

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liu v. Choi*,
2023 BCSC 866

Date: 20230517
Docket: H210588
Registry: Vancouver

Between:

Jun Qi Liu

Petitioner

And

**Vivian Shing Wai Choi and
All Tenants of the Subject Lands and Premises**

Respondents

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Petitioner:

N. Yan

Counsel for the Respondent Vivian Choi:

B. Desruisseaux

Place and Date of Hearing:

Vancouver, B.C.
May 12, 2023

Place and Date of Judgment:

Vancouver, B.C.
May 17, 2023

The Parties and the Applications

[1] Vivian Choi is the registered owner of a condominium located at Unit 1606 - 8833 Hazelbridge Way, Richmond, British Columbia (the “Property”). The Property is the subject of these foreclosure proceedings.

[2] Ms. Choi explains in her 1st affidavit that her parents purchased the Property for her so that she would have some security after her parents died. Her evidence is supported by affidavits from her father and her brother, Shing Chi Choi, who goes by the English name Jackson Choi.

[3] I will refer to Ms. Choi’s brother as Jackson Choi in these reasons.

[4] On the record before me, Ms. Choi is a vulnerable, unsophisticated, adult who has little education and, who, as a result of her difficulties in school, underwent psycho-educational testing for learning disabilities. She was diagnosed with global learning difficulties. She was slow to learn new tasks, and she learned more slowly than her peers. She experienced difficulty in a wide range of situations requiring age-appropriate thinking and reasoning skills. Although the psycho-educational report is dated, and it is not an expert report that would be admissible at trial, I have considered it for the limited purpose of supporting the affidavit evidence describing Ms. Choi.

[5] It is not disputed on the record that Ms. Choi is unable to support herself. She has had unskilled jobs, has not worked consistently, and now lives in Hong Kong with her parents. According to her father, she is unlikely to ever live independently.

[6] Ms. Choi, her father and brother say that she has been the victim of fraudulent schemes in the past. She mistakenly believed individuals to be her friends, and they took advantage of her.

The Applications

[7] Ms. Choi seeks an order setting aside Master Bilawich’s July 28, 2022 order *nisi* and an order transferring this proceeding to the trial list. In a cross-application,

the petitioner, Jun Qi Liu, seeks an order for sale of the Property as the six-month redemption period has expired.

[8] Ms. Choi's application is brought under R. 22-1(3) of the *Supreme Court Civil Rules* which deals with setting aside orders made under R. 22-1(2):

Failure of party to attend

(2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

Reconsideration of order

(3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

[9] The parties disagree about whether all three parts of the well-known *Miracle Feeds* test, referring to *Miracle Feeds v. D. & H. Enterprises Limited* (1979), 10 B.C.L.R. 58 (Co. Ct.), apply to an application under Rule 22-1(3). In *Singh v. Plewes*, 2010 BCSC 1867 at para. 3, Justice Masuhara described the test for a reconsideration under R. 22-1(3) as being essentially the same as the test for setting aside a default judgment.

[10] I applied the *Miracle Feeds* test in a foreclosure proceeding in *B2B Bank v. Sinnarajah*, 2021 BCSC 1475.

[11] Mr. Liu argues that, unlike an application to set aside a default judgment, where none of the three elements of the *Miracle Feeds* test is decisive and the ultimate question is the interests of justice, Rule 22-1(3) focuses on whether the party that failed to attend the chambers proceeding was guilty of wilful delay or default. I note that the order *nisi* is a final order and it also includes a judgment for the \$500,000 purportedly secured by the Mortgage.

[12] The issue has not been definitively decided, and I need not decide it here because, in any event, even in the face of wilful default, the court retains jurisdiction

to set aside an order granted in default if not doing so would amount to a miscarriage of justice.

[13] Assessing whether a miscarriage of justice would occur requires considering the timing of the application to set aside the default order and whether there is a meritorious defence to the petition or, at least, a defence worthy of investigation.

Conclusion

[14] For the reasons which follow, I conclude that the order *nisi* should be set aside and the matter referred to the trial list. It follows that I dismiss Mr. Liu's application for an order for sale of the Property.

The Factual Background

[15] On July 10, 2019, Mr. Liu registered a mortgage against the Property under charge number CA7614403 (the "Mortgage"). The Mortgage was a demand mortgage requiring repayment in full within six months' of demand.

[16] On December 23, 2021, Mr. Liu filed this petition alleging that Ms. Choi had defaulted under the mortgage, and on August 16, 2022, he registered a certificate of pending litigation against title to the Property.

[17] After she was served with the petition by alternate means, Ms. Choi asked her brother to look after the matter for her. She attests to the fact that her brother's English was better than hers and he had business experience in British Columbia. Jackson Choi retained counsel to represent Ms. Choi. Counsel filed a response to the petition in which Ms. Choi denied that: she ever met or spoke to Mr. Liu; entered into a loan or any other agreement with him; borrowed any money from him; or executed any documents in relation to the Mortgage.

[18] After filing the response, counsel withdrew as he was unable to get instructions and was seeking a further retainer. It is of note that the lawyer's communications were not with Ms. Choi but with Jackson Choi.

[19] The application for an order *nisi* was heard on July 28, 2022. Although she was served at the email address given on her former solicitor's notice to withdraw, Ms. Choi did not appear at the hearing. Someone who said she was Ms. Choi called Mr. Liu's counsel's office and indicated that she would not be attending the hearing that day. She was in Hong Kong and did not have the PIN number to log into Microsoft Teams. A link was provided, but no one dialled in.

[20] If it was Ms. Choi on the phone, I accept, on the record before me, that Ms. Choi is guilty of a wilful or deliberate failure to respond to the application for an order *nisi*. It is not disputed that she relied on and trusted Jackson Choi to represent her interests and he retained counsel to represent her. The relationship with that counsel appears to have broken down.

[21] Ms. Choi had a responsibility to monitor her brother's exercise of his delegated authority and failed to do so. Wilful default includes blameworthy action on her part, and a failure to monitor is wilful default.

[22] As Ms. Choi's agent, Jackson Choi did not protect her interests and, in light of the transfers of cash to him from Mr. Liu, and the foreclosure proceedings against Jackson Choi's property in B.C., he may have had interests that conflicted with Ms. Choi's. He may have deliberately deceived her.

[23] On the record before me, Ms. Choi applied to set aside the order *nisi* reasonably promptly. Her current lawyer was appointed in January 2023, and thereafter, he quickly advised Mr. Liu's counsel that he would be applying to set aside the order *nisi* and began taking investigative steps.

[24] In *Miracle Feeds*, this Court explained "what amounts to as soon as reasonably possible" is fact specific and dependant on the circumstances of the case. As explained in *The Toronto-Dominion Bank v. Buchholz*, 2022 BCSC 313 at para. 25, citing *CMHC v. Bhalla*, 2008 BCSC 1352 at para. 43:

[43] ...

... One important circumstance is the nature of the order which the applicant seeks to have reconsidered. The need for an applicant to act as soon as reasonably possible is, in part, a reflection of the need for finality in court orders. People need to be able to arrange their affairs in reliance upon court orders. That need is more acute when the order in question may, to the applicant's knowledge, result in irrevocable steps, such as the sale of real property, being taken in reliance on it.

[25] Mr. Liu has taken no irrevocable steps pursuant to the order *nisi*. Based on the most recent tax assessment of the Property, the equity in it is more than \$150,000 over the \$500,000 secured by the Mortgage. The property might appraise at an even higher number.

[26] Mr. Liu is not at risk of losing his equity, or being unable to collect an order for costs if he is ultimately successful at trial. I also learned at the hearing that Mr. Liu has filed a foreclosure proceeding against property owned by Jackson Choi. The Mortgage appears to have been registered to secure the same debt owed by Jackson Choi to Mr. Liu. An order *nisi* has been obtained in that proceeding.

[27] As to the merits of the defence and whether it is worthy of investigation, I am satisfied on the record before me that there are sufficient concerns about this Mortgage transaction that they need to be investigated at a trial.

[28] Once retained, Ms. Choi's current counsel requested and obtained documents from Mr. Liu's counsel and from Bay Shen Loh, the lawyer who allegedly witnessed Ms. Choi's signature on the Mortgage and the alleged loan agreement underlying it.

[29] The documents disclosed by Mr. Liu's counsel included correspondence between Ms. Loh and Mr. Liu's conveyancing lawyer and the transfer receipts purporting to show payment of the Mortgage proceeds. All of the transfers, totalling close to \$900,000, were in irregular increments from 2017 to 2019, and all were made before the Mortgage was executed. Further, the transfers were made to Jackson Choi, not Ms. Choi.

[30] On the record, it is not disputed that Ms. Choi never met Mr. Liu and never directly received any of the \$500,000 in Mortgage proceeds.

[31] Mr. Liu has not responded to any of Ms. Choi's affidavits. The only affidavit he filed is a December 2021 affidavit sworn in support of the order *nisi*. In it he attests that the information in paras. 3–15 of the petition is true. One of those paragraphs says that Ms. Choi is a business woman. On the evidence that is clearly not the case. Mr. Liu appears to have relied on the information in the Mortgage documents on title. He does not say that he ever met Ms. Choi in a business or any other capacity. Counsel for Mr. Liu submits that he was not required to respond to Ms. Choi's affidavits. I disagree. Ms. Choi raises a number of issues that cried out for response.

[32] The loan agreement contemplates the proceeds of the Mortgage having already been paid directly to Ms. Choi. When it was executed, the funds had already been advanced, but not to her. Ms. Choi never directly received the Mortgage proceeds, and Mr. Liu has not produced any direction from Ms. Choi indicating that the Mortgage proceeds were to be, or had already been, advanced to Jackson Choi on her behalf. The Mortgage appears to have been without consideration. If there was consideration, Mr. Liu does not explain it as he has not filed further affidavit material in response to Ms. Choi's application.

[33] Ms. Loh, who is alleged to have given independent legal advice to Ms. Choi, has produced her file to Ms. Choi's counsel, and the file does not contain any documents in which the lack of consideration was discussed with Ms. Choi. Nor does Ms. Loh's file indicate that Ms. Choi was approving the Mortgage for funds that she was not to receive but that after the fact, she authorized to be sent to Jackson Choi. According to Ms. Choi, she never met Ms. Loh, and she does not know how Ms. Loh obtained copies of her identification records.

[34] Jackson Choi denies knowing Mr. Liu, having borrowed any money from him, having received the Mortgage proceeds, or providing any of the Mortgage proceeds to his sister. He denies ever having pledged the Property as security for any loan or

having Ms. Choi do so. His evidence in that regard may be called into question by the proceedings Mr. Liu brought against him in Vancouver foreclosure File H220074. That proceeding appears to relate to the same transferred amounts Mr. Liu relies on in this proceeding, but seeks relief against property in Jackson Choi's name.

[35] There is no explanation from Mr. Liu about why the Mortgage was interest free or why it was a demand mortgage payable in full on Mr. Liu giving six months' notice. Ms. Loh flagged this term and noted it in the Certificate of Independent Legal Advice she purportedly gave to Ms. Choi.

[36] The ultimate issue in this case - the validity of the Mortgage - depends on the credibility of the parties and their witnesses. Findings with respect to their credibility are best made with the benefit of document discovery, examinations for discovery, and *viva voce* testimony at trial.

[37] Rule 21-7(5)(k) specifically permits the referral of a foreclosure matter to the trial list where there is a triable issue. As the court explained in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, the threshold for conversion under Rule 21-7(5)(K) is relatively low.

[38] I have concluded that there is a real risk of a miscarriage of justice if the order *nisi* is not set aside. A reasonable person would regard it as shocking and unconscionable that Ms. Choi would lose most of the equity in her Property, in circumstances where none of the proceeds of the Mortgage were paid to her or to another at her direction. The Mortgage may well be invalid.

[39] I think it entirely likely that, had Ms. Choi appeared at the hearing of the order *nisi* with the evidentiary record now before me, the matter would have been referred to the trial list.

[40] A mortgage is registered as an encumbrance on title and constitutes the land as "collateral" for a loan (see *Gill v. Bucholtz*, 2009 BCCA 137). However, the fact that a mortgage exists, does not, in and of itself, entitle the mortgagee to recover

funds. The mortgagee must show that money was advanced to the mortgagor or to someone on the mortgagor's behalf.

[41] All of the transfers in support of the Mortgage were advanced to Jackson Choi, without any security. As set out by Walter M. Traub, ed., *Falconbridge on Mortgages*, 5th ed. (Toronto: Thomson Reuters) (loose-leaf updated 2022) at §31.3:

The mortgagor is liable only to pay the principal amount actually advanced. The principal amount required to be paid is the amount advanced to the mortgagor, or an agent of the mortgagor.

...

If the making of the loan is disputed, the mortgagee must prove that the money was in fact paid to the mortgagor, or to some other person upon the order of the mortgagor. However, if the mortgagor disputes the principal amount advanced under the mortgage, the onus is on the mortgagor to show that all, or any part, of the amount claimed was not advanced. The validity of the mortgage is dependent on the ability to ascertain the amount payable. ...

[Footnotes omitted.]

[42] This principle was set out in *Dass v. Rumball*, 2015 BCSC 343 at para. 57 and in *Singh v. Minhas*, 2023 BCCA 7 at para. 53.

[43] Mr. Liu is unable to prove, on the record before me, that the money was paid to Ms. Choi, or to some other person, in this case her brother, upon her order or direction.

[44] It appears that someone, or perhaps more than one person, has taken advantage of Ms. Choi and she should have the opportunity to examine Mr. Liu about the nature of his relationship with her brother and how the Mortgage came about. Mr. Liu's counsel submits that whatever was going on between Ms. Choi and her brother was unknown to him. That may turn out to be the fact, but, in the absence of evidence from Mr. Liu, I cannot reach that conclusion.

[45] For these reasons, I allow Ms. Choi's application to set aside the order *nisi*, dismiss Mr. Liu's application for an order for sale, and refer the matter to the trial list.

[DISCUSSION REGARDING PLEADINGS AND COSTS]

[46] The parties agree that new pleadings are required and are to agree to a schedule for the exchange of such pleadings.

[47] Costs in the cause.

[48] The parties are to prepare the order and submit it for my signature.

“MacNaughton J.”