

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shirazi v. Youssefi*,
2024 BCSC 569

Date: 20240408
Docket: S163621
Registry: Vancouver

Between:

Aliakbar Haidarzadeh Shirazi also known as Saeid Shirazi
Plaintiff

And

**Safiollah Youssefi also known as Safe Youssefi
Sami Yosefi and Salar Yosefi**
Defendants

Before: The Honourable Justice Edelmann

Reasons for Judgment

In Chambers

Counsel for the Plaintiff: S. Visram

Counsel for the Defendants: N. Aram

Place and Dates of Hearing: Vancouver, B.C.
February 7 and 8, 2024

Place and Date of Judgment: Vancouver, B.C.
April 8, 2024

Overview

[1] This is an application seeking summary judgment, the striking of various parts of the pleadings, cancellation of a certificate of pending litigation and security for costs. The notice of application also sought a finding of contempt of court but that aspect of the application has been adjourned generally.

[2] The underlying dispute arises from financial dealings between Mr. Shirazi and Safe Youssefi. Mr. Youssefi was in the business of selling used cars and Mr. Shirazi provided funds to him in the context of that business. A portion of the funds were not repaid and there is a dispute about the terms on which the funds were provided. The parties do not seek to have me resolve that dispute today. The main issue for the purposes of the application before me is the connection between the funds and a property owned by the other defendants, who are Mr. Youssefi's adult sons.

Summary Judgment

[3] Justice McNaughton recently summarized the principles applicable to summary judgment in *Strookow v. Sobey*, 2024 BCSC 175:

[39] Pursuant to Rule 9-6(5) of the *Supreme Court Civil Rules*, the Court may dismiss a claim if, after pleadings are exchanged, it concludes that there is no genuine issue for trial.

[40] The bar on an application for summary judgment is high. Marie bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11.

[41] In *Beach Estate v. Beach*, 2019 BCCA 277, the Court of Appeal discussed the applicable principles on an application for summary judgment under Rule 9-6. Rule 9-6 involves a limited review of the evidence. A defendant may succeed by showing that the plaintiff's case, as pleaded is unsound or by adducing sworn evidence that gives a complete answer to the plaintiff's case:

[48] ... Such evidence generally is adduced in the form of an affidavit. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed on the Rule 9-6 application: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at paras. 10-11. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect or if the defendant's evidence in support of the Rule 9-6 application fails to meet all of the causes of action raised by the

plaintiff's pleadings, the application must be dismissed: *B & L Holdings Inc.* at para. 46, quoting *Progressive Construction Ltd.* at 335.

[Emphasis in original.]

- [4] The Amended Notice of Civil Claim (ANOCC) seeks the following relief:
- A. A declaration that the Defendants Safiollah Youssefi also known as Safe Youssefi, Sarni Yosefi and Salar Yosefi and hold the Property in trust for the Plaintiff
 - B. A certificate of pending litigation over the Property;
 - C. An order setting aside and declaring void ab initio the transfer to the Defendants Sarni Yosefi and Salar Yosefi of the funds necessary to purchase the property;
 - D. An accounting of those funds;
 - E. Judgment against the Defendants Safiollah Youssefi also known as Safe Youssefi, Sarni Yosefi and Salar Yosefi and for the purchase amount of the Property in the amount of \$100,000 plus interest;
 - F. Judgment against Defendant Safiollah Youssefi also known as Safe Youssefi for the sale of the Plaintiff's 2000 Mercedes ML320 for \$9,000 without paying him back;
 - G. Judgment against Defendant Safiollah Youssefi also known as Safe Youssefi for the Promissory Note Agreement;
 - H. Judgment against Safiollah Youssefi Defendant Safiollah Youssefi also known as Safe Youssefi for damages for breach of the Car Agreement;
 - I. Interest;
 - J. Costs;
 - K. A declaration that Defendant Safiollah Youssefi also known as Safe Youssefi holds all the Loan Monies and the sale of the Plaintiff's 2000 Mercedes ML320 for \$9,000 in trust for the Plaintiff;
 - L. A declaration that the Plaintiff is entitled to trace that money into the Property;
 - M. A declaration that a transfer dated June 27, 2013 and deposited for registration in the New Westminster, B.C. Land Title Office on June 14, 2013 under No. CA3180798, of the Property into the name of Sarni Yosefi and Salar Yosefi was a fraudulent conveyance under the provisions of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163. or in the alternative, under the Fraudulent Preference Act, R.S.B.C. 1996, c. 164.
 - N. An order that the Property be sold forthwith and from the proceeds of sale the Plaintiff be paid the Loan Monies of \$100,000 plus the increase in value of the Property from June 14, 2013, the date of the conveyance
 - O. Judgment against Defendant Safiollah Youssefi also known as Safe Youssefi for each cheque he provided as security for payment.
 - P. An order that the fee simple in the Property and premises be vested in Defendant Safiollah Youssefi also known as Safe Youssefi: and
 - Q. Such further and other relief as this Honourable Court may seem just.

[5] Plaintiff's counsel conceded in the course of oral submissions that there is no genuine issue for trial in relation to the allegation that the purchase of the property was a fraudulent conveyance. The property was purchased by Sarni and Salar

Yosefi from a third party. The plaintiff was unable to point to any basis upon which the transfer of the property from one third party to another would delay, hinder or defraud him as a creditor in relation to Mr. Youssefi. I therefore grant summary judgment in relation to items C, D and M of the Amended Notice of Civil Claim.

[6] The defendants do not seek summary judgment in relation to items F-J. The main issue before me is whether there is a genuine issue for trial in relation to the plaintiff's interest in the property.

[7] The pleadings allege that Mr. Youssefi misappropriated funds from the plaintiff and that those funds were used for mortgage payments on the property. In his affidavit, Mr. Youssefi confirms that he did receive at least \$52,500 from the plaintiff which he placed in his personal account. He also confirms that he made payments out of that account to pay the mortgage on the property.

[8] I do not find summary judgment to be appropriate in the circumstances. The defendants concede that the question of whether the plaintiff's funds were misappropriated is a genuine issue for trial. In my view, it is also clear on the evidence before me that if the funds were misappropriated, they could be traced to the property. While the amount that is traceable to the property may be an issue for trial, it is clear even on Mr. Youssefi's own evidence that he used funds from the same personal account in which the plaintiff's funds were deposited to make the mortgage payments.

[9] The defendants argue that given that the funds were mingled with other funds, it is not possible to trace which funds were used to make mortgage payments. I am not satisfied the issue is so clear on the facts before me as to warrant summary judgment. The pleadings clearly allege unjust enrichment, and it is common ground that the funds were placed in an account from which mortgage payments were made. In my view, the question of whether a constructive trust is an appropriate remedy, and if so the amount of funds that could be traced into the property are triable issues. I do not accept that the comingling of funds in this case would

preclude the remedy sought. This issue was discussed by Newbury J.A. in *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357:

[42] Of course, it may be difficult to identify the funds or other property into which the claimed Charges have been transformed or with which they have been mingled; and the process will come to a halt in certain conditions, including where the balance in an account has fallen below the amount being traced. (See generally Madaugh and McCamus, *supra*, at Chapter 7, and Smith, *supra*, at Chapter 8.) As the Court stated in *McTaggart v. Boffo* (1975) 1975 CanLII 351 (ON SC), 64 D.L.R. (3d) 441 (Ont. H.C.J.):

Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:

- a. If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;
- b. the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice. [At 458.]

[10] I conclude that the defendants have not demonstrated that there is no genuine issue for trial in relation to the plaintiff's interest in the property. The application for summary judgment is therefore dismissed as it relates to that aspect of the claim.

Certificate of Pending Litigation

[11] Given my findings on summary judgment, it follows that I am satisfied that the pleadings disclose an interest in land. I am also satisfied that the original pleading disclosed an interest in land through the pleadings of unjust enrichment and constructive trust. I find they sufficiently disclosed an interest in land at the time the CPL was filed (*Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 30).

Security for Costs

[12] The defendants seek an order for security for costs against the plaintiff. The circumstances in which security to costs would be ordered against an individual

litigant was set in *Han v. Cho*, 2008 BCSC 1229 (cited in *Ocean Pastures Corporation v. Old Masset Economic Development Corporation*, 2016 BCCA 12):

[27] The onus is on the applicant to establish that he or she will be unable to recover costs. The fact that the plaintiff resides outside the jurisdiction, has no assets within the jurisdiction, or is impecunious, is not sufficient in itself. 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.

[13] The evidentiary basis for the application is quite weak. The defendants point to the fact that the plaintiff is a citizen of Iran and suggest he travels back to Iran frequently, although there is no indication of the source of that knowledge. They also say that he does not appear to have a source of income in Canada, nor are they aware of any real property or valuable personal property in BC. In my view, the evidence before me does not indicate that the plaintiff is not a resident of Canada, nor that he is impecunious. At best, the defendants seek to have the court speculate about the plaintiff's financial situation.

[14] The plaintiffs also suggest the claims are weak on their face. While there are a number of live issues for trial, Mr. Youssefi admits having signed a promissory note in favour of the plaintiff that he has not repaid. I would not characterize that aspect of the plaintiff's claim against Mr. Youssefi as weak on its face. While the claims against Mr. Youssefi's sons may not be as strong, I do not find them to be so weak as to favour an order for security for costs.

[15] Given the admitted intermingling of finances between Mr. Youssefi and the other defendants I would not have been inclined to order security for costs in relation to the claims against them in any event. If the plaintiff is successful against Mr. Youssefi, even in part, the award and costs consequences for Mr. Youssefi would likely offset any cost consequences for the plaintiff in relation to the other defendants. The application for security for costs is dismissed.

Costs

[16] The plaintiff has been largely successful on the contested portions of the application. However, the plaintiff originally did not file a response to the application and his counsel appeared on the first day of a two-day hearing seeking an adjournment. He had not filed any materials, and did not even have the defendants' materials with him. The oral adjournment request was denied. The defendants did not oppose the filing of a response on the second day of the hearing, but I have little doubt the late filing created additional work for the defendants' counsel. As noted, the plaintiff conceded during the hearing that summary judgment on certain portions of the claim was warranted. Taking into consideration the time spent during the hearing as a result of the approach taken by the plaintiff, I find that each party should bear their own costs of the application.

“The Honourable Justice Edelmann”