

CITATION: Alexandre v. Viola, 2019 ONSC 6467
COURT FILE NO.: CV-16-564154
DATE: 201911108

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bernadine Sach in her capacity as Power of Attorney for Albertina Alexandre,
Plaintiff (Respondent)

- and -

Damasia Viola, Defendant (Appellant)

AND: Damasia Viola, Plaintiff by Counterclaim (Appellant)

- and -

Bernadine Sach in her capacity as Power of Attorney for Albertina Alexandre,
and Bernardine Sach personally, Defendants by Counterclaim (Respondents)

BEFORE: J.E. Ferguson J.

COUNSEL: *Tanya C. Walker*, for the Plaintiff/Defendants by Counterclaim (Respondents)

Julian Heller and Dace Anna Kuze, for the Defendant/Plaintiff by Counterclaim,
Damasia Viola (Appellant)

HEARD: September 19, 2019

ENDORSEMENT

[1] This is an appeal by Damasia Viola (“Damasia”) to a judge from the order of Master Sugunasiri dated January 7, 2019, discharging the Certificate of Pending Litigation (“CPL”) against the real property at 461 Bathurst Street, Toronto, Ontario (“the home”). An interim CPL on the home was ordered by Master Pope on February 24, 2017. There is also an appeal of the costs order made by Master Sugunasiri for which I granted leave and heard brief submissions.

[2] Albertina Alexandre (“Albertina”) owned the home jointly with her husband, since 1968, and solely from the date of his death in 1971. The home is the family home of Albertina and her two daughters, Damasia and Bernadine Sach (“Bernadine”).

[3] Master Sugunasiri set out some of the background facts in her endorsement of November 9, 2018 which include the following:

- (i) Bernadine and Damasia are sisters embroiled in a dispute relating to Albertina's capacity and entitlement to her home. Both appear concerned about the value of their inheritance while their aging mother is still alive. The original will did not give either of them an interest in the home per se; they were simply named as beneficiaries of her residue, whatever that may be at the time of her death;
- (ii) the dispute arose when Albertina changed her powers of attorney and will, transferred her home to her and Bernadine as joint tenants, and sued Damasia over the alleged theft of monies in a bank account in Portugal. (I note that Damasia submits and Bernadine agrees that the dispute actually arose when Bernadine sued Damasia over Damasia's use of a joint account that she held with Albertina. The "difference" does not matter. The point is that the parties are embroiled in litigation and that this is not a palpable and overriding error that needs to be dealt with by me.) Bernadine will now have sole ownership of the home on Albertina's passing through her right of survivorship. In response, Damasia is claiming a resulting and/or constructive trust over the home for alleged assistance with maintenance and repairs over the years that had originally been done for natural love and affection. According to Damasia, this is all a vile scheme concocted by her wayward sister to coerce her mentally incapable mother away from her rightful inheritance. According to Albertina, she is perfectly fine and is entitled to arrange her affairs in any way that she sees fit;
- (iii) in furtherance of her claim, Damasia seeks to protect what she states is an equitable interest in the home by seeking a CPL against it. The home is currently occupied by Bernadine, her adult daughter, and Albertina. Albertina claims that she wishes to purchase a condominium "for senior living" that does not have stairs and needs funds from the sale of the home to purchase the condominium. Damasia claims that Albertina has no such desire and such a move would be impractical in any event given Albertina's community activities;

[4] It was confirmed at the hearing of this appeal that Albertina lives with Bernadine in Pefferlaw, Ontario, which apparently has been the situation since 2016. Some confusion was created about the living situation with the materials put before Master Sugunasiri. Bernadine in her materials confirmed that Albertina was living with her and had been so doing since 2016. Damasia seemed to put forward other facts. The fact that Master Sugunasiri states that Albertina lives in the home did not materially affect her decision. Albertina's evidence is that she would like to sell the home and buy a condominium. The place where Albertina lives does not affect that evidence. Again, this is not a palpable and overriding error that needs to be dealt with by me.

[5] Master Sugunasiri also stated the following after setting out the test and considerations for granting a CPL and considering the evidence before her:

In addition to the affidavits... Alexandre, Jonas and Paiva were all cross-examined on their affidavits. Most of the admissions noted in Viola's factum relate to Alexandre's capacity and whether proper checks and balances were in place when the Will was signed and the Property transferred. In my view, most of "admissions" in cross-examination speak to the merits of the case. It is inappropriate for me to determine whether or not Alexandre lacked capacity when she made those decisions.

Suffice it to say that Viola has made Alexandre's capacity an issue in the action. For the purposes of this motion however, I was not provided with any expert opinion that Alexandre lacked capacity when executing her affidavits or when cross-examined. Viola's lay speculations that Alexandre's inconsistencies in evidence demonstrate incapacity are not sufficient to disregard Alexandre's evidence in this motion. My analysis is based on the totality of the evidence on the record, including Alexandre's.

- [6] The framework which was used by Master Sugunasiri was as follows:
- (i) Was there a triable issue in Viola's interest in the home? Master Sugunasiri found that there was on the basis of constructive trust (and therefore did not nor did she need to consider resulting trust);
 - (ii) Master Sugunasiri found the application of the *Dhunna* factors favoured Albertina. She found that (a) the home was not unique to Damasia; (b) there was an alternative remedy for damages that is satisfactory and easy to calculate; (c) the CPL will harm Albertina more than Damasia; and (d) found that the overall equities of the case favoured Albertina.

The Law

What is the Standard of Review on the Decision of a Master

[7] The parties agree on the standard of review.

[8] A master's decision will be interfered with on appeal if the master made an error of law or exercised her discretion on the wrong principles or misapprehended the evidence such that there is a palpable or overriding error. Where the master has erred in law, the standard of review is correctness.¹ A question of law is a question about what the proper legal test is. Questions of mixed law and fact are questions about whether the facts satisfy the applicable legal test.²

[9] The court set out the various standards of review in *Bee Vectoring Technology v. Chitiz Pathak LLP*:³

- (i) issues of law are about what is the correct legal test and the standard of review is correctness;
- (ii) issues of fact involve the events that took place between the parties and a reversal should only occur if there has been a palpable and overriding error; and

¹ *Zeitoun v. Economical Insurance Group*, (2008) O.R. (3d) 131 (Div. Ct.) [Zeitoun]; *Bee Vectoring Technology Inc. v. Chitiz Pathak LLP*, 2019 ONSC 1714, at paras. 23-27 [Bee Vectoring].

² *Ibid*; *Housen v. Nikolaisen*, 2002 SCC 33, at para 101 [Housen].

³ *Bee Vectoring*, *supra* note 1.

- (iii) questions of mixed fact and law are questions about whether the facts satisfy the legal tests and the standard of review is on a spectrum between correctness and palpable and overriding error.

[10] A question of mixed fact and law is subject to the standard of palpable and overriding error, except where the finding involves an extricable error of law. In such case, the extricable error of law is subject to the correctness standard of review.⁴

[11] I am going to use the framework used by Damasia in her factum. It was not easy to figure out whether the party making the submission on a particular point was doing so with respect to an error of law, an error of fact (except for the facts as set out above), or an error of mixed fact and law, because the responding factum did not address the issues using the same format.

[12] Prior to setting out the two legal issues, Damasia submits that Master Sugunasiri made several errors of fact. I have dealt with Master Sugunasiri's findings on two of these purported errors, first being why Bernadine and Damasia started their dispute, and second being that Albertina is now living with Bernadine. Damasia also submits Master Sugunasiri erred on making the following findings of fact: Albertina has the autonomy to live alone; Damasia helped Albertina with managing and maintaining the home for "natural love and affection" only; Albertina was capable at the time of making the CPL motion; accepting Albertina's real estate lawyer's statement that Albertina was of sound mind and personal agency at the time when he received her instructions, and Albertina was not influenced by third party; presuming Albertina's autonomy during the CPL proceedings; ruling that Viola had a "steep hill" to climb with her constructive trust claim; Damasia's only remedy was against Bernadine and not Albertina; and Albertina has full access to the rights of her home. Bernadine and Albertina submit there was no palpable or overriding error with respect to the findings of fact made by Master Sugunasiri.

[13] Damasia also puts forward two issues:

Issue 1: Having found a triable issue as to an interest in land, did Master Sugunasiri err in her analysis by framing the issue as whether Albertina had the right to deal with her estate?

Issue 2: Did Master Sugunasiri err in the exercise of her discretion by applying some *Dhunna* factors but not others; or by failing to give appropriate consideration to relevant *Dhunna* factors by not applying the factors in the context of a triable issue pertaining to an interest in land?

[14] On Issue 1, Damasia submits that:

- (i) where an interest in land is in question, a party is entitled to a CPL;⁵

⁴ *Housen*, *supra* note 2, at paras. 10 and 36.

⁵ *Rules of Civil Procedure*, R.R.O. 1990, Reg.194, r. 42; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 103.

- (ii) there is sufficient evidence provided by Damasia to establish a reasonable claim to an interest in the home through her claims of undue influence, constructive trust, resulting trust and diminished capacity of Albertina;
- (iii) if reasonable claims are put forward in an action for a constructive trust in respect of property, a CPL may be issued pending trial. A party seeking a CPL need not prove its case at this point;⁶
- (iv) Master Sugunasiri improperly assessed the credibility of the parties and effectively decided disputed issues of fact throughout her analysis;
- (v) although Master Sugunasiri acknowledged the possibility of Damasia making out a constructive trust claim, she failed to give it any weight in the exercise of her discretion regarding the CPL and framed the issue as one of prospective or rightful inheritance. She minimized the importance of the constructive trust claim in justifying the discharge of the CPL, allowing Albertina the ability to transfer the home over which there is a disputed issue.
- (vi) Master Sugunasiri failed to consider the resulting trust claim in her consideration of the CPL other than finding that it was unnecessary to deal with it.
- (vii) Master Sugunasiri determined that Albertina's capacity was a live issue but then wrongly determined that Albertina had mental capacity for the purpose of the CPL motion and dismissed Damasia's evidence with respect to Albertina's lack of capacity as lay speculation;
- (viii) Master Sugunasiri erred in her finding that Albertina's lawyer's statement established that Albertina was not being influenced by a third party.

[15] On Issue 1, Bernadine and Albertina submit that:

- (i) Master Sugunasiri made no error in her findings regarding Albertina's lack of capacity and the undue influence claim alleged by Damasia. Master Sugunasiri had the evidence from the certified capacity assessor in January of 2017, the affidavits and transcript evidence of Albertina, Damasia, Paiva (the lawyer who updated Albertina's will) and Jonas (the lawyer who handled the transfer of the home) and the fact that Damasia had no expert evidence that Albertina lacked capacity. In the face of this evidence Master Sugunasiri found that Damasia's allegations were bald.
- (ii) in assessing whether to grant a CPL, the main issue that the court must determine is whether the party requesting the CPL has a reasonable claim to an interest in land. However, the analysis does not end there - the court must then look at all relevant

⁶ 1017682 *Ontario Ltd. v. Tanzos*, 2008 CarswellOnt 6112 (S.C.), at para. 4 [*Tanzos*].

matters between the parties and exercise its discretion in equity in determining whether the CPL should be granted or vacated;⁷

- (iii) the law does not require that the motions judge “characterize” the issues on a CPL motion in any particular manner;
- (iv) Master Sugunasiri cannot be said to have made an error in law in her characterization of the CPL motion as involving issues of prospective inheritance, rather than proprietary rights, as there is no legal test that governs how masters or motions judges must “characterize” a motion in their reasons; and
- (v) Master Sugunasiri applied the proper legal test in determining whether the CPL should be granted.

Conclusion on Errors of Fact and Issue 1

[16] There was no error of law nor did Master Sugunasiri exercise her discretion on the wrong principles or misapplied the evidence such that there was a palpable or overriding error. Master Sugunasiri appropriately made her findings based on the evidence of the certified capacity assessor and the lawyers involved with Albertina. The fact that factual errors were made (as set out above) on the “place” of Albertina’s residence or the reason why the dispute arose are of no import. There are no other palpable or overriding errors with respect to the findings of fact made by Master Sugunasiri that led to a wrong result. Master Sugunasiri looked at all relevant factors and exercised her discretion in equity in not granting the CPL. Master Sugunasiri was not required to characterize the issues in any particular manner and her comment that this matter involves issues of prospective inheritance was neither an error of law (a matter of correctness) nor a palpable and overriding error on a question of mixed fact and law or on a question of fact. Master Sugunasiri applied the proper legal test.

[17] On Issue 2, Damasia submits that:

- (i) once a triable issue in respect of an interest in land is established, the court must consider the following, non-exhaustive, factors, known as the *Dhunna* factors:
 - (a) the uniqueness of the land;
 - (b) the intent of the parties;
 - (c) the presence or absence of a willing purchaser;
 - (d) whether there is an alternative claim for damages;
 - (e) whether damages would be an adequate remedy; and

⁷ *Clock Investments Ltd. v. Hardwood Estates Ltd.*, 1997 CarswellOnt 1026 (Div. Ct.), at para. 9.

- (f) the harm done to the party affected by the CPL or the harm done to the party seeking the certificate if the certificate is refused;⁸
- (ii) Master Sugunasiri only applied factors: (a) the uniqueness of the land; (d) whether there is an alternative claim for damages; and, (f) the harm done to the respective parties. She found that the remaining *Dhunna* factors did not apply;
- (iii) Master Sugunasiri failed to give appropriate consideration to the harm towards Damasia if the CPL is removed and the risk of dissipation of the asset, particularly where the home is the sole asset of Albertina, and there is no alternative security for Damasia after the CPL is removed;
- (iv) Master Sugunasiri failed to consider that the only remaining remedy or alternative remedy would be against Sach rather than Albertina. Seeking the remedy from Sach would greatly prejudice Damasia and would either unnecessarily expand the scope of the current litigation or lead to a new action against Sach. This would be an unnecessary use of court and party resources, and is very likely an illusory potential remedy;
- (v) Master Sugunasiri failed to consider the presence or absence of a willing purchaser. The home had been listed for sale, but did not sell and was removed from the market;
- (vi) when balancing the equities, Master Sugunasiri considered that the independence of Albertina in her “golden years” and her ability to sell the home were of paramount importance. However, she failed to consider that Albertina cannot transfer the home independently because the home is held in joint tenancy with Bernadine, and that Albertina cannot live alone and resides with Bernadine;
- (vii) Master Sugunasiri erred in her consideration of the alternative claim for damages. If the CPL is not granted, Bernadine will be able to sell the home and transfer all of the proceeds of sale to herself before these proceedings are dealt with. Accordingly, Damasia would have no remedy to recover if she were to be successful in her claim. However, Master Sugunasiri dismissed this argument by treating a tracing exercise into a new property or a bank account as a suitable alternative remedy despite that remedy being speculative and much more complicated than continuing the CPL.

[18] On Issue 2, Bernadine and Albertina submit the following:

- (i) an interlocutory order based on discretion should only be interfered with if it is clearly wrong or based on wrong principles⁹;

⁸ *HarbourEdge Mortgage Investment Corp. v. Community Trust Co.*, 2016 ONSC 448, at para. 53; *Roseglen Village for Seniors Inc. v. Doble*, 2010 ONSC 4680, at para. 4.

⁹ *Worthman v. Assessed Inc.*, 2001 CarswellOnt 218 (S.C.), at para. 5; and *Zeitoun*, *supra* note 1, at para. 40.

- (ii) the court may consider the factors set out in *Dhunna* when determining whether a CPL should be discharged or registered;
- (iii) the law does not require that the court expressly consider each of the *Dhunna* factors, as they all may not be applicable to the matters at issue on the motion. In *1017682 Ontario Inc.* the court finds that it is not an error of discretion for a master to fail to explicitly apply or refer to all the *Dhunna* factors¹⁰;
- (iv) Master Sugunasiri applies the *Dhunna* factors to the evidence and considers the following factors:
 - (a) the uniqueness of the home;
 - (b) whether there is an alternative remedy for damages;
 - (c) the ease or difficulty in calculating damages; and
 - (d) the harm to each party if the CPL is not granted;
- (v) Master Sugunasiri properly exercised her discretion in determining the relevant *Dhunna* factors applicable to the CPL motion.
- (vi) it was properly within Master Sugunasiri's discretion to consider the following points in dismissing Bernadine's motion for a CPL: presuming Albertina's autonomy for the purposes of the CPL motion until coercion is proven; and that Albertina should have access to her rights to sell her own home (especially as she is in her "golden years").
- (vii) Master Sugunasiri considered the fact that the home is Albertina's only asset in weighing the harm of granting or refusing to grant the CPL. In weighing this factor, Master Sugunasiri properly exercised her discretion in finding that the harm to Albertina in granting the CPL outweighed the harm to Viola;
- (viii) Damasia submits that, without the CPL, her only remaining remedy would be against Bernadine. There is no evidence to support this statement and in fact, Damasia has requested damages as an alternative remedy;

Conclusion on Issue 2

[19] Neither an error of law nor an error of mixed fact and law have been made. This is a discretionary order. Master Sugunasiri was not required to expressly consider each of the *Dhunna* factors. She properly exercised her discretion based on the relevant factors that she considered.

¹⁰ *Tanzos*, *supra* note 1, at paras. 6 and 8.

[20] Damasia's appeal of the order of Master Sugunasiri is dismissed. The costs ordered by Master Sugunasiri are appropriate and reasonable and that aspect of the appeal is also dismissed.

[21] If the parties cannot agree on costs, I am prepared to receive brief submissions. The brief submissions may be sent to my assistant by email at Lorie.Waltenbury@ontario.ca within 20 days.


J.E. Ferguson J.

Date: November 8, 2019