COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wu v. Murray,*
2023 BCCA 270

Date: 20230705
Docket: CA49002

2023 BCCA 270 (CanLII)

Between:

Jiaqi Wu

Appellant
(Plaintiff)

And

Collin Bruce Murray and Paulette Anne Nelson

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2023 (*Wu v. Murray*, Vancouver Docket S232483).

The Appellant, appearing in person:	J. Wu
Counsel for the Respondents:	C. Hartnett D. Sahbebi, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia June 21, 2023
Place and Date of Judgment:	Vancouver, British Columbia July 5, 2023

Summary:

Application for extension of time to serve a notice of appeal that had been filed in time granted.

Reasons for Judgment of the Honourable Mr. Justice Harris:

2023 BCCA 270 (CanLII)

Nature of the Application

[1] The appellant and plaintiff below, Jiaqi Wu, applies for an extension of time to serve her notice of appeal. She seeks to appeal Justice Milman's order removing a certificate of pending litigation ("CPL") from a Coquitlam residential property (the "Orkney Property") she had unsuccessfully tried to purchase in January of 2023.

[2] The respondents (defendants below) are, collectively, the sellers and the successful buyers of the Orkney Property. The respondents oppose the application; they do not suggest there is any prejudice resulting from the delay, but maintain the application should nonetheless be refused on the basis the appeal is entirely devoid of merit.

Background

[3] This dispute centers on the interpretation of two contracts the sellers entered into for the purchase and sale of the Orkney Property: the first, with the buyers (the "Perry Contract") and the back-up, with the appellant (the "Wu Contract").

[4] The sellers entered into the Perry Contract on December 31, 2022. The sale was made subject to a number of conditions, all of which had to be removed on or before January 27, 2023. One such condition made the sale of the Orkney Property subject to the sale of the buyers' property (the "Ailsa Property"). The terms of the Perry Contract permitted the sellers to entertain back-up offers on the Orkney Property. If the sellers received another acceptable offer, they could deliver written notice to the buyers to remove all conditions from the contract within 48 hours (the "48-Hour Notice"). The contract stipulated that the 48-Hour Notice clause could not, however, be invoked on the buyers in the event they had accepted an offer to

purchase the Ailsa Property. The relevant language of the Perry Contract reads, in full:

> Subject to the Buyers entering into an unconditional agreement to sell the Buyer's property at [address] by January 27th, 2023. This condition is for the sole benefit of the Buyers. However, in the event the Sellers receive another acceptable offer, the Sellers may deliver written notice to the Buyers or their Agent requiring the Buyers to remove all conditions from the contract within 48 hours of the delivery of the notice, not to include Sundays and Statutory Holidays but not before January 13th, 2023. However, such notice will not be invoked on the Buyers in the event they have accepted an offer to purchase the Buyers property before the subject removal date of that offer.

2023 BCCA 270 (CanLII)

[5] On January 19, 2023, the sellers accepted an offer from the appellant for the sale of the Orkney Property as a back-up, and entered into the Wu Contract. The Wu Contract clearly specified that the offer was a back-up. The relevant terms and conditions portion of the Wu Contract states:

> This is a back up offer. Subject to the seller ceasing to be obligated in any way under the Contract of Purchase and Sale date: December 31, 2022 (the "Sale Contract") respecting the Property, including the Seller obtaining a full release from the Buyer, on or before: January 28, 2023. This condition is for the sole benefit of the Seller.* (Optional - The Seller agrees not to amend the Sale Contract).

[6] The appellant removed all conditions on her offer, paid a deposit, and requested the sellers deliver the 48-Hour Notice to the buyers. After the Notice was given, the buyers informed the sellers that the 48-Hour Notice clause could not be invoked, as they had, as of January 18, 2023, accepted an offer to buy the Ailsa Property. The buyers removed all subject conditions on the Perry Contract on January 27, 2023.

[7] On February 3, 2023, the appellant requested and received the return of her deposit from the sellers.

[8] On March 27, 2023, the appellant sought to enforce the Wu Contract by commencing an action against the respondents for specific performance. She registered a CPL against the Orkney Property. The appellant's claim was primarily based on allegations that the buyers had misrepresented the offer they had received

on the Ailsa Property to avoid the invocation of the 48-Hour Notice clause. The appellant claimed the buyers had induced the sellers to breach the Wu Contract.

[9] The sellers brought an application to remove the CPL on the basis that the appellant has no interest in land, or, on the alternative basis of hardship and inconvenience. On April 12, 2023, the chambers judge granted the sellers' application to remove the CPL on the basis of hardship, and ordered the respondents replace the CPL with a $50 cash security.

[10] The appellant notified her then-counsel the morning of April 13, 2023 of her intention to appeal, but was told he would be unable to assist her in her appeal. The appellant began the paperwork to file the notice appeal herself, and ordered a transcript on a rushed basis. She filed a notice of appeal on April 19, 2023. The respondents state they were only notified of the appellant's appeal on May 19, 2023, at 5:00 pm. They informed the appellant on May 29, 2023 of their position that no appeal had been brought as she had failed to file and serve her notice of appeal within the prescribed timelines under the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*], and *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*].

Analysis

Extension of time to bring the appeal

[11] On an application for an extension of time, there is a material difference in whether the extension is sought to *begin* an appeal, or to take steps to *continue* prosecuting an appeal validly brought: See *Stewart v. Postnikoff*, 2015 BCCA 388 at para. 9.

[12] To dispel any confusion, proper service is a requisite component of bringing an appeal. A failure to serve a copy of the filed notice of appeal on each named

2023 BCCA 270 (CanLII)

respondent within the timeframe prescribed by the *Rules* is a failure to bring the appeal. Rule 22 of the *Rules* states:

> 22 An appeal is brought for the purposes of these rules as follows:
>
> (a) if leave to appeal is not required, when the appellant
>
> (i) files the notice of appeal, and
>
> (ii) serves a copy of the filed notice of appeal on each respondent named in the notice of appeal;
>
> (b) if leave to appeal is required, when leave to appeal is granted.
>
> [Emphasis added.]

[13] Both sub-components 22(a)(i) and (ii) must be satisfied to bring the appeal. This was recently confirmed in *Liebreich v. Farmers of North America*, 2022 BCCA 221 (Chambers), where Justice Butler clarified that even if a notice of appeal is filed on time, if it is not served within the timelines in the *Rules*, and no extension of time to serve the notice of appeal has been granted, the appeal has not been brought: at paras. 21–22.

[14] I now turn to the criteria relevant to an application to extend time to begin an appeal. These criteria were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260 (C.A.) and can be summarized as follows:

i. Was there a *bona fide* intention to appeal?

ii. When were the respondents informed of the intention?

iii. Would the respondents be unduly prejudiced by an extension of time?

iv. Is there merit in the appeal?

v. Is it in the interest of justice that an extension be granted?

[15] The interests of justice is “an overriding question and embraces the first four questions”; the fifth factor therefore “states the decisive question”: *Davies* at 260–261.

2023 BCCA 270 (CanLII)

[16] The appellant's failure to properly serve the appeal within the time limits prescribed by the *Rules* was arguably due to an oversight on the part of her former counsel. Further, correspondence between the appellant and her former counsel, and her continued pursuit of the appeal as a self-represented litigant, evinces a *bona fide* intention to appeal. As noted above, the respondents do not claim any prejudice would flow from granting an extension.

[17] As such, the only relevant issue on this application is whether the appeal has merit.

Merits of the appeal

[18] The threshold for the assessment of the merits of the appeal is low. The question is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit" *Stewart v. Postnikoff*, 2014 BCCA 292 at paras. 5–6 (Chambers). A single judge in chambers does not have the jurisdiction to refuse an extension of time to continue prosecuting an appeal solely on the basis of inadequate merit: *Sekhon v. Armstrong*, 2003 BCCA 318 at para. 28; *E.B. v. British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 at para. 15 (Chambers). However, this is different from when an appeal has not been brought in time. An extension of time to begin an appeal should not be granted if the appeal is without merit: *Simon v. Canada (Attorney General)*, 2018 BCCA 54, at paras. 32, 36–40. This principle applies even where the other *Davies* factors are met: *Simon* at para. 38.

[19] The chambers judge granted the cancellation of the CPL on the basis of hardship and inconvenience, but also concluded that the appellant did not advance a viable claim to an interest in land: at para. 14. The judge noted:

> [15] The main difficulty I have with the plaintiff's position is that even if events had unfolded as she says they should have (that is, had she been apprised of what was actually happening with the [buyers'] sale of their home), there still remained an insurmountable impediment to her being in a position to force a sale to her under back-up contract with the sellers. The sellers would have been required to sell the property to her only if they were in possession of a release from the [buyers], and it is clear that the [buyers] were intent throughout on asserting their rights to purchase the property.

2023 BCCA 270 (CanLII)

> When the [buyers] were put to that election a short time later, they opted to waive the subjects in circumstances where they had no accepted offer outstanding on their home. Although the purported contract with Mr. Sy (the putative purchaser whose accepted offer was said to justify calling off the 48-hour notice) appears to have collapsed at some point, the [buyers] are now bound to sell their home to someone else under a different contract that was entered into only after they agreed to waive the subjects on the December 31 contract with the sellers.

2023 BCCA 270 (CanLII)

[20] The appellant submits her appeal has merit, and advances three grounds of appeal. First, she argues the judge relied upon facts not supported by the evidence. She submits the buyers did not have a *bona fide* contract to allow them to avoid the invocation of the 48-Hour Notice clause. She says the purported contract with the purchasers of the Ailsa Property collapsed shortly after it was entered into, and there was no evidence to show the buyers had arranged another sale to sustain the freezing of the notice period, or that they had waived subjects on the Perry Contract within the specified 48-Hour Notice period.

[21] She also argues the judge erred in mixed law and fact by misapprehending the terms and conditions of the back-up clause in the Wu Contract. The appellant submits the judge erroneously interpreted the subordinate clause, “including the Seller obtaining a full release from the Buyer” as a free-standing precondition to be satisfied for the contract to be binding. The appellant contends that, properly read, that clause simply provides an example of a scenario in which the sellers would cease to be obligated to the buyers in any way.

[22] Finally, she submits the judge erred in law by concluding that the Perry Contract remained in effect at all times.

[23] The respondents say the judge did not make, or rely on, any findings about: (1) whether the sellers ceased to be obligated under the Perry Contract; (2) whether that contract remained in effect at all times; or (3) the merits of the contract the buyers entered into for the sale of the Ailsa Property. Rather, he found that *regardless* of whether the buyers had a valid contract enabling them to resist the 48-Hour Notice, the sellers were only required to sell the Orkney Property to the appellant if they obtained a release from the buyers, and that it was it was clear

throughout that the buyers were intent on asserting their right to purchase: at para. 15.

[24] While it may be that the appellant's chance of success on this appeal is remote, particularly in light of the standard of review applicable to alleged errors in contractual interpretation, I cannot say with certainty this appeal has no merit.

[25] In my view, the argument that a full release was not an independent condition precedent, but was rather an example of a scenario in which the sellers ceased to be obligated in any way, is not one entirely without merit. On these facts, the proper characterization of the clause, whether a release was required or not, is of significance. There is no dispute that the sellers never received a release from the buyers in relation to the Perry Contract, but it is not readily apparent that the sellers ceased to be obligated to them in any way. In my view, the resolution of that question depends on the proper interpretation of the 48-Hour Notice clause and its effect, if any, on the Perry Contract as a whole.

[26] For the purpose of extending time to serve the notice of appeal, I am not persuaded that it is clear that the appeal is doomed to fail. However, I do not wish to be interpreted as foreclosing the possibility that this Court may subsequently find otherwise. It is arguably open to the respondents to apply to quash the appeal pursuant to R. 60(4) of the *Rules*, if they are of the view the appeal is manifestly devoid of substance or merit: *Yang v. Shi*, 2022 BCCA 317 at para. 24.

[27] Considering the totality of the *Davies* factors, I find it is in the interests of justice to grant the extension of time to serve the appellant's notice of appeal.

Disposition

[28] I would grant the appellant's application for an extension of time to serve the appeal within 2 business days of the release of this judgment.

"The Honourable Mr. Justice Harris"

2023 BCCA 270 (CanLII)