

CANADA / JUDGMENT

Vesuna v. Ashworth

2020 BCCA 154

COURT

British Columbia Court of Appeal

DECIDED

25 May 2020

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2020 BCCA 154 Vesuna v. Ashworth

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Vesuna v. Ashworth,

2020 BCCA 154

Date: 20200525

Docket: CA46787

Between:

Rumi Vesuna

Appellant

(Plaintiff)

And

William Ashworth and Jennifer Ashworth

Respondents

(Defendants)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

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

March 30, 2020 (Vesuna v. Ashworth, Powell River Docket S2766).

Oral Reasons for Judgment

The Appellant, appearing in person

(via teleconference):

R. Vesuna

Counsel for the Respondents

(via teleconference):

I. Fleming

Place and Date of Hearing:

Vancouver, British Columbia

May 25, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 25, 2020

Summary:

The applicant seeks leave to appeal from an order dismissing his injunction application, and an injunction order as well as other relief. Held: Applications dismissed. The applicant cannot meet the threshold merits test for the orders he seeks.

GRIFFIN J.A. (via teleconference):

NATURE OF APPLICATION

[1] The applicant, Mr. Vesuna, seeks:

1. Leave to appeal the order of Justice Baird made March 30, 2020, dismissing Mr. Vesuna's application for injunctive relief;
2. A stay of proceedings; and
3. Interim orders as follows:
 - i. an injunction preventing the respondents from making any alterations to a road providing access to his property (the "Old Road");
 - ii. the respondents pay the costs of a contractor to be hired by Mr. Vesuna, restoring the Old Road to the condition it was in prior to March 19, 2020; and
 - iii. Mr. Vesuna be permitted to travel on the Old Road to access his property.

- [2] The respondents oppose the applications. They argue that Mr. Vesuna has not followed the proper procedures in this Court, and that his applications should also be dismissed on the merits.

BACKGROUND

- [3] The parties own adjacent rural properties near Powell River, British Columbia. There is a road described in Mr. Vesuna's materials as the Old Road, located on a portion of the respondents' property, which Mr. Vesuna would like to use to access his property.
- [4] The underlying appeal concerns an order of Baird J. of March 30, 2020, dismissing Mr. Vesuna's application for an injunction order, the purpose of which would allow him a right to use the Old Road to access his property, pending the trial of his claim to have a right to use that road.
- [5] In addition, Mr. Vesuna submitted before the court below that after he filed his injunction application, the respondents subsequently made changes to the Old Road which would prevent him from driving on it. His notice of application filed in the court below did not seek the relief he now seeks in this Court, which is an order that the respondents pay for the cost of reconstruction of the Old Road so that he can drive on it. However, in the hearing below he spoke to this relief.
- [6] The background is that Mr. Vesuna purchased his property in 2005. There was a route of access to his property via the Old Road. The Old Road has a gate on it. Prior to purchasing his property, Mr. Vesuna did not inquire into whether the Old Road was publicly or privately owned.
- [7] After purchasing the property, he brought a claim against the prior owners of the respondents' property, the provincial government and government officials, in which he asserted, amongst other things, that the Old Road is a public road. He relied on a number of historical documents. Ultimately, he was unsuccessful in this claim, which was dismissed after a nine-day trial, affirmed on appeal: *Vesuna v. British Columbia (Transportation)*, 2011 BCSC 941, aff'd 2013 BCCA 10, leave to appeal ref'd [2013] S.C.C.A. No. 154. Mr. Vesuna also claimed that the defendants at that trial, the previous owners of the property, had entered into an agreement with him to allow him to use the Old Road, but he was also unsuccessful in that aspect of his claim.
- [8] The property on which the Old Road is located was purchased by new owners, the respondents, in November 2019.
- [9] On March 10, 2020, Mr. Vesuna filed a notice of civil claim against the respondents seeking damages and a declaration that the Old Road is a public road.

- [10] On March 16, 2020, Mr. Vesuna brought the application below, seeking an injunction that would in essence prevent the respondents from blocking his access to the Old Road and allow him to use the Old Road.
- [11] On March 30, 2020, the application was heard. Between March 16-30, 2020, the respondents commenced construction on the Old Road which is related to other work they are doing on their property. In chambers, Mr. Vesuna stated the construction made it such that a car could not be driven on the Old Road, so that he could no longer use it to access his property.
- [12] Mr. Vesuna provided an affidavit in the court below. He should have included that affidavit in his motion book before this Court, but did not do so. However, he says he "cut and pasted" the content of it into a new affidavit dated April 7, 2020, filed in this Court on April 8, 2020.
- [13] The bulk of his affidavit refers to the evidence he had relied on in the previous litigation in support of his unsuccessful argument that the Old Road is a public road.
- [14] It appears that the only new evidence in his affidavit--new in the sense of being evidence of events occurring subsequent to his previous unsuccessful litigation--was his assertion that on November 24, 2020 [sic] (meaning 2019) he reached an agreement with the respondents. He says he met with the respondents shortly after they purchased their property in November 2019. He claims they indefinitely agreed to keep the gate open for him to drive through, and agreed that he would be able to use the road "in perpetuity." He says that the respondents agreed that, if they did decide to lock the gate, they would leave a key for him under a rock by the gate.
- [15] Mr. Vesuna claims to have left the vicinity right after this alleged oral agreement. When he returned months later, on February 27, 2020, the gate was locked and he was not provided with a key.
- [16] Mr. Vesuna provides no evidence that he provided any consideration for this agreement.
- [17] Mr. Vesuna also has no corroborating evidence of his alleged oral agreement. When he returned in late February 2020, Mr. Vesuna claims to have written an email to the respondents in which he "confirmed" their "undertaking that you would provide me [with] a key." I note that this initial email does not allege any agreement with the respondents to allow him to use the Old Road "in perpetuity."
- [18] In a subsequent email, Mr. Vesuna referred to the respondents' request that he sign a letter of understanding regarding temporary access through the gate until the end of March 2020, following which the respondents intended to move the driveway (presumably their term for what Mr. Vesuna calls the Old Road). It therefore appears from Mr. Vesuna's own material that the respondents did not consider they had any agreement with him.
- [19] The respondents denied in their response to civil claim that there was any agreement with Mr. Vesuna.

- [20] In the court below, Mr. Vesuna submitted that his inability to use the Old Road was preventing him from accessing his property, and from staying at home in accordance with the directions issued during the COVID-19 public health crisis.
- [21] The judge below dismissed the application. He held that Mr. Vesuna had failed to show a triable issue on the merits of Mr. Vesuna's claim.
- [22] The judge was prepared to grant an order, which the respondents indicated they would consent to, that Mr. Vesuna be permitted to use the Old Road to access his property by walking or by means of a quad (an off-road vehicle). Mr. Vesuna refused the order.
- [23] Mr. Vesuna filed a notice of appeal on March 30, 2020. He brought an injunction application as well as a stay application. There have been a number of procedural irregularities in Mr. Vesuna's steps in this appeal proceeding. He was directed to file a notice of application for leave to appeal, which he has done (on May 14, 2020), bringing us to his applications today.
- [24] While the respondents complain of the procedural irregularities by Mr. Vesuna, I am satisfied they have had fair notice and that the Court has done what it could to allow Mr. Vesuna, as a self-represented litigant, a fair procedure for the hearing of his applications, without causing any prejudice to the respondents.
- [25] Dealing first with Mr. Vesuna's application for a stay of proceedings, I dismiss that application. He is the plaintiff, applicant and appellant. The only reason he gave for the stay application was that he wanted more time to prepare his case. It appears that he wants a stay of everything but the injunctive relief. This would obviously be unfair to the respondents. He is not entitled to a stay of his own case and to also receive the benefit of an injunction as that would be akin to giving him the final relief he seeks in the case.
- [26] As for the injunctive relief, what Mr. Vesuna is really seeking is an order that would require the respondents to pay for the restoration of the Old Road, either under his direction, or their direction, so that he can drive on it, and an order that he be permitted to use it. He says that this will require putting down soil, gravel, and installing a culvert. He provides no estimate of the cost of this work. He offers no undertaking as to damages.

APPLICATIONS

Legal Principles: Leave to Appeal and Injunction

- [27] Mr. Vesuna is required to meet the test for leave to appeal a discretionary order, as well as the test for an injunction.
- [28] The test for leave to appeal was summarized by Justice Saunders in *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2020 BCCA 74 (Chambers), a case in which leave to appeal from an injunction order was sought. She held at paras. 2-3:

- [2] On a leave application, this court generally looks at four issues, all under the rubric of the interests of justice: the apparent merits of the proposed appeal; is it *prima facie* meritorious or on the other hand frivolous; the significance, if any, of the point on appeal to the practice or the public; the significance of the point raised to the action itself; and whether the appeal will unduly hinder the progress of the action. The answer on a leave application is not dictated by the answer to any single one of these issues and it is an overall assessment that must be made. I refer to *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 in turn referring to *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 293.
- [3] It is to be remembered that if the order appealed is one made in the exercise of judicial discretion, the degree of merit of the proposed appeal is affected by the standard of review applied by this court to orders made in the exercise of judicial discretion: *Pacifica Mortgage Investment Corporation v. Laus Holdings Ltd.*, 2011 BCCA 317.
- [29] The question of whether there is some merit to an appeal of a discretionary order requires assessment of whether there is an arguable case that the judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed from will work an injustice. The applicant for leave must establish a reasonable possibility that a division of the Court would grant the appeal on the merits: *MacRae v. Woermke*, 2019 BCCA 355 at paras. 4-5 (Fenlon J.A. in Chambers).
- [30] As for the authority of this Court to issue an interim injunction, s. 10(2)(b) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides a broad power to a justice in chambers to "make an interim order to prevent prejudice to any person".
- [31] This provision authorizes a justice to issue an injunction, but only in the "rarest of cases": *Berthin v. British Columbia (Registrar of Land Titles)*, 2016 BCCA 255 at para. 35 (Goepel J.A. in Chambers), citing *Brown v. Anderson*, 1999 BCCA 372 at para. 32 (Esson J.A. in Chambers); *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2014 BCCA 427 at para. 21 (Donald J.A. in Chambers).
- [32] The test in this Court, as in the court below, for the granting of an injunction order is the well-known three-part test involving consideration of the merits, irreparable harm, and balance of convenience. As Goepel J.A. stated in *Berthin*:
- [36] The test for granting injunctive relief under s. 10(2)(b) is similar to the test for granting a stay under s. 18(1) of the Court of Appeal Act: *Hawkeye* at para. 22, citing *Northwood Inc. v. Forest Practices Board*, 2000 BCCA 7 at para. 8 (Mackenzie J.A. in Chambers). There must be a serious issue to be tried, the applicant must risk irreparable harm if the application is refused, and the balance of convenience must favour the applicant: *Northwood Inc.* at para. 8, referring to the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

- [37] An injunction may be granted in circumstances where the order is necessary to preserve the appellant's rights and prevent frustration of the appeal: *Coast Hotels Ltd. v. Northwest Hotels Inc.*, 2001 BCCA 481 at para. 17 (Saunders J.A. in Chambers); *Enns (Guardian ad Litem) v. Voice of Peace Foundation*, 2004 BCCA 13 at para. 18 (Donald J.A. in Chambers).
- [33] One can see from the above review of the legal tests that the first hurdle for Mr. Vesuna, in both his application for leave to appeal and for an injunction, is establishing that there is a serious question to be tried.
- [34] The "serious question to be tried" threshold is a low one: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 22 (Frankel J.A. in Chambers), quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337-338.
- [35] However, it is important to also recognize, in this review of legal principles, that Mr. Vesuna's focus of injunctive relief is not truly one of asking the court to restrain the other party from doing something. He is asking the court to order the other party to do something: to allow for and pay for construction efforts so as to make a passable road on their property, where the Old Road used to be. In essence, this is what is known as a mandatory injunction order.
- [36] In the case of a mandatory injunction order, the same three-part test for an injunction applies but the merits test is a higher threshold. In the case of a mandatory injunction, the applicant at the first stage must show a strong *prima facie* case: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 at para. 15. This requires showing a strong likelihood on the law and evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations: *CBC* at para. 17.

ANALYSIS

- [37] I am of the view that Mr. Vesuna's applications must be dismissed.
- [38] Even considering the lowest threshold of a merits test, in respect of obtaining leave to appeal and in the issuing of an interim injunction, Mr. Vesuna cannot show a serious question to be tried.
- [39] As for the mandatory injunction Mr. Vesuna seeks, he has not shown a strong likelihood that he will be ultimately successful in his claim.
- [40] At its core, Mr. Vesuna has no viable argument that the chambers judge erred in exercising his discretion to dismiss Mr. Vesuna's application for an injunction. The judge did not err in principle or make an order unsupported by the evidence, nor did the judge's order work an injustice.

- [41] First, it has to be kept in mind that the notice of application, filed by Mr. Vesuna in the court below, relied as to the legal basis for relief, solely on the proposition that the Old Road is a public road. Mr. Vesuna filed an affidavit in support of that proposition relying on historical documents.
- [42] The courts have already decided that the Old Road is not a public road, in the previous litigation in which Mr. Vesuna put forward historical documents and arguments based on those documents. Mr. Vesuna introduced no evidence below to suggest, that subsequent to these prior court decisions rejecting Mr. Vesuna's argument that the Old Road is a public road, anything changed to make the private road a public road. He simply wanted to reargue the point.
- [43] Mr. Vesuna has not shown anything explaining how it could be that his injunction application relying on the proposition that the Old Road is a public road was not an abuse of process. It was not necessary for the judge to finally determine that issue, nor did he do so. However, the judge did not make any error in concluding there was no evidence giving rise to a triable issue with respect to Mr. Vesuna's claim that the Old Road is a public road.
- [44] Second, even if one was to read Mr. Vesuna's affidavit below and submissions to the court very generously, and allow him to advance the alternative ground that he had an agreement with the respondents, there was also insufficient evidence to indicate there was a triable issue on this ground that would support the relief sought. Again, Mr. Vesuna's notice of application seeking the injunction did not rely on this ground for his relief.
- [45] Further, the only purportedly corroborative evidence Mr. Vesuna presented in proof of this alleged agreement were alleged extracts of his own emails, without replies, purportedly addressed to the respondent, Mr. Ashworth. There was no evidence of the respondents acknowledging any agreement. Further, Mr. Vesuna does not plead nor allege that he gave the respondents any consideration for this alleged agreement. This suggests that even if there was some form of oral agreement, it would not be enforceable.
- [46] Mr. Vesuna relies on the fact that the respondents did not file an affidavit as to the existence or non-existence of the alleged agreement. However, as I noted, Mr. Vesuna did not rely on the allegation of an agreement in his notice of application for the injunctive relief.
- [47] At the hearing below there was some discussion regarding this absence of responsive evidence about the alleged agreement. The respondents' counsel submitted that due to some circumstances, he had not had time to prepare an affidavit responding to this, but could do so. The respondents' response to civil claim states there was no agreement. In the end, the judge did not find it necessary to allow the respondents time to file reply evidence.
- [48] Mr. Vesuna's own evidence was internally contradictory to the suggestion there was an agreement with the respondents to use their private road forever, without limitation. In Mr. Vesuna's mind, the Old Road is a public road not a private road. He asserts that he has a right to use the Old Road because it is a public road, not that he needs permission to do so.

- [49] Mr. Vesuna's assertion that he had an agreement with the respondents is a bald assertion without any details, and is contrary to logic and ordinary behaviour: why would the respondents voluntarily give someone they just met the right to use their property forever, without compensation? The judge was not required to accept Mr. Vesuna's uncorroborated evidence as raising a triable issue.
- [50] Furthermore, there was no history of conduct between the parties before or after the alleged oral agreement that was consistent with the existence of such an agreement. Mr. Vesuna had no history of using the private road since the respondents purchased their property. The respondents' position, as evidenced and acknowledged by Mr. Vesuna in his emails attached to his affidavit, was that they should have the right to do whatever they wanted with that road, including locking the gate and changing the configuration of the road.
- [51] As for irreparable harm, Mr. Vesuna states in his affidavit that he will suffer significant consequences if he is not provided a key to the locked gate that runs across the Old Road. He implies that his property provides him with the only place to live, and that he is not able to carry food and other supplies to it, and he needs vehicle access in order to live there. He is of advanced years and says he is in poor health. These circumstances are indeed very unfortunate. I am not unsympathetic to the situation he finds himself in, but his case needs to have some merit in order to support an injunction order. As well, the private nature of the road has been the situation since he purchased the property in 2005, and was confirmed when he lost his prior litigation in 2011.
- [52] The balance of convenience clearly did not and does not favour granting the mandatory injunction. The relief Mr. Vesuna sought orally at the hearing of his injunction application would be very difficult for the court to supervise, as it required the road to be rebuilt in some unspecified way at some unknown cost to the respondents, in order to make the Old Road accessible for Mr. Vesuna. Mr. Vesuna did not offer an undertaking as to damages.
- [53] The respondents faced significant inconvenience if they were forced by the court to undergo construction at their expense, altering their private property, without any suggestion Mr. Vesuna would pay damages if he lost the case. This is especially so when he is not seeking to expedite the trial of the case, and instead, is seeking a stay to allow him more time to prepare his case.
- [54] For all of the above reasons, it cannot be said that there is prima facie merit to an appeal of the judge's order below, dismissing Mr. Vesuna's application. On the contrary, this is one of those cases where the lack of merit in an appeal of a discretionary order, refusing an injunction, is readily apparent. Further, the matter itself has no significance to the practice. It has very little significance to the action, in the sense that the refusal of the injunction does not prevent Mr. Vesuna from continuing his claim, and it allows the respondents to continue to use their property as they see fit. There is no reasonable possibility that a division of the Court would grant the appeal on the merits, and grant the injunctive relief sought by Mr. Vesuna. It would not be in the interests of justice to grant leave to appeal.

[55] Mr. Vesuna also does not meet the test for an injunction in this Court. Given the deficiencies in Mr. Vesuna's evidence, it is very apparent that he has no arguable case in favour of a mandatory injunction of the sort he seeks. He also has no arguable case in favour of some lesser form of injunctive relief, preventing the respondents from doing whatever they would like to do with their private road.

CONCLUSION

[56] The applications are therefore dismissed.

[57] The respondents seek special costs. Counsel for the respondents has provided no legal authority for such an award, simply relying on the argument that the respondents have been put to needless expense. I do not consider that a case has been made out for special costs.

[58] I do consider, however, it appropriate that the respondents be awarded the costs of these applications in any event of the cause.

"The Honourable Madam Justice Griffin"

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