

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Civil Forfeiture) v. Nguyen*,
2011 BCSC 1792

Date: 20111208
Docket: S111040
Registry: Vancouver

2011 BCSC 1792 (CanLII)

Civil Forfeiture Action in Rem Against

The Lands and Structures at 2437 East 20th Avenue, Vancouver, British Columbia, with a legal description of Parcel Identifier 006-935-851 Lot 5 Block N Section 45 Town of Hastings Suburban Lands Plan 11660 (“the Property”), and the fruits and proceeds therefrom

Between:

Director of Civil Forfeiture

Respondent

And:

The Owners and all Others Interested in the Property, in Particular Trang Thi Nguyen also known as Thi Trang Nguyen also known as Jennifer Thi Trang Nguyen and Tai Huu Ly

Applicant

Before: The Honourable Mr. Justice Fitch

Oral Reasons for Judgment

In Chambers

Counsel for the Applicant:

S. King

Counsel for the Respondents:

J.I. Solomon
B. Makhon, A/S

Place and Date of Summary Trial:

Vancouver, B.C.
November 24, 2011

Place and Date of Judgment:

Vancouver, B.C.
December 8, 2011

A. Nature of the Application

[1] **THE COURT:** The applicant, Tai Huu Ly, hereinafter “Ly”, applies pursuant to Rule 9-7 for the dismissal of a civil forfeiture claim brought against him by the plaintiff, the Director of Civil Forfeiture. The action also names as defendants Trang Thi Nguyen also known as Thi Trang Nguyen and Jennifer Trang Thi Nguyen, hereinafter “Nguyen”, and all others interested in the lands and structures located at 2437 East 20th Avenue in Vancouver.

[2] The Director seeks dismissal of Ly's application pursuant to Rule 9-7(11)(b)(i) and (ii) on grounds that the issues raised by the summary trial application are not suitable for disposition under this Rule and because a summary trial will not aid the efficient resolution of the proceeding. For the reasons that follow, I would grant judgment in favour of the applicant Ly and dismiss the claim against him.

B. Background to the Application

[3] Nguyen acquired the property in issue on or about November 27, 2009, for \$563,000. She is the sole registered owner. It is apparent from the material filed in this matter that Nguyen acquired the property by using the net proceeds from the sale of a property she previously owned and by taking out a mortgage for the balance. In affidavits filed in support of this application, Nguyen deposes that Ly made no contribution to the purchase of the property. Further, she deposes that Ly has not contributed to payment of the mortgage, property taxes, improvements, or maintenance of the property since the date of its acquisition. She collected the rental proceeds from the property. She denies that Ly has any beneficial or other unregistered interest in the property. In addition, she denies that Ly has ever resided at the property. She acknowledges a friendship with Ly, but swears that they are neither married nor have they ever been in a common-law relationship.

[4] Nguyen has been gainfully employed as a customer service representative with a bank since approximately March of 2010. Prior to that, she was employed by a business called Cash Money as a customer service representative. She has, in

support of the application, filed her tax return forms for 2009 and 2010 showing her income. She has also filed a printout of her banking activities showing monthly payment of the mortgage from her account.

[5] Nguyen acknowledges that Ly was the BC Hydro subscriber for the property. She deposes that he agreed to do this at her request.

[6] In affidavits filed in support of the application, Ly deposes that he has no registered interest and no beneficial or other unregistered interest in the property. He confirms that he made no contribution to the purchase, mortgage, property taxes, improvements, or maintenance of the property. Further, he deposes that he has never resided at the property and has no legal or beneficial entitlement to a claim against the property and no intention of asserting one in the future.

[7] He confirms the affidavit evidence of Nguyen that they are neither married nor in a common-law relationship. He adduced two marriage search certificates from the British Columbia Vital Statistics Agency confirming that neither he nor Nguyen have been married in British Columbia. Although this evidence is likely not proper reply evidence, the Director claims no prejudice and I would exercise my discretion to admit the search certificates in evidence.

[8] Ly confirms that he agreed to be the BC Hydro subscriber for the property at the request of Nguyen. He deposes that he did this as a favour to her and not with the intention of gaining an interest in the property. He swears that he has suffered no deprivation as a result of his involvement in the property and that Nguyen was not enriched at his expense. In essence, the applicant denies any legal or equitable claim against the property and asserts no interest in the resolution of the forfeiture action.

[9] On January 27, 2011, employees with Accenture Business Service of British Columbia, a contractor to British Columbia Hydro, investigated and prepared a report relating to the possible theft of electricity occurring at the property. The report was forwarded to the Vancouver Police Department the following day. Based on this

information, a search warrant was obtained and executed at the property on February 2, 2011. For the purposes of this application only, it is acknowledged that the police discovered inside the house the remnants of a marihuana grow operation. The discovery of the grow operation in the premises led to the initiation of this claim by the Director.

[10] The *Civil Forfeiture Act*, S.B.C. 2005, c. 29, hereinafter the Act, creates an *in rem* cause of action by the Director of Civil Forfeiture against property or an interest in property in British Columbia that is either "proceeds of unlawful activity" or an "instrument of unlawful activity." Under s. 3(1) of the Act, the Director may apply for an order forfeiting to the government the whole or a portion of an interest in property that is proceeds of unlawful activity. Under s. 3(2), the Director may apply to the court for an order forfeiting to the government property that is an instrument of unlawful activity. "Interest in property" is defined in s. 1 of the Act to mean, "A right, a title, an interest, an estate or a claim to or in property."

[11] Sections 4(1) and (2) of the Act provide as follows:

- 4(1) In proceedings commenced under section 3 (1), the director must name as a party
 - (a) a person who is a registered owner of the whole or the portion of the interest in property that is the subject of the application for forfeiture, and
 - (b) a person who the director has reason to believe is an unregistered owner of the whole or the portion of the interest in property that is the subject of the application for forfeiture.
- (2) In proceedings commenced under section 3 (2), the director must name as a party
 - (a) a person who is a registered owner of the property that is the subject of the application for forfeiture, and
 - (b) a person who the director has reason to believe is an unregistered owner of the property that is the subject of the application for forfeiture.

[12] The Director named both Ly and Nguyen, asserting a reason to believe that Ly has a beneficial, unregistered ownership interest in the property. In support of its position, the Director points to the fact that Ly was the BC Hydro subscriber for the

property. In addition, the Director relies on the affidavits of two Vancouver Police Department officers, Detective Constable Dwain Mah and Constable James Embleton-Forrest.

[13] Constable Embleton-Forrest deposes that he was involved in October 2009 in the investigation of an alleged identity fraud committed at a Cash Money store in Vancouver. A complaint was received that an unknown male had attended the store on October 19, 2009, and used a stolen B.C. driver's licence to request a loan. The fraud was discovered by Nguyen, who was then an employee of the Cash Money store. Upon reviewing the paperwork for the loan, Nguyen recognized the driver's licence as belonging to Ly. Nguyen is alleged to have informed the investigating officer that Ly was "her husband" and that his identification had been stolen or lost about a year ago.

[14] In the course of this investigation, Nguyen provided an address for herself at 2385 East 34th Avenue in Vancouver. Counsel for the applicant, Ly, points out that his driver's licence reflects a residential address at 9472 152nd Street in Surrey, British Columbia. Further, a police entry on PRIME from March 2009 records that Ly gave his address as 3229 East 14th Avenue in Vancouver. Neither of these two addresses are, on the admissible evidence before me, associated with Nguyen. In any event, Nguyen filed a responding affidavit on this application swearing she has no recollection of referring to Ly as her husband at the time of this complaint and asserting that she does not believe she did so as she has never been married to or in a common-law relationship with him.

[15] Constable Mah deposes that on February 2, 2011, (the same day the search warrant was executed) he attended at 3229 East 14th Avenue to speak with Ly and/or Nguyen. He was greeted at the front door by an individual who identified himself as Phat Huu Ly, the applicant's brother. According to Constable Mah, Phat Huu Ly advised that his brother and Nguyen had recently moved out of the property at 3229 East 14th Avenue and that he did not know their new address. Phat Huu Ly also filed a responding affidavit on this application denying telling Constable Mah

that Ly and Nguyen had recently moved out. He deposes that Nguyen and Ly are not married and have never resided together. Specifically, he deposes that Nguyen never resided at 3229 East 14th Avenue while his brother, Tai Huu Ly, lived there with him and the rest of his family.

C. The Position of the Parties

[16] The Director suggests that there is a clear conflict in the evidence before me going to the central issue of the defendants' relationship to one another. He also points to the fact that without receiving any consideration, Ly agreed to be the Hydro subscriber for the property. It is asserted by the Director that the nature of their relationship and the role Ly played in becoming the Hydro subscriber may impact on whether Ly has an entitlement to any of the equity in the property. The Director suggests that the evidence may ultimately support a finding that Ly has an unregistered ownership interest in the property - that at least a portion of the property will be found to be held in trust in favour of him. This, in turn, would influence resolution of the forfeiture application. As a consequence, the Director suggests that it is not possible for me to find from the conflicting affidavits before me the facts necessary for adjudication.

[17] The Director also argues that dismissal of the action against Ly will not assist the efficient resolution of the proceeding as the action will be continued as it pertains to Nguyen's interest in the property. Given this, the Director suggests that not only is a conventional trial required to resolve contentious factual issues, a dismissal of the action against Ly will not save time. All it will do is inappropriately slice the litigation. He cites in support of his position the judgment of McEwan J. in *Colosimo v. Geraci*, 2004 BCSC 636, at paras. 15 to 17.

[18] Counsel for the applicant, Ly, argues that there is no evidence in this case that could properly give rise to a finding that Ly has an unregistered beneficial interest in the property. He submits that the Director loses nothing if the application for dismissal is granted. He argues that it would be unjust not to proceed by way of summary trial and dismiss the application against Ly. Despite the *in rem* nature of

the proceedings, he points to the continuing stigma Ly would suffer as a consequence of being named in an action alleging that he has an interest in a residential property used as a marihuana grow operation when there is no evidence establishing that he has an interest in the property in question.

[19] Citing *Inspiration Management Limited v. McDermid St. Lawrence Limited* (1989), 36 B.C.L.R. (2d) 202 (C.A.), counsel for the applicant argues that in the circumstances of this case, the matter should be resolved in his favour by way of summary trial procedure. He notes that it was open to the Director to apply to cross-examine the applicant or Nguyen on the affidavits they swore in support of the application and cites the judgment of Cullen J. (as he then was) in *Clark & Leslie v. Stock*, 2002 BCSC 759, at para. 70, in aid of his position that failure to do so should at least be a factor in the determination of this matter.

E. Discussion

[20] In support of the contention that there exists conflicting evidence unsuitable for resolution under Rule 9-7, the Director, as noted above, relies on the affidavit evidence of Constables Mah and Embleton-Forrest suggesting that the applicant and Nguyen are either married or are, or have been, in a common-law relationship. It is clear that the Director relies on the affidavit evidence of the two officers for the truth of its contents. The difficulty with the Director's position is that the evidence relied upon is hearsay in relation to Ly. The two officers merely report what was allegedly said to them by Nguyen and Phat Huu Ly. Counsel for the Director submits that even if this evidence is hearsay, it could, at least theoretically, be admitted at trial if necessity and threshold reliability are established. While that is true, it is entirely speculative. Moreover, there is no suggestion that either of the declarants are or will be unavailable.

[21] In my view, it is not open to the Director to rely on hearsay evidence inadmissible on its face to support the contention that there exists a conflict in the evidence making this matter unsuitable for resolution under Rule 9-7. It stands to reason that the unresolvable conflict in the evidence said to ground the requirement

for a conventional trial must, in the ordinary course, be rooted in evidence which would be admissible at trial. In the result, the only admissible evidence on this application comes from the applicant and Nguyen that they are not married and have never been in a common-law relationship. It stands uncontradicted by any other admissible evidence. In addition, the Director has not suggested how contrary evidence could be developed if a conventional trial of this matter were to be held. As the applicant's counsel points out, it was open to the Director to cross-examine the applicant and Nguyen on the affidavits sworn in support of this application.

[22] As the evidence of the two officers does not give rise to a conflict in the admissible evidence before me, what is left is the Director's contention, accepted by Ly, that he was the Hydro subscriber with respect to the property in issue. It is on this evidence and this evidence alone that the Director must rest his contention that Ly may be found to have an unregistered beneficial interest in the property. In my respectful view, on the uncontradicted evidence in this case there exists no basis for a proper finding that Nguyen actually holds her interest in the property or some portion of her interest in the property in trust for Ly.

[23] A contribution to the acquisition of a home may give rise to an equitable interest in property. Counsel for the Director brought to my attention *Bajwa v. Pannu*, 2007 BCCA 260, and, in particular, the dissenting judgment of Hall J.A. to illustrate this general point. In that case, the contribution was essential to the acquisition of the home and acknowledged by the fact that the provider of the assistance was registered on title. In this case, the applicant's sole contribution consists of his agreement, at Nguyen's request, to be the Hydro subscriber. There is no other evidence before me to found a conclusion that Nguyen holds the property or some portion of it in trust for Ly. As noted above, the Director did not seek to force the examination for discovery of either defendant prior to the hearing of the summary trial application. More importantly, the Director did not seek to cross-examine either Ly or Nguyen on their affidavits pursuant to Rule 9-7(12).

[24] In my view, this case is suitable for determination by way of summary trial proceeding. There are no inconsistencies in the admissible evidence before me. I am satisfied that the evidence before me enables a just resolution of the case in so far as it relates to the applicant and his alleged interest in the property. Further, I am unpersuaded by the Director's contention that it would be imprudent to resolve the matter before me by way of summary judgment given that it will not bring an end to the proceedings. This is, of course, a proper and important consideration, but as McEachern C.J.B.C. pointed out in *Inspiration Management*, at paragraph 51, a chambers judge should not feel constrained to avoid deciding resolvable issues even if others cannot be decided at the same time by summary trial procedure. In this case, the issue as to the applicant's interest in the land may properly be dealt with separately and without injustice or prejudice being caused to the Director's position on the forfeiture application.

[25] For these reasons, I grant judgment in favour of the applicant, Tai Huu Ly, and dismiss the claim against him.

[26] The applicant shall have his costs.

[SUBMISSIONS RE COSTS]

[27] THE COURT: I am inclined to give Mr. Solomon the opportunity he seeks to consider the matter. I certainly have your point on that issue, Mr. King, but if two weeks are required, then I would certainly be prepared to proceed with any additional representations counsel want me to consider before settling the costs order. I think some time should be given to Mr. King, as well, to respond if you do intend --

[28] MR. SOLOMON: Yes.

[29] THE COURT: -- to seek costs other than in the usual course.

[30] MR. SOLOMON: Yes, so perhaps if he can have two weeks after that?

[31] THE COURT: Perhaps we can just look at a calendar and see where we are at here. We are at the 8th today. Until the 22nd --

[32] MR. SOLOMON: Yes.

[33] THE COURT: -- Mr. Solomon, if you do determine to file something. Mr. King, would until January 6th be acceptable in the event that something is filed should you wish to respond?

[34] MR. KING: That should be sufficient.

[35] THE COURT: And counsel are content, I take it, that I resolve that issue on the basis of written --

[36] MR. SOLOMON: Yes.

[37] THE COURT: -- submissions should they be forthcoming?

[38] MR. SOLOMON: Yes, thank you, My Lord.

[39] MR. KING: Thank you, My Lord.

[40] THE COURT: Thank you, counsel.

“Fitch J.”