
CANADA / JUDGMENT

Reliable Mortgages Investment Corp. v. Chan

2013 BCSC 301

COURT

Supreme Court of British Columbia

DECIDED

5 March 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2013 BCSC 301 Reliable Mortgages Investment Corp. v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reliable Mortgages Investment Corp. v. Chan,

2013 BCSC 301

Date: 20130305

Docket: S115440

Registry: Vancouver

Between:

Reliable Mortgages Investment Corp.

Plaintiff

And

Sylvia Chan, Alice Lee, Sablok & Sablok

and Akash Sablok

Defendants

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

(In Chambers)

Counsel for Plaintiff:

R.J. Ellis

Counsel for Sylvia Chan and Alice Lee:

G.J. Niemela

Place and Date of Hearing:

Vancouver, B.C.

January 18, 2013

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2013

- [1] Applying pursuant to the Rules 9-5(1)(d), 14-1 and 22-4(2) of the Supreme Court Civil Rules on the bases of res judicata, the doctrine of abuse of process by relitigation, and the doctrine of collateral attack, the Defendants, Sylvia Chan and Alice Lee, seek an order that the Notice of Civil Claim be struck and dismissed against them with special costs.

BACKGROUND

(a) The Mortgage and the Foreclosure Action

- [2] On May 26, 2009, Reliable Mortgages Investment Corp. ("Reliable") commenced foreclosure proceedings under Action No. H090727, naming Sylvia Fung Ngan Chan and Jason Edward Lee as Respondents. The Petition set out the usual relief sought, including the enforcement of the mortgage ["Mortgage"] which was the subject matter of the Petition. On June 24, 2009, the foreclosure proceedings were transferred to the Trial List on the basis that: "The Petition filed herein will act as a Writ of Summons and Statement of Claim". After that order was made, Reliable did not amend what had been set out in the Petition to allege further causes of action.

- [3] In seeking to enforce the Mortgage, it was alleged that Jason Edward Lee, who was a nephew of Ms. Chan and the son of Ms. Lee, used a forged power of attorney to mortgage the home of Ms. Chan, that the mortgage proceeds of approximately \$250,000 were deposited into a bank account maintained by Ms. Chan, that Ms. Chan was advised by her nephew that it was his money, and that he persuaded Ms. Chan to transfer the funds to him and to Ms. Lee.

(b) The Trial of the Foreclosure Action

- [4] On the day before the Trial was scheduled to start, counsel for Reliable telephoned counsel for Ms. Chan and advised that Reliable would be claiming "conversion" as a cause of action. Counsel for Ms. Chan objected to the late notice of this particular cause of action noting that "conversion" had not been pled in the original Petition. Reliable did not bring on an application to amend the pleadings to include a claim for conversion.
- [5] The issue of the addition of conversion as a new cause of action was discussed before N. Smith J. prior to the first witness taking the stand at the Trial. As part of the submissions made to N. Smith J., counsel for Reliable stated that the issue relating to conversion would not arise until a determination had been made that the Mortgage was not enforceable and that he wished to "... reserve the right to argue the conversion issue ...". In the Opening Statement on behalf of Reliable, the solicitor for Reliable stated:

All the facts will be before the court. I have said to my friend that we don't get to conversion until such time as the court has found that our principal argument that the mortgage is enforceable is found to be incorrect, that the conversion argument doesn't even arise until we know whether the mortgage is enforceable. Our principal position is that the mortgage is enforceable, and in response to my friend's position that he is taken by surprise I say it's the argument, not the facts, that might take him by surprise, and I certainly - if we get to that point, if the court finds that the mortgage is not enforceable, that an adjournment to allow him to prepare the argument on the conversion would seem to be the most efficient way to proceed.

So I won't go through my submissions here on conversion, other than to make you aware that that is an argument that we would hold in reserve, if you will, My Lord, if you're not with us on the enforceability of the - of the mortgage.

Essentially the order that we are seeking here today, over on page 6, is an Order Nisi of foreclosure, a declaration of the amount, a declaration that the mortgage in fact charges the property, a redemption period, the usual Order Nisi relief. It's only if you're not with us on that - that I would reserve the right to argue the conversion issue, and again we have three days set aside for this trial, I am hopeful that we can get all of the evidence and at least the argument on the mortgage issue in that time.

- [6] Regarding the question of a claim for "conversion", counsel for Ms. Chan made these statements:

My Lord, I'm prepared to proceed today on the state of the pleadings as they are. I object to any argument on conversion proceedings. ...

So my position is if we go ahead today that I will if - if I can later on successfully made a res judicata argument my - I am going to say that my friend can't proceed on conversion. He had the opportunity today to say adjourn the trial. I asked my friend outside in the hallway this morning and he said there were three-day-trial dates available in September. He can adjourn the trial today and I am not averse to that. I am not averse to proceeding.

Either way it doesn't matter to me, but I - the one thing I will object to is a conversion argument and con - and if I can make that argument later, being brought up at a later date, argue against that as well and I say that - that I'm not averse to proceeding today with one comment that I don't know how I would present - present this case if I had done the research on a conversion case, and simply for my friend to say, well, put the evidence in now and then come back and argue about conversion later, to me is a dangerous - may be a dangerous course for me to agree to.

[7] Regarding the conversion claim, N. Smith J. made the following statements:

Well, I think that is how we have to deal with it, in the sense that this - this has been pled as a foreclosure action. I have no idea at this point whether I will be able to decide that off the top of my head or I'm going to have to reserve on it. Then the chips will have to fall where they may as to whether there is - there can further proceedings on a conversion matter, right?

So, but I'm not certain I - I think Mr. Niemela is correct, that conversion is a different cause of action and he should not be expected to - and it may require different or additional evidence and he shouldn't be expected to deal with it in this proceeding, all right? Okay.

(c) Outcome of the Trial

[8] No amendments were made and the Trial proceeded with Ms. Chan and Ms. Lee testifying. The testimony of Jason Lee was not available as he was deceased. N. Smith J. concluded that the mortgage entered into and registered by Reliable on the strength of a forged power of attorney did not create a valid charge against the property of Ms. Chan. The Petition was dismissed with costs. In his written Reasons for Judgment [(2011), 7 R.P.R. (5th) 335)], N. Smith J. made this statement:

I stress that in dismissing Reliable's claim, I am only finding that it is not entitled to execute on the mortgage security, which was the only claim advanced in this proceeding. I make no comment on any other cause of action that Reliable may have against Ms. Chan or anyone else. (at para. 40)

[9] The order of N. Smith J. was appealed but, by an August 28, 2012 letter from the Court of Appeal, counsel for the parties were advised that the appeal had been placed on the "inactive appeal list" and that, if no steps were taken, the appeal would stand as dismissed as abandoned as at February 27, 2013.

[10] In a January 8, 2013 Affidavit, the former solicitor for Reliable stated:

That on May 11, 2011, prior to the commencement of the trial of action H09-0727, I discussed with Defendants' counsel, Glenn Niemela, my wish to include a claim against Sylvia Chan in conversion. He advised that he was not willing to consent to the trial proceeding at that time if it included that claim. At no time did I agree to waive my client's right to later make a claim that Sylvia Chan had converted funds to her own use if the mortgage that was the subject of Action H090727 was found to be unenforceable. At the time of this discussion I had no conclusive evidence that would support a claim against Sylvia Chan in conversion.

In agreeing to proceed to trial May 11, 2011 I did not understand or agree that if the mortgage enforcement claim failed, res judicata or any similar principle, would bar a subsequent action for conversion.

In agreeing to proceed to trial May 11, 2011 I did not have any evidence to conclusively prove conversion by Sylvia Chan. To the best of my recollection, during her examination for discovery Sylvia Chan denied that she had signed the document that authorized the transfer of the funds from her account to an account controlled by Jason Lee. As I recall, she specifically denied that it was her signature on the document that authorized the transfer. It was during her examination in chief at trial that for the first time, Sylvia Chan admitted that she had in fact signed the authorization to transfer the funds to Jason [Lee, her nephew], thereby providing for the first time, clear evidence that could be used to support a claim in conversion or perhaps fraud.

THE PRESENT CLAIM

[11] This Notice of Civil Claim was commenced on August 15, 2011 claiming against Ms. Chan for damages for "fraud and/or conversion" and against Ms. Lee for damages for "fraud and/or conversion" and for an Order for "the tracing of the proceeds of the mortgage received by her".

[12] The "Legal Basis" for the claim against Ms. Chan and Ms. Lee was set out as follows:

The Defendant Sylvia Chan knew or ought to have known that Jason Lee was perpetrating a fraud on the Plaintiff. The net proceeds of the Mortgage were deposited into her bank account and she paid them out as directed by Jason Lee without making adequate, or in fact any, enquiry as to the source of the money. The net mortgage proceeds were in her possession and control when she paid them to Jason Lee and she thereby converted the funds to her own use or, in the alternative, to the use of Jason Lee when she knew or ought to have known that she was not legally entitled to possess or deal with the net mortgage proceeds. The Plaintiff has suffered loss and damages as a result, including the loss of the mortgage proceeds and the cost incurred in the foreclosure action.

The Defendant Alice Lee knew or ought to have known that Jason Lee was perpetrating a fraud on the Plaintiff. A portion of the mortgage proceeds were deposited into a bank account owned or controlled by her and she put them to her own use. She knew or ought to have known that the funds from the mortgage proceeds were the proceeds of a fraud and in any event were not hers. In the alternative, she converted the funds to her own use. In the further alternative, Alice Lee had and received the aforesaid funds without color of right or authority. The Plaintiff has suffered loss and damages as a direct result of the actions of Alice Lee.

CASE AUTHORITIES AND DISCUSSION

[13] The primary argument of the applicants is that there should not be relitigation of what could have been dealt with at the trial before N. Smith J. In *The Doctrine of Res Judicata in Canada*, (Third Edition, 2010, LexisNexis), the learned author states:

There are six essential doctrines developed by the courts of Canada. Each one of these doctrines may be applied with rigour based on its precise meaning. In their most concise definitions, the six essential estoppel doctrines are:

- (1) Issue estoppel bars an issue which has actually been decided in the first proceeding.
- (2) Issue estoppel under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.
- (3) Cause of action estoppel, the trust *res judicata*, bars a cause which has actually been decided in the first proceeding.
- (4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.
- (5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.
- (6) Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.

With respect to the policy grounds, a consideration of issue estoppel or cause of action estoppel focuses upon the interests of the litigants. A consideration of abuse of process by relitigation or collateral attack focuses upon the justice system.

(at pp. 11-12)

[14] In *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, Dickson J. on behalf of the Court stated:

The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537.], at p. 561:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [[1967] 1 A.C. 853.], at p. 935, defined the requirements of issue estoppel as:

... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies ...

(at para. 3)

[15] In *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367, Groberman J.A. made this statement:

That said, there is a subtle difference in focus between the two branches of *res judicata*. Cause of action estoppel is focussed primarily on fairness to litigants. The idea behind it is that a party should not be "twice vexed" with litigation, and should be entitled to deal with the entirety of the opposite party's case within a single piece of litigation. Issue estoppel, on the other hand, as discussed in *Toronto v. C.U.P.E.* [*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77], is primarily concerned with the integrity of the judicial system - the efficiency of the trial process and the authority and credibility of judicial findings.

(at para. 81)

[16] In *Cliffs Over Maple Bay Investments Ltd. (Re)* (2011), 17 B.C.L.R. (5th) 60, Newbury J.A. on behalf of the Court, stated:

The authors of Spencer Bower and Turner, *The Doctrine of Res Judicata* (4th ed., 2009), state:

Two policies support the doctrine of *res judicata* estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:

The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' (*bis vixari*) for the same cause, must be balanced against the other "fundamental principle" (see *Hoque* [*Hoque v. Montreal Trust Co. of Canada* (1997) 162 N.S.R. (2d) 321 (C.A.)] at para. 21) that courts are reluctant to deprive litigants of the right to have their cases decided on the merits: see *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [supra], at para. 55; *Revane v. Homersham* 2006 BCCA 8, 53 B.C.L.R. (4th) 76 (C.A.) at paras. 16-7; *Lange* [Donald J. Lange, *Res Judicata in Canada* (3rd ed., 2010), c. 1] at 7-8.

(at para. 25-26)

- [17] I am satisfied that issue estoppel does not apply. The issue that was before N. Smith J. was the enforceability of the Mortgage and not what happened with the funds after they were advanced by Reliable. There was no decision relating to conversion and, in fact, N. Smith J. specifically stated that the only issue that he was deciding was the issue of the enforceability of the Mortgage and that he would be making no comments on any other causes of action that might be available to Reliable. When originally commenced, it would not have been possible to include a claim for conversion under the Petition as causes of action which can be claimed in a Petition could not include such an action.
- [18] Once the Petition was converted for Trial purposes, it would have been possible to apply to amend the pleadings to claim conversion and, at the same time, to add Ms. Lee as a party. While it would have been preferable to add Ms. Lee, to amend the pleadings and to adjourn the Trial, that was not done. However, not having proceeded in that manner, the ability to later deal with the issue of conversion was specifically reserved in the decision of N. Smith J.
- [19] Regarding cause of action estoppel, it is clear that no decision on conversion was decided at the Trial before N. Smith J. The issue of a conversion claim against Ms. Chan and Ms. Lee was specifically raised before N. Smith J. While the conversion claim was not to be raised during the currency of the Trial, the possibility of later raising a conversion claim was left open when N. Smith J. commented that: "there can be further proceedings on a conversion matter", and that "conversion is a different cause of action ... it may require different or additional evidence ...". While it would have been preferable for the Trial to be adjourned in order that there could also be a hearing of the conversion issue, that was not done. However, I am satisfied that that step was not necessary in order to preserve the right of Reliable to proceed as it did.
- [20] I cannot find that there has been abuse of process as I cannot find that what is proposed in the Action is a relitigation of the Trial before N. Smith J. The integrity of the judicial decision-making process in the first proceeding will not be undermined. Nothing in this Action will deal with the decision relating to the enforceability of the Mortgage. At the same time, I cannot find that Reliable seeks to avoid compliance with the Order made by N. Smith J. There is no challenge of that Order either directly or indirectly.
- [21] In view of what was stated before N. Smith J. and in view of what was stated by N. Smith J., I am satisfied that the integrity of the judicial decision-making process would be undermined if Reliable is not in a position to claim against Ms. Chan and Ms. Lee. Accordingly, the application of Ms. Chan and Ms. Lee is dismissed.
- [22] Costs will be in the cause.

___ "Burnyeat J." ___

Burnyeat J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/13/03/2013BCSC0301.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/reliable-mortgages-investment-corp-v-chan-2013>

Prepared on 28 October 2026 · Esheria