IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Metath Investment Co., Ltd. v. Zhu,* 2024 BCSC 2127

Date: 20241122
Docket: S185495
Registry: Vancouver

Between:

Metath Investment Co., Ltd., Haijian Liu, and Sino Kingshine International Investment Ltd.

Plaintiffs/Respondents

And

Chu Qi Zhu, Zhi Quan Zhu, and Hong Yang

Defendants/Applicants

Before: The Honourable Justice Majawa

Reasons for Judgment on Application to Cancel CPL

Counsel for the Respondents:	B. Wagner
Counsel for the Applicants:	D. Lucas
Place and Dates of Hearing:	Vancouver, B.C. October 28 and November 1, 2024
Place and Date of Judgment:	Vancouver, B.C. November 22, 2024

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Introduction

[1] The applicants, who are the defendants in the underlying action, apply under s. 252 of the *Land Title Act,* R.S.B.C. 1996, c. 250 [*LTA*], for an order cancelling the certificate of pending litigation (the "CPL") registered against 7760 Montana Road, Richmond, BC (the "Property").

[2] Section 252 of the *LTA* permits the court to cancel a CPL if no steps have been taken in the litigation for one year immediately preceding the bringing of the application under s. 252. The parties agree that this threshold has been met, as there have been no formal steps in the litigation for at least one year prior to this application being brought.

[3] The court, however, is not required to cancel a CPL when the prerequisite one-year delay is met. An order under s. 252 is a discretionary one that is to be granted based on the interests of justice in all the circumstances of the case: *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172 at para. 67 [*GMC Properties*].

[4] As there is no dispute that the one-year threshold is met, the narrow issue before the Court in this case is whether the interests of justice, considered in all the circumstances of the case, support the cancellation of the CPL registered against the Property. For the reasons that follow, I have concluded that the application to cancel the CPL should be dismissed.

Background

[5] There are three respondents who are the plaintiffs in the underlying action: Haijian Liu ("Mr. Liu"), a Chinese citizen and businessperson, and two corporate parties, Metath Investment Co., Ltd. ("Metath") and Sino Kingshine International Investment Ltd. ("Sino Kingshine"), which are corporations registered in the British Virgin Islands.

[6] There are three applicants who are the defendants in the underlying action: Chu Qi Zhu ("Ms. Zhu") and her parents, Zhi Quan Zhu ("Mr. Zhu") and Hong Yang (collectively, the "Zhu Parents").

[7] In or about January 2016, Ms. Zhu and Mr. Liu began a romantic relationship. The exact nature of this relationship is the subject of a separate dispute. For the purposes of this application, it is sufficient to say the romantic relationship began in 2016 and terminated in 2018.

[8] In June 2016, the parties purchased the Property for $2,708,000. Legal title of the Property is held by Mr. Zhu. It is the nature of this purchase that is in dispute. The applicants moved into the Property and continue to reside there. The applicants' position is that the Property was a gift from Mr. Liu to the Zhu Parents, and so is owned both legally and beneficially by the Zhu Parents. The respondents' position is that the Property was purchased as an investment and is held in trust for the respondents by Mr. Zhu.

[9] It is common ground that the respondents transferred a total sum of $2,556,699.09 to the Zhu Parents for the purchase of the Property. The first transfer was of $106,729.09 on June 22, 2016, the second was of $1,349,985 on July 5, 2016, and the third was of $1,099,985 on July 15, 2016. The July 5, 2016, transfer originated from Metath, and the July 15, 2016, transfer came from Sino Kingshine.

[10] Mr. Zhu obtained a mortgage in the amount of $1,699,800 to assist in funding the purchase of the Property. Both parties agree that this left an excess amount of approximately $1.5 million (the "Excess Funds"). The respondents' position is that the Excess Funds were held in trust by the applicants for the purpose of making mortgage payments on the Property on behalf of the respondents. The applicants' position is that these funds were part of the gift and were to be used as the Zhu Parents saw fit.

[11] When Mr. Liu and Ms. Zhu's relationship ended in 2018, the respondents allege that Mr. Liu made oral requests to the applicants to vacate the Property and

return it to the respondents. When the applicants failed to do so, the respondents filed the originating notice of civil claim on May 4, 2018, and registered the CPL against the Property at the same time.

[12] It has been more than six years since this action began. The action has been characterized by large gaps of time where little has occurred, including a four-year period between September 1, 2020, and the filing of the present application on June 24, 2024, where no formal steps were taken that advanced the litigation. As a result, the applicants filed the present application to cancel the CPL under s. 252 of the *LTA*.

Legal Framework

[13] Section 252 of the *LTA* provides the following:

> 252 (1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.
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> (2) An application under subsection (1) must be made to the court in which the proceeding was commenced and must be brought
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> (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
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> (b) by petition, if the applicant is not a party.
>
> (3) The registrar must, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), cancel the registration of the certificate of pending litigation.

[14] As referenced earlier, the court retains the discretion to grant or refuse a s. 252 application based on the interests of justice in all the circumstances of the case, even where no steps have been taken in the proceeding for one-year: *GMC Properties* at para. 67.

[15] In determining whether to exercise that discretion, the Court of Appeal in *GMC Properties* at para. 46 endorsed the factors set out by Justice Halfyard in *Wiest v. Middelkamp*, 2005 BCSC 1626 at para. 13 [*Wiest*]:

> [13] In my opinion, the factors relevant to the exercise of the court's discretion in this type of application include the following:
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> a) Whether the respondent has given an acceptable explanation for the delay in prosecuting the claim;
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> b) Whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and
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> c) Whether the respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.

Was there an Acceptable Explanation for the Delay?

[16] The statutory prerequisite of s. 252, being whether no step has been taken for at least one year, considers only formal steps taken by the parties that move the action toward trial or resolution: *Lawn Genius Manufacturing (Canada) Inc. (Drainmaster) v. 0856810 B.C. Ltd. Inc.*, 2016 BCSC 1915 at para. 12 [*Lawn Genius*], cited approvingly in *GMC Properties* at para. 45.

[17] The parties agree that the s. 252 prerequisite of a one-year delay has been met, as the last formal step taken by the respondents was an application for the production of documents on September 1, 2020. The only intervening steps in the litigation between that application and the filing of the present one were informal or did not move the litigation forward.

[18] The respondents took a number of steps to move the litigation forward after the present application was filed, including setting a trial date for January 26, 2026. I assign these steps little weight, as doing so would undermine the purpose of s. 252 by allowing a plaintiff to wait until a s. 252 application was filed before taking steps to further the litigation with little consequence. However, these steps do form part of the circumstances in which the interests of justice are considered. I am mindful that a trial date has been set, limiting how much longer the CPL will be registered in any event.

[19] While informal steps are not considered when determining if the delay of one year has occurred, they are not omitted from the analysis entirely: *GMC Properties* at paras. 82-87. Informal steps form part of the circumstances of the case that the

court must consider in determining whether dismissing the CPL is in the interests of justice.

[20] The respondents identify several informal steps in the litigation that took place between the last formal step on September 1, 2020, and the filing of the present application.

[21] The respondents point to sporadic correspondence which occurred between the parties after the September 1, 2020, application until March 15, 2022. Despite these correspondences, the respondents concede that there remains a gap of approximately two years during which no steps were taken, informal or formal, prior to correspondences in advance of the respondents filing of a notice of intention to proceed on February 24, 2023. A notice of intention to proceed is not considered to move the litigation forward: *Lawn Genius* at para. 20.

[22] The respondents further submit that there were related matters, including a counterclaim filed by Ms. Zhu, and a family law claim filed by Ms. Zhu, that assist in explaining the delay.

[23] I am not persuaded that the informal steps offer a reasonable explanation for the delay. The gaps in correspondences relating to document production are notable: after an initial series of exchanges in September and October of 2020, there is little evidence of further communications other than a handful of emails, often separated by months. The respondents were unable to provide an explanation for these gaps, or the two-year period where no action occurred, other than the vagaries of litigation. Nor was the Court provided with a compelling explanation for why the related matters prevented the effective prosecution of this one.

[24] The underlying purpose of s. 252 of the *LTA* is to prevent property from being tied up in dormant litigation: *GMC Properties* at para. 43. If the informal steps taken by the parties had evidenced serious, or even modest, efforts to move the litigation forward, then a gap may not suggest that the matter was dormant. This is not the

case here. Sporadic requests for documents are not the actions of a plaintiff fulfilling their obligation to prosecute their claim diligently.

[25] I am unable to conclude that the informal steps show more than a passing effort at furthering the litigation, nor do I accept that the presence of related matters reasonably explain the delay. While I remain cognizant that the litigation was not completely dormant for the entirety of the four-year period, I conclude that there is no acceptable explanation for the delay in the prosecution of this matter.

Is there Prejudice to the Applicant if the CPL is not Cancelled?

[26] Where the one-year delay statutory prerequisite is met, prejudice to the landowner is presumed. The onus is on the respondent to show that the prejudice is not serious, or that the prejudice incurred by not cancelling the CPL is outweighed by other factors that suggest cancellation of the CPL would be unjust: *GMC Properties* at para. 45, citing *Lawn Genius* at para. 12. Despite this presumption, the court must consider "the absence of evidence of actual prejudice" to the applicants and the potential for prejudice to the respondents should the CPL be cancelled: *GMC Properties* at paras. 88-90.

[27] The applicants' position is that there is actual prejudice caused by the CPL, as it causes financial strain and prevents the disposal of the Property.

[28] The respondents' position is that there is no actual prejudice because the applicants have access to the Excess Funds to pay for the upkeep and mortgage of the Property. It is not disputed that the Excess Funds are in the possession of the applicants; however, the applicants have not provided an explanation as to the whereabouts of the Excess Funds, or why they are not available to pay for the mortgage. In fact, there is little evidence about these funds at all, save that they were indeed transferred to the applicants. Ms. Zhu deposes that the monthly mortgage payments fluctuate as it is a variable rate mortgage but was $9,050.30 as of June 21, 2024. At this rate, the Excess Funds of approximately $1.5 million would be sufficient to cover at least 13 years of payments.

[29] In the absence of other evidence to the contrary, I find that the Excess Funds are available to pay the mortgage on the Property. The presence of these Excess Funds is persuasive evidence that rebuts the presumption of prejudice.

[30] Further, I find that there is an absence of evidence to suggest that the applicants would be prejudiced by the continued registration of the CPL. Counsel for the applicants pointed to evidence from Ms. Zhu that the "proceeding has cause significant financial… strain on me and my parents" and that they are "unable to mitigate our financial strain by selling the [Property]".

[31] This evidence does not show actual prejudice. The prejudice alleged by the applicants is that the CPL prevents them from dealing with the Property. This is not, however, evidence of prejudice. Rather, it is simply a conclusory statement of how a CPL functions at law. There is no actual evidence before the Court that the Zhu Parents do in fact wish to deal with the Property, and are so prevented, which would provide a factual link that shows actual, not just potential, prejudice.

[32] Counsel for the applicants submit that the Court may draw an inference that the Zhu Parents wish to deal with the Property from the affidavit of Ms. Zhu, and the fact that the applicants sought to sell the Property in 2018, but were prevented from doing so by the CPL. I decline to draw this inference.

[33] There are notable gaps in the evidentiary record put forward by the applicants that are troubling. Most notably, the applicants have not adduced any evidence from Mr. Zhu, the legal owner of the property, despite his central role in the litigation and his potential ability to clarify key issues of prejudice and the merits of the underlying claim. The lack of evidence from the property owner himself was not explained. While I do not go so far as to draw an adverse inference from this omission, in the absence of an affidavit from Mr. Zhu, I decline to infer actual prejudice from the limited evidence brought by the applicants. Nor do I infer that intention to sell the Property six years ago shows that the Zhu Parents wish to sell now.

[34] The applicants did not make their mortgage payments for the months of April and May 2024. Ms. Zhu states that the applicants missed these two mortgage payments due to financial inability to pay, and that there are outstanding property taxes which they are likewise unable to pay. She deposes that she is advised by her father that he is unable to afford the ongoing mortgage payments. However, there is no direct evidence to show that any payments after May 2024 were missed, or that payments will continue to be missed moving forward. Nor is there an explanation as to why the Excess Funds are not available to pay these obligations, and nor is there a confirmation or explanation from Mr. Zhu himself as to the "financial strain" that Ms. Zhu states he is experiencing as a result of the CPL. Again, the unexplained lack of evidence from the legal owner of the Property, Mr. Zhu, leaves notable gaps in the record, and in this context, I decline to infer what ought to have been directly adduced.

[35] I am cognizant as well that removing the CPL risks prejudice to the respondents in the form of a dry judgement should they be successful at trial. There is little evidence on the record that the applicants have other assets of value in Canada other than the Property at issue, and the Zhu Parents are both Chinese citizens who may be willing and able to leave Canada in event of an adverse outcome at trial. There is no evidence from the Zhu Parents that refutes this. I am also mindful that the respondents seek specific performance in their amended notice of civil claim, and cancelling a CPL in this context would substantively dismiss the claim for specific performance: *GMC Properties* at para. 88. These factors weigh in favour of retaining the CPL.

[36] Counsel for the applicants brought my attention to *Charbonneau v. Charbonneau Estate,* 2023 BCSC 2463 [*Charbonneau*]. The court in *Charbonneau* discharged CPLs registered against a mobile home park, finding prejudice was presumed and that the CPLs effectively prevented it from being sold.

[37] *Charbonneau* is distinguishable on two grounds. First, there was clear actual prejudice as an applicant in that case "swore in his first affidavit… that [the

applicants] intend to list and sell" the encumbered property. In the present case, no such evidence of an intention to sell is present. Second, the court in *Charbonneau* noted that the respondents failed to adduce evidence that showed the applicants would not be prejudiced by the continued registration of the CPLs. The respondents have done so in the present case by pointing to the existence of the Excess Funds.

[38] I likewise find *Reddy v. Reddy*, 2022 BCSC 1144 of little assistance. *Reddy* stated that "the defendant did not have to establish prejudice", and that given a delay of three years "without any proper justification", justice demanded discharge of the CPL: at para. 24. However, *GMC Properties* notes that the court must consider "the absence of evidence of actual prejudice": at para. 88. In *Reddy,* the court had "extensive evidence" of prejudice caused by the CPLs, including direct evidence from the owner of an intention to sell: at para. 24. In the present case, there is an absence of such evidence. The court in *Reddy* also concluded that the underlying claim's chance of success was "slim to none": at para. 24. As detailed below, I do not reach the same conclusion in the present case.

[39] As a result, I find that the respondents have rebutted the presumption of prejudice, and find that there is an absence of evidence of actual prejudice that would weigh against discharging the CPL. Further, dismissing the CPL risks prejudice to the respondents in the form of a dry judgement and the effective dismissal of the claim for specific performance without adjudication of that claim on its merits.

Is there a Reasonable Prospect of the Claim Succeeding?

[40] The court must consider the merits of the underlying claim in assessing whether the interests of justice support the dismissal of the CPL: *GMC Properties* at para. 78. The standard is whether the claim has at least a reasonable chance of success: *Weist* at para. 13. This is a relatively low bar.

[41] I pause to note that this application has been characterized by notable gaps in the record that make assessing the merits of this case a challenging endeavor. The claim rests on an alleged oral agreement between two parties, Mr. Liu and

Mr. Zhu. However, there is no evidence from Mr. Zhu directly, only indirect evidence from his daughter, Ms. Zhu. While this hearsay evidence is admissible on an interlocutory application, it negatively impacts the weight I assign to it; particularly given that no explanation has been provided for why hearsay evidence is necessary in the circumstances.

[42] Given that none of the alleged agreements are in writing, much of the underlying claim turns on assessments of credibility that this Court cannot make on affidavit evidence alone.

[43] The respondents claim that Mr. Zhu held the Property in an express trust, or in the alternative in a constructive trust, for Mr. Liu. They claim that Mr. Zhu is in breach of trust by failing to vacate and return the Property to Mr. Liu upon oral request in 2018.

[44] The applicants' position is that the Property and the Excess Funds were a gift to the Zhu Parents.

[45] I conclude that there is a reasonable prospect of success for the claim of express trust. An express trust is established when the requirements of certainty of intention, certainty of subject, and certainty of object are established and the trust property is vested in the trustee: *Suen v. Suen*, 2013 BCCA 313 at para. 45.

[46] The applicants argue that certainty of intention is not met, as there is "no evidence to suggest that Mr. Liu entered into any agreement… with Mr. Zhu or any of the Defendants". I disagree. It is the intention of the settlor that is determinative of whether there was certainty of intention: *Virk v. Singh,* 2020 BCSC 225 at para. 122, aff'd 2022 BCCA 153. Although there is no written trust agreement, Mr. Liu's affidavit evidence is that his intention in transferring Mr. Zhu the funds to purchase the property was for Mr. Zhu to hold the resulting property in trust for him. While the lack of a written agreement evidencing Mr. Zhu's intentions may pose some challenges in ultimately establishing his claim at trial, it does not legally preclude a finding that an express trust was created pursuant to a verbal arrangement.

[47] I must determine whether Mr. Liu's claim for an express trust has a reasonable prospect of success on the evidence before me. As referenced, there is no written agreement. At the end of the day, I am left with Mr. Liu's affidavit evidence alleging that the Property was held by the applicants in trust and that the Excess Funds were also to be held in trust and to be used to make the mortgage payments. This evidence is contradicted by Ms. Zhu's affidavit evidence that the Property and Excess Funds were gifted to the Zhu Parents. While it seems unusual for such large sums of money to be gifted to an unrelated party, the terms of the oral trust agreement alleged by Mr. Liu, and the participation of two corporate entities in funding the purchase of the Property without written agreements, are also unusual.

[48] I have no direct evidence from Mr. Zhu about the nature of the funds used to purchase the Property. Nowhere does Mr. Zhu attest that the Property and Excess Funds were gifted to him alone and/or to the Zhu Parents together. Nowhere does Mr. Zhu deny the existence of a trust. There may be a good explanation for the lack of evidence from Mr. Zhu; however, no explanation was provided. The circumstantial evidence relied upon by the applicants, such as text messages sent to Ms. Zhu by Mr. Liu around the time that their romantic relationship allegedly ended are contradicted by other text messages and do not lead to an inescapable inference that the Property was gifted.

[49] It is not surprising that I am unable to resolve the fundamental conflict in this case on the affidavit evidence before me, and that is not my task at this stage, in any event. My task at this stage is simply to assess whether there is a reasonable prospect that the plaintiffs' claim will succeed. On this relatively low bar, and on the unique evidentiary record and circumstances of this case, I have concluded that there is.

[50] As I have found that there is a reasonable prospect of success on the respondents' express trust claim, it is not necessary for me to consider the respondents alternative claim that the Property is held in a constructive trust.

Conclusion and Disposition

[51] Considering all the circumstances of the case, I do not find it to be in the interests of justice to dismiss the CPL.

[52] The applicant has demonstrated that the statutory prerequisite delay under s. 252 of the *LTA* of one year or more without formal steps being taken is met. I also find that there is no compelling explanation for the large and unexplained gaps in the relevant period where no steps, formal or informal, were taken.

[53] However, balanced against this is the absence of evidence on the record of actual prejudice to the applicants, and a real risk of prejudice to the respondents, if the CPL is dismissed. I also find that the respondents have rebutted the presumption of prejudice because of the Excess Funds which should be available to the applicants, and of which there is little evidence before the Court from which I can conclude they are not.

[54] Given the evidentiary record on this application, I also conclude that there is a reasonable prospect of success for the respondents' claim of an express trust. In weighing all of these considerations, I have concluded that it would not be in the interests of justice to cancel the CPL at this time. This finding does not preclude the defendants from making a future application to remove the CPL under ss. 256 and 257 of the *LTA* on the grounds of serious hardship or inconvenience, should the circumstances warrant it.

[55] The application to cancel the CPL registered against the Property pursuant to s. 252 of the *LTA* is dismissed. The respondents are entitled to their costs.

"Majawa J."