Court of King's Bench of Alberta

Citation: Doerfler v Fitzpatrick, 2023 ABKB 651

Date: 20231120
Docket: 2301 01604
Registry: Calgary

Between:

Guenther Doerfler and Hildegard Doerfler

Plaintiffs

- and -

John Liam Fitzpatrick and Petra Fitzpatrick

Defendants

Decision of the
Honourable Mr. Justice O.P. Malik

I. Introduction

[1] The Defendant, Mr. Fitzpatrick (the "Defendant") seeks summary dismissal of the Plaintiffs' Action pursuant to Rule 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] The Defendant is involved in divorce proceedings with Ms. Fitzpatrick. The Plaintiffs are Ms. Fitzpatrick's parents.

[3] In September 2022, the Plaintiffs registered a Certificate of Lis Pendens ("CLP") against title to a condominium (the "Condominium") owned by the Defendants. The Plaintiffs say they are the beneficial owners of the Condominium and oppose the Defendant's claim that the Condominium is matrimonial property and therefore subject to a claim for property division.

II. Background

[4] In 2013, the Defendants moved to Calgary from Kelowna. The Plaintiffs were residing in Calgary in their own home (the "Home"). At the time the equity in the Home was approximately

$375,000.00. The Plaintiffs' Wills stipulate that Ms. Fitzpatrick would inherit the Home and their other daughter would inherit a cash payment of $50,000.00.

[5] The Plaintiffs wanted to downsize. They were looking to purchase a condominium. They depose that initially, their intention was to sell the Home to the Defendants for its appraised value of $550,000.00 (although the appraisal has never been found). This would have realized their objectives of allowing Ms. Fitzpatrick to acquire the Home as an advance on her inheritance and would have allowed them to use the sale proceeds to purchase a condominium in the $325,000.00 price range outright, leaving them with a cash balance of $50,000.00 which they could use to pay their other daughter out on her inheritance.

[6] However, there was an issue. The Plaintiffs say the Defendants did not qualify for the required mortgage (and the Defendant concedes he did not apply for financing at that price). If the Plaintiffs sold the Home to the Defendants for a reduced price, then they wouldn't be able to afford to buy the Condominium. The Plaintiffs depose that to solve this issue, the Defendants agreed to purchase the Home for the sum of $450,000.00, to be financed with a $325,000.00 mortgage and a $125,000.00 gift from the Plaintiffs. It was agreed that $100,000.00 of the equity in the Home would be applied (or, as the Defendant put it, "pulled out") against the purchase price of the Condominium with the remaining $50,000.00 to be paid as the inheritance to the other daughter.

[7] The Plaintiffs were solely responsible for selecting the Condominium. They made an offer to purchase through the Defendant and in 2013, they completed the sale and moved in.

[8] According to the Plaintiffs, the parties verbally agreed (there is no written agreement to this effect) the Defendants would be the registered owners on title to the Condominium and would hold it in trust for the Plaintiffs. The Plaintiffs would in turn be responsible for paying all Condominium-related expenses, including the initial deposit, mortgage payments, property taxes, insurance, and condo fees, until such time as the Plaintiffs had paid off the mortgage, could qualify for a mortgage to purchase the Condominium outright, or passed away.

[9] Contrary to the Defendant's assertion, the Plaintiffs say they never signed a lease agreement (which in any event has not been found). The Defendant notified the condominium board the Plaintiffs were occupying the Condominium as tenants five years after they moved in but otherwise did not comply with the condo board's formal registration requirements to register the Condominium as a rental unit. The Plaintiffs have paid all the Condominium-related expenses totalling approximately $190,000.00. Mr. Doerfler says that his description of the monthly e-mail transfers of these amounts to the Defendant as "rent" is merely descriptive shorthand and not evidence that he viewed theses payments as rent. The Plaintiffs depose that in 2018, they attempted to purchase the Condominium from the Defendants but according to Ms. Fitzpatrick (who was not questioned on her Affidavit), they were unable to qualify for financing. It is the Plaintiffs' position that the Defendant is advancing his matrimonial claim to the Condominium for the first time in the Defendant's divorce proceedings as a tactic to pressure Ms. Fitzpatrick into settlement.

[10] The Defendant denies there was ever any agreement the Condominium was being held in trust for the Plaintiffs. He says the $100,000.00 contribution the Plaintiffs made towards the cost of the Condominium was a gift, consistent with a gift letter prepared by the Plaintiffs. The letter is

dated May 22, 2013, and is addressed to the Defendants' bank. It confirms the Plaintiffs have gifted the Defendants the sum of $100,000.00 towards the purchase of the Home, that these funds will never have to be repaid, and that no part of the gift is being provided by a third party having any interest in the sale or purchase of the Home. The Defendant asserts the Plaintiffs' monthly payments should be considered "rent" as characterized by the Plaintiffs in the e-mail transfers and that he has always characterized these payments as rental income in his tax returns to the Canada Revenue Agency. He argues that the Plaintiffs have made a claim to the Condominium as a strategy to disentitle him from his fair share of matrimonial property.

[11] The parties' divorce proceedings are being litigated under a separate Action (the "Family Proceedings"). In summary, in August 2022, a King's Bench Justice (the "Justice") granted the Defendant's application to list the Condominium for sale (the "August Order"). A summary of the proceedings is provided in the Justice's decision in ***Fitzpatrick v Fitzpatrick***, 2022 ABKB 862. The Justice found at para 10 that on the initial application, there was "no evidence" with respect to the "exact nature of any interest [the Plaintiffs] had in the [C]ondominium". Subsequently, the Justice has on separate occasions found Ms. Fitzpatrick and the Plaintiffs to be in contempt of the August Order.

III. Analysis

A. The Test for Summary Dismissal

[12] The parties agree on the test for summary dismissal. A claim may be summarily dismissed pursuant to Rule 7.3 if there is "no merit" to the claim. Summary judgment is appropriate when there is no genuine issue requiring trial, such as where the record allows the court to make the necessary findings of fact, apply the law to those facts, and arrive at a just result in an expeditious way: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***., 2019 ABCA 49 at para 47; ***Hannam v Medicine Hat School District No. 76***, 2020 ABCA 343 at paras 145-161.

[13] The question before me is whether the state of the record permits a fair resolution of the dispute on a summary basis, or whether the uncertainties in the facts reveal a genuine issue requiring trial: ***Weir-Jones*** at para 47. While a court is not precluded from granting summary judgment in the face of contested facts or conflicting evidence (***Hannam*** at para 161), it should not be granted if a party proves there is a genuine issue requiring trial such as where there is a dispute on material facts or there are questions of credibility or evidentiary gaps: ***Weir Jones*** at para 35. On an application for summary judgment, the parties must put its best foot forward. The focus is on the actual evidentiary record available to the judge rather than on speculation about what might "turn up in the future" or whether a party can produce a "better" record should the matter proceed to trial (***Weir-Jones*** at paras 37, 39).

[14] In determining whether I should grant the Defendant's application, I must consider the following questions (***Weir-Jones*** at para 47):

> (a) Is it possible to fairly resolve this dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

(b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial?

(c) Have the Plaintiffs demonstrated there is a genuine issue that requires a trial?

(d) Does the state of the evidentiary record give rise to sufficient confidence that summary disposition is appropriate in the circumstances?

[15] I am not prepared to summarily dismiss the Plaintiffs' Action. There are credibility issues that require a trial and the Defendant has failed to satisfy me there is no merit to the claim. While a trial may not yield a more complete documentary record, having the parties testify at trial will produce a more complete evidentiary record from which to make a fair and just decision.

[16] The Defendant argues the "evidence and law make it abundantly clear that there is no genuine issue of material fact here requiring a trial". I disagree.

[17] The central issue to be determined is whether the Plaintiffs intended the Condominium to be an outright gift, to be used by the Defendants as they chose, or whether it was intended that the Defendants would hold the Condominium in trust for the Plaintiffs as beneficial owners until the mortgage was paid off, the Plaintiffs were able to acquire it, or they passed away. No written agreement memorializing the parties' intentions has been produced. There is disagreement over whether the Plaintiffs' monthly payments should be characterized as expenses or as rent. To glean the parties' intentions, their circumstances must be examined.

[18] Notwithstanding the conflicting evidence on key issues, I have some difficulty with the Defendant's argument. The Defendant was aware of the Plaintiffs' financial circumstances. He knew the Plaintiffs had no other assets and knew the Plaintiffs could not afford purchase the Condominium in 2019. Where else, other than in the Condominium, were the Plaintiffs to live? I find it hard to believe the Plaintiffs would have gifted away the equity in the Home (which had been passed down to them from their other daughter, according to Ms. Doerfler's Affidavit sworn on April 18, 2023) without seeking something in return, such as a beneficial interest in the Condominium. If the Defendant is to be believed, the Plaintiffs made themselves completely vulnerable and at the whim of the Defendants. In my view, it is more plausible that the sale of the Home was structured in such a way as to confer benefits on each of the parties: for the Defendants, the Plaintiffs' gift, which derived from the equity, allowed them to qualify for a mortgage and find a place to live with their two children, while leveraging the equity allowed the Plaintiffs to make good on their daughters' inheritances and fund the purchase of the Condominium. Further, the fact that the Plaintiffs attempted to purchase the Condominium in 2019 is consistent with their version of what was agreed to, namely that they could reside in the Condominium until such time as they could purchase it outright and transfer title into their own names. I acknowledge these are not issues that I must determine in the course of this application, but I raise them because they illustrate the danger of making a hasty decision on a summary basis.

[19] The Defendant relies on the analysis set out in ***Locke v Locke***, 2000 BCSC 1300, where the Court enumerated a list of factors to be considered when deciding "the loan or gift issue": ***Zheng v Yang***, 2020 MBQB 146 at para 65. I agree that many of the factors enumerated there are

absent here: there is no written agreement evidencing their ownership claim to the Condominium or demands for repayment and there is no security held for the loan. However, this case, and the others cited in ***Dhariwal v Dhariwal***, 2015 ABQB 50 were not decided summarily but at trial where the conflicting evidence could be fully addressed. In a case summary relied upon by the Defendant titled "Gift or Loan from Parents to Separating Children: ***Dhariwal v Dhariwal***, 2015 ABQB 50", 2018 CanLII Docs 546 (cited in ***Zheng*** at para 64), Mr. Robert Omura acknowledges that while a "sudden claim that funds given from parents to children before separation is recast as a loan "smacks" of a collateral attack on the distribution of matrimonial property in the normal course", "this problem is clearest when the loan is enforced by the parents against the departing ex-spouse but not against their own child" (the "clear problem" scenario does not apply here, where the Plaintiffs' Action is brought against both the Defendant *and* Ms. Fitzpatrick).

[20] In ***Zheng***, the Court found that ***Locke*** must be considered in light of the Supreme Court of Canada's decision in ***Pecore v Pecore***, 2007 SCC 17 where the Court held that "the presumption of resulting trust is the general rule for gratuitous transfers" (para 27), particularly in the case where the transfer is made to adult children. The "onus is placed on the transferee to demonstrate that a gift was intended" (***Pecore*** at paras 24-25) and they must do so by proving the transferor's intention at the time the transfer was made (***Pecore*** at para 5). Starting at para 55, the Court in ***Pecore*** provides examples of the types of evidence a court may consider when determining the transferor's intent, and I see no reason why the factors enumerated in ***Locke*** do not similarly apply.

[21] In my view, there are genuine issues which need to proceed to trial. Without a written agreement, the Court will need to make a final decision following an assessment of the parties' credibility and their unique circumstances. The Defendant will need to rebut the presumption of a resulting trust, something he has thus far not addressed. While I appreciate the Defendant wants a quick determination so the Condominium can sell quickly, I do not believe that disposing of the matter on a summary basis would result in a fair and just resolution. Accordingly, I dismiss his application.

B. Issue Estoppel

[22] The Defendant argues the Plaintiffs' Action is barred due to the doctrine of issue estoppel on the basis it is the subject of the Family Proceedings. He relies on the test for issue estoppel which requires that: the same question to have been decided in previous proceedings; the judicial decision creating the estoppel is final; and the parties (and their privies) to the judicial decision are the same as those in which estoppel is raised: ***Danyluk v Ainsworth Technologies Inc***, 2001 SCC 44 at para 25.

[23] In my view, the requisite factors for raising issue estoppel are not present here. As the Justice noted in ***Fitzgerald*** (see above at para 11), the issue of the Plaintiffs' ownership interest in the Condominium was not the subject of the initial hearing before her and therefore, was not addressed. The subsequent appearances before the Justice have dealt with compliance with the terms of the August Order rather than with the nature of the Plaintiffs' ownership in the Condominium. Indeed, requiring the Condominium to be sold pursuant to the August Order is not dispositive of the Plaintiffs' application before me notwithstanding these matters are interrelated.

IV. Disposition

[24] The Defendant's application is dismissed.

[25] The Plaintiffs are entitled to their costs. If the parties cannot agree on the amount, they shall provide me with their submissions within 30 days, not exceeding 3 pages, and attaching a proposed Bill of Costs.

Heard on November 17, 2023.
Dated at the City of Calgary, November 20, 2023.

O.P. Malik
J.C.K.B.A.

Appearances:

Peter R.S. Leveque,
for the Defendant, John Liam Fitzpatrick

Chadwick Newcombe,
for the Plaintiffs, Guenther Doerfler and Hildegard Doerfler