IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *674191 B.C. Ltd. v. Gold Spring Recreational Association,* 2011 BCSC 1616

Date: 20111128
Docket: S060739
Registry: Vancouver

Between:

674191 B.C. Ltd.

PLAINTIFF

And:

Gold Spring Recreational Association,
Gold Spring Heights Development Ltd.,
Gold Spring Mountain Estates Ltd.

DEFENDANTS

Before: Master McCallum

Reasons for Judgment

Counsel for Plaintiff:	M. W. Ferbers
Counsel for Defendants:	J. F. Dixon
Place and Date of Hearing:	Vancouver, B.C. September 30, 2011
Place and Date of Judgment:	Victoria, B.C. November 28, 2011

INTRODUCTION

[1] The plaintiff is the assignee of a purchase agreement of real property owned by the defendants. The plaintiff commenced this action to recover a deposit of $1,000,000 paid to the defendants in the fall of 2005 in furtherance of that agreement.

[2] The defendants apply for an order dismissing the action for want of prosecution or alternatively for an order cancelling a Certificate of Pending Litigation filed by the plaintiff against the defendants' property.

[3] For the reasons that follow, I have concluded that the action of the plaintiff must be dismissed for want of prosecution and that the application to cancel the registration of the Certificate of Pending Litigation must be dismissed.

BACKGROUND

[4] The defendants ("Gold Spring") are in the land development business and owned development property comprised of several parcels of land in the Chilliwack area. On July 27, 2005, Gold Spring entered into a contract of purchase and sale ("Master Agreement") of the property with Double J Developer Holdings Ltd. ("Double J").

[5] The Master Agreement stipulated a price for the land of $16,000,000 to be paid partly by way of an initial payment of $1,000,000 comprised of a deposit of $100,000 and a further payment of $900,000. The initial payment was said to be non- refundable once paid. The purchaser's obligation was subject to various conditions that were to be removed and the initial payment paid by August 26, 2005.

[6] On September 14, 2005, James Das ("Das") the principal of Double J delivered a bank draft in the amount of $100,000 to Lighthouse Realty, the listing agents for the Gold Spring property. It appears from the evidence that the funds may have been provided to Double J by the plaintiff. It does not appear that Gold Spring or Lighthouse Realty was aware of the source of the funds.

[7] On September 29, 2005, Gold Spring accepted two offers ("New Contracts") made by Double J for the property that was the subject of the Master Agreement. The New Contracts stipulate a purchase price of $8,000,000 and $8,100,000 respectively for the various parcels owned by Gold Spring referred to in the Master Agreement. Each of the New Contracts required a deposit of $500,000 and each contract was subject to various conditions precedent.

[8] By an agreement ("Assignment Agreement") originally dated September 14, 2005, and amended to a date of September 29, 2005, Double J assigned its interest in the New Contracts to the plaintiff. The Assignment Agreement makes it clear that the original deposit was to be provided to Double J by the plaintiff and the remaining $900,000 of the initial payment was to be provided to Double J by the plaintiff.

[9] On October 5, a lawyer acting for the plaintiff prepared a letter addressed to Lighthouse Realty enclosing a bank draft in the amount of $900,000 payable to Lighthouse representing the balance of the initial payment due under the Master Agreement and the New Contracts. The letter identified the plaintiff as the assignee from Double J under the New Contracts in that correspondence.

[10] There is a dispute in the evidence over whether or when Gold Spring learned of the assignment and the plaintiff's involvement in the transaction in question. The evidence around delivery of the letter, as opposed to the $900,000 bank draft, is controversial. For the purposes of this application nothing turns on the resolution of those issues.

[11] Gold Spring took the position that the conditions precedent in favour of Double D as purchaser had to be removed if Third Reading of a rezoning bylaw by the City of Chilliwack was achieved on or before November 30, 2005. Third Reading of the bylaw occurred on November 28, 2005. On November 30, 2005, Das, on behalf of Double J, signed a Release of Trust Funds authorizing Lighthouse Realty to release the balance of $900,000 it held as stakeholder in the transaction. A representative of Gold Spring executed that document on November 30, 2005,

agreeing to release Lighthouse from its obligations as stakeholder. Lighthouse then paid the sum of $900,000 to Gold Spring as contemplated in the New Contracts.

[12] The transaction did not complete on January 30, 2006, as contemplated by the New Contracts. In the days prior to January 30, 2006, lawyers for the parties discussed the plaintiff's request for an extension of the time for closing. Gold pring would not consent to an extension of the time for closing.

[13] On February 2, 2006, the plaintiff commenced this action claiming judgment in the amount of $1,000,000 (the amount of the initial payment) against Gold Spring. The statement of claim was amended on February 3, 2006, to include a claim for a purchaser's lien and a Certificate of Pending Litigation ("CPL"). The CPL was registered against Gold Spring's property on February 6, 2006.

[14] Gold Spring filed its statement of defence on February 27, 2006. The plaintiff delivered a list of documents on March 10, 2006, following a demand for a list from Gold Spring. The plaintiff delivered a supplemental list of documents on October 19, 2009. With the exception of various notices dealing with a change of counsel in early 2010 and an application to amend pleadings filed in response to this application, the plaintiff has not initiated any significant step in the proceeding since the list of documents in March 2006. The plaintiff has responded to various steps taken by Gold Spring including consenting to removal of the CPL on two occasions in 2006.

[15] Gold Spring applied in December 2007 for an order cancelling registration of the CPL against its land. The application was heard by Morrison J. on February 12, 2008, and dismissed. The court exercised its discretion holding that it was not possible at that stage of the litigation to say that the plaintiff had no reasonable chance of success. The court there found that there had been no steps taken by the plaintiff since initiation of the action because the plaintiff lacked the financial resources to pursue the claim. The court noted that the plaintiff, by February 2008, was in a financial position to proceed.

[16] In July 2008, the plaintiff consented to an order that it pay security for costs. The costs were not posted in accordance with the order and Gold Spring applied for an order dismissing the claim on account of that failure. The plaintiff posted the costs in September 2008 and the application did not proceed.

[17] Gold Spring set the action for trial in May 2010 by notice of trial delivered on January 15, 2009. The plaintiff discharged its counsel in December 2009 and retained new counsel on April 27, 2010, just days before the commencement of the trial. Gold Spring consented to an adjournment of the trial upon request by new counsel for the plaintiff.

[18] Gold Spring filed a notice of intention to proceed on March 23, 2011, in order to bring on the application to cancel the CPL. The plaintiff filed a similar notice in June 2011 in order to bring on an application to amend the pleadings and add parties. That application has been adjourned pending resolution of the Gold Spring applications.

[19] On September 28, 2011, the plaintiff filed a notice of civil claim against Gold Spring, Double J, Das, Lighthouse Realty and all of the realtors involved in the original transaction that lead to this action. The essential claim in the new action is for return of the $1,000,000 paid to Gold Spring. The basis of the claim is expanded considerably in the new proceeding from the claim in this proceeding.

DISCUSSION

[20] Gold Spring says firstly that the action must be dismissed for want of prosecution arguing that the test established by the authorities (*Irving v. Irving,* (1982) 38 B.C.L.R. 318 (B.C.C.A.) has been met. That test may be summarized as requiring Gold Spring to demonstrate that:

(a) there has been an inordinate delay;

(b) the inordinate delay is inexcusable; and

(c) Gold Spring is likely to be seriously prejudiced by the delay.

[21] In the case at bar, the plaintiff commenced the proceeding immediately following collapse of the real estate transaction in February 2006. Since commencement, the plaintiff has taken virtually no steps to prosecute the claim. It delivered a list of documents in March 2006 and a supplemental list in October 2009. The plaintiff filed a notice of intention to proceed in June 2011 and an application to amend the statement of claim and add new parties in July 2011.

[22] Otherwise, the plaintiff has simply responded to various steps taken by the defendants. None of those steps, in my view, mitigate the delay in proceeding. The defendants applied in February 2008 for an order cancelling registration of the CPL filed by the plaintiff. In her reasons dismissing the application, Morrison J. found that the plaintiff had not initiated any activity in the litigation other than that set out above. The plaintiff maintained in that application that lack of funds had prevented it from proceeding. The court found that the plaintiff was, in February 2008, “in a position to proceed with the litigation”. (Reasons for Judgment, para. 32.)

[23] Morrison J. found that the delay occasioned until February 2008 was justified by the plaintiff’s lack of resources to fund the litigation and declined to cancel registration of the CPL. She also found that there was actual prejudice accruing to Gold Spring as a result of the filing of the CPL but exercised her discretion in favour of the plaintiff in maintaining registration of the CPL. More than 44 months have passed since the court’s decision in February 2008. The plaintiff has taken no steps to prosecute the claim. The delay in proceeding is inordinate.

[24] The plaintiff offers no excuse for the delay in proceeding and I find it is inexcusable. In those circumstances, prejudice is presumed and there is evidence of actual prejudice given the finding in February 2008. Gold Spring has had title to a valuable asset tied up by the plaintiff since commencement of the proceeding in February 2006.

[25] The court in *Irving* held that the finding of inordinate, inexcusable delay and prejudice did not necessarily lead to dismissal of the action. The court must weigh the interests of justice before concluding that the action cannot proceed. In this case,

the plaintiff was given an opportunity in February 2008 to proceed with the litigation and failed to do so. At least one essential witness has died and all of the events leading up to the action occurred some six years ago. The evidence will inevitably involve many witnesses' recollection of those events. I conclude that the likelihood of a fair trial on the merits will be significantly diminished. This is a case where the interests of justice demand that the action be dismissed.

[26] Gold Spring applies as well for an order that registration of the CPL be cancelled as provided for in S. 252 (1) of the *Land Title Act*. Section 252(1) provides that where a CPL is registered and no step in the proceeding is undertaken for one year the owner may apply for an order cancelling registration of the CPL.

[27] Gold Spring brought an application under s. 252 in February 2008 that was dismissed by Morrison J. In her reasons, Morrison J. concluded that the order was a discretionary one and she was satisfied with the explanation offered by the plaintiff for the failure to prosecute the claim.

[28] The authorities establish generally that the purpose of s. 252 of the *Land Title Act* is to prevent a party from tying up property in dormant litigation. (*Wiest v. Middlekamp,* 2004 BCSC 2002.) In the application before Morrison J. there was no issue taken with the fact that no step had been taken in the proceeding for the requisite one year. This application was filed June 9, 2011. The plaintiff filed and delivered a notice of intention to proceed on June 3, 2011. That seems to me to be a step in the proceeding leading, as the authorities require, towards a result. The notice of intention was a required document to allow the plaintiff to bring on the application that now stands adjourned to amend and add parties.

[29] In those circumstances, Gold Spring cannot succeed on the application to cancel registration of the CPL given the step in the proceeding within one year of the application.

CONCLUSION

[30] The plaintiff's action is dismissed for want of prosecution with costs to the defendants on Scale B.

[31] The application to cancel registration of the Certificate of Pending Litigation is dismissed. Each party will bear their own costs of that application.

"W. McCallum"
Master W. McCallum