

CANADA / JUDGMENT

Stewart v. Sanddar Estate

2020 BCSC 1898

COURT

Supreme Court of British Columbia

DECIDED

14 October 2020

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2020 BCSC 1898 Stewart v. Sanddar Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart v. Sanddar Estate,

2020 BCSC 1898

Date: 20201014

Docket: S1910319

Registry: Vancouver

Between:

Darshan Kaur Stewart, also known as Darcy Stewart

Petitioner

And

Wilma Gutierrez Moratalla, litigation representative for the estate of

Mohinder Singh Sanddar, Deceased

Respondent

Before: The Honourable Justice Skolrood

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:

G. Brandt

Counsel for the Respondent:

F.C.M. Lowther

Place and Date of Hearing:

Vancouver, B.C.

October 8, 2020

Place and Date of Ruling:

Vancouver, B.C.

October 14, 2020

- [1] THE COURT: The petitioner, Ms. Stewart, seeks an order pursuant to the provisions of the Partition of Property Act, R.S.B.C. 1996, c. 347, for the sale of property located at 1369 East 63rd Avenue, Vancouver, BC. (the "Property"). She also seeks an order for exclusive conduct of sale, various ancillary orders dealing with the sale, an order that the respondent remove all personal property located on the Property and an order for occupational rent from May 15, 2020, to the date of sale.
- [2] The respondent agrees that the Property should be sold but says that there should be joint conduct of sale. The respondent opposes any order for occupational rent.

Background

- [3] The petitioner and Mohinder Singh Sanddar were siblings. Following the death of their parents, they became owners of the Property, initially as joint tenants and later as tenants in common.
- [4] After the death of their mother in 1999, Mr. Sanddar took up residence in the Property and remained there until his death in February 2020. Throughout that period, the petitioner had little involvement with the Property and derived no benefit from it.
- [5] The evidence filed on the petition sets out a history of disputes between the petitioner and Mr. Sanddar relating to the Property, including some bylaw infraction proceedings relating to unauthorized use of the Property. It is not necessary to go into detail about those events.
- [6] This proceeding was initially commenced in September of 2019 with Mr. Sanddar named as the respondent. However, he, again, died in February 2020. The present respondent, Ms. Moratalla, is named as the executrix under Mr. Sanddar's will, but probate of the will has not yet been granted. Ms. Moratalla is appointed as litigation representative for Mr. Sanddar's estate for the purposes of this litigation.

[7] The evidence also discloses a difficult relationship between the petitioner and Ms. Moratalla following Mr. Sanddar's death. Both parties retained counsel, and there were discussions about selling the Property, but no agreement was reached.

[8] On May 1, 2020, Ms. Moratalla's counsel wrote to the petitioner's counsel stating in part:

Ms. Stewart is not to permit or allow any other persons to attend at or enter upon the property without the knowledge and consent of Ms. Moratalla. I am instructed that Ms. Stewart already acted in a manner to permit certain other persons to enter upon and come into the home and that Ms. Stewart aided and abetted in those persons taking property, chattels from the home that do not belong to them. This taking of those items is considered to be theft, and we want steps taken to have the return of ALL items that were taken.

[9] The persons referred to who allegedly entered the Property were apparently the adult children of Mr. Sanddar, who took some personal items.

[10] The petitioner's counsel responded on May 15, 2020, stating in part:

I take from the restrictions communicated in your email that Ms. Moratalla is purporting to exclude Ms. Stewart from having any reasonable access to or use of the residence, including for the purpose of addressing the immediate disrepair and non-compliance issues. While I will look forward to your substantive response to our March 3, 2020 letter, I note a change in circumstances in that I am instructed that Ms. Moratalla is no longer living at the residence and now agrees it should be sold. In these circumstances it is our view that all personal possessions should be removed forthwith and the residence or appropriate portions thereof rented out until it can be marketed for sale. To the extent that Ms. Moratalla does not agree to productive use of the residence pending sale, Ms. Stewart will claim an adjustment for occupational rent from the proceeds of the eventual sale.

[11] There was some further correspondence between counsel, including in August 2020 about a neighbour who was possibly interested in purchasing the Property by way of a private sale, but nothing came of this.

DISCUSSION

[12] As noted at the outset, both parties agree that the Property should be sold. However, they disagree on the process for doing so. Three issues thus arise:

- 1) Should the petitioner have exclusive conduct of sale or should there be joint conduct?
- 2) Is the petitioner entitled to occupational rent?
- 3) What should be done with the personal property and other items that are currently in the Property?

[13] I will deal with each of these in turn.

Exclusive or Joint Conduct?

- [14] In *Durrani v. Lehal*, 2018 BCSC 2489, Madam Justice Fitzpatrick cited Master Keighley's decision in *Dhillon v. Kumar*, 2014 BCSC 2366, where he set out some factors that the court will consider when deciding who should have conduct of sale:
- [34] As to whether the claimant should be given sole conduct of sale, while there is no singular test for granting sole conduct of sale, the Court should consider all factors including the willingness of a party to facilitate sale, the inability of the parties to agree on routine aspects of sale and the inability of the parties to cooperate: *McLachlan v. McLachlan*, 2013 BCSC 1733.
- [15] The petitioner submits that the history of this matter, including serious allegations levelled by the respondent against her and the respondent's engagement in discussions with a neighbour about a sale without her input, demonstrates that the parties cannot cooperate. She also points to the fact that probate has not been granted of Mr. Sanddar's estate, and that accordingly, the respondent has no legal authority to deal with the Property. The petitioner submits that these factors militate in favour of granting her sole conduct of sale.
- [16] The respondent submits that under Rule 13-5 of the Supreme Court Civil Rules, the court has the power to order a sale of property and further may appoint a person or persons who are to have conduct of sale. She submits that under this rule, the court can order that she have conduct of sale or joint conduct, notwithstanding that the probate of Mr. Sanddar's will has yet to be granted. The respondent further submits that the estate of Mr. Sanddar has an interest in ensuring that a reasonable and proper sale price is obtained for the Property and given that she is the person charged with protecting the interests of the estate, she should be involved in the sale.
- [17] In my view, while the relationship between the parties has unfortunately been difficult, I am not prepared to grant exclusive conduct of sale to the petitioner. The respondent lived in the house for a period of time, took care of Mr. Sanddar and, as noted, is the executrix of his estate, which is acknowledged by the petitioner to be entitled to a one-half interest in the proceeds of any sale. In the circumstances, it is appropriate that she have involvement in the sale. I do not think that the fact that probate of Mr. Sanddar's will has not yet been completed bars the respondent from being involved in the conduct of sale. What that means for an actual sale in the event an acceptable offer is received will have to be addressed at that time.
- [18] I therefore order that the parties have joint conduct of sale. The preferable approach would be for the parties to agree on a single realtor. In order to facilitate such an agreement, each party may put forward the name of up to two realtors. The parties will then attempt to agree on a single realtor from the group of four names. If the parties are unable to agree, they may each retain a realtor of their choosing and the two realtors will enter into a joint listing agreement.

Is the Petitioner Entitled to Occupational Rent?

- [19] Occupational rent may be payable where a co-owner is involuntarily excluded or ousted from the property such that their right of full use of or benefit from the property is impeded: *L.M.R. v. J.F.R.*, 2010 BCSC 363, at para. 28; *Pelikan v. Quarry et al.*, 2006 BCSC 269, at paras. 28 to 31.
- [20] As set out in the letter from the petitioner's counsel dated May 15, 2020, which I referred to earlier, the petitioner takes the position that the restrictions imposed by the respondent in her counsel's email of May 1, 2020, amounted to an ouster of the petitioner, thus entitling her to claim occupational rent.
- [21] I do not agree. The May 1st email clearly states that the petitioner should not let other people enter the Property without the knowledge or consent of the respondent. This followed an incident in which Mr. Sanddar's children apparently did enter the Property using a key provided by the petitioner. While the tenor of the May 1st correspondence was unfortunate, particularly the allegation of theft, I do not read it as an attempt to exclusion the petitioner.
- [22] The respondent moved out of the Property in May 2020, and it was largely vacant after that time. There is no indication that the petitioner took any further steps to gain access to the Property during that time, nor any indication of how the respondent allegedly excluded her. Further, from May through the summer, there were discussions between the parties about what to do with the Property, specifically how it would be sold.
- [23] In the circumstances, I am not satisfied that there was an ouster or exclusion of the petitioner that would warrant an order for occupational rent.

Removal of Personal Property

- [24] Photos of the Property show that while it is unoccupied, it is full of furniture and other personal effects. The petitioner submits that these items should be removed to facilitate a sale.
- [25] The respondent says that she removed her personal property, and she is concerned about removing or destroying other items that may belong to Mr. Sanddar's estate or that other people may have an interest in. She notes that the petitioner is seeking an order for sale of the Property on an as-is/where-is basis and that there is no evidence to indicate that it cannot be sold with the various items in the house, recognizing that they will have to be removed if and when a sale closes.

- [26] While it may not be addressed directly in the evidence, common sense says that removal of at least some, or the bulk, of the personal items is likely to enhance the prospects of sale for the Property. As the named executrix of Mr. Sanddar's estate, the respondent is obligated to take whatever steps are necessary to preserve any property belonging to the estate. To the extent that there are costs associated with doing so, for example, placing items in storage, presumably those are costs are to be borne by the estate.
- [27] The order that I am prepared to make is that within 21 days of today's date, the respondent shall remove any personal property belonging to her or the estate of Mr. Sanddar. After 21 days, any remaining items on the Property may be disposed of in order to facilitate the sale of the Property. The parties shall attempt to come to an agreement on how that is to occur but failing an agreement, either party may arrange the removal of the Property. Costs of doing so will be shared equally and paid out of the proceeds of sale.

Conclusion

[28] In summary, I make the following orders:

- a) The property located at 1369 East 63rd Avenue, Vancouver, BC, with a legal description of:

PID: 009-829-016

Lot 10 Block 6

Plan VAP9008 District Lot 200, land District 1

Land District 36

shall be sold on an "as is where as" basis;

- b) The petitioner and the Estate of Mohinder Singh Sanddar (the "Estate") are each entitled to an equal undivided one-half interest in the Property.
- c) The petitioner and the respondent shall have joint conduct of sale. Each party may put forward the names of up to two realtors. The parties will then attempt to agree on a single realtor from the group of four names. If the parties are unable to agree, they may each retain a realtor of their choosing, and the two realtors will enter into a joint listing agreement.
- d) The respondent shall take all necessary steps for the removal of all personal property belonging to her or the Estate within 21 days of the date of this order. Thereafter any remaining property or items on the Property may be disposed of in order to facilitate the sale of the Property. The parties shall attempt to come to an agreement on how that is to occur but failing an agreement, either party may arrange the removal of the items. Costs of doing so will be shared equally and paid out of the proceeds of sale.

- e) The net proceeds from the sale of the Property after payment of all necessary costs of sale and discharge of encumbrances if any, and any expenses incurred in removing personal property shall be divided equally between the parties, and one-half shall be paid to Lawson Lundell in trust for the petitioner, and one-half to Fred C. Lowther Law Corporation to be held in trust for the Estate.
- f) The price and other terms of sale of the Property and the distribution of the proceeds shall be subject to approval of the court in this proceeding.
- g) The parties are at liberty to apply to the court for such further and other directions as may be necessary to carry out the full purpose and intent of this order.

[29] Those are my reasons.

(SUBMISSIONS ON COSTS)

[30] THE COURT: All right. Thank you. I think that success was in large measure divided, and accordingly, I am going to order that the parties bear their own costs. Thank you.

"Skolrood J."

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