CANADA / JUDGMENT

Sutton v. Oshoway

2010 BCSC 1440

COURT
Supreme Court of British Columbia

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2010 BCSC 1440 Sutton v. Oshoway

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sutton v. Oshoway,

2010 BCSC 1440

Date: 20101015

Docket: S056720

Registry: Vancouver

Between:

Kenneth Charles Sutton

Plaintiff

And

Vincent Lawrence Oshoway, and Valerie Elizabeth Walker

Defendants

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. Sutton

The Defendant, Vincent Oshoway:

Self-represented

The Defendant, Valerie Walker:

No appearance

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 10, 2010

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2010

Introduction

[1] On December 9, 2004, Valerie Walker transferred her one-half interest as a joint tenant in residential real property (the "Property") to Vincent Oshoway, the owner of the remaining one-half interest.

[2] The plaintiff, Mr. Sutton, says that the transfer of the Property was a fraudulent conveyance so that s. 1 of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 (the "Act") applies to render the transfer void and of no effect.

[3] The defendant, Vincent Oshoway, says that the transfer of the Property to him should not be treated as a fraudulent conveyance because it was done only to accommodate the refinancing of the property. The defendant Valerie Walker did not appear.

[4] The issues may be simply stated. Was the transfer of an interest in the Property by Ms. Walker to Mr. Oshoway a fraudulent conveyance? If so, is Mr. Sutton entitled to a remedy against the defendant transferee Mr. Oshoway?

Background Facts

[5] As a result of earlier proceedings by the plaintiff against Ms. Walker involving an arrangement between them to share in the proceeds from the sale of a classic automobile, the plaintiff obtained judgments against Ms. Walker of $12,500 in April, 2003, and $2,928 in January, 2005. On August 9, 2005, costs of $2,799 were also awarded to the plaintiff against Ms. Walker. Ms. Walker has not paid any amount to the plaintiff in respect of these judgments. It is those debts that the plaintiff says Ms. Walker was trying to avoid by transferring the Property to Mr. Oshoway. Currently, with accrued interest, the total debt amounts to $26,027.55.

[6] In November 2001, Mr. Oshoway was given $60,000 by his mother, Mrs. Oshoway. Originally, the gift was to provide him with a $55,000 down payment for a house to be owned by him alone. That arrangement changed and it appears that Mrs. Oshoway decided to "allow" Mr. Oshoway to purchase a house jointly with Ms. Walker. A letter from her lawyer states that the $55,000 "shall be used to acquire equity for them both."

[7] The defendants purchased the Property on January 14, 2002.

[8] Mr. Oshoway's evidence is that he included Ms. Walker in the purchase of the Property only so that he could qualify for a mortgage, which he could not have done alone. This is supported by the affidavit evidence of a mortgage broker. He also says that, notwithstanding the fact that Ms. Walker was registered as a one-half owner in joint tenancy, it was always agreed between them that she would not have any beneficial interest in the Property.

[9] Mr. Oshoway also indicated that all of the funds required to purchase the Property, including the deposit, were paid by his mother. Ms. Walker did not contribute any funds to the purchase of the Property.

[10] The relationship between Mr. Oshoway and Ms. Walker is not entirely clear from the affidavit evidence, but they were close friends and appear to have been romantically linked. Mr. Oshoway gave evidence that Ms. Walker never resided in the property, and always kept her own residence.

[11] In October 2004, the mortgagee, Coast Capital Credit Union, commenced foreclosure proceedings against the Property. Around that time, Mr. Oshoway's relationship with Ms. Walker was deteriorating. He says that a mortgage broker advised him that re-financing would be difficult to obtain if Ms. Walker remained on the title when they were undergoing a separation. He was also advised that he now qualified for mortgage financing in his own right. As a result, Mr. Oshoway says, Ms. Walker transferred her legal interest in the Property to him in November 2004. He says the transfer was not made to defeat any creditors of Ms. Walker.

[12] While this action was proceeding, the plaintiff filed a certificate of pending litigation against the title to the Property. Subsequently, Mr. Oshoway paid funds into his lawyer's trust account as security for these proceedings. He then sold the Property to an arm's length third party on December 31, 2007. Currently, I understand that there is about $24,300 being held in trust which is to be paid to the successful party in these proceedings.

[13] The evidence clearly shows that Ms. Walker has not only failed to pay any of her outstanding judgment debts to the plaintiff but has also sought to evade service of documents in these court proceedings. Perhaps the most extreme example is the filing by her of a notice that she would act alone in these proceedings in which she provided an address and phone number that did not belong to her.

[14] Mr. Oshoway avers that, because he had borrowed money from Ms. Walker during their relationship, he agreed to pay $25,000 to her when she transferred her interest in the Property to him. Some correspondence between solicitors for Mr. Oshoway and Ms. Walker refers to a cash payment of $10,000 and a promissory note from Mr. Oshoway to Ms. Walker in the amount of $15,000, representing the amount required by Ms. Walker to transfer her interest in the Property to Mr. Oshoway. Consistent with Mr. Oshoway's evidence, correspondence from his lawyer suggests that Ms. Walker was not a beneficial owner but would be entitled to some payment for having assumed the risk of the mortgage while on title. None of the correspondence among the lawyers refers to any loans by Mr. Oshoway.

[15] Correspondence from Ms. Walker's lawyer indicates that she had contributed financially to the Property by making payments on the mortgage for a period of four months to forestall foreclosure proceedings and lawyer's fees, as well as paying gas and hydro costs.

[16] The plaintiff argues that Ms. Walker had a beneficial one-half interest in the Property. He says there is no evidence to show that Ms. Walker's interest in the Property was not beneficial. He refers to the fact that she held her interest in joint tenancy rather than as a tenant-in-common and thus had rights of survivorship, which would be inconsistent with the rights of the holder of bare legal title.

[17] While Mr. Oshoway says that Ms. Walker never lived on the Property, the plaintiff points to the property tax return signed by the defendants when the Property was acquired, which includes in its standard form a statement that the parties intend to live on the property. The plaintiff also refers to a letter from Mr. Oshoway's solicitor, which states that her funds " shall be used to acquire equity for them both," referring to Mr. Oshoway and Ms. Walker. In my view neither of these facts leads to the conclusion that Ms. Walker had a beneficial interest in the Property.

[18] I do not accept that the $25,000 payment related to loans from Ms. Walker to Mr. Oshoway. I also reject Mr. Oshoway's evidence that Ms. Walker never contributed financially in any way to the property. The payment to Ms. Walker may have been made in recognition of her financial contribution to the property, her assumption of risk under the mortgage or because she was breaking up with Mr. Oshoway and was in a position to extract a payment from him in order to remove herself from the title. In the end result, although she received a payment that was described in some of the lawyer's correspondence as being for the transfer of her interest in the property to Mr. Oshoway, I am not satisfied that this establishes that she had a beneficial interest in the property. The payment was equally consistent with her having only a legal interest in the property.

Submissions

[19] The plaintiff says that the defendants colluded to affect a fraudulent conveyance by way of the transfer of Ms. Walker's interest in the Property to Mr. Oshoway. The plaintiff says that, because of his involvement with Ms. Walker, Mr. Oshoway must have been aware of her outstanding judgment debts to the plaintiff when she transferred her interest in the Property to him.

[20] The plaintiff also points to the fact that Mr. Oshoway paid Ms. Walker $5,000 of the promissory note in December 2007, rather than paying that amount to the plaintiff when he knew that she had outstanding debts to the plaintiff. The plaintiff states that this is evidence of collusion.

[21] In support of his position that the transfer by Ms. Walker of her interest in the Property to Mr. Oshoway was a fraudulent conveyance, the plaintiff relied on s. 1 of the Act. He also referred to the following decisions:

1) Koop v. Smith (1915), 51 S.C.R. 554 [Koop];

2) Abakhan & Associates Inc. v. Braydon Investments Ltd., 2009 BCCA 521;

3) Verizon Information Services, Canada Inc. v. Bubble Boy's Powerwashing Ltd., 2005 BCSC 1496; and

4) State of Idaho v. Ultimate Ventures Inc., 2007 BCSC 1710.

[22] Mr. Oshoway did not have counsel in these proceedings and his submissions were brief. He reiterated some of the evidence and said he followed the advice of the mortgage brokers when he first included Ms. Walker on the title to the Property and then again when she transferred her interest back to him. He said that any problems Ms. Walker had with Mr. Sutton were not his business and in his view they had nothing to do with him.

Analysis of the Law

[23] Section 1 of the Act provides:

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies

(a) a disposition of property, by writing or otherwise,

(b) a bond,

(c) a proceeding, or

(d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

[24] However, there is an important exception set out in s. 2 of the Act as follows:

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice of collusion or fraud.

[25] This provision appears to protect a transferee who has paid good consideration for property. As noted in Ashcroft Holding Ltd. v. Almas (1992), 11 C.B.R. (3d) 221 at 233 (B.C.S.C.):

While the court might find that the conveyance was made with the intent to defeat, hinder, delay or defraud creditors on the part of Mr. Almas, the conveyance is not void because it was made for good consideration and in good faith to a person not having at the time of the conveyance notice or knowledge of the intent to defraud.

[26] In Abakhan & Associates Inc. v. Braydon Investments Ltd., Finch C.J.B.C. reviewed the case law respecting the proof of a fraudulent conveyance. This case is helpful in determining how the Act should be applied. In that case, an individual caused a corporation that he controlled to transfer property to a corporation of which he was also the controlling mind. He did that with professional advice and for the admitted purpose of making sure that the property transferred would not be available to creditors of the transferor. The Court of Appeal made it clear that a dishonest intent, or mala fides, is not necessary to avoid a transaction under s. 1 of the statute. Further, the Court said that the words "by collusion, guile, malice or fraud" do not perform a meaningful function in the text and should be struck. Thus, the Court said, at para. 73:

The only intent now necessary to avoid a transaction under the modern version of the Act is the intent to "put one's assets out of the reach of one's creditors". No further dishonest or morally blameworthy intent is required.

It is notable that in reaching his conclusion vis-à-vis the intent requirement for the transferor, he did not disturb certain cases which have historically protected the transferee.

[27] In particular, he did not disturb the case law on "valuable consideration," articulated in the Court of Appeal's earlier decisions Meeker Cedar Products Ltd. v. Edge (1968), 68 D.L.R. (2d) 294 (B.C.C.A.), and Chan v. Stanwood, 2002 BCCA 474:

63 In Chan v. Stanwood, 2002 BCCA 474, Madam Justice Newbury, giving the judgment of this Court, noted the differences in the intent required between cases where consideration for a transfer was inadequate or nominal, and those where "valuable" consideration had passed. She said:

20 The Commission's report also stated, however, that the significance of consideration lies both in its relation to the intention behind the transaction and in relation to its effect. Where the consideration is inadequate or nominal, a creditor need only show that the Transferor intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the transferee actively participated in

the fraud. As stated by this court in Meeker Cedar Products Ltd. v. Edge (1968), 68 D.L.R. (2d) 294 (B.C.C.A.) (aff'd at (1968), 1 D.L.R. (3d) 240 (S.C.C.)):

... it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice of knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless it be proved that the purchase[r] was actually privy to the fraud, i.e., a party to carrying out the fraudulent intention and purpose. [at 299; emphasis added.]

[Italic emphasis in original; underline emphasis added.]

[28] The principle from Meeker Cedar was again positively referred to in the BCSC decision, Liu v. Wang, 2009 BCSC 1792 at para. 25:

[25] Where there is good and valuable consideration, the transferee's knowledge of the transferor's fraudulent intent does not void the transfer unless the transferee was actually a party to carrying out the fraudulent intent and purpose: Meeker Cedar.

[29] In light of these comments, one can conclude that the presence or absence of consideration is of critical importance with respect to the impeachment of conveyances for fraud.

[30] Once there is evidence of a transfer for good and valuable consideration, the plaintiff must prove not only intent to defraud on the part of the debtor but also that the transferee actively participated in the fraud. The plaintiff must do so on the balance of probabilities (Solomon v. Solomon (1977), 16 O.R. (2d) 769 (H.C.) at 774.

[31] The requirement of proving "active participation" seems to apply notwithstanding the wording in the Act. Section 2 of the Act arguably sets out three requirements: 1) good consideration; 2) a lawful transfer in good faith; and 3) lack of notice or knowledge of collusion or fraud.

[32] However, the plain wording of the statute appears to have been generally disregarded. As noted in Kashyap v. Canadian Imperial Bank of Commerce, 148 Nfld. & P.E.I.R. 200, [1997] N.J. No. 57 at para. 14 (C.A.):

Using a literal interpretation of the Act one could argue that, by the combination of sections 4 and 5, if there is "good consideration" all that need be established is that there was fraudulent intent on the part of the transferor and knowledge of that intent on the part of the transferee. However, that is contrary to the weight of the authorities which are to the effect that if there is consideration there must be fraudulent intent on the part of both the transferor and the transferee.

[33] A similar conclusion is articulated in the following extract from Creditor-Debtor Law in Canada, 2d ed. (1994) by Dunlop, at p. 611 (referred to in Kashyap at 14) :

It is clearly not enough to prove knowledge of the grantor's indebtedness or insolvency or even knowledge that the effect of the sale may be to defeat or delay creditors. If evidence goes further and establishes that the purchaser knew that the seller's intention was to defraud the seller's creditors, the statute literally interpreted would appear to invalidate the transfer, and there are many English and Canadian cases which have taken this view. Despite this authority, mere knowledge of the debtor's intent would appear to be insufficient in Canada as a result of the important decision of the Supreme Court in Mulcahy v. Archibald.

[34] In light of the BCCA decision in Meeker Creek, one can conclude that, as is the case in Newfoundland, where there is evidence of a transfer for good consideration, the plaintiff must show that the transferee actively participated in the fraud, beyond mere knowledge or notice. Otherwise, the conveyance will not be disturbed.

[35] The principle that full consideration is not required in order to uphold a conveyance has been repeated on several occasions (see e.g. Meeker Cedar at para.7).

[36] Furthermore, in assessing the adequacy of consideration, a one-to-one correspondence is not required. As indicated in the Report of the Law Reform Commission of British Columbia on Fraudulent Conveyances and Preferences, issued in 1988 (cited in Chan):

Whatever formula is used to distinguish "good" consideration from "inadequate" consideration, the policy is clear. To bring a transaction within section 4 [now s. 2], it is unnecessary to show that there exists a one-to-one correspondence between the market value of the property transferred and the consideration supplied. To do so would constitute too great a restraint on the transferability of property.

[37] Furthermore, as indicated in Chan at 21, "Where valuable consideration has passed, then, the focus is not on the sufficiency of that consideration but on the intentions of both parties to the transaction."

Application to the facts

[38] With respect to Ms. Walker, the evidence suggests that in transferring her interest in the Property to Mr. Oshoway, she may have intended to place her interest beyond the reach of the plaintiff. It is clear that from the results of the transfer that its effect was to delay or hinder the plaintiff in pursuing his just and lawful remedies against Ms. Walker.

[39] The plaintiff could have pursued collection action against the assets of Ms. Walker which, after the transfer of her interest, would have included $10,000 in cash and a $15,000 promissory note. However, it is apparent that his collection remedies had been delayed and hindered. He no longer had the opportunity to pursue the remedy of attaching Ms. Walker's interest in the Property.

[40] As such, I find that the plaintiff would likely satisfy the test in Botham since there is sufficient evidence upon which one could infer that Ms. Walker intended to place the assets out of the reach of the plaintiff.

[41] However, Ms. Walker is not before the Court. Rather, the plaintiff seeks a remedy against Mr. Oshoway. Accordingly, the analysis must turn to whether Mr. Oshoway should be held accountable for the fraudulent conveyance or whether s. 2 applies to protect Mr. Oshoway's transferred interest.

[42] Mr. Oshoway paid Ms. Walker $25,000 when she transferred her interest in the Property to him. The payment corresponded with the transfer at issue in this case. As a result, the evidence is that Mr. Oshoway paid valuable consideration for Ms. Walker's interest. The ruling in Bothman has limited application in this case, where valuable consideration has passed.

[43] According to Meeker Cedar, the burden is on the plaintiff to prove, on the balance of probabilities, that Mr. Oshoway was actually a party to carrying out the fraudulent intent and purpose of Ms. Walker. Mr. Sutton must point to evidence that Mr. Oshoway actively participated in the fraud. Mere knowledge or notice of the fraud is insufficient.

[44] In my opinion, the plaintiff has not proven on a balance of probabilities that Mr. Oshoway actively participated in the fraud. Mr. Oshoway should therefore not be held liable for the debts of Ms. Walker.

[45] The application of the plaintiff in respect of Mr. Oshoway is dismissed and allowed in respect of Ms. Walker.

[46] Costs will be awarded to the defendant Oshoway at Scale B. The plaintiff is awarded costs against Ms. Walker also at Scale B.

"Bowden J."

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