

CANADA / JUDGMENT

Volovsek v. Donaldson

2020 BCSC 25

COURT

Supreme Court of British Columbia

DECIDED

10 January 2020

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2020 BCSC 25 Volovsek v. Donaldson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Volovsek v. Donaldson,

2020 BCSC 25

Date: 20200110

Docket: S161952

Registry: Vancouver

Between:

Yasmine Volovsek

Plaintiff

And

Larry Donaldson, as the Executor and Trustee of the Last Will and Testament of Fernand Joseph Boisvenu, Deceased; Larry Donaldson, as the Trustee of the Boisvenu Alter-Ego Trust #1 and the Boisvenu Alter-Ego Trust #2; Lucie Boisvenu, also known as Lucie Hayes; Normand Boisvenu, also known as Normand Hayes; Jules Boisvenu; Robert Boisvenu; Roger Boisvenu; Berthe Renaud Boisvenu; Marthe Boisvenu; and Hauke Nissen

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment re Counterclaim

Counsel for the Plaintiff:

Candace Cho

Janis Ko

Counsel for Larry Donaldson:

Duncan J. Manson

Counsel for Lucie Boisvenu, Normand Boisvenu, Jules Boisvenu, Roger Boisvenu, Berthe Renaud Boisvenu and Marthe Boisvenu

Scott M. Boucher

Louise Hamill

Margaret McConnell, Articled Student

No appearance by the Defendants, Hauke Nissen and Robert Boisvenu

Place and Dates of Trial:

Vancouver, B.C.

August 12-16 and 19-23, 2019

Written Submissions

December 31, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 10, 2020

- [1] In October 2019, I dismissed Ms. Volovsek's claim: 2019 BCSC 1820. I deferred deciding Mr. Donaldson's counterclaim for trespass and asked for further submissions, which I have now received. This is my judgment on the counterclaim.
- [2] In my prior reasons I set out the background of the litigation:
- [1] This case raises the novel question of whether a person in a marriage-like relationship owes the other person a fiduciary duty with respect to the disposition of his assets on death.
- [2] Ms. Volovsek was in a relationship with Mr. Boisvenu from 1989 until he died in March 2015. Mr. Boisvenu was 18 years older than Ms. Volovsek. She did not work during their relationship and was supported by Mr. Boisvenu.

- [3] On December 18, 2014, Mr. Boisvenu transferred virtually all of his assets into two alter-ego trusts. At the same time, he made a will. Oversimplifying the scheme somewhat, the combined effect of the will and trusts was to distribute his estate to his siblings (or their children if they predeceased) and Ms. Volovsek in equal shares. A friend, Hauke Nissen, is to receive one half of what the others are to receive.
- [4] Mr. Boisvenu was a successful businessman. The value of his assets on death was more than \$8 million. Under the will and trusts, Ms. Volovsek would receive approximately \$1 million.
- [5] Ms. Volovsek alleges the relationship was marriage-like. She recognises that the trusts are not subject to a wills variation claim under the Wills, Estates and Succession Act, S.B.C. 2009 c. 13 (WESA). She also recognises that she cannot claim Mr. Boisvenu's assets under the Family Law Act, S.B.C. 2011, c. 25 (FLA), because there was no separation prior to his death and therefore no triggering of family property.
- [6] Ms. Volovsek therefore argues that while Mr. Boisvenu was entitled to do estate planning, he had a duty to advise her in advance of the plan so she could make an informed decision as to what to do. She says that had she been advised of Mr. Boisvenu's plans, she would have separated from him, thereby triggering a right to a division of family property. Following from that, she argues she is entitled to what she would have been entitled to had she separated and initiated a claim under the Family Law Act.
- [3] The trespass claim arises in this manner. At the time of Mr. Boisvenu's death in 2015, Ms. Volovsek was living with him in a condominium which had been transferred from Mr. Boisvenu to the Boisvenu Alter-Ego Trust #1. Mr. Donaldson is the trustee of that trust. After Mr. Boisvenu died, Ms. Volovsek started this action and filed a certificate of pending litigation.
- [4] On January 10, 2017 Mr. Donaldson wrote Ms. Volovsek's counsel to advise her that he wanted to sell the condominium and that her right to remain there was terminated effective February 28, 2017. Ms. Volovsek refused to leave. In her counterclaim she pleaded that she was not occupying the condominium unlawfully because she claimed a constructive trust over the estate's assets and her interest had not been determined.
- [5] The parties recently agreed that Ms. Volovsek will vacate the property by March 1, 2020. They did not agree on the damages being sought in this counterclaim.
- [6] Mr. Donaldson argues that while the court often calculates damages for trespass based on lost rental income, it is not appropriate here because under the strata by-laws, the condominium could not be rented. Mr. Donaldson's intent was to sell the condominium so that its value could be distributed to the beneficiaries. He therefore claims occupational rent. He calculates this not on the rental value of the unit but on the basis of interest the sale proceeds would have earned had they been invested and the costs of maintaining the unit.

- [7] Ms. Volovsek argues that because Mr. Donaldson was not in possession of the unit, he cannot maintain a claim in trespass. I found this submission to be questionable: it would make little sense for a property owner to be denied a remedy in trespass because it was prevented from being in occupation by the wrongful act of a defendant. I asked counsel for this to be addressed further. It turns out that - as pointed out by Mr. Donaldson - Ms. Volovsek's submission was based on an incomplete citation from a passage from *Fridman's The Law of Torts in Canada* (3rd ed., 2010) at p. 41. The full passage is as follows - I underline the portions omitted by Ms. Volovsek:

Trespass is a wrong against the possession of land. The essence of the action is "an unjustifiable interference with possession", to succeed Ms. Volovsek must show that he or she was in possession". So, in *Filliol v. Kozolowski*", there was no liability for trespass because the statement of claim included no allegation that Ms. Volovsek was in possession of the land on which the trespass was said to have been committed. Normally, the owner, unless also in possession, is not the appropriate plaintiff: if he lacks possession he has no right to sue the trespasser." However, there are some situations in which ownership may be the basis for maintaining an action. As Stark J. quoted in *Townsvlew Properties Ltd. v. Sun Construction & Equipment Co. Ltd.* [(1973), 2 O.R. (2d) 213; aff'd (1974), 56 D.L.R. (3d) 330]:

The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since a mere right of property without possession is not sufficient to support the action. If however, land is vacant, the owner has sufficient possession to sue in trespass.

Title may therefore be enough on some occasions for an action. In other situations, bare possession is both necessary and sufficient. A plaintiff who can show neither title to land nor actual possession that suffices to give him a right of action will not be able to sue.

- [8] Ms. Volovsek was not in lawful possession of the condominium after February 28, 2017. (She does not argue that the time by which she was required to vacate was unreasonable.) *Townsvlew Property*, cited by *Fridman*, is authority for the proposition that Mr. Donaldson can maintain a claim in trespass once Ms. Volovsek's license to occupy had ceased.
- [9] Turning to the remedy, the only authority provided by the parties which resembled this case was *Morgan v. Pengelly Estate*, 2011 BCSC 1114. The claimant continued to occupy property owned by an estate after he had been asked to vacate. The estate claimed damages in trespass or occupational rent. Justice Harvey declined to order occupational rent because the claimant had no interest in the property. He held that the estate was entitled to damages for trespass based on actual loss suffered:

- [267] I assess damages for the trespass on the supposition, supported by the evidence, that the three beneficiaries hope to retain the Celistra property and would have continued to pay the expenses totalling some \$23,000, in any event. This would have been offset by rental income of \$2,600 annually over the summer months and a further \$1,000 a month over the non summer months, assuming full rental. Over the course of 50 months rental revenue, assuming 100% occupancy, would have amounted to \$53,000.
- [268] Applying a discount of 20% for the prospect the cabin would remain unrented, I assess damages for trespass in the amount of \$42,400.
- [10] Of course, the general rule for damages in tort is to put the wronged party in the position it would have been had the tort not been committed.
- [11] As I said above, Mr. Donaldson wanted to sell the property and he claims the carrying costs related to the property which the estate would not have had to pay had the property been sold. The expenses for the period of March 1, 2017-July 31, 2019 (the month end prior to the trial date) were \$34, 209. The per diem expenses are \$41.62.
- [12] Mr. Donaldson also claims the lost interest on the sale proceeds. An opinion was filed at trial that the market value of the condominium, as at October 20, 2017, was valued at \$1,855,000 assuming an exposure on the market of 60-90 days. Lost interest is calculated as \$77,435 which would have been earned from May 31, 2017 to August 19, 2019 by investing the net sale proceeds in GIC's. This GIC investment is the same way Mr. Donaldson invested other monies belonging to Trust #1 and Trust #2, and how he would have invested such sale proceeds.
- [13] It appears to me that these amounts reflect the loss to the Trust caused by Ms. Volovsek's continued unlawful occupation.
- [14] In his written argument, Mr. Donaldson asks for judgment as follows:
- a. \$77,435, on account of the interest which the Trust #1 would have earned by investing the net proceeds from the sale of the #2403 Condo in GIC's from May 31, 2017 to August 19, 2019, plus interest calculated thereafter at the rates earned by the Trust #1 on GIC's until the #2403 Condo has been sold and the Trust #1 has received the net sale proceeds; plus
 - b. \$34,209.85, on account of Expenses incurred by the Trust #1 to July 31, 2019, plus \$41.62 per diem on account of Expenses incurred after July 31, 2019 and until the #2403 Condo is sold.
- [15] I agree with this subject to the following provisos:
- a. Lost interest should be calculated only to March 1, 2020. This provides for greater certainty than an open date and also eliminates future arguments based on efforts to sell. Further a contingency of 10% is to be applied to account for the vagaries of the appraisal and the market and the imputed time of sale; and

- b. Similarly, the expenses should be calculated to March 1, 2020. I do not think a contingency ought to be applied to this.

[16] The judgment amount is to be taken from the bequest to Ms. Volovsek.

[17] If there is any disagreement as to calculations and similar matters, they are not to be brought back before me but handled according to the ordinary procedure for settling the terms of an order by a Registrar.

"E.M. MYERS J."

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Prepared on 28 October 2026 · Esheria