

CANADA / JUDGMENT

Wosnack v. Ficych

2021 BCSC 2651

COURT

Supreme Court of British Columbia

DECIDED

27 September 2021

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2021 BCSC 2651 Wosnack v. Ficych IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Wosnack v. Ficych, 2021 BCSC 2651 Date: 20210927 Docket: S227547 Registry: New Westminster Between: Barry Edward Wosnack Plaintiff And Roger Charles Ficych, Kevin Michael Wosnack, Kevin Michael Wosnack in his capacity as Executor of the Will and Trustee of the Estate of Donald Kay Daken, Deceased, Sharon Ruth Kjos Defendants Before: The Honourable Mr. Justice Basran Oral Reasons for Judgment In Chambers Counsel for the Plaintiff, appearing via telephone conference: D. Magnus Counsel for the Defendant, Roger Charles Ficych, appearing via telephone conference: B. Rosberg Counsel for the Defendant, Kevin Michael Wosnack, appearing via telephone conference: B. Vickers No other appearances Place and Date of Hearing: New Westminster, B.C. September 27, 2021 Place and Date of Judgment: New Westminster, B.C. September 27, 2021

- [1] THE COURT: This is an application made by Kevin Wosnack to cancel a Certificate of Pending Litigation ("CPL") pursuant to ss. 256 and 257 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA].

Background

- [2] The matter involves a property owned by Donald Daken located at 42125 Ratzlaff Road, Chilliwack, BC (the "property"). Mr. Daken died on November 22, 2017.
- [3] At the time of Mr. Daken's death, he had four step-children, Barry Wosnack, Roger Ficych, Kevin Wosnack, and Sharon Kjos.
- [4] The property that is the subject of this application is currently subject to a CPL. The application is to remove the CPL because the property is about to be sold. There is an offer to buy at \$1.425 million. The property had been listed for \$1.2 million. The subject removal date is September 30, 2021. Positions of the Parties

- [5] The applicant's position is that the CPL should be removed pursuant to ss. 256 and 257 of the LTA because failing to do so will cause hardship and inconvenience. He asserts that of the net sale proceeds, somewhere between \$200,000 and \$400,000 should be withheld on the basis that he has a very strong claim that the property should pass outside of the estate and should be considered to be a gift to the applicant from the deceased, Mr. Daken. All parties agree that the CPL may be lifted.
- [6] The applicant asserts that there is a gift letter and associated notes from the lawyer, Mr. Klassen, a very experienced lawyer called in 1984, who took instructions from Mr. Daken, and that together with a note from Mr. Daken's doctor, Dr. Ken Dueck, constitutes a very strong case that the gift letter is valid and that the property ought to pass outside of the estate.
- [7] The applicant's position is that only \$200,000 to \$400,000 should be withheld from the sale because of the strength of their case and that the probability of a party's success on a CPL is a relevant consideration pursuant to s. 257(3) of the LTA.
- [8] The two respondents appearing on this application are Mr. Roger Ficych and Mr. Barry Wosnack. Mr. Sharon Kjos did not participate in this application.
- [9] Mr. Ficych and Mr. Barry Wosnack take the position that the CPL can be lifted. Therefore, in essence, they agree that there will be hardship and inconvenience if the sale is not allowed to proceed. However, where they differ from the applicant is that they suggest that the entire net sale proceeds ought to be held in trust.
- [10] Mr. Ficych asserts that the creation of the gift letter occurred under uncertain circumstances, and this is because the notice of civil claim asserts that the property was owned by the estate and that Mr. Daken was subject to dominance by the applicant. Mr. Ficych further points out that removal of the CPL is not an impediment to sale and that the only issue is access to funds. He asserts that if the subject property is properly part of the estate, then all of the proceeds from it should be divided equally among the four beneficiaries of Mr. Daken's will.
- [11] Mr. Ficych further points out that this application has been brought with short leave, and disclosure has not been completed. Mr. Ficych's counsel also points out that neither the full medical file of Mr. Daken nor Mr. Klassen's full legal file have been disclosed. He refers to *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, in which the onus shifts to the person in a position of dominance and points out that a full accounting may be required before any amounts should be available to the applicant. He asserts that if this court were to make some portion of the sale proceeds from the property available to the applicant, this would amount to a summary judgment.

- [12] Mr. Barry Wosnack asserts that the circumstances surrounding the execution of the gift letter are uncertain, as are the circumstances surrounding Mr. Klassen's retainer. He points to the letter in the materials dated August 9, 2019, in which it is unclear whether Mr. Klassen had been retained by Mr. Daken, by the applicant or by both of them. He also points out that there is no evidence of the circumstances surrounding the gift, only the gift letter, which he describes as some type of a form letter.

Analysis

- [13] In *Dhillon v. Dasta*, 2019 BCSC 729, this court set out the test to be applied on applications of this type. I am satisfied that hardship and inconvenience has been established. This is because impeding a sale process or effecting the exercise of an option to sell a property amounts to inconvenience, as set out in *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2007 BCSC 1379. However, once hardship and inconvenience are established, the CPL is not automatically removed. The court can cancel the CPL if posting of security is satisfied, and one of the relevant considerations is the financial worth of a party called upon to post security.
- [14] I note from this application that one of the reasons why the applicant seeks to sell the property at this time is he is unable to maintain this property and pay the amounts required for its on going maintenance, including annual property taxes. There is no evidence before me of the applicant's ability to post security.
- [15] In my view, it is far too early in the proceedings to make a determination that would effectively grant the applicant a portion of the proceeds from the sale of the subject property. This is because examinations for discovery have not been completed. Disclosure has not taken place. This matter is taking place in the context of an interlocutory application on short leave. Medical records have not been disclosed. Nor have the lawyers filed Mr. Klassen's file. Decision
- [16] I am not satisfied that, in these circumstances, a case has been made out pursuant to s. 257(3) of the LTA in which it can be determined that the applicant is entitled to a portion of the proceeds. On that basis, I am going to grant the order: permitting the sale of the property for the sale price of \$1.425 million on the condition that the net sale proceeds be held in trust pending further order of this court or agreement of the parties.
- [17] Counsel, are there any submissions on costs in this matter? [SUBMISSIONS ON COSTS]
- [18] THE COURT: I am satisfied that the respondents in this matter were successful. On that basis, Mr. Barry Wosnack and Mr. Roger Ficych are entitled to the costs of their application in any event of the cause. "Basran J."

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Prepared on 28 October 2026 · Esheria