IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lyle v. Kanngiesser,*
2023 BCSC 1232

Date: 20230718
Docket: 58237
Registry: Kamloops

Between:

Jo Ann Lyle

Plaintiff

And

Steven Richard Kanngiesser and Danelle Lisa Kanngiesser also known as Danelle Lisa Hatton

Defendants

Before: The Honourable Mr. Justice Hori

On appeal from: An order of the Supreme Court of British Columbia, dated May 2, 2023 (*Lyle v. Kanngiesser*, KA 58237).

Reasons for Judgment

Counsel for the Plaintiff:	T.A. Maas
Counsel for the Defendants:	J.S. Koch
Place and Date of Trial:	Kamloops, B.C. June 19, 2023
Place and Date of Judgment:	Kamloops, B.C. July 18, 2023

Introduction

[1] The defendant, Danelle Lisa Kanngiesser, applied to cancel the registration of a certificate of pending litigation ("CPL") filed against her property by the plaintiff. On May 2, 2023, the master dismissed Ms. Kanngiesser's application. Ms. Kanngiesser appeals the master's order.

Background

[2] In this action, the plaintiff claims judgment against the defendants in the sum of $105,699.77 pursuant to an agreement by which the defendant, Steven Richard Kanngiesser, agreed to purchase the plaintiff's property in Barrier, British Columbia (the "Barrier Property"). Payment of the purchase price for the Barrier Property was secured by way of a "Right to Purchase Agreement" registered against title to the Barrier Property.

[3] The notice of civil claim alleges that in June 2018, the plaintiff released the Right to Purchase Agreement on Mr. Kanngiesser's agreement to pay out the outstanding amount owing on the purchase of the Barrier Property or register a mortgage in favour of the plaintiff against the Barrier Property.

[4] The plaintiff alleges that after she released the Right to Purchase Agreement, Mr. Kanngiesser failed to pay the amount owed to her for the purchase of the Barrier Property and failed to register a mortgage in the plaintiff's favour against the Barrier Property.

[5] The plaintiff alleges that Mr. Kanngiesser then transferred the Barrier Property to the defendant, Ms. Kanngiesser, who then transferred the Barrier Property back to herself and Mr. Kanngiesser as joint tenants.

[6] The plaintiff alleges that in June 2019, the defendants sold the Barrier Property to a third party and used the sale proceeds to purchase property in 100 Mile House (the "100 Mile House Property").

[7] The plaintiff claims an interest in the 100 Mile House Property pursuant to the principles of constructive trust, the remedy of tracing and the provisions of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163. Based on those claims, the plaintiff filed a CPL against title to the 100 Mile House Property.

[8] In response to the plaintiff's claims, the defendants allege that the plaintiff released her interest in the Barrier Property as part of a settlement agreement. The defendants allege that they fulfilled the terms of the settlement agreement and deny that they owe any monies to the plaintiff for the purchase of the Barrier Property.

[9] In addition, the defendants have filed a counterclaim in which they claim compensation for unjust enrichment for repairs and renovations made to the Barrier Property on behalf of the plaintiff. The defendants also claim a set-off of their unjust enrichment claim against any award made to the plaintiff in this action.

History of the Proceedings

[10] The plaintiff commenced this action by filing a notice of civil claim on November 5, 2019. The defendants filed a response to civil claim and a counterclaim on January 28, 2020. The plaintiff filed a response to the defendant's counterclaim on February 18, 2020.

[11] On February 17, 2021, plaintiff's counsel commenced an examination for discovery of the defendant, Steven Richard Kanngiesser. Plaintiff's counsel adjourned this examination for discovery but, before doing so, made various requests for additional information.

[12] The parties agree that the last step taken in these proceedings, for the purposes of this application, was the examination for discovery of Mr. Kanngiesser on February 17, 2021. However, since that date, counsel for the plaintiff has proposed dates for the resumption of the examination for discovery of Mr. Kanngiesser on at least two separate occasions. Mr. Kanngiesser has not responded to any of those proposed dates.

[13] In addition, Mr. Kanngiesser remains unresponsive to the requests made at his examination for discovery even though plaintiff's counsel has requested responses.

[14] Plaintiff's counsel requested discovery dates from Mr. Kanngiesser on November 26, 2021 and January 10, 2022. On February 25, 2022, plaintiff's counsel requested Mr. Kanngiesser's e-mail address and/or phone numbers for Mr. and Ms. Kanngiesser from their previous counsel. No response to this request was received by plaintiff's counsel until September 6, 2022.

[15] On October 20, 2022, plaintiff's counsel delivered a written request to the defendants for responses to the requests made at Mr. Kanngiesser's examination for discovery and for dates to resume the examination. However, there does not appear to have been any response from the defendants.

Issues on Appeal

[16] Ms. Kanngiesser appeals the master's order on the basis that the master improperly exercised her discretion to dismiss her application. The specific grounds of appeal are that:

a) The master failed to exercise her discretion in a manner consistent with the principle of *stare decisis* in that she:

   i. failed to follow the result in *Lawn Genius Manufacturing (Canada) Inc. (Drainmaster) v. 0856810 B.C. Ltd.*, 2016 BCSC 1915 [*Lawn Genius*]; and

   ii. failed to properly apply the three factors relevant to the exercise of her discretion as set out in *Collington Construction Ltd.* v. *CPOS Development Corp.*, 2019 BCSC 1716; and

b) The master erred by giving no weight, or insufficient weight, to the presumption that the owner of the property charged with a CPL is

prejudiced when no step in the proceeding has been taken for a period of one year.

Standard of Review

[17] The standard of review to be applied on an appeal from an order of a master was established in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCSC 999 (leave to appeal ref'd 2011 BCCA 390). *Ralph's Auto Supply (B.C.) Ltd.* held at para. 7 as follows:

> 1) Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.
>
> 2) A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master.

[18] It is common ground between the parties in this case that Ms. Kanngiesser appeals a purely interlocutory decision of the master which is not to be interfered with unless it is clearly wrong.

[19] In *Genesis Fertility Centre Inc. v. Yuzpe*, 2017 BCSC 1037 at para. 17, Justice Gropper held that a clearly wrong decision is made where:

a) masters abuse their discretion by acting arbitrarily or capriciously;

b) masters exercise their discretion under a mistake of law;

c) masters err in law or principle;

d) masters misdirect themselves;

e) masters disregard a principle;

f) masters misapprehend facts or take into account irrelevant factors; or

g) masters' orders would result in an injustice.

Analysis

[20] Ms. Kanngiesser applied to cancel the registration of the CPL pursuant to s. 252(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], which provides as follows:

> (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.

[21] Justice Bernard considered the application of s. 252(1) of the *LTA* in *Lawn Genius* and established the following principles at para. 12:

a) A step in the proceedings must be either required or permitted by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, and must move the action forward towards trial or resolution;

b) The period of one year refers to the year immediately preceding the bringing of an application pursuant to s. 252(1) of the *LTA*;

c) The court retains the discretion not to cancel a CPL, even where the statutory prerequisites are met, if a cancelation would not be fair and equitable; and

d) Where the statutory prerequisites are met, prejudice to the land owner is presumed and the claimant must show that the prejudice is either not serious or is outweighed by other factors that suggest cancelation of the CPL would be unjust.

[22] The parties agree that no step in the proceeding has been taken in the year preceding the notice of application to cancel the CPL. Therefore, the question is whether the master properly exercised her discretion in refusing to cancel the CPL.

Stare Decisis

[23] Ms. Kanngiesser's first ground of appeal is that the master was clearly wrong because she failed to follow the result in *Lawn Genius.*

[24] Ms. Kanngiesser submits that the facts in *Lawn Genius* are so similar to the facts in this case that the master was compelled to arrive at the same result. I do not accept this submission because there are two significant factors in *Lawn Genius* that distinguish it from this case.

[25] The first distinguishing factor is that in *Lawn Genius,* the amount claimed was only $18,552 about which the court makes the following comment at para. 22:

> (b) …it seems improbable in all of the circumstances, including the size of the claim, that success by the plaintiff would be a hollow victory without the CPL as security.

The amount claimed in *Lawn Genius* was significantly less than the $105,699 claimed by the plaintiff in this action. Therefore, the consequence of cancelling the registration of the CPL in this case is more likely to result in a hollow victory for the plaintiff without the CPL as security.

[26] The second distinguishing factor is that there was no suggestion in *Lawn Genius* that the defendant contributed to the delays in prosecution of the action. In this case, the master held that the actions of the defendants contributed to the plaintiff's delay in prosecution.

[27] Accordingly, I would not give effect to this ground of appeal.

[28] The second ground of appeal is that the master was clearly wrong by failing to properly apply the three factors relevant to the exercise of her discretion as set out in *Collington Construction Ltd.*

[29] The three factors set out in *Collington Construction Ltd.* are as follows at para. 32:

> a) Whether the respondent has given an acceptable explanation for the delay in proceeding with the claim;

b) Whether, despite the presumed prejudice, no actual prejudice would be sustained by the applicant; and

c) Whether the respondent's claim for an interest in land has at least a reasonable chance of success.

[30] In my view, while the master did not explicitly refer to the factors set out in *Collington Construction Ltd.,* her reasons indicate that she implicitly considered these factors.

[31] With respect to the explanation for delay, the master considered that the defendants contributed to the delay.

[32] With respect to the actual prejudice, as I will discuss later in these reasons, the master rejected Ms. Kanngiesser's claim of actual prejudice.

[33] With respect to the merits of the plaintiff's claim, the master had only the pleadings from which to assess the merits. The plaintiff's notice of civil claim discloses, at least, a reasonable cause of action.

[34] Accordingly, I would not give effect to this ground of appeal.

Presumption of Prejudice

[35] The third ground of appeal is that the master erred in giving no weight, or insufficient weight, to the presumption of prejudice.

[36] The master recognized the proper test for exercising her discretion at para. 10 of her reasons, where she stated:

> [10] Once the applicant has demonstrated that no formal steps have been taken, prejudice is presumed to be experienced by the property owner as a result of the CPL being registered on title. It then falls to the court to determine whether or not there are circumstances such that the cancellation of the CPL would be unfair or unjust in the circumstances.

[37] At para. 12 of her reasons, the master determined that she had very little detail about any "actual prejudice" suffered by either of the parties.

[38] However, the master rejected Ms. Kanngiesser's assertion that the CPL prevented the resolution of the property claims in her family law case with Mr.

Kanngiesser. The master held there was a lack of evidence to support that assertion. In particular, the master found that there was no evidence that "the Kanngiessers attempted to either transfer, sell or borrow money against the property, nor that the CPL was the reason for the failure of any attempt".

[39] In rejecting this submission, the master was addressing the claim that Ms. Kanngiesser suffered actual prejudice as a result of the CPL. However, it is clear from the concluding paragraph of her reasons, that the master recognized the presumption of prejudice in that she made the following statement:

> [18] In the circumstances, I am satisfied on the evidence before me that any prejudice being suffered by Ms. Kanngiesser is outweighed by other factors, including the defendants' contribution to the delay.

Since the master had already rejected Ms. Kanngiesser's claim of actual prejudice, the master could only be referring to presumed prejudice in this passage.

[40] In the final two paragraphs of her reasons, the master considers and weighs the competing interests of the parties to determine whether the prejudice to Ms. Kanngiesser was outweighed by other factors, as she was required to do by the principles established in *Lawn Genius.* The master concluded that the following factors outweigh the prejudice to Ms. Kanngiesser:

a) The defendants' contribution to the delay in the prosecution of the action; and

b) The loss of security afforded to the plaintiff by the CPL.

[41] The passages from the master's reasons to which I have referred show that the master considered the presumed prejudice to Ms. Kanngiesser. The weight that the master places on the presumed prejudice and the weighing of that prejudice against other factors are matters of discretion. The master's conclusion is based in the evidence and it is in accordance with the principles established in *Lawn Genius.*

[42] On these facts, I cannot conclude that the master was clearly wrong in her assessment of the proper balance between the presumed prejudice to Ms.

Kanngiesser and the other factors in this case. Therefore, I would not give effect to this ground of appeal.

Disposition

[43] Based on the foregoing, I have concluded that the discretion exercised by the master in dismissing Ms. Kanngiesser's application was not clearly wrong.

[44] Accordingly, I would dismiss the appeal.

"D.K. Hori J."

HORI J.