

SUPREME COURT OF YUKON

Citation: *St. Cyr v. Atlin Hospitality Ltd.*, 2020 YKSC 4

Date: 20200205
S.C. No. 19-A0011
Registry: Whitehorse

BETWEEN

**SHERENE ST. CYR, CLAYTON CONNER, AND CORAL ST. CYR (A MINOR) AND
TRISTAN CONNER (A MINOR) BY THEIR LITIGATION GUARDIAN CLAYTON
CONNER, AND 1440208 ALBERTA LTD.**

PLAINTIFFS

AND

ATLIN HOSPITALITY LTD. AND ROBERT REED

DEFENDANTS

AND

S.C. No. 19-A0071
Registry: Whitehorse

BETWEEN

ATLIN HOSPITALITY LTD.

PETITIONER

AND

1440208 ALBERTA LTD.

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:
Shaunagh Stikeman
Mark Wallace

Counsel for the plaintiffs and respondent
Counsel for the defendants and the petitioner

REASONS ON APPLICATIONS FOR CONSOLIDATION/TRIAL TOGETHER/STAY

INTRODUCTION

[1] Sherene St. Cyr purchased a 14-acre rural property with a house and three cabins on the Atlin Lake and Lubbock River, near Atlin, British Columbia, in 2013 from Atlin Hospitality Ltd. She provided Atlin Hospitality Ltd. with a mortgage of \$550,000 in order to finance the purchase amount of \$650,000. In June 2018, she stopped making the mortgage payments, claiming that the residence was uninhabitable and had caused her and her children to become sick. On April 5, 2019, Ms. St. Cyr, her company and her children started an action against Atlin Hospitality Ltd. for damages for breach of contract and negligent misrepresentation.

[2] On July 25, 2019, Atlin Hospitality Ltd. initiated a petition for relief in the form of foreclosure, sale and possession of the property and other related relief because of the defaulted mortgage payments.

[3] Sherene St. Cyr and her company seek to have the two matters consolidated, or heard together. Alternatively, she seeks to have the foreclosure petition stayed pending the outcome of the civil action. Although she acknowledges her failure to make the mortgage payments, she says the reason is that her illness, caused by mould in the residence, has prevented her from earning an income allowing her to make payments. She claims the existence of mould is a defect that should have been disclosed by Atlin Hospitality Ltd. before the purchase. She also claims other representations about the condition of the heating, electrical, mechanical and plumbing systems in the residence were negligently made and unfairly induced her to purchase the property and enter into the mortgage. She says the value of the property is much lower than what she agreed

to pay on purchase and her mortgage payments made between 2013 and 2018 exceed the value of the property.

[4] Atlin Hospitality Ltd. objects to Ms. St. Cyr's procedural request. It wants to continue with the mortgage foreclosure petition, saying it is a straightforward matter to which there is no defence. Further, Atlin Hospitality Ltd. argues the action in contract and negligent misrepresentation is without merit and should not delay the relief it seeks and is entitled to in the foreclosure proceeding.

[5] There are two applications - one in each proceeding. The two applications request the same remedy. The evidence and arguments are the same in both applications. As a result I will address both applications in this decision.

ISSUES

1. Should the two matters be consolidated or heard together? More specifically, do common claims, disputes and relationships exist between the parties and are the issues in the petition and the action "so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems, not to mention expense" *Webster v. Webster* (1979), 12 B.C.L.R. 172 (C.A.), at para. 11, quoted in *Peel v. Western Delta*, 2003 BCSC 784, at para. 25; and *Funk v. Harder*, 2015 BCSC 2152, at para. 16. Is there any advantage or prejudice to the parties that would result from hearing the matters separately or hearing them together?
2. Should the petition be stayed pending the outcome of the action?
3. Should the petition be converted to an action?

BRIEF CONCLUSION

[6] There are sufficient commonalities that the hearing together of the two matters is the most efficient and just way of proceeding. Both matters arise from the purchase and sale of the same property. There is overlap in the parties and the lawyers are the same. The facts relied on in the tort and contract action have also been raised in defence to the mortgage foreclosure proceeding. It is possible that the plaintiffs' claim and the respondent's defence to the petition may be found to be without merit, in which case the mortgage foreclosure proceeding will have been unfortunately delayed. On the other hand, if the action or defence do have some merit, there may be a different outcome in the mortgage proceeding. If the mortgage proceeding proceeds, it will be determined first, and if successful and the property is sold, the ability of the purchaser to have her claims fairly adjudicated may be prejudiced. "[I]t is a basic right of a litigant to have all issues in dispute resolved in one trial ..." *1623242 Ontario Inc. v. Great Lakes Copper Inc.*, 2013 ONSC 2548, at para. 14, quoting from the Ontario Court of Appeal in *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1986), 55 O.R. (2d) 56 (O.N.C.A.).

ANALYSIS

Introduction

[7] Legal authority to consolidate or try proceedings together is found in Rule 5(8) of the *Rules of Court* for the Supreme Court of Yukon. As noted by counsel for Atlin Hospitality Ltd., there is no substantive difference in the rules between consolidation or hearing together. For the purpose of these applications I will treat them as interchangeable and refer to them as hearing together.

Legal Principles

[8] The jurisprudence sets out a number of factors to be considered in determining whether matters should be heard together. The cases of *Funk v. Harder*, 1623242 *Ontario Inc. v. Great Lakes Copper Inc.* and *Peel v. Western Delta*, include the following factors which I have grouped together as follows:

- i. Are there common claims, disputes and relationships between the parties?
 - a. Is there overlap between the parties?
 - b. Are the lawyers the same?
 - c. Are the claims so interwoven that they make separate trials at different times before different judges undesirable and fraught with problems and economic expense?
 - d. Is there expected to be significant overlap of evidence or witnesses between the proceedings? Are the same events involved?
- ii. Is there any advantage or prejudice the parties are likely to experience if the actions are kept separate or tried together?
 - a. Would a decision in one action, if tried separately and first, likely put an end to the other action or significantly narrow the issues or increase the likelihood of settlement?
 - b. Are the issues in one action relatively straightforward compared to the complexity of the other actions?
 - c. Is there a risk of inconsistent findings or judgments if the actions are not joined?

- d. Will the parties save costs or have their costs increased if the actions are tried together?

Common Claims, Dispute and Relationships

a. Overlap of parties

[9] In this case there is overlap between the parties. The petitioner in the mortgage foreclosure proceeding, Atlin Hospitality Ltd., is the same as one of the defendants in the action. The other defendant is Robert Reed, who is the principal of Atlin Hospitality Ltd. The respondent in the mortgage action is 1440208 Alberta Ltd. It is also one of the plaintiffs in the civil action, along with Sherene St. Cyr, who is the principal of 1440208 Alberta Ltd., and two of her children and their litigation guardian. The two primary individuals involved in these matters, Robert Reed and Sherene St. Cyr, are the same.

b. Lawyers are the same

[10] The lawyers are the same in both proceedings.

c. Interwoven claims

[11] The respondent states in response to the petition that the reason for their failure to continue making mortgage payments is that the residence is uninhabitable due to the presence of mould, which could or should have been disclosed to them at the time of purchase. The mould has allegedly caused illness that has negatively affected their financial status and ability to make the payments. The respondent also says that the amount owing under the mortgage should be adjusted. The property value is lower than the value at the time of purchase, as a result of the poor condition of the residence. This includes deficiencies in the heating, plumbing, electrical and mechanical systems, the conditions of which were misrepresented at the time of purchase.

[12] The petitioner says the admission by the respondent of the breaches of the mortgage contract means that the only relevant factual dispute in the mortgage proceeding is the amount of money owing and the number of payments made by the respondent. The defendants in response to the tort and contract claim rely on various clauses in the purchase agreement that demonstrate the unconditional acceptance by the purchaser of the condition of the residence and of all the representations by the vendor of good working order of all the systems at the time of purchase in 2013. As a result, the petitioner says that regardless of the health of the respondent and plaintiffs, or the condition of the residence, the claims of the plaintiffs and defence of the respondent in the mortgage proceeding are without merit, based on the terms of the mortgage agreement and the purchase and sale agreement.

[13] The petitioner may be correct. However, with this submission, the petitioner is asking the Court at this juncture, on the basis of pleadings and affidavit evidence, to make a determination on the merits of the plaintiffs' claim and the respondent's defence to the petition. A formal application for this relief has not been brought. In any event, at this stage, without the advantage of further evidence, witness credibility assessments, and additional legal argument, the Court is unable to make this determination.

[14] The respondent to the petition has made a link based on the pleadings and affidavit evidence between the mortgage foreclosure proceeding and the tort and contract action. That link is that Sherene St. Cyr has been unable to make the mortgage payments for failure to earn sufficient income allegedly as a result of her illness caused by mould and possibly other poor conditions in the residence. She also argues that the

outstanding mortgage amounts should be adjusted to account for the alleged diminished value of the property. This also links the petition for foreclosure to the action.

[15] In order to make a full determination of the merits of the petition and the action, it is preferable to have all of the evidence and arguments related to the disputes arising from the purchase and sale of the property and condition of the residence before the court.

d. Overlap of evidence, witnesses and events

[16] The interweaving of the petition and the claim also means there will be an overlap of evidence and witnesses in the proceedings. The evidence about the contents of the mortgage agreement, the purchase and sale agreement, the representations made at the time of purchase and sale, the condition of the residence at various times, and the health condition, including causes, of Sherene St. Cyr is all potentially relevant in both proceedings. The circumstances of the purchase and sale of the property, the mortgage between Robert Reed and Sherene St. Cyr and their companies, the condition of the residence, and the health status of Sherene St. Cyr are underlying facts that tie the two proceedings together.

[17] On a consideration of the factors related to whether there are common claims, disputes and relationships, I am persuaded that there are sufficient commonalities to support the matters being heard together.

Advantage or Prejudice to the Parties If Matters Heard Separately or Together

a. Decision in one proceeding ends the other proceeding?

[18] A decision in the mortgage foreclosure proceeding is unlikely to end the tort and contract action. A court may not accept the respondent's defence to the mortgage

proceeding as sufficient to overcome the contractual provisions of the mortgage agreement. However, this finding is unlikely to preclude the plaintiffs' pursuit of the tort and contract claim for damages on the basis of alleged negligent misrepresentations at the time of purchase and alleged breaches of the purchase and sale agreement.

[19] If the tort and contract claim were to proceed separately and in the unlikely event it was decided first, if it were successful in whole or in part, the outcome of the mortgage proceeding may be affected, as the amounts owing may be reduced. If the tort and contract claim were unsuccessful, it would not end the mortgage proceeding, but the chance of success of the petition is likely to be higher.

[20] There is no incentive to proceed with one matter before the other in the hope that a ruling in one would put an end to the other. This would not be an advantage or prejudice to either party.

[21] The petitioner argues it is prejudiced by the delay in hearing its petition. This argument has some merit. However, even if the petition were heard first, the response would still need to be adjudicated. The response raises issues related to the health of Sherene St. Cyr and the condition of the residence, which will take time to be adjudicated. Further, even if the petition were successful, the petitioner would likely still be required to defend the tort and contract claim. In other words, the dispute between the parties would not be over. This reduces the significance of the prejudice to the petitioner by a delay of the petition.

[22] A possible result of the hearing of the petition is the sale of the property. The plaintiffs may be prejudiced if the petition is heard first and separately, and a sale

results, as it may make it more difficult for the plaintiffs to obtain evidence in the tort and contract action.

[23] By hearing the proceedings together, the possibility of settlement may increase because of the link between the two matters. This is a potential advantage to both parties.

[24] A consideration of this factor shows that a decision in one proceeding if proceeded with separately is unlikely to put an end to the other proceeding and there are advantages to both parties of having the matters heard together.

b. Are the Matters Relatively Straightforward?

[25] While on its face the petition is relatively straightforward, the respondent's response linking the foreclosure proceeding to the tort and contract action makes it more complex. Thus, as noted above, there is no advantage to the petitioner in proceeding separately with the petition, given the evidence and legal argument required for the respondent's defence to it. Even if in the end the response is found to be without merit, it is likely still to require an evidentiary hearing and legal argument.

c. Risk of Inconsistent Findings or Judgments

[26] It is possible if these matters are heard separately that two different courts may, for example, assess evidence about the health condition of the plaintiffs and the condition of the residence differently. This may result in inconsistent findings – that is, damages could be awarded to the plaintiffs in the tort and contract claim but no adjustment made to the mortgage amounts in the foreclosure proceeding, or vice versa. This potential inconsistency has a prejudicial effect on the litigants and is potentially an affront to the administration of justice.

d. Costs savings

[27] Costs may be saved by having both matters tried together, as the witnesses, including experts, and legal arguments on all of the issues need only be heard once.

[28] Considering all of the above factors, there is a greater advantage to the parties of having the matters heard together, than heard separately.

Move petition to trial list

[29] A final procedural issue in this case is whether the petition should be moved to the trial list. In order for the two matters to be tried together, both must be in the form of an action.

[30] The broad powers set out in Rule 50(12)(d) to order a trial of the proceeding and give directions for the conduct of the trial and pre-trial proceedings allow for a petition to be converted to an action.

[31] The factors for consideration of this issue are similar to those relevant in deciding whether the two matters should be heard together. Generally, courts have converted petitions into trials where the petition and action involve the same parties, individuals, events and witnesses (*Bevcheck Systems Inc. v. Takk Systems Canada Inc.*, 2008 BCSC 855); or where facts underlying the claims in contract and tort in that case and those underlying the relief sought in the petition were substantially similar; or where the issues in the two proceedings were interwoven and in part fact-driven (*Dalstrom v. British Columbia (Organized Crime Agency)*, 2008 BCSC 844, at paras. 51-53). The undesirability of multiple proceedings; avoiding unnecessary costs and delays; the need to assess demeanour and credibility of witnesses; and the need for the court to have a full grasp of all the evidence were factors considered in the older decision of *Haagsman*

v. British Columbia (Minister of Forest) (1998), 64 B.C.L.R. (3d) 180 (B.C.S.C.), paras. 46 and 47.

[32] I agree with the defendants that there is likely to be a delay to the resolution of the mortgage proceeding by converting it to a trial. However, as a result of the respondent's response to the mortgage proceeding, there is enough overlap in the two proceedings that to determine them separately is undesirable. It is preferable for the Court to have a full grasp of all of the evidence in order to make a full determination of the issues. It is also necessary to assess the demeanour and credibility of witnesses. As noted above, there is similarity in the facts and issues in the two proceedings and they involve the same parties, individuals, events and witnesses. In this case, the issues raised by the respondent to the petition cannot be resolved "properly and adequately" without a trial in the ordinary way.

Stay of Foreclosure Action

[33] Given my findings above, it is unnecessary to address the request for a stay of the foreclosure proceeding. I am unable at this stage to make determinations on the merits of the respondent's defence to the petition or the plaintiffs' claim. The argument of the petitioner in this application requires that I find that the defence of the respondent to the petition and the claims of the plaintiffs are without merit and I have addressed above the reasons why I am unable to do so at this stage. Further, I have found there is a link between the two matters, and as a result, it is in the interests of efficiency and economy to have the two matters heard together, rather than postponing the hearing of the mortgage proceeding to a later time to be heard separately.

[34] This of course does not preclude the ability of the parties to attempt to reduce the time, effort and complexity of full trials by invoking one or more of the procedural tools available, such as summary trial or summary judgment.

CONCLUSION

[35] For the reasons set out above, I order that the petition be converted to an action, and that the petition and the tort and contract action be heard together. The effect of this is that evidence in one shall be evidence in the other, and the matters shall be heard on the same dates.

[36] Other procedural questions that cannot be resolved between counsel may be addressed in case management.

[37] Costs in the cause.

DUNCAN J.