

CANADA / JUDGMENT

Rascal Trucking Ltd. v. Nishi

2010 BCSC 649

COURT

Supreme Court of British Columbia

DECIDED

16 April 2010

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2010 BCSC 649 Rascal Trucking Ltd. v. Nishi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rascal Trucking Ltd. v. Nishi,

2010 BCSC 649

Date: 20100416

Docket: S55023

Registry: Nanaimo

Between:

Rascal Trucking Ltd.

Plaintiff

And:

Edward Sumio Nishi

Defendant

Before: The Honourable Mr. Justice Dley

(appearing via teleconference)

Oral Reasons for Judgment

Counsel for the Plaintiff:

N. Evans (via teleconference)

Counsel for the Defendant:

P. Guy (via teleconference)

Place of Trial/Hearing:

Nanaimo, B.C.

April 16, 2010

Place and Date of Judgment:

Nanaimo, B.C.

April 16, 2010

- [1] THE COURT: This action arises out of the plaintiff contributing money toward the purchase of land and for which an interest in the land is sought. The defendant takes the position that the contribution was in payment of a debt arising out of the plaintiff's nuisance.
- [2] Hans Heringa is, by his own account, a successful and wealthy civil engineer. He has been in construction since 1972 and in land development since 1985. He has some 12 corporations, including Rascal Trucking Ltd. ("Rascal") and H. & F. Ventures Ltd., that administer to his empire. Mr. Heringa had developed property with the Plavetic family. Cidalia Plavetic is a realtor and a principal of Kismet Enterprises Ltd. Kismet owned just under two acres at 6231 Hammond Bay Road in the City of Nanaimo, British Columbia (the "City").
- [3] Mr. Heringa and Ms. Plavetic had more than just a business relationship for a period of time. In spite of their relationship breaking up, they continued to deal with each other in business matters, which included being co-owners of property on Bowen Road. Their agreements were always reduced to writing. Ms. Plavetic had some judgments against her, and land was placed into Mr. Heringa's name to protect her against creditors. In that case, an agreement was executed to confirm that Mr. Heringa was holding the property in trust for Ms. Plavetic.
- [4] In 1996, Mr. Heringa learned that the Kismet property was correctly zoned to accommodate a topsoil processing facility. That resulted in a five-year lease commencing April 1, 1996, whereby Rascal would use the bottom two-thirds of the parcel for its soil-processing business. Rascal agreed to pay royalties to Kismet that were anticipated to be approximately \$10,000 per year. Rascal also agreed to keep the property free of builders' liens and to hold harmless Kismet from any and all liabilities resulting from Rascal's operations on the property.
- [5] Rascal moved about 15,000 cubic yards of topsoil onto the property for processing. Mr. Heringa valued the soil at about \$225,000.
- [6] As a result of complaints from the neighbourhood, the City passed a resolution determining that the soil processing was a nuisance and that the accumulated topsoil should be removed. The initial order of July 3, 1996, was directed only to Kismet as the owner of the land.

- [7] A second order dated August 19, 1996, added Rascal to the resolution and directed the removal of the topsoil. The resolution provided the City with the power to remove the topsoil if its order was not complied with. Costs incurred by the City would be added to and form part of the property taxes.
- [8] Kismet had no means to remove the soil and accordingly did nothing.
- [9] Rascal tried to have the City pay for the removal to another site, but the negotiations were unsuccessful. Rascal then entered the bidding process tendered by the City for the soil removal. In spite of the fact that Rascal was the lowest bidder, the City declined to award it the tender. The initial costs of removal were \$85,467.84.
- [10] There were differing numbers set out by the City as to its final costs for the soil removal. However, the parties are in agreement that the sum of \$110,679.74 is the proper sum charged by the City for the soil removal and associated costs. That amount was lodged against the property as tax arrears.
- [11] Rascal brought an action to have the City's nuisance resolution set aside. That claim reached the Supreme Court of Canada, which ruled that the City had the jurisdiction to declare the nuisance.
- [12] Tax arrears and existing mortgage to the CIBC caused Ms. Plavetic to conclude that there was no equity in the property, and she ceased making the mortgage payments. Rascal caused three builders' liens totalling just over \$300,000 to be lodged on title. Ms. Plavetic received advice that these liens were not valid. However, she did not take any steps to remove them as she had been told by Mr. Heringa that the liens were for her protection, and she trusted his advice.
- [13] Rascal made a claim against its own insurance seeking payment of the tax arrears sum equivalent to the City costs for removing the dirt. The insurer denied the claim.
- [14] The CIBC commenced foreclosure proceedings in December 1977. As a protective disbursement, CIBC subsequently paid the \$110,679.74 to redeem the property from a tax sale.
- [15] The bank was granted an order to sell the property and to have conduct of the sale. Throughout the foreclosure proceedings, Mr. Heringa took an active role in seeking a way in which he might take an ownership position. All of his efforts were either ignored by CIBC or rebuffed.
- [16] At the same time, Mr. Heringa was demanding that the City remove its tax arrears from title. Rascal also sued the City seeking damages for the topsoil removal.
- [17] Foreclosure proceedings were finally concluded on May 14, 2001, when a vesting order was granted with title being transferred to Mr. Nishi at a price of \$237,500.

- [18] Mr. Nishi retained counsel, Philip LeSeur, to represent him presenting his offer to the court. Mr. LeSeur prepared the closing documents on behalf of Mr. Nishi and paid the funds as directed.
- [19] Mr. Nishi was assisted in the financing of the purchase by Mr. Heringa, who advanced the equivalent of \$110,679.74 and signed as covenantor.
- [20] Mr. Nishi and Ms. Plavetic have resided on the Hammond Bay property in a common-law relationship since 1997. Following Mr. Nishi gaining title on the foreclosure, the couple has spent in excess of \$100,000 in development costs. They anticipate being able to ultimately market the property as a multi-dwelling site. They would not have spent that money if Mr. Heringa was to have had an interest in the land.
- [21] The initial question raised by the pleadings and the declaration of Mr. Heringa in lodging a caveat in September 2008 is whether there was an agreement between the parties. The facts attested to by Mr. Heringa in the caveat allege that in or about May 2001, Mr. Nishi verbally agreed to give up a 50 percent interest in the land in exchange for Mr. Heringa contributing \$80,000 to redeem the property. Mr. Nishi is adamant that there was no such agreement. He is candid in acknowledging that he does not recall all of the conversations or receiving the written documents from Mr. Heringa.
- [22] Mr. Nishi was not a sophisticated or business-wise entrepreneur. His background as a millwright would not give him the kind of business acumen possessed by Mr. Heringa. Mr. Nishi provided no written notes, memorandums, or offered any documents that might confirm his position.
- [23] Much of the correspondence relating to Mr. Nishi's involvement was sent to the attention of Ms. Plavetic. She was well versed in real estate transactions and wise to issues relating to judgments, creditors, and self-protection.
- [24] Mr. Heringa's brother Eric testified that he was present on one occasion during the foreclosure proceedings. He said that there were discussions between his brother and Ms. Plavetic that would have resulted in his brother receiving the bottom piece of the property where the dirt had been located. Eric Heringa also said that H. & F. Ventures made a bid for the property.
- [25] I do not find Eric Heringa's evidence to be reliable. He testified in a manner that suggested that he was simply summarizing the case for his brother. He said that H. & F. Ventures bid on the property; that did not occur. His brother did not want to be seen as any part of the transaction due to the friction that he was having with the City.
- [26] I do not find Hans Heringa's evidence to be particularly reliable as it relates to an alleged agreement. During the course of cross-examination, Mr. Heringa was often evasive and unresponsive. This was particularly evident during an exchange in cross-examination when Mr. Heringa was reluctant to admit that the topsoil belonged to Rascal.

- [27] Mr. Heringa took the position that the save harmless clause in the lease was only effective if the occurrence was covered by insurance. That position cannot be sustained either in law or by common sense. It was an example of Mr. Heringa tailoring his evidence to suit his argument.
- [28] Mr. Heringa testified that it still has to be shown that Rascal's use of the property caused the tax arrears. By now it should be obvious even to Mr. Heringa that it was Rascal's topsoil which resulted in the nuisance resolution by the City.
- [29] Mr. Heringa's sworn declaration in support of the caveat referred to an agreement where he was to receive a 50 percent interest in exchange for an \$80,000 contribution. The fact is that at the time the caveat was lodged, the contribution he had made was \$110,679.74.
- [30] In spite of Mr. Heringa's insistence that an agreement was reached, his own faxes prove otherwise. On May 18, 2001 (Exhibit 1, Tab 41), Mr. Heringa sent a fax to Mr. Nishi proposing a contribution of \$110,000 towards the property purchase. Mr. Heringa suggested that he would then be entitled to subdivide or use the lower half of the land. The fax also refers to Rascal and Kismet continuing to support each other and settle the issue of damages as between themselves and as against the City and CIBC. There was no response to that proposal.
- [31] On May 25 (Exhibit 1, Tab 45), Mr. Heringa sent a fax to Mr. Nishi's solicitor confirming that \$85,000 would be applied to the purchase and that Rascal Trucking would be responsible for payments on \$25,000 of the new mortgage. Mr. Heringa set out in paras. 4 and 5 of the fax the following:
- 4) We would like Edward Nishi to sign "Registrable Form documentation for a Second Mortgage for \$110,000, no interest, to secure Rascal's interest in this land. This Second will not be Registered as yet, and only at some later date perhaps, with the consent of both of us.
 - 5) There should be an Agreement that Edward Nishi will apply for, transfer & convey the bottom 1/2 of the property to Rascal Trucking Ltd., after completion of the Sale, and that it is the intent that Rascal can use, and later own the bottom portion of the property, commencing at the halfway point of the upper driveway, as per the attached Plan.
- [32] Mr. Heringa then went on in that same fax to say the following:
- It could be that Edward Nishi will hold "in Trust" the bottom portion, as directed by Rascal, for legal, accounting, Tax, negotiating or other reasons for unspecified time periods.
- [33] That fax was copied to Mr. Nishi. Mr. Nishi testified that he rejected suggestions from Mr. Heringa that the property be placed into the latter's name. Mr. Nishi said that he was not prepared to give any interest in the land to Mr. Heringa since he had been the cause of the difficulties associated with the topsoil.

[34] Mr. Heringa said the following at his examination for discovery of May 20, 2009, at Question 420:

Q Did you receive anything in writing to indicate that this proposal was accepted by Mr. Nishi?

A I don't recall verbally or anything in writing to say that it was not accepted either. But I don't know. If it's in the court documents, there is. If it isn't, it wasn't.

[35] In spite of the manner in which the question was answered the inference is clear. There was no acceptance from Mr. Nishi.

[36] On May 28 (Exhibit 1, Tab 46), Mr. Heringa sent a further fax to Mr. LeSeur and again copied Mr. Nishi. This fax, which is to be read together with the May 25th correspondence, includes the following:

- 1) So there is no confusion, Instruction #1, is a stand alone instruction, and the \$85,000 is to be applied to the purchase without any conditions or requirements, and these instructions are irrevocable. The Sale must complete, in the name of Edward Nishi. Items 2 & 3 are only to confirm what is to occur.
- 2) The rest (Item 4 & 5) are just possibilities, for future reference & consideration, and that's all.
- 3) However, if you think that a Second Mortgage or anything else makes sense, to properly protect Nishi, Kismet & Rascal, in the future, from demands from the City or from future Nuisance charges, etc, please advise Also, Rascal doesn't want to lose its legal non-conforming status in regard to topsoil processing at this site.

[37] I should add that under para. 2 the word all was underlined by Mr. Heringa.

[38] The only rational conclusion to be drawn from these faxes is that Mr. Heringa was pushing for an interest in the land. Mr. Heringa conceded that his proposal of May 25, being items 4 and 5 which would have given him an interest in the land, were only possibilities to be dealt with in the future. The \$85,000 contribution was free and clear of any conditions or requirements.

[39] His intention and desire to secure an interest was obvious, but Mr. Nishi would not agree. As a result, I conclude that there was no agreement whereby Mr. Heringa was to be given an interest or ownership position in the land.

[40] I further conclude that as a result of this court's finding that there was no agreement and my assessment of Mr. Heringa's evidence, the evidence of Mr. Nishi is to be preferred over that of Mr. Heringa. I make that finding even though Mr. Nishi was present in court while all other witnesses testified.

- [41] There remains the question as to whether the payment to assist in the purchase results in an equitable interest in favour of the plaintiff. Mr. Evans argues that the payment by Rascal Trucking toward the purchase of the property creates a resulting trust.
- [42] The presumption of a resulting trust arises where one party contributes financially to the purchase of property but does not take title. In this case, there is no issue of a gift. Neither Mr. Nishi nor Ms. Plavetic considered the plaintiff's contribution to be a gift. The presumption of a resulting trust is rebuttable by the title holder showing that the payment was not intended to create a beneficial interest.
- [43] The considerations relating to a resulting trust are succinctly reviewed by the Ontario Supreme Court in the case of *Stanciu v. Stanciu*, 2004 CanLII 15291, and in that case, at para. 25, the court quotes from *Anger & Honsberger Real Property*, 2nd Ed. Volume 1, and refers to p. 647 of that text and says the following:

"A resulting trust is presumed to arise when property is purchased with the money of one person but the conveyance is taken in the name of another, although there is no written evidence of the trust.

... A trust thus prima facie resulting from the payment or an obligation to pay the purchase price may always be rebutted by parol evidence on the part of the nominal purchaser. On the other hand, this rebutting evidence may in turn be contradicted by some sort of evidence on the part of the alleged beneficiary and the question to be decided may thus become a pure question of fact to be determined on the conflicting evidence alternatively adduced for these purposes."

...

"The basic principle of a resulting trust is an intention, express or presumed by the law, on the part of the person paying the purchase money that he should have the beneficial interest. Consequently, it would follow that, if there can be shown to have been in fact an intention on the part of a purchaser that the beneficial interest shall go to the person to whom the property is conveyed, the presumption is entirely removed and no trust would result."

- [44] Rascal has maintained an action against the City claiming damages for the soil removal. In an amended statement of claim signed by Mr. Heringa and prepared under his instruction, it is alleged that Rascal may be required to pay Kismet damages for contractual obligations which include tax arrears of \$110,679.74. Rascal seeks indemnification from the City for those damages.
- [45] Rascal was obligated to hold harmless Kismet from any liabilities resulting from its soil-processing business. Rascal conceded its obligation to indemnify Kismet for the City charges by the following pieces of evidence:
1. making a claim against its insurance for the City charges. Mr. Heringa testified that if the insurer had accepted the claim, then Kismet would have been paid;

2. writing to Ms. Plavetic, Kismet and Mr. Nishi on June 28, 2000 (Exhibit 1, Tab 21), confirming that "Rascal is morally obligated to pay the \$85,495.64 in City charges and accepts this liability if this invoice indeed legally has to be paid";
3. writing to the City on May 4, 2001 (Exhibit 1, Tab 33), accepting a full moral obligation to pay the tax arrears but under protest;
4. by paying the exact amount of the tax arrears as part of the purchase price. Mr. Heringa wrote a memorandum to his staff on August 25, 2001 (Exhibit 1, Tab 57), which broke down the payment of \$85,000 and the balance of \$25,679.74; the latter being a continuing obligation on the new mortgage;
5. by acknowledging responsibility for the tax arrears in the following admissions in his examination for discovery. The questions and answers that I am going to refer to refer to Mr. Heringa's notes of May 3, 2001 (Exhibit 1, Tab 31), and those notes were sent to Ms. Plavetic. The questions are Questions 345 to 348. Starting at 345:

Q Then paragraph 2 says: Rascal takes responsibility for the taxes in arrears on Kismet's title and -- "something"?

A Pays to remove them or pays them as part of damages with the city and as part of settlement with the city:

Q "CW", the city?

A Carried with.

Q And as part of settlement with the city?

A Of a settlement with the city. Had this proposal been accepted, we were going to argue away -- or try to argue away the 110 with the city. If we couldn't, well, we'd have to pay it.

Q "We" was Rascal?

A "We" was Rascal, yeah. It says Rascal takes responsibility for the taxes in arrears contrary to the agreement -- or the lease agreement.

[46] In those instances where Mr. Heringa uses the phrase under protest, I infer that phrase refers to the City and not with respect to Kismet. I conclude that Mr. Heringa was simply taking the position that any payment of the tax arrears was not to be construed as an acknowledgement of the debt to the City or a waiver of his claim against the City.

[47] Mr. Nishi has satisfied the burden on him to rebut the presumption of a resulting trust as urged by the plaintiff. I have specifically accepted the evidence of Mr. Nishi that there was no intention to have any interest in favour of Rascal created in the land. Additional evidence which I have referred to shows Rascal accepted the liability created by its own nuisance.

[48] As a result, I conclude that the money paid during the course of the purchase by Mr. Nishi was simply to satisfy a debt against the land which had been caused by Rascal. Accordingly, there is no resulting trust.

[49] The plaintiff further seeks relief based on a constructive trust. The essence of this action is based upon a dispute that has arisen between Rascal Trucking and the City. The actions which resulted in the nuisance can be attributed solely to Rascal. It was the cost of the soil removal which resulted in the chain of events leading to Ms. Plavetic concluding, rightly or wrongly, that there was no equity left in the land and the mortgage payments fell into arrears.

[50] Much of what has occurred since the initial soil removal has been motivated by Mr. Heringa's dispute with the City.

[51] The position of the parties was aptly summed up by Mr. Heringa in his June 4, 1999, fax (Exhibit 2, Tab 7) to Bob Draper at CIBC when he stated:

To some extent, Cidalia Plavetic and Kismet are innocent victims in a City - Rascal feud.

[52] In his examination for discovery, Mr. Heringa said the following at Question 209:

Q It's fair to say that you agree that Kismet did nothing to cause the City of Nanaimo to charge its property with what was initially \$85,000?

A I would definitely agree Kismet did nothing wrong and is an innocent victim in all of this.

[53] I have drawn the inference that Mr. Heringa has tried to maintain an interest or create an interest in the land in order to preserve the claim against the City for tax arrears. That is obvious from his amended statement of claim. It is also apparent that Mr. Heringa would prefer to continue pursuing a soil-processing plant on the Hammond Bay property. He could only do that if he had maintained an interest in the land.

[54] The focus on issues with the City is apparent in the May 28 fax to Mr. LeSeur where Mr. Heringa contemplated a second mortgage. A second mortgage was viewed as an impediment to any actions or claims by the City. Mr. Heringa wrote:

[I]f you think that a Second Mortgage or anything else makes sense, to properly protect Nishi, Kismet & Rascal, in the future, from demands from the City or from future Nuisance charges, etc, please advise... Also, Rascal doesn't want to lose its legal non-conforming status in regard to topsoil processing at this site.

[55] The result is that Mr. Nishi has not been unjustly enriched such that a constructive trust has been created. The contribution toward the purchase price by Rascal was simply to put Ms. Plavetic, Kismet, and Mr. Nishi in the same position as if the nuisance and its accompanying charges had not been caused by the plaintiff. If any trust was created, it was between Mr. Nishi and Ms. Plavetic.

[56] The stark reality of the equitable claim is that the plaintiff seeks to secure an interest in property in exchange for a debt that the plaintiff caused by its own nuisance. The plaintiff seeks relief caused by its own wrongful action. Equity does not permit a wrongdoer to profit from its own misconduct.

[57] The facts do not disclose an agreement, a resulting trust, or a constructive trust as alleged and claimed by the plaintiff. Accordingly, the action is dismissed.

"S.D. Dley J."

DLEY J.

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