

CANADA / JUDGMENT

Shen v. Chan

2018 BCCA 4

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 4 Shen v. Chan COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Shen v. Chan, 2018 BCCA 4 Date: 20180105 Docket: CA43862 Between: Shang Chen Shen Appellant (Plaintiff) And Edith Chan Respondent (Defendant) And Youti Wan (Defendant) And John A. Gunson also known as John Gunson Euro Canadian Construction Corp. (Third Party) Before: The Honourable Mr. Justice Tysoe The Honourable Mr. Justice Willcock The Honourable Mr. Justice Hunter On appeal from: An order of the Supreme Court of British Columbia dated July 22, 2016 (Shen v. Chan, 2016 BCSC 1370, Vancouver Docket S117400) Appellant appearing on her own behalf: S.C. Shen Counsel for the Respondent Edith Chan: K.A. Murray Place and Date of Hearing: Vancouver, British Columbia November 29, 2017 Place and Date of Judgment: Vancouver, British Columbia January 5, 2018 Written Reasons by: The Honourable Mr. Justice Tysoe Concurred in by: The Honourable Mr. Justice Willcock The Honourable Mr. Justice Hunter Summary: Appeal from an order of a summary trial judge allowing Ms. Chan's application to dismiss Ms. Shen's claim against her pursuant to Rule 9-7 of the Supreme Court Civil Rules. Ms. Shen's claim related to water leakage into her strata unit which she alleged was caused by Ms. Chan's negligence. Held: Appeal dismissed. Ms. Shen failed to demonstrate that the summary trial judge made any error of fact or law when he held Ms. Shen failed to prove the causes of the alleged leaks or that the damage was caused by a breach of a duty on the part of Ms. Chan. Reasons for Judgment of the Honourable Mr. Justice Tysoe:

- [1] Ms. Shen appeals the order dated July 22, 2016 of a summary trial judge allowing Ms. Chan's application to dismiss Ms. Shen's claim against her.
- [2] Ms. Shen's claim relates to water leakage into her strata unit located at 700 - 1919 Beach Avenue in Vancouver. She sued Youti Wan, the owner of Unit 800 above her, and Ms. Chan, a real estate agent who deposed that she was a friend of Ms. Wan and assisted her with matters relating to Unit 800. The amended notice of civil claim detailed eight leaks alleged to have occurred between May 2009 and December 2011, and claimed against both Ms. Wan and Ms. Chan in negligence.

- [3] Ms. Wan passed away on April 6, 2014. On the following day, Unit 800 was transferred to Allister David Chan, presumably by way of a transfer signed by Ms. Wan before she died. Ms. Shen alleges that Allister David Chan is the son of Ms. Chan, and this is not denied by Ms. Chan.
- [4] In June 2016, Ms. Chan filed an application seeking the dismissal of the claim against her on three bases. The first basis was Rule 9-7 of the Supreme Court Civil Rules, the summary trial rule. The second basis was want of prosecution. The third basis was failure of Ms. Shen to comply with orders made at two case planning conferences.
- [5] In her affidavit in support of the application, Ms. Chan deposed as follows with respect to the alleged leaks:
- (a) she was not aware of the precise cause or extent of each leak;
 - (b) she believed the first leak came from Unit 900 but Ms. Wan paid for the repair at the request of the strata corporation;
 - (c) she was unaware of the second leak;
 - (d) she was told by the tenants in Unit 800 that they had flushed cat litter down the toilet causing it to overflow, and the insurer of the strata corporation paid for the remediation, with Ms. Wan paying the deductible;
 - (e) she learned the fourth leak had occurred while the tenants in Unit 800 were cleaning a bathtub, and Ms. Wan's insurer paid for the repair work;
 - (f) she was told by a representative of the strata corporation the fifth leak occurred when the strata corporation retained a plumber to investigate the fourth leak;
 - (g) the tenants moved out of Unit 800 shortly after the fifth leak, and she arranged for the water supply to Unit 800 to be turned off; and
 - (h) she was advised by a representative of the strata corporation that the seventh or eighth alleged leak occurred at a time a contractor was renovating Unit 800 and testing a new shower.
- [6] In her affidavit in response to the application, Ms. Shen deposed as follows about the alleged leaks:
- (a) the first leak came from Unit 800, and the damage was repaired by the strata corporation;
 - (b) the second and third leaks affected parts of Unit 700 (but she did not assert a cause for them);

- (c) the fourth leak (which had been described in the amended notice of civil claim as the fifth leak) was caused when an investigation was carried out into the causes of the previous leaks - Ms. Shen quoted from a plumber's report that he had "found water leaking from [the] tub in 800 when the shower [was] used [and that] water [was] leaking from [a] crack between [the] tiles and [the] tub", but the report was not appended as an exhibit;
 - (d) the fifth and sixth leaks (which had been described in the amended notice of civil claim as the sixth and seventh leaks) affected parts of Unit 700 (but she did not assert a cause of the leaks);
 - (e) the eighth leak occurred after she heard jackhammer noises from Unit 800, and she was told by the resident manager that a contractor had been hired to replace a bathtub with a shower; and
 - (f) the strata corporation shut off the water circuit for the bathroom of Unit 800 after the eighth leak, and Ms. Chan's statement that the water was turned off after the fifth leak was false.
- [7] Ms. Chan's application was heard on July 11, 2016 and, in written reasons issued on July 22, 2016 and indexed as 2016 BCSC 1370, the summary trial judge dismissed the claim against Ms. Chan pursuant to Rule 9-7. The judge said he would not have dismissed the claim for want of prosecution if he had not dismissed it under Rule 9-7, and he declined to rule on the third basis relied upon by Ms. Chan.
- [8] Despite Ms. Chan's contention that she was simply acting as a friend of Ms. Wan, the summary trial judge found that Ms. Chan held herself out as Ms. Wan's property manager and agent and, as such, owed a duty of care to Ms. Shen to facilitate communications between Ms. Shen and Ms. Wan and had an obligation to take reasonable care to avoid conduct that entailed an unreasonable risk of harm to Ms. Shen. These findings are not disputed by Ms. Chan on this appeal.
- [9] The judge held there was no evidence that anything Ms. Chan did, or failed to do, caused any of the leaks alleged by Ms. Shen. He said the real evidentiary issue was whether Ms. Chan took reasonably quick steps to investigate the source of the leaks when they occurred, arrange for repairs and facilitate communication between Ms. Shen and Ms. Wan. The judge found that although Ms. Chan's failure to provide Ms. Shen with Ms. Wan's contact information left Ms. Chan as the conduit between Ms. Shen and Ms. Wan, there was no evidence that Ms. Chan failed to communicate Ms. Shen's concerns to Ms. Wan or that any failure of communication resulted in the alleged damage to Unit 700.
- [10] The judge then turned to the issue of causation in more detail. He discussed each of the eight alleged leaks individually. He held there was no evidence of the causes of seven of the leaks. He ruled that, while there was some evidence as to the cause of the fifth leak (which Ms. Shen had referred to as the fourth leak in her affidavit), it was hearsay evidence which was not admissible because it was not shown to have been necessary for her to have relied upon it.

- [11] Although it was not necessary to do so in light of his conclusion on the issue of causation, the judge also addressed the issue of whether the alleged damage was caused by a breach of the standard of care owed by Ms. Chan. He held that, while there was some evidence of property damage to Unit 700, Ms. Shen had failed to prove any breach of duty on the part of Ms. Chan or that any breach of duty caused the damage.
- [12] In her factum, Ms. Shen says the summary trial judge erred in nine respects. In my opinion, Ms. Shen has not established the judge erred, in fact or in law, when he held she had not proved the causes of the alleged leaks or when he held she failed to prove the damage was caused by a breach of duty on the part of Ms. Chan. Several of the grounds of appeal relate to issues which are not relevant to the bases upon which the judge dismissed the claim against Ms. Chan. I will deal with each of the grounds briefly.
- [13] Firstly, Ms. Shen says the judge erred by completely agreeing with Ms. Chan's affidavit. At the hearing of the appeal, Ms. Shen spent considerable time endeavouring to persuade us that all the documents provided by Ms. Chan were fraudulent or otherwise questionable, and that none of her affidavit evidence should have been accepted by the judge. However, it was not what Ms. Chan said in her affidavit that led the judge to dismiss Ms. Shen's claim against her. Rather, the claim was dismissed because there was a lack of admissible evidence regarding the causation of the leaks and a breach of duty by Ms. Chan.
- [14] Secondly, she says the judge erred by failing to accept correspondence from the strata council that supported her submission that Ms. Chan breached her duty of care by failing to repair the leakage. This evidence is similar to the hearsay evidence properly excluded by the judge when considering the plumber's report. Although this correspondence was admissible as part of the narrative of the events which occurred during the relevant period of time, it was inadmissible hearsay evidence on the issue of whether Ms. Chan breached her duty of care. In addition, the evidence does not overcome the obstacle Ms. Shen faced of having to prove the causes of the leaks.
- [15] Thirdly, Ms. Shen asserts the judge erred in finding Ms. Chan to be "the only conduit between Wan, the Appellant and the strata council. In the absence of any evidence that Chan communicated to Wan the Appellant's concerns respecting the water leakage." [sic] All the judge found was that Ms. Chan's failure to provide Ms. Shen with Ms. Wan's contact information left Ms. Chan as the only conduit between Ms. Shen and Ms. Wan. The onus was on Ms. Shen to prove that a failure by Ms. Chan to communicate with Ms. Wan caused any damage to Unit 700, and the judge concluded that Ms. Shen did not discharge this onus. It has not been shown that he erred in that regard.

- [16] Fourthly, it is said the judge erred by concluding that Ms. Chan took quick steps to investigate the leakage source and arranged for repairs. On my reading of his reasons for judgment, the judge did not make that finding. He stated it to be an issue arising on the evidence but it was not necessary for him to decide the issue because he found there was no admissible evidence as to the cause of any of the leaks. He also found Ms. Shen failed to prove any breach of duty on the part of Ms. Chan was the cause of the damage.
- [17] Fifthly, Ms. Shen says the judge erred in finding no breach of duty when she provided strata council documents demonstrating the strata council made efforts to inform, or insist, that Ms. Chan should repair the source of the water leakage. This is a duplication of the second ground of appeal raised by Ms. Shen. These documents were not admissible on the issue of whether Ms. Chan breached her duty of care, and the judge also dismissed the claim on the basis that causation of the leaks had not been proven.
- [18] Sixthly, she maintains the judge erred in permitting the question of the executor of Ms. Wan's estate to remain unresolved. Ms. Shen is referring here to the uncertainty as to the identity of the proper executor of the estate. This issue relates to the prosecution of Ms. Shen's claim against Ms. Wan's estate, and it is not relevant to the claim against Ms. Chan. The judge did not err in failing to deal with this question.
- [19] Seventhly, Ms. Shen says the judge erred in ignoring the delay in her prosecution of the claim was caused by the failure to resolve the executor issue, and in failing to answer the question of whether Ms. Wan left a will. The first part of this ground relates to the aspect of Ms. Chan's application to have the claim against her dismissed for want of prosecution, but the judge did not dismiss the claim on this basis. The second part of this ground, like the sixth ground, relates to the prosecution of Ms. Shen's claim against Ms. Wan's estate and is not relevant to the claim against Ms. Chan.
- [20] Eighthly, she contends the judge erred in dismissing her claim against Ms. Chan "by judging the Appellant did not comply with the case planning orders". This relates to the aspect of Ms. Chan's application to have the claim against her dismissed for failure to comply with the case planning orders, but the judge declined to rule on that aspect of the application. The claim was not dismissed for failure to comply with the case planning orders.
- [21] Ninthly, Ms. Shen submits the judge erred by failing to take into account that she and her family are still living in a damaged suite, which has had a negative health impact and has led to financial loss. The judge did not fail to take this into account. He found that there was some evidence supporting Ms. Shen's claim that she sustained damage from water leaks into Unit 700. The claim against Ms. Chan was not dismissed for failure to prove damage.
- [22] Subsequent to the filing of her factum, Ms. Shen filed an application to introduce fresh evidence, and the application was heard concurrently with the hearing of the appeal. The fresh evidence consists of an affidavit sworn by Ms. Shen detailing failures to comply with the two case planning orders and water leaks in Unit 700 in 2017. I would not admit this evidence because it does not meet the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R.

759. The evidence relating to the case planning orders could have been adduced at the summary trial, and water leaks in 2017 go beyond the scope of Ms. Shen's claim because her amended notice of civil claim deals with eight leaks alleged to have occurred between 2009 and 2011. None of the matters addressed in the affidavit would have affected the outcome of the summary trial.

[23] As Ms. Shen has not demonstrated an error on the part of the summary trial judge in dismissing her claim against Ms. Chan, I would dismiss the appeal. "The Honourable Mr. Justice Tysoe" I agree: "The Honourable Mr. Justice Willcock" I agree: "The Honourable Mr. Justice Hunter"

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