Court File No. 05-145-15

ONTARIO
SUPERIOR COURT OF JUSTICE
ESTATE LIST

IN THE MATTER OF THE ESTATE OF PAUL ZIGOMANIS, deceased

B E T W E E N:

GAIL MACDONALD

Plaintiff

- and -

VIOLET COOPER

Defendant

SUBMISSIONS OF CERTAS HOME AND AUTO INSURANCE COMPANY, CO-OPERATORS GENERAL INSURANCE COMPANY and INTACT INSURANCE COMPANY

PART I – OVERVIEW

The Explosion

1. On April 20, 2015, an large explosion occurred in a home at 3356 Brimley Road, Scarborough, Ontario (hereinafter the "Property"). As a result of the explosion, the Property was destroyed and the sole occupant of the Property, Paul Zigomanis, was killed. Neighbouring properties also sustained significant damage.

2. As outlined in detail by the other parties, allegations exist regarding Paul's instability and whether he intentionally caused the explosion.

The Claims

3. The moving party is seeking to reassign ownership of the Property retroactively, a result that would have a profound impact on several parties who suffered losses as a result of the explosion. Over twenty surrounding residences and several automobiles were damaged in the explosion. Several insurers and other claimants have commenced actions with respect to losses sustained in the explosion.

4. In one case, Kip-In Alexandre Choi owned a neighbouring property that was entirely destroyed by the explosion (the "Choi Property"). The Choi Property was insured with State Farm Mutual Fire Insurance Company (hereinafter "Certas"). Certas has paid out $825,916.04 to their insureds in connection with the losses sustained in the explosion.

5. Pursuant to their right of subrogation, Certas issued a Statement of Claim bearing Court File Number CV-16-555413, seeking damages equal to the amount paid out under the Certas Policy. The Statement of Claim names Jonathan Cooperman (Estate Trustee of the Estate of Paul Zigomanis) and Gail MacDonald (Estate Trustee of the Estate of John Zigomanic) as defendants.

6. Co-operators General Insurance Company ("Co-Operators") also commenced a subrogated action (Court File Number CV-17-573484), seeking $100,000 in damages for losses sustained by Hui Lin, Qing Lin, Bing Fu Lin, Bernard Sik To Woo, May Woo, Kowk-Chung Yim, and Yet-Wan Yim. These individuals all owned and occupied neighbouring properties impacted by the explosion.

7. Similarly, Intact Insurance Company ("Intact") commenced a subrogated action (Court File Number CV-17-573487), seeking $500,000 in damages for losses sustained by Yan Yin Ye, Jing Qin Dong, Tse Yau Winnie Mok, Raymond Chen Sai Woo and 5005 Steeles Plaza Inc. for property damage arising from the explosion.

8. In addition to the claims of Certas, Intact and Co-Operators, there are numerous other claimants, including other insurers, with an interest in the outcome of the within proceedings.

Ownership of the Property

9. The Property was registered in the names of John Zigomanis and Mary Zigomanis on the date of the explosion. John and Mary are the parents of Paul Zigomanis, as well as Paul's siblings, Gail MacDonald and Violet Cooper.

10. Mary died in May 2013 and John died in December 2014. After John's death, the Property passed to the Estate of John.

11. At the time of the explosion, the Property was insured by Aviva Insurance Company of Canada ("Aviva"), with John and Mary listed as the sole named insureds.

12. Jonathan Cooperman, Estate Trustee of the Estate of Paul Zigomanis ("Paul's Estate"), now seeks an order that the Property was held in trust for Paul since 1996, and an order that title be transferred to Paul retroactively, effective January 1, 2015, the day after his father's death.

13. The argument of Paul's Estate – the house was held in trust for Paul, to be given to him absolutely after his life "got back on track" – cannot be reconciled with the known facts: Paul demonstrated an intention to abandon all ownership interests in the Property. The relief sought by Paul's estate is for the express purpose of limiting the exposure of the beneficiaries of John's Estate, the same individuals who have provided supporting evidence with respect to this motion.

14. Moreover, the court should not exercise its inherent jurisdiction to grant a retroactive order because the effect of such order would cause significant prejudice by defeating existing and potential claimants and creditors.

15. In summary, the relief sought by Paul's Estate is at odds with the known facts, any supporting evidence is entirely self-serving, and the relief sought would prejudice many claimants.

PART II – FACTS

Property Transferred for First TIme to Avoid Taxes

16. In November 1989, Monarch Construction purchased land from John and his two partners and, in lieu of John's 1/3 interest in the land, Monarch Construction built a home on the land for John. John made a deal with Monarch to construct a house in his name to avoid capital gains tax. On December 31, 1990, Mary and John took title of the lot known as 3356 Brimley Road from Monarch Construction for $270,000.00. On the "Transfer/Deed of Land", Mary and John took title as joint tenants.

> **Affidavit of Gail MacDonald, sworn May 9, 2016 (the "MacDonald Affidavit"), ¶ 8, Motion Record of the Trustee (the "Trustee's Record"), Tab 2, p 8.**

17. On the accompanying Form 1, John identified himself as "a transferee named in the above-described conveyance". Although prompted by the Form 1, John did not identify himself as "a person in trust for whom the land conveyed in the above-described conveyance is being conveyed" or as "a trustee named in the above-described conveyance to whom the land is being conveyed".

Exhibit B to MacDonald Affidavit, ¶ 8, Trustee's Record, Tab 2B, p 32-36.

18. In May 1991, Mary and John transferred the Property to Paul with the only consideration in the Transfer/Deed being "Natural Love and Affection" (the transfer documents describe the transaction as a transfer from husband and wife to son for natural love and affection). The transfer documents were prepared by John and Mary. Ostensibly, the transfer was carried out in this manner to avoid estate taxes on the Property.

Exhibit C to MacDonald Affidavit, ¶ 11, Trustee's Record, Tab 2C, p 37-39.

19. Paul received the Property in exchange for nothing more than natural love and affection. Paul's Estate has argued that there is evidence by way of a transfer in a bankbook that Paul paid $140,000.00 for the Property and then made further payments thereafter. There are no documents to link this payment to the Property, or even to Paul Zigomanis. The relevant bankbook entry was on November 5, 1991, six months after the transfer. There is no corresponding record for an account held by Paul, though, presumably, such information would be available had such a large transfer been made.

MacDonald Affidavit, ¶ 12, Trustee's Record, Tab 2, p 9.

20. In summary, it is not even clear that Paul obtained ownership to the Property as a result of this transfer. As discussed below, however, any ownership interest was transferred absolutely to his parents in 1996.

Property Transfer to Improve Eligibility for Social Services Benefits

21. In August 1996, Paul transferred the Property to John and Mary, absolutely transferring any beneficial interest that he possessed at that time. On the "Transfer/Deed of Land", Mary and John were named as transferees and joint tenants. On the accompanying Form 1, although prompted, John did not identify himself as "a person in trust for whom the land conveyed in the above-described conveyance is being conveyed" or as "a trustee named in the above-described conveyance to whom the land is being conveyed". Instead, the Form 1 indicated that "this is a conveyance from the son back to the parents for no consideration". It is evident from the moving party's materials that the Zigomanis family had access to legal counsel and could have had the documents prepared to reflect a trust, had it been the intention of the parties to do so.

22. Paul transferred the Property in an attempt to qualify for social programs, such as social assistance, Ontario Works, and the Ontario Disability Support Program. It was likely also carried out to avoid the claims of creditors of Paul's company, as the company was in distress at the time.

Exhibit E to MacDonald Affidavit, ¶ 23, Trustee's Record, Tab 2E, p 43-51, 22.

23. Contrary to the arguments put forth by Paul's siblings, the beneficiaries of John's Estate, there is no evidence that the above transfer was carried out with the intention of creating a trust. In fact, the evidence supports the opposite conclusion: Paul intended to transfer title absolutely to his parents.

PART III - ISSUES AND THE LAW

Correct Approach to Resulting Trust: No Presumption where Intent Clear

24. The law on resulting trusts is detailed in the motion materials filed by Paul's Estate and will not be set out in detail here. Briefly, a resulting trust may arise where a transferor voluntarily and gratuitously transfers property into the name of a transferee. The common law has determined that, in certain circumstances, a rebuttable presumption exists in that the transferor is presumed to be beneficially entitled to the transferred property.

25. Based on the above law, Paul's Estate has advocated that a mechanical approach be taken to determine ownership of the Property: 1) impose a presumption of resulting trust due to the transfer being for no consideration; 2) require that the presumption be rebutted to avoid the transfer from being retroactively converted into a trust, providing Paul's Estate with ownership of the Property prior to the explosion.

26. While there is a presumption of a resulting trust in certain circumstances, that presumption is only applicable where the intention of the transferor is not clear on the facts. The Court is to consider all of the facts and circumstances and then, if the transferor's intention is unclear, apply the presumption if it is appropriate in the circumstances and in light of all of the evidence. The correct approach was well summarized in *Wu v. Sun*, 2010 BCCA 455, p 18:

> The Supreme Court of Canada has made it clear in cases such as *Pecore v. Pecore*, [2007] 1 S.C.R. 795, ***that it is a question of fact as to what is the intention of a party transferring property to a third party for no consideration. In some circumstances, it may be appropriate to infer a resulting trust or a constructive trust, but the conclusion to be inferred in the individual case will depend on a consideration by the trier of fact of all***

> ***the circumstances of the case.*** The trial judge in the present case concluded on his consideration of all the evidence that the mother, at the time of the transfer of the Drummond property from her to her son in 1999, intended to divest herself of ownership of the property and transfer that ownership to her son. In a recent case in this Court, *Fuller v. Harper*, 2010 BCCA 421, the Court, after referring to the comments of Mr. Justice Rothstein in *Pecore*, noted that ***the effect of any presumption of resulting trust only will be requisite after all the evidence and the surrounding circumstances in which the transfer was made has been weighed and considered by the trial judge. It is only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer that it may become necessary to apply such presumption to possibly tip the scales in favour of the transferor of property or the donor of funds.*** ... [emphasis added]

27. This above approach was also emphasized by the Court in *Lee v. Lee,* 2007 CarswellOnt 7195, p 39:

> I do not accept that this case can be resolved by a mechanical application of the burden of proof depending upon which of the two equitable assumptions (resulting trust or advancement) are applied. These presumptions of equity are just that -- presumptions. They are not mechanical rules to be applied by a judicial automaton in order to produce pre-determined results. Common sense is not checked at the judicial door. These assumptions are designed to assist not obstruct the court in doing justice in the particular circumstances of a case. *Lee v. Lee*, [2015] O.J. No. 841

28. In this case, however, Paul's actual intention is evident from the conduct of the parties as well as the evidence. Specifically, there is no significant evidence to indicate that Paul intended to retain an ownership interest in the Property. Paul's conduct and use of the Property is inconsistent with any intention to retain an ownership interest in the Property. The following facts are salient in this regard:

- **No explanation for alleged mischaracterization of transaction in legal documents.** There were no legal documents indicating that Paul intended to create a trust or otherwise retain an ownership interest in the Property. The legal documents demonstrate the contrary intention.

- **Paul paid rent to his Parents.** Paul's ongoing payment of monthly rent to his parents is totally inconsistent with him having intended to retain ownership in the Property. Paul made a monthly payment of $500 to his parents in exchange for tenancy at the Property.

- **Paul did not pay the bills associated with the house.** Paul's parents paid the bills for the Property during Paul's tenancy at the house, with the exception of Paul's phone bill, which is consistent with a landlord-tenant relationship. It would not, however, be consistent with Paul having assumed ownership of the Property. Paul's parents further obtained property insurance in their names for the Property and there is no evidence that the insurer, Aviva, was ever advised that the named insureds on the Property were not actually the absolute owners.

- **Paul advanced a complaint at the Landlord and Tenant Board.** The evidence suggests that Paul sought legal counsel and advanced a complaint to the landlord and tenant board during the time when he was residing at the Property, a claim that would be entirely irreconcilable with intending to retain an ownership interest in the Property.

- **Correspondence from Paul's sisters is consistent with parents owning the Property.** Despite the relief claimed on this motion, the prior correspondence from Paul's sisters makes it clear that, in their view, Paul did not already own the Property: they were trying to provide him with ownership as part of a bargain involving the

parents' estate. This cannot be reconciled with the relief that is now being sought on a retroactive basis. Examples of this correspondence are set out below:

- Correspondence from Angela Casey to Paul, dated January 20, 2015, does not mention Paul as being the beneficial owner and suggests that Gail is prepared to transfer the property back to Paul. The same correspondence indicates that Gail will be seeking tax advice as to the most advantageous method of making the transfer of the property to Paul.

  Exhibit J to MacDonald Affidavit, ¶ 54, Trustee's Record, Tab 2J, p 66-68.

- Correspondence from Angela Casey, dated April 8, 2015, indicates that Gail is prepared to transfer the Property to Paul, suggesting the Property belongs in John's estate.

  Exhibit K to MacDonald Affidavit, ¶ 56, Trustee's Record, Tab 2K, p 69-71.

- The draft Minutes of Settlement prepared prior to Paul's death suggest that the property in question was legally and beneficially owned by John (Exhibit "L" to Ms. MacDonald's affidavit).

- Gail's May 8, 2013 letter indicates that it is her parents' intention that the house be transferred back to Paul on their death. There is no mention that the house had always belonged to Paul and, similarly, Paul did not respond to take issue with his sister's characterization of the Property's ownership.

Exhibit F to MacDonald Affidavit, ¶ 44, Trustee's Record, Tab 2F, p 52-53.

29. Collectively, the above conduct – both during and following the transfer – demonstrates Paul's intention to have transferred absolutely any ownership interest he might have had in the Property. Moreover, there is no indication that Paul intended to create a resulting trust. Accordingly, there is no applicable presumption to be applied by the Court.

30. In the alternative, if a presumption is applicable, it would be rebutted based upon the above facts.

Evidence of Paul's Siblings Should be Given Little Weight

31. It is worth noting that the evidence in support of the moving party's motion is almost entirely derived from those individuals who would benefit from the relief sought. For this reason, it is submitted that the affidavit evidence of Paul's siblings should be given little weight and heavily scrutinized. In short, the evidence is self-serving and puts forth a position that is at odds with the objective facts and documents.

Prejudice will Result if Title is Passed to Paul Retroactively

33. Certas, Intact, and Co-Operators – and indeed other insurers and potential claimants – could suffer significant prejudice as a result of the Property being transferred retroactively to Paul. As outlined in the factum of the Estate Trustee of Paul Zigomanis, prejudice to opposing parties is a factor considered by the courts when exercising their inherent jurisdiction to grant a retroactive order.

34. In the case at hand, re-characterizing the transfer documents and assigning Paul title to the Property could affect the potential claims of creditors, insurers, or other claimants who suffered losses as a result of the explosion. In addition to the insurers referenced herein, there are other property, auto, and personal injury claims resulting from the explosion. Claimants suffering losses from the explosion would be prejudiced by a retroactive order in at least three respects.

35. First, the effect of transferring the property retroactively to Paul would insulate the assets of John's estate from liability that the estate would otherwise have as the owner/occupier of the property.

36. Second, the order could have the effect of negating insurance coverage on the property. Significantly, if the property were legally owned by Paul as of January 2015 (which would be the effect of the order sought), Aviva, whose policy named Mary and John as named insureds, may take the position that it did not insure Paul and that the retroactive ownership change is indicative of a material change in risk that negates coverage under the policy. This is a real risk given Paul's criminal history.

37. Third, if the Property was deemed to be owned by Paul on the date of the explosion, the issue of whether Paul intentionally caused the explosion could have a significant impact on coverage under the Aviva policy. Insurance policies are designed to cover fortuitous losses; they do not generally cover intentional acts. The explosion was found to be caused by a gas line that was intentionally disconnected.

38. In contrast, if the Property rightfully remains in John's estate, both a liability claim can be advanced against Paul who is alleged to have caused the explosion and a claim against John's Estate for permitting his son, who might be viewed as unstable in light of his history with crime and substance abuse, to live at the Property. If the Property is

transferred retroactively, any claimants or creditors would lose access to John's estate's assets and may lose access to the Aviva policy, which might otherwise respond to claims against John.

39. In summary, if the retroactive order is granted, it will have the effect of defeating creditors and potential creditors to the claim and re-characterizing the 1991 and 1996 transfers in a way not supported by the documents. This is prejudicial. Thus, the Court should not exercise its inherent jurisdiction to grant the retroactive order.

PART IV - CONCLUSION

40. The court should not exercise its inherent jurisdiction to grant the retroactive order requested.
41. A retroactive order is not appropriate because significant prejudice will exist against many parties if the order is granted. The order would have the effect of sheltering John's Estate from liability and, therefore, insulate their assets from creditors. It could also have the effect of voiding the Aviva insurance policy and prevent the numerous creditors from collecting the insurance proceeds.
42. More importantly, however, a resulting or implied trust would be at odds with the evidence regarding Paul's intention and actual use of the Property: his conduct cannot be interpreted as being consistent with someone who has an ownership interest in a property. The property should remain in John's estate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of May, 2017

Neil Colville Reeves/Andrew M. Mercer
SAMIS + COMPANY

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Wu v. Sun*, 2010 BCCA 455

2. *Lee v. Lee,* 2007 CarswellOnt 7195