IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Rodney Daniel Dick and R.D. Backhoe Services Inc. v. Vancouver City Savings Credit Union et al,*** 2006 BCSC 810

Date: 20060519
Docket: S89831
Registry: New Westminster

Between:

RODNEY DANIEL DICK
and
R.D. BACKHOE SERVICES INC.

PLAINTIFFS

And

VANCOUVER CITY SAVINGS CREDIT UNION ET AL

DEFENDANTS

Before: The Honourable Mr. Justice Crawford

Reasons for Judgment (Security for Costs)

Plaintiff, Rodney Daniel Dick	In Person
Counsel for Defendants, District of Maple Ridge, the City of Port Coquitlam, Jeff Yip and Tony Chong	A. Atherton
Simpson, Penny & Keenleyside Appraisals Limited, Canamera Appraisal Group Inc., Reilly and Erho	R. M. McLennan
Date and Place of Hearing:	14 October, 2005 New Westminster, B.C.

[1] Two groups of defendants apply to have the plaintiffs secure legal costs of the proceedings, failing which they ask that the action be stayed. The first group is the District of Maple Ridge, the City of Port Coquitlam, Jeff Yip and Tony Chong, (the "Municipal Group"), while the second group comprises the defendants Simpson, Penny & Keenleyside Appraisals Limited, Canamera Appraisal Group Inc., Reilly and Erho (the "Appraisal Group").

[2] Mr. Dick and R.D. Backhoe Services are self-represented. While I may say "he" or "they" in describing the plaintiffs, it does appear that the corporate plaintiff is Mr. Dick's *alter ego*.

[3] The plaintiffs put forward a complicated conspiracy claim wherein they allege they have been unlawfully deprived of various lands they once owned, and they claim damages.

[4] Some of those claims have already been dismissed. For instance, the claim against Vancouver City Savings Union (VanCity), Stubbs, Grant, Citizens Bank of Canada, and Westminster Savings Credit Union was dismissed by Master Groves (as he then was) on March 21, 2005. The court ruled the issues raised by the plaintiffs were issues that should have been raised in the foreclosure proceedings (default on the mortgages, sale orders, court approval of the sale of the lands, and current market values) and therefore the plaintiffs' claims against the defendants were barred by the principle of *res judicata*. On October 14, 2005, I dismissed the claims against Damax Consultants Ltd. and David Laird as the pleadings against them did not disclose a cause of action.

[5] Mr. Dick attended in person with his son. After counsel had made their submissions and provided copies of their submissions and case law to Mr. Dick, I asked Mr. Dick to respond. He gave various explanations, most of which repeated the claim that he had been wrongfully deprived of his lands, and none of which went to the legal issues raised by counsel.

[5] I carefully explained to Mr. Dick that I would give him 14 days to make any written response he wished regarding the application for security for costs and what the outcome might be should he fail to respond.

[6] I have not received any written response from Mr. Dick. However on a recent review of the court file I found a number of affidavits (numbered 4, 6,7,8,9 and 10 and all sworn November 14, 2005) some of which are said to be the response to demands for particulars from various defendants. Where they are relevant, I have considered them. For the most part, however, they add little, and in some cases the documents appended to the affidavits appear to contradict the assertions in the affidavits.

[7] I am therefore giving my reasons on the application by the applicant defendants.

A SUMMARY OF EVENTS ALLEGED IN THE STATEMENT OF CLAIM

[8] The statement of claim runs 204 paragraphs and has attached to it copies of many documents. Many are illegible. The statement of claim alleges that Mr. Dick

was seeking to develop five parcels of land, one in Port Coquitlam and four in Maple Ridge.

[9] He alleges the actions of the various defendants resulted in him losing his lands and sustaining economic loss.

[10] The Port Coquitlam property was located at 1843 Mary Hill Road (the "Mary Hill Property"). The plaintiffs say they entered a joint venture to develop the property with the owners, the Hundals, in 1996. Potentially it may have been a nine or ten lot development.

[11] In January 1997 Mr. Dick bought a three-acre property at Gilker Hill Road in Maple Ridge (the "Gilker Hill Property") with a mortgage from Westminster Savings.

[12] In 1990 Mr. Dick bought a two-acre property on 236th Street in Maple Ridge and in February 1997 Mr. Dick bought the adjacent two acres with funding from Westminster Savings. The four acres assembled on 236th Street in Maple Ridge I will call the "236th Street Property".

[13] In 1997 development site reviews were obtained for the three properties.

[14] In July 1997 Westminster Savings, who had been the plaintiffs' principal underwriters, said they would not underwrite the Mary Hill development and the plaintiffs then turned to VanCity Savings Credit Union ("VanCity") seeking $1,000,000 in funding.

[15] In September 1997 the plaintiff company offered to purchase the Mary Hill Property from Hundal for $475,000, having already paid $25,000.

[16] In September 1997 VanCity approved funding to the plaintiffs for a development loan, secured by a first mortgage on the Mary Hill Property and collateral security over the Gilker Hill and 236th Street properties. Title was put in the plaintiff company. The first draw was in the amount of $375,000, $350,000 of which was paid to Hundal, and Hundal gave a second mortgage on the property for 60 days at 10.5% for $125,000.

[17] Throughout this time the plaintiffs say they were having discussions and negotiations and obtaining tentative development approvals from the City of Port Coquitlam and its employees.

[18] In November 1997 Hundal extended the second mortgage for a further six months.

[19] In December 1997 tentative approval for the Mary Hill ten-lot subdivision was given by the City of Port Coquitlam and again extended in March 1998.

[20] As well, the plaintiffs allege they received approval in principle from Maple Ridge for the development of the four-acre 236th Street Property into a 56-unit townhouse development.

[21] In April 1998, the City of Port Coquitlam extended its tentative approval of the Mary Hill Property to August 1998.

[22] The following month however, in May 1998, Hundal foreclosed on the Mary Hill Property obtaining a foreclosure order *nisi* on May 20, 1998, with a redemption date of October 22, 1998.

[23] Mr. Dick said he was injured in May 1998 and the plaintiff company was given no notice of the Hundal foreclosure proceeding.

[24] Ongoing discussions with Port Coquitlam over the development continued. On August 18, 1998, VanCity demanded repayment of the first draw and gave Notice of Intent to enforce the security which it held over the other lands.

[25] In the fall of 1998 the plaintiffs proposed the purchase of lands from Port Coquitlam to add to the property and thereby obtain an additional lot. In September 1998 the City offered a 690 square foot parcel of land to the plaintiffs, who declined to purchase it.

[26] In October 1998 VanCity began foreclosure proceedings against the 236th Street Property in Maple Ridge, obtaining *inter alia* a *lis pendens* against it.

[27] On October 26, 1998, VanCity obtained an order *nisi* against the Mary Hill Property and a personal default judgment against Mr. Dick. It also obtained an order for sale.

[28] The District of Maple Ridge then cancelled the development approvals of the four-acre 236th Street Property and the Gilker Hill Property.

[29] In November 1998 the Westminster Credit Union took judgment on a property on 113B Avenue, Maple Ridge in the name of the corporate defendant, (the "113B Avenue Property").

[30] In January 1999 the plaintiffs say Mr. Dick purchased property at 24130 110 Avenue, Maple Ridge (the "110 Avenue Property") and obtained a $295,000 building draw from the Citizens Bank Credit Union. Mr Dick undertook various improvements through March 1999, clearing the land and reframing an old barn.

[31] In February 1999 Port Coquitlam gave the plaintiffs tentative development approval and a checklist for a five-lot subdivision on the Mary Hill Property.

[32] In mid-1999 the plaintiffs allege a contract was made with a bus company to lease the 110 Avenue Property.

[33] In August 1999 VanCity began examination in aid of execution on the judgment that had been taken against Mr. Dick. In September 1999 VanCity took default judgment against the 110 Avenue Property on the deficiency judgment obtained in the earlier foreclosure on the Mary Hill Property.

[34] On November 1999 a court ordered sale of the Mary Hill Property resulted in a numbered company owned by Mr. Dick's parents buying the property.

[35] The plaintiffs make allegations against the credit unions and their employees, the municipal corporations and their employees, the appraisers, the real estate brokers and others with respect to their actions and valuations given throughout the

developments and foreclosures. As well, they make allegations regarding a lack of service or notice of some of the court proceedings.

[36] In June, July and August 2000, VanCity proceeded with the foreclosure of the 110 Avenue Property.

[37] The plaintiffs also take issue with appraisals given by Penny & Keenleyside and others regarding their Maple Ridge Property. They point to the difference in the appraisals given by Penny and Keenleyside in September 1997 and in September 2000. This, however, would appear to be the result of the different purposes for which the opinions were sought. The first appraisal for $1,200,000 states that it is given for the purpose of mortgage financing, and subject to ... “fill to be in accordance with regulatory authorities and Amendment of the Official Community Plan to reflect development of the total site as a proposed 56 unit townhouse.” In contrast, the second appraisal for $380,000 was given “to function as the basis for foreclosure proceedings”.

[38] On August 2, 2000, Citizen Bank of Canada began foreclosure against the 110 Avenue Property. Order *nisi* was granted October 20, 2000, with a six-month redemption period.

[39] On November 20, 2000, Van City obtained an order for conduct of sale of the 110 Avenue Property.

[40] In late 2000, Westminster Savings commenced foreclosure against the 236th Street Property, the Gilker Hill Property and the 113B Avenue Property.

[41] The plaintiffs tried to negotiate for time and terms but say none was given. On February 23, 2001, VanCity sought court approval for the sale of the 110 Avenue Property for $210,000 to a Mr. MacDonald. The application for court approval was adjourned while the plaintiff sought to obtain second mortgage financing for the 110 Avenue Property. On April 17, 2001, court approval was given to the sale of the 110 Avenue Property for $210,000. The plaintiffs say the subsequent development of the half the property contradicts the evidence given to the court on the sale application, particularly regarding environmental riparian setbacks and property values.

[42] On June 7, 2001, the 113B Avenue Property was sold by the defendant Lisa Telep. All the plaintiffs' construction and development equipment on site vanished.

[43] On December 14, 2001, it is alleged that the four-acre 236 Street Property was sold to the defendant Telep doing business as Venture Projects Ltd, who soon after obtained approval from the District of Maple Ridge and marketed 24 luxury homes.

[44] The plaintiffs allege the Gilker Hill Property was developed by others building a single-family home on the property.

[45] The plaintiffs allege all the named defendants profited at the expense of the plaintiffs.

[46] Paragraphs 198 and 199 in the statement of claim read:

> 198. In reliance on the representations made by the Defendants, the plaintiffs Dick & Company are forced to stop their life concentrating only on repairing the harm &monetary damages caused by the Defendants conspiring and discriminating in concert.
>
> 199. In reliance on the Representations made by the Defendants the plaintiffs Dick & Company had no choice but to put their business and life in suspense while suffering the Defendants discrimination.
>
> and
>
> 201. The Defendants, or anyone of them were negligent and malicious by continuously making false and misleading Representations stemming from the original, illegal, unwarranted and flawed Mary Hill Property foreclosure and subsequent other tainted foreclosures which could only occur through conspiracy and deliberate contrivance furthered by all the Defendants.

TIMETABLE IN THIS ACTION

[47] The Statement of claim is dated December 17, 2004.

[48] Port Coquitlam and its employees filed their defence January 10, 2005. Maple Ridge filed its defence January 12, 2005.

[49] The defendants made ongoing demands for particulars and documents. The plaintiffs did not respond.

[50] Notice of these motions was given on or before July 29, 2005.

[51] No examinations for discovery have been scheduled.

[52] I have tried to encourage the plaintiffs to respond to the requests for documents, over and above those attached to their statement of claim, and pointed out the difficulties created by attaching providing illegible copies of documents to the

statement of claim. Several times the management of this case has in large part been an exercise in making clear to the plaintiffs their obligations under the ***Supreme Court Rules*** regarding disclosure. It now appears from the court file that the plaintiffs have by way of more affidavits filed in November, 2005, sought to respond to the various demands for particulars.

[53] There has been no delay by the applicants in bringing this motion. The solicitors for the municipal corporations have indicated legal costs recoverable in the event of their successful defence of the matter would be $28,636.80 and $5,350 in disbursements.

[54] The costs of the Appraisal Group were estimated at $40,036.80 and disbursements (including expert fees of $15,000) of $21,400, for a total of $61,436.

[55] No affidavits, other than those filed in November 2005, have been filed in response to this application nor have written arguments made by the plaintiffs. The later affidavits do not go to the legal issues arising on this application. The evidence is that the plaintiffs have no assets. No evidence been offered as to whether there are other means of support for their lawsuit. On the other hand, the pleading discloses Mr. Dick's parents purchased the Mary Hill subdivision lands.

The Law

[56] A useful brief of authorities was put forward in support of the application for security of the costs to which I would add the judgment of Justice Arnold-Bailey in ***Global Banking Systems Inc. v. Datawest Solutions Inc.***, 2005 BCSC 1739. Her ladyship there refers to the relevant principles cited by Barrow J. in ***Scopeset***

Technology Inc. v. Astaro Corp., 2004 BCSC 830 in turn reiterating the words of Finch J.A., as he then was in ***Kropp v. Swaneset Bay Golf Course Ltd***. (1997), 29 B.C.L.R. (3d) 252 (C.A.), which in turn refers to the English Court of Appeal's decision in ***Keary Development v. Tarmac Construction***, [1995] 3 All E.R. 534.

[57] The principles are summarized thus:

1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;

3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;

4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;

5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and

7. The lateness of the application for security is a circumstance which can properly be taken into account.

Analysis

[58] This is not a late application for security.

[59] It does appear that the plaintiffs will be unable to pay the defendants costs if the action fails. There is no evidence of exigible assets of value to satisfy an award of costs.

[60] I note Romilly J. in ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*** (1999), 36 C.P.C. (4th) 266 said, at ¶ 28:

> In sum, on an application for security for costs, once the defendants have established a *prima facie* case that the plaintiff lacks exigible assets, the plaintiff is required to respond with evidence to establish either that it will be able to pay the defendants' costs, that the defendants have no arguable case, or that an order for security will stifle the action. These tests serve to balance the possible injustice of stifling the corporate plaintiff's claim against the possible injustices of exposing the defendants to a law suit where they could not recover their costs if successful.

[61] The municipal group argue while the pleadings are not clear on this point, the cause of action is alleged to have occurred September 1997, but the action was not commenced until December 17, 2004, and that s. 285 of the ***Local Government Act***, R.S.B.C. 196, c. 323 requires the action be started within six months of the cause of action arising.

[62] As against the personal defendants Yip and Chong, employees of the corporation of Port Coquitlam, the defendants argue that regardless of whether there is a two-year or six-year limitation, the plaintiffs' claim is defeated by the provisions of the ***Limitation Act***, R.S.B.C. 1996, c. 266.

[63] The defendants also invoke s. 287 of the ***Local Government Act***. It provides a defence to alleged neglect or default in performance of an employee's duties,

except in the case of dishonesty, gross negligence or malicious or wilful misconduct. The latter is denied by the defendants Yip and Chong.

[64] The defendants note the plaintiffs also appear to allege fraud mis-representation, discrimination and conspiracy on the part of some or all of the said defendants, and all of which is denied.

[65] The competing considerations on this application are the impecuniosity of the plaintiff and the use of the security for cost applications being used to stifle legitimate claims.

[66] In this regard, corporate defendants are not treated as generously as natural persons. ***Western Telluric Resources Inc. v. Cardero Resources Corp.***, [2005] B.C.J. No. 499 (Q.L.) (B.C.S.C.).

[67] In ***Kropp v. Swaneset Bay Golf Course Ltd.*** *Supra,* the court noted a mere assertion of impecuniosity was not sufficient and plaintiffs seeking to avoid security for costs on the grounds of impecuniosity should lead evidence to demonstrate their impecuniosity by giving evidence of their assets and finances.

[68] In ***Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress***, supra, Romilly J. stated, at ¶ 22:

> Consequently, though it appears that the plaintiff may be unable to pay costs of the action, it does not follow, in the absence of evidence, that such a state of affairs would result in stifling the advancement of the plaintiff's claim if costs were ordered to be secured.

[69] Section 236 of the ***Business Corporations Act*** is likewise apposite. It states:

> If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

[70] With respect to individual plaintiffs, the court tends to exercise its discretion more cautiously.

[71] In so doing the court looks to the relative strength of the plaintiff's case and the strength of the available defences.

[72] While the statement of claim is cast widely and one may discern allegations of fraud, discrimination, conspiracy, and fraudulent and negligent misrepresentation, on a plain reading of the statement of claim it appears the principal problem was the plaintiff's lack of financing for the various developments, and failure to attend and defend foreclosure proceedings. The defendants therefore see lengthy and protracted proceedings, given the prolixity of the pleadings and lack of plaintiff counsel, without any prospect of recovering their costs.

[73] The defendants also point to the fact that the plaintiffs started an earlier action against VanCity and they have failed to pay the costs of the discontinuance.

[74] The Municipal Group pleads legitimate statutory limitation defences, and generally deny the claims made against them or their employees. The Appraisal Group has filed a very short defence denying each and every allegation of the

plaintiffs' claim. On the face of the pleadings there are differences in the valuations given in respect of the various properties at issue, in large part because initial opinions were sought on market values derived from best development outcome, while later opinions are premised on foreclosure or liquidation situations. Given the obvious difference in approaches and consequent valuations, it is difficult to see a meritorious claim against the various appraisers. The plaintiffs do not have legal counsel to sift what evidence they may have to see if in fact there is a viable claim. On the face of the pleadings, the defendants take a legitimate stance in simply making a broad and general denial.

[75] On the other side of the issue is the concern of stifling legitimate litigation. The onus there is on the plaintiffs to show the order for costs will bar the litigation. They have not done so.

CONCLUSION

[76] Considering all of the foregoing, I will order security for costs be posted by the plaintiffs in the amount of $25,000 regarding the Municipal Group, and $25,000 regarding the appraisal Group. The action will be stayed until that amount of security is posted with the Court.

[77] In the event security for costs in those amounts is not posted within six months of this Order, the defendants may apply to dismiss the action.

"R. Crawford, J."
The Honourable Mr. Justice R. Crawford