
CANADA / JUDGMENT

Taylor v. Banicevic

2015 BCSC 15

COURT

Supreme Court of British Columbia

DECIDED

8 January 2015

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2015 BCSC 15 Taylor v. Banicevic

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Banicevic,

2015 BCSC 15

Date: 20150108

Docket: S124709

Registry: Vancouver

Between:

Graham Taylor

Plaintiff

And:

Peter Mario Banicevic, Banicevic Developments Inc.,

Banicevic Holdings Ltd and 679484 B.C. Ltd.

Defendants

Before: Master Muir

Reasons for Judgment

Counsel for Plaintiff:

J.W. Zaitsoff

Counsel for Defendants:

J.J. McIntyre

Place and Date of Hearing:

Vancouver, B.C.

December 16, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 8, 2015

I. Background

- [1] The defendants apply for an order setting aside the consent order of Master Scarth of September 14, 2012 and cancelling certain certificates of pending litigation (CPLs) registered on their properties.
- [2] The plaintiff's claim stems from an agreement he alleges was entered into between him and the defendants in or about December 2004 (the "agreement"). Mr. Taylor was to advance funds, estimated at \$320,000, to assist in the purchase of certain properties on 68th Avenue in Surrey, which I will refer to as "Lot 17". That property was to be developed and the plaintiff was to be responsible for ½ of the costs. In return, the defendants were to hold in trust an undivided 50% interest in the property for Mr. Taylor. Ultimately he would receive ½ of the profit from the development.
- [3] Alan Hultman was retained to draft the agreement between the parties and deal with some other matters pertaining to it and the development.
- [4] Part of the consideration for the agreement is alleged to be that losses that the defendant, Peter Banicevic, suffered through investments placed with the plaintiff, a stock broker, would be repaid by the issuance of shares in a company. That was apparently not done.
- [5] It is said that funds were advanced pursuant to the agreement by the plaintiff through a nominee. There are assertions that this was done so that the plaintiff could evade Canadian taxes by appearing to keep his money offshore.
- [6] The defendants say that in 2006 they learned of this, determined that the plaintiff's actions were illegal and resiled from the agreement. The defendants apparently took the position that the amount of the unresolved stock losses and the amount paid by Mr. Taylor for the development of Lot 17 were roughly the same and cancelled each other out, leaving nothing owing to either.
- [7] The plaintiff advanced no further funds for the development of Lot 17. The defendants say they managed to continue the development with funds raised using Lot 17 and other properties owned by the defendants as security.

- [8] Most of the development has been sold. There is one partial lot left, for which an agreement for sale has been negotiated.
- [9] It is said that the development of Lot 17 has generated about \$500,000 to \$600,000 over the 10 years. Mr. Banecevic has taken no money for his time.
- [10] On July 4, 2012, the plaintiff filed the notice of civil claim to commence this action and a CPL was filed against the properties involved in Lot 17.
- [11] Shortly thereafter, an amended notice of civil claim was filed alleging that two other properties of the defendants had been obtained from proceeds of the development of Lot 17 and were trust property. I will refer to those as the "136th Street Property" and the "182nd Street Property". CPLs were filed against both.
- [12] Mr. Gordon Phillips, the then counsel for the defendants, brought an application to cancel the CPLs against one of the lots of the Lot 17 development ("Lot 18") and the 136th Street Property. As a result, a consent order was entered into before Master Scarth on September 14, 2012.
- [13] That order provided, amongst other things:
- a) The CPLs on Lot 18 and the 136th Street Property were to be removed.
 - b) No further encumbrances were to be registered on those properties other than mortgages.
 - c) Any money obtained by such financing was to be used only for the costs of development of Lot 17 or 136th Street Property and were not to include any payments to the defendants for labour or services.
 - d) Lot 18 and the 136th Street Property could be sold, but any proceeds after payment of transaction costs, mortgages registered against the property and costs of development were to be held in trust by Alan Hultman, and paid out only by agreement or further order.
 - e) Either party was at liberty to apply to vary or vacate the order on 8 days' notice.
- [14] The 136th Street Property has since been subdivided and sold and \$49,114 from this sale was paid to the trust account of Mr. Hultman, per the order of Master Scarth.
- [15] Unfortunately, development of that property is not finished and requires work to be completed that is secured under a letter of credit held by the City of Surrey. This development appears to have resulted in a loss to date of \$116,498.35.
- [16] There is now an agreement for sale of Lot 18. Work required by the City of Surrey will also remain to be completed on this property. It is anticipated that approximately \$180,000 will be deposited with Mr. Hultman following this sale if the order of Master Scarth remains in force.

- [17] On March 27, 2013, the plaintiff filed a further amended notice of civil claim alleging in part that the defendant Peter Banicevic's home on Sierra Drive in Burnaby (the "Sierra Drive Property") was obtained by using Lot 17 to obtain financing and was thus trust property. A CPL was accordingly filed against title to this property.
- [18] The defendants now seek to vacate the order of Master Scarth and to have the CPLs on the 182nd Property (Registration Number BB1494335) and the Sierra Property (Registration Number CA3056666) cancelled.
- [19] The trial of this action is scheduled to proceed in March 2015.

II. Cancellation of the CPLS

- [20] The defendants apply for cancellation of the CPLs in accordance with ss. 256(1) and 257 of the Land Title Act, RSBC 1996, c. 250, which provide:

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) 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
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
- (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and

(ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.

(2) The form of the undertaking must be settled by the registrar of the court.

(3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

[21] It is for the defendants to establish hardship and inconvenience. That is a threshold requirement for obtaining relief under s. 257 of the Land Title Act.

[22] The requirement for hardship and inconvenience has been variously stated in the cases relied upon by the parties here. I will refer only to the statement from the Court of Appeal in *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at para. 37:

[37] The plain language of s. 256(1)(b) requires that evidence of the applicant's hardship and inconvenience must be "experienced or likely to be experienced by the registration" [emphasis added]. This language imports a requirement that the hardship and inconvenience experienced or likely to be experienced by the applicant must be causally connected solely to the registration of the CPLs. Evidence of hardship must be more than general allegations of inconvenience but include particulars that demonstrate real hardship: *Thonger v. Palmer*, [1988] B.C.J. No. 1474 (B.C.S.C.); *Aviawest Resorts Inc. v. Memory Lane Developments Inc.*, 2004 BCSC 999 (CanLII), 22 R.P.R. (4th) 255; and *Burns v. Kuhn*, 2008 BCSC 1767 (CanLII).

[23] The hardship asserted by the defendants is set out first in the affidavit of Mr. Banicevic, sworn November 25, 2014, as follows:

21. The filing of the CPLs against Sierra, our house, has caused and continues to cause a great deal of emotional upset, distress and anger with my wife. I used the equity we had in Sierra to support the real estate developments of my business as and when needed, including to develop Lot 17 when it became known to us in September 2006 that the plaintiff could not fund ½ of the expenses by legitimate means.
22. No monies from Lot 17 went into the acquisition of Sierra. Money was borrowed on the equity of Sierra to fund the development of Lot 17 and then paid back as Lot 17 was developed.
23. My personal and business holdings and equity have been tied up by the CPLs placed by the plaintiff on Lot 17, 136th Street, 182nd St. and Sierra. We have been unable to sell or refinance our home to reduce our family expenses and to cover our living costs and unpaid bills. As a result of the CPLs, I have been forced to use secondary and tertiary lenders at higher rates of interest in order to carry on with the properties. I have been paying the mortgages and property taxes on these. The net expense on 182nd St for the mortgage, taxes

and insurance is \$1790 a month after deduction of rent. The monthly expense on Sierra for mortgages, insurance and taxes is \$7700. I borrowed money from my sister and mother to pay our bills and to live day by day.

24. As a result of the filing of the CPLs, I have been unable to take advantage of any real estate opportunities that came my way as my equity in the properties was tied up. This has affected my business and ability to generate future work. Not every development can be expected to make money, but as long as a developer is in the business, chances are higher that he might be able to take advantage of rises in real estate prices when they come along. Further as a result of filing the CPLs, work that I might have done myself on these properties, especially those covered by the Consent Order, I no longer could afford to do as I could not expect to be reimbursed for it.
25. Further as a result of the CPLs I could not afford to wait for a better market when it came to the sale of the properties affected by the CPLs. I had to recoup the money to pay the debts owing to the service providers and contractors that worked on these developments and could not wait for better offers to come along. As it is, the delay in payments to my service providers has tarnished both my reputation and that of my companies.
- [24] He also references the loss on the development of the 136th Street Property, referred to above and that despite the overall loss on that development that funds were required to be paid into trust pursuant to the order of Master Scarth.
- [25] In addition, the defendants bring the evidence of Mr. Randle Barrington-Foote, a mortgage broker who, since 2006, has been involved in arranging all of the mortgages for Mr. Banecevic on the various properties that he or his companies have had an interest in, including Lot 17, the 136th Street Property, the 182nd Street Property and the Sierra Property.
- [26] Mr. Barrington-Foote confirms that monies were raised for the development of Lot 17 by placing a second mortgage on the Sierra Property and that money for the development of the 136th Street Property was also raised using the Sierra Property as security. Later, due to the CPL on Lot 17, funds were raised to provide capital for the construction of houses on Lot 17 by another mortgage placed on the Sierra Property and a third mortgage on the 136th Street property.
- [27] Mr. Barrington-Foote confirms that he did not raise money on Lot 17 to secure the acquisition of the Sierra Property or the 182nd Street Property.
- [28] Mr. Barrington-Foote also deposes:

the filing of Certificates of Pending Litigation have negatively impacted [Peter Banecevic's] ability to raise financing to continue to develop real estate properties. It has made it more difficult for me as a mortgage broker to assist him and his companies.

- [29] The plaintiff asserts that this evidence does not achieve the level of particularization required to establish true hardship and inconvenience. I do not agree.
- [30] Although some of the hardship asserted is advanced in generalizations, taken as a whole, I am satisfied that this evidence provides the particularity required. It is clear to me that the effect of these CPLs over the properties in question has been to hobble Mr. Banecevic's ability to develop property, which is his livelihood. The CPLs have resulted in increased costs to his developments due to the requirement to use more costly financing and has limited the funds available for development purposes and to him personally.
- [31] That applies equally to the provisions of the consent order entered into before Master Scarth on September 14, 2012. It was undoubtedly not contemplated that proceeds from sale of a development that actually lost money should be held in trust for the benefit of this action. Circumstances have changed since that order was entered into. The effect of the order is to replace the hardship and inconvenience of the CPLs then in issue with hardship and inconvenience in another form.
- [32] I have concluded that the CPLs in question should be cancelled on the grounds of hardship and inconvenience and the order of Master Scarth should be vacated due to the changed circumstances since that order was consented to.
- [33] I am satisfied that the plaintiff's claim to a property interest is simply for security and not due to any importance in or uniqueness of the properties themselves. Damages will therefore be an adequate remedy.
- [34] I must then turn to consider what the appropriate security should be. In doing so I can consider, in general terms, the merits of the plaintiff's claims.
- [35] Suffice it to say that the plaintiff's claim and in particular the trust assertions against the defendants' other properties appear to me to be weak. It seems to me, as is asserted by the defendants, that should the plaintiff be successful in his action, any profit to which he is entitled will be that remaining from the development of Lot 17.
- [36] The defendants appear to have considerable assets and I believe on the evidence that there is an ability to pay any judgment rendered against them.
- [37] Based on the evidence of Mr. Anthony Danielov, CGA, I am satisfied that the profit from the development of Lot 17 is presently calculated to be in the range of \$500,000 to \$600,000. GST remains owing, however, and tax will be payable.
- [38] In all of the circumstances, I conclude that security of \$150,000 should be posted and held in trust by counsel for the defendants. The money being held in trust by Mr. Alan Hultman is to be released to the defendants and Mr. Hultman is relieved of all obligations under the order of Master Scarth of September 14, 2012 by payment out of the funds held by him.

[39] In conclusion, the CPLs, bearing Registration Numbers BB1494335 and CA3056666, are to be cancelled upon the posting of \$150,000 security by the defendants with their counsel. That security is to stand in place of the CPLs to the credit of this action and is to be held pending agreement or further order.

[40] The consent order of Master Scarth dated September 14, 2012 is vacated upon the posting of the abovementioned security.

[41] Costs of this application are to the defendants in the cause.

____ "Master Muir" ____

Master Muir

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Prepared on 26 October 2026 · Esheria