

CANADA / JUDGMENT

Save-A-Lot Holdings Corp. v. Christensen

2022 BCSC 1361

COURT

Supreme Court of British Columbia

DECIDED

28 June 2022

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2022 BCSC 1361 Save-A-Lot Holdings Corp. v. Christensen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Save-A-Lot Holdings Corp. v. Christensen,

2022 BCSC 1361

Date: 20220628

Docket: S1812676

Registry: Vancouver

Between:

Save-A-Lot Holdings Corp.

Plaintiff

And

Tom Christensen, Rebecca Christensen, Tom Christensen Jr.

and Alexandra Christensen

Defendants

Before: The Honourable Justice Thomas

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff and Bing Zhao:

N. Muirhead

Counsel for the Defendants:

D.K. Magnus

Place and Date of Hearing:

(via videoconference)

Vancouver, B.C.

June 20-21, 2022

Place and Date of Ruling:

Vancouver, B.C.

June 28, 2022

- [1] THE COURT: I said I was going to give my reasons, and here they are.
- [2] This is an application by the defendant, Tom Christensen, for an order that: (1) the certificates of pending litigation filed on his home be cancelled. In addition, the plaintiff seeks an order for short leave to adjourn the defendant's application; and (2) to have Mr. Christensen attend before the court to be cross-examined on his affidavits, or in the alternative, for a second examination for discovery to occur.

Factual Basis

- [3] On November 27, 2018, the plaintiff filed a notice of civil claim against the defendants. The allegations were that Tom Christensen; his wife, Rebecca; and their two children (the "Christensen defendants") misappropriated approximately \$988,497.13 from the plaintiff. On November 27, 2018, a Mareva injunction order was made restraining the Christensen defendants from using or transferring their assets. On January 23, 2019, an order was made setting aside the Mareva injunction on the basis that there had been material non-disclosure by the defendants. This application was granted. On January 20, 2020, a certificate of pending litigation was filed against Tom and Rebecca Christensen's home. The two adult children have no interest in the home.
- [4] On December 23, 2020, a stay of proceedings was issued due to consumer proposals filed by the Christensen defendants. On May 17, 2021, the plaintiff obtained forensic accounting investigative report which indicated \$862,560 in improper personal payments to the defendants and \$2,449,586 in questionable payments. The factual foundations and conclusions of this report are contentious.
- [5] On December 3, 2021, the certificate of pending litigation registered by the plaintiff was cancelled on the basis that the plaintiff did not sufficiently plead a claim for an interest in the family home. On December 13, the plaintiff filed a notice of appeal, and on January 17, 2022, the Court of Appeal granted a stay and reinstated the certificate of pending litigation. On February 17, 2022, Master Bilawich granted the plaintiff leave to file an amended notice

of civil claim to include a claim for an interest in the family home but also required the plaintiff to provide particulars of the constructive trust claim.

- [6] On March 4, 2022, the plaintiff filed the amended notice of civil claim and filed a second certificate of pending litigation on the family home. On March 10, 2022, the plaintiff provided particulars of the constructive trust claim. The particulars indicate that approximately \$20,000 of the total claim against the defendants to the family home. On April 8, 2022, the plaintiff brought an application to cross-examine the defendants on their affidavits, or in the alternative attend an examination for discovery and to adjourn the application and to have the certificates of pending litigation removed.
- [7] Four affidavits of the defendant Tom Christensen were placed before Master Vos. In this application, which was filed on May 5, 2022, Mr. Christensen filed one additional affidavit. This affidavit attempts to address some of the concerns raised by the plaintiff from the hearing before Master Vos. Master Vos dismissed the plaintiff's applications.
- [8] On April 16, 2022, Rebecca Christensen passed away after enduring a short battle with cancer. On June 8, 2022, the plaintiff unilaterally set down an examination for discovery of the remaining defendants. A physician's note had been provided indicating the defendants were not in an emotional state to be examined due to Rebecca's death. Nonetheless, the plaintiff proceeded with the examinations.
- [9] Due to the unavailability of counsel and hearing dates, the application to have the certificates of pending litigation removed was reset from May 20 to June 7 to the week of June 20, 2022.

Legal Test

- [10] The parties are in agreement that in order to apply for an order cancelling the certificate of pending litigation, Mr. Christensen must satisfy the criteria set out in s. 256 of the Land Title Act. This requires him to show that the certificates will cause or are likely to cause hardship and inconvenience.
- [11] Mr. Christensen had to refinance his home after the certificates of pending litigation had been placed on his property. This resulted in approximately \$380,000 or \$300,000 depending on the evidence, being subject to an interest rate of approximately 16 percent. There is evidence from a mortgage broker indicating that significantly more favourable mortgage terms could be provided if the certificates of pending litigation were removed from the property in a reasonable period of time. I find the exorbitant interest rate charged in Mr. Christensen's refinancing is directly linked to the certificates of pending litigation and constitutes a "hardship" as defined by our Court of Appeal in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388.

- [12] Upon being satisfied that s. 256 of the Land Title Act has been met pursuant to s. 257(4)(a) the court may order the cancellation of the registration of the certificate of pending litigation either in whole or in part on one, being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and the applicant giving to the party the security so ordered in an amount satisfactory to the court.
- [13] The defendant states that since only a small amount of the plaintiff's claim pertains to an interest in land, the certificate should be removed and replaced with security that would protect the plaintiff's entire interest in land, which in this case would be \$20,000. The plaintiff says s. 257 requires a two-step process. The first question is whether the defendant must prove that it is plain and obvious that damages will be an adequate remedy at trial. It is only once this question is answered in the affirmative that the issue of the amount of the appropriate security should be considered.
- [14] Since the defendants have filed for consumer protection and the plaintiff is claimed approximately \$3 million in damages, the court cannot be satisfied that the damages will be an adequate remedy and the certificates should remain. This issue was recently considered by our Court of Appeal in *Wosnack v. Fychy*, 2022 BCCA 139 [Wosnack]. In *Wosnack*, the plaintiffs were claiming for both an interest in land as well as the residual of an estate. The issue was whether the security for removing the certificate of pending litigation on the land should be limited to the plaintiff's interest in the land or should extend to the residual of the estate. The court noted at paras. 27-30 and 36 as follows:
- [27] It is significant, in my view, that an order requiring security under s. 257(1)(a) is predicated in part on the court being satisfied that damages will provide adequate relief "to the party in whose name the CPL has been registered". The focus then, is on the interest of the party--in this case the respondents. In setting the amount of the security "satisfactory to the court", s. 257(3) gives the court discretion to consider the probability of the party's success "in the action in respect of which" the CPL was registered.
- [28] Clearly, the entire CPL scheme is grounded in claims to interests in land. As the trial court has recognized, the "extraordinary pre-trial mechanism" of a CPL is intended to protect only valid claims to an interest in land: See *Chen v. Jin*, 2019 BCSC 567 at para. 8; *Wai v. Chung*, 2020 BCSC 34 at para. 13. I agree with the appellant that ss. 215, 256 and 257 of the LTA, when read together and contextually, indicate that the security the court may order when cancelling a CPL should be tied to the claim to the interest in land that grounds the CPL, whether that claim forms all or part of an action.
- [29] I also agree with the appellant that Xiao supports this interpretation. If a CPL must be cancelled under s. 254 where a claim to an interest in land that constitutes only part of an action has been dismissed, the amount of security ordered where a CPL is cancelled under s. 257(1)(a) should be set by considering only that part of an action that claims an interest in land.

- [30] That said, I would not go so far as to say that the amount of security must never exceed a party's asserted interest in the land in issue. I see this determination as one requiring a proper exercise of discretion. The court must only consider factors that are relevant when setting the amount of security. What is relevant includes the probability of a party's success and the possible range of damages to which the party may be entitled, in relation to the claim involving an interest in land. What is not generally relevant are other claims within an action that do not involve, or are unrelated to, an interest in land. The discretion granted to the court in s. 257 is broad, but it is not unfettered: See *Hansra v. Hansra*, 2017 BCCA 199 at para. 44.
- [36] On this basis, I conclude that the chambers judge erred in principle by ordering an amount of security that failed to recognize the limitations of the respondents' potential interests to the Property. The effect of his order secured far more than the respondents could hope to achieve if they were to succeed in their claims to the Property.
- [15] I find the principles in *Wosnack* to be applicable to this case and consistent with the position put forward by the defendant. Since \$20,000 represents the maximum of the plaintiff's interest in land, there is no need to assess the conflicting evidence of the parties with respect to whether the action can best be characterized as a claim for fraud or a shareholders' dispute.
- [16] The plaintiff also says it is premature to remove the certificates until he has had an opportunity to fully canvass his allegations with the defendants through the discovery process. Although the claim is limited by particulars, it may be that new particulars will be discovered through the discovery process which would enable him to increase the number of assets linked to the defendant's home.
- [17] I disagree with this proposition. In *Zou v. Rai*, 2021 BCSC 1931, Master Elwood, as he then was noted at para. 16:
- [16] Section 215 and the case law decided under that section makes it clear that the requirements for an interest in land must be pleaded. The plaintiff cannot claim an interest in land and then wait for evidence or discovery that would establish the requirements of law.
- [17] In other words, to support a CPL based on a claim of interest in land through a constructive trust, it is necessary for the plaintiff to plead material facts which, if true, would support the two requirements to establish an interest in land.

The Plaintiff's Applications

- [18] In my view, it is plain and obvious that hardship exists for Mr. Christensen due to the fact he refinanced his home without the benefit of being able to use the property as security. This required him to accept an onerous interest rate. There is uncontradicted evidence from a mortgage broker that a lower interest rate would be available if the certificates for removed from the land in a reasonable period of time.

- [19] Furthermore, I accept the medical evidence that it may take some time for Mr. Christensen to emotionally recover from his wife's death such that he could be cross-examined on his affidavit or discovered. I agree with the plaintiff the court should consider the following factors as set out in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995, at paras. 26-31, in determining whether to order cross-examination on an affidavit. These four principles are as follows:
- 1) whether there are material facts in issue.
 - 2) whether the desired cross-examination is relevant to an issue that may affect the outcome of the application in respect of which the cross-examination order is sought.
 - 3) whether the cross-examination will serve a useful purpose by yielding evidence that would help to determine the issue on the application.
 - 4) whether the cross-examination will produce unreasonable delay or general rate unreasonable expense.
- [20] However, I disagree with the plaintiff's conclusion that a cross-examination is appropriate in this case. In my view, there is little dispute over my findings on the hardship caused to Mr. Christensen and required cross-examination would produce both unnecessary delay and considerable expense.
- [21] The plaintiff also seeks to adjourn this application to enable him to complete his discovery of Mr. Christensen and his children. In my view, the certificates need to be evaluated on the current material facts. In the circumstances, I am of the view that it would not be appropriate to allow the plaintiff to go on a fishing expedition to see if further assets could be tied to the family home.
- [22] This is not a case where the defendants purchased property with alleged fraudulent funds. This is a case where less than one percent of the alleged fraudulent assets were allegedly used to make mortgage payments on or purchases for the family home. The alleged fraudulent assets amount to perhaps two percent of the total value of the property.
- [23] The certificates have caused the defendant to pay onerous interest payments on approximately \$300,000 because they were unable to secure financing on their home. I note the interest payments alone will shortly exceed the value of the alleged fraudulent assets contained in the land. Given my findings, it is unnecessary for me to consider whether there has been a material change in the same applications brought by the plaintiff that were dismissed by Master Vos.
- [24] I indicated to counsel during the hearing of this matter that I was troubled that examinations for discovery proceeded on the day after what would have been Ms. Christensen's birthday. The family had difficulty in obtaining and paying for her cancer treatments due to the financial circumstances created by the Mareva injunction and the certificates of pending litigation.

[25] I have not considered whether the plaintiff is entitled to a second discovery or whether any cost ramifications flow from his decision to proceed with the discoveries in what can only be characterized as questionable circumstances. In my view, an assessment of these issues lies outside the scope of these applications.

Disposition

[26] The plaintiff's application to adjourn the defendant's application to facilitate the cross-examination on affidavits or conduct further discovery is dismissed.

[27] I order the certificate of pending litigation filing on January 28, 2020, under registration number CA 8003939 against the title to the following property PID 027-454-924 lot 44 section 9 township 26 New Westminster district plan DCP 35335, and the certificate of pending litigation filed on March 4, 2022, under registration number CA 9764670 against the same property be cancelled upon the applicant's filing with the registry of titles at the applicable Land Title Office a certified copy of this order and security of \$20,000 posted.

[28] The defendant is entitled to the cost of his application and the plaintiff's application.

"Thomas J."

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