

CANADA / JUDGMENT

Rehak v. Zalanfy Estate

2019 BCCA 86

COURT

British Columbia Court of Appeal

DECIDED

21 February 2019

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2019 BCCA 86 Rehak v. Zalanfy Estate

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Rehak v. Zalanfy Estate,

2019 BCCA 86

Date: 20190221

Docket: CA45435

Between:

Terezia Rehak and Laszlo Saska

Appellants

(Plaintiffs)

And

The Estate of Charlotte Ilona Zalanfy, and Steven Joseph Butz as the Executor and Trustee of the Estate of Charlotte Ilona Zalanfy, Deceased

Respondent

(Defendant)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia,

dated June 14, 2018 (Rehak v. Zalanfy, 2018 BCSC 2443,

Victoria Registry No. 170982)

Oral Reasons for Judgment

The Appellant, appearing in person:

T. Rehak

The Appellant, appearing in person:

L. Saska

Counsel for the Respondent:

H.D. Fisher

Place and Date of Hearing:

Victoria, British Columbia

February 19, 2019

Place and Date of Judgment:

Victoria, British Columbia

February 21, 2019

Summary:

Appeal from summary trial judgment dismissing the appellants' claim for relief for breach of contract. The appellants claim that the respondent agreed to sell her condominium to them at less than its assessed value on the condition that she would live in it for the remainder of her life and the appellants would care for her. The summary trial judge found that there was no contract and, further, that the appellants were not entitled to compensation for care they claim to have provided. Held: Appeal dismissed. The judge did not err in concluding that it was appropriate to appoint a litigation guardian for the respondent, in finding that the appellants had not established the existence of a contract or a case for compensation, or in deciding not to admit the appellants' audio recordings into evidence.

- [1] WILLCOCK J.A.: The appellants allege that in November 2016, the respondent Mrs. Zalanfy agreed to transfer ownership of a condominium on Mackenzie Avenue to Mrs. Rehak in exchange for the appellants' promise to care for her for the remainder of her life. On June 18, 2017, Gaul J. dismissed the appellants' action at a summary trial. He found while a contract had been discussed, the respondent had not yet agreed to the terms proposed by Mrs. Rehak. In addition, the purported agreement was not in writing and unenforceable as it did not satisfy s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253. Finally, he concluded a claim for compensation for the care actually provided to the respondent had not been adequately pleaded or proven.

- [2] Most of the essential facts before the summary trial judge were undisputed. The appellants and the respondent lived in the same condominium complex and were friends for many years. In the fall of 2016, Mrs. Rehak made a proposal to Mrs. Zalanfy: she would purchase Mrs. Zalanfy's condominium, which then had an assessed value of \$366,000, for \$200,000. In exchange, Mrs. Zalanfy could remain in her condominium for as long as she wished and Mrs. Rehak and her son, Mr. Saska, would care for her.
- [3] Mr. Butz, the respondent's friend and, later, litigation guardian, says Mrs. Zalanfy told him about Mrs. Rehak's offer in October 2016.
- [4] On November 21, 2016, Mrs. Zalanfy wrote a note outlining the plan. The judge described this as the foundation of the appellants' argument that there was a binding contract. However, as the appellants themselves acknowledged, the note was incomplete as it did not describe the terms of the oral agreement they say was concluded. In particular, it did not identify what care would be provided to the respondent and who would be responsible for deferred taxes of approximately \$35,000 owing on the property.
- [5] Another document, written in Hungarian, which appeared to have been prepared by or for Mrs. Zalanfy was produced. It refers to the terms of the agreement to sell the condominium and the care the appellants proposed to provide to the respondent. That document, however, was not signed by either Mrs. Zalanfy or Mrs. Rehak.
- [6] Further to her plan to purchase the condominium, Mrs. Rehak attended at the office of a lawyer, Mr. Dunstan Browne, had a purchase and sale agreement prepared and provided \$200,000 to him. Those funds were held in trust until it became clear the transaction would not occur. Mrs. Zalanfy did not meet with Mr. Browne. He drafted an agreement on the basis of the November 21, 2016, letter but advised the appellants there would be no transfer unless he personally saw Mrs. Zalanfy and was confident that she was capable of making such a decision. He did not do so.
- [7] Mr. Butz attested to the fact that, although Mrs. Zalanfy discussed Mrs. Rehak's proposal with him during the relevant period, at no time did she tell him that she had decided to accept Mrs. Rehak's proposal. Another friend, Mr. Otvos, deposed that Mrs. Zalanfy told him she was uncertain what she wanted to do, she seemed particularly stressed and agitated and, when asked, said she had not signed anything yet. Ms. Visslai deposed that Mrs. Zalanfy told her about Mrs. Rehak's offer but said she did not want to sell her home to anyone and that she wanted Mrs. Rehak to stop pressing her to sell the condominium.
- [8] Mrs. Zalanfy was living on her own in her home until December 2016, when she was admitted to the Victoria General Hospital with serious health issues. The judge found that she had friends, including the appellants, assisting her, but essentially she was living an independent life.

- [9] While she was in the hospital, the staff provided her with the care and necessities of life she required. The judge was not persuaded the appellants had to care for Mrs. Zalanfy at the hospital.
- [10] Mrs. Zalanfy was transferred from the Victoria General Hospital to the Oak Bay Lodge in March 2017. The judge was satisfied the care she received there was appropriate. He expressly rejected the submission the care she was receiving was insufficient to maintain a healthy standard of living. He concluded all of her needs were being met.
- [11] The appellants commenced the civil claim on March 8, 2017.
- [12] On March 29, 2017, Mr. Butz consented to act as Mrs. Zalanfy's litigation guardian. Counsel for Mr. Butz filed a Certificate of Fitness indicating her belief that Mrs. Zalanfy was incapable of managing her financial and legal affairs due to a major neurocognitive disorder, dementia. This belief was founded upon the medical records, including the opinion of Mrs. Zalanfy's physician, Dr. Charlotte Bester.
- [13] The respondent's application for judgment at a summary trial was heard on May 14-16, 2018. The appellants did not seek a conventional trial.
- [14] The judge found Mrs. Rehak had made an offer to purchase Mrs. Zalanfy's condominium on the terms alleged; Mrs. Zalanfy had written the note of November 21, 2016, and it described her wishes; but there were important terms that had not been agreed to and Mrs. Zalanfy ultimately decided against the idea of selling her condominium to Mrs. Rehak. He concluded:
- [52] Having considered all of the evidence, I am satisfied it points overwhelmingly to the fact the parties never reached a meeting of the minds so as to create a binding contractual obligation for them.
- [15] Turning to the claim for compensation, he found the appellants' records of care provided to the respondent were "grossly exaggerated". He concluded at para 67: "If the plaintiffs did provide Mrs. Zalanfy with the care and services they claim to have, then they did so voluntarily, with no reasonable expectation of compensation."
- [16] The appellants point to what they say are many errors in the judgment, falling into what appear to me to be four categories:
- a) They say the judge erred in law by:
- i. Relying on the opinion of an expert, Dr. Bester, as to the competence of the vendor;
- ii. Admitting the affidavit evidence of a witness, Judit Szy, "when she was neither a party nor an applicant"; and,
- iii. Giving limited weight to evidence of edited audio recordings.

- b) They say he erred in law by permitting a litigation guardian to act for the respondent when the appellants say she was competent, without scrutinizing the evidence of competence;
- c) They say he erred by applying an inappropriate test when considering the validity of the contract for sale, in particular by misapprehending the role of the parties' solicitors and by placing inappropriate weight on the fact there was no agreement on payment of deferred property taxes when there was agreement on the substantial terms; and,
- d) Last they say he erred by applying an inappropriate test when considering the claim for compensation for the care they provided to the respondent when "some form of compensation" had been sought.

Analysis

The Litigation Guardian

- [17] The appellants say the appointment of a litigation guardian took the case out of the hands of Mrs. Zalanfy and "removed" her Charter rights. They do not go so far as to say Mrs. Zalanfy would have taken a different position in response to their claim had a guardian not been appointed, however they suggest the guardian prevented them from making out their case. They describe in detail the manner in which the Court should address a request for the appointment of a litigation guardian and the role of counsel in the process.
- [18] Their submission is misconceived. As Johnston J. recently noted in *Gengenbacher v. Smith*, 2016 BCSC 1164:
- [14] [T]he Rules with respect to conducting litigation through a litigation guardian clearly leave any assessment of capacity to counsel: the court does not inquire into capacity, nor does the court rule on capacity. It is enough that a lawyer, as an officer of the court, certify that a person is "a mentally incompetent person," in the words of Rule 20-2(8).
- [19] The evidence of the respondent's incapacity was unchallenged, even by those to whom she had given an enduring power of attorney, when the Guardian was appointed in March 2017 and over the intervening year before the summary trial. No application was brought to remove the guardian pursuant to Rule 20-2(11), to which the respondent's counsel might have had to respond with more ample evidence than the certificate filed in support of the appointment.
- [20] The judge dealt with the appellants' submission at the summary trial that the appointment of a guardian was improper and uncalled for by simply stating that there was ample evidence to conclude that Mrs. Zalanfy required a litigation guardian and that Mr. Butz was an appropriate person for the appointment. The evidence before him included an affidavit sworn by Dr. Bindra, with medical records attached, upon which the judge could properly rely as proof of the diagnosis of the respondent's neurodegenerative disorder.

- [21] Even if it were open to the appellants, as plaintiffs, to apply to remove the litigation guardian (which in my view is a dubious proposition in this case), they did not do so. I would not accede to the argument that they can do so now.

The Claim in Contract

- [22] The judge appropriately required the appellants to prove they had entered into a valid and binding contract with the respondent on a balance of probabilities. There was evidence before the judge, in the form of the affidavits of three witnesses with no interest in the transaction (Mr. Butz, Mr. Otvos and Ms. Viszlai) that Mrs. Zalanfy was stressed, agitated and uncertain whether she would accept Mrs. Rehak's offer. The judge found the terms of the offer to be uncertain and noted that the appellants' description of the essential terms changed even in the course of argument. It was clearly open to him to conclude the appellants had not met the onus upon them.
- [23] The deferential standard of review is applicable to findings of fact and mixed findings of fact and law, even on a summary trial. This court can interfere with findings of fact only to the extent that it is shown that the trial judge made "a palpable and overriding error" which means an error that is "plainly seen" as this Court held in *Patzer v. Hastings Entertainment Inc.*, 2011 BCCA 60 (on appeal from a summary trial) at para. 7, referring to *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.
- [24] I can see no basis in the appellants' factum and heard no submissions to substantiate the argument that the findings of fact upon which the judge's conclusions are founded were affected by a palpable and overriding (or indeed any) error.
- [25] In particular, I can see no error in the trial judge's conclusion that it was not clear whether Mr. Browne ever acted as the respondent's lawyer and his conclusion that the respondent's long time lawyer, Ms. Kovacs, was curiously excluded from the attempts to transfer the condominium.
- [26] That being the case, it is unnecessary to deal with the argument that the judge erred in holding that the contract alleged, if made orally, was unenforceable because it was not in writing and did not meet the requirements of s. 59(3) of the Law and Equity Act.

The Claim for Compensation

- [27] What I have said in relation to findings of fact in relation to the contractual claim applies, of course, with equal force to the claim for compensation. The judge made findings of fact and drew inferences from those findings unfavourable to the appellants. In my view, the appellants have not shown us how those findings are undermined by an error.
- [28] The appellants submit, for example:

- a) "The trial judge's conclusion was wrong in ruling that the service by Rehak was not necessary and grossly exaggerated to Zalanfy"; (Appellants' Factum at para. 74)
 - b) "The trial judge made the wrong conclusion that Zalanfy did not need Rehak's service in the Oak Bay Lodge"; (para. 74(c))
 - c) "The trial judge erred in the assessment of facts by stating that Rehak's service was not necessary"; (para. 74(d))
 - d) "The trial judge misconceived the evidence because it was Rehak who took care of Zalanfy and provided the service Zalanfy needed " (para. 75)
- [29] In support of these allegations of error the appellants refer to their affidavit evidence and make arguments that were made at the summary trial. Beyond those allegations that the trial judge drew the wrong conclusion from the evidence, which essentially amount to a dispute with respect to what conclusions should have been drawn, the appellants do not allege an error of law on the part of the judge in relation to the claim for compensation.
- [30] Given that no error is demonstrated in relation to the conclusion that a case for compensation was not made out on the facts, I would dismiss the appeal on this ground.

The Audio Recordings

- [31] In light of those conclusions the only remaining evidentiary issue is the appellants' submission the judge erred "in his opinion about the recorded audio conversation". The opinion was:
- [76] Leaving aside the question of whether it was appropriate to have recorded these meetings without first informing the other participants, in my opinion the fact that the entire conversations were not recorded and translated, when necessary, renders what was presented of minimal evidentiary value because it could easily be misconstrued and taken out of context.
- [32] That opinion was largely immaterial to the outcome and, further, I can see no error in treating the selective transcripts that might have been taken out of context with great caution.
- [33] I would dismiss the appeal.
- [34] SAUNDERS J.A.: I agree.
- [35] FISHER J.A.: I agree.
- [36] SAUNDERS J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Willcock"

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Prepared on 27 October 2026 · Esheria