IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bath v. 593144 B.C. Ltd.,*
2024 BCSC 1335

Date: 20240724
Docket: S250955
Registry: New Westminster

Between:

Jasbir Bath also known as Jasbir Kaur Bath

Plaintiff

And

593144 B.C. Ltd.

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:	No appearance
Counsel for Defendant:	G. Khosa
Place and Date of Hearing:	New Westminster, B.C. June 14, 2024
Place and Date of Judgment:	New Westminster, B.C. July 24, 2024

[1] In the summary trial application before me, the defendant seeks to remove a certificate of pending litigation filed against residential property, which is presently lived in by the plaintiff. In addition, the defendant seeks an order that the plaintiff vacate the property and an order for a writ of possession.

[2] The plaintiff is a tenant of the defendant, and hoped to purchase the property at issue from the defendant. Since April 2023 the plaintiff has not paid rent to the defendant. In June and August 2023, the defendant served the plaintiff with notices to end the tenancy. On September 21, 2023 the plaintiff filed this notice of civil claim, and filed a certificate of pending litigation [CPL] against the property,

[3] The defendant's application originally sought judgment for unpaid rent, but the defendant agreed that the pleading did not support such an order. The defendant abandoned that aspect of its application, to be pursued in a different proceeding.

[4] The plaintiff did not attend the hearing of this summary trial application, but had filed materials in opposition to an earlier application seeking similar relief, and those materials were brought to my attention.

[5] The application raises the following issues:

a) Should the application be heard in the absence of the plaintiff?

b) Is the matter suitable for summary trial?

c) Is there a basis to maintain the CPL?

d) Is the defendant entitled to vacant possession and a writ of possession?

Should the application be heard in the absence of the plaintiff?

[6] In June and August 2023, the defendant served the plaintiff with notices to end tenancy on the basis of non-payment of rent. These were disputed by the plaintiff. The parties appeared before the Residential Tenancy Branch [RTB] on September 26, 2023. The RTB declined to exercise its jurisdiction on the basis that

this Supreme Court proceeding was substantially linked to the issues raised in the RTB dispute.

[7] In October 2023, counsel for the defendant sought the availability of the plaintiff for the hearing of an application to cancel the CPL and seek a writ of possession. At that time the plaintiff was represented by counsel. Plaintiff's counsel advised he would be available in the first week of December 2023.

[8] On November 28, 2023, the defendant filed its application to be heard December 12, 2023. The application did not proceed because the plaintiff was seeking new counsel. The application was reset to December 20, 2023.

[9] On December 18, 2023, the plaintiff served a notice of change of counsel on the defendant. The December 20, 2023 application was then adjourned by consent and an agreement between counsel was reached that the dispute would proceed to mediation. If the mediation was not successful, the plaintiff would file an amended claim.

[10] The mediation was set for February 7, 2024, but did not proceed because the plaintiff was ill.

[11] On March 1, 2024 the defendant filed a notice of application scheduled for March 15, 2024 seeking to cancel the CPL. This application was adjourned because no judge was available.

[12] In February 2024, the plaintiff advised that she could be available for discovery on April 22, 2024. The defendant served an appointment to discover her that day, but she failed to show up at the discovery and the defendant obtained an endorsement of non-appearance.

[13] On April 23, 2024 the defendant wrote to the plaintiff advising that a full day had been secured on June 14, 2023 for the hearing of this summary trial application.

[14] On April 23, 2024, the plaintiff's counsel filed a notice of intention to withdraw. Ultimately, the plaintiff's counsel was required to obtain an order for substitutional service to allow him to serve the notice on his own client.

[15] On April 25, 2024, the defendant filed a notice of application seeking to cancel the CPL, scheduled to be heard May 28, 2024.

[16] The defendant obtained an order for substitutional service on May 27, 2024.

[17] The defendant served the plaintiff with the summary trial application material on May 27, 2024, advising the application had been reset for June 14, 2024.

[18] On May 30, 2024, new counsel for the plaintiff wrote to the defendant seeking an adjournment of the application, to which the defendant did not consent. On June 7, 2024 the new counsel for the plaintiff advised that he would not be representing the plaintiff on the summary trial application.

[19] In the morning of June 14, 2024, the plaintiff corresponded with counsel for the defendant, advising that her husband was very ill and they were in the US seeking medical treatment and could not attend the summary trial application.

[20] Ordinarily, I would not proceed with this application if the plaintiff was not able to attend for health reasons. However, I am not satisfied that this application should be adjourned again. The defendant has been attempting to deal with the CPL and termination of the tenancy since October 2023.

[21] The plaintiff has had ample notice of this application – in April she was advised the full day hearing would take place on June 14, 2024. While the motion material was not filed and served until the end of May, she knew since October 2023 that an application to cancel the CPL and obtain possession would be made, and had been provided with an earlier similar application which did not proceed. This application does not take the plaintiff by surprise.

[22] This is not a complex application, and really succeeds or fails on the plaintiff's ability to establish she has an interest in the land. The application is straightforward

and for the most part turns on the plaintiff's own pleading. There is nothing from the plaintiff to suggest that she does not have the facts needed to defend this application.

[23] A summary trial is a trial, and parties must make every effort to be ready to proceed. The pattern of behaviour of the plaintiff since October 2023 appears to be one of delay, non-attendance, avoidance, and changing counsel to avoid dealing with this application.

[24] Since April 2023 the plaintiff and her family have not paid rent to the defendant, and have continued to live in the property. The defendant has been attempting to sell the property, but cannot while the plaintiff and her family continue to live in it, all the while refusing to pay rent. I am satisfied that there is significant prejudice to the defendant in a further adjournment of this application, and I am satisfied that the application should be determined in the absence of the plaintiff.

Is the matter suitable for summary trial?

[25] Pursuant to Rule 9-7(15), the Court may grant judgment in favour of any party unless the Court is unable to find the necessary facts to decide the issues of fact or law or the Court is of the opinion that it would be unjust to decide the issues summarily.

[26] On this application the defendant does not seek to dispose of the plaintiff's notice of civil claim in its entirety. The plaintiff is advancing a claim in damages for unjust enrichment and punitive damages. The defendant is not seeking to have those aspects of the claim decided. The defendant simply seeks to have the claim for a CPL based on an asserted claim to an estate or interest in the land determined on this application.

[27] I am satisfied that it is in the interests of justice to have this discrete issue determined by way of summary trial. This issue can be determined on the materials before me, and will not affect the remaining claim in damages. It will reduce the complexity of the trial on the remaining issues. There is urgency in having the

entitlement to the lands and the CPL determined, given the failure of the plaintiff to pay rent for over one year, the desire of the defendant to sell the property, and the active avoidance by the plaintiff in dealing with this application and other steps in the litigation.

Is there a basis to maintain the CPL?

[28] The defendant seeks an order under s. 215 of the *Land Title Act,* R.S.B.C. 1996, c. 250 [*LTA*] cancelling and discharging the CPL on the basis that the plaintiff's claim does not support a claim to an estate or interest in land, either registrable under the *LTA*, or at all.

[29] The plaintiff's claim may be summarized as follows:

a) The plaintiff entered into a rental agreement with the defendant on December 1, 2016 with respect to the property with a legal description:

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b) The plaintiff and her husband undertook substantial work to improve the property.

c) On December 1, 2017, the plaintiff and defendant entered into a rent to own agreement for the property, with the following material terms:

i. The purchase price would be $1,500,000, and

ii. Completion would occur on May 4, 2018.

d) In March 2018 a further contract was entered into, with the following material terms:

i. The purchase price would be $1,500,000, and

ii. Completion would occur on June 5, 2018.

e) In May 2018 the plaintiff paid for an appraisal of the property.

f) Between June 2018 and February 2022, the defendant represented to the plaintiff that they should treat the house as their own. During this period, the plaintiff and her husband treated the house as their own and paid municipal taxes until March 2023.

g) In February 2022, the plaintiff drafted a new purchase and sale agreement, with a new purchase price of $2,500,000 and which credited the plaintiff for rent paid and upgrades done to the house since 2018 in the total amount of $266,896.64. The completion date for this new draft was April 20, 2022.

h) The draft 2022 purchase and sale agreement was not executed by the defendant and did not complete in April 2022. The defendant continued to represent to the plaintiff that the property was theirs and that the defendant was seeking tax advice on the draft purchase and sale agreement.

i) In March 2022 the defendant listed the property for sale. The defendant repudiated the rent to own agreement and took steps to evict the plaintiff.

j) As a result of the representations made by the defendant, the defendant holds the property on a constructive or resulting trust in favour of the plaintiff.

[30] Section 215(1) of the *LTA* requires a party to plead facts establishing an estate or interest in the land, in order to maintain the registration of a CPL: *Yang v Williams*, 2019 BCSC 156 at paras. 15 -18. Evidence is not available on an application to discharge a CPL pursuant to s. 215, as the claim itself must disclose the interest in the land: *Wai v Chung*, 2020 BCSC 34 at para. 18.

[31] The notice of civil claim filed by the plaintiff does not disclose an agreement in force in September 2023 when the CPL was registered. The only agreements

alleged between the parties would could have supported an interest in land are the agreements in 2017 and 2018, both of which had expired on their face before September 2023.

[32] The February 2022 draft agreement is not pleaded as an enforceable agreement. It is pleaded as a draft agreement presented by the plaintiff. There is no allegation that the defendant agreed to its terms. In any event, the notice of civil claim goes on to plead that the 2022 agreement did not complete. There is no allegation that the defendant agreed to an extension of the 2022 agreement (in addition to the fact that there is no allegation that the defendant actually agreed to the terms of the 2022 draft agreement).

[33] At best, what the notice of civil claim could be read to allege is the parties had an understanding that an agreement would be made in the future with respect to the terms of a purchase of the property, which would include a credit to the plaintiff for rent and expenditures they made to the property during their tenancy. That pleading is not sufficient to establish an estate or interest in the land.

[34] In *Nouhi v Pourtaghi*, 2019 BCSC 794, the court addressed the test on an application under s. 215 of the *LTA*. The court held:

> [30] This is not an application to strike the pleadings; it is an application to strike a certificate of pending litigation based on s. 215(1) of the Land Title Act. This application requires the court to determine whether the pleadings disclose a claim to an interest in land so as to support a certificate of pending litigation. Unlike in an application to strike a claim for failing to disclose a cause of action, where pleadings are read liberally and are often not struck if they are inadequate but could be amended to disclose a cause of action, the party who filed the certificate of pending litigation may not maintain the certificate when the pleadings were inadequate to disclose a claim to an interest in land at the time the certificate was filed. If the pleadings were not adequate when the certificate was filed, the certificate was never valid and is immediately cancelled.

[35] The court in *Nouhi* also addressed the elements of a claim in constructive which must be pleaded, and whether a claim in constructive trust was sufficient to maintain the CPL:

> [26] A party seeking either type of constructive trust must satisfy two criteria, in addition to the cause of action or circumstances on which the remedial or substantive constructive trust is based. The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: BNSF at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is inadequate, insufficient or inappropriate in the circumstances: Kerr v. Baranow, 2011 SCC 10 at para. 50; ProSys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 92; Li v Li, 2017 BCSC 1312 at para. 227.
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> …
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> [49] However, Mr. Nouhi does not plead that monetary damages are, or may be, an inadequate or insufficient remedy with regard to the claim for unjust enrichment. Pleadings (and eventual proof) of the inadequacy of damages is a precondition to the impression of a remedial constructive trust. The constructive trust is Mr. Nouhi's only assertion of, or claim to, an interest in land. Accordingly, Mr. Nouhi's pleadings do not disclose a claim for an interest in land as they do not state that monetary damages are, or may be, an inadequate or insufficient remedy.

[36] I find that the allegations regarding the agreements between the parties are inadequate to disclose a claim to an interest in the land at the time the CPL was filed. Similarly, the claim of constructive or resulting trust is inadequate to support a CPL because there is no allegation that monetary damages would be an inadequate remedy.

[37] For these reasons, the notice of civil claim is inadequate to support the maintenance of the CPL.

[38] I strike the CPL pursuant to s. 215 of the *LTA*.

Is the defendant entitled to vacant possession and a writ of possession?

[39] The defendant relies on Rules 13-2(3) and 13-2(13)(b) of the *Supreme Court Civil Rules*, which provide that an order for the recovery or delivery of the possession of land may be enforced by writ of possession.

[40] Pursuant to s. 46 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 a landlord may issue a notice to end tenancy if a tenant fails to pay rent when due, or within 10 days after the tenant receives notice to end tenancy for failure to pay rent. A landlord must not take possession of a rental unit occupied by an overholding tenant unless the landlord first obtains a writ of possession.

[41] I am satisfied that the plaintiff has been in arrears of rent since May 2023, and is in breach of both notices to end tenancy issued by the defendant. The tenancy is terminated. If the plaintiff and the other occupants of the property do not vacate the property, the defendant will be entitled to a writ of possession.

[42] The defendant has, in my view, been extremely patient and reasonable with the plaintiff. On this hearing, the defendant suggested that any writ of possession could be stayed for a reasonable period of time, into the summer of 2024. I find the plaintiff and all occupants of the property must vacate the property within 30 days of this order.

Disposition

[43] Pursuant to s. 215 of the *LTA*, the certificate of pending litigation (registration no. CB907388) filed by the plaintiff on September 21, 2023 against the following lands is cancelled:

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[44] Upon filing a certified copy of this order at the New Westminster Land Title Office, the Registrar of the Land Title Office forthwith cause the certificate of pending litigation (registration no. CB907388) to be cancelled against the property.

[45] The plaintiff, Ms. Jasbir Bath and any other occupants or other persons occupying the property shall deliver to the defendant full vacant possession of the property and shall remove all personal property from the property, within 30 days of this order.

[46] This order may be served substitutionally on the plaintiff in accordance with the Order of Associate Judge Vos dated May 27, 2024.

[47] If the property is not vacated in accordance with the terms of this order, the defendant is entitled to apply for a Writ of Possession by desk order pursuant to Rule 13-2(13) and in Form 52 of Appendix A of the *Supreme Court Civil Rules* against the plaintiff and any other persons occupying the property without further order of this Court or notice.

[48] The defendant is entitled to its costs of this application in any event of the cause.

"W.A. Baker J."