

CANADA / JUDGMENT

Randhawa v. Khaira

2020 BCSC 1257

COURT

Supreme Court of British Columbia

DECIDED

24 August 2020

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2020 BCSC 1257 Randhawa v. Khaira

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Randhawa v. Khaira,

2020 BCSC 1257

Date: 20200824

Docket: S167512

Registry: Vancouver

Between:

Jasvir Kaur Randhawa

Plaintiff

And

Mohinder Singh Khaira, Joginder Singh Khaira and

GN Motors Sale "N" Rentals Limited

Defendants

Before: The Honourable Madam Justice Veronica L. Jackson

Oral Reasons for Judgment

Counsel for the Plaintiff:

J. Virk

Counsel for the Defendant Mohinder Singh Khaira:

C. Clark

Counsel for the Defendants Joginder Singh Khaira and GN Motors Sale "N" Rentals Limited:

No appearance

Place and Date of Hearing:

Vancouver, B.C.

August 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 24, 2020

THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

INTRODUCTION

- [1] Since the two individual defendants share the same surname, I will follow both counsels' lead and for clarity at times refer to them by their first names, meaning no disrespect in doing so.
- [2] The defendant Mohinder Singh Khaira ("Mohinder") applies by way of summary trial for certain relief, specifically:
1. An order dismissing the plaintiff's claim for a declaration that the transfer of the shares in 653294 BC LTD ("653") from Joginder Khaira ("Joginder") to Mohinder is a fraudulent conveyance or fraudulent preference;
 2. an order dismissing the plaintiff's claim for a declaration that Joginder and Mohinder hold their interest in 653 in trust for the plaintiff;
 3. an order that the plaintiff's claim for damages for civil conspiracy be dismissed; and
 4. costs.
- [3] Joginder, and his company GN Motors Sale "N" Rentals Limited, are also defendants in the plaintiff's action. The further amended notice of civil claim alleges Joginder is indebted to the plaintiff but transferred shares he held in 653 to Mohinder (his younger brother) with either the intention, or the effect, of defeating the plaintiff's ability to collect on the debt.
- [4] The debt action is not before me as no summary trial application was initiated by Joginder. Joginder and his company filed no material in the application, and did not appear at the hearing, although duly served.

LEGAL FRAMEWORK

- [5] On a summary trial under R. 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the court may grant judgment in favour of any party, either with respect to an issue or generally, unless "on the whole of the evidence", the court is unable to find the facts necessary to decide the issues of fact or law, or is of the opinion it would be "unjust to decide the issues on the application": R. 9-7(15); *Mayer v. Mayer*, 2012 BCCA 77 at para. 58 [Mayer]; *Tassone v. Cardinal*, 2014 BCCA 149 at para. 24; and *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), [Inspiration Mgmt.] at para. 53.
- [6] The purpose of the summary trial rule is to enable the early resolution of cases that can be determined on affidavit evidence or the law alone: *Kimball v. Nikiforuk*, 2019 BCSC 964 at para. 40; *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at para 85.
- [7] The suitability of a case for summary trial depends on the facts and legal issues in each case. In *Inspiration Mgmt.* at para. 48, the court set out some of the factors relevant in determining whether it would be unjust to grant a judgment in a summary trial. These factors include:
- § the amount of money involved;
 - § the complexity of the matter;
 - § the urgency of the case;
 - § the prejudice likely to arise by reason of delay in taking the case to trial;
 - § the cost of taking the case forward in relation to the amount involved; and
 - § the course of the proceedings.
- [8] Other factors have also been found to be relevant, such as the cost of litigation, the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [9] Where there are conflicting affidavits on a summary trial application, judges may be able to make findings of fact, however this depends on the nature and quality of the material before the court: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) at 386, cited in *Inspiration Mgmt.* at para. 42. If there is a conflict in the evidence on a critical issue, the court may not be able to assess credibility and determine the necessary facts under the summary trial rule: *HP and OM Enterprises Ltd. v. Badesha Enterprises Ltd.*, 2009 BCSC 1429 at paras. 37-38; see also *Urban Holdings Ltd. v. MacDuff*, 2007 BCSC 631. The inability to find the necessary facts may be most acute where credibility lies at the heart of a case, in which case proceeding by way of summary trial is not appropriate: *Mayer* at para. 93.

[10] If a judge is able to make the necessary findings of fact and apply the applicable law to those facts, proceeding to trial does generally not represent a process which is proportionate, timely or cost-effective: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49 - 50.

IS THE MATTER SUITABLE FOR SUMMARY TRIAL?

[11] Mohinder argues the fraudulent preference, fraudulent conveyance and civil conspiracy claims which involve him are suitable for summary trial because:

§ the claims arise out of a single share transfer transaction, albeit one that occurred in two tranches, and as such is not factually complex;

§ the law with respect to fraudulent conveyance, fraudulent preference and civil conspiracy is well settled and does not raise complexities that cannot be resolved through summary trial;

§ summary trial represents the most efficient and cost-effective way of dealing with the issues raised for summary trial;

§ the parties are canvassing trial dates in 2022, meaning Mohinder will have to wait for approximately two years to have the matter resolved at a viva voce trial;

§ credibility is not a factor;

§ a summary decision with respect to conspiracy, fraudulent preference or conveyance will not create unnecessary complexity in the resolution of the remainder of the claim, and may in fact streamline it; and

§ the issues for summary trial are not intertwined with the debt claim, and because the debt claim is distinct there is no risk of duplicative proceedings or inconsistent findings of fact, and therefore there is no concern that this summary trial represents litigating in slices.

[12] The plaintiff argues the claims involving Mohinder are not suitable for summary trial because:

§ the amount for which the shares transferred to Mohinder were allegedly pledged is significant, somewhere between \$1 million and \$2 million dollars;

§ the credibility of both Joginder and Mohinder on the share transfer issue is critical and should not be resolved on the basis of only affidavit evidence;

§ the plaintiff is exploring the idea of retaining an expert to examine the original promissory notes purportedly given to Mohinder by Joginder, the existence of which she only became aware of in July 2020, and which have not yet been located or shown to her; and

§ there is no urgency to the resolution of the issues.

[13] For the following reasons, I find the fraudulent preference, fraudulent conveyance and civil conspiracy claims are not suitable for summary trial.

- [14] The amount of money alleged to be secured by the transaction is not insignificant. There is no urgency. The evidence does not demonstrate that Mohinder is likely to suffer prejudice by reason of the delay in scheduling the matter for trial beyond ordinary inconvenience and stress of awaiting litigation. The claim against Mohinder is fairly fresh (he was only added as a defendant in late October 2019) and has moved expeditiously. While there will be costs associated with a trial, that expense can be ameliorated to some extent through an award of costs if Mohinder is ultimately successful in defending the claims. In any event, that fact does not outweigh the larger concerns I have with respect to the unsuitability of this case for summary trial.
- [15] While I agree with Mohinder that the factual and legal issues are not overly complex, I disagree that credibility is not critical in this case. The efficacy of debts owed by Joginder to Mohinder, and what Mohinder knew and when, are issues which squarely involve the credibility of both of the individual defendants. The evidence on those central points conflict. I find it is not appropriate to determine the conflicts in the evidence on those points based on an assessment of affidavit evidence only: *Wu v. Gu*, 2020 BCSC 396 at para. 99.
- [16] In addition, the absence of evidence from either of the witnesses to the impugned promissory notes, or person who drafted them who has never been identified, also leads me to conclude the matter is unsuitable for summary trial.
- [17] Further, I disagree with Mohinder's submission that the debt claim is not intertwined with the fraudulent preference, fraudulent conveyance and civil conspiracy claims. Until there is a determination that Joginder owed a debt to the plaintiff, it cannot be determined the debt was defeated by means of fraudulent action or conspiracy, so the foundation for the causes of action at issue on summary trial application is missing. Determination of the debt claim, which is not before me, must be undertaken contemporaneously with the consideration of the other causes of action.
- [18] Finally, a party who applies for relief by way of summary trial runs the risk that the outcome will be decided against them. However, the orders Mohinder seeks have the potential to affect Joginder. For example, Mohinder seeks an order dismissing the plaintiff's claim for a declaration that both Joginder and Mohinder hold their interests in 653 in trust for the plaintiff. A potential outcome of the summary trial is a declaration that they do. While the fact that Joginder did not participate in this application, despite being properly served, could be taken as meaning he accepted the risk that central issues in the claim would be decided against him, given the importance of these issues that is not an assumption I am prepared to make. His absence is another reason why in my view, in this particular case, it would be unjust to determine the fraudulent conveyance, fraudulent preference and civil conspiracy claims by way of summary trial.
- [19] For all these reasons I find the matter is not suitable for summary trial.

[20] As a result of my conclusion on the threshold issue of suitability, it is not necessary for me to address the merits of Mohinder's summary trial application and I decline to do so.

[21] Mohinder's application for summary trial is dismissed.

[22] The plaintiff was the successful party in this application. Costs will be in the cause.

"Jackson J."

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