

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Juarez v. Singh*,
2023 BCSC 1891

Date: 20231030
Docket: S233547
Registry: Vancouver

Between:

Ana Teresa Magaly Silva Juarez

Plaintiff

And

Pakar Singh, Lata Suma, Jesvinder Singh, and Manbir Singh

Defendants

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Plaintiff:

N. Knezevic

Counsel for the Defendants:

S. Grewal

Place and Date of Hearing:

Vancouver, B.C.
July 13 and August 23, 2023

Place and Date of Judgment:

Vancouver, B.C.
October 30, 2023

I. Introduction

[1] By contract of purchase and sale dated June 14, 2021 (the “contract”), the defendants agreed to purchase residential property located in Langley (the “property”) from the plaintiff, Ana Juarez. The sale did not complete.

[2] On this summary trial application, the plaintiff seeks judgment against the defendants in the sum of \$50,000, being the amount of the deposit the plaintiff claims is owing under the terms of the contract. She argues that the straightforward nature of the claim makes it appropriate to determine by way of summary trial.

[3] The defendants argue that the plaintiff’s characterization of the issue does not accurately capture the fullness or complexity of either the facts or the law. Nonetheless they agree that the matter can be determined summarily. Among other things, they allege that the plaintiff’s failure to make certain disclosures amounted to a misrepresentation which renders the contract void *ab initio*. Accordingly, they say that the obligation to pay the deposit never arose.

[4] Alternatively, they say that if they repudiated the contract, the plaintiff did not accept the repudiation, leaving the contract open for completion. In that case, they argue that the plaintiff did not meet her obligations and was not ready, willing, and able to complete on the closing date and her claim should be dismissed. They say that issue can be determined on this summary trial application.

[5] In the final alternative, they say that given the early stage of the litigation, it may be that the Court is unable to find the facts necessary to determine the issues. In that case, they argue that the matter should not be determined by way of summary trial.

II. Background

A. The Evidence

[6] The defendants are a family unit consisting of two elderly parents and their two adult sons, Jesvinder Singh and Manbir Singh. In June 2021, the defendants began looking for a home for their family unit. On June 13, 2021, the defendants,

accompanied by the plaintiff, attended the property for a viewing. A person they say identified himself as the plaintiff's husband showed them around the Property. According to Jesvinder Singh, the man told them about work he had done to the property, including renovating the bedroom, turning the stand alone carport into an attached garage, and building a new bedroom over the garage he had built. That work included installing a heating system for which he had to do a lot of wiring. Their own agent told them that she thought that some work had been done without permits.

[7] The next day, on June 14, 2021, the parties entered into the contract pursuant to which the defendants agreed to purchase the property for \$1,200,000. The \$50,000 deposit, which was to form part of the purchase price, was to be paid on or before June 15, 2021. The sale was scheduled to complete on July 28, 2021.

[8] The contract contained the following other terms:

- a) At para. 3(9.), that the defendants acknowledge and are satisfied with the property disclosure statement dated June 1, 2021;
- b) At para. 3(10.), that the defendants are aware that the property has “renovations and extensions done without permits”;
- c) At para. 12, that time was of the essence, and if the defendants failed to pay the purchase price by the completion date, the plaintiff had the option to terminate the contract and in such circumstances the deposit would be non-refundable and absolutely forfeited; and
- d) At para. 18 (the “No Representations Clause”), that there are no “representations, warranties, guarantees, promises or agreements” other than those set out in that warranties.

[9] The defendants deny having receiving the property disclosure statement when they signed the contract.

[10] On June 15, 2021, Mr. Singh told his brother-in-law, Kuljit Singh Dulai, about the contract. Mr. Singh also informed him about the agent's remarks that some work had been done without permits. Mr. Dulai was concerned that unpermitted work could mean that the work was not allowed or was done by people not properly qualified to do the work.

[11] The defendants returned to the property that evening with Mr. Dulai. There, Mr. Dulai spoke with a man who said he was the property owner's husband. The man confirmed that he did all of the renovation work himself including the electrical wiring, plumbing, and taking down walls inside the property to create an open concept house.

[12] According to Mr. Dulai, the man told him that he did not report any of the work he had done on the property to the City of Langley. Mr. Dulai deposed that he asked the man "if it was safe or if he was even allowed to turn a car port into a garage and then build an entire bedroom on top of that garage." The man replied that "it was okay as long as no one checked into it."

[13] That same evening Mr. Dulai told the defendants about his concerns that the unauthorized work could cause a serious risk for injury, and could result in fines or penalties or an order to reverse the work.

[14] The defendants did not pay the deposit on June 15, 2021.

[15] On June 16, 2021 the defendants' agent advised the plaintiff's agent by text message that the defendants did not want to proceed with the purchase of the property (the "June 16, 2021 Text Message"). To formalize their decision, the agent sent the defendants a final general release for their signature, which they signed and returned to their agent.

[16] On June 22, 2021, the plaintiff relisted the property for sale. She entered into a contract (the "Third Party Contract") to sell the property to a third party on July 22, 2021.

[17] The defendants did not pay the purchase price on July 28, 2021.

[18] On September 15, 2021, the plaintiff completed the sale of the property to the third party for \$1.17 million.

[19] Mr. Singh says the defendants heard nothing about the property from June 16, 2021 until February 2022 when his agent told him that the owner had claimed \$30,000 in respect of the transaction. In April 2023, the plaintiff claimed the \$50,000 deposit.

B. Post-Litigation Events

[20] The plaintiff commenced this action for payment of the deposit on May 10, 2023. The defendants filed their response on June 13, 2023.¹

[21] Since June 2023, the defendants, through counsel, have taken steps and made repeated requests of plaintiff's counsel. This included requests for information and documents relating to renovations conducted at the property, as well as contact information for the person they spoke to at the property who they believe to be the plaintiff's husband. The plaintiff has steadfastly rejected those requests, taking the position that the terms of the contract are fully determinative of the issue in dispute. Plaintiff's counsel did advise that the plaintiff informed him that she does not have a husband.

[22] By notice of application dated June 23, 2023, the plaintiff set this matter for summary trial, estimating that the matter would require one hour for hearing. Despite the opposition of the defendants' counsel, the matter was set for a hearing on July 13, 2023.

[23] At the request of plaintiff's counsel, on July 8, 2023, licenced building inspector Arvind Kainth attended at the property to do a home inspection. Although

¹ The defendants also filed a counterclaim on June 27, 2023; the plaintiff filed her response to counterclaim on July 4, 2023. The defendants take the position that the counterclaim should proceed as a stand-alone claim. I have not included the counterclaim in my analysis of suitability for summary determination.

he was not able to conduct a full inspection, it appeared to him that the original carport or garage had been converted into additional new living space and an additional second floor had been constructed on that living space. He was of the view that completing those renovations would require, at a minimum, the involvement of a structural engineer, submitting plans and obtaining permits, getting inspections, and obtaining a final certificate of approval from the City of Langley.

[24] By email dated June 27, 2023, a permits and licences clerk of the City of Langley advised counsel for the defendants that other than a foundation permit that was issued in 1989, “[t]here are no records of applications and/or permits on City records” in respect of the property.

[25] Notwithstanding the requests of counsel for the defendants, at the date of the hearing, no examinations for discovery had been conducted.

[26] The plaintiff’s document production is limited to the three documents attached to the affidavit sworn in support of her application for summary judgment. They are the contract (without the property disclosure statement), the June 16, 2021 Text Message, and the Third Party Contract.

[27] The defendants have not had the opportunity to make an application to cross-examine the plaintiff on her affidavit.

III. Issues

[28] Broadly put, the two main issues to be determined on this summary trial application are as follows:

- a) Is the matter suitable for determination by way of summary trial?
- b) If so, is the plaintiff entitled to the payment of the \$50,000 deposit from the defendants?

IV. Discussion and Analysis

Suitability for Determination by Way of Summary Trial

1. Legal Framework

[29] Pursuant to Rule 9-7(15)(a) of the *Supreme Court Civil Rules*, on the hearing of summary trial application, the court may grant judgment in favour of any party, either on an issue or generally, unless:

- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

[Emphasis added.]

[30] A number of factors will inform the analysis of whether a summary trial is unjust: *Gichuru v. Pallai*, 2013 BCCA 60 [*Gichuru*] at paras. 30–31, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, and others. The factors include: the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward in relation to the amount involved, the course of proceeding, and whether credibility is a crucial factor in determining the dispute.

[31] On an application for summary trial, a party is obliged to “put its best foot forward” and take every reasonable step to put itself in the best position possible to prove its claim or defence, regardless of which party has brought the application: *Gichuru* at para. 32; *Rahman v. Windermere Valley Property Management Ltd.*, 2021 BCSC 118 at para. 10.

2. Discussion and Analysis

a. *Are the necessary facts available to decide that the judgment should be granted in favour of the plaintiff?*

[32] The plaintiff argues that the issue is a simple one: the defendants’ failure to pay the deposit when due on June 15, 2021, or alternatively, the June 16, 2021 Text

Message were repudiations which discharged the plaintiff from any further obligation under the purchase contract. Relying on the decisions in *Argo Ventures Inc. v. Choi*, 2020 BCCA 17 at paras. 39–41, and *Tang v. Zhang*, 2013 BCCA 52, she says that the repudiation entitles her to the full amount of the deposit without proof of damages.

[33] She also argues that the terms of the contract are a full answer to any issue the defendants have with the renovations. In particular, she refers to: (a) the defendants' express acknowledgement that the "property has renovations & extensions done without permits"; and (b) the No Representations Clause.

[34] In other words, the plaintiff relies on the contract terms as being dispositive not only of her entitlement to the deposit, but in response to the allegations made against her. She also relies on the doctrine of *caveat emptor* (i.e., that a purchaser takes existing property as they find it) for that second purpose.

[35] However, the plaintiff's reliance on the contractual terms can only succeed if the contract is binding on the parties. The defendants say it is not. Specifically, they argue that the contract is void *ab initio* on three bases:

- a) Although the plaintiff disclosed that "renovations and extension [were] done without permits", she failed to disclose that the renovations were of the type that required permits. They argue that this failure to disclose amounted to a misrepresentation which entitles them to rescission of the purchase contract;
- b) The plaintiff did not provide the property disclosure statement to the defendants prior to them signing the contract; and
- c) The allegedly illegal renovations upon which the contract was founded renders the contract itself illegal or improper.

[36] For the purposes of determining whether the plaintiff's claim is suitable for determination by summary trial, I will start by considering the first basis for the

possibility that the contract is void *ab initio*: the issue of whether the defendants are entitled to rescission due to the plaintiff's alleged misrepresentation.

[37] There is no dispute that renovations were conducted to the property. As the plaintiff notes, the contract expressly refers to renovations. There also appears to be no dispute that no permits were obtained for those renovations. As the plaintiff argues, that was referred to in the contract and appears to be confirmed by the City of Langley permit clerk.

[38] The defendants argue that the more significant point is what the contract did not disclose: that is, that the renovations for which a permit was not obtained required a permit. They argue that, together, the contract and the property disclosure statement imply that the renovations did not require permits.

[39] The case law provides that a party to an executory contract will be entitled to rescission for fraudulent misrepresentation which induced the party to enter into the contract. Rescission is also available as a remedy for non-fraudulent (negligent or innocent) misrepresentation where certain other criteria are met: *Riding Mountain Excavating Ltd. v. K & D Farm Corp.*, 1999 BCCA 319 at para. 12. A failure to disclose material facts can constitute a positive representation for the purposes of that analysis: *Kingu v. Walmar Ventures Ltd.*, 10 B.C.L.R. (2d) 15, 1986 CanLII 142 (C.A.) at 6–7.

[40] A finding of fraud or non-innocent misrepresentation will also serve to oust the application of the doctrine of *caveat emptor*: *Nixon v MacIver*, 2016 BCCA 8 at paras. 31–33 and 47.

[41] Accordingly, whether the contract terms and the doctrine of *caveat emptor* are dispositive of the plaintiff's position may depend on whether the defendants are able to establish their misrepresentation claim. This gives rise to the following primary issues:

- a) What obligation did the plaintiff have to disclose more information to the defendants regarding the allegedly unauthorized renovations;

- b) Did the plaintiff fail to disclose that information to the defendants; and
- c) If so, did the plaintiff's failure to disclose that information amount to a misrepresentation that entitled the defendants to rescission?

[42] For this matter to be suitable for determination by way of summary trial, I must be able to find the facts necessary to determine those issues on the evidence that is before me. Those facts include:

- a) What renovations were conducted to the property;
- b) Did those renovations require municipal authorization or permitting;
- c) If so, did the plaintiff obtain that municipal authorization or permitting;
- d) What did the plaintiff know about the renovations and the obligation to obtain authorization or permits for the renovations; and
- e) What did the plaintiff or the plaintiff's agent tell the defendants about the renovations?

[43] Other than the informal observations of Mr. Kainth, the only evidence regarding the renovations at the Property is the hearsay evidence of Mr. Singh who describes what he was told by a person he believes to be the plaintiff's husband. Notably absent from the record is any direct evidence of the renovations that were conducted, including the evidence of the person who made the statement or the person or persons who conducted the renovations.

[44] There being no admissible evidence of the renovation work, it is impossible to know whether that work required municipal approval or permits.

[45] Also missing from the record is evidence from the plaintiff or person who conducted the renovations regarding what they knew about the obligation to obtain permits. Even the identity of the person who spoke with the defendants at the property is unknown as the plaintiff, through counsel, has refused to provide that

information and has indicated, also through counsel, that she does not have a husband.

[46] Without any evidence about those key elements of the defendants' claim, I conclude that I am not able to find the facts that are necessary to decide the issues of fact or law regarding the defendants' position on the issue and, therefore, the plaintiff's application for judgment.

[47] Notably, this is not a situation described in *Gichuru* in which the defendants have failed to take steps to ascertain those facts prior to the summary trial: *Gichuru* at paras. 32–33. They tried to do so. Their efforts were consistently resisted by the plaintiff.

[48] In the circumstances, I am satisfied that the defendants took all reasonable steps to put themselves in the best position possible to ascertain the facts they require to defend that claim against them.

[49] Having concluded that I do not have the facts required to determine the allegation of misrepresentation, I do not have to consider their other two bases on which they allege the contract was void *ab initio*.

b. Are the necessary facts available to decide that the claim should be dismissed?

[50] Regardless of that conclusion, the defendants say that the facts necessary to conclude that the plaintiff's claim should be dismissed are available. They say the dismissal of the claim can be determined on a summary basis.

[51] In that regard, they say that if the contract was valid, and if they repudiated their obligations under the contract, the plaintiff had an obligation to communicate her acceptance of the repudiation. They argue that her failure to do so meant that the contract was left open for completion. By re-listing the property and entering into the Third Party Contract on July 22, 2021, they argue that the plaintiff was not ready, willing, and able to complete the sale to them on their closing date, July 28, 2021.

Accordingly, they argue that no remedies are available to her, for payment of the deposit or otherwise.

[52] I pause here to note that, while the defendants argued this position at the hearing, it was not raised in the response to civil claim, nor is it raised in the counterclaim. I discuss the implication of that failure below.

[53] Without deciding the issue, I accept that a non-breaching party to a contract has an obligation to communicate its acceptance of the other party's breach within a reasonable time. If it fails to do so, the contract will remain open requiring both parties to be ready, willing, and able to complete the contract on its terms: *Norfolk v. Aikens*, 41 B.C.L.R. (2d) 145, 1989 CanLII 245 (C.A.).

[54] In *Kaur v. Bajwa*, 2020 BCCA 310 [*Kaur*], a case involving an alleged anticipatory breach, the Court of Appeal explained the requirement for acceptance of a repudiation:

[26] A repudiation, whether anticipatory or performed, “will not effectively terminate the contract unless the innocent party does accept the repudiation, and is prepared to treat the contract as ended”: G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 595.

[27] The legal significance of an accepted repudiation was explained in *Potter* at para. 144:

If the other party “accepts” the repudiation, the contract is over. If the other party does not accept the repudiation, the contract continues (subject to various other doctrines). In either case, the non-breaching party can pursue the available remedies which may vary depending on whether that party has accepted the repudiation or affirmed the contract.

[28] The practical rationale for the requirement that an innocent party accept a purported repudiation rests on the need for both parties to understand whether they remain bound by the terms of their contract and to avoid having the repudiating party continue to fulfil that contract in the belief that it remains in effect. Accordingly, the innocent party is required to reject or accept the repudiation within a reasonable period of time and cannot adopt a “wait-and-see” approach, as its decision simultaneously determines the position and ongoing legal obligations of the repudiating party: [citations omitted].

[29] The onus is on an innocent party to establish that it has accepted a repudiation of a contract and that it has communicated that acceptance to the repudiating party within a reasonable time: *Ginter* at 392.

[55] Briefly stated, unless the non-breaching party clearly communicates its acceptance of the purported repudiation, the contract remains in place and both parties remain bound by their obligations under it: *Kaur* at para. 40.

[56] However, what constitutes effective acceptance is less clear. In most cases, direct communication of the acceptance is expected and “mere silence” will not constitute an acceptance of an alleged repudiation. At the same time, “an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all of the circumstances as proved”: *Kaur* at paras. 31–32, citing *American National Red Cross v. Geddes Brothers*, [1920] 61 S.C.R. 143, 1920 CanLII 6 (SCC) at 145 and others.

[57] In *Kaur*, the Court went on to suggest that if the repudiation is not accepted, whether the repudiating party has the ability to complete the transaction will also factor into the analysis.

[58] Given those principles, the defendants’ position gives rise to the following possible issues:

- a) Did the defendants’ failure to pay the deposit when due on June 15, 2021 or the delivery of the June 16, 2021 Text Message constitute a repudiation of the contract;
- b) If so, did the plaintiff accept the repudiation;
- c) If so, did the plaintiff communicate her acceptance of the repudiation to the defendants;
- d) If the plaintiff did not accept the repudiation, did her re-listing the property or entering in the Third Party Contract amount to a breach such that she was not ready, willing, and able to complete the sale on the closing date;
- e) If so, what are the legal implications of that breach; and

- f) Alternatively, in any event, would the defendants have been in a position to complete the purchase on the closing date?

[59] For the defendants' position to be suitable for determination by way of summary trial, I must be able to find the facts necessary to determine those issues on the evidence that is before me. Those facts include, at a minimum:

- a) What communications (other than the June 16, 2021 Text Message), if any, did the defendants (through their agent or otherwise) have with the plaintiff (through her agent or otherwise) regarding the defendants' intention not to purchase the property;
- b) Did the plaintiff or her agent have any further communications with the defendants or their agent after the June 16, 2021 Text Message was delivered;
- c) If so, what was the content of those communications;
- d) Did the defendants (through their agent or otherwise) know that the plaintiff had re-listed the property; and
- e) Were the defendants in a position to purchase the property if the repudiation was not accepted?

[60] There is no dispute that, by the evening of June 15, 2021, the defendants had decided that they did not want to purchase the property. There is also no dispute that they did not pay the deposit when due on that date.

[61] However, there no evidence from either agent regarding any communications they may have had after the June 16, 2021 Text Message. Even assuming, without deciding, the defendants' conduct was a repudiation, without the evidence, I am unable to determine if the plaintiff accepted that repudiation or, more importantly, whether she communicated her acceptance of that repudiation to the defendants.

[62] Based on the above, I easily conclude that this is not a case in which the court can properly find the facts necessary to resolve the issues in the action.

c. Is it unjust to decide the issues on the application?

[63] Even if I was able to find the find the facts necessary to determine this dispute, in my view, it would be unjust to do so by way of summary trial.

[64] In coming to that conclusion, I acknowledge the importance of summary trial procedures in ensuring access to justice, by favouring proportionality and fair access to the affordable, timely, and just adjudication of claims: *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*] at paras. 1–5. However, regardless of the procedure by which a matter is brought to trial, the principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found: *Hryniak* at para. 28.

[65] As contemplated at paras. 32 and 33 of *Gichuru*, a party cannot frustrate the benefits of the summary trial rule by failing to take reasonable steps to complete pre-trial discovery. In my view, in a fair and just process, the opposite is also true: a party cannot, in the name of expediency and proportionality, wholly deprive the other party of the benefit of pre-trial discovery where that discovery is reasonably requested in a timely way and warranted on the pleadings. That is what happened in this case.

[66] As I have set out above, the defendants filed their response to civil claim on June 13, 2023. The facts alleged in the response include facts relating to the renovations and that the defendants were “not reasonably informed nor were made aware of the circumstances regarding the renovations and alterations at the [p]roperty”. Despite the repeated requests of counsel for the defendants, at the time this summary trial application was heard, the plaintiff had not disclosed any information or documents regarding the renovations, including the name or contact information of the person who the defendants spoke to at the property. It is not clear if the plaintiff has made any effort to disclose documents relating to the June 2016

Text Message that she alleges constituted a repudiation, including any documents that may evidence her acceptance of that alleged repudiation. No examinations for discovery have been conducted, and there has been no opportunity for the defendants to apply to cross-examine the plaintiff on her affidavit.

[67] As a result of the plaintiff's position on the pre-trial discovery process, the full picture of what happened in the period before the offer was made and in the period after the June 16, 2021 Text Message was delivered—both key periods of time—has not been fully fleshed out.

[68] Characterized in the best light, it is simply premature to decide the issues on this application. At worst, the manner in which the plaintiff brought the matter for hearing undermined both the defendants' ability to fully explore all possible arguments in defence of the claim, and the court's ability to determine the issues on a fulsome record. Either way, it does not amount to a process that is just and fair.

[69] While the defendants attempted to ensure that record was complete prior to the application, in my view it would also be unjust to determine their application for a dismissal. At the hearing, they argued that the plaintiff's failure to communicate her acceptance of their alleged repudiation and the subsequent sale of the property to a third party disentitled her to the deposit. However, their response to civil claim makes no mention of this. Having not pled the relevant material facts, the plaintiff could not know the case that she would have to meet.

[70] A summary trial may ultimately be the suitable method to determine this matter. However, until oral and document discovery have been completed, I cannot conclude that the plaintiff's claim is a straightforward matter of contractual interpretation as she asserts. Nor can I conclude at this time that the matter is not factually complex or that there are no credibility issues to be determined.

[71] Given the very early stage of this proceeding, it would be unjust to determine this matter at this time.

VI. Conclusion and Disposition

[72] I have concluded that I am unable on this summary trial application to find the facts necessary to decide the issues of fact or law to be determined. I have also concluded that even if I could decide those facts, it would be unjust to do so at this early stage of the litigation. I decline to grant judgment in favour of either party on the basis of Rule 9-7(15).

[73] The plaintiff's application for judgment pursuant to Rule 9-7 is dismissed, with leave to any of the parties to re-apply.

VII. Costs

[74] At the conclusion of this hearing, counsel for the defendants asked for the opportunity to speak to costs after these reasons for judgment have been given. If it remains their intention to make submissions, they may file written submissions, not to exceed five pages, within 3 weeks of these reasons. The plaintiff will have a further 2 weeks after receipt of the defendants' submissions to file a written response, also not to exceed five pages.

[75] If I have not received submissions from counsel for the defendants in the 3 weeks set out above, costs of this application are awarded to the defendants at Scale B.

“Ahmad J.”