v. 0865580 B.C. Ltd.*, 2014 BCSC 2110 at para. 22.
- [22] Mr. Wang concedes the amount involved is relatively modest and the issues are not complex. No party claimed that there was prejudice or any urgency. The claim arose in 2013. Discoveries have occurred but no trial date has been set.
- [23] With respect to the time a conventional trial would take, Mr. Wang estimated approximately five days. The plaintiffs estimated five to ten days. All of the parties would require interpreters. Assessing the credibility of the three individual parties will be important, so cross-examination is likely to be lengthy. Based on these factors and the material before me, it is likely that ten days will be required.
- [24] While these considerations favour of adjudication by summary trial, I must weigh them against the two last concerns listed by Justice Fleming: whether credibility is a critical factor and whether the summary proceeding will unnecessarily complicate resolution of the dispute.
- [25] The fact that credibility arises in a claim of fraudulent misrepresentation does not necessitate adjudication by conventional trial. In *0997900 B.C. Ltd. v. Askounis*, 2015 BCCA 458, the Court of Appeal upheld the chambers judge's determination that an allegation of fraudulent misrepresentation was suitable for summary trial:

23 I will mention two particular submissions, however. Included in the appellants submission on the mode of trial is the contention that a full trial was required because their counterclaim included an allegation of fraudulent misrepresentation. This, in my view, is not a sufficient reason to require a full trial. The mere use of the electric word 'fraud' does not disqualify an action from summary trial - in determining a challenge to the mode of trial the question is always whether issues involved in the presentation of the case make the summary trial process unsuitable. The appellants, in my view, have not identified any area of evidence that would have advanced a viable claim in fraudulent misrepresentation requiring a full trial. . .

[26] In *Crest Realty Westside Ltd. v. W & W Parker Enterprises Ltd.*, 2015 BCCA 447, the Court of Appeal upheld another decision to proceed by way of summary trial in a case involving fraudulent misrepresentation:

21 The trial judge found the case suitable for summary disposition under R. 9-7. While acknowledging that conflicting affidavit evidence might render a case unsuitable for summary trial, he noted that the key persons involved here had all been cross-examined on their affidavits and thus he had the opportunity to consider the veracity of their statements. He was satisfied that he could decide the issues on the basis of the evidence presented.

[27] Notably, in both cases, the chambers judge was satisfied that the claim could be decided on the basis of the evidence available. In 0997900 B.C. Ltd., the chambers judge found that there was no evidence of the representations made; in *Crest Realty*, cross-examination on affidavits provided sufficient foundation to determine credibility.

[28] That is not always the case. For example, in *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2018 BCSC 1112, the chambers judge found that a summary trial was not appropriate:

24 I am not satisfied on the material before me that I can fairly reconcile the competing affidavits with the positions taken by either party. In this case there are allegations of numerous representations made over various meetings and interactions. The evidentiary record regarding these interactions is very thin and vague as to dates, locations, and people present. I am not satisfied that the discrepancies in the evidence can be fairly resolved on a summary trial.

25 Given that the statements alleged to be made by Ms. Gina are central to the fraudulent misrepresentation claim asserted by Satnam, it is my view that this evidence must be presented at a regular trial and be subject to cross-examination.

26 While credibility issues may be determined on a summary trial, I am not satisfied that the issues in this case can be resolved justly on the evidence before me on this application.

[29] In this case, while the plaintiffs have identified a subset of their claims that do not turn on credibility, they have reserved the right to pursue all of their other claims at a conventional trial if they are not successful on the claims advanced in a summary trial. I agree with counsel that credibility is critical to the determination of those other claims. The evidence relating to those claims is akin to that described in *Satnam*, in that there are "allegations of

numerous representations made over various meetings and interactions" and the record is insufficient to resolve the discrepancies in the record.

- [30] The fact that deciding the three identified allegations by summary trial will not necessarily resolve the dispute raises a concern about litigation in slices.
- [31] It may be fair and efficient to decide a discrete issue by way of summary trial even though it will not resolve the dispute in its entirety. However, where the issues proposed for summary adjudication are intertwined with the issues remaining for trial, there is a real potential for duplication or inconsistent findings. There is also the possibility of multiple appeals. In such cases, summary trial is not appropriate: *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at para. 110. Where there is a counterclaim which raises issues that are inextricably interwoven with the claim, a summary trial is not appropriate: *Shannon v. Gill*, 2015 BCCA 402.
- [32] In the present case, the allegations identified by the plaintiffs as suitable for summary trial are entirely intertwined with the other allegations and with the issues raised in the counterclaim. All arise out of the same series of events, and there are conflicts in the affidavit evidence of all three individual parties on numerous issues. Summary adjudication on the issues proposed by the plaintiffs while reserving the remainder of their claims and the counterclaim for another day would be inefficient and unfair.
- [33] Counsel also raised the possibility of adjourning the summary trial application and ordering cross-examination on the affidavits. While that is appropriate in some cases, I do not believe it is efficient and fair in this case. Assessing the credibility of the three individual parties goes to the foundation of their dispute. The allegations raised in the claim and counterclaim are inextricably intertwined. Although there are a number of documents, resolution of the dispute turns on the oral communications between the various parties and their understandings that either was or was not captured accurately in those documents. In these circumstances, I am not persuaded that cross-examination on affidavits will save time or permit fair resolution of the issues.
- [34] The application is dismissed with costs to the defendants in the cause.

"TYER J."

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