

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brady v. Jiang*,
2024 BCSC 1038

Date: 20240617
Docket: S251168
Registry: New Westminster

Between:

Marilyn Frances Brady and Amanda Jade Baillie

Plaintiffs

And

An Er Jiang

Defendant

Before: The Honourable Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiffs:

F. Ju

The Defendant, appearing in person:

A.E. Jiang

Place and Date Hearing:

New Westminster, B.C.
May 30, 2024

Place and Date of Judgment:

New Westminster, B.C.
June 17, 2024

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I. Introduction

[1] The plaintiffs, Marilyn Frances Brady and Amanda Jade Baillie, bring an application for a summary trial to recover a \$69,000 deposit (the “Deposit”) they say was forfeited to them by the defendant, An Er Jiang, on a real estate transaction that went awry. The plaintiffs also seek prejudgment interest on the deposit, which at the time the application was filed amounted to \$2,531.

[2] The parties agree that on August 8, 2023, they entered into a contract of purchase and sale (the “CPS”) in which the defendant agreed to purchase a property with a civic address of 4429 Savoy Street, Delta, British Columbia (the “Property”) from the plaintiffs. The terms of the CPS included that the defendant would be required to pay the Deposit within one business day after she advised the plaintiffs that she had removed certain conditions to the CPS, which included the defendant obtaining financing.

[3] After some negotiations between the parties, on August 25, 2023, the plaintiffs received a document from the defendant’s realtor purporting to remove the subjects. They relied on that document and refused another offer on the Property. However, the defendant never paid the Deposit, nor purchased the Property. The plaintiffs subsequently sold the Property for a lower amount than both the defendant’s offer and another offer that the plaintiffs had as a “back-up” offer that they refused because they thought was a binding deal with the defendant.

[4] The defendant contends that her realtor submitted the subject removal document to the plaintiffs without her permission. She accepts that she signed a “subject removal” form, but asserts that her realtor, dated the form to a different date than when she signed it, and sent it to the plaintiffs without her permission. The defendant states that she should not have to pay the Deposit because she never authorized her realtor to submit the document purporting to remove the subjects.

[5] The complexity of this case is that it seems to turn on the actions of a third party: the realtor. However, the defendant has not brought the realtor into these proceedings by third party claim or as a witness. Further, no affidavit evidence from the realtor was put before me by either the defendant or the plaintiffs.

[6] I must first determine if the matter is suitable for summary trial. To do so, I must consider whether I have the facts necessary to make a decision, and, if so, whether it is in the interests of justice to do so. If the matter is suitable for summary trial, I will determine if the plaintiffs are entitled to the Deposit and pre-judgment interest.

[7] Before turning to my discussion and analysis, I note that the defendant has not retained a lawyer in this proceeding. Further, she is not fluent in the English language. At a previous chambers application, I adjourned this matter to require that the defendant obtain an interpreter. At this summary trial application, an interpreter was present to assist the defendant. Further, at the defendant's request, I allowed her husband, Mr. Losier, who is not a lawyer, to speak on her behalf.

II. Discussion and Analysis

A. Background Facts

[8] For the real estate transaction that is the subject matter of this application, I accept that each party had engaged the services of a realtor. However, I note that the actions of the defendant's realtor and her authority to act on the defendant's behalf have been put in issue by the defendant.

[9] On August 8, 2023, the parties entered into the CPS for the Property. In the CPS, the defendant agreed to purchase the Property for \$1,425,000, and to pay the Deposit to the plaintiffs in the amount of \$69,000, within one business day of the defendant removing certain conditions set out in the CPS.

[10] Those subject conditions in the CPS were to be waived, declared fulfilled, or otherwise removed ("Subject Removal") by the defendant on or before August 23, 2023 (the "Subject Removal Date"). The subject conditions imposed by the defendant included that the defendant would:

- a) obtain a home inspection report and be satisfied with the contents of the home inspection report;
- b) obtain and be satisfied with a property disclosure statement; and
- c) obtain and approve suitable financing for the purchase of the Property.

[11] On August 22, 2023, the parties entered into an amendment of the CPS to change the Subject Removal Date from August 23, 2023 to August 25, 2023.

[12] On August 25, 2023, the plaintiffs accepted a “back-up” offer from I Lin Chiu and Sze Fung Choi to purchase the Property for \$1,420,000 (the “Back-Up Offer”).

[13] On August 25, 2023, the plaintiffs received from the defendant’s realtor an addendum removing all of the subjects from the CPS apparently signed by the defendant (the “Subject Removal Addendum”). On receiving the Subject Removal Addendum, the plaintiffs cancelled the Back-Up Offer.

[14] The defendant never paid the Deposit and disengaged with her realtor. The plaintiffs made efforts to have the transaction contemplated in the CPS complete with the defendant through contact between the plaintiffs’ realtor and the defendant’s realtor. However, when it appeared that the transaction was not going to complete, the plaintiffs, through their realtor, indicated that they would take legal action to enforce the payment of the Deposit. This litigation ensued.

[15] The plaintiffs sold the Property on January 4, 2024, to another purchaser for \$1,358,000. I note the final sale price of the Property is \$67,000 less than the amount the defendant had offered to pay for the Property and \$62,000 less than the amount of the Back-up Offer.

B. Parties’ Positions

[16] The plaintiffs’ position is simple. They assert they had a binding agreement with the defendant that required the defendant to pay the Deposit within one business day of removing the subjects on the Property. The plaintiffs received the Subject Removal Addendum on August 25, 2023, but never received the Deposit.

[17] The plaintiffs assert that there are no facts in dispute between the plaintiff and the defendant. Any disagreement or allegations of wrongdoing made by the defendant are between the defendant and her realtor, and should be irrelevant to determining whether the plaintiffs had a binding agreement with the defendant. Put

simply, the plaintiffs say that the factual dispute is between the defendant and her realtor, and the plaintiffs are innocent third parties that should not be prevented from recovering the Deposit in a summary trial proceeding.

[18] The defendant's position is also conceptually simple, but factually more complex. She contends that she never authorized her realtor to provide the Subject Removal Addendum to the plaintiffs. The defendant asserts she would not have authorized her realtor to send the document or complete the transaction, because she never obtained financing to purchase the Property.

[19] The defendant acknowledges that she signed a subject removal document that was dated August 23, 2023, but asserts that she never signed the one dated August 25, 2023, that was given to the plaintiffs by her realtor. The defendant contends that her realtor changed the date of the Subject Removal Addendum to August 25, 2023, and provided it to the plaintiffs' realtor without the defendant's permission. The defendant contends that she did not intend to complete the transaction and so believes she should not be bound by the CPS, nor be required to pay the Deposit. In legal terms, the defendant's argument appears to be that she lacked the requisite intention to complete the transaction and her realtor lacked the authority to bind her to the CPS by submitting the Subject Removal Addendum dated August 25, 2023, on the defendant's behalf. While not articulating it as such, the defendant contends that she has a defence to the plaintiffs' claim because she did not intend to complete the transaction to purchase the Property and that this is a triable issue that should not be resolved by summary trial.

[20] I pause to note that in the materials before me, I have only the defendant's version of events. I have no ability to assess the veracity of her claim regarding her interactions with and instructions to her realtor, nor the actions taken by her realtor. Nor am I able to assess the credibility of the defendant in making these statements.

[21] With these circumstances in mind, I now turn to my analysis of whether this matter is suitable for determination by summary trial.

C. Suitability for Summary Trial

[22] Pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, a matter will be suitable for summary trial if the court can find the facts necessary to decide the claim, and it is in the interests of justice to do so.

[23] The plaintiffs contend that the court has all of the necessary facts to determine whether the defendant was in breach of the CPS. They argue that they received the Subject Removal Addendum that was signed by the defendant. Pursuant to the CPS, this triggered that the Deposit was due within one business day. The Deposit was not paid by the defendant, thus the plaintiffs assert it is clear that they are entitled to recover the amount of the Deposit.

[24] In support, the plaintiffs point not only to the transaction documents, but also to the examination for discovery of the defendant. At the examination for discovery, the defendant stated that she signed the document on August 23, 2023, but never signed the Subject Removal Addendum dated August 25, 2023, that was submitted to the plaintiffs. The plaintiffs say that, having signed the Subject Removal Addendum document, even if it was dated on a different day than the date of the one ultimately submitted by her realtor, the defendant agreed to remove the subjects. Further, the plaintiffs point to the communications between their realtor and the defendant's realtor that they say demonstrates that the defendant's realtor was acting as the defendant's agent and was authorized to act on the defendant's behalf.

[25] To reiterate, the defendant argues that she is a victim of her realtor. She asserts that her realtor submitted the Subject Removal Addendum without her permission and she never signed the version of that document dated August 25, 2023.

[26] I have sympathy for the plaintiffs, who I agree are strangers to the relationship between the defendant and her realtor. However, in my view, their position that there are no facts in dispute takes too narrow a view of the circumstances.

[27] The plaintiffs' argument that, because they received a copy of the Subject Removal Addendum signed by the defendant, the defendant is bound by the terms

of the CPS ignores the factual issue of whether the defendant had the requisite intention to be bound. Put another way, if on this summary trial I were to determine that the realtor was acting with the defendant's authority, I would be making a credibility and factual assessment of the defendant's position. I would be, in essence, disbelieving the defendant's argument that her realtor did not have the authority to bind her when she submitted the Subject Removal Addendum dated August 25, 2023. Making such a pivotal credibility and factual finding in a summary trial, based on affidavit evidence is not appropriate.

[28] In the defendant's Response to Civil Claim filed on January 5, 2024, she squarely put the question of whether she agreed to the terms of the CPS in issue:

4. In response to paragraph 6 and 7 of the plaintiff's Notice of Civil Claim, the Defendant denies removing the subjects on August 25, 2023. To the contrary, the Defendant did not sign the contract of purchase and sale addendum which ostensibly removed the subjects dated August 25, 2023.

[29] If I were to decide this matter summarily, without allowing a ventilation of the facts in a trial, I would be denying the defendant the opportunity to raise the defence that her realtor was operating without the defendant's authority by submitting the Subject Removal Addendum dated August 25, 2023, to the plaintiffs. Again, the defence may not ultimately succeed at trial, but in my view, I do not have the facts necessary before me on this summary trial to make such a determination, nor would it be in the interests of justice to do so.

[30] Whether it was reasonable for the plaintiffs to rely upon the various agreements provided to them by the defendant's realtor, in my view, is an issue that raises a triable issue and will require a judge to make factual determinations as to the nature and the context of the relationship between the defendant, the plaintiffs, and their realtors. In other words, I find that there is a conflict in the evidence regarding whether the defendant intended to complete the transaction based on her arrangement between her realtor, which may also include factual determinations regarding the interactions between her realtor and the plaintiffs' realtor. A summary trial proceeding is not suitable to resolve this conflict in the evidence.

[31] Without predicting how the matter may unfold, it would appear that, should the matter proceed to trial, the defendant's realtor will be involved in some capacity whether as a witness for one of the parties, or as a third party. Again, as I referenced earlier, I have no direct evidence from the defendant's realtor in the application before me and I am making no findings regarding her conduct. It would be unfair of me to do so based on the evidence before me. Resolution of those issues are for another day.

[32] Ultimately, I am unable to find the facts necessary to decide the plaintiffs' claim and to determine if the defendant intended to be bound by the terms of the CPS. In my view, at minimum, the defendant should be entitled to raise her defence that her realtor did not have authority to bind her in completing the transaction.

[33] Given my conclusion that this matter ought to be referred to the trial list because I am unable to find the facts necessary to decide the issues, it is not necessary for me to consider whether it would otherwise be in the interests of justice to decide the case summarily.

[34] However, in coming to my conclusion that this matter is not suitable for summary trial, I have considered the factors established by our Court of Appeal in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31 which include the following:

- a) the amount involved;
- b) the complexity of the matter;
- c) the urgency of the matter;
- d) any prejudice likely to arise by reason of delay;
- e) the cost of taking the case forward to a conventional trial in relation to the amount involved;
- f) the course of the proceedings;
- g) the cost of litigation and the time of the summary trial management conference;
- h) whether credibility is a critical factor in the determination of the dispute;
- i) whether the summary trial may create unnecessary complexity in the resolution of the dispute;
- j) whether the application would result in litigating in slices; and
- k) any other matters which may be relevant in the particular case.

[35] In respect of the *Gichuru* factors, while the issues are simple, in terms of whether the CPS was breached, they become more complex and nuanced given the potential defences to be raised by the defendant regarding her argument that her realtor acted without her authority. This complexity favours referral to the trial list.

[36] I have also considered the prejudice that referring this matter to the trial list will cause. In my view, the prejudice to the defendant of having the matter decided now on a final basis without a means to have a determination of the necessary facts is greater than the prejudice to the plaintiffs which is delay and added expense. Again, this favours referring the matter to the trial list.

[37] Another factor favouring trial is that, if the summary trial proceeded, but there was ultimately another matter or issue raised as between the defendant and her realtor, it would have the effect of litigating in slices, which, as held by the Court in *Gichuru* is not in the interests of justice.

[38] To reiterate, if I were to determine this matter summarily, I would in effect be disbelieving the defendant's version of events that her realtor acted without her authority. I would be accepting the plaintiffs' version of the facts—that the defendant's realtor acted with the defendant's authority to submit the Subject Removal Addendum—and disbelieving the defendant's version of the facts. In my view, this is an impermissible determination on a summary trial and demonstrates that the matter is not appropriate to be heard summarily.

III. Conclusion

[39] Given the foregoing, I dismiss the plaintiffs' application for summary trial and order that the matter be referred to the trial list.

[40] I acknowledge the plaintiffs likely feel that it is unfair that they did not receive the Deposit after relying on what they viewed was the valid and authorized intention of the defendant to remove the subjects and complete the transaction. I sympathize with them as they appear at least on the evidence before me to be innocent parties who believed they had sold the Property. They relied on the documents provided by the defendant's realtor and suffered a loss because they ultimately sold the Property

for less than the Back-Up Offer. The plaintiffs may yet succeed, but in my view, the interests of justice require that the matter be heard at trial.

[41] In respect of the costs of this application, the defendant has been successful in defending the plaintiffs' application for a summary trial. As such, the defendant is entitled to her costs of this application, payable in any event of the cause, at Scale B.

[42] I thank the parties for their submissions.

“Gibb-Carsley J.”