

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1332404 B.C. Ltd. v. 1266685 B.C. Ltd.*,
2024 BCSC 592

Date: 20240314
Docket: S250439
Registry: New Westminster

Between:

1332404 B.C. Ltd.

Plaintiff

And:

1266685 B.C. Ltd. and 1317903 B.C. Ltd.

Defendants

And:

IMAX Ventures Ltd.

Defendant by way of counterclaim

Before: The Honourable Justice Francis

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

J. Singh

Counsel for the Defendant 1317903 BC Ltd.:

M. Tribe

Place and Date of Hearing:

New Westminster, B.C.
March 8, 2024

Place and Date of Judgment:

New Westminster, B.C.
March 14, 2024

[1] **THE COURT:** These are my reasons on the application that was heard last week. I am giving these reasons orally this morning. If a transcript is ordered, I will likely edit the reasons for grammar and clarity and to include the case citations, but the substance will not change, nor will the outcome.

[2] The defendant 1317903 B.C. Ltd., (“131”) has applied to remove a certificate of pending litigation placed by the plaintiff, 1332404 B.C. Ltd. (“133”), on lands owned by 131.

[3] 131 asserts that the CPL should be removed on the basis that the notice of civil claim does not claim an estate or interest in land, or alternatively, that the CPL gives rise to hardship and inconvenience for 131.

Facts

[4] The property in issue (“the Property”) consists of two development lots in Langley.

[5] On March 3, 2021, 131 entered into a purchase and sale agreement to purchase the Property with a completion date of November 15, 2021. The plan was to subdivide the Property for resale purposes. The purchase price of the Property was \$7.5 million.

[6] On October 29, 2021, 131 entered into a purchase and sale agreement to sell the Property to the defendant 1266685 BC Ltd., (“126”) for \$14,170,000 (the “October 2021 Contract”). Because the sale of the Property to 131 and subsequent subdivision of the Property into lots was not completed at the time of the October 2021 Contract, the October 2021 Contract stipulated that the purchase price of the Property would be \$1,090,000 per lot if the number of subdivided lots changed. The October 2021 Contract also provided that 126 would provide 131 with two deposits: a first deposit on November 5, 2021, in the amount of \$1,417,000; and a second deposit of \$708,000 payable March 21, 2022.

[7] In the October 2021 Contract, the parties agree that the number of lots to be subdivided, and the approximate dimensions, lot lines, and location of the proposed lots as set out in the contract was not a representation by 131 of the final number of lots, areas, lot lines, or dimensions of the subdivision lots in the development. This was necessarily a term of the October 2021 Contract because 131 had not yet obtained approval from the Township of Langley to undertake the proposed subdivision development at the time the agreement was made.

[8] A later addendum was made to the October 2021 Contract on November 5, 2021 (“the Addendum”). The Addendum, among other terms, contained the following term:

Seller agrees that the lot size not be reduced more than 2 percent upon approval from Township of Langley as shown on Exhibit B attached to this contract of purchase and sale on November 5, 2021.

[9] The Addendum also stipulated that there would be four deposits:

- a) The first deposit of \$10,000 paid November 1, 2021;
- b) A second deposit of \$200,000 paid on November 5, 2021;
- c) A third deposit of \$1,207,000 to be paid on November 8, 2021; and
- d) A fourth deposit in the amount of \$708,000 to be paid on June 30, 2022, or 30 days after 131 had received first and second reading approvals from the Township of Langley for the subdivision of the Property.

[10] The first, second, and third deposits were paid in accordance with the Addendum. The fourth deposit has not been paid.

[11] On November 15, 2021, the plaintiff 133 registered an option to purchase against title to the Property.

[12] At some point in the development approval process with the Township of Langley, the layout of the development on the Property was changed. This resulted

in the development having 14 lots as opposed to the 13 lots contemplated in the original October 2021 Contract.

[13] On August 4, 2023, 133 filed the notice of civil claim in this proceeding. In the notice of civil claim, 133 alleges that 131 failed to comply with the requirements set out in part 2 of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41[*REDMA*], and as a result the October 2021 Contract is not enforceable against 133. 133 also filed a CPL on the Property.

Does the pleading claim an estate or interest in land?

Authorities

[14] Pursuant to s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250, a person who is a party to a proceeding claiming an estate or interest in land may register a CPL against the land.

[15] A CPL is an extraordinary prejudgment mechanism intended to protect a valid claim to an interest in land until the underlying issues can be resolved: *Chen v. Jin*, 2019 BCSC 567 [*Chen*].

[16] In order to properly file a CPL, an interest in land must be established on the pleadings. Where the pleadings fail to establish an interest in land, the CPL should be cancelled on the basis that it does not meet the necessary precondition: *Chen* at para. 8. The test is whether the pleadings are adequate to establish a sufficient connection between the misappropriated funds and the Property in question to justify a CPL: *Wai v. Chung*, 2020 BCSC 34 at para. 18.

Analysis

[17] In the notice of civil claim, the plaintiff sets out the following material facts:

- a) On October 29, 2021, 126 entered into the October 2021 Contract to buy 13 subdivided fully serviced single family lots for the price of \$14,170,000.

- b) On November 5, 2021, 126 assigned the October 2021 Contract to the plaintiff 133.
- c) Upon obtaining the assignment, 133 paid 131 the deposit in the amount of \$1,417,000.
- d) The subdivision lots purchased under the October 2021 Contract were to be at least 12.5 metres wide and at least 420 square metres in size, which could accommodate a house of a specific design with a living room, office of at least 10 by 10 square feet, a kitchen and family room on the main floor.
- e) At some point prior to May 29, 2023, 131 amended the subdivision plan to subdivide the Property into 14 lots instead of 13 lots, thus reducing the size of the lots and making it impossible for 133 to construct the houses it intended to construct on the subdivision lots.

[18] In the notice of civil claim, the plaintiff asserts that 133 is a purchaser for the purposes of *REDMA* and that 131 is a developer for the purposes of *REDMA*. The plaintiff submits that under *REDMA*, 131 was required to take a number of steps it did not take, including obtaining the approval of 133 to any material changes to the layout of the individual lots. Because 131 failed to comply with *REDMA*, the notice of civil claim asserts that the October 2021 Contract is "not enforceable against the plaintiff."

[19] However, notwithstanding the position of 133 that the October 2021 Contract is not enforceable against 133, in the notice of civil claim 133 claims an interest in the Property "equivalent to the contribution of the deposit paid to the defendant 131." Because 133 has paid 131 a total deposit of \$1,417,000, the notice of civil claim states that 133 "has an interest in the lands for the deposit already paid by way of a purchaser's lien."

[20] 133 also asserts in the notice of civil claim that 131 "holds the title of the Lands in trust for the Plaintiff by way of a resulting trust, enforceable through a

purchaser's lien, or alternatively by way of a constructive trust enforceable through a purchaser's lien”.

[21] 133 also pleads unjust enrichment, and submits that it should be entitled to a remedial constructive trust “proportionate to the amount of the Deposit paid by the plaintiff”.

[22] Under part 2, relief sought, the plaintiff seeks the following:

- a) Rescission of the October 2021 Contract;
- b) A declaration that 131 has contravened *REDMA*;
- c) A declaration that the October 2021 Contract is unenforceable against the plaintiff;
- d) An order that 131 return the Deposit plus interest;
- e) An order that 126 return the assignment fees paid by 133;
- f) In the alternative, damages against 131 and 126;
- g) Interest pursuant to the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78; and
- h) “A purchaser's lien” on the Property by way of a certificate of pending litigation.

[23] At first glance, this proceeding appears to be a monetary claim of the kind commonly seen in these courts in which two parties enter into a real estate deal, the deal falls apart, and the proposed purchaser sues for return of his or her deposit. Such claims do not generally give rise to an entitlement for the plaintiff to file a CPL on the land because in seeking a return of a deposit to purchase land, the purchaser is not asserting an interest in land. If a claim cannot give rise to an interest in land, cancellation of the CPL will be ordered: *Bilin v. Sidhu* 2017 BCCA 429, at

paras. 54-56, *RVS Investments Inc. v. HH Maple Investments Ltd.*, 2021 BCSC 2412, at paras. 11-12.

[24] However, the plaintiff submits that this is not a straightforward return-of-deposit case. As I understand the submissions of the plaintiff, notwithstanding the fact that the plaintiff seeks to rescind the October 2021 Contract and asks the court to order a return of the deposit to 133, the fact that the plaintiff has pled a purchaser's lien makes this a case in which an interest in land is asserted.

[25] In *Pan Canadian Mortgage Group III Inc. v. 0859811 BC Ltd.*, 2014 BCCA 113, Justice Newbury helpfully described the doctrine of purchaser's liens. She noted that:

[1] The purchaser's lien is a relatively obscure equitable remedy with roots dating back at least to the mid-19th century: see *Wythes v. Lee* (1855) 61 E.R. 954; *Rose v. Watson* [1864] 10 H.L.C. 672. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides him or her with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs.[1] It exists even though specific performance may not be available (as in this case, which involves strata lots that were never created) and even though the purchaser may have (legally) rescinded the contract. The lien is said to have the same effect as if the vendor had executed a mortgage in the purchaser's favour in the amount covered by the lien; and comes into existence at the moment of payment by the purchaser. (See generally *Halsbury's Laws of England*, 4th ed., Vol. 28 at paras. 560-64; *Snell's Equity* (31st ed., 2005) at §42-25 to §42-32; C. Harpum, S. Bridge and M. Dixon, eds., *Megarry and Wade: The Law of Real Property* (7th ed., 2008) at §15-056; A. Warner La Forest, ed., *Anger & Honsberger: Law of Real Property* (3rd ed., looseleaf) at §34:80; and J.V. Di Castri, *The Law of Vendor and Purchaser* (3rd ed., looseleaf) at §781.) The Supreme Court of British Columbia has granted a purchaser's lien in at least one case, although the Court did not go on to consider how it might be affected by the land registration system: see *Lehmann v. B.R.M. Enterprises Ltd.* (1978) 88 D.L.R. (3d) 87.

[2] True to its equitable roots, the purchaser's lien is intended to do justice in situations in which the common law does not, or cannot, do so. Thus in *Whitbread & Co., Ltd. v. Watt* [1902] 1 Ch. 835, Vaughan Williams L.J. observed that the lien "is not the result of any express contract" but is a right that may be said to have been invented "for the purpose of doing justice" (at 838). In a similar vein, it is said that the lien "supplies a remedy where the law falls short of accomplishing full justice". (See *Di Castri*, supra, at §913.)

[26] On the basis of the Court of Appeal's decision in *Pan Canadian Mortgage Group*, I am satisfied that this case is somewhat different from cases like *RVS Investments Inc. v. HH Maple Investments Ltd.*, 2023 BCSC 758, where there is simply no assertion of an interest in land contained in the pleadings. In this case, it is at least conceivable that the assertion of a purchaser's lien is an assertion of an interest in land. 133 has also pled unjust enrichment and claims that 131 holds an interest in the Property in trust in the amount of the deposit paid to 133. Again, this gives rise to the possibility that the plaintiff's claim can be categorized as an assertion of an interest in land.

[27] However, this is not the end of the inquiry. If the plaintiffs have simply asserted a purchaser's lien or claimed unjust enrichment and sought a remedial constructive trust, while pleading facts and seeking other remedies that are inconsistent with an assertion of a proprietary interest in land, they cannot be found to have genuinely asserted an interest in land. The facts pleaded in the claim must support an assertion of a proprietary interest in land, and they must not be inconsistent with one. To hold otherwise would be to encourage parties to simply add inconsistent assertions of liens or of trust interests to otherwise straightforward monetary claims as a way to obtain a CPL to gain financial leverage, which is an improper use of this important litigation tool. As Justice Macintosh noted in *Drein v. Puleos*, 2016 BCSC 593, the parties must not be allowed to use CPLs as:

A bargaining tool to extract prejudgment payment for financial claim. That is not what CPLs are intended to protect. They are designed to preserve land claims pre-trial by preventing the land from passing to innocent third parties pre-trial, thereby undermining the claim. If the claim in essence is not for an interest in land, CPLs are not intended to be one of the weapons in the claimant's war chest.

[28] In this case, the facts pled in the notice of civil claim, if proven, will establish that the plaintiff and defendant disagreed about a particular term in the October 2021 Contract. Specifically, 131 asserts that the parties contemplated and indeed anticipated changes to the individual lot sizes as the development plans for the Property worked their way through the municipal approval process. 133 asserts that properly construed, the October 2021 Contract and Addendum bound 131 to

ensuring that the individual lot sizes as set out in the drawings attached to the October 2021 Contract would not significantly change. 133 says that 131 fundamentally breached the contract, and it wishes to have the October 2021 Contract rescinded and its deposit returned.

[29] There is a clear inconsistency between the primary remedy sought in this lawsuit, namely rescission and return of deposit, and the notion that the plaintiff seeks an interest in land.

[30] Both parties relied on a number of cases involving s. 215 of the *Land Title Act* and whether a pleading asserts an interest in land. The only case tendered that dealt with the question of whether a pleading of a purchaser's lien was an assertion of an interest in land sufficient to grant a CPL was the decision of Master Harper in *Kang v. Steveston Public Market Inc.*, 2017 BCSC 544. In that case, similar to this one, the plaintiff sought a return of a deposit on a failed real estate deal and asserted a purchaser's lien. The plaintiff submitted that the purchaser's lien claim was an assertion of an interest in land and that it was therefore entitled to maintain a CPL on the Property. Master Harper rejected this argument, finding that the contract in that case had lapsed when neither party extended it. Because the contract had lapsed, the plaintiff ceased to have an interest in the land. As such, there was no equitable claim to assert.

[31] The plaintiffs rely on *1305788 B.C. Ltd. v. Sodhi Dream Homes Ltd.*, 2023 BCSC 445 [*Sodhi Dream Homes*], to support their position. They submit that *Sodhi Dream Homes* stands for the proposition that, by pleading a purchaser's lien, a plaintiff has met the requirements of s. 215 of the *Land Title Act* and may file a CPL on property. However, in *Sodhi Dream Homes*, Justice Gibb-Carsley was not asked to consider whether an assertion of a purchaser's lien enabled a party to file a CPL. He was dealing with the question of whether the plaintiff should be entitled to amend their pleadings to assert a purchaser's lien. Not only did he not deal with the question before me, but he expressed skepticism when the issue was raised by the party resisting the amendment:

[47] Number Co.'s primary concern with the amendment is that it will lead to Sodhi Dream Homes registering a CPL on title to the Property. In this regard, I note that in *Pan Canadian*, our Court of Appeal stated that while at least one judgment of this Court had considered a purchaser's lien, "the Court did not go on to consider how it might be affected by the land registration system": Para. 1. In my view, Sodhi Dream Homes may face hurdles in taking steps to encumber the Property through a purchaser's lien. However, that may be the subject of a further application and is not an issue that is before me on this application. I expect that any such application would require notice to any party with an interest in the Property, including any party with a mortgage registered on title to the Property.

[32] In this case, I need not determine whether a pleading of a purchaser's lien could in certain circumstances ground the filing of a certificate of pending litigation. In this case, it appears clear that the plaintiff's claim has nothing to do with asserting an interest in land. 133 seeks to rescind its contract and get its deposit money back. Such a claim is inconsistent with the assertion of an interest in land.

[33] As such, I find that the CPL was improperly registered, and it must be cancelled without conditions.

[34] Having determined that the CPL ought never have been filed, I need not consider the other bases on which 131 sought to have the CPL removed. The applicant's application is granted, and the relief sought at paragraph 1 of the notice of application is allowed.

[35] With respect to costs, unless there are specific submissions as to costs, I would be inclined to order that the normal rule should apply and costs should be in the cause, but I am happy to hear from counsel if there are specific cost submissions.

(DISCUSSION RE COSTS)

[36] THE COURT: Costs will be in the cause. Thank you.

“Francis, J.”