

CANADA / JUDGMENT

The Owners, Strata Plan VR29 v. Kranz

2020 BCSC 2171

COURT

Supreme Court of British Columbia

DECIDED

17 September 2020

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2020 BCSC 2171 The Owners, Strata Plan VR29 v. Kranz and others

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Owners, Strata Plan VR29 v. Kranz and others,

2020 BCSC 2171

Date: 20200917

Docket: S197870

Registry: Vancouver

Between:

The Owners, Strata Plan VR29

Petitioner

And

Fred Kranz and Tenants in the Property

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 66 on October 28, 2020.

Before: The Honourable Madam Justice D. MacDonald

Oral Reasons for Judgment

Counsel for Petitioner:

J.M. Chatten

Counsel for Respondents:

J.D. Shields

Place and Date of Hearing:

Vancouver, B.C.

September 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2020

BACKGROUND FACTS

- [1] The petitioner is a strata corporation under s. 2 of the Strata Property Act, S.B.C. 1998, c. 43, and is responsible for managing and maintaining common property and common assets, including the finances of a residential strata complex located at 120 East 4th Street, North Vancouver, British Columbia.
- [2] In or about 1977, Mr. Kranz, a respondent, purchased strata lot 6. He later purchased strata lot 1 and consolidated it with lot 6 (the "Property").
- [3] According to the petitioner, Mr. Kranz continues to be the registered owner in fee simple of the property.
- [4] The petitioner alleges Mr. Kranz has repeatedly failed to pay strata fees and special levies for the Property in accordance with the Bylaws and the relevant statutory requirements.
- [5] The petitioner is attempting to have Mr. Kranz pay his outstanding arrears. Failing that, the petitioner is seeking to have Mr. Kranz's property sold to cover the arrears.
- [6] The petitioner seeks, inter alia, the following orders:
 - 1) the respondent, as registered owner of the Property, is in default of his obligation to pay strata fees and special levies in accordance with the Bylaws of the petitioner;
 - 2) a declaration that payment of Mr. Kranz's share of common expenses, including strata fees and special levies, are now due and owing;
 - 3) an order that upon the expiry of 30 days from the date of pronouncement of the judgment, the petitioner be granted exclusive conduct of the sale of the property; and
 - 4) an order that Mr. Kranz stop contravening the Bylaws and that he pay the strata fees in respect of the property for as long as he is owner of the property.

PRELIMINARY ISSUE

- [7] The respondent takes issue with much of the affidavit evidence tendered by the petitioner.

- [8] The petition was filed on July 15, 2019. The sole affidavit filed in support of the petition is that affirmed by Jeffrey Langford dated July 15, 2019. In his affidavit Mr. Langford affirms that he is the owner of strata lot 35, strata plan VR29, and co-president of the Strata Council. He affirms that he has personal knowledge of certain facts and matters alleged in the petition. He further affirms where certain facts and matters are stated to be based upon information and belief, he verily believes the same to be true.
- [9] In the response to petition, filed December 16, 2019, the respondent takes the position there is no admissible evidence to prove the petition, or meet the high onus on the petitioner. The respondent states the petition must be dismissed.
- [10] I agreed with the parties that the respondent's concerns with the evidence should proceed first. The respondent had a number of objections to the affidavit evidence that he went through in detail at the hearing. I will summarize his objections.

Hearsay Objections

- [11] The respondent's primary concern is that Mr. Langford's affidavit contains inadmissible hearsay evidence. Mr. Kranz argues hearsay evidence is not permissible in support of a final order: Supreme Court Civil Rules, B.C. Reg. 168/2009, R. 22-2(13). The petitioner is seeking final orders, including having Mr. Kranz's property put up for sale.
- [12] Mr. Kranz argues Mr. Langford does not identify his hearsay sources, e.g., he points to para. 8, and therefore this evidence is inadmissible.
- [13] Mr. Langford attaches many documents as exhibits to his affidavit that are not certified. As a result, the exhibits fail to prove the facts required to support the petition: *Rempel Bros. Concrete Ltd. v. C.J. Smith Contracting Ltd.*, 2014 BCSC 1186.
- [14] For example, Mr. Langford relies on filings from the Land Title Office that are not certified and therefore are hearsay and cannot be admissible for the truth of their contents: *Rempel* at para. 22. The respondent points to para. 16 as an example.
- [15] Mr. Langford also relies on strata council documents which are not certified.
- [16] Mr. Langford attaches documents for which he is not the author, e.g., the respondent points to para. 49. This is classic hearsay evidence. The petitioner has not offered sworn evidence from the management company and the lawyers who wrote the letters attached to the affidavit. Further, the petitioner offers no evidence that a demand letter attached to the affidavit was correctly sent, or that it was received by Mr. Kranz. The respondent argues it is not enough for an affiant to say the letter was mailed to Mr. Kranz.

- [17] Mr. Langford deposes to things of which he has no personal knowledge, e.g., the respondent points to paras. 10 to 12. Further, Mr. Langford does not attempt to overcome this by asserting that any of the hearsay documents attached to his affidavits are accurate or true. For example, Mr. Langford does not have first hand knowledge of anything that happened before 2016. All of this evidence, argues the respondent, is inadmissible.
- [18] Mr. Langford states a retroactive increase in strata fees was approved at the February 2017 Annual General Meeting but does not state he was present at the meeting: para. 44. The respondent argues this evidence is therefore inadmissible hearsay.
- [19] A land title search is attached as exhibit "C" but the affiant did not do the search himself and it is not certified. The respondent argues the land title search is inadmissible hearsay.

Other Objections

- [20] Mr. Langford states partial payments toward Mr. Kranz's outstanding balance were paid but does not say how much was outstanding or how much was paid: paras. 45 and 57. Mr. Langford offers no proof of Mr. Kranz's obligations. He also does not state the amount of the 2018 special levy, e.g., para 47. Mr. Langford is argumentative, e.g., para. 17. He is usurping the role of the judge, e.g., para. 58, in attempting to establishing hardship.
- [21] Mr. Langford refers to irrelevant evidence, e.g. para. 36.
- [22] Mr. Langford states conclusions without articulating how he came to those conclusions, e.g. para. 41.
- [23] The respondent argues the affidavit is inadmissible as a whole.

Response to the Objections

- [24] The petitioner argues that the respondent's response to petition does not particularize the above detailed objections. The petitioner did not know the basis for the respondent's objection to the affidavit evidence before this matter was heard.
- [25] On its merits, the petitioner does not agree that the affidavit evidence is largely inadmissible. He argues the affidavit is admissible for the following reasons:
1. Mr. Langford can say anything in an affidavit he could state at trial: R. 22-2(12). Most of the paragraphs simply contain statements that Mr. Langford could testify about before a judge.
 2. Much of the evidence attached to the affidavit falls within the business records exception to hearsay. For example, the petitioner argues the land title documents, the lien, the court decisions, and the strata plan documents "were made or kept in the usual and ordinary course of business", and "it was in the usual and ordinary course of business to record in that document a statement of the fact at the time it occurred or within a reasonable time after that": Evidence Act, R.S.B.C., c. 24, s. 42(2). The petitioner also relies on the public nature of the documents.

3. The principled exception to the rule against hearsay applies. If the evidence meets the indicia of necessity and reliability, it is admissible: *R. v. Khelawon*, 2006 SCC 57 at para. 49.
- [26] If I am inclined to rule that parts of the affidavit are inadmissible, the petitioner argues the petition should be adjourned and leave granted for it to file additional affidavit evidence. Counsel concedes that if I do so, I should also grant leave for the respondent to file responsive affidavits and/or an amended response to petition.

Reply

- [27] The respondent replies the documents were not attached according to the business records exception because none of the necessary language to establish the business records exception is contained in the affidavit.
- [28] Further, the petitioner cannot rely upon the business records exception where the documents were produced for litigation.
- [29] The respondent argues I should not grant leave to the petitioner to file additional affidavits if I find the affidavit before me is inadmissible. He argues this is an adversarial system and one is expected to put their full case forward. It is the duty of the petitioner to provide proper evidence to the court: *Rempel* at paras. 22 - 26.
- [30] In addition, the respondent argues that allowing additional affidavits would be splitting the petitioner's case. It is not open for the petitioners to "patch up" their case under the guise of reply: *Slaughter*, 2018 BCSC 573 at para. 56.

Analysis

General Principles

- [31] The purpose of an affidavit is to present factual evidence to the court. It should be based on personal knowledge. Where it is not based on personal knowledge, the affiant should set out the source of their knowledge and depose that they believe the fact to be true: *R. 22-2(13)*.
- [32] The general rule is an affidavit should contain only facts which would be admissible as evidence at trial: *R. 22-2(12)*. An affidavit should not contain opinion evidence, conclusions of fact or law, legal argument, or evidence that is not relevant to the issues before the court: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at para. 7.
- [33] The petitioner has the onus of proof: *Slaughter* at para. 56.

Hearsay

- [34] Hearsay statements are presumptively inadmissible in an affidavit or in testimony at trial because the opposing party is deprived of the opportunity to cross-examine the affiant to test their reliability and credibility (e.g. perception, memory, narration and sincerity): *Khelawon* at paras. 2 - 3; R. 22-2(12).
- [35] An affidavit may contain statements as to the information and belief of the affiant if the source of the information and belief is provided and the affidavit is not made in support of a final order: R. 22-2(13); *Slatter v. Warde*, 2017 BCCA 293 at para. 8. Hearsay evidence is therefore often admissible on interlocutory applications. Where documents are attached, it is important that the affiant set out that they believe that the contents of the document are true, and the grounds for that belief: *Mallard v. Killoran*, 2005 SKQB 203, at para. 11.
- [36] On an interlocutory matter, if the affiant is introducing evidence from another source for proof of its truth, the affiant must swear or affirm that they believe the fact contained in the affidavit is true: *L.M.U. v. R.L.U.*, 2004 BCSC 95 at para. 22. However, it is preferable that the individual who has direct knowledge of the statement contained in the affidavit swears or affirms it. Similarly, it is preferable for the author of a document to attach it to their own affidavit.
- [37] I agree with the respondent that the relief sought by the petitioner here is in the nature of a final order and therefore hearsay evidence is presumptively inadmissible: *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 33.
- [38] While the petitioner cannot rely upon hearsay evidence to support a final order, there are a number of matters I would have assumed were not controversial and within the direct knowledge of the respondent. For example, the general background facts relating to the strata plan VR29 and the strata council, that the respondent owns the property in question, whether he is or is not renting out his property, and so forth. The respondent could have sworn or affirmed an affidavit confirming or denying this information.
- [39] Despite many issues deposed to by the petitioner being within the respondent's direct knowledge, he is putting the petitioner to strict proof of these facts. He is entitled to do so where a final order is sought.
- [40] Other affidavit evidence and exhibits speak to the central issue in the case, namely that Mr. Kranz is in arrears. This evidence, in the form provided, constitutes hearsay. I would expect direct evidence of this point. The rules of evidence are to be strictly enforced.

Business Records Exception

- [41] Documents attached as exhibits may be admissible where the affiant has no personal knowledge of the document if they fall within the business records exception: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 861 at para. 78.

- [42] I agree with the petitioner that some of the documents attached as exhibits to Mr. Langford's affidavit are business records that may qualify for admission under this exception. Records such as the 2018 AGM minutes at Exhibit N could fall into the exception to hearsay if the petitioner can prove they are kept in the usual and ordinary course of business and it was in the usual and ordinary course of business to record a statement of the fact at the time it occurred or within a reasonable time of its occurrence: Evidence Act, R.S.B.C. 1196, c. 124, s. 42 (2).
- [43] However, documents produced in anticipation of litigation, such as the letter sent to Mr. Kranz by the strata corporation found at Exhibit "S", do not fall within this exception: Evidence Act, s. 42(4).

Public Documents Exception

- [44] At common law, statements made in public documents are admissible as an exception to the rule against hearsay evidence: Bracken and Dull, *British Columbia Courtroom Procedure* (2nd ed.), p. 933.
- [45] Further, as stated in J. Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths 1999), at p. 247, there is a measure of dependability as long as the following preconditions exist:
- a) The subject matter of the statement must be of a public nature;
 - b) The statement must have been prepared with a view to being retained and kept as a public record;
 - c) It must have been made for a public purpose and available to the public for inspection at all times; and
 - d) It must have been prepared by a public officer in pursuance of their duty.
- [46] Public documents are admissible without further proof because of their inherent reliability. It avoids the inconvenience of requiring public officials to be present in court to prove them: *R. v. West*, 2009 BCSC 1164.
- [47] This common law exception has been codified in the Evidence Act, ss. 28 and 39. Section 39 expressly applies this exception to documents found in the Land Title Office and Supreme Court Registry:

Evidence of documents and proceedings of corporations

28 (1) If the original record, including a document, bylaw, rule, regulation, proceeding or entry in a register or book of a municipality, regional district or other corporation created by charter or by a statute of Canada or a province, could be admitted in evidence, a copy of that record that

- (a) purports to be certified under the seal of the corporation, and

- (b) purports to be signed by the local government corporate officer or the presiding officer, clerk or secretary of the corporation

is admissible in evidence without further proof of the record or proof of the seal, signature or official position of the person signing the copy.

- (2) If the original record, including a document, bylaw, rule, regulation, proceeding or entry in a register or book of a municipality or regional district could be admitted in evidence, a copy of that record that purports to be certified a true copy by the local government corporate officer is admissible in evidence without further proof of the record or proof of the signature or official position of the person signing the copy.

Certified copies of documents in land title and Supreme Court offices as evidence

39 An exemplification or a certified copy of an instrument or document deposited, filed, kept or registered in a land title office or a registry of the Supreme Court under the hand and seal of office of the registrar in whose office it is deposited, filed, kept or registered, must be received as evidence in a court in British Columbia of the original of the instrument or document, without proof of the signature or the seal, and without proof that the instrument or document was deposited, filed, kept or registered.

- [48] Even though these public documents may be reliable, to be received as admissible evidence under either of these sections of the Evidence Act, the documents must be certified copies: Rempel at paras. 22, 23 and 26. The copies provided with Mr. Langford's affidavit were not certified.

Principled Approach to Hearsay

- [49] Some of the paragraphs in Mr. Langford's affidavit are hearsay because they are out of court statements by individuals who have not sworn an affidavit. Unless an exception applies, they are inadmissible to support a final order: Cambie at para. 69. The petitioner relies on the principled approach. Hearsay evidence is permitted if it is supported by the indicia of necessity and reliability: Khelawon at para. 49.

- [50] Here the reliability of much of the evidence is easily verifiable by the respondent, including whether he received certain documents: Slaughter at para. 52. However, I do not find the criterion of necessity is met here. The petitioner could have presented affidavits sworn by affiants who had personal knowledge of these facts, but did not do so.

Other Affidavit Objections

- [51] I agree with the respondent that other aspects of Mr. Langford's affidavit are also objectionable. At points he is argumentative and attempts to usurp the role of the judge by stating conclusions without including the basis for these conclusions.

Summary

- [52] Some paragraphs in Mr. Langford's affidavit, and many of the attached exhibits, are inadmissible based on the jurisprudence and the Supreme Court Civil Rules. "With leave of the court, an affidavit may be used in evidence despite an irregularity in its form": R. 22-2(14); Evidence Act, s. 67. However, in my view the petitioner must be extra scrupulous when attempting to dispossess the respondent of his property. The rules of evidence are to be strictly enforced in these circumstances.

Remedy

- [53] I have determined that much of Mr. Langford's affidavit is inadmissible. However, both parties have come before this court with defective materials.
- [54] The lack of particulars in Mr. Kranz's response to petition was very concerning. For example, under "Factual Basis" in the response to petition, the respondent states: "There is a difference in Strata Plan numbers in paragraphs 5 and 6 of the Petition, without proper explanation." However there are no references to strata plan numbers in paragraphs 5 and 6 in the petition. The respondent corrected this in oral submissions, stating that the mistake is in Mr. Langford's affidavit.
- [55] Further, in Part 5, "Legal Basis", the respondent states: "There is no admissible evidence to prove the Petition, or meet the high onus on the Petitioner, and the Petition must be dismissed." He further states, "The Langford affidavit is all but inadmissible." I am not sure what this means and the respondent did not elaborate further.
- [56] In his response to petition, the respondent did not say which evidence is defective, how the evidence is defective, and why I should determine it is inadmissible, or "all but inadmissible". All the respondent does is list 37 cases with no explanation. Both the petitioner and I were given no direction as to what to take from these cases or how they are relevant to the respondent's opposition to the affidavit. Prior to the hearing, he did not provide the petitioner or this Court the proper factual or legal basis on which to properly understand this position.
- [57] The respondent argues there is no precedent for this Court to find the affidavit in question inadmissible but then provide leave for the petitioner to refile additional affidavits. This is not the case. This Court has broad discretion to hear cases on their merits: R. 1-3. It appears Justice Groves did just that, as reported by Justice Gray in *The Owners, Strata Plan VR 390 v. Harvey*, 2014 BCSC 2580:
- [12] The SC commenced this proceeding by petition in September 2012. Counsel agreed to an estimate of seven days for the hearing of the petition and it was set to commence on April 8, 2013.

- [13] About two weeks before the hearing date, and about two days before the Easter long weekend, Mr. Woodall, counsel for the TR, advised Ms. Franco, counsel for the SC, that the TR would object to affidavits containing hearsay and argument. It was also around this time that the TR provided their material in response to the petition.
- [14] On the hearing date of April 8, 2013, Mr. Woodall gave Ms. Franco a copy of his intended written argument, objecting to the admissibility of affidavits. Mr. Woodall also gave Ms. Franco copies of the affidavits, highlighted to indicate the portions objected to and noting the basis for the objections. This written argument is 77 pages long. It refers to many cases and it sets out particular paragraphs in particular affidavits which the TR objected to.
- [15] The petition was initially set for hearing before Mr. Justice Groves on April 8, 2013. He adjourned that hearing. I understand that the adjournment related to Mr. Woodall's written argument about the admissibility of the SC's affidavits. I understand that the adjournment was intended to permit the SC to consider Mr. Woodall's arguments about admissibility and make any necessary corrections to its affidavits. Groves J. ordered that the SC had until April 30, 2013 to provide further materials to Mr. Woodall, and Mr. Woodall had until May 31, 2013 for a response.[1]
- [58] Similarly, in *Sharp v. Royal Mutual Funds Inc.*, 2019 BCSC 2357, Justice Francis struck inadmissible hearsay evidence from the plaintiffs' affidavits, but provided leave to file further affidavits that complied with the Rules. This avoided prejudice to the plaintiffs, but also ensured only admissible evidence was put before the court.
- [59] I must balance the need for strict compliance with the substantive rules of evidence against the public interest in ensuring that cases are heard on their merits.
- [60] The court has discretion to craft its own processes, including discretion to allow the petitioner to correct its shortcomings in the evidence. In *Hayes Forest Services Limited v. Krawczyk*, 2006 BCCA 156, a criminal contempt case, the Court of Appeal agreed with Justice Harvey that the court has discretion on how to proceed, subject to the principles of fairness: para. 55. This is consistent with the court's truth seeking function.
- [61] Since I allowed the respondent to proceed with his objection to the affidavit despite the deficiencies in his pleading, in the interest of fairness I should also allow the petitioner to overcome the deficiencies in the affidavit.
- [62] I am bolstered by the fact that I see no prejudice in allowing the petitioner to file additional affidavits. I do not accept that granting leave to allow the petitioner to file additional affidavits is splitting its case in this situation. The petitioner is not filling in "evidentiary gaps" as referred to in the cases relied upon by the respondent: *British Columbia (Director of Civil Forfeiture) v. Vu*, 2020 BCSC 106; *The Owners, Strata Plan KAS 2971 v. American Bankers Insurance Company of Florida*, 2016 BCSC 581. The petitioner is not being permitted to "patch up" its case under the guise of reply: *Slaughter* at para. 56. The respondent has not provided the petitioner with his argument on the merits of the case, so

the petitioner has no greater indication about what needs "patching" up than it did prior to filing Mr. Langford's affidavit. It will simply be correcting the form of the same evidence already provided to the court through admissible affidavits.

- [63] The hearing of the petition on its merits has not commenced. The respondent will be in a position to provide responsive affidavits and to amend his response to petition if he believes this is required.
- [64] Rule 1-3 is overarching. The stated objective is to find a just, speedy, and inexpensive way to determine every proceeding on its merits. It is not in the interests of justice that I not hear the petition on its merits based on these admissibility issues with the affidavit.

Conclusion

- [65] To the extent the affidavit of Mr. Langford contains hearsay information and other deficiencies, I grant leave for the petitioner to refile Mr. Langford's affidavit and/or file other affidavits to support the petition. The petitioner is not to bolster its evidence in this process.
- [66] I provide leave to the respondent to file responsive affidavits and an amended response to petition.

"D. MacDonald J."

- [1] Ultimately, the petitioner did not take advantage of the opportunity to re-file supporting affidavits, and instead chose to proceed on the merits as if the objectionable aspects of the affidavits struck; thus, Justice Gray never made any admissibility decisions with regard to the impugned affidavits: para. 18.

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