

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *RSC Motors Inc. v. Marks*,
2024 BCSC 1585

Date: 20240828
Docket: S237592
Registry: Vancouver

Between:

RSC Motors Inc.

Plaintiff

And

Lauren Megan Marks and Daniel Vlckov

Defendants

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Plaintiff:

K.E. Ducey

Counsel for the Defendants:

W.A. McLachlan, K.C.

Place and Date of Hearing:

Vancouver, B.C.
July 11, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 28, 2024

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Introduction

[1] This application for summary trial involves a dispute over a green Porsche Carrera 4, VIN #: WP0ZZZ96ZMS403316 (the "Vehicle"). In the documents before me, the Vehicle is sometimes referred to as a 1991 Porsche and sometimes as a 1992 Porsche. It is common ground that all of these references are to the same vehicle. The Vehicle is very unique and rare, particularly because of its colour, a bright green, similar to Kermit the frog.

[2] On this application, the plaintiff seeks orders that:

- a) The Vehicle in possession of the defendants be returned to the plaintiff by the defendants;
- b) A declaration that the plaintiff is at liberty to sell the Vehicle to a third party to this action pursuant to a motor vehicle purchase contract dated September 20, 2023;
- c) The defendant Marks' counterclaim against the plaintiff be dismissed; and
- d) Costs.

[3] In oral argument, the plaintiff took the position that if he is permitted to sell the Vehicle to a third party, he is prepared to place those funds in trust and return funds to Ms. Marks subject to an accounting for damages. It is common ground that this Court is not presently in a position to make any award as to damages so that issue needs to be resolved another day.

[4] The defendants oppose the orders sought. In her counterclaim, Ms. Marks seeks an order that the plaintiff transfer the title of the Vehicle to her concurrent with her paying the balance determined to be owing on PST and GST for the Vehicle. She also seeks an order reducing the amount owing to the plaintiff for early cancellation of the insurance and for the return of certain items.

Issues

[5] Although determination by summary trial is not opposed by the defendants, determination of the suitability of an application for summary trial is a discretionary exercise that I must decide for myself having regard to the particular circumstances of the application: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 34.

[6] Under Rule 9-7(15)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR] on the hearing of a summary trial application, the court may grant judgment in favour of any party, unless the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law or is of the opinion that it would be unjust to decide the issues on the application: *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.) at para. 40 [*Inspiration Mgmt.*].

[7] For the reasons that follow, I have determined that I do not have the necessary evidence, and I am unable to find the facts necessary to decide the issues of facts and law raised in this proceeding. It would be unjust to do so in the circumstances. I am unable to, and therefore do not, grant judgment on this summary trial for the reasons set out in Rule 9-7(15)(a)(i) and (a)(ii).

Background Facts

[8] The plaintiff, RSC Motors Inc. (“RSC”), is a licensed motor dealer in the province of British Columbia. RSC specializes in modern classic and collectible cars, sourcing and trading rare vehicles from local Vancouver to around the world.

[9] Raymond Poon is the director of RSC.

[10] Mr. Poon and the defendants have all known each other for several years through their local community. The defendants are in a spousal relationship and, as will be explained in more detail below, during the relevant time period underlying this litigation, they separated and reconciled on at least two occasions.

[11] In November 2022, Mr. Vlckov contacted Mr. Poon about the Vehicle which he had discovered listed for sale in Japan through carsensor.net. Mr. Vlckov and Mr. Poon exchanged text messages about buying the Vehicle.

[12] The parties agree that an agreement was reached between them in December 2022 (“December Agreement”); however, as I will discuss in more detail below, the nature and terms of the December Agreement are in dispute.

[13] Pursuant to the December Agreement, on December 8, 2022, Mr. Vlckov delivered a bank draft to Mr. Poon in the amount of \$179,000. The bank draft was issued in Ms. Marks’ name. Mr. Poon arranged for the Vehicle to be sold to RSC by the dealer in Japan and to be brought into British Columbia.

[14] On December 11, 2022 (three days after Mr. Poon received the bank draft), Mr. Poon sent a deposit agreement to Mr. Vlckov (“Deposit Agreement”). Although all of the communications up to this point had been between Mr. Poon and Mr. Vlckov, the Deposit Agreement was between RSC and Ms. Marks.

- a) Mr. Poon’s position on this application is that the plaintiff and Ms. Marks entered into a deposit agreement and that the plaintiff accepted a deposit toward bringing the Vehicle from Japan and eventually selling the Vehicle to the defendants. It is common ground that of the \$179,000 given to Mr. Poon, \$4,000 was in payment for certain wheels. Mr. Poon says the remaining sum of \$175,000 was a lump sum deposit towards the eventual purchase price of the Vehicle that was \$175,000 plus taxes. He says that no breakdown between the sale price and shipping and handling was ever identified.
- b) Ms. Marks denies that the Deposit Agreement was ever signed and denies that it reflects the agreement reached between the parties. Ms. Marks’ position on this application is that she contracted for ownership, shipping and handling of the Vehicle and that the bank draft included partial payment for ownership, shipping and handling with only the taxes outstanding. Ms. Marks

says the purchase price for the Vehicle was \$160,000 plus taxes and that \$15,000 was for shipping and handling.

[15] Shortly after the December Agreement was entered into, the defendants began spending thousands of dollars on replacement items for the Vehicle.

[16] The Vehicle landed in British Columbia on March 20, 2023, while Mr. Poon was out of the country. It was delivered to RSC's warehouse on March 28, 2023.

[17] On April 11, 2023, RSC obtained insurance on the Vehicle from the Insurance Corporation of British Columbia ("ICBC"). On the Owner's Certificate of Insurance and Vehicle Licence, RSC is listed as the owner, Mr. Vlckov is named as the principal driver and Mr. Poon is named as a secondary driver. RSC paid for the cost of this insurance in the amount of \$1,462.

[18] On or around April 12, 2023, Mr. Vlckov took possession of the Vehicle, with Mr. Poon's consent. The parties do not agree about the rationale for this arrangement.

- a) Mr. Poon deposes that at that time, Mr. Vlckov indicated that he wished to test drive the Vehicle before paying the taxes due and completing the transaction. Mr. Poon deposes that because of their personal connection, he agreed to a maximum of three months even though this is not how he would normally conduct business.
- b) Ms. Marks disagrees that the defendants ever asked to test drive the Vehicle. Her position is that the defendants had purchased the Vehicle and the parties agreed to defer signing the paperwork to transfer ownership to the defendants' names in order to defer payment of the applicable sales tax. She deposes that one of the options presented to her was whether to do a trade-in on another purchase to save on taxes.

[19] On May 31, 2023, Mr. Poon received a letter dated May 25, 2023 from Ms. Marks' counsel. The letter advised that the defendants were no longer in any

form of relationship and that Ms. Marks considered herself to be the beneficial owner of the Vehicle.

[20] On May 31, 2023, Mr. Poon sent an email to Ms. Marks' counsel which stated:

I've received a courier letter From your office regarding to Ms. Lauren Marks's 1992 Porsche. My company helped her source and imported this vehicle from Japan to Canada end of March 2023. Lauren paid us a \$179,000 deposit at December 2022.

If she wish to transfer the vehicle to her name, my company need to collect 5% GST and 20% PST to complete the transaction. Also there are few other expenses which include a set of new tires, wheels, service, inspection and insurance. You can email or call me at [phone number] to discuss.

[21] By July 2023, the defendants were back together. Mr. Vlckov visited Mr. Poon's warehouse to look at another vehicle. They discovered that both the defendants and Mr. Poon planned to be in Germany at the same time in August 2023. They agreed to meet at RUF Automobile in Germany to discuss modifications of the Vehicle. Ms. Mark and Mr. Poon each depose that they agreed to effect transfer of the Vehicle and for the defendants to pay the associated taxes when they returned to Canada in September 2023.

[22] On September 7, 2023, Ms. Marks called Mr. Poon to discuss getting rid of the Vehicle. By this point in time, the defendants had separated for a second time. The parties do not agree about the content of the discussion on this date.

- a) Mr. Poon deposes that on the phone on this date Ms. Marks repudiated the December Agreement. Mr. Poon says they agreed that RSC would take the Vehicle back and look for another buyer.
- b) Ms. Marks denies this. Her evidence is that she simply asked Mr. Poon to assist her in exploring her options with respect to the Vehicle. She denies that the plaintiff was ever authorized to sell the Vehicle without her instructions.

[23] On September 8, 2023, Mr. Poon picked up the Vehicle from Ms. Marks' residence. At Ms. Marks' request, Mr. Poon listed the Vehicle for sale.

[24] On September 17, 2023, Mr. Poon found another buyer.

[25] On September 19, 2023, Mr. Poon and Ms. Marks spoke on the phone. The parties do not agree about the content of the discussion on this date.

- a) Mr. Poon deposes that on September 19, 2023, Ms. Marks authorized the sale of the Vehicle to this third party.
- b) Ms. Marks denies this and deposes that she called and rejected the offer as too low because it would result in a loss for her.
- c) Ms. Marks deposes that at this stage she also raised an issue that the Vehicle had serious oil leaks and she did not want any purchaser inspecting the Vehicle until those were fixed. She says Mr. Poon offered to cover the cost of repairing those leaks.
- d) Mr. Poon denies this.

[26] In the evening of September 19, 2023, Mr. Poon advised Ms. Marks that he had moved the Vehicle to Mike's Auto.

[27] On September 20, 2023, without forewarning, the defendants picked the Vehicle up from Mike's Auto. The owner advised Mr. Poon of this development. Mr. Poon texted Ms. Marks relaying his understanding that she no longer wished to sell the Vehicle and he offered to "prepare the documents for you to sign, collect the sales tax and expenses then transfer the car to you [sic] name". Ms. Marks asked that he correspond with Mr. Vlckov about the Vehicle. Thereafter, Mr. Poon sent the defendants what he referred to as a "draft" bill of sale for the Vehicle.

[28] Mr. Poon deposes that on September 20, 2023, he also sent a signed Motor Vehicle Purchase Agreement for the sale of the Vehicle to the third party ("Third Party Agreement").

[29] Mr. Poon asked that the defendants deliver the Vehicle back to Mike's Auto for an inspection. Ms. Marks deposes that she was suspicious of Mr. Poon's intentions and refused to do so.

[30] Despite the Third Party Agreement, over the next few days, Mr. Poon continued to communicate with the defendants about the Vehicle. The defendants identified errors in the draft bill of sale and Mr. Poon sent revised versions to them in response. Mr. Poon urged that the transaction had to be completed by the end of the month and eventually urged that it had to be completed by September 26, 2023.

[31] On that date, Mr. Vlckov texted Mr. Poon advising that there were some delays with work being done on the Vehicle and asked to do the paperwork the following day. On September 27, 2023, Mr. Vlckov again attempted to arrange a time to complete the title transfer. Mr. Poon did not respond directly to those communications.

[32] Instead, on September 27, 2023, Mr. Poon's then counsel sent a without prejudice letter to the defendants which alleged that they had been in unlawful possession of the Vehicle since September 20, 2023. The letter sets out an incomplete chronology of events and then states:

The foregoing confirms your possession of the vehicle is not in compliance with the terms of any completed agreement between you and RSC. The sale of the Vehicle to you was never completed: the balance of the purchase price of the Vehicle remains unpaid by you, and the Vehicle was never transferred to either of you. As a result, there is no lawful basis for your continued possession of the Vehicle.

[33] The letter demands the return of the Vehicle to Mike's Auto by September 29, 2023.

[34] There is reference to a response from Ms. Mark's lawyer dated September 28, 2023, but that is not in the record before me.

[35] Instead, the next correspondence in the record is dated October 4, 2023 and it is from Ms. Mark's counsel to Mr. Poon's counsel. It states:

We need to determine now, if this file is going to resolve. The resolution is for RSC Motors Inc. to provide Lauren Marks with a transfer for the vehicle with \$160,000 CAD as the transfer price. Ms. Marks will attend at an ICBC facility to transfer the vehicle and pay the required taxes. Ms. Marks will provide us with a copy of the confirmation that taxes are paid and upon receipt we will provide that to you.

We are advised that on October 3, 2023, Mr. Vlckov had a chance meeting in Kerrisdale with [Mr. Poon] of RSC Motors Inc. [Mr. Poon] is still repeating his position that the Porsche needs to be returned to his facility, as RSC Motors Inc. has purchased the vehicle. If that is going to be the RSC Motors Inc. position, we will proceed with court action for a declaration of ownership, claiming all costs against RSC Motors Inc.

[36] Further correspondence on October 4, 2023 between counsel indicates that Mr. Poon reported the vehicle stolen to the RCMP. The RCMP then contacted Ms. Marks on October 4, 2023 and declined to take a stolen auto report advising it was a civil matter. The RCMP also advised that Mr. Poon had cancelled the insurance on the Vehicle. Later the same day, counsel confirmed that the plaintiff would reinstate insurance on the Vehicle the next day on a without prejudice basis. Despite this representation, Ms. Marks has deposed that the plaintiff has not put insurance on the Vehicle and because the Vehicle is registered in the plaintiff's name, she is also unable to insure it.

[37] On November 9, 2023, Mr. Poon filed the within notice of civil claim. On November 24, 2023, Ms. Marks filed her response to civil claim and counterclaim. On December 1, 2023, Mr. Vlckov filed his response to civil claim.

[38] The plaintiff claims the defendants have wrongfully taken the Vehicle without completing the transaction and after repudiating the contract.

[39] For their part, the defendants allege that Ms. Marks is the beneficial owner of the Vehicle and that the RSC is in breach of the contract by refusing to complete it.

Suitability for Summary Trial

[40] A summary trial is governed by Rule 9-7 of the *SCCR*. Subrule (2) permits a party to an action, to which a response to civil claim has been filed, to apply to the court for judgment under the rule, either on an issue or generally. In support or

response to the application for a hearing by summary trial, subrule (5) provides that a party may tender evidence in a variety of forms: (i) affidavit; (ii) answers to interrogatories; (iii) examination for discovery transcripts; (iv) admissions; and (v) expert reports.

[41] The scope of a summary trial application is set out in R. 9-7(15) of the SCCR:

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.

[42] In *Inspiration Mgmt.*, the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, among other things, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[43] To this list have been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary

complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[44] The authorities are clear that a summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claims and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 35.

Analysis

[45] The parties both acknowledge conflicts in the evidence but neither party opposes this matter being dealt with by summary trial.

[46] As noted above, proportionality is relevant to the suitability determination. It is understandable that the parties wish to have this matter addressed by summary trial because the amount involved is relatively low. This factor weighs in favour of determining these issues by summary trial.

[47] There is also some urgency to obtaining a timely resolution. As noted above, the Vehicle is currently uninsured and, it appears, will not be insured until the issue of ownership is resolved.

[48] As well, from the plaintiff's perspective, there is some urgency because he deposes that he is at risk of being sued under the Third Party Agreement if he cannot complete the sale of the Vehicle to the third party. There is some evidence before me to support this concern. Mr. Poon has produced a text message which is said to be from the third party and is dated January 22, 2024. On that date, the third party indicated that he still wants the Vehicle, that he has signed the bill of sale agreement and was given a deposit and that he will sue RSC and the defendants to resolve the issue. Nevertheless, I give little weight to this evidence. The Third Party Agreement is said to have been signed some nine months ago. Despite this, and

although the third party was made aware of these proceedings, he has not attempted to participate in them and there is no direct evidence from him before me.

[49] The most difficult issue before me is that there are significant conflicts in the evidence.

[50] Conflict in the evidence *per se* is not necessarily always a reason to render a summary trial application unsuitable. As the Court of Appeal stated in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, at para. 22:

[22] ...the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[51] However, a court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. There must be documentary evidence, evidence of independent witnesses, or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another: see *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200, at para. 27, citing *Cory v. Cory*, 2016 BCCA 409, at para. 10.

[52] In addition, as a prerequisite to deciding a case on a summary trial, the court must be able to find the facts necessary to decide the issues of fact or law and must be of the opinion it would not be unjust to decide the issues.

[53] Where there exists “uncertainties in the evidence”, see *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249, at para. 100 [*Main Acquisitions*]; and the determination of legal issues are largely fact-dependent and require a close examination of the facts, these circumstances can militate against a summary trial determination since it may not be possible to find the facts necessary to decide those issues: *Main Acquisitions*, at paras. 100-101 and 106.

[54] In this case, the evidence conflicts on almost every central issue for determination. In particular, and as outlined in more depth above, there are conflicts in the evidence as to:

- a) The nature of the December Agreement and, relatedly, the purpose of the \$179,000 bank draft.
- b) The price of the Vehicle.
- c) The reason that the defendants were given possession of the Vehicle when it was first imported to Canada.
- d) Whether or not Ms. Marks repudiated the December Agreement on or around September 7, 2023.
- e) Whether or not Ms. Marks authorized Mr. Poon to sell the Vehicle without further instructions from her on or around September 7, 2023.
- f) Whether or not Ms. Marks authorized Mr. Poon to enter into the Third Party Agreement on or around September 19, 2023.
- g) Whether or not the defendants refused to complete the transaction in September 2023.

[55] Although there is sufficient documentary evidence to prefer the evidence of one or the other affiant on some of these issues, others fall to be resolved largely or entirely on the credibility of the witness's account of oral communications. Unfortunately, the determination of legal issues such as contract formation, breach of contract, and repudiation are largely fact-dependent and require a close examination of the facts.

[56] I am not able to make the necessary credibility findings on the basis of the record before me and in these circumstances, it would be unjust to decide the issues raised in this action on the basis of this record.

Conclusion

[57] For the reasons given, I find that the notice of application of the plaintiffs filed on April 4, 2024, for summary trial is dismissed as not suitable pursuant to Rule 9-7(15)(a).

[58] Costs shall be in the cause.

“Latimer J.”