
CANADA / JUDGMENT

Rissman v. Chen

2012 BCSC 715

COURT

Supreme Court of British Columbia

DECIDED

17 May 2012

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2012 BCSC 715 Rissman v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rissman v. Chen,

2012 BCSC 715

Date: 20120517

Docket: S120848

Registry: Vancouver

Between:

Rissman, Hendricks & Oliverio, LLP

Plaintiff

And

Chris Xunan Chen

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiff:

S.R. Andersen

Counsel for Defendant:

H.C. Ritchie Clark, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 2, 2012

Place and Date of Judgment:

Vancouver, B.C.

May 17, 2012

- [1] The plaintiff is seeking to enforce a Massachusetts Court order that enjoins the defendant from disposing of any interest in land and has filed a Certificate of Pending Litigation (CPL) against the title to a house the defendant owns in Vancouver. On this application, the defendant seeks an order cancelling the CPL. The plaintiff says that, if the CPL is cancelled, it is entitled to an interim injunction that would have a similar effect.
- [2] The relevant facts alleged in the Notice of Civil Claim are that the plaintiff, a law firm in Boston, sued the defendant for unpaid legal fees and disbursements. That action was commenced in the State Superior Court in Massachusetts in April, 2011. At that time, the plaintiff sought and obtained an order (the State Court Order) enjoining the plaintiff from transferring or encumbering any property, wherever located, unless proceeds of any such transaction in the amount of \$407,613.52 are paid to be held in escrow "pending agreement by the parties or further order of this Court."
- [3] For reasons not entirely clear from the pleadings, the action was "removed" to the U.S. Federal Court, which ultimately gave judgement against the defendant (the Federal Court Order) in the amount of \$547,091.98, along with a writ of execution against all properties owned by the defendant. By that time, the defendant's lawyer had withdrawn and the defendant did not respond to the plaintiff's motion for judgment.
- [4] The Notice of Civil Claim states that the defendant is a resident of Vancouver and is the registered owner in joint tenancy of property in British Columbia (the "British Columbia Land"). It alleges that the Massachusetts State Court Order remains in effect and seeks an order:
 - 1. That this Court recognize and enforce the Massachusetts Order and, in particular, that the defendant be restrained and enjoined from directly or indirectly conveying, liquidating, encumbering, transferring, pledging, gifting or diluting any of his interest in the British Columbia Land.

The Notice of Civil Claim also includes a claim for a CPL and a certificate was registered against the property on February 3, 2012.

- [5] In his Response to the Civil Claim, the defendant says the Massachusetts action against him was without merit and any legal services the plaintiff performed were not for him personally, but for a corporation.
- [6] The plaintiff has commenced a separate action seeking recognition and enforcement the Federal Court Order. That action does not include a CPL claim and no order in relation to that action is sought on this application.
- [7] I am not being asked to decide, on this application, whether this court can or should recognize and enforce the Massachusetts State Court Order to enjoin the defendant from dealing with land he owns in British Columbia. That is an issue to be decided on further application or trial. I am also not asked to consider what effect, if any, the assumption of jurisdiction by the U.S. Federal Court may have on the continued enforceability of the State Court Order. That is a question of U.S. law that may have to be the subject of expert evidence in the further proceedings. The only issues before me are cancellation of the CPL and the plaintiff's alternative application for a new injunction.
- [8] The CPL was filed under s. 215(1) of the Land Title Act, R.S.B.C. 1996, c. 250 which reads:
- A person who has commenced or is a party to a proceeding, and who is
- (a) claiming an estate or interest in land, or
 - (b) given by another enactment a right of action in respect of land,
- may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.
- The effect of registration is set out in s. 216(1):
- After registration of a certificate of pending litigation, the registrar must not make any entry in the register that has the effect of charging, transferring or otherwise affecting the land described in the certificate until registration of the certificate is cancelled in accordance with this Act.
- [9] The owner of lands against which a CPL has been registered may apply under s. 256 for cancellation on grounds that "hardship and inconvenience are experienced or are likely to be experienced by the registration." No such hardship or inconvenience is suggested here. Counsel for the plaintiff argues that, in the absence of evidence of hardship, there is no statutory authority for striking the CPL prior to determination of the action in respect of which it was registered.
- [10] However, in *Seville Properties Ltd.v. Coutre, et al*, 2005 BCSC 1105 Macaulay J. said, at paras. 7 and 8:

- [7] The section narrowly limits who is entitled to register a Certificate of Pending Litigation. The party must claim "an estate or interest in land" or be given "a right of action in respect of land" by another enactment. There are exceptions enumerated in subsections (5) - (8) that I have not set out as none apply here.
- [8] In *Tymira Holdings Ltd. v. Whittaker* (2004), 21 R.P.R. (4th) 288; 2004 BCSC 905, Drost J. held that before considering hardship and inconvenience in an application to cancel a Certificate of Pending Litigation, the court must consider the threshold question of whether the certificate was properly based on a proprietary claim against the defendants' lands.
- [11] In *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)* 2000 BCCA 525, the Court of Appeal was considering whether a claim of aboriginal title could support the registration of a CPL (formerly known as a *lis pendens*), but in the course of that judgement, Southin J.A. reviewed the history of the legislation and said at para. 43:

The question for the Registrar upon an application to register a *lis pendens* was whether, if the plaintiff succeeded in his action, he would be entitled to a registrable interest in the lands in issue. [Emphasis added.]

- [12] The plaintiff in this action does not claim to have any proprietary or ownership interest in the land in question. The notice of civil claim merely alleges that the defendant has such an interest and the plaintiff seeks to limit the defendant's ability to deal with that interest. The action does not arise from any dealings with respect to that land. It arises from a debt claim against a defendant who happens to own land in British Columbia.
- [13] Success in this action would not give the plaintiff any registrable or ownership interest in the land. It would not force the defendant to divest himself of any interest in the land in favour of the plaintiff. Unlike the separate action to enforce the Federal Court order, this action does not even carry the possibility of a monetary judgment that might subsequently be registered against the property and form the basis of execution proceedings. It would only require the defendant comply with the Massachusetts injunction, which requires that, should he decide to sell or encumber the property, a portion of the proceeds is to be posted as security for the plaintiff's debt claim, subject to further order of the Massachusetts Court.
- [14] I find that to be a long way from anything that can reasonably be said to be a claim for "an estate or interest in land," as that phrase is used in s. 215 (1)(a) of the Act and find that the notice of civil claim alleges no basis for such a claim.
- [15] The plaintiff also seeks to support the CPL under s. 215(1)(b), which applies where "another enactment" gives "a right of action in respect of land." The plaintiff relies on Massachusetts legislation, and in particular a section of the Massachusetts Civil Procedure Rules, which presumably gave the Massachusetts court jurisdiction to make the order it did.

- [16] I agree with counsel for the defendant that s. 1 of the Interpretation Act, R.S.B.C. 1996, c. 238 is a complete answer to that submission. That section defines "enactment" as "an act or regulation" and defines "Act" as an "Act of the legislature, whether referred to as a statute, code or by any other name." Clearly, s. 215(1)(b) applies only to a right of action arising out of British Columbia legislation.
- [17] In the event the CPL is cancelled, as I find it must be, the plaintiff asks this court to issue its own injunction to prevent the plaintiff from selling, encumbering or otherwise dealing the property. That application is made pursuant to Rule 10-4 which deals generally with pre-trial injunctions, and Rule 10-1(1), which reads:
- (1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.
- [18] In *Osooli-Talesh v. Emami*, 2003 BCSC 1924, Gray J. set out the test for an order under what is now Rule 10-1(1) at para. 43:
- (a) Is there a claim on the evidence and not just on the pleadings to a proprietary interest in property?
- (b) Is there some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction?
- (c) Is there a substantial question to be decided as to the plaintiff's entitlement to the property?
- (d) Does the balance of convenience favour the granting of the order?
- [19] Gray J. noted that this test is in essence the same as the traditional test for an interim injunction, set out at para .44:
- i. A preliminary assessment must be made of the merits of the case to ensure that there is a fair or serious question to be tried.
- ii. It must be determined whether the applicant would suffer irreparable harm if the application were refused.
- iii. An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.
- [20] However, she distinguished that test from the more onerous test required for a *Mareva* injunction, at paras.45,46,and 54:
- [45] The term "Mareva injunction" is applied to injunctions which restrain a defendant from disposing of or handling assets on the basis that they might not be available to satisfy a judgment if pronounced. These injunctions are considered exceptional, and require a plaintiff to demonstrate a "strong prima facie case".

[46] The gist of the injunction is to freeze exigible assets when found within the jurisdiction. However, there must be a genuine risk of disappearance of assets. (See *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2).

...

[54] It is appropriate for the more onerous "Mareva" test to apply to cases where the applicant does not directly claim an interest in specific property, instead claiming judgment which may be executed against the property to be the subject of the injunction. In such cases, the court is protecting the viability of a judgment, rather than protecting an applicant's claim for specific performance of a right to particular property.

[21] *Osooli-Talesh* was clearly a claim in which property was the subject matter of the proceeding. Each party claimed to be the beneficial owner of the majority interest in certain property. On that basis, Gray J. applied the test appropriate to an application under Rule 10-1(1).

[22] This action has been framed in a way that makes the property the subject matter of the proceeding in the sense that it seeks to enforce the Massachusetts injunction to prevent the defendant from dealing with the property. But the Massachusetts injunction was issued in an action that had nothing to do with this or any property. In substance, both this action and the Massachusetts injunction seek to preserve property as security against any future judgment for an alleged debt.

[23] This injunction sought on this application is therefore more in the nature of a Mareva injunction than a normal order for preservation of property under Rule 10-1. The reason that a Mareva injunction is considered an exceptional remedy is set out in a frequently quoted passage from the decision of the Supreme Court of Canada in *Aetna Financial Services v. Feigelman*, [1985] 1 SCR 2 at p. 10:

A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stubbs*, [1886-90] All E.R. 797, at p. 799, as follows:

I know of no case where, because it is highly probable if the action were brought the plaintiff could establish that there was a debt due to him by the defendant, the defendant has been ordered to give a security till the debt has been established by the judgment or decree.

Similarly, the limited availability of an injunction to enjoin a defendant from disposing of his assets was referred to in *Burdett v. Fader* (1903), 6 O.L.R. 532, affirmed (1904), 7 O.L.R. 72, at p. 533, by Boyd C.:

The plaintiff may or may not get judgment in the case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.

There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere quia timet and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.

The principle has been restated in modern times in *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190, where Megarry V.C. stated, at p. 193:

In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

[24] In *Silver Standard Resources Inc. v. Joint Stock Company Geolog* (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196 (B.C.C.A.), the Court of Appeal said that, as with any injunction, the "overarching consideration" on an application for a Mareva Injunction is "the balance of justice and convenience between the parties," but:

[21] Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

[25] There is no evidence the defendant has any plans or has made any effort to sell the property. The plaintiff only says it has reason to fear removal of assets and difficulty collecting a judgement because the defendant frequently travels to China and apparently has a bank account there, so could easily transfer any sale proceeds out of the country. It also says that the fact the plaintiff has sought to cancel the CPL supports an inference that he intends to do what the certificate prevents.

[26] That amounts to no more than speculation, and very weak speculation at that. I particularly reject the submission that I should draw an adverse inference against the plaintiff because he has come to court seeking relief that he is, in fact, entitled to.

[27] The appropriate question to ask is: If the plaintiff was seeking judgment on a debt allegedly incurred in this jurisdiction, would the court restrain the defendant from dealing with his residential property prior to judgment? In my view, the evidence falls far short of what would be required to justify such an order. This plaintiff should be in no better position because it is seeking to collect a debt in another jurisdiction, where the court has seen fit to issue an interim injunction.

[28] I therefore order cancellation of the Certificate of Pending Litigation filed in the Land Title Office under number BB1484577 against:

City of Vancouver

Parcel Identifier: 011-143-509

Lot B of Lot 3 Block 3 of Block 14 District Lot 526 Plan 5522

[29] I further order that the plaintiff's application for an interim injunction to restrain the defendant from dealing with his interest in the same property is dismissed. The defendant is entitled to costs on both applications.

"N. Smith J."

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Prepared on 29 October 2026 · Esheria