

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Massot v. Shewchuk*,
2023 BCSC 673

Date: 20230426
Docket: 57649
Registry: Vernon

Between:

Eric Bernard Emmanuel Massot

Plaintiff

And

Mark Daniel Shewchuk and Elizabeth Ann Shewchuk

Defendants

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Appearing on his own behalf:

E.B.E. Massot

Counsel for the Defendants:

E.E. Ross

Place and Date of Hearing:

Vernon, B.C.
March 23, 2023

Place and Date of Judgment:

Vernon, B.C.
April 26, 2023

Background Facts

[1] The defendants are the current owners of property located at 619 North Fork Road, Cherryville, British Columbia (the “Property”). In this application the defendants apply for an order dismissing the plaintiff’s claim that he has an interest in the Property.

[2] William Welsh, deceased, owned the Property for many years before the defendants. Mr. Welsh passed away on March 23, 2021.

[3] While the deceased was still alive, the plaintiff grazed livestock on the Property with the agreement of the deceased. The plaintiff claims that his arrangement to graze livestock on the Property has existed for over 20 years.

[4] When the deceased passed away, the Property passed to the defendants pursuant to the terms of a will executed by the deceased on November 4, 2019 (the “Will”).

[5] The Will appointed one of the defendants, Mark Daniel Shewchuk, as the executor and trustee of the deceased’s estate. The Will made a cash bequest to the plaintiff in the amount of \$20,000 and bequests of \$1,000 each to two charitable organizations. The residue of the estate was left, in equal shares, to the defendants.

[6] The Property formed part of the residue of the deceased’s estate. Accordingly, the Property passed to the defendants from the deceased’s estate.

[7] On July 27, 2021, Mr. Shewchuk obtained a probate order from the court by which the court granted the administration of the deceased’s estate to Mr. Shewchuk.

[8] The estate transferred the Property to the defendants, as joint tenants, on December 10, 2021.

[9] Following the deceased’s death, the plaintiff continued to graze his livestock on the Property until November 8, 2021. On that date, counsel for the executor of

the estate delivered a letter to the plaintiff requesting that the plaintiff remove his livestock from the Property.

[10] From November 8, 2021 to May 2, 2022, the plaintiff refused to remove his livestock and equipment from the Property. The plaintiff claimed the right to graze his livestock on the Property pursuant to an agreement between the plaintiff and the deceased, the terms of which Mr. Shewchuk allegedly adopted shortly after the deceased's death.

[11] On May 2, 2022, the plaintiff removed his livestock and farm equipment from the Property after the police became involved in the dispute between the parties.

[12] On May 31, 2022, the plaintiff initiated this action claiming that he had an interest in the Property.

Nature of the Plaintiff's Action

[13] The plaintiff's amended notice of civil claim is difficult to interpret. However, in essence, the plaintiff claims a right, title or interest in a portion of the Property in order to graze his livestock.

[14] The plaintiff's claim arises out of an alleged verbal agreement with the deceased which, the plaintiff claims, the defendants confirmed and adopted.

Nature of the Defendants' Application

[15] The defendants seek to have the plaintiff's action dismissed.

[16] In addition, Mr. Shewchuk seeks an order authorizing him to pay the plaintiff's \$20,000 bequest from the deceased's estate into court.

[17] The defendants bring this application as a summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

Suitability for Summary Trial

[18] After hearing from the parties and having reviewed the material, I am satisfied that this application is suitable for disposition by a summary trial. The material facts necessary for a final disposition are not in dispute. Further, the legal principles applicable are well established. Therefore, I find that proceeding with this application as a summary trial is appropriate.

Issues

[19] The plaintiff's notice of civil claim does not clearly identify the legal basis or the causes of action relied upon in seeking the relief he claims in the action. However, I interpret the notice of civil claim to raise the following issues:

- a) whether the Will is valid;
- b) whether the plaintiff is entitled to occupy the Property by license or agreement; and
- c) whether the plaintiff is a tenant pursuant to a lease arrangement.

Analysis

Validity of the Will

[20] Mr. Shewchuk, as the executor of the estate, has conducted a search for testamentary instruments executed by the deceased. His investigations, including a wills search, have identified the Will as the only testamentary instrument executed by the deceased.

[21] The plaintiff presents vague evidence of a previous will. However, he is unable to provide a copy of any previous will or to provide any specific details of it. If the plaintiff claims that the previous will specifically gave him an interest in the Property, then there is no evidence of such a bequest.

[22] Further, the Will commences with a revocation clause in which the deceased declares "I revoke all previous wills and codicils made by me." There is no evidence

upon which I can conclude that the revocation clause was not effective in revoking all previous wills that the deceased may have made.

[23] The plaintiff is not a member of the deceased's family. Therefore, he is not a person who would benefit from the deceased's estate on an intestacy. He is also not a person who is entitled to seek a variation of the Will pursuant to s. 60 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13.

[24] Therefore, any claim made by the plaintiff to challenge the Will cannot succeed.

Agreement or License

Land Title Act

[25] The plaintiff deposes that he had an agreement with the deceased for 20 years that allowed him to graze his livestock on the Property. Even if that were the case, the plaintiff has registered no such agreement against the title to the Property.

[26] An agreement or license to occupy the Property that is not registered in accordance with the *Land Title Act*, R.S.B.C. c. 250 [*LTA*] cannot bind subsequent owners of the Property. Therefore, the terms of any such agreement are not enforceable against the subsequent owners of the Property.

[27] Section 20(1) of the *LTA* provides:

20 (1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.

[28] Therefore, the plaintiff cannot enforce the terms of any agreement that he may have had with the deceased against the defendants.

Agreement with the Defendants

[29] The plaintiff alleges that the terms of his agreement with the deceased continued after the deceased's death because Mr. Shewchuk adopted the agreement on March 26, 2021. The plaintiff claims that on March 26, 2021, Mr.

Shewchuk stated to the plaintiff that “we don’t want anything to change. You can keep your cows here for as long as you want”.

[30] Mr. Shewchuk denies making the comments alleged by the plaintiff. However, even if Mr. Shewchuk spoke those words, they do not establish an agreement to allow the plaintiff to continue occupying the Property.

[31] The plaintiff alleges that the statement made by Mr. Shewchuk was made on March 26, 2021, only three days after the deceased’s death. At that time, Mr. Shewchuk had not received authority from the court to administer the deceased’s estate and he had not yet become the owner of the Property. Therefore, Mr. Shewchuk had no authority to make any agreements with respect to the Property when the plaintiff alleges Mr. Shewchuk made the statement.

Colour of Right

[32] The plaintiff claims the right to occupy the Property for grazing purposes by reason of a “colour of right” interest. The plaintiff refers to the “colour of right” principle in the context of the *Trespass Act*, R.S.B.C. 2018, c. 3 [TA].

[33] Section 3(c) of the *TA* establishes the “colour of right” as a defence to the offence of trespassing. It does not create a legal cause of action entitling the plaintiff to continued occupation of the Property.

Revocation of Licence or Agreement

[34] In any event, it is clear that by November 8, 2021, the executor of the estate revoked any license or agreement to allow the plaintiff to occupy the Property, if such a licence or agreement existed. The letter of November 8, 2021, from counsel for the executor notifies the plaintiff as follows:

We write in regards to the Property referred to above.

1. We have been made aware that there is livestock and farm equipment belonging to you present on the Property.
2. This is pursuant to a verbal agreement you had with the Deceased. However, this agreement does not survive the death of the Deceased

and is no longer in place. Therefore, the livestock and farm equipment must be removed from the Property.

[35] Accordingly, the plaintiff's claim that he has an agreement to occupy the Property for grazing purposes cannot succeed.

Lease Agreement

[36] If the plaintiff claims that he is a tenant on the Property pursuant to a lease arrangement, that claim must also fail.

Section 73 of the LTA

[37] The plaintiff claims a right to occupy only a portion of the Property. The Property is comprised of areas suitable for grazing livestock, but it also includes an area used as a residence and an area where a hunting structure is located. The plaintiff claims no interest in the areas not used for grazing.

[38] Section 73 of the *LTA* provides:

73(1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of

- (a) transferring it, or
- (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years.

...

(6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

[39] *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (C.A.) [*Top Line*], held at para. 6, that a lease of only a portion of a parcel of land was a subdivision of property. Therefore, s. 73 of the *LTA* rendered such a lease, if it exceeded a term of three years, invalid and unenforceable. Further, the Court of Appeal in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2010 BCCA 460 [*Idle-O*] held, at para. 20, that a lease granted in violation of the

statutory prohibition in s. 73 is an illegal and unenforceable contract and is void *ab initio*.

[40] As in *Top Line*, the plaintiff claims only a part of the Property which is an impermissible attempt to subdivide the Property. In addition, the plaintiff seeks to occupy the Property for a term exceeding three years as he seeks to graze his livestock on the Property indefinitely. Accordingly, any agreement to lease the Property on the terms suggested by the plaintiff is invalid and unenforceable.

[41] On May 31, 2007, after the Court of Appeal decision in *Top Line*, the legislature enacted s. 73.1 of the *LTA* which provides as follows:

73.1(1) A lease or an agreement for lease of a part of a parcel of land is not unenforceable between the parties to the lease or agreement for lease by reason only that

(a) the lease or agreement for lease does not comply with this Part, or

(b) an application for the registration of the lease or agreement for lease may be refused or rejected.

[42] The effect of s. 73.1 of the *LTA* is that the contravention of s. 73 of the *LTA* does not render a lease unenforceable as between the parties to the lease. Therefore, if the parties had reached an agreement on the essential terms of a lease, those terms could be enforced as between the parties, but could not be enforced against third parties who are not privy to the terms of the lease agreement.

[43] In *Idle-O*, at para. 25, the Court of Appeal declined to give s. 73.1 retrospective effect. Therefore, the Court held that leases entered into before the enactment of s. 73.1 are invalid and unenforceable.

[44] As the plaintiff's evidence is that he had entered into an agreement with the deceased owner 20 years ago, the terms of that agreement, if it constituted a lease, continued to be invalid and unenforceable notwithstanding the enactment of s. 73.1 of the *LTA*.

Essential Terms of an Agreement to Lease

[45] Even without applying s. 73 of the *LTA* and the principles of *Top Line*, the plaintiff's claim does not establish that he and the defendants had agreed upon the essential terms of a lease agreement.

[46] In *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 553, Justice Barrow outlined the requirements of an agreement to lease and specified the essential elements as follows, at para. 111:

- a) The identification of the lessor and the lessee;
- b) The premises to be leased;
- c) The commencement and duration of the term; and
- d) The rent or other consideration to be paid.

[47] In this case, the plaintiff has not established an agreement on the essential terms of a lease.

[48] On March 26, 2021, when the plaintiff claims that Mr. Shewchuk represented to him that he could stay on the Property, there was no identification of the lessor. At that time, the Property belonged to the estate. Mr. Shewchuk was neither the administrator of the estate nor an owner of the Property. Therefore, at that time, the identity of the lessor was not determined.

[49] Further, the statement attributed to Mr. Shewchuk did not specifically identify the leased premises. The plaintiff claims the right to occupy only a portion of the Property. There was no description or identification of the boundaries of the leased premises.

[50] There was also no agreement with respect to the commencement of the lease or its duration, and no mention of the rent payable or other consideration to be paid for the plaintiff's use and occupation of the Property.

[51] Accordingly, any claim made by the plaintiff as a tenant pursuant to a lease or an agreement to lease must fail.

Conclusion on the Plaintiff's Claims

[52] Based on the foregoing analysis, none of the potential causes of action under which a plaintiff may establish an interest in the Property can succeed. Therefore, the plaintiff's action is dismissed.

Disposition of the Gift to the Plaintiff

[53] The Will provides for a cash legacy of \$20,000 to the plaintiff. The \$20,000 gift remains in the possession of Mr. Shewchuk as the executor of the deceased's estate. He wishes to deposit those funds into court for the benefit of the plaintiff.

[54] However, an order made in this action on December 5, 2022 awarded the defendants \$500 in general damages against the plaintiff. Those damages have not been paid by the plaintiff. Therefore, the defendants seek to deduct the \$500 damages award from the \$20,000 legacy before they pay it into court.

[55] I am not prepared to direct that the defendants pay the \$20,000 legacy into court to the credit of this action. This action is unrelated to the deceased's estate. The estate no longer has any interest in the Property and no interest in this action. Further, the plaintiff makes no claim for the \$20,000 bequest in this action. Therefore, it would not be appropriate for estate funds to be paid into court in this action.

[56] In addition, the \$500 damages award should not be deducted from the \$20,000 bequest. The damages awarded in this action are payable by the plaintiff to the defendants. It is not an award payable to the deceased's estate.

[57] The estate accounts and the defendants' damages award are and should remain separate. The deceased's estate has obligations to the plaintiff. It should satisfy those obligations directly with the plaintiff. Similarly, the plaintiff has obligations to the defendants. He should satisfy those obligations directly with them.

Costs

[58] The defendants have been entirely successful in this application. They have also been successful in having the plaintiff's action dismissed. With this result, I see no reason to deprive the defendants of their costs pursuant to the usual rule that costs follow the event. Therefore, subject to conducting a further hearing on the issue of costs, the defendants will have their costs of the action at Scale B.

[59] If the parties wish to make submissions on the issue of costs, then, within 30 days of these reasons, the parties will schedule a costs hearing.

"D.K. Hori J."

HORI J.