

CANADA / JUDGMENT

Wai v. Chung

2020 BCSC 34

COURT

Supreme Court of British Columbia

DECIDED

15 January 2020

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2020 BCSC 34 Wai v. Chung IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wai v. Chung, 2020 BCSC 34 Date: 20200115 Docket: S194800 Registry: Vancouver Between: Kimberly King Yi Wai Plaintiff And Karen Elizabeth Lau Chung and Anthony Man Kit Yim Defendants Before: The Honourable Madam Justice D. MacDonald Reasons for Judgment Counsel for the Plaintiff: C. Lo Counsel for the Defendants: E. Hatch Place and Dates of Trial/Hearing: Vancouver, B.C. November 12 and December 6, 2019 Place and Date of Judgment: Vancouver, B.C. January 15, 2020

Introduction

- [1] The defendants, Karen Elizabeth Lau Chung ("Ms. Chung") and Anthony Man Kit Yim, Ms. Chung's husband, seek the cancellation of a certificate of pending litigation (the "CPL") registered against their family residence in Richmond, BC (the "Property"). The CPL was registered because the plaintiff, Kimberly King Yi Wai, alleges during the period from April 2016 to December 2017 she invested monies (the "Investment Funds") into Ms. Chung's businesses without receiving any profits from them. She alleges the defendants misappropriated all or part of the Investment Funds to purchase the Property for their own personal benefit.
- [2] The defendants argue the CPL should be cancelled because the plaintiff's notice of civil claim does not plead an interest in the Property. Alternatively, the defendants argue the plaintiff's claim to the Property should be summarily dismissed pursuant to R. 9-6(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. In the further alternative, the defendants argue the CPL should be cancelled on the basis of hardship and inconvenience to the defendants pursuant to s. 256(1) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA].
- [3] The defendants specifically seek:
- a) An order that the plaintiff in the main action remove the CPL registered against the following lands within two business days from the date of the order: Parcel Identifier: 000 - 521 - 884 Legal Description: Lot 168 Section 30 Block 5 North Range 5 Wets New Westminster District Plan 66221;

- b) An order that the Registrar of Land Titles immediately thereafter remove the CPL registered against the Property;
 - c) Alternatively, an order that the CPL is canceled upon the defendant's posting security in the amount of \$100; and
 - d) An order that the plaintiff pay to the defendants costs of this application in any event of the cause payable forthwith after assessment.
- [4] The plaintiff opposes all the requested orders. The plaintiff argues she has a proprietary interest in the Property because her Investment Funds were misappropriated by the defendants to purchase the Property. Given her propriety interest in the Property, the CPL is justified. Factual Basis
- [5] Ms. Wai is an individual with an address for service of #236 - 5000 Kingsway, Burnaby, BC. Ms. Chung is a business person residing at 12331 Greenland Drive, Richmond, BC. Mr. Yim is a project manager residing at 12331 Greenland Drive, Richmond, BC.
- [6] In or about March 2015, Ms. Chung approached the plaintiff to invest money to start a business operating child care facilities. Ms. Chung allegedly represented to the plaintiff she could share half of any profits generated from the proposed business and they would share equally in the operation of the proposed business.
- [7] The plaintiff invested the Investment Funds in the proposed business but events did not unfold as she anticipated. She filed a notice of civil claim on April 24, 2019 alleging misrepresentations by the defendants, fraud, the misappropriation of funds, and corporate misconduct. She also alleged that the defendants used the Investment Funds for the purchase of the Property or, in the alternative, for the maintenance, upkeep, and mortgage payments required in relation to the Property.
- [8] On or about April 25, 2019 the plaintiff filed the CPL against the Property.
- [9] In her notice of civil claim, the plaintiff states the facts as follows:
- a) In March 2015, the defendant, Ms. Lau, induced the plaintiff to invest money to start a business to operate child care facilities;
 - b) Ms. Lau incorporated a company named Octopus Academy Inc. ("Octopus Academy");
 - c) Ms. Lau incorporated two additional companies, Octopus Academy Richmond Inc. ("Octopus Richmond") and Octopus Academy Surrey Inc. ("Octopus Surrey") to operate the child care facilities. Octopus Academy is the shareholder of Octopus Richmond and Octopus Surrey;
 - d) The plaintiff advanced various funds to Octopus Academy, Octopus Richmond and Octopus Surrey;

- e) On January 18, 2017 Ms. Lau confirmed to the plaintiff that Octopus Surrey had become Ms. Lau's own company and was separate from Octopus Academy and Octopus Richmond;
 - f) After the separation of Octopus Surrey, Ms. Lau transferred funds from Octopus Academy and Octopus Richmond to Octopus Surrey;
 - g) Ms. Lau failed to use the plaintiff's advances for the ongoing operation of Octopus Academy and Octopus Richmond. Instead, Ms. Lau used the plaintiff's investment for a real estate purchase;
 - h) Ms. Lau misappropriated the plaintiff's advances, or a portion thereof, to purchase the defendants' personal property located at 12331 Greenland Drive, Richmond, BC or, in the alternative, for maintenance, upkeep and mortgage payments in relation to the Property; and
 - i) The plaintiff seeks, [and has now filed] a CPL against the Property.
- [10] In her application response the plaintiff further states:
- a) During the period from April 2016 to December 2017, the plaintiff invested \$282,341.81 into Octopus Academy, Octopus Richmond and Octopus Surrey (the "Octopus Businesses") under the instructions of Ms. Lau;
 - b) The plaintiff has never received any profit or salary from the various Octopus Businesses;
 - c) The plaintiff has been left in the dark as to the management and financial matters of the Octopus Businesses;
 - d) The plaintiff is only able to see some bank documents which contain many withdrawals without the consent of the plaintiff.
 - e) On or about December 17, 2018 the defendants misappropriated all or part of the Investment Funds to purchase the Property for their own personal benefits.
- [11] In her notice of civil claim, the plaintiff seeks relief on various grounds: the defendants are liable in fraud; the defendants conspired against her; the defendants have been unjustly enriched; and the defendants have assets derived directly or indirectly from the proceeds of fraud. The plaintiff also seeks a declaration that she has an interest in the Property on the basis of a constructive trust, resulting trust, or unjust enrichment.
- [12] The primary issue before me is whether sufficient facts were pleaded to give rise to an interest in the Property that would support a CPL. Legal Basis LTA Section 215
- [13] A CPL is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the underlying issues can be resolved: *Chen v. Jin*, 2019 BCSC 567 at para. 8 [Chen].
- [14] Section 215 of the LTA governs the registration of CPLs:

- (1) A person who has commenced or is a party to a proceeding, and who is
- (a) claiming an estate or interest in land, or . may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.
- [15] Section 256(1) of the LTA provides that a CPL may be cancelled if there is evidence of hardship and inconvenience:
- (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements, apply for an order that the registration of the certificate be cancelled.
- [16] Section 257(1)(a) of the LTA permits the court, after hearing an application under s. 256(1), to cancel the CPL, in whole or in part, if it is satisfied that an order requiring security is proper in the circumstances and damages will provide an adequate remedy and security is provided.
- [17] The plaintiff relied on a 2011 decision by Justice Masuhara regarding a CPL. Masuhara J. engaged in a limited review of the merits and considered the pleadings but also considered evidence adduced to demonstrate whether there was a triable issue. He found there was an arguable case for a remedial constructive trust where misappropriated funds might be traced to the property. This could sustain a CPL on the property as it might trace or follow the misappropriated funds to the property: *Drucker, Inc. v. Hong*, 2011 BCSC 905 [Drucker] at paras. 36 and 39.
- [18] The law has evolved since 2011. When a CPL is challenged under s. 215, it is no longer permissible to assess the evidence filed in support of the claim for an interest in land: *Bilin v. Sidhu*, 2017 BCCA 429 [Bilin] at paras. 53-54. Instead, this Court will only consider whether the pleadings are adequate to establish a sufficient connection between the misappropriated funds and the Property to justify a CPL. If the merits of the claim are challenged, the defendant applies for a summary dismissal under R. 9-6(4): *Xiao v. Fan*, 2018 BCCA 143 at para. 27 [Xiao]; *Bilin* at para. 53.

- [19] Pursuant to s. 215(1)(a) of the LTA, the registration of a CPL must be grounded in a claim to an interest in land. Where the pleadings fail to establish an interest in land, the CPL should be cancelled on the basis that it does not meet the necessary precondition: Chen at para. 12, citing Xiao at paras. 19 and 27. In Xiao, the court stated at para. 27: "the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the Land Title Act is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered." The decision of Masuhara J. in Drucker predated these decisions.
- [20] Under the current approach the focus is on the plaintiff's pleadings. An interest in land must be established through the pleadings; a mere assertion with no proper factual foundation is insufficient: Chen at para. 27. As stated by Justice Holmes, as she then was, in Bajwa v. Singh, 2016 BCSC 916 at para. 20: "If the claim could not give rise to an interest in land, the CPL will be ordered to be cancelled because, essentially, it was improperly registered from the start."
- [21] In both Chen and 1077708 BC Ltd. v. Agri-Grow Farm Services Ltd., 2019 BCSC 977 [Agri-Grow], the plaintiffs alleged certain funds paid by the plaintiff were misappropriated by the defendant to maintain and preserve the subject properties. In both decisions the court held there was no information in the pleadings about how the property was maintained. There was no specified time period identified and there was no indication of how much money was misappropriated. These bald assertions, without a foundation as to how the money flowed from the defendants to the properties, did not meet the threshold of claiming an interest in land. As stated by Justice Murray in Agri-Grow at para. 39: "An interest in land can not be based solely on unsubstantiated assertions with no factual- whether they ultimately are proved to be true or not- underpinning. Such an extraordinary and powerful pre-trial tool must be grounded on more than mere conjecture."
- [22] The analysis rests on the pleadings filed in support of the CPL. It does not rest on the pleadings as amended after the fact. However, if a CPL is cancelled because the pleadings were inadequate when the CPL was filed, a plaintiff can seek to amend the pleadings to disclose a claim to an interest in land and subsequently file a valid CPL: Bilin at para. 68.
- [23] Hardship is not a consideration under s. 215: Bilin at para. 56. Equitable Remedies
- [24] The plaintiff seeks a declaration that she has an interest in the Property "on the basis of any or all of constructive trust, resulting trust, or unjust enrichment, and that the plaintiff's interest be vested and registered accordingly": notice of civil claim, Part 2, para. 7. As Justice Matthews explains in Nouhi v. Pourtaghi, 2019 BCSC 794, a constructive trust must satisfy two criteria:
- [26] The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: BNSF at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is

inadequate, insufficient or inappropriate in the circumstances: *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 92; *Li v Li*, 2017 BCSC 1312 at para. 227.

- [25] A remedy for constructive trust is unavailable when a monetary award for the claim is sufficient: *Drein v. Puleo*, 2016 BCSC 593 at para. 9 [Drein]. It is improper to file a CPL as leverage to secure a financial claim: *Drein* at para. 10; *Chen* at para. 11.

Analysis

- [26] To justify a CPL under s. 215 of the LTA, the pleadings must disclose an interest in land. This Court may cancel a CPL if it is satisfied that damages will provide adequate relief.
- [27] In the case before me, there is no factual foundation in the plaintiff's pleadings that gives rise to a CPL. My concerns are:
- a) The plaintiff did not plead an interest in the Property. She simply asserts the Investment Funds were used to purchase the Property. The last injection of Investment Funds was in December 2017. The purchase of the Property was December 2018. This was a whole year later.
 - b) The primary relief sought in the plaintiff's pleadings is in para. 1 of Part 2, judgment in favour of the plaintiff in the amount of \$282,341.81. This is a financial claim by the plaintiff for repayment of her Investment Funds. The trust and fraud claims are sought in the alternative.
 - c) Paragraph 7 of the plaintiff's pleadings sets out the basis for the relief with respect to the Property, constructive trust, resulting trust, and unjust enrichment. Not only are they alternative claims, no specific facts were pleaded to support these claims, including unjust enrichment.
 - d) The plaintiff did not claim anything to support a constructive trust or a resulting trust such as the holding of land or holding property beneficially for another. As set out in the jurisprudence, there must be more than broad statements and bald assertions.
 - e) More importantly, no funds were directly linked to the purchase of the defendants' Property. There must be some basis set out in the pleadings establishing a connection or nexus between the misappropriated funds and an interest in land.
- [28] As Justice Macintosh explained in *Drein* at para. 10, parties are not able to use a CPL to gain financial leverage or use it as: a bargaining tool to extract prejudgment payment of a financial claim [T]hat is not what CPLs are intended to protect. They are designed to preserve land claims pre-trial by preventing the land from passing to innocent third parties pre-trial, thereby undermining the claim. If the claim in essence is not for an interest in land, CPLs are not intended to be one of the weapons in the claimant's war chest.

[29] The plaintiff pleaded generally that the defendants used her Investment Funds to purchase the Property. How they did so is not set out or particularized in any way. The plaintiff's pleadings are vague and imprecise, without any direct connection between the Investment Funds and the Property.

[30] I have some sympathy for the position of the plaintiff because she may not be in possession of many of the relevant documents. That is the subject matter of another application. However, I am not persuaded the funds are sufficiently connected to the Property to satisfy the requirements of s. 215 of the LTA.

[31] In these circumstances it is appropriate to cancel the CPL.

[32] Based on the above, I need not address the defendants' alternative arguments.

Disposition

[33] The CPL registered against the Property is cancelled.

[34] The Registrar of Land Titles shall remove the CPL registered against the Property.

[35] Costs are in the cause. "D. MacDonald J."

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