IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bridal Falls Development Corp. v. Bridal Falls RV Park Inc.,* 2023 BCSC 1496

Date: 20230828
Docket: VLC-S-217748
Registry: Vancouver

Between:

Bridal Falls Development Corp.

Plaintiff

And

Bridal Falls RV Park Inc.

Defendant

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for Plaintiff:	A. A. Macdonald
Counsel for Defendant:	T. Boyd
Place and Date Hearing:	Vancouver, B.C. August 10, 2023
Place and Date of Judgment:	Vancouver, B.C. August 28, 2023

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[1] This is an application under Rule 9-6 or, alternatively, Rule 9-7 of the *Supreme Court Civil Rules* for dismissal of the plaintiff's claims for specific performance or damages in lieu.

Background

[2] On February 1, 2021, the defendant entered into a contact (the "Contract") to sell the subject property to Infinite Expansion Corp. whose purchase rights were ultimately assigned to the plaintiff.

[3] The property which was the subject of the Contract consisted of (1) 14 existing and subdivided strata lots and (2) Lot A, which was not subdivided but was contemplated to be subdivided into 76 future lots.

[4] On May 19, 2021, the purchaser at the time (the party who assigned the purchase rights under the Contract to the plaintiff) removed the Buyer's Conditions Precedent under the Contract.

[5] Following various extensions, the completion date was set for June 23, 2021.

[6] On that date, the plaintiff did not complete the purchase by paying the balance of the purchase price.

[7] On July 15, 2021, counsel for the plaintiff wrote to the defendant's solicitor to advise that "our client agreed to purchase on the basis that all approvals (including from the Fraser Valley Regional District and the preliminary layout approval from the Ministry of Transportation) … were in place to allow for servicing to proceed". The plaintiff offered to enter into a new contract conditional upon these approvals being obtained.

[8] This action was commenced on August 30, 2021.

[9] The primary claims set out in the Amended Notice of Civil Claim ("ANOCC") sound in misrepresentation. However, the ANOCC also contains a claim for specific performance. Paragraph 1 of Part 3 provides:

> The plaintiff is entitled to specific performance of the Contract and damages by reason of the Seller's failure to obtain the Approvals and complete the sale and purchase of the Properties.

[10] Presumably on the basis of this plea, as it is the only plea in the ANOCC which advances a claim for an interest in land, a certificate of pending litigation (CPL) was registered against the subject property.

[11] On November 24 and 25, 2021 an application was brought before Justice Sharma to remove the CPL. On that application, which was heard and determined on an urgent basis because a sale to a third party was pending, Justice Sharma ordered that the CPL be removed on the basis that $500,000 in security (the "Security") be posted

[12] As I read her reasons, she ordered the removal of the CPL on the basis of hardship and inconvenience. However, in the course of her reasons, she also found that it was "plain and obvious that the claim for specific performance cannot succeed" and that the claim for specific performance is "doomed to fail".

Analysis

[13] There are two questions to be determined on this application.

[14] First, ought the claim for specific performance to be dismissed? Counsel for the applicant defendant candidly conceded that I am not bound by Justice Sharma's conclusions on this issue although he submitted that her reasons ought to be persuasive.

[15] Second, is it appropriate to hear this issue in advance of the balance of the relief sought? Regardless of what occurs on this application, the claims based in misrepresentation will continue.

[16] Counsel for the plaintiff argues that this matter is not suitable for summary determination and takes the position that this Court should decline to determine this application because it would constitute "litigating in slices".

[17] Counsel for the plaintiff also applied to adjourn this application on the basis that the plaintiff has filed a notice of appeal in respect of an application to disqualify plaintiff's counsel which was heard and dismissed last week.

[18] If both of these issues are answered affirmatively, the claim for specific performance will be dismissed. In those circumstances, the plaintiff will no longer have a claim for an interest in land and the security posted pursuant to the order of Justice Sharma will be released.

The claim for specific performance

[19] It is important to carefully examine the factual pleas underlying the specific performance claim and the evidence in support of that claim.

[20] The relevant factual pleas are found at paras 13 and 15 of the Factual Basis of the ANOCC. They provide:

> [13] Prior to entering into the Contract, Munro [the defendant's realtor] represented to Infinite that local and provincial government approvals (the "Approvals") had been obtained to allow for the stratification and development on the undeveloped parcel of land in the Properties known as Lot A (the "Agent's Representation"). …
>
> [15] The Agent's Representation was an implied term of the Contract.
>
> [emphasis added]

[21] The only direct evidence regarding the Implied Term is found at para. 8 of the first affidavit sworn by Joe Duminico, a shareholder of the plaintiff. In that paragraph, Mr. Duminico deposed:

> I went with Don [Munro] to view the Properties on or about December 15, 2020. I asked Don at that site meeting if all government approvals were in place for the subdivision in Phases 3-6 (the "Approvals"). I told Don I was not interested in making any offer on the Properties without the Approvals in place. Don assured me that the planned development for Phases 3-6 had been fully approved and the lots in those Phases were ready to be serviced and sold as individual lots.
>
> [emphasis added]

[22] This evidence may or may not support a claim in misrepresentation. That question is not before me today and will have to await a much fuller evidentiary record.

[23] On the present pleadings and on the evidence before this Court, there are two hurdles that the plaintiff must overcome before succeeding on its specific performance claim.

[24] First, the plaintiff must establish that the criteria for an implied term have been satisfied. In *MJB Enterprises Ltd v. Defence Construction (1951) Ltd.*, [1999] 1 SCR 619 *[MJB Enterprises]*, Justice Iacobucci wrote for the Court as follows at para 29:

> … a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.
>
> [emphasis added]

[25] In my view, it is not at all obvious that an implied term ought to be found that all government approvals had been obtained. Apart from the alleged statement of Mr. Munro, no evidence, and indeed, no argument has been offered to support the proposition that this implied term is necessary to give business efficacy to the Contract or that the officious bystander test is met.

[26] Further, the evidence from Mr. Dominico about Mr. Munro's alleged statement is inconsistent with the entire agreement clause in the contract. The entire agreement clause constitutes evidence of a "contrary intention" as described in *MJB*

Enterprises and is a complete answer to the implied term argument. In *Water's Edge Resort Ltd. V. Canada (Attorney General)*, 2014 BCSC 873, Justice Ross held at paras 72 and 73:

> Turning then to the legal basis asserted by Water's Edge in support of its claim for breach of contract, it asserts first that this contract contains certain implied terms including an implied contractual term of fairness. The first difficulty with this proposition is that it is contrary to the entire agreement provision contained in Clause 47.01 of the Lease. I agree with the submission of the Crown that clause 47.01 precludes any implied terms because it expressly provided that the Lease constituted the entire agreement between the parties and required any modification to be in writing.
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> As McLachlin C.J.S.C., as she then was, stated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1989] B.C.J. No. 114 at para. 15, 1989 CarswellBC 1705 (S.C.):
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> > 15 ... the question is whether the intention of the parties in the case at bar was that the written contract together with the specified appendices would constitute the whole of the contract. That intention, as in all matters relating to contractual construction, must be determined objectively. Here the parties expressly agreed that the contract documents constituted the whole of their agreement. While in most cases such an agreement is only a presumption based on the parol evidence rule, in this case it has been made an express term of the contract. A presumption can be rebutted; an express term of the contract, barring mistake or fraud, cannot. I have no alternative but to conclude that the parties intended the contract documents to be the whole of their agreement and the plaintiffs cannot rely on collateral contract against Westar.

[27] The plaintiff points to the reference to “mistake or fraud” in the above passage but it has not identified any decision in which an implied term has been found in the circumstances of an entire agreement clause, on the basis of mistake or fraud otherwise.

[28] Moreover, the plaintiff’s claim for specific performance is problematic because the implied term of the Contract which it seeks to enforce is a representation. It is not a covenant to do something that can be specifically performed. Rather, it is a statement about an existing state of affairs – that the “Approvals”, as defined, had been obtained.

[29] The precise nature of the plaintiff's specific performance claim is not entirely clear to me, but if it is seeking an order that the subject properly be delivered to it with all of the representations and warranties being true, it is my view that this is not a remedy available to it. No authority has been shown to me in which on a claim based on representations and warranties, the court has ordered specific performance for delivery of the subject property with all of the representations and warranties being true. It does not require much imagination to identify situations in which this would be impossible.

[30] This analysis underlines the core difficulty with the plaintiff's position–its claim appears to lie only in the tort of misrepresentation, and that remedy for misrepresentation is damages.

[31] In my view, the points set out above are sufficient to dismiss the claim for specific performance. I find that there no implied term that gives rise to a claim for specific performance.

[32] It would not be appropriate on this application to make any findings about what misrepresentations were made and I decline to so do.

Other submissions

[33] In the alternative to the arguments above, the plaintiff advanced a number of submissions, all to the effect that this summary trial or judgment application ought to be deferred until a later date.

[34] Regarding the issue of suitability on the summary trial, I have concluded that I am able on the evidence to find the facts necessary to decide the issues of fact and law. The scant evidence that is before the court falls far short of the threshold required to establish an implied term and, as stated, the entire agreement clause is a complete answer to the plaintiff's position on that issue.

[35] The plaintiff has made a number of submissions which amount to an argument that it ought to be permitted to advance more evidence after discoveries,

and to amend its pleadings to advance different factual claims and legal arguments. The plaintiff submits, *inter alia,* that the issue before this Court is unsuitable for summary determination because examinations for discovery have not been conducted, and it would be premature for the Court to make any findings of fact.

[36] However, these arguments are met by the authorities in relation to Rule 9-7 (formerly 18A). In *Everest Canadian Properties Ltd. V. Mallmann*, 2008 BCCA 275, the Court held:

> It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of *viva voce* evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992), 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R.18A motion.
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> [emphasis added]

[37] I am advised the plaintiff has made no requests for further documentation or to set down an examination for discovery of the defendant. Counsel for the defendant on this application was not the defendant's original counsel but he has been counsel of record since at least early May 2023.

[38] The plaintiff also cites the authorities, well known to this Court, which caution against "litigating in slices". In particular, the plaintiff refers to *Clark v Newall Structures Ltd.*, [1990] BCJ No 1025 (S.C.) wherein the court held that "it would be inappropriate to find facts from conflicting affidavits and then make a ruling which would not dispose of the whole case but leave the trial judge with one issue res judicata".

[39] With regard to that issue, the decision in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 is of assistance:

> [95] I disagree with the submission that the phrase "litigating in slices" is pejorative or that it has been used in BC to create a presumption against

> summary trial of a single issue when multiple issues remain. I find that the comments in *Hryniak* mirror those in *Inspiration Management* and *Baccus* and the other leading authorities in BC to the effect that determining one issue by way of a summary trial procedure can at times be in the interests of justice, but determining whether it is so needs to consider whether it is truly efficient and the impact it will have on the remaining issues in dispute.
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> [96] The extensive experience with this procedure in BC identifies that litigation in slices is most feasible if the slice can be made cleanly but is less advisable when the issues sought to be determined first are intertwined with the issues remaining.
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> [97] When an issue in litigation is inextricably interwoven with the remaining issues, the courts in BC have often found it inappropriate to determine the issue first by way of summary trial. …

[40] In my view, determining the specific performance claim in this case would not run afoul of these authorities. As stated above, the finding being made on this application is very narrow; I have found that there no implied term that gives rise to a claim for specific performance. This finding will not have any bearing on the misrepresentation claims that will have to be determined by the trial judge.

[41] As stated above, the plaintiff has also sought to adjourn this hearing for reasons related to an application that it advanced to disqualify counsel for the defendant last week. That application was dismissed, but an appeal has been filed and is pending. However, no stay of the dismissal application has been sought and, in my view, the existence of the outstanding appeal is no reason to adjourn this summary trial application.

Conclusion

[42] Pursuant to Rule 9-7, the plaintiff's claim for specific performance in this proceeding is dismissed.

[43] Given that the specific performance claim is dismissed, the plaintiff no longer has any claim to an interest in land, and no basis on which to maintain a CPL or the security posted in lieu of that CPL: on this point, see *Wosnack v. Ficych*, 2022 BCCA 139 and *Nextgear Capital Corporation v. Corsa Auto Gallery Ltd*., 2019 BCSC 1667.

[44] I order that the Security held by the solicitors for the defendant pursuant to the Order of Justice Sharma made November 25, 2021, be released to the defendant.

[45] Costs of this application shall be payable to the defendant at scale B.

"The Honourable Justice Loo"