IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Martin v. Morris,*
2023 BCSC 1020

Date: 20230523
Docket: S229962
Registry: Vancouver

Between:

Rochelle Martin, in her personal capacity and in her capacity as the Personal Representative of the Estate of Robbie Lee Morris

Plaintiff

And

Harvey Denis Morris

Defendant

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	R. Mannering
Counsel for the Defendant:	D.A. Hobbs M. McGarry
Place and Date of Hearing:	Vancouver, B.C. May 15, 2023
Place and Date of Judgment:	Vancouver, B.C. May 23, 2023

[1] **THE COURT:** This is an application by the defendant in this action seeking judgment by way of summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*. The defendant seeks to have the claim dismissed in its entirety as being entirely devoid of merit.

[2] The application is opposed by the plaintiff. While the plaintiff acknowledges that the claim cannot succeed as currently pleaded, she says the claim can be amended to make out a viable cause of action and that the application should be dismissed, or at least adjourned, so that she can have the opportunity to amend the claim accordingly and proceed to discoveries. She says the claim, as she hopes to amend it, does not lend itself to summary disposition, given the conflicting evidence before the court on this application.

[3] By way of background, the plaintiff, Rochelle Martin, is the administrator of the Estate of Robbie Lee Morris who died on September 24, 2021. She was the deceased's common-law spouse when he died. She has received a grant of administration from this court on that basis.

[4] In her capacity as administrator of the estate, she has brought this action against the defendant, Harvey Morris, who is the father of the deceased.

[5] The subject matter of the claim consists of two pieces of real property in which it is alleged the deceased held a beneficial interest. The plaintiff seeks to have the estate recognized as the beneficial owner of both properties and paid compensation accordingly.

[6] The first of those properties is an apartment on Halifax Street in Burnaby (the "Halifax Property"). It is not disputed that when it was acquired, title to the Halifax Property was taken in the name of both the defendant and the deceased as joint tenants. It is also not disputed that the defendant purchased the Halifax Property on December 18, 2017 by making a down payment and by taking out a mortgage, and that he paid the mortgage on his own until the Halifax Property later came to be sold.

[7] The deceased did not have the financial ability to acquire a property, nor did he have adequate credit standing to qualify for a mortgage. The deceased was added as a covenantor under the mortgage, not to share the burden of making payments, but rather to assist him to improve his credit worthiness.

[8] The plaintiff and the deceased resided together at the Halifax Property until the deceased died unexpectedly in September 2021. After that, title transferred into the defendant's name alone through his right of survivorship as the surviving joint tenant, and he has since sold the Halifax Property to a third party.

[9] The plaintiff asserts in this action the right of the estate to receive its share of those proceeds of sale on the basis that the defendant held his interest in the Halifax Property in trust for the deceased.

[10] The second property in issue in this action does not yet exist. It is going to be located in a building on Gilmore Avenue in Burnaby that is still under construction and expected to be completed in 2024 (the "Gilmore Property").

[11] The background on the Gilmore Property is as follows. On August 23, 2018, the defendant entered into a contract with the developer to purchase the Gilmore Property as a presale unit. The purchase price was stated to be $1,051,900, and the contract required the defendant to pay a deposit totalling $262,975 which the defendant duly paid upon signing the contract.

[12] On September 11, 2018, the defendant assigned his interest in that contract to himself and the deceased. Just under two years later, on September 5, 2020, the defendant and the deceased assigned their shared interest to the deceased alone. Both assignments were effected pursuant to a form of assignment agreement that stated that the consideration payable was to be the amount of the deposit paid by the defendant to the developer, which amount was to be payable by the assignee to the assignor forthwith upon execution of the assignment agreement.

[13] Both assignment agreements were accompanied by a companion agreement among the defendant, the deceased, and the developer, in which the developer

consents to the assignment on certain terms. The second of those two accompanying consent agreements, but not the first, contains a clause stating that the assignor, in this case the defendant and the deceased, acknowledge receipt of that consideration from the assignee, in this case, the deceased.

[14] The evidence suggests that despite that acknowledgment, the deceased paid no consideration for either assignment prior to his death one year later in September 2021.

[15] The plaintiff commenced this action on December 13, 2022. On February 9, 2023, she applied for an injunction prohibiting the defendant from disposing of the proceeds of sale from the Halifax Property, or of his interest in the Gilmore Property, relying on a claim she was then advancing for a resulting trust in both properties.

[16] In response, counsel for the defendant wrote to counsel for the plaintiff by letter dated March 10, 2023, purporting to demand payment of the deposit monies owing as consideration under the two assignments within seven days, failing receipt of which the assignments would be terminated. It is not disputed that no such payment was made and hence, according to the defendant, the assignment agreements have been terminated.

[17] As of today, the defendant considers himself bound to complete the purchase of the Gilmore Property from the developer when the building is ready in 2024. The defendant now brings this application seeking dismissal of the plaintiff's claim.

[18] In the meantime, the plaintiff came to realize that her claim was untenable as originally pleaded. While her injunction application was pending, she amended the claim to allege that the defendant's interest in the two properties had been given to the deceased as a gift and therefore now belongs to the estate.

[19] At the hearing of this application, counsel for the plaintiff informed me that she now recognizes the newly-amended claim to be untenable as well. Instead, she now seeks leave to amend the claim once more, this time to assert that there has been an unjust enrichment in favour of the defendant at the expense of the deceased,

thereby entitling the estate to a remedial constructive trust in one or both of the properties.

[20] The test to be applied in determining whether an action lends itself to summary adjudication under Rule 9-7 was conveniently summarized in *Gichuru v. Pallai*, 2013 BCCA 60. In summary, the court may grant judgment where it is able to make the requisite findings of fact and it would not be unjust to do so. I agree with the defendant that both conditions are met here.

[21] With respect to the Halifax Property, no viable claim is made out or could be made out because any gift that the defendant made had to be perfected by delivery in order to become irrevocable: see *McKendry v. McKendry*, 2017 BCCA 48.

[22] At no time was the gift alleged here ever given. The only gift made out on the evidence was that of a joint tenancy subject to the right of survivorship. I am also not persuaded that the claim could be amended to advance a viable cause of action in unjust enrichment, as the plaintiff now argues. There is no pleading or evidence that either the deceased or the plaintiff contributed funds or other property of sufficient value to have enriched the defendant at their expense. On the contrary, it is the plaintiff and the deceased who were enriched at the defendant's expense, insofar as the defendant advanced the down payments for both properties and continued to pay the mortgage on the Halifax Property in order to allow the plaintiff and the deceased to reside there rent-free for five years.

[23] The status of the Gilmore Property presents a slightly more complicated question, but the result is the same. I am willing to accept that the defendant appears to have made a gift to the deceased of the right to purchase the Gilmore Property. However, the assignment agreements, as written, do not reflect the transactions that actually occurred, insofar as they state on their face that consideration for the assignments was payable forthwith, and indeed that it had in fact been paid. Neither of those things were true.

[24] The most that could be said is that the defendant gifted to the deceased during his lifetime an option to proceed with the purchase of the Gilmore Property in his own name when the time came, perhaps using the proceeds of sale from the Halifax Property. The deceased might have been in a position to exercise that option had he been at liberty to sell the Halifax Property and apply the proceeds in that manner. It is unclear whether, if the deceased had exercised that option, the defendant expected to be repaid for the original deposit as the defendant now claims. It is also unclear what the expectation was if the deceased chose not to exercise the option or was unable to do so, which is what has, in fact, occurred.

[25] It appears likely that in this scenario, the right to proceed with the purchase was intended to revert to the defendant, just as he says it now has.

[26] Regardless, it is not necessary to resolve those questions today because the plaintiff is not seeking the right to exercise the option and complete the purchase on behalf of the estate. Rather, the plaintiff seeks an equitable interest in the Gilmore Property itself, which is not a remedy available to her on these facts. I say this for two reasons. First, the Gilmore Property itself does not yet exist. All that exists today is a contractual right to purchase it in the future when it does come into existence. Second, the plaintiff is in no position to force the defendant, when the time comes, to complete the purchase of the Gilmore Property with his own funds in order to make a gift of it to the estate.

[27] To the extent the defendant may have promised to make such a gift to the deceased while he was still alive, the promise was unsupported by consideration or delivery of the gifted item and was therefore revocable at all material times.

[28] There is, in summary, no valid basis for the estate to be granted a beneficial interest in either property. It follows that the application should be allowed and the action dismissed with costs to the defendant.

"Milman J."