

CANADA / JUDGMENT

Urban Land Holdings Ltd. v. Babich

2020 BCSC 1900

COURT

Supreme Court of British Columbia

DECIDED

4 December 2020

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2020 BCSC 1900 Urban Land Holdings Ltd. v. Babich

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Urban Land Holdings Ltd. v. Babich,

2020 BCSC 1900

Date: 20201204

Docket: S33745

Registry: Chilliwack

Between:

Urban Land Holdings Ltd.

Petitioner

And

Earl Steven Babich and Monique Jacqueline Babich

Respondents

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment Re: Costs

Counsel for the Applicant purchasers, Phuoc Hon Vo and Viet Phuoc Vo:

N.T. Hooge

Representative for the Respondents:

A. Sello

Place and Dates of Hearing:

New Westminster, B.C.

August 11, 2020

September 9, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 4, 2020

- [1] These reasons concern the application by Viet Phuoc Vo and Phuoc Hon Vo for special costs relating to their involvement in a foreclosure proceeding concerning property at 10990 Sylvester Road, Mission, BC (the Sylvester Road lands). These individuals purchased the Sylvester Road lands and paid the purchase proceeds. After the transaction was completed Earl Babich, refused possession of the premises and the purchasers obtained a writ of possession. Eventually, the applicants obtained possession of the property and seek costs of the proceeding to enforce their right of possession.
- [2] Urban Lands, the petitioner, transferred title to the applicants and received full payment of the purchase price; they took no position on this application.

Background

- [3] Prior to January 2018, Mr. Earl Babich was a registered owner of the Sylvester Road lands. Mr. Babich and his wife had borrowed money from the petitioner and by that January were in arrears under the petitioner's mortgage with a balance owing of approximately \$661,000.
- [4] The petitioner commenced foreclosure proceedings in January 2018 and an order nisi was granted April 16, 2018 with the last date for redemption of October 16, 2018. On October 1, 2018, the court granted a 60-day extension of the redemption to December 16, 2018.
- [5] On January 7, 2019, the court granted exclusive conduct of sale to the respondent, Mr. Babich, for the period January 7 to February 28, 2019. Effective March 1, 2019, the petitioner obtained conduct of sale subject to court approval.
- [6] On March 7, 2019, the respondent applied for an extension of the redemption period to April 30, 2019; this application was dismissed. On August 8, 2019 an appeal of the extension application was also dismissed: see *Urban Land Holdings Ltd. v. Babich*, 2019 BCSC 1318.
- [7] In December 2019, the petitioner received an offer to purchase the lands for \$900,000 and on December 15, 2019, the applicants entered into a contract to purchase the lands for \$1,201,500 following a sealed bid process taking place in chambers.

- [8] The respondent appealed the master's sale approval of January 6, 2020; that appeal was dismissed by Mr. Justice Ross on March 6, 2020: see *Urban Land Holdings Ltd. v. Babich*, 2020 BCSC 1326.
- [9] On March 18, 2020, the respondent applied for leave to appeal the appeal dismissal order.
- [10] On March 19, 2020, the applicants completed the purchase of the lands required by the purchase and sale agreement. They obtained a mortgage loan in the amount of \$781,000 with an interest rate of 9.5%. The order approving the sale to the applicants also granted the applicants vacant possession, but the respondent refused to vacate the premises despite requests and demands from the petitioner.
- [11] During the foreclosure proceeding, the respondent, Mr. Babich, asserted that the lands had been appraised on March 4, 2020 at a fair market value of \$1,600,000 and the impact of the sale order deprived him of substantial equity. He appealed the order approving the sale.
- [12] On March 26, 2020, the petitioner caused a Writ of Possession to be issued and served on Mr. Babich. On April 2, 2020 Associate Chief Justice Holmes issued a stay regarding the writ of possession; this order was the subject of the application before me.
- [13] The respondent applied to the Court of Appeal for a stay of the possession order contained in the sale order made January 6, 2020. He also applied for leave to appeal dismissal of the March 6, 2020 appeal decided by Mr. Justice Ross.
- [14] The applicants had become the registered owners of the property under the order approving sale and sought an order vacating the stay issued by the Associate Chief Justice and seeking permission for the sheriff to act under the writ of possession. This application was argued May 29, 2020 and reasons issued June 2, 2020; the application to set aside the writ of possession was successful. Costs of that application were adjourned pending further submissions.
- [15] On June 1, 2020, the Court of Appeal had ordered an interim stay of the order of possession contained in the sale approval order until June 16, 2020. On June 16, 2020, Madam Justice Dickson heard Mr. Babich's application for leave to appeal on stay of execution and on June 18, 2020, the court dismissed Mr. Babich's applications: See *Urban Land Holdings Ltd. v. Babich*, 2020 BCCA 210.
- [16] On July 20, 2020, Mr. Babich delivered a notice of application to vary the order of Dickson J.A. I was informed that no further steps appear to have been taken in that proceeding.
- [17] This costs application came before this Court on August 11, 2020. Mr. Babich appeared by telephone at this application and indicated a wish to have the matter adjourned to permit him to prepare for submissions. The application was adjourned to September 9, 2020 with the express consent of both parties. On September 9, 2020, the case was called at 2:00 p.m. but Mr. Babich did not call in by telephone. Counsel for the applicant and the court registrar made efforts to telephone Mr. Babich at the telephone numbers that had been previously

provided. The Court stood this matter down until approximately 2:20 p.m.; further calls were made to Mr. Babich but he did not appear. Accordingly, the application proceeded.

Applicant's Position

[18] The applicants seek special costs on the bases that Mr. Babich:

- a. showed disregard for court orders concerning his obligation to abide by the court sale approval order;
- b. behaved improperly in regards to material filed in support of his opposition to the orders, including assertions that counsel for the petitioner was morally bankrupt with the effect of depriving him of a fair opportunity to defend himself;
- c. asserted that counsel for his wife in their family law proceeding had signed and filed fraudulent documents;
- d. asserted the petitioner had not acted in good faith in marketing the Sylvester Road lands thereby devaluing his interest in those lands;
- e. interfered with the marketing of the property during the period when the petitioner had conduct of sale;
- f. asserted that the petitioner's lawyer lied to the court in obtaining the order approving sale;
- g. intended to pursue punitive costs against the applicants' law firm for failing to endure applications in March 2020;
- h. alleged that Cinthya Nunez, the paralegal at Farris LLP, was negligent and liable to him for deliberately excluding facts in a sworn affidavit; and
- i. alleged that the applicants drove expensive new vehicles in an effort to influence the Court's decision in this application.
- j. alleging that Mr. Justice Ross neglected to interfere with the Order Approving Sale when addressing his appeal.

[19] The applicants seek special costs based on Mr. Babich's behaviour and improper assertions made to justify his refusal to deliver possession of the premises after the order approving the sale to the applicants was made and the sale completed. They have incurred substantial costs to achieve possession of the Sylvester Road lands sold to them under the order approving sale.

[20] The applicants contend that the respondent's behaviour was reprehensible in that it was scandalous, outrageous or otherwise "deserving of reproof or rebuke" as discussed in *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (B.C.C.A.) at para. 17.

- [21] The applicants contend that Mr. Babich should not be shielded from a special costs order simply because he was self-represented in the procedure: see *Allart Estate v. Allart*, 2016 BCSC 768 at para. 18.
- [22] The applicants ask the Court to construe Mr. Babich's behaviour in refusing to deliver possession of the property according to the order as "disregard for a court" (absent a specific contempt finding) that justifies special costs as a consequence of breaching the court order: see *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 186 at para. 50; *The Owners, Strata Plan VR 390 v. Harvey*, 2014 BCSC 2580 at paras. 18-31.
- [23] The applicants refer to other circumstances that warrant special costs orders including those listed in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 [Mayer] at para. 11. In that case, the Court concluded that special costs can be ordered where parties pursue meritless claims with recklessness as to truth and make improper allegations of fraud, conspiracy or breach of fiduciary duty. Maintaining allegations of fraud and dishonesty can be taken into account in assessing special costs claims: see *Kim v. Choi*, 2019 BCSC 1792 at paras. 26-27.
- [24] Lastly, the applicants say that unsubstantiated allegations of misconduct by counsel and their staff detracts from the professional integrity of the lawyer and is conduct worthy of rebuke that should attract special costs awards. Overall, the totality of all factors pertinent to costs orders need to be considered.

Legal Principles

- [25] The Court in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 summarized principles for awarding special costs at para. 73:
- [73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and

f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[26] The summary provided by Mr. Justice Walker in *Mayer* is helpful to the analysis of this application. In that case he concluded:

[11] Special costs may be ordered in the following circumstances:

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and
- (i) where a party pursues claims frivolously or without foundation.

See: *Garcia* [1994 CanLII 2570 (BC CA)] at 748; *International Hi-Tech* [2007 BCSC 1724] at paras. 7-13; *Webber v. Singh*, 2005 BCSC 224 at para. 28; *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at paras. 26, 29; *Buchan v. Moss Management Inc.*, 2008 BCSC 1286 at paras. 11-12; and *Edwards v. Bell*, 2004 BCSC 399 at paras. 12, 43-45.

[27] As noted, special costs are punitive and designed to denounce poor behaviours and deter offending parties: see *Ip v. Insurance Corp. of British Columbia*, [1994] B.C.J. No. 81 at para. 7.

Discussion

[28] This costs application relates to a one-day telephone application, followed by oral reasons, allowing the application and removing the applicants' obstacle to obtaining possession of the subject land.

[29] Taking into account the totality of Mr. Babich's behaviour, I am satisfied on the question of the writ of possession that Mr. Babich pursued a meritless claim. In his presentation he alleged the petitioner's lawyer was "morally bankrupt" and alleged his wife's lawyer had signed and filed fraudulent documents. He claimed for punitive costs against the applicants' lawyer for failing to adjourn an application. He accused the applicants' law firm of negligence and incurring liability to him for contents of affidavits sworn in the proceeding. He also made unsupported allegations concerning the applicant's motor vehicles in an obvious attempt to influence the Court's assessment of their financial ability in contrast to his.

[30] The attacks on lawyers and staff alone are worthy of rebuke. The Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 at para. 80 said:

A lawyer relies on his reputation for integrity. While not every accusation against a lawyer will lead to special costs, when a lawyer's reputation is falsely assailed, the court's reproof should be felt.

[31] Overall, I am satisfied that Mr. Babich's behaviour rises to the level exceptional circumstances warranting the order of special costs. His behaviours were intended to abuse the court's process for the sole purpose of interfering with the applicants' rights granted under the sale order. No single item relied on by the applicants justified this result; however, the cumulative impact of his behaviour should be rebuked by the Court. The applicants went to considerable expense in a process in which Mr. Babich unfairly assailed counsels' reputation, actions, counsel's staff and the applicants.

Conclusion

[32] In the result, the applicants will have their costs as special costs.

"Armstrong J."

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