SUPREME COURT OF YUKON

Citation: *Mao v. Grove*, 2020 YKSC 23

Date: 20200611
S.C. No. 19-A0091
Registry: Whitehorse

BETWEEN

WEN-TAI “DANIEL” MAO,
I LIKE HOME DESIGN LTD., AND
318 ARCTIC COLOR TOURISM DEVELOPMENT LTD.

PLAINTIFFS

AND

WAYNE GROVE

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
Wen-Tai “Daniel” Mao — Representing himself and the corporate plaintiffs

Graham Lang and
Sarah Hart — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This an application by the defendant Wayne Grove to strike the statement of claim on the basis of Rule 20(26)(a) and Rule 18(6) of the *Rules of Court*.

[2] Although this is a claim against the defendant, Wayne Grove, a review of the statement of claim shows clearly that the plaintiffs’ issues are with their business

partners who are not included in this lawsuit. The vast majority of the statement of claim sets out facts describing the plaintiffs' disputes with those third parties.

[3] The following reviews the legal tests on an application to strike pleadings for no reasonable claim and on an application for summary judgment. It then applies those tests to the claims and circumstances of this case.

[4] For the purposes of this application, all facts alleged in the statement of claim are assumed to be true.

The Statement of Claim

[5] The following background is set out in the statement of claim.

[6] Wayne Grove owns rural property outside of Whitehorse. In August 2016 he entered into a lease agreement (the "2016 Lease") with Arctic Color Tours Inc. ("Arctic Color"). Lawrence Wei and James Pan were the principals of Arctic Color. The agreement allowed Arctic Color to construct and operate a bed and breakfast facility tailored to northern lights viewing (the "Facility").

[7] Arctic Color started the construction of the Facility, but had issues with the contractor. The construction was unfinished and the resulting registered liens against the property were a breach of the 2016 Lease. On May 11, 2017, Wayne Grove terminated the 2016 Lease.

[8] The 2016 Lease contained the following clause:

> Those improvements, which are affixed to the Premises, are intended to become and will become the absolute property of the Landlord upon construction thereof by the Tenant and upon expiry or earlier termination of the Term.

[9] At the end of May, 2017, Daniel Mao, the plaintiff, and James Pan entered into an oral agreement. The terms included the provision of construction services by I Like

Home Design Ltd. (“Design Ltd”, Daniel Mao’s company) and the provision of vehicles, marketing management and advance payments by Daniel Mao. These services were provided in exchange for payment by James Pan at fair market price plus surcharge, payment of management fee and wages, reimbursement for the rental cost of vehicles and the provision of interest, shares and dividends. Daniel Mao described the arrangement as he and James Pan becoming business partners. He said he was promised that all funds would be paid by James Pan; and that he would share in the profits once the business began to generate income.

[10] Wayne Grove then agreed to enter a new lease in August, 2017 (the “New Lease”) with 318 Arctic Color Tourism Development Ltd., a newly formed British Columbia corporation (“Arctic Vancouver”). Daniel Mao signed the New Lease on behalf of Arctic Vancouver.

[11] Design Ltd. completed the construction of the Facility. Arctic Vancouver began operating the tourist business on Wayne Grove’s property.

[12] In the meantime, there was a falling out between Daniel Mao on the one hand and Lawrence Wei and James Pan on the other. Daniel Mao claimed he was not paid for services he rendered in completing the construction of the Facility, nor was he paid his management fee, wages or reimbursed for the vehicle rentals. Daniel Mao further claimed he made all the rent payments to Wayne Grove and was not reimbursed by James Pan. Finally, the use and control of the leased property was in dispute.

[13] On or about September 26, 2018, Wayne Grove removed a lock on the gate leading to the Facility that Daniel Mao had installed because he wanted to prevent Lawrence Wei, James Pan and tourists from accessing the Facility.

[14] Daniel Mao's claims can be summarized as follows:

a) Wayne Grove has been unjustly enriched by:

i) the buildings at the Facility completed by Design Ltd.; and

ii) material upgrades, jobs, extra service and overtime provided by Daniel Mao.

Daniel Mao claims restitution, entitlement to the leased property which he claims is currently held in trust (express, constructive or resulting) by Wayne Grove for Design Ltd., and a certificate of pending litigation against the property;

b) Wayne Grove breached the New Lease by failing to provide quiet possession of the property to Arctic Vancouver through his removal of the lock from the main gate and his failure to evict Lawrence Wei and James Pan for their unfair occupancy of the property and Daniel Mao is entitled to the return of rent, insurance and related expenses paid during their unfair occupancy; and

c) the operation of the tour business without an occupancy permit in 2016 and 2017 by Lawrence Wei and James Pan entitles Daniel Mao to a declaration.

[15] Lawrence Wei and James Pan are not parties to this action.

Related Litigation

[16] There are two actions between Daniel Mao on the one hand and Lawrence Wei and James Pan on the other. On August 17, 2018, Lawrence Wei and James Pan started an action through their company against Daniel Mao and his companies, in the

Supreme Court of British Columbia, seeking relief related to the ownership of Arctic Vancouver.

[17] On June 20, 2019, Daniel Mao and his companies claimed in the Supreme Court of Yukon against Lawrence Wei and James Pan and their companies, seeking their removal from the Wayne Grove property.

[18] Neither of these actions is currently being pursued.

ISSUES

[19] Does the statement of claim allege facts that support reasonable causes of action at law? Specifically, are there reasonable claims for unjust enrichment; for breach of the lease covenant of quiet possession of the rental property; to support a declaration of unlawful operation of a business?

[20] In the alternative, should summary judgment be granted based on a lack of merit to the claims, based on the evidence set out in the affidavits?

ANALYSIS

Legal test on application to strike - Rule 20(26)(a)

[21] Rule 20(26)(a) says:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> …

[22] No evidence is admissible on an application under subrule (26)(a). The rule is concerned with the sufficiency of the pleadings. It addresses matters of law. An order

striking a pleading under this rule cannot be a basis for a *res judicata* defence in subsequent proceedings.

[23] The test was most recently articulated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42:

> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the [the former British Columbia *Rules of Court*] [identical to Yukon Rule 20(26)(a)]. This Court has reiterated the test on many occasions. **A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true**, **that the pleading discloses no reasonable cause of action**: *Odhavji Estate v. Woodhouse,* 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15: *Hunt v. Carey Canada Inc,* [1990] 2 S.C.R. 959, at p. 980 [emphasis added]. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada,* [1980] 2 S.C.R. 735.
>
> …
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion … It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

Legal test for summary judgment - Rule 18(6)

[24] Rule 18(6) allows the defendant to apply for summary judgment on certain conditions.

> 18(6) In an action in which an appearance has been entered, the defendant may, on the ground there is no merit in the whole or part of the claim, apply to the court for judgment on an affidavit setting out the facts verifying the defendant's contention that there is no merit in the whole or part of the claim and stating that the deponent knows of no facts which would substantiate the whole or part of the claim.

[25] The test for summary judgment has been described by the Court of Appeal of British Columbia in *Serup v. British Columbia School District No. 57* (1989), 57 D.L.R. (4th) 261 (B.C.C.A.) at p. 264:

> The question is whether there is a *bona fide* triable issue … that is equivalent to the question … of whether the claim is bound to fail, or … bound to succeed.

[26] The British Columbia Court of Appeal in *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500, explained more specifically the process to be undertaken by the Court in determining whether summary judgment should be granted:

> [10] … examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.

[27] If insufficient material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant will have met the onus to negative the existence of a *bona fide* triable issue.

[28] If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those facts is contested, then the Court is not to weigh the evidence. Its function is to determine whether there is a genuine issue for trial on the material before it, in the context of the applicable law. If it is necessary to assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.

[29] This analytical exercise is similar to that undertaken in the application of Rule 20(26). All facts in the pleading are assumed to be true. The important differences are that evidence is permitted to be considered (but not weighed) in a determination of summary judgment; and once a claim or part of a claim is struck under the summary judgment rule, it provides a *res judicata* defence in any future proceedings.

a) Unjust enrichment

[30] The facts in the statement of claim do not support an unjust enrichment claim, or the consequential remedies of an express, resulting or constructive trust of the property, or the ability to attach a certificate of pending litigation on the property.

[31] In order to succeed, a claim for unjust enrichment must contain the following three elements:

i) enrichment to the defendant;

ii) corresponding deprivation of the plaintiff; and

iii) the absence of a juristic reason for the enrichment (*Pettkus v. Becker,* [1980] 2 S.C.R. 834 at p. 848).

[32] In this case, there are juristic reasons for the enrichment: the 2016 Lease provisions allowing the constructed Facility to become the property of Wayne Grove; the

absence of a contract for the completion of the Facility construction and ancillary activities between Wayne Grove and Daniel Mao; and the statutory remedy of the registering of a lien as permitted by the *Builders Lien Act.*

[33] The focus of the analysis in the case at bar is on the third element. There are two parts to the juristic reason analysis. The categories of juristic reasons include a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. In order to deny recovery successfully, the plaintiff must prove that none of these (or any other) juristic reasons exists. If the plaintiff proves this, the second part of the analysis obliges the defendant to show there is another reason to deny recovery and why the enrichment should be maintained (*Garland v. Consumers' Gas Co.,* 2004 SCC 25 at paras. 44 and 45; *Sabihi v. Dr. Mansur Roy Inc.* 2013 BCSC 1571).

[34] The Supreme Court of Canada elaborated on the juristic reasons element in *Kerr v. Baranow*, 2011 SCC 10, saying:

> [43] … the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied….
>
> [44] … Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (Peter: at p. 990).

[35] In this case, Daniel Mao claims that Design Ltd.'s completion of the construction work on the Facility and all the payments associated with that including materials, overtime work, wages have enriched Wayne Grove and correspondingly deprived Daniel Mao and his companies. Wayne Grove now has a completed bed and breakfast tourist Facility on his property.

[36] While it is clear there has been enrichment and deprivation, the facts in the statement of claim support juristic reasons to deny recovery.

[37] First, the 2016 Lease, quoted at para. 25 of the statement of claim, included the following term:

> Those improvements, which are affixed to the Premises, are intended to become and will become the absolute property of the Landlord upon construction thereof by the Tenant and upon the expiry or earlier termination of the Term.

The existence of this clause is not contested by Wayne Grove.

[38] The improvements are the buildings that constitute the Facility. Daniel Mao acknowledges at para. 29 of the statement of claim that the ownership of the buildings had changed on termination of the 2016 Lease, before he became involved with the property.

[39] Second, when Daniel Mao entered into the oral agreement with James Pan, and became his business partner (see para. 32 of the statement of claim) part of the agreement was that Daniel Mao would provide construction services and make advance payments, in exchange for receipt of a fair market price and surcharge, management fees, wages, reimbursement of expenses, and interest, shares, dividends. Nowhere in the statement of claim does Daniel Mao say that Wayne Grove entered into a construction or other business contract with him or his company, issued directions or instructions to him or his company about the construction or was required to pay him or his company. All of Daniel Mao's dealings with respect to the oral agreement were with James Pan and Lawrence Wei.

[40] Third, there is a statute that applies in this situation to provide a remedy to the plaintiffs. The *Builders Lien Act*, R.S.Y. 2002, c. 18, allows a contractor to register a lien

on the title to the property in order to obtain some assurance of payment for work done on that property. There are statutory time limits set out for the liens to be registered. In this case, no lien was registered on title to the property by Design Ltd. or Daniel Mao, although para. 54(f) of the statement of claim indicates their acknowledgement of their ability to do so if James Pan failed to pay off the arrears owing to Design Ltd. The time to register a lien has long expired.

[41] There have been several decisions from the Supreme Court of British Columbia on unjust enrichment in the commercial context. In those decisions, the Court found that in a situation where an owner has contracted to have construction work performed, a sub-contractor, who later claims its contract has been breached, cannot successfully bring an unjust enrichment claim against the non-contracting owner. In other words, the sub-contractor cannot seek a remedy against an entity that is not a party to the contract that has been breached, even if that entity has benefitted from the work done under the breached contract. The remedy for that sub-contractor (other than the contractual one) against the non-contracting party is to place a builders' lien on the property within the allotted time.

[42] The Court in *Sabihi v. Dr. Mansur Roy Inc*. at para. 48, quoting from *Park v. K.S. Mechanical Ltd.*, 2012 BCSC 1751, set out the remedies available to a subcontractor in a position similar to that of Design Ltd.:

> [39] … A subcontractor on a construction project has remedies in contract against the person with whom he or she contracts. The legislature has recognized these remedies to be inadequate and has enacted the *Builders Lien Act.* Thus, the subcontractor has remedies against the property as long as the subcontractor acts within the time limits imposed by the *Act.*

> [40] Except in unusual circumstances, that is the extent of a subcontractor's remedies.

[43] This is the situation in the case at bar. Wayne Grove will benefit from the improvements, as provided by the 2016 Lease. However, he was not part of any contract for the construction or completion of the project. That contract was the oral agreement between James Pan and Daniel Mao, referenced at para. 32 of the statement of claim. Daniel Mao and Design Ltd. have no cause of action against Wayne Grove. Their remedy is through the *Builders Lien Act* (which is no longer available because the time limits have expired), or through pursuing James Pan and Lawrence Wei for breach of contract.

[44] The claims of express, resulting or constructive trust of the property derive from the claim for unjust enrichment. The Court in *Man-Shield (Alta.) Construction Inc. v. 1117398 Alberta Ltd.,* 2007 ABQB 603 defined constructive trust as arising:

> [10] … when there has been unjust enrichment and the "law is of the view that one person ought to surrender or hold property for the benefit of another"… The entitlement to a constructive trust then arises if monetary damages are inadequate and there is a connection between the contribution that founded the action and the property in which the constructive trust is claimed.

[45] Constructive trust cannot apply in a case where there is no unjust enrichment. There is no unjust enrichment in the case at bar because of the juristic reasons that exist to deny recovery. The same reasoning applies to an express trust or resulting trust.

[46] Similarly, a certificate of pending litigation is claimed here against Wayne Grove's property in order to secure the unjust enrichment claim. If there is no unjust enrichment claim, then there is no legal basis for a certificate of pending litigation.

[47] As a result these claims shall be struck pursuant to Rule 20(26)(a).

b) Breach of lease covenant of quiet enjoyment by failing to evict Lawrence Wei and James Pan; declaration that Wayne Grove was unauthorized to cut the gate lock; repayment of rent, insurance and related expenses

[48] The facts pleaded in support of these claims are similar, and are not enough to constitute a cause of action or show the existence of triable issues.

[49] The covenant of quiet enjoyment is provided by a landlord to its tenant. It has been described as:

> ... the landlord, by leasing the premises, gives the tenant the right of possession to the premises during the term of the lease and promises not to interfere with this right of possession, and the right to use the premises for all of the usual purposes incidental to occupation [Harvey M. Haber, ed., *Tenant's Rights and Remedies in a Commercial Lease: A Practical Guide*, 2nd ed (Toronto,ON: Canada Law Book Inc.),, p. 201].

The word 'enjoy' means the use and exercise of the right of possession. The word 'quiet' means without interference. It is in effect a promise by the landlord that it will not do anything to interfere with the tenant's right to use the leased property.

[50] Here, Daniel Mao says that Wayne Grove's unauthorized cutting of the lock on the gate allowing access to the Facility was an interference with his ability to use the property. Daniel Mao objects to the removal of the lock, not because of Wayne Grove's activities, but because it allows Lawrence Wei and James Pan and the tourists to enter onto the property. Daniel Mao's claim against Wayne Grove is that his failure to prevent them from entering onto and using the property is a breach of the covenant of quiet enjoyment.

[51] An examination of the New Lease is necessary in considering this issue. The New Lease is attached to an affidavit of Wayne Grove filed in support of this application. This affidavit and attachments supports Wayne Grove's argument that there is no merit to these claims. It sets out in Schedule A a map of the property, and identifies an Exclusive Licence Area. The use of this area is set out in Schedule B. It is an area reserved by Wayne Grove, as Licensee, for agricultural purposes.

[52] It is clear from the map on Schedule A that the entry to the Exclusive Licence Area from the road is the same access road for the Facility.

[53] Wayne Grove was entitled to obtain access to his farm land; to do so, it was necessary to cut the lock on the gate.

[54] The fact that the cutting of the lock also meant that the tourist visits organized by Lawrence Wei and James Pan could continue, does not provide a basis for a cause of action by the plaintiffs against Wayne Grove. The New Lease allows for Arctic Vancouver to continue using the Facility for northern lights viewing tours. The dispute over control of that company and the business between Daniel Mao and Lawrence Wei/James Pan is a separate claim that does not involve Wayne Grove. Who controls Arctic Vancouver is irrelevant to Wayne Grove, as long as the terms of the New Lease are complied with. Daniel Mao's attempts to involve Wayne Grove in his business dispute by claiming Wayne Grove has an obligation to prevent Lawrence Wei and James Pan from accessing the Facility does not constitute a cause of action against Wayne Grove.

[55] Similarly, the claim that Wayne Grove should evict Lawrence Wei and James Pan from the property because of the dispute between them and Daniel Mao over

control of the company and monies owed, is not a reasonable cause of action. As has been stated clearly in writing (letter dated June 12, 2019 attached to Affidavit #1 of Wayne Grove as Exhibit G and verbally by Wayne Grove to Daniel Mao), Wayne Grove takes no position in relation to that dispute and has encouraged both parties on numerous occasions to resolve the issue between them through the litigation that has been commenced in the courts. Allowing the tourism business to be carried on by Arctic Vancouver, as is permitted by the New Lease, cannot constitute a breach of the covenant of quiet enjoyment.

[56] The repayment of rent, insurance and other expenses during the period that Lawrence Wei, James Pan and the tourists occupied the Facility is also not a proper cause of action against Wayne Grove. It is a remedy sought by Daniel Mao as part of the dispute between him and Lawrence Wei/James Pan.

[57] Daniel Mao's attempt to seek a remedy from Wayne Grove for his claims against Lawrence Wei and James Pan is misplaced. The remedy for Daniel Mao is to pursue his claims directly against the parties with whom he is in disagreement.

[58] The claims of breach of quiet enjoyment, for a declaration that the lock cutting was unauthorized and for return of payments of rent, insurance and related expenses are dismissed on the basis of Rule 18(6).

c) Failure of Lawrence Wei and James Pan to obtain occupancy permit before starting tourism business

[59] The statement of claim seeks a declaration that Wayne Grove failed to take action against Lawrence Wei and James Pan, by way of evicting them from the

property, when they began tours before all the necessary permits from the Government of Yukon were obtained.

[60] This was a historical issue, not a current one. More importantly, it is not an issue between Daniel Mao and Wayne Grove. If anything, there may be a remedy to be sought by the Government of Yukon as against the company or its principals.

[61] This claim shall also be struck pursuant to Rule 20(26)(a) for failure to set out a reasonable cause of action.

CONCLUSION

[62] For the above reasons, the claim shall be struck. Leave to amend may be requested in case management for those claims struck pursuant to Rule 20(26)(a).

[63] Costs may be spoken to in case management upon request.

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DUNCAN J.