

CANADA / JUDGMENT

Vyskovska v. Vyskovsky

2024 BCSC 1725

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1725 Vyskovska v. Vyskovsky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vyskovska v. Vyskovsky,

2024 BCSC 1725

Date: 20240918

Docket: E212486

Registry: Vancouver

Between:

Jana Vyskovska

Claimant

And

Zbynek Vyskovsky

Respondent

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

The Claimant, appearing in person:

J. Vyskovska

The Respondent, appearing in person:

Z. Vyskovsky

Place and Date of Hearing:

Vancouver, B.C.

July 11, 2024

Written Submissions of the Claimant:

September 5, 2024

Written Submissions of the Respondent:

September 11, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 18, 2024

Overview

- [1] This is an application for interim relief brought in the context of a family law claim.
- [2] The applicant is Zbynek Vyskovsky ("Mr. Vyskovsky"). He asks the Court to order the immediate sale of certain family real estate owned jointly by the parties.
- [3] The respondent to the application is Jana Vyskovska ("Ms. Vyskovska"). She opposes Mr. Vyskovsky's application, and asks that it be dismissed.
- [4] The real estate in question is a three-bedroom apartment. It is located in Prague, Czech Republic. The apartment is occupied by tenants. The parties use it as an investment property and as a source of rental income.
- [5] The issue before the Court is whether it should order the Prague apartment to be sold now, prior to the trial of this claim. Because the real estate is located outside of British Columbia, consideration must also be given to whether the Court can and should issue such an order as it relates to foreign property.
- [6] While I am prepared to assume that I have the jurisdiction to order the immediate sale of the Prague apartment, I am not persuaded on the evidence before me that it is necessary or expedient to do so over the objection of Ms. Vyskovksa. This is particularly the case since the trial of this matter will take place relatively soon. The order sought by Mr. Vyskovsky will be denied.

Background

- [7] The parties were born in the Czech Republic. After having cohabited since 2004, they were married in October 2012. Ten months before their wedding, they purchased the Prague apartment together.

- [8] In August 2016, the parties moved to Canada. Since that time, the Prague apartment has been rented out. As such, the apartment generates income but also requires maintenance expenditures to be made. They apparently include mortgage payments, management company fees, repairs, and taxes.
- [9] On October 14, 2021, the parties separated. Ms. Vyskovska initiated this proceeding by filing a notice of family claim the next day, on October 15, 2021. A ten-day trial of the claim is scheduled to start on March 31, 2025.
- [10] Mr. Vyskovsky first applied for an interim order requiring the Prague apartment to be put up for sale in his notice of application for multiple relief filed on April 9, 2024. That application was heard by Associate Judge Keim on April 22, 2024. While other aspects of Mr. Vyskovsky's application were decided, the specific issue of whether the Prague apartment should be ordered to be sold was adjourned generally.
- [11] Mr. Vyskovsky then filed the present application on June 27, 2024. It seeks only relief in relation to the proposed forced sale of the Prague apartment. I heard the application in general chambers on July 11, 2024.
- [12] The parties are both self-represented. While Mr. Vyskovsky's notice of application contains a lengthy recitation of alleged facts, the legal basis is brief and the authorities referenced have no relevance to the present application. Ms. Vyskovska's application response is similarly deficient.
- [13] In particular, neither party identified the source of the Court's authority to order an immediate sale of family property prior to trial, or the applicable test to be applied by the Court when considering such relief. Furthermore, neither party addressed the extent to which such relief can and should be granted when the property proposed to be sold forcibly is located outside of British Columbia.
- [14] Accordingly, I directed the parties to prepare further written submissions that address the latter question in particular. The parties requested that the deadline for their submissions be set for September 9, 2024. I agreed.
- [15] Ms. Vyskovska complied with this deadline, filing her submissions on September 5, 2024. Mr. Vyskovsky did not comply. His submissions were filed on September 11, 2024. While he provided no explanation for his delay, I am exceptionally prepared to accept Mr. Vyskovsky's late filing. However, Mr. Vyskovsky should be aware that such unexplained non-compliance with Court directions is not acceptable generally, and should not become routine.

Mr. Vyskovsky's Position

- [16] Mr. Vyskovsky submits that the Prague apartment should be sold immediately because of the parties' financial circumstances, which he characterizes as being "close to insolvency".

- [17] In particular, he says that both parties are currently unemployed and their cash assets will be exhausted by October or November 2024. As such, they must sell some family property to fund their basic living expenses. In Mr. Vyskovsky's view, the Prague apartment is the most suitable of their assets for this purpose. He argues that it will have to be sold anyways, and that there would be tax advantages to selling it now in 2024 rather than after the trial in 2025. Mr. Vyskovsky also claims that the proposed sale has the support of the parties' tenants and their banks.
- [18] Mr. Vyskovsky's written submissions do not clearly address the legal question of the Court's jurisdiction to order the sale of property located in the Czech Republic. He seems to say that while a portion of the parties' dispute over the Prague apartment could in principle be dealt with by a Czech court, this real estate is an integral part of their family property. Therefore, it should be dealt with by this court in British Columbia.

Ms. Vyskovska's Position

- [19] Ms. Vyskovska's primary position is that the Supreme Court of British Columbia does not have any jurisdiction to order the parties to sell their real estate located in the Czech Republic.
- [20] In the alternative, if the Court cannot determine whether or not it has such jurisdiction based on the available evidence, she says that the matter should be left to be decided at the March 2025 trial.
- [21] In the further alternative, Ms. Vyskovska submits that the immediate sale of the Prague apartment is neither necessary nor beneficial at this time. She says that there are other family assets with greater liquidity than the Prague apartment that can be used to cover the parties' expenses until the trial. Furthermore, a rushed sale of the Prague apartment could lead to unnecessary losses and troubles for both the parties and their tenants.

The Law - Immediate Family Property Sale Applications

- [22] The Court's general authority to force co-owners to sell real estate is found at s. 2 of the Partition of Property Act, R.S.B.C. 1996, c. 347. The Court's specific authority to issue an interim order forcing the sale of family property prior to trial is provided for at s. 216 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] and Rule 15-8 of the Supreme Court Family Rules, B.C. Reg. 169/2019. Rule 15-8(1) states:

15-8(1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

- [23] The decision of this Court in *Morrison v. Greenwood*, 2020 BCSC 1356 at paras. 25 to 31 sets out the legal principles that apply to immediate sale applications. They can be summarized as follows.
- [24] Rule 15-8(1) authorizes the court to order the interim sale of property where it is necessary or expedient. If there is no necessity, the court still has the discretion to order a sale if it would be expedient to do so. However, consideration of whether the sale would be "expedient" differs from the "necessity" analysis, in that a finding of expediency involves a balancing of the interests of both parties and requires that the sale be advantageous to both.
- [25] Most importantly, the onus on a Rule 15-8(1) application is on the spouse seeking to change the status quo pending trial. Any doubts about the justice of an order for sale on an interim application should be resolved in favour of the status quo.
- [26] There is no exhaustive list of factors that must be considered on an immediate sale application. Some of the factors that have been considered in other cases include:
- (a) the needs of the children;
 - (b) the availability of alternative accommodation (if the property is or may be used as a residence for a party and/or the children);
 - (c) the emotional condition of the spouses;
 - (d) external economic factors;
 - (e) wasting of the asset;
 - (f) the capacity of both parties to maintain the asset;
 - (g) whether the sale will promote early settlement;
 - (h) whether the sale will defeat a spouse's claim for reapportionment;
 - (i) whether the sale is inevitable; and
 - (j) whether a spouse might be able to retain the property on a division of assets.
- [27] Furthermore, potential prejudice to a party is always a factor in determining an interim application of this nature that irrevocably alters the status quo.

The Law - Family Property Claim Jurisdiction

- [28] Sections 105 to 109 of the FLA set out the applicable principles for determining whether the Court has jurisdiction to hear a case involving a family property claim, when it should decline jurisdiction, and which choice of law should govern the dispute: *Souhaibb v. Javed*, 2023 BCSC 584 at paras. 125 to 141.
- [29] In particular, s. 106(1), (2) and (3) of the FLA provides for the Court's territorial competence over family property claims in these terms:

106(1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

106(2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:

- (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
- (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
- (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
- (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

106(3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:

- (a) property that is the subject of the proceeding is located in British Columbia;
- (b) the most recent common habitual residence of the spouses was in British Columbia;
- (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.

[30] Sections 106(4) and (5) of the FLA provide that the Court may nevertheless decline its jurisdiction over a family property division claim in these circumstances:

106(4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

106(5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:

- (a) [Repealed 2014-9-15.]
- (b) the relative convenience and expense for the spouses and their witnesses;
- (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
- (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
- (e) the extent to which an order respecting property or debt
- (i) made in another jurisdiction would be enforceable in British Columbia, and

- (ii) made in British Columbia would be enforceable in another jurisdiction;
- (f) the fair and efficient working of the Canadian legal system as a whole;
- (g) any other circumstances the court considers relevant.

[31] Determination of the applicable choice of law for a family property division claim is effected in accordance with ss. 107 and 108 of the FLA:

107 The proper law of the relationship between the spouses for the purposes of section 108 [choice of law rules] is

- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,
- (b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or
- (c) if the spouses did not have a common habitual residence, the internal law of the jurisdiction in which the spouse making an application for an order under this Part was most recently habitually resident.

108(1) In this section, "regime of community of property" means a system of law, including a regime of partnership of acquests, in which property owned or acquired and debt owing or acquired during the relationship between the spouses

- (a) are deemed to be owned or owing by both spouses, and
- (b) are divided, on separation of the spouses, as if both spouses equally owned the property or owed the debt,

but does not include a regime of separate property or a system of law under which a spouse's interest is deferred until or after the occurrence of an event that signifies the end of the relationship between the spouses.

108(2) If the Supreme Court takes jurisdiction under this Division, the Supreme Court must act in accordance with the rules set out in this section.

108(3) Subject to subsection (4), if spouses make an agreement respecting the division of property or debt, the substantive rights of the spouses in a proceeding under this Part are determined by the agreement.

108(4) The enforcement of an agreement under subsection (3) is subject to any restriction that the proper law of the relationship places on the ability of spouses to determine the division of property or debt by agreement.

108(5) Subject to subsection (3), if the spouses' first common habitual residence during the relationship between the spouses was in a jurisdiction in which a regime of community of property applies, property owned or acquired and debt owing or acquired during the relationship between the spouses that is property or debt to which the regime of community of property applies must be divided at the end of the relationship between the spouses according to that regime of community of property.

108(6) If neither subsection (3) nor (5) applies, the substantive rights of spouses in a proceeding under this Part must be determined according to the proper law of the relationship.

[32] Finally, s. 109 of the FLA prescribes the extent of the Court's authority to make orders in respect of "extraprovincial property", which is defined at s. 105 as property located outside of British Columbia:

109(1) If the Supreme Court has authority under this Division to make an order respecting extraprovincial property, the Supreme Court may make an order respecting the ownership and division of the extraprovincial property.

109(2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:

- (a) instead of dividing the extraprovincial property,
 - (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
 - (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;
- (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
 - (i) preserve the extraprovincial property,
 - (ii) provide for the possession of the extraprovincial property,
 - (iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or
 - (iv) provide for any other matter in connection with the extraprovincial property;
- (c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

Analysis

[33] I will begin with a discussion of the jurisdictional question.

- [34] As a preliminary comment, I thank Ms. Vyskovska for attempting to provide helpful submissions on this issue. She notes that, since the parties were habitually resident in British Columbia at the time this proceeding was started, s. 106(2)(c) of the FLA applies to provide the Court with territorial jurisdiction over the issue of family property division. I agree. The question then becomes whether the Court should exercise its s. 106(4) discretion and decline to exercise jurisdiction in relation to the Prague apartment given that it is extraprovincial property located outside of British Columbia,
- [35] Ms. Vyskovska submits that I should so decline, for three reasons. First, she says that much of the documentation relating to the Prague apartment is in the Czech language and will have to be translated into English for the court. Second, Czech property law may be applicable and expert evidence will need to be led to prove it. Third, she is unsure whether an order from this court regarding the Prague apartment would be enforceable in the Czech Republic. She cites three authorities in support of her position: (1) *Souhaaibb*; (2) *L.M.H. v. R.M.V.*, 2024 BCSC 1199; and (3) *Sekhon v. Sekhon*, 2023 BCSC 1413.
- [36] As for Mr. Vyskovsky, he has not addressed the jurisdictional issue by reference to any legislation or jurisprudence. He has also not responded to Ms. Vyskovska's arguments as to why the Court should decline jurisdiction summarized in the previous paragraph, even though her submissions were filed almost a week before his.
- [37] That said, the burden to demonstrate why the Court should decline jurisdiction pursuant to s. 106(4) of the FLA falls upon the party urging the Court to do so: *Jiang v. Shi*, 2017 BCCA 276 at paras. 27, 59 and 60. In this case, it is Ms. Vyskovska who bears this burden. I find that she has not met it.
- [38] In particular, it is not apparent on the evidence tendered that there is a need for the Court to consider presently either Czech documents or Czech law, or that an interim sale order would be unenforceable. In particular, the parties' pleadings and submissions indicate that the parties agree that the Prague apartment is jointly owned family property that must be divided along with the rest of their family property in accordance with the FLA. There is also no apparent impediment to a sale of the Prague apartment if the parties were to voluntarily agree to one. As such, I do not accept that there would be enforceability concerns given that the parties are subject to the Court's jurisdiction as habitual residents of British Columbia who are willingly participating in these proceedings.
- [39] Accordingly, I will proceed on the basis that I have the jurisdiction to make the order that Mr. Vyskovsky is seeking on this application. Before doing so, however, I caution the parties that my remarks on the jurisdictional issue should not be taken as a dismissal of Ms. Vyskovska's concerns when it comes to the trial. It is possible that the parties will need to tender Czech language documents into evidence. If so, they must indeed be formally translated into English using a certified translator (and not through informal translations prepared by the parties themselves). It is also possible that Czech law may be applicable to portions of the parties' dispute. If so, expert evidence will be needed to prove it. Simply put,

my jurisdictional determination only applies to the matter before me, and not to the parties' claim generally.

- [40] I turn now to the merits of Mr. Vyskovsky's application.
- [41] As has been noted, a Rule 15-8(1) immediate sale order can be granted either on the basis that it is "necessary" or "expedient". I understand that Mr. Vyskovsky seeks such an order on both grounds. I will consider them separately, beginning with necessity. I do so while recognizing that it is Mr. Vyskovsky who bears the burden to demonstrate that the order he seeks is warranted.
- [42] Mr. Vyskovsky's necessity argument is that the parties need to sell part of their family property now in order to finance their basic living expenses given that they are both currently unemployed. He also says that their Prague apartment is the most suitable candidate for such a sale. Ms. Vyskovska does not dispute that the parties are experiencing financial difficulties, but submits that they have other liquid assets that can be used to fund living expenses until the trial.
- [43] Both parties made Form F8 financial statements in early July 2024, just prior to the hearing of this application. On my review of these statements, I am not persuaded the parties' financial situation is such that it is necessary to force a sale of the Prague apartment now over the objection of Ms. Vyskovska. In particular, Mr. Vyskovsky deposes to having financial assets (i.e., savings and chequing accounts, stocks, mutual funds, etc.) worth approximately \$790,000. They include a number of bank accounts denominated in both Canadian dollars and Czech korunas whose balances are significant. Mr. Vyskovsky's evidence does not explain why it would not be possible to access sufficient funds from these assets to meet the parties' living expenses until the March 2025 trial. Furthermore, while Mr. Vyskovsky does not have a job at present, he is an experienced software engineer who continues to actively seek out work. In sum, I do not find that an immediate sale of the Prague apartment is necessary at this time.
- [44] With respect to expediency, Mr. Vyskovsky's primary argument is that there would be tax advantages to selling the Prague apartment now in 2024, rather than waiting for the trial to take place in 2025. While not clearly explained, I understand the basis for this assertion is Mr. Vyskovsky's expectation that the parties will ultimately pay more capital gains tax in the future if the sale is delayed. He says that the additional tax will be significantly greater than the rental income that might be earned in the interim.
- [45] On the other hand, Ms. Vyskovska argues that an immediate sale of the Prague apartment could create difficulties for the parties given uncertainties surrounding its current market value and the fact that there are tenants living on the property who have legal rights under the lease. Mr. Vyskovsky disagrees. He says that the Prague apartment will inevitably have to be sold in the context of the parties' family claim, and that the tenants have accepted this to be the case.

- [46] I have reviewed the affidavit evidence filed by the parties, discounting the Czech language documents that have not been accompanied by certified English translations. This evidence does not substantiate either Mr. Vyskovsky's optimistic speculation about the tax benefits of an immediate sale or Ms. Vyskovska's pessimistic speculation about the risks posed by such a sale. Viewed holistically, however, the evidence leaves me with doubt that forcing a sale of the Prague apartment now would be in the collective interest of both parties. As such, I have decided that the status quo should be maintained until the issue of whether, when, and how this property should be sold can be decided at the trial.
- [47] In sum, I find that Mr. Vyskovsky has not met his burden to show that an immediate forced sale of the jointly owned Prague apartment over the objection of Ms. Vyskovska is either necessary or expedient. This is particularly the case when the trial of the parties' family claim will take place in just six months.

Disposition

- [48] For all of these reasons, Mr. Vyskovsky's application is dismissed. The costs of this application shall be in the cause.

"Brongers J."

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