
CANADA / JUDGMENT

Tsai v. Li

2018 BCSC 582

COURT

Supreme Court of British Columbia

DECIDED

11 April 2018

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2018 BCSC 582 Tsai v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tsai v. Li,

2018 BCSC 582

Date: 20180411

Docket: S158797

Registry: Vancouver

Between:

Wen Hsien Tsai

Plaintiff

And

Zhixiang Li, Sincere Real Estate Services Ltd.,

Yi Zhang aka Leo Zhang, 1035566 B.C. Ltd.,

Arsalan Mahboub and Bahaiedin Naemi

Defendants

Before: The Honourable Mr. Justice Kent

Corrected Reasons: These reasons were corrected at
paras. 3, 9, 13 and 20 on April 16, 2018.

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

January 11 and 12;

February 22 and 23, 2018

Place and Date of Judgment:

Vancouver, B.C.

April 11, 2018

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INTRODUCTION and OVERVIEW

- [1] The defendants Zhixiang Li, Sincere Real Estate Services Ltd. ("Sincere"), and Yi Zhang aka Leo Zhang apply for summary trial of the liability issues in this case and seek dismissal of the action with costs. The action against the other three named defendants was dismissed by consent shortly before the hearing of this application.
- [2] Mr. Tsai opposes any summary trial procedure. He claims that the facts necessary to decide the issues in this case cannot and ought not be decided on the evidence before the Court on this application and that, indeed, it would unjust to do so. He claims that this is a case involving deception and fraud perpetrated against an elderly and unsophisticated plaintiff for whom English is a second language and that there are critical issues of credibility on key matters that require cross-examination and observation of the parties and other witnesses at

a conventional trial in order that justice can fairly be done in this case.

- [3] For the reasons that follow, I conclude it would be unjust to decide the issues of fact and law in this summary trial application and I direct that the matter proceed to a full trial at the earliest possible opportunity.

BACKGROUND, PLEADINGS and APPLICATION MATERIALS

- [4] The basic factual framework is largely uncontested:

- On May 16, 2015 the plaintiff signed a Contract of Purchase and Sale respecting his home at 1028 Eyremont Drive, West Vancouver (the "Property"), and pursuant to which he agreed to sell the Property to Mr. Li for \$5.1 million.
 - The broker for the transaction was Mr. Zhang of Sincere.
 - On the same date, and at the same time, May 16, 2015, Mr. Tsai signed an Exclusive Listing Contract with Sincere pursuant to which Mr. Tsai agreed to pay a gross commission of \$100,000, and a Limited Dual Agency Agreement authorizing Mr. Zhang to act as agent for both the buyer and the seller in respect of the transaction.
 - Two months later, on July 14, 2015, Mr. Li formally assigned his Contract of Purchase and Sale to 1035566 B.C. Ltd. for a consideration of \$600,000, representing a total purchase price for the Property to the assignee of \$5.7 million.
 - On July 15, 2015 Mr. Tsai signed an Addendum to the Contract of Purchase and Sale extending the possession and adjustment date for the transaction from October 31, 2015 to December 1, 2015. That Addendum contained a clause expressly reserving Mr. Li's right to assign the Contract to any third party without notice to Mr. Tsai.
 - Mr. Zhang of Sincere acted as Mr. Li's broker for the purpose of the assignment and also secured Mr. Tsai's signature on the Addendum the following day.
 - Mr. Tsai was provided a cheque for \$5,000 dated July 15. It was drawn on the bank account of 1035566 B.C. Ltd. It bore the notation, "For the extension of completion from Oct 30 to Nov 30".
 - On August 11, 2015 the Contract of Purchase and Sale was further assigned by 1035566 B.C. Ltd. to Mr. Lian Zhang (no relation to Mr. Zhang of Sincere) for the purchase price of \$6.3 million.
- [5] Mr. Tsai claims to have been unaware of the assignment transactions until mid-October 2015. He issued this lawsuit on October 23, 2015. He also refused to complete the sale of the Property on November 30, 2015.

- [6] In his Notice of Civil Claim, Mr. Tsai accuses Messrs. Li and Zhang of scheming and conspiring to induce Mr. Tsai to sell his Property below market value so they could re-sell it for profit at the expense of the plaintiff. The action against Mr. Li is framed in conspiracy and tort. The action against Mr. Zhang and Sincere is framed in conspiracy, negligence, breach of fiduciary duty, breach of contract, and misrepresentation. The relief sought by Mr. Tsai is rescission of the Contract of Purchase and Sale and in the alternative damages.
- [7] The defendants deny any conspiracy or other wrongful conduct. Mr. Li alleges in his Response to Civil Claim that he and his wife listed their own residence for sale with the intention that the sale proceeds would be used to assist funding the closing of the Tsai transaction. He alleges he was unable to obtain the desired sales price for his home, therefore he cancelled the listing and instructed Mr. Zhang to broker an assignment of the Tsai contract, with the latter being fully informed at the time. He has issued a counterclaim against Mr. Tsai alleging that the refusal to complete the sale was a wrongful and malicious attempt to "usurp to himself" the profit Mr. Li would otherwise have made on the first assignment. Punitive and compensatory damages are claimed.
- [8] Mr. Zhang and Sincere filed their summary trial application on September 20, 2016. Mr. Li filed his summary trial application on March 14, 2017.
- [9] The Application Record provided to the Court, as more recently supplemented by all parties, contains some 13 affidavits, spanning March 8, 2016 through February 15, 2018. Mr. Tsai has sworn four affidavits, Mr. Li three and Mr. Zhang three. Four of those affidavits were sworn after commencement of the summary trial hearing.
- [10] Mr. Tsai was examined for discovery on May 3 and 4, 2016. Mr. Zhang was examined for discovery on August 12, 2016 and again on October 26, 2017. Mr. Li was examined for discovery on September 14, 2016 and again on October 31, 2017.
- [11] Two expert reports have been provided to the Court respecting the estimated market value of the Property as at May 16, 2015. Mr. Brent McLaren of Grover Elliott & Co. appraises that value within the range of \$5 to \$5.3 million. Another professional appraiser, Mr. Steven Wong, places the value at \$5.645 million.

SUITABILITY FOR SUMMARY TRIAL

- [12] Rule 9-7(15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, provides:

Judgment

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[13] The defendants acknowledge significant conflicts exist between the sworn evidence of Mr. Tsai and some of the affidavit evidence produced on behalf of the defendants. They urge that any credibility conflict relates to matters of little consequence and should in any event be resolved against Mr. Tsai given the contradictory and illogical nature of some of his evidence. The defendants submit the following surgical analysis militates in favour of dismissing the action:

- The critical legal issue between the parties relates to the formation of the sale contract on May 16, 2015.
- While Mr. Tsai alleges a scheme or conspiracy between Mr. Zhang and Mr. Li to purchase Mr. Tsai's Property below market value, he has produced no evidence corroborating the existence of any such scheme.
- The fact that Mr. Zhang and Mr. Li knew each other and were friends before this transaction does not and cannot give rise to any reasonable inference of conspiracy.
- Mr. Tsai approached Sincere, not the other way around, and told Mr. Zhang he would sell the Property with the first realtor to bring him a cash, no-subject offer for \$5 million.
- When Mr. Zhang produced Mr. Li's \$5.1 million offer, he was not acting as Mr. Tsai's real estate agent and owed no duty of care nor any fiduciary duty to the latter;
- There is no evidence the sale price of \$5.1 million was below then-market value for the Property.
- Mr. Tsai did not rely upon any advice from Mr. Zhang regarding price, and any assertion by him to the contrary is unreasonable in the circumstances and contradicts his admissions on discovery.
- As a matter of law, the Contract of Purchase and Sale was assignable by Mr. Li immediately upon execution and without the requirement of any consent beforehand from Mr. Tsai.
- In any event, there was nothing legally improper about the first Assignment from Mr. Li to 1035566 B.C. Ltd.
- Mr. Tsai has produced no (expert) evidence establishing the standard of care owed by a real estate agent in the circumstances of this case, let alone that Mr. Zhang's conduct in any way fell below the requisite standard of care.

· This case is simply one of "vendor's remorse" and involves no illegal conduct of any sort (except Mr. Tsai's own breach of contract and failing to complete the sale of the Property to the ultimate assignee).

- [14] The defendants present strong arguments. They may very well prevail at the end of the day and Mr. Tsai may very well be confronting liability for significant legal costs as a consequence of any unsubstantiated allegations of dishonesty that he is making.
- [15] But some cases, and this is one of them, cry out for a traditional trial rather than a summary determination based on affidavits prepared by a party's legal counsel and which may obscure the affiant's authentic voice. In some cases, decontextualized affidavit and transcript evidence has the potential for substantive unfairness of a sort that would not likely occur in a full trial where the trial judge sees and hears it all. This is especially so where the cause of action (conspiracy) alleges concealed conduct difficult to prove and which in large measure will depend upon an assessment of the credibility and reliability of witnesses' testimony and inferences to be drawn from all of the evidence as a whole.
- [16] In this case, the "optics" arguably engender skepticism, if not suspicion. Shortly after the Contract in this case was executed, significant changes were made in the real estate industry to address the controversial practice of "shadow flipping" and alleged misconduct on the part of real estate agents, including misleading advertising and predatory sales strategies designed to take advantage of consumers. If the flipping transactions in this case had occurred two years later, Mr. Tsai would have benefitted to the tune of some \$1.2 million over and above the purchase price set out in the May 16, 2015 Agreement. The Limited Dual Agency Agreement would not have been signed and Mr. Zhang would not have been able to represent both vendor and purchaser.
- [17] This does not in any way mean that Mr. Zhang's conduct was illegal or inappropriate at the time of his dealings with Mr. Tsai in May 2015. The surgical analysis urged by his counsel may very well prevail at the end of the day, and Mr. Zhang (and, of course, Mr. Li) may be completely exonerated of all alleged wrongdoing.
- [18] Certain documents claimed by the plaintiff to be critical to his case, and which were colourfully labelled by his counsel as "smoking guns", are various "WeChat messages" exchanged between Mr. Li and Mr. Zhang between March and December 2015. Some of this material was produced for the first time in December 2017. During some of these multiple exchanges, Mr. Li and Mr. Zhang refer to themselves as "brother" or "bro". Some exchanges relate to the Property that is the subject matter of the present litigation, as well as to over 40 other properties.
- [19] Most of the "smoking guns" relied upon by Mr. Tsai's counsel are exchanges that occurred after the execution of the May 16, 2015 Contract of Purchase and Sale. All of them may very well bear the completely innocent meaning ascribed to them in the more recently filed affidavits of the parties and the submissions of their counsel. The fact that Mr. Li and Mr. Zhang may have been friends before the transaction with Mr. Tsai may have no legal

significance whatsoever. In the context of a dual agency scenario, however, skeptics might suggest otherwise.

- [20] And it must not be overlooked that Mr. Tsai has sworn under oath that he was effectively deceived by Mr. Zhang. First, he portrays himself as an elderly, retired gentleman with a poor command of the English language and whose cataracts make reading difficult for him in any event. While he acknowledges he wanted to know about the value of his Property, he says he did not ask Mr. Zhang to sell the Property, to solicit offers, or to bring him a buyer. He says he was "stunned" when Mr. Zhang told him he had a buyer for \$5 million and that he rejected the offer. He describes Mr. Zhang calling back with a higher offer combined with a reduced commission:

He told me to hurry to sign the deal because my property was not worth that much, but today I was lucky that someone wanted to purchase my property and I would get \$5 million. He urged me to seize the opportunity, saying I would not get a better offer. I believed him so I went to his office.

- [21] Mr. Tsai swears that when he arrived at Mr. Zhang's office he was presented with the Contract of Purchase and Sale already signed, an Exclusive Listing Agreement and a Limited Dual Agency Agreement. He says Mr. Zhang only reviewed with him the sale price, the deposit amount, his commission fee, the completion date and the Property Disclosure Statement. He expressly swears that Mr. Zhang did not discuss independent legal advice, the concept of assignment, and did not explain the Listing and Dual Agency Agreements with him. He states:

Had I known the difference in duties of a realtor between a regular agency agreement and a dual agency agreement, I would have found another realtor.

- [22] Mr. Tsai and Mr. Zhang relate completely different version of events respecting the execution in mid-July of an Addendum to the Contract of Purchase and Sale. Mr. Tsai denies being advised of the assignment by Mr. Li to the numbered company. He acknowledges receiving \$5,000 to extend the completion date by a month at the request of Mr. Li. He claims Mr. Zhang covered up part of the Addendum and simply asked Mr. Tsai to sign (which he did).
- [23] Mr. Tsai's counsel had produced expert evidence purporting to establish the value of Mr. Tsai's home at \$5.645 million at the time the Contract of Purchase and Sale for \$5.1 million was signed on May 16, 2015. That appraisal is, of course, challenged but if sustained at trial, any such \$500,000 difference between the sale price and the fair market value may contribute to negative inferences against Mr. Zhang (and possibly Mr. Li) when all of the evidence is considered as a whole.

- [24] Insofar as shortcomings respecting expert evidence on a realtor's professional standards of conduct are concerned, counsel for Mr. Tsai apologetically acknowledges fault for its absence and asks that this not be allowed to result in judgment being granted against Mr. Tsai in the circumstances.
- [25] Combining all of these considerations leads me to conclude that it would be unjust to decide this case by way of a summary trial and that, instead, a full trial is required where the parties can testify in their own words and be cross-examined before the Court to determine the credibility, reliability and probative value of their evidence. I also reject Mr. Li's suggestion that the (unproved) allegation of conspiracy against him be dismissed at this time and only the balance of the lawsuit against the realtors proceed. I am sympathetic to his plight, but such "litigation in slices" would be unwise. In my view, all of these claims must be determined at the same time and based on the same evidence as a whole.
- [26] The parties no doubt recall the observations of Mr. Justice Savage at para. 36 of *Zhang v. Tsai*, 2017 BCCA 371:

In my view, the Rescission and Misrepresentation Action and the Specific Performance Action should be tried together, or sequentially, as originally contemplated by the Procedural Order. Arguably, in order to determine whether Mr. Lian Zhang is entitled to specific performance it must be determined whether Mr. Tsai is entitled to rescission. Moreover, the issues are so interwoven as to make separate trials at different times before different judges fraught with problems including potentially inconsistent findings.

- [27] It appears a procedural order has been issued by Master Taylor ordering that this action be tried at the same time or consecutively with the parallel Specific Performance Action initiated by the ultimate assignee of Mr. Tsai's Contract of Purchase and Sale. That order presumably remains in place and steps should be taken by all parties in both actions to set this matter down for trial at the earliest possible date so this long-outstanding drama can be brought to a conclusion.
- [28] The costs of this summary trial application will be in the cause.

"KENT J."

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