
CANADA / JUDGMENT

Trumpet Capital Corp. v. Octagon Properties Ltd.

2012 BCSC 490

COURT

Supreme Court of British Columbia

DECIDED

3 April 2012

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2012 BCSC 490 Trumpet Capital Corp. v. Octagon Properties Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trumpet Capital Corp. v. Octagon Properties Ltd.,

2012 BCSC 490

Date: 20120403

Docket: 21891

Registry: Cranbrook

Between:

Trumpet Capital Corp.

Petitioner

And

Octagon Properties Ltd., Marco DeDominicis,

Stoneset Equities Ltd., BKDI Architects a

partnership, Hayesborne Holdings Inc.,

Colin Lawson, and Stoneset One

Mortgage Corporation

Respondents

Before: Master Bishop

Reasons for Judgment

Counsel for the Petitioner:

O.C. Hanson

Counsel for the Respondents BKDI Architects, and as agent for K.A. Robertson and Counsel for Hayesborne Holdings Inc. and Colin Lawson:

R. Eichler

Counsel for the Respondents Stoneset Equities Ltd., and Stoneset One Mortgage Corporation:

J.A. Bird

Place & Date of Hearing:

Cranbrook, B.C.

January 24, 2012

Place and Date of Judgment:

Cranbrook, B.C.

April 3, 2012

- [1] The petitioner, Trumpet Capital Corp. (hereinafter "Trumpet") applies for what may be loosely termed as a standard order nisi with a shortened redemption period and an order for conduct of sale. Mr. Eichler, on behalf of his client and Ms. Robertson, for whom he is agent, does not now oppose the applications of the petitioner. The petitioner has now agreed that, if successful on its applications, it will not seek costs on a solicitor and client basis. The petitioner also agrees that if successful in obtaining the order for conduct of sale and in selling the property, it will pay the balance of the net sale proceeds into court after deducting the amounts actually owed to it on its mortgage. More will be said of this later.
- [2] Mr. Bird, on behalf of his clients (hereinafter "Stoneset"), responds to Trumpet's application with an application of his own, seeking summary dismissal of the petition, or alternatively, that the petition be remitted to trial.
- [3] The respondents Octagon Properties Ltd. and Marco DeDominicis, (hereinafter "Octagon" and "Marco" respectively) have not responded in the proceedings.
- [4] At the commencement of the hearing, I granted judgment in default against Octagon and Marco. For the purposes of these reasons, the actual amount is unimportant but it is a little over \$4 million.
- [5] The factual history of this matter is set out in the affidavit of Tony Argento, affidavit 1, sworn the 26th day of September 2011 and filed herein on the 30th day of September. A summary of his affidavit is as follows.

- [6] He is a director of Stoneset and in September of 2006 was approached by Marco with respect of the sale of some properties near Invermere, B.C. As a result of the information received by Stoneset from Octagon through Marco and his other companies, Argento learned the following:
- (1) the properties total acreage was 12.5 acres; and,
 - (2) the properties were re-zoned to accommodate a high density development of over 570 residential condominiums, a 120 room boutique hotel, a large conference centre, and over 60,000 square feet of commercial space.
- [7] The discussions culminated in a series of agreements with Octagon, Navigator (Marco's other company) and Stoneset whereby Stoneset would purchase the properties and Octagon and Navigator would finance and develop the project.
- [8] Prior to the purchase and sale, Marco provided an appraisal of the property which stated that the properties comprised 12.34 acres and were valued on a dollar per acreage value at \$25 million.
- [9] Marco also provided Stoneset with a development summary showing the land value of \$30 million, and providing revenues of \$329,465,975 and a gross profit of a little over \$77 million.
- [10] Marco also provided Stoneset with a community plan amendment request which provided that the development would include the 570 residential condominiums but reduce the hotel to 144 rooms and the commercial area to 45,000 square feet. The amendments to the community plan were granted by the City of Invermere on June 13, 2006.
- [11] The purchase and sale agreement for the properties, such as it is, was entered into between Octagon and Stoneset on or about March 17, 2007. The purchase and sale completed on or about October 26, 2007 resulting in a purchase price of \$23 million, \$4 million in total in cash, and a vendor take back mortgage of \$19 million.
- [12] At paragraphs 22 and 23 of his affidavit, Mr. Argento deposes as follows:
22. In deciding to enter the Purchase and Sale Agreement, and in actually purchasing the Properties, I and the board of directors at Stoneset Equities relied on the following:
 - (a) the appraised value in the Cushman Appraisal of \$25 million;
 - (b) the statements by DeDominicis and the written representations that the Properties were 12.34 or 12.5 acres;
 - (c) the financial projections contained in the Waterside Development Summary;
 - (d) that the plans contained in the OCPAR were, apart from the amendments applied for, legal to carry out and in compliance with all bylaws and other regulatory or legal requirements;

- (e) the stated experience and skills of DeDominicis in real estate development, cost projections, construction management and construction financing;
 - (f) the representations made in the Management Agreement regarding the ability of Navigator Dev to perform its obligations thereunder, and
 - (g) the special skill and knowledge of BKDI Architects as to the legality and feasibility of the plans in the OCPAR.
23. It was a condition precedent and fundamental to the Purchase and Sale Agreement and that Stoneset Equities enter a development management agreement with a company nominated by DeDominicis and controlled by DeDominicis wherein Stoneset Equities would obtain various covenants regarding financing to develop the Properties.
- [13] After the sale completed, Octagon and Navigator did not perform their duties pursuant to the various agreements then in place with Stoneset and in 2010 Stoneset began managing the development of the properties. In the course of doing so, they had a survey performed of the properties which resulted in determining the acreage of the properties was 9.732 acres rather than the 12 plus acres in the original representations and appraisal. Subsequently, the acreage was confirmed after re-surveying it at 9.732 acres.
- [14] Another appraisal was commissioned which valued the property at November 1, 2010 at \$10.9 million. By this time, Stoneset had paid approximately \$22,700,000 plus in direct expenses on the property including \$13,000,000 plus in payments on the vendor take back mortgage. (VTBM).
- [15] Taking a step back in time, on or about February 19, 2008, Trumpet loaned Octagon \$5 million secured by an assignment of the VTBM in its total amount and Marco's guarantee. The precise details of the repayment schedule from Octagon to Trumpet are not necessary for these reasons but needless to say, default was made.
- [16] As I stated earlier, Trumpet now concedes that its interest in the VTBM is limited to the outstanding amount owing by Octagon on its loan.
- [17] Stoneset argues that Trumpet took the assignment of the VTBM subject to the equities between Octagon and Stoneset. In the circumstances of this case, the equities, based on the facts set out earlier in these reasons, include the right of rescission based on misrepresentation and/or a set off for damages. That being the case, the matter should be remitted to trial.
- [18] The test for remitting a petition to trial is summarized in the decision of The Honourable Madam Justice Fitzpatrick in *TCC Mortgage Holdings Inc. v. Alysén Place Developments Inc., et al.*, 2011 BCSC 383. That case involved a foreclosure proceeding arising from a failed real estate development. The petitioners sought judgment against some of the respondents based on the covenants and guarantees in respect of TCC's advances to the respondent debtor.

- [19] There as here, the respondents defended the application on the basis that there were bona fide triable issues that should be remitted to the trial list.
- [20] The order nisi was granted but the application for judgment against some of the respondents on their guarantees was adjourned and it was this application that was at issue before the learned justice.
- [21] At paragraph 11 she states:
- From TCC's point of view the application was straightforward. It says that it advanced the funds to Alysén Place which have not been repaid and that Mr. Bergen and Pilot Pacific are liable to pay those amounts under the guarantees . . .
- Mr. Bergen and Pilot Pacific say that even if they are liable to pay TCC under their guarantees, they dispute the amounts alleged owing to TCC.
- [22] The sole issue before her was whether or not there was a bona fide triable issue which dictates that the matter of the Bergen and Pilot Pacific's liability should be referred to the trial list. At paragraphs 13 through 17 of her decision, she sets out the tests to be applied, the onus on the petitioner, and the degree to which the Courts should weigh the evidence. Those paragraphs are as follows:
- [13] The parties agree on the test to be applied on this application. They also agree that the onus is on TCC to show that there are no triable issues.
- [14] It must be manifestly clear that Mr. Bergen and Pilot Pacific are without a defence that deserves to be tried: *Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324 at 325 (S.C.). In addition, the threshold to establish a triable issue is not high: see *Royal Bank* at 327; *HSBC Bank Canada v. Channel Ridge Properties Limited*, 2009 BCSC 118 at para. 15; *Canadian Western Bank v. 0777419 B.C. Ltd.*, 2009 BCSC 683 at para. 30.
- [15] The case authorities also are clear that before the matter will be referred to the trial list, the issues must stand as a defence to the claims, as opposed to a counterclaim. This distinction was discussed by Madam Justice McLachlin (as she then was) in *Royal Bank* at 327. In *HSBC* at para. 16, the issue of whether or not the mortgagee had denied the mortgagor its equitable right of redemption was described as going to the "root" of the foreclosure action. Accordingly, the Court agreed that the matter should be referred to the trial list. See also *Canadian Western Bank* at para. 14.
- [16] The degree to which courts should weigh the evidence on this type of application was discussed by Mr. Justice Hood in *Southeast Toyota Distributors Inc. v. Branch*, [1997] B.C.J. No. 1426 (S.C.). He stated that some weighing of the evidence is necessary to determine whether a triable issue had been raised:
- [61] The test is not a high one. While some cases say that the evidence should not be weighed, I would suggest that some weighing is necessary because the court has to look at the evidence in order to conclude whether there is a bona fide triable issue or whether the asserted

defence is bound to fail. See the leading decision of the Court of Appeal in *Memphis Rogues Ltd. v. Skalbania and N.M. Skalbania Ltd.* (1982), 38 B.C.L.R. 193. There the defendant asserted oral understandings or agreements in the face of, and inconsistent with a promissory note and a guarantee agreement signed by him. Affidavits had been filed in response to the assertions made by the defendant in his affidavit. Mr. Justice Seaton, speaking for the court, emphasized that those affidavits could not be looked at to resolve an issue, but only to determine whether there was an issue. And he found on the evidence before him that there was no factual basis in existence on which to find a triable issue.

- [62] Bald assertions in a given case may not be enough to resist the order nisi, and to justify the transfer of the proceedings to the trial list. This will depend to some extent on the state of the defendant's evidence or case at the time of the application. If he has basically presented his case, then assertion would probably not be enough. On the other hand if the evidence or facts upon which the defendant relies are not within his knowledge or control, and there is a real possibility of a factual base being developed as the trial proceeds, then assertion may be enough. Each case of course will stand alone on its particular circumstances. See *Memphis Rogues*.
- [17] This approach was adopted in *0847395 B.C. Ltd. v. The Estate of Doris N. Guilbride*, 2009 BCSC 847, where the Court stated:
- [5] The authorities explain that on stay applications such as this it is not necessary for the chambers judge to assess the facts in a detailed way or make findings between affidavits that conflict on pivotal issues. However, I do not see the authorities to be saying either that the facts should be viewed passively simply because there is disagreement about some of the facts. To the extent the case requires, [the facts] should be probed to sufficiently clarify the issues and supporting facts...
- [23] Applying these principles to the case at hand, I am unable to conclude that Trumpet has met the onus that there are no triable issues. Indeed, there is little, if any, evidence to contradict the affidavit of Mr. Argento with respect to the misrepresentations made. That is so, as Marco and Octagon have so far declined to defend their position nor to participate at all in these proceedings.
- [24] Mr. Eichler argued that rescission was not possible in the case at hand in that what Stoneset was actually purchasing was the land and the opportunity to make a profit. Therefore, he argues, it is a certainty that the defence will fail because rescission is not possible with respect to the opportunity to make a profit.

- [25] With respect, I disagree. I cannot say that it is manifestly clear that Stoneset is without a defence that deserves to be tried. Part of the evidence before me is that any development of the property is unlikely at the present time. That is so in that as I understand the evidence, the City requires a boardwalk which would require the consent of CPR as they hold a right-of-way over some or all of the area needed for a boardwalk. CPR's consent has not been forthcoming and therefore no development is possible at this time.
- [26] Given that the representations of the land size and therefore value and the development potential of the properties strike at the very heart of the transaction and the fact we do not presently know whether they were innocent, negligent, or fraudulent, it may be open to the Court to find total failure of consideration with respect to the property transaction.
- [27] Given my findings here, I need not go further in these reasons to discuss the other arguments of Trumpet and the other respondents. Many of those arguments deal with evidentiary matters or the ultimate disposition of the issues at trial and that is the venue at which they should be pursued.
- [28] In the result, the issues raised by Stoneset are referred to the trial list and the parties are directed to file the appropriate pleadings for that purpose. If the parties cannot agree on how or on what to proceed, any of them may apply for directions.
- [29] Costs of the application will go to Stoneset as against Trumpet in the cause.

"Master M. Bishop"

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