IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Viterbo v. Palomo,*
2023 BCSC 1691

Date: 20230927
Docket: S226895
Registry: Vancouver

Between:

Aron Paul Herma Viterbo

Plaintiff

And

Patricia Nicole Palomo

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiff:	R.Y. Kornfeld
Counsel for the Defendant:	F. Munoz-Job
Place and Date of Hearing:	Vancouver, B.C. September 11, 2023
Place and Date of Judgment:	Vancouver, B.C. September 27, 2023

[1] The plaintiff seeks a declaration on summary trial that an exchange of emails between counsel constitutes a binding settlement of this action, with the defendant agreeing to transfer her interest in jointly owned property to the plaintiff for $40,000.

[2] The property at issue is a strata title rental unit. In August 2021, the parties purchased the property from the plaintiff's parents. In addition to mortgage financing, the parties made the purchase with financial assistance from the plaintiff's parents and the defendant's mother. The parties were in a romantic relationship at the time, but that relationship has since ended.

[3] In this action, the plaintiff alleges and seeks to enforce an earlier agreement under which the defendant agreed to transfer her interest in the property. The defendant says she entered into that agreement under duress.

[4] After some negotiations that did not result in settlement, counsel for the defendant wrote to counsel for the plaintiff on December 21, 2022, stating:

> My clients have reached out to me. They have reconsidered the plaintiff's offer and decided to keep the $40,000 to have peace of mind instead of continuing with these proceedings.
>
> This offer means that both parties will enter into a consent dismissal order and Mr. Grinhute and his wife [the plaintiff's parents] will execute a release signed by them with a nominal consideration and an assurance that they will not file any claim against my client involving this particular property.

[5] Counsel agrees that, in the context of earlier discussions, the reference to "keep the $40,000" is properly understood as the defendant offering to accept $40,000 in exchange for her half interest in the property.

[6] Counsel for the plaintiff responded on December 27, 2022 with an email that began:

> Below is a proposed agreement in principle for discussion to ensure that all loose ends are taken care of.

[7] A draft consent dismissal order and mutual release were attached to that email. These documents confirmed that the plaintiff would pay $40,000, with the

funds initially paid in trust to a notary retained by the plaintiff. The notary would deal with the conveyance of the property. Other provisions included:

> Aron's [the plaintiff's] notary will be provided with proof that the BC Spec Tax declaration for the years 2021 and 2022 (given that Patricia [the defendant] will continue to the be the owner in 2023 until the property interest is transferred) has been filed and a zero balance confirmed on Patricia's [the defendant's] account. Until Patricia files the declaration by telephone/online and provides a copy of the filing and confirmation of the NIL account balance, the amount of the BC Spec Tax will be held back until the proof is provided and if not provided on or before the property transfer or within 30 days thereafter, the holdback amount will be paid to the Ministry of Finance to the credit of Patricia's account.

[8] That provision refers to the fact that the defendant had received a statement of account, dated November 24, 2022, stating that she owed taxes, interest and penalties under the *Speculation and Vacancy Tax Act*, S.B.C. 2018, c. 46, totalling $4,888.55 for the year ended December 31, 2021. It is common ground that the obligation to pay that amount could be eliminated, and a similar claim for 2022 prevented, by the defendant filing the appropriate declarations required by the statute. She had not filed those declarations as of the time of the emails exchanged between counsel.

[9] The plaintiff now argues that counsel's email of December 21, 2022, constituted an offer that was accepted by his counsel's response on December 27, 2022. The defendant argues that the plaintiff's response was not an acceptance, but a counter-offer containing an additional term and was not accepted at the time.

[10] The court must determine whether it is clear to "the objective reasonable bystander" that the parties intended to contract and whether the essential terms of the contract can be determined with reasonable certainty. There must not only be offer and acceptance, but evidence demonstrating agreement on all essential terms: *Jahanshahi v. Ly*, 2022 BCSC 2226 at para. 28 and the authorities cited therein.

[11] The formation of the contract is to be distinguished from its completion. In *Fieguth v. Acklands Ltd.*, 37 B.C.L.R. (2d) 62,1989 CanLII 2744 (B.C.C.A.) [*Fieguth*], the Court said at para. 36:

> [36] The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate.…One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[12] *Fieguth* involved settlement of a claim for damages for wrongful dismissal. The plaintiff accepted an amount offered by the defendant, but in tendering the settlement funds, the defendant's lawyer deducted an amount for income tax as required by the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Court held that the defendant could not ignore the legal tax requirements, and there was a completed agreement.

[13] I find that this is not a case where the recipient of an offer has simply submitted documents intended to give effect to the agreement proposed by the offeror or to comply with the law applicable to the agreement. In this case, the plaintiff's response required a positive *further* action by the defendant offeror to deal with a potential claim of a third party. The plaintiff proposed that if the defendant failed to complete that further action, part of the settlement funds would be withheld. But the defendant never proposed that as part of her initial offer and never agreed to the plaintiff's addition of that requirement.

[14] Although the further action the plaintiff asked of the defendant was not onerous and might have been easily accomplished, that action was still something she had not offered to do. I must therefore conclude that the plaintiff's response added a contractual term that was not accepted.

[15] Further, the plaintiff's response was not stated to be an acceptance of the offer but a "proposed agreement in principle for discussion". I find that language would indicate to an "objective reasonable bystander" that the agreement was not complete because the response included something more than necessary matters of

implementation of a completed agreement or matters reasonably implied in the circumstances.

[16] I must therefore conclude that there was no complete agreement on all terms of the contract and no completed contract. The plaintiff's application must be dismissed with costs.

"N. Smith J."