IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Faulkner v. Erickson,*
2023 BCSC 1305

Date: 20230728
Docket: S223116
Registry: Victoria

Between:

Charlotte Faulkner and David Hermansen

Plaintiffs

And

Jonathan Todd Erickson

Defendants

And

Charlotte Faulkner and David Hermansen

Defendants by way of Counterclaim

Before: Master Harper

Reasons for Judgment

Counsel for the Plaintiffs and the Defendants by way of Counterclaim:	M.R. Scherr
Counsel for the Defendant:	H.J.S. Harris
Place and Dates of Hearing:	Victoria, B.C. June 28–29, 2023
Place and Date of Judgment:	Victoria, B.C. July 28, 2023

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Overview

[1] The parties have been friends for many years and became business partners. The real property at issue in this proceeding is on Salt Spring Island, British Columbia (the "property").

[2] The defendant, Mr. Erickson, applies pursuant to the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 ("*COEA*") for an order setting aside a without-notice garnishing order before judgment made October 5, 2022 in the amount of $200,265 (the "garnishing order") that resulted in the garnishee, Mr. Erickson's bank, paying that amount into court.

[3] The garnishing order relates to the plaintiffs' claim on a promissory note signed by Mr. Erickson for the sum of $200,000. The plaintiffs say the claim is a simple one: it is an action on the promissory note and in debt.

[4] Mr. Erickson alleges that, over time, the parties entered into a number of agreements relating to the property, both orally and in writing. He says that these agreements related to, among other properties, a number of strata lots in a strata development known as the "Blue Stone Strata".

[5] Mr. Erickson counterclaims for various relief pertaining to what are described as "personal agreements" and a limited partnership. The plaintiff, Mr. Hermansen, is not a party to the limited partnership. The plaintiffs say that the limited partnership agreement requires mediation and then arbitration to resolve disputes. The plaintiffs have filed a notice of application seeking an order staying the counterclaim pursuant to the *Arbitration Act*, S.B.C. 2020 c. 2. That application was set on the assize list for the week of June 28, 2023 for one day, but no judge was available.

Positions of the Parties

[6] Mr. Erickson's main argument on this application is that the plaintiffs failed to comply with s. 3(2) of the *COEA*. Specifically, he says that the application materials in support of the garnishing order were deficient in that the plaintiffs failed to make all just discounts.

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[7] Further, Mr. Erickson says that the affidavit sworn in support of the plaintiffs' application by the affiant, Mr. Farquhar, failed to make full and frank disclosure of the material facts that would affect the registrar's decision on whether or not to grant the garnishing order.

[8] Mr. Erickson also argues that the garnishing order was not served on him "at once" as required.

[9] As an alternative ground for setting aside the garnishing order, Mr. Erickson says that the order is unnecessary in the circumstances as he has sufficient assets in British Columbia to satisfy any judgment the plaintiffs may obtain.

[10] The plaintiffs say that Mr. Erickson, in both his response to civil claim and in his counterclaim, has "lumped in" the personal and corporate agreements. On my review of the pleadings, I have formed the same view. I agree with the plaintiffs that the business relationships between the parties directly and through a related numbered company are complex. Then there is the pending application on the counterclaim for a stay which has presented a procedural impediment to the determination of the application to set aside the garnishing order.

[11] At the commencement of the hearing of this application, counsel for the plaintiffs submitted that the chambers judge should hear this application at the same time as the application to stay the counterclaim. In an ideal world of timely access to unlimited judicial resources, that would have been the best approach, given the risk of inconsistent findings of fact if two presiders heard the two applications separately. However, I decided to hear this application on its own given that an application to set aside a garnishing order is, for most litigants, urgent.

[12] I have now heard extensive submissions about the counterclaim and the complexities of the alleged agreements between the parties. I am not able to decide the application on the primary grounds presented by Mr. Erickson because, to do so, would run the risk that I might make findings of fact that would be inconsistent with the findings of fact yet to be made by the chambers judge. That said, I have

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determined that it is not necessary to refer this application to the chambers judge and order that the two applications be heard at the same time because I am able to decide the application on Mr. Erickson's second argument.

[13] For the reasons that follow, I have determined that the garnishing order is unnecessary and, therefore, it should be set aside and the garnisheed funds returned to Mr. Erickson.

Discussion and Disposition

[14] Mr. Erickson denies the terms of the alleged promissory note, but for the purposes of this application, I will assume that the debt of $200,000 is owing.

[15] Mr. Erickson alleges that the plaintiffs owe him more than he owes them.

[16] Rule 8-5(8) of the *Supreme Court Civil Rules* provides:

> Setting aside orders made without notice
>
> On the application of a person affected by an order made without notice under subrule (6), the court may change or set aside the order.

[17] Under s. 5(2) of the *COEA*, the court may order that all or part of the garnisheed funds be released if the court considers it "just in all the circumstances".

[18] If the circumstances establish that the garnishing order is unnecessary, the court may order that the garnisheed funds be released.

[19] In *Key Insurance Services Partnership v. T. Clarke Insurances Services Ltd*., 2010 BCSC 1857, the court considered evidence that justified a finding that the sum the plaintiff sought to recover appeared to be "reasonably secure": paras. 33–35.

[20] Mr. Erickson has provided evidence to show that, if the plaintiffs are successful at trial, their judgment will not go unsatisfied. Mr. Erickson has assets in British Columbia that are valued at more than the amount of the garnishing order. He has equity in his property located at 111 Blue Stone Drive on Salt Spring Island. There is also value in Mr. Erickson's share of the strata lots referred to in the materials as the "3 Blue Stone Strata Lots", whether bare land or if developed.

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[21] Counsel for the plaintiffs submits that I should take into account the fact that Mr. Erickson is a non-resident (he lives in Hawaii) so that there would be tax withheld by the Canada Revenue Agency if his British Columbia properties were sold. The plaintiffs tendered no evidence on this point. I do not accept this argument as I cannot take judicial notice of any tax impact on the sale of Mr. Erickson's assets.

[22] The plaintiffs dispute the value of Mr. Erickson's interest in the limited partnership. I cannot resolve this dispute on the evidence. It will be determined as the litigation proceeds or by mediation/arbitration. However, together with the equity in 111 Blue Stone Drive, the plaintiffs' claim is reasonably secure.

[23] Accordingly, it is just in all the circumstances to set the garnishing order aside and order that that garnisheed funds be returned to Mr. Erickson together with any interest accrued while the funds were in court.

[24] To conclude, I wish to emphasize that I have decided this application on a narrow basis. I have sidestepped Mr. Erickson's main argument in support of the application and express no opinion on the merits.

Costs

[25] Mr. Erickson has been successful on the application. He will have his costs in the cause.

"Master Harper"

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