Court of King's Bench of Alberta

Citation: Jones v Nilsson Livestock Ltd, 2023 ABKB 588

Date: 20231018
Docket: 2203 05661
Registry: Edmonton

Between:

Stella Jones and Christopher Jones

Applicants

- and -

Nilsson Livestock Ltd.

Respondent

Corrected judgment: A corrigendum was issued on October 18, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Justice A. Loparco

I. Introduction

[1] The Applicants, Stella Jones (Stella) and Christopher Jones (Christopher), filed an Originating Application that seeks an order requiring the Registry of Land Titles to cancel the existing certificate of title for certain Lands in the name of Nilsson Livestock Ltd. (Nilsson) and issue a new certificate of title in the Applicants' name, pursuant to what they state is an unequivocal enforceable contract for the sale of land (Land Agreement).

[2] There is no separate written contract for the Land Agreement. However, there is a Mortgage Agreement dated October 23, 2017, which confirms that Stella, Christopher, and Peter

Jones (Peter), now deceased, (collectively, Stella, Christopher, and Peter are referred to as the Jones) purchased the Lands for $850,000.00, which was paid for by a $250,000.00 cash deposit, with the remainder financed by Nilsson.

[3] The Jones made a single payment of $3,800.00 towards the Mortgage, but to date, they have not made any additional payments. An outstanding balance of $849,699.50 remained as of February 2022.

[4] On or about October 23, 2017, Nilsson submitted a Land Transfer Request, along with the Mortgage Agreement to the Registrar of Land Titles. However, due to an administrative issue, the title was never transferred to the Jones. The Jones insist this is evidence of the intention to transfer the Lands and they ask the Court to now give effect to this intention.

[5] The Respondent, Nilsson, states that even if the intention was to transfer the Lands at the outset, the Jones' Mortgage default changed the Land Agreement. The Agreement included oral discussions and a history of prior dealings between the same parties, the effect of which resulted in an agreement permitting the Jones to continue to live on the Lands with the title to the Lands transferred after the Mortgage was paid in full.

II. Issues

[6] The two questions before the Court are: 1) Is an Originating Application the appropriate method to resolve this matter; and 2) If so, should title to the Lands be transferred to the Jones?

III. Brief Conclusion

[7] I dismiss the Application for an order transferring the Lands.

[8] The issue before this Court is not as straightforward as the Applicants purport.

[9] First, the transaction in question was a deal between old friends and only evidenced at the time by a Mortgage Agreement without the benefit of legal counsel.

[10] Second, there was a default on the Mortgage Agreement shortly after it was signed, with conversations that ensued between a now deceased party to the transaction, Peter Jones (Peter), and the principal of Nilsson, that allegedly changed the terms of the sale.

[11] Finally, credibility is an issue, making this inappropriate for resolution by summary process.

[12] The Application cannot therefore proceed by Originating Application as there are material facts in dispute, namely: i) what the terms of the Land Agreement were and whether parol evidence should be considered; and ii) whether the Applicants' default under the mortgage led to amendments to the Land Agreement regarding when the Lands would be transferred.

[13] Credibility is a live issue on all questions and cannot be resolved by affidavit evidence alone within the Originating Application process.

[14] A subsidiary question about whether the Applicants' claim is statute-barred was raised. This is not an issue that I need to deal with since there is no cross-application filed to dismiss the action on the basis that the limitation period has expired. It remains, nevertheless, a live issue for trial of the matter.

[15] Pursuant to Rule 3.2(6), the Applicants' claim shall be converted into a Statement of Claim and the parties shall proceed with the Action in accordance with the usual procedural rules that follow.

IV. Facts and Position of the Parties

a. Applicants

[16] On or about October 23, 2017, Stella, Christopher, and Peter purchased approximately 3 acres of land as joint tenants from Nilsson (Lands). The purchase price was $850,000.00, which was paid for by a $250,000.00 cash deposit, with the remainder financed by Nilsson, according to the terms of a Mortgage Agreement.

[17] At various times after the Mortgage Agreement was signed, the parties met to discuss finances because the Jones were unable to make any payments toward the Mortgage or pay expenses related to the Lands.

[18] Nilsson provided the Jones with Mortgage Loan Statements, which included the purchase price along with other expenses that Nilsson agreed to pay for over the years in relation to the Lands, such as house repairs, insurance, and utility payments.

[19] The Mortgage Loan Statements also included the cost of a Land Transfer Request to transfer the Lands to the Jones totalling $170.00, which Nilsson paid for when they submitted the transfer request on or about October 23, 2017.

[20] Unbeknownst to the Applicants, the Land Transfer Request was rejected by Land Titles for administrative reasons on November 9, 2017, and never resubmitted.

[21] The Applicants depose that they believed they were title owners of the Lands since the cost of the Land Transfer Request was recorded on their Mortgage Loan Statement, and because of some other subsequent events that allowed them to act as owners.

[22] Peter passed away on September 20, 2021. Stella is the personal representative and sole residual beneficiary of his estate. The Applicants state that they only became aware that the Lands were not transferred on or about March 4, 2022.

[23] The Applicants further purport that the Land Transfer Request, Mortgage Loan Statements, and Mortgage Agreement are sufficient evidence to permit the Court to order the registration of the Lands in their names.

[24] The Applicants acknowledge that they defaulted on the Mortgage Agreement but state that since no foreclosure proceedings have been commenced, there is no impediment to the Order they are seeking.

b. Respondent

[25] The Respondent does not challenge the validity of the land transaction on the basis that it does not meet the requirements of the *Statute of Frauds* (1677), 29 Car II, c 3. It states that the Mortgage Agreement satisfies this obligation. However, they claim that there were additional relevant oral discussions and acts that form part of the Land Agreement (both at the time the original agreement and Mortgage Agreement were entered into, and, after the Jones' defaulted on the mortgage, which resulted in the contractual terms being altered).

[26] In ***Haan v Haan***, 2015 ABCA 395 the Court of Appeal describes the *Statute of Frauds* and its intended purpose at para 9:

> The *Statute of Frauds* recites that it was enacted for the "... prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury ...". The mischief arising from claimants asserting oral agreements was to be avoided by requiring that certain contracts be evidenced by "some memorandum or note thereof ... in writing and signed by the party to be charged therewith ...". Contracts respecting land "created by livery and seisen only or by parole" would not be enforced absent such a writing.

[27] Essentially, contracts concerning land cannot be proven by parol evidence alone; there needs to be a note or memorandum in writing (at para 10). An exception to this general rule is part performance that is unequivocally related to the alleged contract (at para 11).

[28] The Court noted a multi-part analysis for situations where a party argues part performance:

> a) First, the applicant proves what the parties said and did up to and after the time of the alleged agreement, including the acts that constitute part performance.
> b) Second, the applicant shows that the acts are obviously and unequivocally related to dealing with the land. The acts cannot be equally explained as coincidences, the products of social interaction from love and affection, or some other agreement that did not relate to the land.
> c) Then, the parol evidence about the agreement is admissible and can be considered to explain the agreement and show how the facts and part performance relate to the agreement.
> (at para 15)

[29] Although parol evidence, such as “we agreed on this” or “we did not agree on this” cannot be used to prove the existence of the contract at a trial involving the *Statute of Frauds*, there is some admissible parol evidence, namely, set out at para 17:

> a) Evidence about what the parties did or said with respect to the land that is sufficient to meet the first parts of the test, namely that there was some sort of agreement about the land. In other words, the observed conduct of the parties respecting the land is not just coincidental, or explainable by something other than some sort of agreement.
> b) Once an agreement is proven on a balance of probabilities, then the claimant is entitled to introduce evidence showing part performance that is unequivocally related to the type of contract alleged. The evidence of part performance is not, however, admissible to prove the very existence of the underlying agreement which is the subject of the first parts of the analysis.

[30] The Court summarizes, at para 17: “To repeat, direct parol evidence about "what we agreed to" is only admissible at the final stage, and then only to demonstrate the kind of agreement that the evidence of partial performance is said to demonstrate. The burden on the trial judge is to ensure that the evidence is only used on those issues for which it is admissible.”

[31] Under the Mortgage Agreement, the Applicants agreed to make monthly payments of $3,838.84, commencing on January 1, 2018. On or about January 4, 2018, the Jones made a payment of $3,800.00 towards the Mortgage but to date, they have not made any additional payments. As of February 2022, there is an outstanding balance of $849,699.50 owing on the Mortgage Loan Statement.

[32] The Respondent does not dispute submitting the Land Transfer Request on or about October 23, 2017. However, the Respondent states that an intervening event, namely, the immediate default on the mortgage, led to further discussions that amended the terms of the parties' Agreement. They further argue that the parties acted in accordance with the amended terms.

[33] For example, throughout the entire term of the Mortgage Agreement, the Property Tax Notices related to the Lands were made out to and paid by Nilsson, and then added to the Mortgage Loan Statement, along with other expenses related to the Lands such as utility and insurance payments.

[34] The Respondent argues that the parties met regularly at the Nilsson's offices to review the Mortgage Agreement and the Property Tax Notices, and they were all in agreement that the Lands were to remain registered to Nilsson as per their subsequent oral agreement.

[35] Further, the Respondent states that the parties share a history of prior financial dealings, mostly between Nilsson's principal Bill and Peter, which inform the basis of their understanding in this transaction. Nilsson further deposes that there was an expectation that Peter would secure gainful employment so that he could make the payments under the Mortgage Agreement, which he failed to do.

[36] Despite the default and failure to comply with the expectation, Nilsson did not commence any legal action or foreclosure proceedings and permitted the Jones to continue to live on the Lands. Nilsson did not transfer the Lands nor register the Mortgage against the title of the Lands.

V. Analysis

a. Is an Originating Notice the Appropriate method to resolve this Claim?

[37] Section 3.2(2) of the *Alberta Rules of Court*, Alta Reg 124/2010 states:

> A statement of claim must be used to start an action unless:
>
> (a) there is no substantial factual dispute,
>
> (b) there is no person to serve as defendant,
>
> (c) a decision, act or omission of a person or body is to be the subject of judicial review,
>
> (d) an enactment authorizes or requires an application, an originating application, an originating notice, a notice of motion or a petition to be used,
>
> (e) an enactment provides for a remedy, certificate, direction, opinion or order to be obtained from the Court without providing the procedure to obtain it, or

> (f) an enactment provides for an appeal to the Court, or authorizes or permits a reference to the Court, or provides for a matter to be put before the Court, without providing the procedure to be used,
>
> in which case an originating application may be used to start the action.

[38] Nilsson submits that there are sufficient material facts in dispute that prevent this Court from fairly resolving the issue of whether title to the Lands should be transferred to the Jones, including:

a) the terms of the Mortgage Agreement; and
b) whether the Jones knew or ought to have known that title to the Lands was not in their names (which impacts the limitations argument for trial).

[39] Moreover, Nilsson deposes that the parties agreed that title would be transferred once the Jones satisfied their obligations under the Mortgage Agreement.

[40] The Jones, on the other hand, submit that this Court can infer the parties' intention to transfer title to the Lands at the outset because of the filing of the Land Transfer Request and the Mortgage Agreement. Nilsson argues that, even if transferring title was an immediate obligation, the terms of the Mortgage Agreement quickly changed upon the Jones own default under that Agreement.

[41] Grosse J (as she then was) noted in ***Rifco Inc (Re),*** 2020 ABQB 366 that an Originating Application cannot be used to resolve a matter where there are substantial factual disputes and other gaps in the record. She also noted, at para 37:

> The party opposing the Originating Application procedure must demonstrate that there are material facts in dispute and speculation in this regard does not suffice. The party opposing the Originating Application need not necessarily adduce evidence. The existence of disputed facts could be demonstrated by adducing evidence, by cross-examination of the applicant's affiant or by relying on the material filed by the applicant.

[42] In ***Rifco***, the Court found that the applicant adduced a reasonable amount of evidence, while the respondent adduced more limited evidence. However, the Court held that there were "substantial factual disputes and other gaps in the record" that prevented resolution of the issue before the Court. Grosse J held that she could not make a determination on the record due to the substantial facts in dispute.

[43] Relying on ***Snyder v Snyder***, 2018 ABQB 318, the Applicants argue the current record is sufficient for a determination of this matter. *Viva voce* evidence is unnecessary since there is evidence available through affidavits and cross-examination on affidavits. The facts in ***Snyder*** are as follows:

- A mother and father lived on a farm. They entered an agreement to sell the farm to their son Bruce and his wife Virginia.
- Bruce and Virgina made payments for several years until, Bruce says, the payments stopped at the father's request.

- The mother, and then the father, died. Another son, Howard, was executor of the father's estate. The Will provided that Howard would transfer to Bruce all debts due to the parents by Bruce – no mention was made of the farm or the agreement to sell the farm.
- Bruce and Virgina said the debt transfer stands in satisfaction of payment under the agreement and the farm should be transferred to them. Howard refused to effect the transfer.

[44] Bruce and Virgina brought an application for summary judgment seeking an order for transfer of title to the farm to them. The Court noted that a summary process was appropriate in the circumstances, saying at para 11:

> ...The facts of this matter are not complex; it is largely their legal effect that is at issue. There is nothing to suggest to me that a trial will produce further or better evidence. Most significantly, I do not believe that *viva voce* evidence is required here nor indeed that it would add anything useful. Bruce and Howard both have given evidence by affidavit and been cross-examined thereon. It is unlikely that *viva voce* evidence would materially change Bruce's account of the history. Moreover, Howard admitted in his cross-examination that he had little knowledge of the facts underlying the arrangement among Charles, Gloria, Bruce and Virginia. Sending the matter to trial will not produce greater knowledge on his part.

[45] ***Snyder*** can be distinguished both on the basis that it did not involve an Originating Application, and on the basis that it is factually quite different. There, one of the parties had little to no involvement in the arrangement and admitted he had little knowledge of the facts underlying. In this case, both parties were involved in the underlying deal, and have opposing views on certain matters, including the terms of the agreement.

[46] The Applicants also argue there is precedent for awarding this type of relief in proceedings brought by Originating Application. In ***Frydman v Pelletier***, 2013 ABQB 225, the Court found the applicant to be the legal owner of an asset held in trust by the respondent and ordered amendment of ownership documents to reflect same.

[47] The respondent in ***Frydman*** also argued that the matter could not proceed by way of Originating Application because there were many issues in dispute. The Court then found the application to be straightforward, and noted that most of the issues the respondent raised did not relate to the issue, had no basis in fact, were contradicted by the applicant's evidence, and were contradicted by the respondent's own evidence.

[48] The Applicants further rely on ***Morrison v Daus (Estate)***, 2019 ABQB 448, where the applicants used an Originating Application to seek specific performance of transfer of lands. In that case, although the application was *brought* by Originating Application, the matter was eventually set for a two-day summary trial, where the issues were heard and determined.

[49] Given the lengthy history between the parties, whereby Nilsson and the Jones would enter into various financial arrangements, Nilsson submits that the agreements, or at least a significant portion thereof, were driven by the parties' verbal discussions and their intentions more so than the written instruments they drafted themselves.

[50] Generally, "words in a contract are to be given their natural and ordinary meaning without resort to external evidence, unless there is some ambiguity": ***North Pacific Properties Ltd v Bethel United Church of Jesus Christ Apostolic of Edmonton***, 2020 ABQB 791 at para 188. I elaborated on this in ***North Pacific***, at paras 189-190:

> In *Sattva* at para 57, the Supreme Court clarified how the background, context, and market are reconciled with the text and stated:
>
> > The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract [. . .]. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc v BC Tel Mobility Cellular Inc* (1997), 101 BCAC 62).
>
> The Court further cautioned that the parol evidence rule still applies and stated, at para 59, that:
>
> > It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing [. . .]. To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties [. . .]. The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579* v *Bradco Construction Ltd*, [1993] 2 SCR 316, at pp 341-42, per Sopinka J).

[51] I agree that the foregoing factual disputes surrounding the terms of the Mortgage Agreement, and specifically the timing of the Land Transfer, which is ambiguous, and whether there was any parol evidence that would be required for its interpretation, requires a more complete discovery process and trial with *viva voce* evidence so that credibility may be assessed.

[52] The parties are diametrically opposed on the questions before the Court. For the reasons stated above, the documentary evidence does not provide a complete answer.

[53] Had the Action been commenced by way of a Statement of Claim, this Court would have the ability to consider a more complete set of factors such as credibility, the parties' intentions with respect to the Mortgage Agreement, the parties' prior dealings and manner of doing business together, and other factors that would assist in interpreting the agreement between the parties.

[54] Given the contractual ambiguity, the intention of the parties that may be evidenced by parol evidence, the manner in which they conducted themselves in prior dealings, the evidence surrounding the Jones' knowledge of the terms, the timing of the discovery that the Lands were not transferred, and the credibility of the parties are all relevant factors in this Action.

[55] The Court's analysis of these factors within the Originating Application process circumscribes the evidence to a documentary review. However, for the reasons stated, this Court is not able to properly rule on the Application relying solely on the record before it.

[56] Thus, for the same reasons, the question of whether the Jones knew, or ought to have known, that the title was not in their name, cannot be resolved in a summary process and will be based partly on a credibility assessment of their evidence.

[57] In conclusion, as there are substantial factual disputes, this Action was incorrectly commenced by Originating Application and cannot be resolved in this summary proceeding.

b. Should Title to the Lands be Transferred to the Applicants?

[58] As I have determined that the process commenced by Originating Application does not permit a fair and just adjudication of this matter, it follows that the second question will be answered in the negative.

[59] Given the material factual disputes on the record, an application for an order to transfer title of the Lands to the Jones' fails.

c. Can the Court Order the Continuation of the Action?

[60] Pursuant to Rule 3.2(6), the Applicants' claim shall be converted into a Statement of Claim and the parties shall proceed with the Action in accordance with the usual procedural rules that follow.

VI. Conclusion

[61] The Application is dismissed.

[62] The Action shall continue as though it was originally commenced as a Statement of Claim.

Heard on the 10th day of August, 2023.
Dated at the City of Edmonton, Alberta this 18th day of October, 2023.

A. Loparco
J.C.K.B.A.

Appearances:

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Corrigendum of the Reasons for Judgment
of
The Honourable Justice A. Loparco

The citation was amended to the current KB status.