

COURT FILE NO.: CV-16-564154 MOTION HEARD: 11092018

SUPERIOR COURT OF JUSTICE - ONTARIO

Bernadine Sach in her capacity as Power of Attorney for Albertine Alexandre,
Plaintiff/Moving Party

Damasia Viola, Defendants/Responding Party

BEFORE: Master P. T. Sugunasiri

COUNSEL: Walker, T., Counsel for the Plaintiff/Responding Party

Heller, J., Counsel for Defendant/Moving Party

HEARD: November 95 2018

ENDORSEMENT ON VIOLA MOTION FOR A CPL

[1] Bernadine Sach ("Sach") and Damasia Viola ("Viola") are sisters embroiled in a dispute relating to their mother Albertine Alexandre's capacity and entitlement to her home at 461 Bathurst Street in Toronto ("Property"). Both appear concerned about the value of their inheritance while their ageing mother is still alive. The original Will did not give either of them an interest in the Property per se; they were simply named as beneficiaries of her residue, whatever that may be at the time of death.

[2] The dispute arose when Alexandre changed her Powers of Attorney and Will, transferred her home to her and Sach as joint tenants, and sued Viola over the alleged theft of monies in a bank account in Portugal. Sach will now have sole ownership of the home on Alexandre's passing through her right of survivorship. In response, Viola is claiming a resulting trust and/or constructive trust over the Property for alleged assistance with maintenance and repairs over the years that had originally been done for natural love and affection. According to Viola, this is all a vile scheme concocted by her wayward sister to coerce her mentally incapable mother away from her rightful inheritance. According to Alexandre, she is perfectly fine and is entitled to arrange her affairs in any way that she sees fit.

[3] In furtherance of her claim, Viola seeks to protect what she states is an equitable interest in the Property by seeking a certificate of pending litigation "(CPL)" against it. The Property is currently occupied by Sach, her adult daughter, and Alexandre. Alexandre claims that she wishes to purchase a condominium "for senior living" that does not have stairs and needs funds from the sale of the Property to purchase the condominium. Viola

claims that her mom has no such desire and such a move would be impractical in any event given Alexandre's community activities.

[4] For the reasons that follow, I dismiss the motion.

Applicable Law:

[51 Section 103 of the Courts of Justice Act, RSO 1990, c C43 ("CJA") and r. 42 of the Rules of Civil Procedure gives the court discretion to grant a CPL. The test and considerations are succinctly summarized by Masters Muir and Glustein (as he then was) in *Roseglen Village for Seniors Inc, v Doble*, 2010 ONSC 3239 pat paras. 10 and 11 (Master) and *Perruzza v. Spatone*, 2010 ONSC 841 at para. 20 (Master):

- a. The test on a motion for leave to issue a CPL made on notice to the defendants is the same as the test on a motion to discharge a CPL;
- b. The threshold in respect of the "interest in land" issue in a motion respecting a CPL (as that factor is set out at section 103(6) of the Courts of Justice Act, R.S.O. 1990, c. C.43) is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed;
- c. The onus is on the party opposing the CPL to demonstrate that there is no triable issue in respect to whether the party seeking the CPL has "a reasonable claim to the interest in the land claimed";
- d. Factors the court can consider on a motion to discharge a CPL include (i) whether the plaintiff is a shell corporation, (ii) whether the land is unique, (iii) the intent of the parties in acquiring the land, (iv) whether there is an alternative claim for damages, (v) the ease or difficulty in calculating damages, (vi) whether damages would be a satisfactory remedy, (vii) the presence or absence of a willing purchaser, and (viii) the harm to each party if the CPL is or is not removed with or without security ("Dhunna factors");
- e. The governing test is that the court must exercise its discretion in equity and look at all relevant matters between the parties in determining whether a CPL should be granted or vacated; and
- f. In determining whether there is a reasonable claim to an interest in land, the motions court must not simply rely on the pleadings or accept affidavits uncritically. The court has a duty to examine the whole of the evidence as it stands after cross examination and, without deciding disputed issues of fact and credibility, consider whether on the whole of the evidence, a reasonable claim to an interest in land has been made out.

The Claim and Counterclaim:

[61 Alexandre claims damages in conversion, misappropriation and unjust enrichment against Viola in the amount of \$70,000 and damages from breach of fiduciary duty in an amount to be proven at trial.

[7] Viola seeks an order setting aside the transfer of the Property from Alexandre and Sach as joint tenants and the new Will, declarations of resulting and/or constructive trust with respect to the Property, and damages. The counterclaim also seeks a CPL against the Property.

The Evidence:

Viola —Affidavits sworn January 27, 2017 and June 7, 2017

[81] Viola attests that Alexandre has resided at the Property since July 4, 1968. She executed a Will on April 27, 1975 stating that her daughters were to share equally in the residue of her estate. On November 4, 2015 for no consideration, Alexandre transferred the Property to her and Sach as joint tenants. This is Alexandre's main asset. As at January 27, 2017 it was listed for sale in the amount of \$1.7 million,

[91] Alexandre then brought the within action claiming that Viola had improperly transferred money out of an account in Portugal. Viola states that on the contrary, she transferred the money into a trust account to keep it out of reach of Sach for fear that she would take the money to herself and leave their mother with no funds to live. She also indicates that Alexandre wanted her to transfer the money for other reasons,

[10] Viola's counterclaim is grounded in her belief that Alexandre lacked the mental capacity to effect the transfer and that her behaviour is not consistent with the historical relationship between her and her mother. Viola states that she took care of all aspects of her mother's affairs for 30 years including managing her financial affairs and being the point person for the tenants who reside on the second and third floors. This included setting up her preauthorized bill payments because Alexandre does not have a computer nor does she know how to use one. Alexandre would frequently vacation with her family and her husband maintained and renovated the property over the years. They did so for natural love and affection. In her affidavit sworn June 7, 2017, Viola attaches at Exhibit "N" a narrative of the work that she and her husband did or oversaw, at the Property.

[11] Sach on the other hand has a fractured history with the family and did not assist Alexandre with the daily tasks of living until more recently when she and her daughter moved into the Property. Viola and her family were the constants in Alexandre's life and assisted her in every way.

[121] Viola attempted to have Alexandre's capacity assessed and believes in fact an assessment was done by her family physician, Dr. Leanza. She does not however know of the result because she claims that Sach prevented the doctor from communicating with her. After Sach was informed of Viola's intention to bring this motion, she was provided with a capacity assessment of Alexandre dated January 20, 2017. Viola does not accept the assessment and will dispute it at trial. Her preliminary objections to the report is that it

contains inaccurate facts including that her husband was compensated for the small repairs that were done. Further, the assessor is not a medical doctor. Viola continues to believe that Alexandre lacks capacity because of some etxatic behaviour. For the purposes of this motion, there is no evidence of incapacity beyond Viola's lay opinion.

[13] The concern then is that if no certificate of pending litigation is registered, the property could be sold and Sach will take control of the net proceeds of sale. She is now Alexandre's power of attorney and has full control of her financial affairs. On the other hand, she knows of no potential purchasers and therefore no prejudice to registering the certificate.

[14] Alexandre —Affidavits sworn March 24, 2017, October 4, 2017

[15]Alexandre does not read or write English. According to her affidavit, she reviewed Viola's affidavits through an interpreter and reviewed and signed her own affidavits through an interpreter,

[16] For a period of time, she had both daughters on her bank accounts as joint holders as a matter of convenience. Most bills were paid by pre-authorized payments as evidenced by banking records that Alexandre attached to her affidavit. She denies knowingly signing a Power of Attorney in favour of Viola and states that she only became aware of it when her counsel showed her the document attached to Viola's August 16, 2001 affidavit.

[17] On October 8, 2015, Alexandre went to her Portugese-speaking lawyer, Mr. Paiva, to change her Will. She wanted to leave the house to her grand-daughter Nicole. She executed a new Will on the same date. In November of 2015, she transferred title to the Property to her and Sach as joint tenants. She did this as an estate planning measure to make it easier for Sach to deal with the Property after her death or if she became incapable. She categorically denies that any of these actions were as a result of coercion from Sach.

[18]Alexandre then became aware that on August 17, 2016 Viola withdrew funds from her Portugese bank account without her consent. Thereafter she removed Viola from her other bank accounts. On November of 2016, she instructed Ms. Walker to commence the within action against Viola because she withdrew funds from her account without her consent.

[19] On January 5, 2017 counsel arranged for Alexandre to have a capacity assessment. It was completed by Ms. Ana Carrabau who is capacity assessor with the Ministry of the Attorney General. Carrabou concluded that Alexandre did not have any impairment and understood the decisions that she made with respect to her Power of Attorney, transfer of property and

Will.

Abraham Jonas (Real Estate Lawyer) Affidavit ofSeptember 29, 2017

[201] Mr. Jonas handled the transfer of the Property to Sach and Alexandre as joint tenants. He attests that Alexandre attended his office to effect a transfer of her property. His law clerk translated for Alexandre. Jonas believed Alexandre to be of sound mind and fully competent when she instructed him to transfer her Property.

Mario Paiva (Estates Lawyer) — Affidavit of October 19, 2017

[211] Paiva was the lawyer who updated Alexandre's Will. He is fluent in Portuguese and was able to receive her instructions in Portuguese. Alexandre explained to him that she wanted to make Sach the sole estate trustee and sole beneficiary of her estate. While it was Sach who brought Alexandre to the appointment, Paiva spoke with Alexandre alone. He also confirmed her testamentary capacity and that her instructions were not influenced by a third party. He confirmed with her that her requests were based on what she wanted.

The Cross-examinations

[221] In addition to the affidavits noted above, 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 speaks 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.

Analysis:

There is a triable issue in Viola's interest in the Property

[23] The first issue to be decided is whether there is a triable issue as to her interest in the Property. The basis of her claim is a constructive or resulting trust. I cannot agree with Alexandre that there is no reasonable issue involving Viola's interest in the property. The threshold of reasonableness is very low, although higher than if this motion proceeded on an ex parte basis (See 876761 Ontario Inc v Maplewood Ravines Ltd, [2001] OJ No 862 at para. 36 (SC)). Constructive and resulting trusts are inherently proprietary. Based on the record before me, I find that Viola has raised a triable issue based primarily on her hotly disputed claim that she made improvements to the Property without compensation. Regardless of how steep a hill Viola will have to climb on that claim, it is possible that she can make it out. Having determined that Viola meets the threshold on this claim alone, I do not address her claim for a resulting trust.

Dhunna factors favour Alexandre

The Property is not unique to Viola

- [24] Prior to this unfortunate battle, Viola had no prima facie right to her mother's Property. Her rights were as a beneficiary of the residue of Alexandre's estate. If the house formed the residue, then she would obtain a half interest in it. If Alexandre decided to sell the house and donate the proceeds to the humane society, that would have been her prerogative and there would be no property to inherit. There is no evidence that Viola is particularly attached to the house, or that it, in and of itself, is important to her. Rather, the evidence makes it clear that the house is nothing more than a possible inheritance. The constructive trust claim only reared its head post litigation. Even still, there is no evidence that the repairs allegedly done by Viola's husband makes the house subjectively or objectively unique. The absence of uniqueness is further exemplified in the absence of any argument in that regard in Viola's factum.
- [25] At the hearing, counsel for Viola argued that the Court does not need to consider uniqueness when there is a claim for constructive trust. In my view, this depends on the nature of the trust that is claimed. It is not so much that uniqueness does not have to be considered but rather in many constructive trust cases, a party can readily establish that the property is unique because they have made specific and special improvements to the property. There is no such evidence or argument here,

There is an alternative remedy for damages that is satisfactory and easy, to calculate

- [26] As noted above, Viola asserts a claim over the Property by way of the 1975 Will which she would like reinstated, and/or a trust claim. If the Will is reinstated, she will once again be a one-half beneficiary of the residue of Alexandre's estate. If she establishes her trust claims, she will have beneficial ownership of one-half of the Property.
- [27] In my view, given the nature of this particular claim to an interest in the Property, Viola can more than adequately be compensated for her claim to an interest in land by a damages award. The Property is an asset whose value is easily ascertainable and in fact has already been estimated at \$ 1.7 million. I therefore disagree with Viola when she states in her factum that without a CPL, she will be left with no remedy. This is not the type of constructive trust claim that when the property is gone, all is lost. It is clear that what Viola treasures is the value of the house and not the house itself,

A CPL will harm Alexandre more than Viola

- [28] Alexandre is an elderly woman whose only asset is under siege. She has expressed a desire to move. I have no reason to doubt her evidence on the point in any event. The fact that she may have told Viola that downsizing was not in her future does not mean that she cannot change her mind or has not changed her mind, Even if I agree with Viola that her desire is not a bona fide plan, the issue is not only whether she is likely to move. It is not outside

the realm of reasonable possibilities that Alexandre will want, or need, to downsize, have more liquid cash to support herself, or move to a senior's home. No one can predict that

with certainty and circumstances can change quickly if health starts to deteriorate. Granting a CPL will prevent Alexandre from dealing with the home she has lived in for 50 years in a manner that best suits her and her needs. This is a significant blow to Alexandre's autonomy, especially if she is successful in defending against the counterclaim.

[29] Viola submits that Alexandre does not have autonomy and is under Sach's control. That is an issue for the trier of fact. For the purposes of this motion, Viola's allegation does not mean that I presume coercion. In my view, I am able to do the opposite — which is to presume autonomy until coercion is proven. In any event, I must consider all relevant considerations and I do consider the possibility of Sach having control as a factor that favours a granting of the CPL.

[30] On the other hand, Viola has no particular attachment to the Property and simply wants to ensure that Alexandre is not depleting what she believes to be her rightful inheritance. The consequences of not obtaining a CPL may make it harder for her to realize on her interest. She may have to trace her interest into another property or to a bank account. In my view, this is overall less of a hardship.

[31] The remaining Dhunna factors have no applicability to the present case.

The overall equities of the case favour Alexandre

[32] On the totality of the evidence before me, I exercise my discretion in equity to dismiss Viola's motion. While I understand the risk to Viola in allowing Alexandre full access to her property during the course of the action, I am not willing to impede Alexandre's rights to her own home based on speculation that Sach is controlling Alexandre or that Alexandre lacks capacity to deal with her assets. It may well be that Alexandre was simply arranging her affairs to her liking, which though hurtful to Viola, is within her rights. This will be determined at trial. In the meantime, I favour Alexandre's freedom in her golden years over the minimization of Viola's risk.

Disposition:

[33] For the foregoing reasons, I dismiss Viola's motion.

Costs:

- [34] I strongly urge the parties to agree on costs. If they cannot, they shall book a special 30 minute appointment before me in regular motions court to argue costs. The Registrar is directed to allow the parties to book the appointment as part of my regular motions list and to accept the materials in support of the motion (as described below) within the normal times allowed by the Rules for motions.
- [35] The parties shall only file their Costs Outlines and no more than three cases each. No other documents are to be accepted.

A handwritten signature in black ink, appearing to be 'P. Tamara Sugunasiri', written over a horizontal line.

Original signed
"Master P. Tamara Sugunasiri"

Date: January 7, 2019