

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Li Estate (Trustee) v. Li*,
2023 BCSC 893

Date: 20230530
Docket: S228684
Registry: Vancouver

Between:

**Crowe MacKay & Company Ltd., in its capacity as
Trustee of the Estate of Xiao Bo Li, a Bankrupt**

Plaintiff

And

Clinton Li, Danny Ting Chung Ma

Defendants

Before: Master Scarth

Reasons for Judgment

Counsel for the Plaintiff:

J.R. Pollard
S. Fischer, Articled Student

Counsel for the Defendants:

J.E. Roos

Place and Dates of Hearing:

Vancouver, B.C.
April 5 and 18, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 30, 2023

[1] The defendants apply for an order cancelling a certificate of pending litigation (“CPL”) filed against their property on West 57th Avenue in Vancouver. They say that the CPL is causing hardship and inconvenience, specifically, preventing their planned development of the property.

[2] The plaintiff concedes that the defendants are inconvenienced by the CPL but says that they should have to post substantial security if the CPL is cancelled.

[3] The defendants say that an undertaking to pay damages is sufficient, or, alternatively, that any security should be nominal given that the plaintiff’s claim to an interest in land is unlikely to succeed.

THE ACTION

[4] The plaintiff is the trustee in bankruptcy of the estate of Xiao Bo Li. Ms. Li is the mother of the defendant Clinton Li.

[5] The plaintiff commenced this action in October 2022 alleging that, *inter alia*:

- a) Ms. Li (the bankrupt) and the defendant Danny Ting Chung Ma were the joint owners of the property at 3656 West 6th Avenue in Vancouver which was sold for a net profit of \$1,715,663.44. Ms. Li was entitled to 50% of the proceeds, or \$857,831.72.
- b) Thereafter Ms. Li and Mr. Ma deposited the sale proceeds into a joint account and subsequently transferred them to Mr. Li for the purpose of purchasing the property at 2092 West 57th Avenue in Vancouver.
- c) On or before September 23, 2021, Mr. Li purchased the West 57th property with the sale proceeds and a mortgage, on which Mr. Ma was covenantor.
- d) On or around September 9, 2022, Mr. Li transferred a 50% share of the West 57th property to Mr. Ma.

[6] With respect to the presumption of resulting trust, the plaintiff alleges:

25. ... Ms. Li transferred or made available Ms. Li's Share of the Sale Proceeds to Mr. Li for the purpose of allowing Mr. Li to purchase the West 57th Property, or a half interest therein, and this transaction was in purpose and effect a gratuitous transfer of Ms. Li's half interest in the West 57th Property to Mr. Li.

26. Mr. Li is the adult son of Ms. Li and holds a half interest in the West 57th Property on a resulting trust for Ms. Li.

[7] The plaintiff seeks declarations that, *inter alia*:

a) Mr. Li holds his interest in the West 57th property in trust for the plaintiff on an express or resulting trust;

b) Mr. Li held his interest in Ms. Li's share of the sale proceeds of the West 6th property in trust for Ms. Li on an express or resulting trust, and a tracing of those funds into the West 57th property; and

c) Mr. Ma acquired his interest in the West 57th property from funds derived from Ms. Li's share of the West 6th property proceeds.

THE STATUTORY PROVISIONS

[8] The defendants apply pursuant to ss. 256 and 257 of the *Land Title Act*, R.S.B.C. 1996, c. 250, the relevant portions of which provide that:

256 (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.

...

257 (1) On the hearing of the application referred to in section 256(1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on

- (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
- (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court,

...

- (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

ISSUE

[9] A number of concessions have been made which narrow the issue before the Court on this application.

[10] The plaintiff concedes that the defendants have experienced hardship and inconvenience, and will continue to do so, if the CPL is not cancelled. This is the foundation for an order for cancellation under s. 257.

[11] The defendants concede that the plaintiff has an arguable claim to an interest in land, in particular, the claim of resulting trust against Mr. Li.

[12] The plaintiff concedes that damages are an adequate remedy for that claim: s. 257(1)(a)(i).

[13] What remains, therefore, is the determination as to what security should be ordered under s. 257(1)(a)(ii). There is no dispute that the Court has a discretion under s. 257(3) in determining the security to be provided by the defendants or that, in making that determination, the Court has discretion to consider the probability of the plaintiff's success in its claim to an interest in land: *Wosnack v. Ficych*, 2022 BCCA 139, paras. 27 and 28.

DISCUSSION

[14] The defendants submit that the plaintiff's only claim for an interest in land is the claim in resulting trust against Mr. Li in relation to the West 57th property. They say that claim is a weak one and that, accordingly, an undertaking as to damages is

sufficient security. The defendants rely on *De Cotiis and Others v. De Cotiis et al*, 2004 BCSC 1658. There Justice Sigurdson concluded, after considering a “vast amount of material ... that touched on the merits of the plaintiffs’ claim”, and after hearing argument over several days, that the plaintiffs had an arguable case; that damages provided adequate relief; that the plaintiffs’ case was not a strong one; and that accordingly, an undertaking as to damages was sufficient: para. 79.

[15] The defendants acknowledge that Ms. Li was registered as a joint owner to the West 6th property. They also concede that the proceeds of sale of West 6th were used in the purchase of West 57th which was initially in the name of Mr. Li alone. However, the defendants say that although the West 6th property was registered in the names of Ms. Li and Mr. Ma, Ms. Li was never a beneficial owner. They say that Ms. Li never contributed to the purchase of the West 6th property or to its maintenance and that her name was on title for “business purposes” only. Their position is that Ms. Li’s interest was held in trust for Mr. Ma who contributed the entire down-payment for West 6th. This position, they say, is bolstered by Ms. Li’s statement to the bankruptcy trustee that at the time of her assignment she no longer had an interest in the sale proceeds.

[16] I am mindful of the caution required where an action is in the early stage of litigation and the record is undeveloped: see *Wosnack*, para. 42. This may be why the analysis of the likelihood of success often occupies only a few paragraphs in the relevant authorities. *De Cotiis* is an exception but the record there was considerably more developed and the action more complex.

[17] On the materials before me, it is fair to conclude that, contrary to the position of the defendants, the plaintiff’s claim to an interest in the West 57th property by way of resulting trust has a strong probability of success. In other words, it appears probable that the plaintiff will be able to establish that: Ms. Li had an interest in the West 6th property; on the sale of West 6th, the proceeds were transferred gratuitously to Mr. Li, her adult son; and that Mr. Li used the proceeds to purchase the West 57th property.

[18] First, Ms. Li was on title to the West 6th property jointly with Mr. Ma: see *Demir v. Peyman*, 2009 BCSC 445 at para. 9, as to the statutory presumption which arises when individuals are registered on title: “if your name is on the title in the Land Title Office, you own that property”. The defendants’ position appears to be, in essence, that this was a sham on the part of Mr. Ma and Ms. Li, that Ms. Li was being held out as having an interest in the property for the purposes of obtaining financing. It seems unlikely that this would be a basis upon which a court would find that the defendants had met the onus of rebutting the presumption that Ms. Li had an interest in West 6th. Further, as the plaintiff submits, Mr. Ma’s evidence that he loaned Ms. Li money towards the down-payment for the purchase of the West 6th property negates a finding of a purchase money resulting trust in favour of Mr. Ma: *Bostrom v. Bigford*, 2019 BCSC 79 at paras. 92 and 93.

[19] Second, Ms. Li’s statement to the trustee is to the effect that she “lost her right to claim sales proceeds”. It is not clear what Ms. Li means by that and in any event, her credibility is in some doubt. Her evidence was found to be unreliable by Justice Verhoeven in *Chao Yin Canada Group Inc. v. Xenova Property Development Ltd.*, 2021 BCSC 1445 at paras. 54 to 59. The resulting judgment in favour of Chao Yin Canada Group Inc. – \$154,597, plus special costs assessed at over \$300,000 – is the main debt in Ms. Li’s bankruptcy.

[20] Third, there is evidence that the West 6th sale proceeds were deposited into an account which at the time of the deposit was in the names of Ms. Li and Mr. Ma. Mr. Ma’s evidence is that this was for expediency only, and not because Ms. Li had an interest in the funds, but his evidence is not consistent on this point.

[21] There is no dispute that the funds were transferred to Mr. Li and used in the purchase of the West 57th property. Mr. Li says that he provided consideration but I accept the plaintiff’s submission that the evidence supports a finding that any consideration was received by Mr. Ma, not Ms. Li.

[22] While again acknowledging that at this early stage of the proceeding some caution is required in assessing the merits of the plaintiff’s case, I conclude that it

has a good probability of success. Having so concluded, I do not propose to address the issue of whether the plaintiff's claims against Mr. Ma amount to a claim to an interest in land.

[23] It follows from my finding that an undertaking is not sufficient security. If I am wrong in my conclusion on the strength of the plaintiff's case, I would nevertheless conclude that an undertaking is not adequate in the circumstances here. I accept the submissions of the plaintiff that the evidence appears to show that the defendants do not view the *Chao Yin* judgment as being enforceable, making their undertakings less reliable.

[24] I turn to the question of what amount should be required to be posted as security.

[25] The defendants say a nominal amount is sufficient, or at the very most, an amount which reflects the value of Mr. Li's interest in West 57th. The defendants submit that this value is \$500,000, which is half the equity of West 57th based on the most recent property tax assessment.

[26] In my view, it is appropriate to require that the amount sought by the plaintiff of \$857,831.72 or half of the West 6th sale proceeds, be posted on cancellation of the CPL. First, the value of Mr. Li's interest in the property has yet to be determined. It is likely to considerably exceed the security amount proposed by the defendants. Second, it is consistent with the authorities to require security equal to, while not exceeding, the claim made by the plaintiff. Finally, there is no basis upon which to conclude that the defendants are not financially able to post security in that amount. They have been able to secure the necessary financing for the development of West 57th: see *Dhillon v. Dasta*, 2019 BCSC 729 at para. 25.

[27] There will therefore be an order for cancellation of the registration of the CPL on the posting of security in the amount of \$857,831.72. The plaintiff having been successful on the issue before the court is entitled to its costs in the cause.

“Master Scarth”