

CANADA / JUDGMENT

Siemens v. Howard

2017 BCCA 211

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 211 Siemens v. Howard COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Siemens v. Howard, 2017 BCCA 211 Date: 20170601 Docket: CA44404 Between: Lucas Siemens Appellant (Plaintiff) And Graham Alexander Howard Respondent (Defendant) Before: The Honourable Madam Justice Saunders (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated April 10, 2017 (Siemens v. Howard, 2017 BCSC 587, Chilliwack Docket No. S027624). Counsel for the Appellant: A. Mackay J. Lithwick Counsel for the Respondent: J. Fiddick Place and Date of Hearing: Vancouver, British Columbia May 19, 2017 Place and Date of Judgment: Vancouver, British Columbia June 1, 2017 Summary: The appellants apply for a stay of the order releasing a certificate of pending litigation and lifting an interlocutory injunction, and seek to extend the temporal application of the injunction, pending the hearing of the appeal. The action, dismissed by the trial court, is for a declaration of constructive trust in favour of the appellant of the respondent's interest in real property in Abbotsford, B.C. The appellant is a farmer and neighbour of the respondent who is a real estate agent. The property adjoins the respondent's property. The appellant contends a purchase of that property by the respondent was for the appellant. Held: Application allowed and a stay of both instruments is granted to maintain the subject matter of the appeal, on condition security for the trial costs and appeal costs is posted. The respondent's position is protected to a significant degree by the undertaking as to damages that is a term of the injunction, now extended to the hearing of the appeal. Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] Mr. Siemens' appeal is from an order made April 10, 2017, dismissing his claim for a declaration of constructive trust in respect to real property Mr. Howard agreed to purchase. By the order appealed the judge lifted an interlocutory injunction effective immediately. That injunction had enjoined Mr. Howard from alienating or selling the property until 30 days following the pronouncement of final judgment unless otherwise ordered. The order also released a certificate of pending litigation registered against the property.
- [2] In this application Mr. Siemens applies for a stay of the order releasing the certificate of pending litigation, a stay of the order lifting the injunction, and an extension of the injunction.

- [3] Mr. Siemens is a farmer and businessman who operates an egg and chicken farm in a rural neighbourhood of Abbotsford, British Columbia. Mr. Howard is a real estate agent who lives across the street from Mr. Siemens. The property in issue adjoins the property owned by Mr. Howard.
- [4] The action focuses on dealings between December 2013 and March 19, 2014. In that period Mr. Howard entered into a contract for the purchase of the property. Mr. Siemens alleges Mr. Howard was acting as his realtor when dealing with the property and that Mr. Howard had agreed to purchase the property for him.
- [5] The injunction, obtained ex parte, enjoined Mr. Howard from assigning his contract to purchase the property to any person other than Mr. Siemens or a company controlled by Mr. Siemens, enjoined him from selling the property to anyone other than Mr. Siemens or a company controlled by Mr. Siemens, and provided for assignment to Mr. Siemens or his company of the contract in the event Mr. Howard was unwilling or unable to complete the purchase. Although provision was made for variation by further court order, the order continued until trial in its original terms. The order includes Mr. Siemens' undertaking as to damages.
- [6] The action was commenced on March 19, 2014, the injunction was granted March 24, 2017, and on June 30, 2014, Mr. Siemens filed the certificate of pending litigation.
- [7] In this appeal Mr. Siemens challenges the judge's treatment of the evidence, including as viewed against *Swiss Reinsurance Co. v. Camarin Ltd.*, 2015 BCCA 466 and *Laurentide Motels Ltd. v. Beauport (Ville)*, [1989] 1 S.C.R. 705, and he says the judge applied the incorrect legal test to determine whether an agency relationship existed between the parties.
- [8] Sections 10(2)(b) and 18 of the Court of Appeal Act, R.S.B.C. 1996, c. 77 combined, provide authority to grant a stay of execution and to make other orders incidental to the appeal in order to preserve the rights of the parties or to prevent prejudice to any person. This allows, in my view, the power to issue or extend an injunction pending appeal as well as the express power to order a stay of execution. The test applied on a stay application is the same test as considered for interlocutory injunctions. Whether that be the three-part test described in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, or the two-part test articulated by Madam Justice McLachlin in *B.C. (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333, that is, whether irreparable harm is a separate and free-standing requirement as stated in *RJR-MacDonald* or is but a factor (albeit important) in assessment of the balance of convenience as contemplated in *Wale*, a court must address: the merits of the proposed claim or appeal; the degree of harm that will follow absent an injunction; and the balance of convenience raised by the circumstances before the court.
- [9] Mr. Siemens contends the circumstances favour a stay. He recognizes that his challenge to the findings of fact and the treatment of evidence will encounter the high hurdle of deference this court must owe to a trial judge, but urges that those grounds are not doomed to fail. In respect to the legal issue, he poses a question that engages the less deferential

standard of review. Mr. Siemens notes that he does not claim damages. Rather he seeks only a constructive trust over the property. This means, he says, that a disposition of the property to someone other than himself will render the appeal moot. He advances that feature as demonstrating irreparable harm to him absent the relief he seeks, and says both harm to Mr. Howard and balance of convenience considerations are in the main addressed by his undertaking as to damages he gave as security for maintaining the status quo.

- [10] Mr. Howard submits that the appeal lacks merit, that irreparable harm is not established because the property is not asserted to be unique as demonstrated by pleadings that do not claim specific performance, and that the balance of convenience weighs against an injunction because he continues to incur costs associated with holding an interest in the property. He contends the injunction should never have issued.
- [11] I conclude that the issues sought to be raised meet the relatively low threshold of the merits criteria, both as to the evidence and factual issues and the issue of law. I also am satisfied that the other criteria are met. In my view, the appellant should be given the opportunity to address his challenges to the order, on appeal. A stay is necessary to preserve the subject matter of the appeal, and will maintain the status quo without significant and unprotected inconvenience to Mr. Howard. The parties are agreed that any appeal should proceed with dispatch, and will cooperate for that purpose.
- [12] Mr. Howard seeks as a term of any stay, an order that Mr. Siemens post security for costs of the appeal and security for the amount protected by Mr. Siemens' undertaking as to damages. He seeks, as well, security for costs of the trial forthwith after taxation.
- [13] I agree that security for costs of the appeal in the amount of \$10,000 should be posted as a term of any stay. The other amounts referred to, however, are undetermined. As to the value to be placed on the undertaking as to damages, said in Mr. Howard's affidavit to exceed \$500,000, the amount is not established and Mr. Howard's evidence on his damages is rather unspecific and is untested. I would not order security for his undertaking as to damages. So, too, trial costs are not established. I would order, as a stop gap, that Mr. Siemens post \$10,000 as security for Mr. Howard's trial costs, with liberty to return to seek further security once the amount of taxable costs is finally determined in the Supreme Court of British Columbia. However, given the parties' intention to pursue this appeal with dispatch, it may be that the appeal will overtake that opportunity.
- [14] I turn to the terms of the stay. I have no hesitation in staying the order releasing the certificate of pending litigation.
- [15] It is said that a stay of the order lifting the injunction is not required, given that it would have expired on its own terms by the time this application was heard, and that an injunction is not required given that the certificate of pending litigation will be noted in the Land Registry. I am not satisfied an injunction will be redundant. The material before me describes Mr. Howard's intention to dispose of most of the property (he intends to retain one acre for himself to bring his holding to over 10 acres) to a person already identified who has

provided financing in respect to the enjoined transaction. Given the equitable nature of the relief sought, I cannot say an injunction will have no practical effect. In my view, the order lifting the injunction should be stayed and the injunction should be extended to the hearing of the appeal or such earlier date as a justice shall otherwise determine.

Conclusion

- [16] The application for a stay of the order releasing the certificate of pending litigation is allowed. The application for a stay of the order lifting the injunction is allowed and the injunction of March 24, 2014, with appropriate modifications, is extended to the date of the hearing of the appeal or such earlier date as may be ordered by a justice. It appears to me that only paragraphs 1–4 inclusive and paragraph 8 of the injunction of March 24, 2014 will have application in the context of this appeal but the parties are at liberty to make submissions on the terms of the injunction if they choose. The parties are at liberty to apply to vary or discharge the injunction.
- [17] As a term of this order, the appellant shall post \$10,000 in court as security for costs of the appeal, and \$10,000 in court as security for costs of the trial proceedings, with liberty to apply to increase the latter sum after the amount of trial costs is finally determined by the trial court. The security for costs shall be posted by June 15, 2017, failing which the appeal is stayed until the security is posted. "The Honourable Madam Justice Saunders"

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