IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Musak v. Ma,*
2023 BCSC 1304

Date: 20230728
Docket: S30717
Registry: Cranbrook

Between:

Douglas Musak

Respondent
(Plaintiff)

And

Patrick Tung Sang Ma and Josephine Angela Maher-Ma

Appellant
(Defendants)

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Appellant (Defendants):	D.J. Taylor
Counsel for the Respondent (Plaintiff):	L.V. Halyn
Place and Date of Hearing:	Cranbrook, B.C. May 9 and 11, 2023
Place and Date of Judgment:	Cranbrook, B.C. July 28, 2023

Introduction

[1] This is an appeal by the defendants from a Master's order granting summary judgment under Rule 9-6 of the *Supreme Court Civil Rules*, B.C./Reg. 168/200 in a claim arising from a contract for the sale of land. The Master was satisfied that there were no triable issues raised in the pleadings as to the validity and enforceability of the contract. The Master granted summary judgment to the plaintiff, along with an injunction requiring the defendants to complete the sale, with issues of implementation and consequential damages to be dealt with by way of a subsequent court order.

Factual Background and Procedural History

[2] The underlying action is a claim by the plaintiff Mr. Musak against the defendants, the Mas, for breach of contract related to the sale of a property in Invermere, B.C. Mr. Musak was the intended buyer and the Mas were the sellers. The sale did not complete due to a dispute about the ability of the Mas to provide clear title.

[3] The inability to provide clear title had to do with a pending claim to an easement against the property by the owners of an adjacent property, the Romanows. After the contract of purchase and sale of the Invermere property was signed, but prior to the closing date, the Romanows commenced a petition proceeding, and filed a certificate of pending litigation against the Ma property. In their petition, the Romanows sought an order declaring that they have a right to an easement over a portion of the Ma property.

[4] Meanwhile, Mr. Musak and the Mas extended the closing date on the contract of purchase and sale once by written agreement, but ultimately counsel for the Mas advised counsel for Mr. Musak that his clients would not be able to complete the sale because they could not provide clear title. Mr. Musak then filed a notice of civil claim alleging breach of contract and seeking specific performance and damages in the alternative. Mr. Musak also filed a *caveat* against the title to the property, in order to preserve his claim as the purchaser.

The Application for Summary Judgment

[5] Mr. Musak brought an application before a Master for summary judgment under Rule 9-6. The Mas had retained counsel, who had notice of the application, but did not attend the hearing, for reasons explained below. The Master granted an order (i) declaring that there should be specific performance of the contract, (ii) allowing for "other matters of relief" as may be required for the closing of the sale, by further order of the court or agreement of the parties, and (iii) specifying that the order was made without prejudice to "any claims or defence as to damages" by either party.

Issues Raised on Appeal

[6] On appeal, the Mas argue that the Master erred by:

(1) proceeding with the hearing in the absence of anyone appearing on their behalf, when in fact their counsel had been making efforts to appear by MS Teams;

(2) proceeding with the application without hearing all interested parties, including the Romanows;

(3) acting on inadmissible evidence, including statements of counsel;

(4) granting judgment in favour of the plaintiff when there were triable issues as to the enforceability of the contract;

(5) making an order for specific performance:

(a) in the absence of jurisdiction to do so;

(b) on terms that were not outlined in the plaintiff's pleadings; and

(c) when there were triable issues on the pleadings as to the preconditions for specific performance; and

(6) permitting the plaintiff to “split his case”, by granting judgment in the nature of specific performance for the sale of the property, but leaving open further issues with respect to implementation of the sale, defences as to remedy, and damages for abatement.

Standard of Review

[7] This appeal is brought under Rule 18-3 of the *Supreme Court Civil Rules*. The standard of review in an appeal from the decision of a Master was described by Justice Horsman, as she then was, in *4HD Construction Ltd. v. Dawson Wallace Construction Ltd.*, 2020 BCSC 1224 at para. 19:

> The parties agree on the principles that govern the standard of review on an appeal from a master. The review of an interlocutory decision of a master is a true appeal and appellate interference is warranted only if the master is “clearly wrong”. However, a master’s decision on a question of law, a final order, or a ruling that raises questions vital to the final issue in the case will be reviewed by way of rehearing on the merits based on the record that was before the master. The question in the latter category of cases is whether the master was correct, not whether she was clearly wrong. See: *Canadian Western Bank v. 353806 B.C. Ltd.*, 2017 BCSC 1072 at para. 11; *Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.).

[8] In the present matter, I have no difficulty characterizing the Master’s order granting summary judgment as a final order, or at least an order that decided matters vital to the final disposition of the case. The order conclusively resolved the question of liability for breach of contract, and went on to specify the nature of the remedy, namely specific performance. Even though the order left open the mechanics of how the specific performance was to be implemented, it most certainly dealt with issues vital to the final disposition of the case.

Analysis

Whether the Master Erred in Hearing the Application without Anyone Appearing for the Defendants

[9] On behalf of the Mas, counsel submits that the Master erred by proceeding with the hearing in the absence of anyone appearing for the defendants. I would summarize the circumstances relevant to this argument as follows:

(a) The plaintiff's application for summary judgment was filed on 27 July 2022, almost eight months before the hearing proceeded on 20 March 2023.

(b) The application was originally returnable in Cranbrook on 8 August 2022, but that date was lost because plaintiff's counsel failed to file the application record in time.

(c) Plaintiff's counsel, Mr. Halyn, re-set the application for hearing on 20 March 2023, by way of a requisition filed on 6 March 2023. The requisition was served on counsel for the Mas, Mr. Taylor, on or before 10 March 2023, as reflected in email correspondence contained within the appeal record.

(d) Despite having been served with the notice of application months earlier, and having been served with the requisition some 10 days before the scheduled hearing date, counsel for the defendants did not file an application response.

(e) On Friday, 17 March 2023, Mr. Taylor wrote to Mr. Halyn, proposing that the hearing be adjourned and re-scheduled for a more convenient date. Mr. Halyn, whose office is in Calgary, responded by email on the weekend, indicating that he was already *en route* to Cranbrook, he had instructions to proceed, and he was not inclined to agree to an adjournment.

(f) When the case was called in court on the morning of 20 March 2023, Mr. Halyn told the Master that he had instructions to proceed, and that opposing counsel had been served with the application materials and the requisition. Mr. Halyn further stated (accurately) that on the preceding

Friday he had received email communication from Mr. Taylor, who wanted to have the matter re-scheduled. Counsel speculated that Mr. Taylor, whose office is in Vancouver, might be seeking to "call in". Counsel said that several weeks earlier he had proposed to arrange the hearing by MS Teams, so that neither counsel would have to travel to Cranbrook, but he got no response to that proposal, so he attended in person.

(g) In the course of the hearing, the Master pondered whether to stand the matter down for Mr. Halyn to make efforts to speak with Mr. Taylor, but ultimately the Master decided to deal with the application on its merits, with no one appearing for the defendants.

[10] In her reasons for judgment, the Master explained that the application had been filed in July of 2022, and had been subsequently set for hearing by requisition filed on 6 March 2023, the defendants did "nothing to respond to the application", with the exception of sending an email at 4:20 p.m. on the date before the hearing, to seek an adjournment without explaining the basis for that request. The Master's reasons continue as follows:

> [5] As of now, it being 10:30 a.m., there has been no note or communication received by the court as to a request, or any attempt by defence counsel, to phone in to today's application, to appear remotely, send an agent or take any other steps in order to further advance an adjournment application.
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> [6] In light of that, and given that there is no formal adjournment application before the court today, I am prepared to proceed.

[11] On appeal, counsel for the defendants tendered fresh evidence to provide more detail about the efforts he and his office made on the morning of 20 March 2023 to appear in court remotely. I would admit the fresh evidence, keeping in mind the somewhat relaxed standard that applies where the evidence is tendered to address the fairness or integrity of the hearing process, rather than the merits: *R. v. Ball*, 2019 BCCA 32 at para. 103-104, applying *R. v. Aulakh*, 2012 BCCA 340 at para. 59, 64.

[12] Counsel for the defendants relies on the fresh evidence to explain that in fact, his office contacted the Registry in Cranbrook on the morning of 20 March 2023, requesting that Mr. Taylor be permitted to appear by telephone. More specifically:

(a) Between 9:00 a.m. and 9:55 a.m. (Vancouver time) on 20 March 2023, Mr. Taylor's legal assistant phoned the Registry in Cranbrook, twice, requesting that Mr. Taylor be permitted to appear by telephone from Vancouver.

(b) On the second occasion, the assistant was advised to submit a Requisition in Form 17 permitting Mr. Taylor to appear by telephone.

(c) At 9:55 a.m. (Vancouver time), Mr. Taylor's assistant submitted a requisition seeking permission to appear by telephone. The reasons given in support of the request were as follows: "Counsel for the [d]efendants is based in Vancouver and by reason of a mistake made by counsel for the [d]efendant regarding the date of the within application, counsel for the [d]efendant has not made travel arrangements and cannot attend in Cranbrook."

(d) Shortly before 10:00 a.m. (Vancouver time), Mr. Taylor also phoned the Registry in Cranbrook seeking an opportunity to appear in court by telephone. No one answered Mr. Taylor's call and he left a voicemail message.

[13] The requisition submitted by Mr. Taylor's assistant was ultimately rejected by the District Registrar. The reason given was as follows: "The file was called and heard at 10:12 a.m. Cranbrook time. The package was received at 10:55 a.m. Cranbrook time and was out of time."

[14] At this point I should note that Cranbrook operates on Mountain Daylight Savings time, whereas Vancouver operates on Pacific Daylight Savings time. Thus, when Mr. Taylor's assistant was phoning the Cranbrook Registry at 9:00 a.m. Vancouver time, it was already 10:00 a.m. in Cranbrook. And when Mr. Taylor's

assistant submitted a Requisition at 9:55 Vancouver time, it was already 10:55 a.m. in Cranbrook.

[15] On appeal, counsel for the Mas submits that while the Master said in her reasons that there had been “no note or communication received by the court as to a request, or any attempt by defence counsel, to phone in to today’s application”, this was not correct. In fact, since 9:00 a.m. Vancouver time (10:00 a.m. Cranbrook time), counsel’s office had been making attempts to get permission for Mr. Taylor to appear by telephone.

[16] Counsel submits that the Master erred in “failing to stand matters down to check with the Registry about efforts made by counsel for the [d]efendants, based in Vancouver, to attend the hearing by telephone”, by failing to require counsel for the [p]laintiff to contact counsel for the [d]efendants”, and by failing “to consider an adjournment, which would have been granted if the Master had been aware of the efforts of counsel for the Defendants” to appear at the hearing.

[17] I do not agree that the Master made any of the errors alleged. The backdrop is that the notice of application had been filed and served on the defendants months in advance of the hearing date. The hearing had been scheduled by requisition served on counsel for the defendants at least 10 days before the hearing date. Despite all of this, no application response had ever been filed by counsel for the defendants. In fact, the defendants did not file an application response until 21 March 2023 (the day after the hearing), supported by an affidavit sworn on 20 March 2023. Further, counsel for the defendants took no steps to attend the hearing, and took no steps to communicate with plaintiff’s counsel or seek an adjournment until late in the day on the business day before the hearing.

[18] I do not agree that the Master made any error in failing to “stand matters down to check with the Registry”. It is the responsibility of counsel to make arrangements to appear in court in response to an application. Certainly where a presider is given some reason to believe that counsel is expected to appear, reasonable efforts ought to be made to accommodate that counsel, or to stand down

for more information. But there are limits on the lengths that presiders must go to in giving parties who have been duly notified and who have counsel an opportunity to be heard. Masters and Justices presiding in chambers often have lengthy court lists. A presider may sometimes make accommodations, or indulgences in an effort to ensure that parties and counsel are given every opportunity to appear and be heard, but there was no obligation for the Master to do any more than she did in this case.

[19] I do not agree that the Master made an error in failing to "require counsel for the [p]laintiff to contact counsel for the [d]efendants" prior to hearing the application. The Master made appropriate enquiries of counsel and was informed by Mr. Halyn of the steps taken to give notice to the opposing party, and the position and intention of opposing counsel as best it could be ascertained. Mr. Halyn was straightforward with the Court and fair to opposing counsel in providing as much information as he could about his correspondence with counsel for the defendants.

[20] I do not agree that the Master erred in failing to consider an adjournment. As the Master noted, there was no formal adjournment application before the Court. In fact, the defendants, who had been represented by counsel throughout, had never even filed any response to the application. Nor do I agree that an adjournment "would have been granted" if the Master had been made aware of the reasons for the request. The best information as to counsel's reason for not appearing at the hearing on the morning of 20 March 2023 is found in the requisition form, submitted at 10:55 a.m. Cranbrook time, some 20 to 25 minutes after the hearing concluded. That requisition contained an assertion that counsel was not in attendance "by reason of a mistake made by counsel for the [d]efendant regarding the date of the within application". No further explanation for the "mistake" can be found anywhere in the record. In fact, the plaintiff's summary judgment application had been before the court for some eight months, with no response ever having been filed. The hearing itself proceeded on at least ten days notice to the defendants. Aside from sending an email on the Friday afternoon before the Monday hearing, it is not clear that counsel for the defendants took any steps whatsoever to respond to the plaintiff's pending application.

[21] On the record before me, there is no basis for holding that the Master erred in hearing the plaintiff's application for summary judgment without anyone appearing for the defendants. I would not accede to this ground of appeal.

[22] I should not leave my discussion of this ground of appeal without addressing a recent decision dealing with a somewhat similar issue, namely *Boone v. Jones*, 2023 BCCA 215, which was handed down some four weeks after the hearing of the appeal in the instant matter.

[23] In *Boone*, the Court set aside a summary judgment made in the absence of the defendant, on the basis that proceeding with the summary trial application in the defendant's absence violated the *audi alteram partem* principle. The Court found that the appellant was "misled as to the time of the hearing" and had a "reasonable explanation for her non-attendance": *Boone* at para. 43. The Court went on to apply the general principle reflected in *Ritchards-Rewt v. Ruschyna*, 2019 BCCA 143 that "an order made following a hearing in the absence of one of the parties who had an acceptable explanation for their non-attendance will amount to a breach of procedural fairness": *Boone* at para. 44-46.

[24] In my view, the facts in *Boone* differ materially from the facts in the present matter. In *Boone*, although the appellant had not filed a response to the summary trial application, she had expressed an intention to appear at the hearing, by seeking and obtaining leave to appear remotely by MS Teams, three days before the scheduled hearing date. The appellant then received contradictory information from the Registry about when the summary trial application would be called in court.

[25] On the date of the hearing, the appellant attempted to join the proceeding using an MS Teams link that had been provided to her by email from the Court Registry, but the appellant was told to stand by and was not admitted to the hearing. The appellant then remained online in the MS Teams "waiting room" for more than an hour. She called the Registry for an explanation of the delay but got no response.

[26] Unbeknownst to the appellant, there was in fact a criminal matter being dealt with in the morning court session, and her case was not called until the afternoon. Part way through the hearing in the afternoon, the appellant once again tried to join the proceedings via MS Teams, but the judge was already in the midst of her ruling and the appellant was not admitted until the ruling was finished. The appellant then tried to explain what had happened, but the chambers judge declined to re-open the matter, at least in part because the appellant had not filed an application response.

[27] It was in that context that the Court of Appeal determined that, despite her not filing a response to the summary trial application, the appellant had exercised reasonable diligence in attempting to appear remotely. Accordingly, proceeding in her absence and declining to re-open the hearing when she did appear offended the *audi alteram partem* principle.

[28] The facts in the case at bar are fundamentally different. The defendants had fair notice of the application. They were not misled as to the date or time of the hearing. Their counsel made no effort in advance of the hearing date to obtain leave to appear remotely. Counsel did not exercise anything close to “reasonable diligence” in attempting to appear at the hearing. Counsel’s actions were too little, too late. There was no violation of the *audi alteram partem* principle. As I have said, there must be limits on the extent to which the Court will accommodate last minute efforts to attend hearings remotely. In my respectful view, those limits were exceeded in the case at bar.

Whether the Master Erred in Proceeding with the Application Without Hearing from All Interested Parties

[29] The defendants next assert that the Master erred by proceeding with the application without hearing from the Romanows, who, though not parties to this proceeding, have a pending petition in which they assert an interest in the property which is the subject of the disputed contract of purchase and sale.

[30] The defendants rely on Rule 8-1(7), which provides that notice of an application in chambers must be served on “each of the parties of record and on

every other person, though not a party, who may be affected by the order sought". The defendants say the Romanows "may be affected by the order sought", because they have a pending proceeding involving the property that is the subject of the current action, they assert an interest in the subject property, and they have a certificate of pending litigation registered against it.

[31] In support of this position, the defendants cite *Mundi v. McCarthy*, 2019 BCSC 1562. In *Mundi*, two separate buyers had entered into contracts to purchase the same property from the owners, the Traceys. Both sets of buyers, the McCarthys in one case and the Mundis in the other, filed separate actions seeking enforcement of their contracts, and both registered CPLs against the title to the Tracey property. The McCarthys then brought an application in their action seeking specific performance of their purchase contract, without notice to the Mundis. The presiding Justice, having been told that the Mundis had "no standing" in the McCarthy action, granted the order. The Traceys then brought a separate application, supported by the McCarthy's, to have the Mundi CPL removed from the title to the property. Justice Williams declined to deal with the merits of the application, citing Rule 8-1(7), and suggesting that what had occurred at the initial application was not fair or just, and that it was "a mess" that cried out to be made right. Justice Williams directed that the matter be brought back before the Justice who presided over the original application to enforce the McCarthy contract.

[32] *Mundi* is factually different from the case at bar inasmuch as it involved two purchasers each claiming a right to purchase the subject property, whereas the present case involves a purchaser claiming a right to purchase and an adjacent property owner claiming an interest in the subject property. However, despite the differences, in my view, the underlying concern is the same.

[33] The order obtained by the plaintiff in the Musak action had the potential to affect the interests of the petitioners in the Romanow proceeding in a number of ways. To begin with, the practical effect of the order was to give Mr. Musak a right to step into the Romanow petition proceedings (as the new owner of the Ma property),

without the Romanows being given notice or an opportunity to be heard. At a more fundamental level, the order required specific performance of the Musak contract, thus requiring sale of the subject property despite the pending claim of the Romanows to an interest in it.

[34] Counsel for Mr. Musak says the order for summary judgment in the Musak action did not necessarily have any implication for the Romanows. The order simply determined the question of liability as between Mr. Musak and the Mas. And, while the order also required specific performance of the contract of purchase and sale, it did so on terms that arguably left open the issue of the validity of the easement claim asserted by the Romanows in their petition and CPL. In Mr. Musak's submission, the Master's order merely substituted Mr. Musak in the place of the Mas as the owner of the property, without determining or affecting the claims asserted by the Romanows in the other proceeding.

[35] Although plaintiff's counsel may be right in his interpretation of the legal effect of the Master's order, I am not sure that is the case. From the perspective of the Romanows, the order may have more significant legal or practical consequences. The Romanows continue to assert a legal interest in the very property that is the subject of the order under appeal. And the order under appeal compels that the property be transferred. The implications of all of this for the Romanows are not entirely clear to me. Without actually hearing from the Romanows, it is difficult to anticipate what they might say about the validity and implications of a summary judgment order compelling the sale of a property over which they have a pending easement claim.

[36] In the course of the hearing, Mr. Musak's counsel asserted that the order would give his client "standing" in the Romanow petition. He went on to say that his client was planning to make an application "conjoining the two matters", that is, joining the *Musak* action and the Romanow petition. Counsel asserted that the two matters were "interrelated" as there were common issues concerning who bears responsibility for the damages alleged by Mr. Musak, and whether the easement

asserted by the Romanows is “valid or not”. In my view, counsel’s suggestion that the two matters were “interrelated” to the point that they ought to be consolidated into a single proceeding cannot be ignored in determining whether the Romanows “may” have been affected by an order granting specific performance of a contract for the sale of the subject property.

[37] Rule 8-1(7) requires that notice be served on any person who “may be affected by the order sought”. Having carefully considered the positions, and being apprised of all the circumstances, including the alleged involvement of the Romanows with both the Mas and with Mr. Musak himself prior to entering the contract of purchase and sale, I conclude that the Romanows may have been affected by the order sought. Had they been given notice, the Romanows might have made arguments opposing the basis for the order, or its terms. For this reason alone, I would allow the appeal and set aside the order granted by the Master.

Remaining Grounds of Appeal

[38] Having determined that it is necessary to allow the appeal on what is in essence a point of procedure, I see no value in addressing the remaining grounds. This is particularly so given that parties who may have been affected by the order – the Romanows – did not have the opportunity to be heard on either the original application, or the appeal.

Disposition

[39] The Master’s order dated 20 March 2023 is set aside, without prejudice to the plaintiff’s right to bring a further application for summary judgment, on notice to both the Mas and the Romanows.

[40] I did not hear submissions on costs. If the parties are unable to agree as to costs of the appeal, they can make arrangements through Supreme Court

Scheduling to appear before me, by MS Teams, at 9:00 a.m. on any date when I am available to hear the matter.

"Riley J."