

CANADA / JUDGMENT

Tiamzon v. Vandt

2020 BCCA 336

COURT

British Columbia Court of Appeal

DECIDED

20 November 2020

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2020 BCCA 336 Tiamzon v. Vandt

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Tiamzon v. Vandt,

2020 BCCA 336

Date: 20201120

Docket: CA46833

Between:

Edgardo Santos Tiamzon

Respondent

(Plaintiff)

And

Nelita Aday Vandt

Appellant

(Defendant)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

April 17, 2020 (Tiamzon v. Vandt, 2020 BCSC 587, Vancouver Docket S121738).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

G.W.D. Abrams

Counsel for the Respondent

(via videoconference):

W. Ryan

Place and Date of Hearing:

Vancouver, British Columbia

November 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 20, 2020

Summary:

The appeal is from the dismissal of an application to set aside a default judgment and ordering payment out of court of monies paid into court, on account of the action. The monies were paid into court by consent to obtain cancellation of a Certificate of Pending Litigation. Held: Appeal allowed and default judgment set aside. As a matter of right the appellant is entitled to have the default judgment set aside because the criteria for a default judgment were not satisfied. First, the claim alleges a promissory note, the advancement of other funds, and entitlement to a beneficial interest in property in the statement of facts, seeks damages as a remedy, and asserts a legal claim based only on a constructive trust. These pleadings do not cohere; one cannot say the claim is for recovery of money in a specified or ascertainable amount. Second, the condition pleaded for payment under the document referred to as a promissory note was, on the court record, not met at the time default judgment issued. Third, by the document's terms pleaded, the document is not a promissory note.

- [1] SAUNDERS J.A.: This appeal is from an order dismissing Ms. Vandt's application to set aside a default judgment in favour of the respondent Mr. Tiamzon against her, and an order directing that \$114,000 paid into court by Ms. Vandt to the credit of the action, be paid to Mr. Tiamzon.

- [2] The default judgment is in the amount of \$114,000, plus \$1,049.49 in court order interest, plus \$1,140.87 in costs. Judgment was entered on January 3, 2014. On February 6, 2014, Ms. Vandt filed an application to set aside the default judgment, but did not proceed. Instead, the parties had ongoing communications that resulted in a consent order entered on October 10, 2014, whereby Ms. Vandt paid into court \$114,000 to the credit of the action. In exchange, Mr. Tiamzon agreed to the cancellation of a Certificate of Pending Litigation registered by him, in respect to this action, against title to her property, thereby allowing Ms. Vandt to complete a sale of it. The Certificate of Pending Litigation had been filed on the basis that by this action Mr. Tiamzon claimed an interest in land. Pursuant to the consent order, the Certificate of Pending Litigation was cancelled and the sale completed.
- [3] I note that both parties have changed lawyers during the course of the litigation and that for a time Ms. Vandt was self-represented, until her current counsel came onto the record.
- [4] In the course of the action, both parties have filed a notice of intention to proceed. The most recent notice of intention to proceed was filed by Mr. Tiamzon on November 27, 2019. Mr. Tiamzon had filed a notice of trial in April 2018, and another in December 2019. Mr. Tiamzon's counsel says the notice of trial was filed in error.
- [5] The appellant contends the judge erred in dismissing her application and in ordering the monies in court to be paid out. The latter submission depends upon the order confirming the default judgment. I understand her grounds of appeal are that the default judgment should be set aside:
1. As a matter of right (*ex debito justitiae*), because:
 - a. default judgment was not available under R. 3-8(3) of the Supreme Court Civil Rules because the claim was not for recovery of money in a specified or ascertainable amount as required by the Rule; and
 - b. The judge was mistaken that the claim advanced was on a promissory note as to which payment had been due at a fixed or determinable time.
 2. Alternatively, as a matter of discretion because: she acted reasonably, and in reliance of Mr. Tiamzon's assurances and actions, when not advancing her application to set the default judgment aside in a more timely way; there is a meritorious defence to the claim based on duress and undue pressure; the amounts owing between the parties cannot be determined without an accounting of benefits and charges applicable to both parties; and any prejudice to Mr. Tiamzon, if there be any, derives from his actions. These considerations come within the factors discussed in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.).
- [6] I will briefly discuss the circumstances before turning to the issues.

- [7] The action arises from the parties' relationship which started with business and moved to romance. They cohabited in Ms. Vandt's residence between about 2007 and 2012. The parties kept some, but not perfect, track of monies provided one to the other in the form of loans, financial obligations, and payments to third parties.
- [8] The notice of civil claim was signed by a lawyer and was filed on March 7, 2012. In it, Mr. Tiamzon follows Form 1 in the Supreme Court Civil Rules, setting the claim into Part 1: Statement of Facts, Part 2: Relief Sought, and Part 3: Legal Basis. In the Statement of Facts, Mr. Tiamzon sets out the manner of the meeting of the parties, alleges certain loans made by him to Ms. Vandt, the commencement of their cohabitation, and in November 22, 2010, the creation of a document the parties signed that has been referred to as a "promissory note". It is pleaded that by the document Ms. Vandt acknowledged that she owed Mr. Tiamzon \$114,000 "payable upon availability of the funds or sale of the House".
- [9] The notice of civil claim alleges that Mr. Tiamzon then advanced additional monies to Ms. Vandt, that he requested that she repay the monies loaned but she declined to do so, and that she had not to date "repaid any of the loans or made any repayments on the monies" that she owed him.
- [10] In the statement of facts Mr. Tiamzon also advances a beneficial interest in real property, alleging that he has a beneficial interest in the house based on the agreement he would be repaid upon sale of the house, that he has a beneficial interest in the house as a result of "repairs, improvements and general upkeep" that he performed, and that he has a beneficial interest in the house because he assisted with paying the mortgage while the parties resided together as common law spouses.
- [11] Under Part 2: Relief Sought, Mr. Tiamzon seeks damages, special damages, special costs, in the alternative, costs, and such further and other relief as may seem just.
- [12] In Part 3: Legal Basis Mr. Tiamzon advances his claim in terms of constructive trust. He first pleads the essential ingredients of a claim of constructive trust. He then pleads that Ms. Vandt has been unjustly enriched by the monies borrowed, in part to make mortgage payments, and from Mr. Tiamzon's labours in repairing, improving, and maintaining the house. He next alleges failure to repay and a consequent deprivation. This is followed by a plea of no judicial reason for the enrichment, ending with the plea: "It would not be equitable or just to permit the Defendant to keep the Monies the Plaintiff loaned her."
- [13] Based on the notice of civil claim Mr. Tiamzon registered a Certificate of Pending Litigation against title to Ms. Vandt's property. The judge found that in sequence: Mr. Tiamzon obtained default judgment, the registration of the Certificate of Pending Litigation was cancelled, and Ms. Vandt sold the house. It is apparent that there were, therefore, no "funds or sale of the House" at the time default judgment was obtained.

- [14] No steps were taken by Mr. Tiamzon on this matter subsequent to the payment into court except for the service of a notice of intention to proceed with the action and the notices of trial referred to earlier until, on January 15, 2020, Mr. Tiamzon filed his notice of application for an order that the money paid into court be paid out to his lawyer. Two days later, on January 17, 2020, Ms. Vandt filed her competing notice of application for an order setting aside the default judgment.
- [15] In my view, the order dismissing Ms. Vandt's application to set aside the default judgment itself must be set aside, as must the default judgment. I reach this conclusion on the first basis described above, that the prerequisites for a default judgment were not established at the time it issued and it is, therefore, irregular to the point of being a nullity; as a matter of right, the appellant is entitled to an order setting it aside.
- [16] Rule 3-8 of the Supreme Court Civil Rules, the successor to R. 17 of the Rules of Court, governs default judgments. Rule 3-8 provides:
- (3) If the plaintiff's action against a defendant includes a claim for recovery of money in a specified or ascertainable amount, the plaintiff may
 - (a) on that claim, obtain judgment in Form 8 against that defendant for an amount not exceeding the total of
 - (i) the amount claimed,
 - (ii) the interest, if any, to which the plaintiff is entitled, and
 - (iii) costs, and
 - (b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).
 - (5) If the plaintiff's action against a defendant includes a claim for damages in an amount that is neither specified nor ascertainable, the plaintiff may
 - (a) on that claim, obtain judgment in Form 8 against that defendant for damages to be assessed and costs, and
 - (b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).
 - (11) The court may set aside or vary any judgment granted under this rule.

[Emphasis added.]

[17] The key requirement in R. 3-8(3) for a default judgment in a sum certain is that there be a claim for "recovery of money in a specified or ascertainable amount". That provision replaces the requirement in former R. 17 that the claim be for recovery of a debt or liquidated demand. Under R. 17, the test for a debt or liquidated demand, accepted in *Standard Oil Company of British Columbia Limited v. Wood* (1964), 47 W.W.R. 494 (B.C. Co. Ct.), was that set out in *The Annual Practice*, 1964 ed., referred to at 497:

"Debt or Liquidated Demand.' - A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages.'"

[Emphasis added.]

[18] I take the language of R. 3-8(3) of the Supreme Court Civil Rules "specified or ascertainable amount" to be a modern expression of that same concept; I do not see the current rule as diminishing the need for the sum sought to be readily discernible, or calculable in the sense described in *Standard Oil*, on the pleadings alone. This conclusion is consistent with the balance of R. 3-8, which allows for default judgment with damages to be assessed.

[19] In my view, the notice of civil claim plainly does not satisfy the key requirement of R. 3-8(3). Further, in particular, there was no basis upon which to find that a sum certain was owing as of the date the default judgment issued.

[20] I will address the pleading in general first and then address the singular absence of an allegation on which the court could find the sum awarded in the default judgment was due and owing when the default judgment was granted.

[21] Rule 3-1(2) sets out the requirements of a notice of civil claim:

(2) A notice of civil claim must do the following:

- (a) set out a concise statement of the material facts giving rise to the claim;
- (b) set out the relief sought by the plaintiff against each named defendant;
- (c) set out a concise summary of the legal basis for the relief sought;
- (d) set out the proposed place of trial;
- (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
- (f) provide the data collection information required in the appendix to the form;
- (g) otherwise comply with Rule 3-7.

- [22] Rule 3-1(1) requires a notice of civil claim to be in Form 1. Form 1 divides the substance of the pleading into the three parts I mentioned earlier with, for instruction to litigants, a description of the requirements using the words of R. 3-1(2)(a), (b), and (c).
- [23] In *Rose v. British Columbia Life & Casualty Company*, 2012 BCSC 1296, Mr. Justice Voith explained the distinction between a material fact and a "claim", observing that the terms "claim" and "cause of action" mean the same thing. He also adopted the explanation of "material fact" for the purposes of R. 3-1(2)(a), provided by Mr. Justice Smith in *Jones v. Donaghey*, 2011 BCCA 6, as the ultimate fact or ultimate issue to the proof of which evidence is directed. The purpose of subrule (a) is that the material facts required to found a cause of action must be pleaded.
- [24] The implications of R. 3-1(2)(c) were discussed by Master Muir in *Fletcher v. British Columbia (Public Safety and Solicitor General)*, 2013 BCSC 554. In a passage with which I agree, she said:
- [26] The requirement to plead the legal basis for the relief sought is new. The parties were unable to provide me with any authority that considered the effect of the change on an amendment of a statement of claim into the new form or with respect to the new form itself.
- [27] In *British Columbia Teachers' Federation v. British Columbia*, 2012 BCSC 1722, Madam Justice Griffin considered the new form of notice of civil claim in the context of an application for particulars. She held:
- [14] Starting out with Part 3 of the notice of civil claim itself, I see nothing wrong with the way in which the plaintiff has set out the legal basis for the relief sought. The "Legal Basis" portion of the notice of civil claim is appropriately concise; it commits the BCTF to a cause of action and it adequately informs the Province of the legal foundation of the claim. ...
- [28] Thus, in his pleadings the plaintiff must now commit to a cause of action and adequately inform the defendants of the legal foundation of the claim. I conclude the plaintiff will be limited to recovery founded on the legal bases set out in his pleading.

[Emphasis added.]

- [25] The need for the notice of civil claim to adequately commit to a cause of action and adequately inform the defendant of the legal basis for the claim is of particular importance to the availability of a default judgment because such a judgment is given without adjudication of the liability issue, or, in the case of a default judgment for a sum certain, of the quantum advanced by the plaintiff.
- [26] In this case, the judge addressed the requirements of the pleadings by approaching the validity of the default judgment as a question of whether the plaintiff had specifically identified that the "promissory note" pleaded in Part 1 was the source of the relief sought in Part 2, and whether the amount claimed was "capable of being ascertained as a mere matter of arithmetic", referring to *Primus Electric Inc. v. Ryken Construction Inc.*, 2014 BCSC 421

para. 32, in turn citing *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78 at para. 8. The judge said:

- [31] On the facts of this case, the notice of civil claim pleaded the promissory note, and the amount due under it was certain. Accordingly, I do not find the failure to specifically identify the promissory note in Part 2 of the notice of civil claim to be an irregularity.
- [27] This analysis, however, gives no effect to R. 3-1(2)(c), that is, Part 3. Part 3, in this case, supports the allegations in Part 1 that Mr. Tiamzon holds a beneficial interest in Ms. Vandt's house, and advances that portion of the statement of facts in speaking solely of a claim of constructive trust.
- [28] It was said in the hearing of this appeal that the claim to a beneficial interest and trust was necessary to obtain a certificate of pending litigation. We must, however, take the pleading to have been made in good faith and to honestly assert a claim of Mr. Tiamzon to property, beyond the monies said to have been lent to Ms. Vandt.
- [29] In my view, the three parts of the notice of civil claim do not cohere, and looking to the place where the basis of the claim, that is the cause of action, must be asserted - Part 3 - cannot support the default judgment for a sum certain.
- [30] I consider, in any event, that this plea of a "promissory note" does not allow the default judgment. The plea is that the time for payment on the "promissory note" was on "the availability of funds or sale of the House". There is no allegation that funds were available or the house was sold, or even that the amount of the default judgment was due and owing. This is an omission of a material fact required to establish liability. Taken by itself, this allegation in the notice of civil claim does not support a default judgment because it does not establish that any sum was owing when the application for the judgment was made. On this basis, also, the default judgment is a nullity.
- [31] Nor, even, do I consider the document was a promissory note. The term "promissory note" is defined in the Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 176(1):
- 176 (1) A promissory note is an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.
- [Emphasis added.]
- [32] I cannot say this document, as pleaded (or as in evidence), is a promissory note. The default judgment was issued in error for this reason, also, and must be set aside.
- [33] I would allow the appeal, set aside the order dismissing the application to set aside the default judgment and ordering payment out to Mr. Tiamzon of the money held in court, and set aside the default judgment.

[34] I would also order costs of the two applications in the Supreme Court of British Columbia leading to the order to Ms. Vandt. Ms. Vandt is, of course, entitled to her costs consistent with s. 23 of the Court of Appeal Act, R.S.B.C. 1996, c. 77.

[35] DICKSON J.A.: I agree.

[36] DEWITT-VAN OOSTEN J.A.: I agree.

[Discussion with counsel re: payment of funds]

[37] SAUNDERS J.A.: I suggest that counsel have a discussion about this issue. Counsel may come to a resolution as to what ought to be done with the funds, and that could include counsel being in agreement that it be put into a lawyer's trust account. However, failing agreement, counsel can make submissions in writing, no longer than three pages, to the court on this outstanding matter. If needed, we can reconvene for a telephone hearing.

[38] To reiterate, the appeal is allowed, the order dismissing the application to set aside the default judgment and ordering payment out to Mr. Tiamzon of the money held in court is set aside, and the default judgment is set aside. Ms. Vandt is entitled to her costs of the two applications in issue in the Supreme Court of British Columbia, and entitled to her s. 23 costs.

"The Honourable Madam Justice Saunders"

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