

CANADA / JUDGMENT

Well Sing Property Development Ltd. v. MacDonald Platinum Marketing Ltd.

2021 BCSC 755

COURT

Supreme Court of British Columbia

DECIDED

22 April 2021

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2021 BCSC 755 Well Sing Property Development Ltd. v. MacDonald Platinum Marketing Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Well Sing Property Development Ltd. v. MacDonald Platinum Marketing Ltd.,

2021 BCSC 755

Date: 20210422

Docket: S229334

Registry: New Westminster

Between:

Well Sing Property Development Ltd.

Petitioner

And

MacDonald Platinum Marketing Ltd.

Respondent

Corrected Judgment: The text of the judgment was corrected at
paras. 17 and 18 on April 29, 2021.

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for the Petitioner, appearing by videoconference:

S. Xue

Counsel for the Respondent, appearing by videoconference:

W. Simek

Place and Date of Trial/Hearing:

New Westminster, B.C.

October 8, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 22, 2021

- [1] The petitioner, Well Sing Property Development Ltd. ("Well Sing"), is a company in the business of real estate development, and caused to be constructed and sold a project in Richmond, B.C., known as "Spark", consisting of 135 residential units. On May 10, 2016, prior to development of the project, Well Sing entered into an agreement with the respondent, MacDonald Platinum Marketing Ltd. ("Platinum"), referred to as a letter of engagement ("LOE") under which Platinum would provide marketing and sales services to Well Sing. Well Sing agreed to compensate Platinum for its services by way of commissions on sales, as detailed in the LOE.
- [2] All of the units in the Spark development have since been sold. Well Sing has paid Platinum 50% of the commissions which were to be paid to Platinum. However, Well Sing has refused to pay the balance of the commissions, amounting to approximately \$465,000, which funds have been placed in trust with Platinum's lawyers pending the findings in this petition.
- [3] The gist of the position of Well Sing is that Platinum undervalued the price of the units in the Spark development, causing loss to Well Sing. Well Sing seeks to use the funds held in trust to satisfy its claims against Platinum. Well Sing claims an equitable set-off as against the funds in trust.
- [4] In its amended petition, Well Sing seeks the following declarations:
1. A declaration that:
 - (a) There is no equitable assignment by [the] petitioner to the respondent of any interest or right in any proceeds of sale (the "Proceeds of Sale") of a residential condominium project (the "Spark Project")
 - (b) the respondent does not have any proprietary interest in the Proceeds of Sale.

Or, in the alternative,

- (c) a declaration that the petitioner has granted to the respondent an equitable charge in the proceeds of sale (the "Proceeds of Sale") of a residential condominium project (the "Spark Project") as security for the payment of commission.
- 2. An order that the respondent shall cause its solicitors at Allen/MacMillan to pay into the Court the amount that the solicitors had received and held in trust pursuant to the interim agreement between the parties, which is equal to the commission to the respondent plus the applicable GST, without deduction or setoff, within 3 business days of this Order, pending an agreement between the parties or any further order of this Honourable Court.
- 3. Costs of this proceeding be awarded to the petitioner.
- [5] In a separate petition issued September 25, 2020, Platinum seeks a declaration that:
 - a) Well Sing is contractually obligated to pay commissions owing to Platinum;
 - b) Well Sing assigned the portion of the sale proceeds that constitute Platinum's commissions, for the benefit of Platinum;
 - c) The commissions are held in trust for the benefit of Platinum;
 - d) Well Sing has no interest in the funds held in trust;
 - e) Allen & McMillan LLP, as trustee, is at liberty to pay out the funds in trust to Platinum; and
 - f) Costs.
- [6] Well Sing has also issued a notice of civil claim as of March 14, 2019, seeking damages for negligence on the part of Platinum in carrying out its duties in connection with the Spark project. That action is being defended by Platinum through its errors and omissions insurer.

BACKGROUND

- [7] The Spark project was the first real estate project undertaken by Well Sing in Canada. Well Sing sought out and interviewed several real estate brokers active in the Vancouver area, before entering into the LOE with Platinum. Under the LOE, Platinum was to attract buyers to the project, based upon the many years of experience as real estate brokers of the principal of Platinum, Vince Taylor, and others. The scope of work of Platinum under the LOE was set out in article 2 of the LOE, under the general heading of "all marketing management and consulting duties for the Property. Marketing set-up, ongoing marketing management, and other project management duties which may include .", and continues to list duties through the four phases of the project. The Phase I duties included "market study and research, competitive pricing and market analysis ."
- [8] Mr. Taylor has deposed in his affidavit of July 31, 2020 as follows:

17. As soon as Platinum was retained by Well Sing, we started performing regular Current Market Analyses ("CMAs") and provided them to Well Sing for the purpose of tracking comparable products in Richmond. This practice continued frequently during the time of Platinum's engagement to make sure all pricing was up to date.
18. Real Estate pricing is based on a spot market - much like gold, oil or other commodities. It is impossible to predict whether the market will go up or down in the future after an agreement has been reached and the transaction price agreed to by both parties. That is the nature of real estate in all asset classes, pre-sale or otherwise.
19. Platinum is not a party to the sale. Its most important role is to bring the buyer and seller together and facilitate the transaction between two contracting parties. Platinum fulfilled this duty entirely and earned its commissions.
- [9] Platinum's remuneration under the LOE was set out in article 3.2 under the sub-heading "Marketing and Commission Fees":
 - (a) A commission of \$1,000, plus all applicable taxes payable on the Commission, for 55 owner privilege Units selected by the Owner and sold in the Project during the Term
 - (b) a commission of 2.000% of the Net Contract Sales Price, plus all applicable taxes payable on the Commission, for the remainder of the Units sold in the Project during the Term; and

The Vendor shall pay PLATINUM 50% of the Marketing and Sales Commission Fee for each unit sold once the Contract of Purchase and Sale for the unit is deemed Firm and Binding with all subjects satisfied and removed and will be paid without deduction or set-off. The Marketing and Sales Commission Fee is deemed to have been earned upon the receipt of a Firm and Binding, unconditional Contract of Purchase and Sale:

The remaining 50% of the Marketing and Sales Commission Fee is payable upon the successful completion of each transaction. Commissions shall be paid by cheque via the Statement of Adjustments at the closing of each transaction by the Vendors or Purchasers lawyer upon receiving an irrevocable direction to pay from the Vendor.

- [10] Well Sing paid the first 50% of commissions to Platinum, as called for in the LOE.
- [11] Included in Exhibits "H" and "I" to the affidavit of Dong Wei (also known as "Stevie" Wei) filed July 27, 2020, are exchanges of email messages between Platinum and Well Sing, in which the pricing of all units of the Spark project was discussed in anticipation of an upcoming sales event in March of 2017.
- [12] Mr. Wei also deposed to signing a pricing form on March 8, 2017, approving the marketing list offering prices "that Platinum had recommended for the Units" (Dong Wei affidavit, July 27 2020, para. 25). After further discussions with his father and others regarding increasing prices in the real estate market, Mr. Wei signed an amended list of marketing list prices on March 12, 2017, with slightly increased prices from the March 8, 2017 list.

- [13] It is not in issue that on March 17, 2017, at the "VIP Sales Day", agreements of purchase and sale were entered into for all of the available units in the Spark development.
- [14] The sales of all units were completed by the end of August 2020, however, prior to completion, counsel for Well Sing sent a letter to counsel for Platinum advising that Well Sing would not make the second commission payment, i.e. the last 50% payment, but agreed to the remaining amount of the deposit being deposited in trust. The funds were eventually deposited into the trust account of Platinum's solicitors on terms agreed to by both parties.
- [15] The funds representing the balance of the commission claimed by Platinum remain in trust.
- [16] Mr. Taylor has also deposed that an email was sent by a lawyer for the Real Estate Errors and Omissions Insurance Corporation to Mr. Taylor and is attached to his affidavit, which confirms the insurer will pay on behalf of Platinum any damages arising out of any error made by Platinum.
- [17] In addition to the affidavit of Mr. Taylor, Platinum filed an affidavit of Matthew Wansink, a lawyer with experience in real estate conveyancing. Mr. Wansink deposed that, in a typical real estate transaction, "the usual accepted practice is that realtors' commissions are paid out from the proceeds of sale, held in trust by the buyer's lawyer, at the closing of the real estate transaction."
- [18] Clause 3.2(b) of the LOE is consistent with the accepted practice referred to by Mr. Wansink, save that the LOE states the balance of commission is to be paid on closing by either the vendor's or purchaser's lawyer, whereas Mr. Wansink states the usual practice is for the buyer's lawyer to pay the commission without reference to the vendor's lawyer.

DID WELL SING GRANT AN EQUITABLE ASSIGNMENT OF THE PROCEEDS OF SALE?

- [19] As stated previously in these reasons, Well Sing has commenced an action against Platinum for damages for breach of the LOE, alleging that Platinum underestimated the selling price of the units in the Spark development. The application before me is for a declaration that Well Sing has not granted an equitable assignment of any of the proceeds of sale from the Spark project and that Platinum has no proprietary interest in the proceeds of sale.
- [20] Effectively, Well Sing is seeking an order that the funds held in trust, which have been designated to pay the balance of the real estate commissions sought by Platinum, remain in trust as security for Well Sing's claim for damages. Well Sing is effectively seeking pre-judgment execution should its claim for damages be successful.
- [21] Well Sing submits that none of the terms in "the LOE expressly provides that Well Sing would assign an interest in the Proceeds of Sale to Platinum for payment of the Commission".

- [22] In its petition, Well Sing relies on *Lawson Graphics Pacific Ltd. v. Simpson* (1987), 12 B.C.L.R. (2d) 126 (S.C.) at para. 11 for the principle that, so long as an agreement "clearly show[s] an intention that the assignee is to have the benefit of the chose in action", there is an equitable assignment.
- [23] Well Sing alleges that the wording of the LOE, specifically article 3.2, does not clearly support the existence of an agreement to pay Platinum from the proceeds of sale. Therefore, there is no equitable assignment. In support of its submission, Well Sing refers to the last para. of article 3.2 of the LOE, which refers to commission to be paid from funds other than the proceeds of sale, in the circumstance that the contemplated sale does not proceed.
- [24] In my opinion, the submissions of Well Sing in this respect ignore the clear wording of article 3.2 of the LOE.
- [25] The sales contemplated by the LOE did complete. Article 3.2 is clear that "[t]he remaining 50% of the Marketing and Sales Commission Fee is payable upon the successful completion of each transaction", and then provides how the payment is to be made to Platinum, i.e. payment of commissions "shall be paid by cheque via the Statement of Adjustments at the closing of each transaction by the Vendors or Purchasers lawyer upon receiving an irrevocable direction to pay from the Vendor."
- [26] The balance of the Marketing and Sale Commission Fee was payable and a cheque for the fee was to be delivered to Platinum by the lawyer holding the sale proceeds, upon the owner providing an irrevocable direction to pay. The provision of an irrevocable direction to pay sets out how Platinum was to be paid, not if Platinum was to be paid.
- [27] A very similar situation arose in the decision of *Grech v. Stanley*, 2019 BCSC 2437, a decision of Justice Skolrood, in which the facts were very similar to the case before me. In *Grech*, the law firm holding funds in trust which were to be paid to the realtor as commission applied to interplead the funds into court. The owner was disputing the realtor's entitlement to the commission, as is the case with Platinum. While *Grech* was in the context of an interpleader application, the principles regarding entitlement to the disputed commission are relevant to this case. Justice Skolrood stated as follows:
- [10] The courts have also made it clear that interpleading proceedings are not available to obtain prejudgment execution or security against some future potential judgment.
- [11] In this case there are not two competing claims to the specific funds held in trust by Farris. For their part, the plaintiffs assert a contractual right to the funds as the commission properly earned pursuant to the terms of the MLS contract. In contrast, Mr. Stanley has no direct claim for an interest in the funds held in trust. Rather, as is evidence from his amended response to civil claim and his counterclaim filed in response to the plaintiffs' claim, he has at best a claim in negligence or for breach of contract against the plaintiffs, which, if successful, may result in an award of damages.

- [12] The essential criterion for the granting of interpleader relief therefore does not exist. I would add that to permit Mr. Stanley to tie up the funds at this stage would be to, in effect, grant him a form of prejudgment execution that he would not otherwise be entitled to.
- [28] In Grech, the agreement between the parties included similar provisions for the payment of commissions to the realtor.
- [29] Justice Skolrood continued:
- [14] In this case there is no competing evidence to weigh. I am satisfied on the evidence, which is largely in the form of an agreed statement of facts, that the plaintiffs have established their claim to the commission funds. The right to those funds arose under the original MLS contract upon the execution of a legally enforceable contract of purchase and sale.
- [19] Returning then to Farris's notice of application, I order that Farris pay the sum of \$228,795 to the plaintiffs. ...
- [22] Mr. Stanley can proceed with his counterclaim as he sees fit. There is no suggestion that the plaintiffs would be unable to satisfy any monetary judgment that Mr. Stanley might obtain in the event he is successful in establishing negligence or breach of contract.
- [30] There is no significant fact or principle separating Grech from the case at bar. As was the case in Grech where there was an agreed statement of facts, the facts in the case before me are not in issue and it is a question of interpreting the words of the LOE. As in Grech, the property has been sold and the realtor is looking for payment and is facing a claim for negligence.
- [31] From the clear words of the LOE, an equitable assignment was therefore created in favour of Platinum: see *Coast Realty Group (Campbell River) Ltd. v. Neilson Island Holdings Inc.*, 2015 BCSC 187 at paras. 93-94. Under article 3.2 of the LOE, that portion of the sales proceeds secured from the sale were specifically earmarked for Platinum, and while in the solicitor's trust account following the sale, were held in trust for Platinum: *Coast Realty Group (Campbell River) Ltd.* at para. 91.

EQUITABLE SET-OFF

- [32] In *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (C.A.) at para. 23, the Court set out the requirements for a claim of equitable set-off:
1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands - *Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.).
 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed - *British Anzani*.

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim - Federal Commerce & Navigation Ltd.
 4. The plaintiff's claim and the cross-claim need not arise out of the same contract - Bankes v. Jarvis, [1903] 1 K.B. 549 (Div. Ct.); British Anzani.
 5. Unliquidated claims are on the same footing as liquidated claims - the Newfoundland case.
- [33] Well Sing claims the equitable ground on which it refuses to pay the balance of the commission is that Platinum was in breach of its duties under the LOE as well as its duty of care to Well Sing.
- [34] I find there are no equitable grounds for Well Sing to withhold payment of Platinum's commissions. I have found that Platinum has earned its commissions and is entitled to payment. Well Sing has a claim for damages which, if successful, will result in an award of damages to be paid by Platinum's insurer. Well Sing is fully aware of the significance of the insurance coverage, and there is no need to protect them from Platinum's demands.
- [35] Although I am not being tasked to assess the strengths or weaknesses of the Well Sing's claims, noting the evidence of Platinum to the effect that the sale prices for the units at Spark were, at the time, the highest price per square foot for similar projects in the history of Richmond, B.C., it would appear as though Well Sing likely faces a difficult hill to climb to succeed against Platinum.
- [36] The claim of Well Sing for equitable set-off is of no merit.

SECURITY INTEREST

- [37] Finally, Well Sing claims in the alternative that it assigned only a security interest in the commissions.
- [38] The logic of this alternate claim is not understandable and leaves the court with the impression that Well Sing is simply advancing every possible claim under every possible cause of action of which it can conceive.
- [39] Well Sing could only be assigning a security interest in the funds if it was aware of a debt when the LOE was executed in 2016. There was no debt to secure, and so this claim must also fail.

CONCLUSION

- [40] The petition of Well Sing is dismissed, with costs to Platinum. I find that Platinum is contractually entitled to its commissions owing; that Well Sing equitably assigned the portion of the sale proceeds that constitute Platinum's commissions to Platinum; and that the commissions are held in trust for Platinum's benefit.

"Jenkins J."

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