

CANADA / JUDGMENT

Volovsek v. Donaldson

2020 BCSC 228

COURT

Supreme Court of British Columbia

DECIDED

21 February 2020

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2020 BCSC 228 Volovsek v. Donaldson IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Volovsek v. Donaldson, 2020 BCSC 228 Date: 20200221 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 Reconsideration of Decision re: Counterclaim Counsel for the Plaintiff: Candace Cho Janis Ko Counsel for the Defendant, Larry Donaldson: Duncan J. Manson Counsel for the Defendants, 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 Written Submissions January 29, 2020 Place and Date of Judgment: Vancouver, B.C. February 21, 2020

- [1] On January 10, 2020, I allowed the estate's counterclaim for trespass (2020 BCSC 25). Mr. Donaldson is the trustee of the estate.
- [2] After I released my reasons, I received submissions on a point that ought to have been addressed in both parties' initial or supplemental submissions. This has caused me to reconsider my decision.
- [3] Since the parties have already reached an agreement on costs, I will not detail the history of the submissions. Had no agreement been reached, I would have addressed the matter with a costs order.
- [4] The point that is now raised is the effect of Ms. Volovsek's Certificate of Pending Litigation (CPL) filed against the condominium which was the subject of the trespass counterclaim. For the reasons below, I conclude that the estate's counterclaim fails and my decision needs to be vacated.

- [5] As I described in my earlier reasons, after Mr. Fernand Boisvenu died, Ms. Volovsek commenced an action claiming she had been in a marriage-like relationship with him and that he owed her a fiduciary duty with respect to the distribution of his estate. She refused to vacate the condominium registered in Mr. Boisvenu's name and filed a CPL against it. I dismissed her action.
- [6] There are two different routes by which a landowner can obtain damages from a person who has wrongfully filed a CPL against his property: either by a statutory cause of action or a common law cause of action. They are described by the Court of Appeal in *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141:
- [23] The statutory cause of action created by ss. 256(1) and 257(1) of the Act is different from the common law cause of action for damages for the wrongful filing of a *lis pendens* (now referred to as a CPL). In order to succeed at common law, the plaintiff must establish the defendant had a malicious or unlawful purpose in filing the CPL that amounts to an abuse of process. To recover damages, the successful defendant land owner (in the underlying action) must establish that they suffered or were likely to suffer adverse consequences that flowed from the registration of the CPL. In other words, there must be a causal connection between the registration of the CPL and the damages suffered: *Sagoo v. Reyat*, [1985] B.C.J. No. 612, 1984 CarswellBC 1795 (B.C.S.C.) at para. 6.
- [24] The statutory scheme under the Act was first introduced by the legislature in 1921. It removes the inherent difficulties in the common law cause of action which requires *mala fides* or improper motive to be established before damages can be awarded for the wrongful filing of the CPL. The only requirement of s. 256(1) is that the registered owner of the property, or a person who "claims to be entitled to an estate or interest in the land" against which the CPL is registered, is able to demonstrate hardship and inconvenience that is caused or is likely to be caused by the registration of the CPL. Liability for damages will follow where the plaintiff provides an undertaking to abide by any court order for damages "as a result of the registration of the certificate of pending litigation" (s. 257(1)(b)(i)). Absent such an undertaking, there can be no recovery of damages in the event the plaintiff's action fails. [emphasis added.]
- [7] Mr. Donaldson never applied to have the CPL removed. He therefore has no statutory cause of action.
- [8] As made clear in *Liquor Barn*, the common law cause of action requires the plaintiff to demonstrate that the defendant had a malicious or unlawful purpose in filing the CPL. Mr. Manson, on behalf of the estate, acknowledges there is no evidence of that; nor was the cause of action pleaded. There can therefore be no common law claim.
- [9] I query whether a plaintiff who remains in a property against which she has a filed a CPL can be separately sued for trespass if the CPL is not removed. It seems to me that the owner would be limited to the statutory or common law causes of action for the filing of the CPL.

- [10] Even if that were not the case, the estate suffered no loss from the trespass or continued occupation of the unit. Mr. Boisvenu's condominium could not have been sold because of the CPL and it could not have been rented due to the building's rental restrictions. Therefore, any loss resulted only from the filing of the CPL, for which, as I have said, no action is maintainable.
- [11] Mr. Manson recognises the validity of the above points, but raises a pleading issue. He argues: With respect, the court should not address abuse of process based on the filing of the plaintiff's CPL when the issue was not been pleaded by Donaldson and he has not applied to amend his counterclaim to add that plea. Donaldson is satisfied that the counterclaim has been decided based on its trespass pleading and submits that it would not assist Donaldson or the plaintiff to be in the court of appeal [sic] trying to support or attack a finding on an issue that neither of them brought forward.
- [12] This argument misses the point. Ms. Volovsek is not claiming abuse of process - that is something the estate could have done and it is something that would have to be specifically pleaded as a separate cause of action. Nor am I making a ruling on an abuse of process claim. It is quite the opposite: Ms. Volovsek's current argument is based on the legal effect of her having filed a CPL and there being no abuse of process claim.
- [13] Moreover, the following paragraphs in her response to counterclaim lay a sufficient basis for the legal argument I am now addressing:
5. The facts alleged in paragraph 11 are denied. The Plaintiff is not occupying the Harwood Apartment wrongfully and without lawful excuse, as the issue of her interest in the Harwood Apartment has yet to be determined in this litigation.
 6. The facts alleged in paragraph 14 are denied. The Plaintiff intends to occupy the Harwood Apartment until the issue of her interest in the said apartment has been determined.
 7. The facts alleged in paragraph 15 are denied. Again, the Plaintiffs interest in the Harwood Apartment has yet to be determined in this litigation. As such, she is not a trespasser of the property.
- [14] The Counterclaim is therefore dismissed. As I said, I make no order for costs, since the parties have reached an agreement on costs for the entire proceeding. "E.M. MYERS J."

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Prepared on 26 October 2026 · Esheria