

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0928234 B.C. Ltd. v. Starmark Properties Corp.*,
2023 BCSC 1795

Date: 20230712
Docket: S2010846
Registry: Vancouver

Between:

0928234 B.C. Ltd. and Ali Ibrahim

Plaintiffs

And

**Starmark Properties Corp., Maryam Pour-Nasrollah, Ahmad Mahlooji d.b.a.
Pavilion Ventures, Hussein Shivji and Nadia Shivji**

Defendants

Before: The Honourable Mr. Justice Thomas

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

M.G. Funt

Counsel for the Defendants Nadia Shivji and
Hussein Shivji:

M.E. Guy

For the Defendants Starmark Properties
Corp., Maryam Pour-Nasrollah, and
Ahmad Mahlooji d.b.a. Pavilion Ventures:

No appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.
July 11-12, 2023

Place and Date of Judgment:

Vancouver, B.C.
July 12, 2023

[1] **THE COURT:** This is an application by the purchasers of a property to strike the action that is being commenced against them by Mr. Ibrahim and 0928234 B.C. Ltd. pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR]. Mr. Ibrahim is an entrepreneur and 0928234 B.C. Ltd. provides financing services. The numbered company is associated with Mr. Ibrahim but the extent of his interest in the company is unclear.

[2] Mr. Ibrahim and the numbered company are the plaintiffs in this action. The amended notice of civil claim sets out the following facts.

- a) The action involves the sale of a property. The property in question was owned by Ms. Pour-Nasrollah, Mr. Mahlooji and Starmark Properties, who sold the property to Mr. and Mrs. Shivji.
- b) Mr. Ibrahim entered into a business relationship and an employee relationship with Ms. Pour-Nasrollah to provide real estate services to sell the property amongst other things. Mr. Ibrahim says this relationship enables him to provide real estate services to Ms. Pour-Nasrollah and receive compensation for those services, despite the fact he does not have a licence. Ms. Pour-Nasrollah was already represented by a realtor to sell the property. Mr. and Mrs. Shivji were represented by their own realtor who showed them the property. A contract of purchase was entered into between the defendants with the assistance of their realtors.
- c) A third party wished to make an offer on the property for more money than the contract to purchase. Ms. Pour-Nasrollah was considering accepting the third party offer over the contract to purchase. Mr. Ibrahim met with Mr. Shivji and the following events have been alleged to have occurred, which are set out at paras. 24-25 of the amended notice of civil claim.

24. In or around August 2020, the Defendant Buyers discovered the following:

- a. that the Defendant Seller had received a new offer from a third party to purchase the Property for \$6,950,000.00; and

- b. that the Defendant Seller intended to breach the New Contract of Sale so that the Defendant Seller could accept the higher offer made by the third party.
25. In or around August of 2020, the Defendant Buyer entered into an agreement with the Plaintiffs (the "Buyer's Agreement") on the following terms:
- a. the Plaintiff would expend time and effort to communicate with the Defendant Sellers for the purpose of convincing them not to breach the New Contract of Purchase and Sale; and
 - b. in exchange, the Defendant Buyers would pay \$75,000.00 if the Defendant Sellers ultimately performed their obligations under the New Contract of Purchase and Sale;
 - c. that Plaintiff would also refer or recommend to the Defendant Buyers prospective clients from Plaintiff's network for the purpose of the Defendant Buyers attempting to provide insurance services to those clients through Sunlife Financial; and
 - d. the Plaintiff would receive a 20% commission of any gross profits generated by the Plaintiff referring clients to the Defendant Buyers to purchase insurance.
- d) With respect to the buyer's agreement, the pleadings state the plaintiffs were in compliance with their obligations under the agreement and they have performed all of their required obligations. They had made repeated demands for payment of \$75,000. The Shivjis have refused to pay monies owing pursuant to the buyer's agreement. As a result of the breach and repudiation of the buyer's agreement, the plaintiffs have suffered loss and damage. In the alternative, the Shivjis are liable to pay compensation to the plaintiffs under the principle of *quantum meruit*. In the alternative, the defendants have received a benefit of the plaintiff's services set out in the buyer's agreement and benefit from the services which have resulted in a binding contract of purchase and sale for the property, and it would be unjustly enriched such the plaintiffs are entitled to restitution of benefits received by the Shivjis. When I refer to the buyer's agreement, that was defined in para. 25 of the amended notice of civil claim.

- e) The plaintiffs also have an allegation of conspiracy that is set out in paras. 38-40 of the amended notice of civil claim.

Conspiracy

38. Following the removal of the condition precedents of the New Contract of Purchase and Sale, the Defendants held a meeting, without notice to the Plaintiffs, in which they combined and conspired with each other to injure the Plaintiffs through their actions to complete the purchase and sale of the Property without any payment whatsoever to the Plaintiffs and for the following purposes:
- a. to deprive the Plaintiffs completely of the amounts outstanding under the Finder's Fee Agreement, as amended, and the Buyers' Agreement;
 - b. to artificially reduce the purchase price of the property by \$321,429.00 from \$6,750,000.00 to \$6,428,571.00 in order to reduce the G.S.T. and Property Transfer Tax payable on the transaction;
 - c. to pay the proceeds of sale from the Property directly into the Defendant Sellers' accounts instead of to the trust account operated by the Defendant Sellers' Lawyer, in order to circumvent legitimate efforts by the Plaintiff to garnish those funds pursuant to a Garnishing Order made by the BC Supreme Court on October 28, 2020.
39. Pursuant to their conspiracy, the Defendants, or any of them, carried out or caused to be carried out overt acts, which were aimed or directed at the Plaintiffs, to breach the Finder's Fee Agreement, as amended, and the Buyers' Agreement and which could reasonably be foreseen would cause injury.
40. As a result of the acts carried out by the Defendants, and in furtherance of their conspiracy, the Plaintiffs have suffered loss and damage.

The Law

[3] Rule 9-5(1) of the *SCCR* reads:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court, and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[4] Before a pleading can be struck out under Rule 9-5(1), it must be plain and obvious that the pleading as it is or as might be amended does not disclose a reasonable claim for a defence. It is to be assumed that the facts pleaded are true and any doubt is to be resolved in favour of letting the pleadings stand. I rely upon *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 1990 CanLII 90 (S.C.C.) [*Hunt*].

[5] Of note is that in *Hunt*, Madam Justice Wilson quoted with approval the following passage from the judgment of Mr. Justice Norris in *Minnes v. Minnes* (1962), 34 D.L.R. (2d) 497, 1962 CanLII (B.C.C.A.):

I might add that upon the motion, with respect, it was not for the learned trial Judge as it is not for this Court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried.

[6] Also germane is that as Mr. Justice Dickson, as he then was, stated in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at 451, 1985 CanLII 74 (S.C.C.):

...we are obliged to read [pleadings] as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.

Orders Sought

1. Real Estate Services

[7] The applicants say that the allegations against them should be struck as the services alleged to have been provided by Mr. Ibrahim to them in para. 25(a) are real estate services which he is prohibited from receiving any compensation for by the *Real Estate Services Act*, S.B.C. 2004, c. 42 [*RESA*]. They rely on *Lindsay v. Ambrosi*, 2019 BCCA 442, at para. 38.

[8] Mr. Ibrahim says that with respect to para. 25(a), real estate services are defined as trading services by the *RESA*, and are limited to the following activities:

"trading services" means any of the following services provided to or on behalf of a party to a trade in real estate:

- (a) advising on the appropriate price for the real estate;
- (b) making representations about the real estate;
- (c) finding the real estate for a party to acquire;
- (d) finding a party to acquire the real estate;
- (e) showing the real estate;
- (f) negotiating the price of the real estate or the terms of the trade in real estate;
- (g) presenting offers to dispose of or acquire the real estate;
- (h) receiving deposit money paid in respect of the real estate

but does not include an activity excluded by regulation;

[9] Real estate is specifically defined under the *RESA*.

[10] Mr. Ibrahim says he was providing advice to Ms. Pour-Nasrollah with respect to the contract for purchases completed by the Shivjis and the third party offer or potential offer. As such, he was providing real estate services to Ms. Pour-Nasrollah, an activity he was entitled to be compensated for pursuant to the employee exemption in the *RESA*. He says the communications with Ms. Pour-Nasrollah referred to in para. 25(a) did not amount to providing real estate services to the Shivjis because the communications and advice occurred solely with Ms. Pour-Nasrollah.

[11] I do not accept this interpretation of the pleadings or of the *RESA*. In my view, it is plain and obvious that paras. 24-25 of the amended notice of civil claim refer to the provision of real estate services being provided to the Shivjis by Mr. Ibrahim. The fact that Mr. Ibrahim was communicating with Ms. Pour-Nasrollah does not mean that he was not negotiating or acting on behalf of the Shivjis. The pleadings clearly state that he was acting on their behalf with respect to the activities set out in paras. 24, 25(a) and (b).

[12] In addition, in my view, the act of negotiating on behalf of the Shivjis required Mr. Ibrahim to communicate with Ms. Pour-Nasrollah. This does not mean that Mr. Ibrahim was not also acting on behalf of Ms. Pour-Nasrollah. That is an issue that simply does not need to be decided here.

[13] Mr. Ibrahim states that in addition to providing the services set out in paras. 25(a) and(c) of the buyer's agreement as defined in the amended notice of civil claim, the corporate plaintiff offered to remove the financing that was being provided to the third party which constituted part of their offer as a further element of the buyer's agreement. Although this aspect of the agreement has not been pled, the plaintiffs asked for leave to include this as a cause of action that would provide actionable consideration in addition to the services provided in para. 25(a) for the payment set out in para. 25(b).

[14] The plaintiffs advised that some time will be required to properly draft a pleading given its complicated nature. I agree that such a pleading would be complicated and expressed concern about the nature of the proposed allegation.

Disposition of Real Estate Services

[15] Given that it is clear and obvious that the plaintiffs cannot claim compensation for the provision of services contained in paras. 25(a) and (b) under the pleadings, I order the following pleadings be struck:

- 25(a) and (b);
- 29;
- Paragraph 34, all references to the Defendant Sellers must be removed;
- Paragraph 37, the following should be removed, "have received the benefit of the Plaintiffs' services which resulted in a binding contract of purchase and sale for the Property and";
- Part 2: Relief Sought. Strike point 4.

[16] With respect to the proposed amendment to the buyer's agreement, the plaintiffs have leave to bring an application to amend the pleadings but I am seized of any such application.

2. The Referrals

[17] The applicant says there is no evidence that any referrals were provided pursuant to para. 25(c) and that the pleadings are insufficient to support a cause of action for nonpayment of commissions.

[18] In my view, it is not appropriate to consider evidence on this aspect of the application. In applying the law with respect to Rule 9-5(1), I am not satisfied that upon a broad reading of the pleadings and perhaps with appropriate amendments, the plaintiffs have failed to plead a cause of action.

Disposition on Referrals

[19] I order the plaintiff provide particulars of the clients referred to the Shivjis and amend the pleadings to indicate a clear breach of para. 25(d).

3. Conspiracy

[20] The applicants say there is no evidence of a conspiracy or that the pleadings of conspiracy are insufficient to support a cause of action for civil conspiracy.

[21] In my view, it is not appropriate to consider evidence in this aspect of the application. In applying the law with respect to Rule 9-5(1), I am not satisfied that upon a broad reading of the pleadings and perhaps with amendments the plaintiffs have failed to plead a cause of action.

Disposition

[22] I dismiss this aspect of the application.

4. Abuse of Process

[23] The applicant says that this action amounts to an abuse of process. They rely upon a large volume of what in my view are largely unrelated and irrelevant material to support this proposition, which consists of:

- a) some past difficulties the plaintiff had with the law,
- b) some family, commercial and injury litigation,
- c) a disability from work; and
- d) the fact that he has used different names etc.

[24] I am not convinced that this history amounts to an abuse of process or establishes that the plaintiff is a vexatious litigant.

Disposition

[25] I dismiss that aspect of the application.

5. Security for Costs

[26] The law for security for costs against a corporate plaintiff is set out in *Morecorp Holdings Ltd. v. Island Tug and Barge*, 2011 BCSC 84, as follows. On a security for costs application the applicant bears the onus of first establishing a *prima facie* case that the corporate plaintiff will be unable to pay costs if its claim fails. If the applicant successfully discharged the onus, then security for costs is “generally ordered” unless the corporate plaintiff can show that (a) it will be able to pay for costs by adducing evidence that it has exigible assets; (b) there is no arguable defence; or (c) an order for security for costs would stifle the action.

[27] The corporate plaintiff has over \$400,000 of assets deposited in a bank in the jurisdiction. I agree with the plaintiffs that there are more than sufficient exigible assets to pay an award for costs.

[28] I reject the applicants' position that the fact that the assets are removeable is sufficient in this case to satisfy the threshold factor that the corporate plaintiff will be unable to pay the costs if the claim fails. A similar argument was rejected by our court in analogous circumstances in *Westcorp Solutions v. Collins*, 2014 BCSC 1606.

[29] The law for security for costs against an individual claimant is set out in *Hu v. Lee*, at 2022 BCSC 56, at paras. 70-71:

[70] Rule 22-1(6) authorizes the court to make an order for security for costs. The considerations bearing on the exercise of the court's discretion under the rule were canvassed in detail by Harris J. in *L.S. v. G.S.*, 2016 BCSC 1130 at paras. 31-36 and Ker J. in *Javaheri v. Heidari*, 2019 BCSC 1438 at paras. 42-51. Both cases quote the following statement of Dillon J. in *Han v. Cho*, 2008 BCSC 1229, adopted by the Court of Appeal in *Meade v. Armstrong (City)*, 2011 BCCA 63 at para. 12:

[27] ... The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

[71] Both cases have regard to the following list of considerations initially articulated in *Ruko of Canada Ltd. v. Canadian Imperial Bank of Commerce* (1991), 49 C.P.C. (2d) 105 (B.C.S.C.):

- a. the ability of the defendant to pay costs, if ordered;
- b. the merits of the case;
- c. the level of costs;
- d. any prejudice to the plaintiff as a result of a delay in the application; and
- e. prejudice to the plaintiff in the sense of preventing it from proceeding with a meritorious claim if an order is made.

[30] The trial of this matter is set for 14 days in 2024. The applicants ask for \$34,000 in security given the length of trial and the number of parties and non-parties involved. In this case, the plaintiff does not have sufficient assets to pay costs if he is not successful. There is no evidence that he could obtain assets from the corporate plaintiff if necessary. The claims brought by the corporate plaintiff are distinct with respect to the lending of money as to real estate services or insurance

services which were provided by the plaintiff. There is no direct evidence the plaintiff would abandon his claim if security for costs was ordered, and I find given the evidence presented by the applicants this would likely not be the case.

[31] I am concerned about the tenuous nature of the allegations made by the plaintiff as a whole and I am of the view that there is little merit in the allegations made against the applicants. In my view, these factors constitute special egregious circumstances such that discretion should be exercised to order security for costs against the individual plaintiff.

[32] Given the length of trial and complexity of the matter, in my view, \$34,000 is appropriate in these circumstances.

Disposition

[33] I order the plaintiff to post security for \$35,000 for security for costs. Failure to do so within 45 days of today's date will result in a stay of proceedings against the applicants. For purposes of any document disclosure orders, time will not begin to run on those orders until security has been posted.

[34] In my view, the applicants have been largely successful in this application and are entitled their costs.

“Thomas J.”