

Court of Queen's Bench of Alberta

Citation: Scotia Mortgage Corporation v Pang, 2019 ABQB 312

Date: 20190501
Docket: 1001 07621
Registry: Calgary

Between:

Scotia Mortgage Corporation

Plaintiff

- and -

Stephen Pang

Defendant

- and -

**Nazmie Abuid also known as Nancy Abuid, Reema Ashraf also known as Reema Abuid,
Malik Ashraf, Douglas M. Sefcik, Douglas M. Sefcik Professional Corporation**

Third Parties

**Judgment
of the
Honourable Madam Justice B.E. Romaine**

I. Introduction

[1] Stephen Pang was what is commonly called the “straw purchaser” in a mortgage fraud situation. He was sued by the mortgagee, Scotia Mortgage Corporation, and subsequently joined a number of third parties in the litigation, including Reema Ashraf and Nazmie Abuid. Mr Pang has reached a settlement with Scotia Mortgage and matters have been either settled with or discontinued against the other third parties. This trial focused on Mr Pang’s claim for indemnification and judgment against Ms Ashraf and Ms Abuid. I found that Ms Ashraf and Ms Abuid were jointly and severally liable to indemnify Mr Pang, and these are my reasons.

II. Facts

[2] The following facts are relevant to this third party action.

[3] Mr Pang was 24 years old in the summer of 2007, working as a youth and family counsellor at Woods Home. He was introduced to the mortgage fraud scheme by his then friend and co-worker, Slyman Fares. Mr Pang testified about what Mr Fares said to him to induce him into participating in the scheme. Mr Fares was not called as a witness and therefore much of this testimony was hearsay, and I have not given it weight in deciding the case. However, I accept Mr Pang's testimony that Mr Fares introduced him to Reema Ashraf when he agreed to participate in the scheme.

[4] Mr Pang testified that he thought it was an opportunity to help immigrants who did not have the requisite credit rating to obtain a mortgage, to help out his financially-stressed friend and to make some money himself. Mr Pang's understanding of the arrangement was that he would take title to a property and be the mortgagor, but that he would be taken off title three months after the purchase. He would be repaid the three months of mortgage payments that he would have to make and receive a "bonus" of \$3,000. Mr Fares would receive \$2,000 for the referral.

[5] Mr Pang was a credible witness for the most part. While he sought to minimize his knowledge that what he was doing was wrong, he accepted responsibility for his naiveté, his lack of diligence and his involvement in the scheme. He conceded that he knew that the mortgage proceeds would benefit someone who did not qualify for a mortgage, and he also admitted that he was paid \$3,000 for his involvement.

[6] Mr Pang's testimony was consistent and believable and supported by email exchanges with Ms Ashraf and other documents. He was unshaken by cross-examination. He was candid, if embarrassed, about his participation. I accept Mr Pang's evidence of what occurred.

[7] After agreeing to help out Mr Fares, Mr Pang was contacted by Reema Ashraf by telephone. She advised him that she would run a credit check to see if he qualified for a mortgage. He provided her with his social insurance number, and at some point with some of his recent T-4's, which he sent to her through Mr Fares. Mr Pang did not meet Ms Ashraf in person until later, when the scheme went off the rails.

[8] Mr Pang referred to a series of emails between him and Ms Ashraf during the period between September 10, 2007 and October 3, 2007.

[9] In the September 10, 2007 email, Ms Ashraf referred to the purchase of a home at 1327 – 8th Avenue NE, Calgary. She stated:

[I] have given your phone number to the mortgagors and they may contact you regarding details of the purchase such as the address and price etc

[10] The email then provides the details of the purchase and the mortgage, giving the seller's name as Nazmie (Nancy) Abuid. Mr Pang said this was the first time he had been informed of the address of the property. He had no previous experience with real estate, and did not pay much attention to the details, as he thought he was just a place-holder for three months.

[11] On September 20, 2007, Ms Ashraf emailed Mr Pang about "lawyer signing", indicating:

I will hopefully be calling you to sign the papers at the lawyer by Friday. So hang tight for a couple of days and we should get this all closed soon.

I really appreciate your patience Stephen, and I hope to do a lot more business with you.

[12] There was an email exchange about a delay in the “lawyer signing”, and on September 28, 2007, Ms Ashraf sent an email to Mr Pang as follows:

Well, everything is finally in order. I will give you a call today or tomorrow and we can arrange a time to meet. I am hoping for Tuesday, Wednesday being the latest. If you will be at work can you please give me the address.

[13] There were also telephone conversations between Ms Ashraf and Mr Pang during this period of time. At some point, Ms Ashraf told Mr Pang that her mother, Nazmie Abuid, would be picking him up to take him to the lawyer’s office. He responded as follows:

Hey, Reema,

I am off work for the next couple of days. Please call me to arrange a time, I will be in the NW so it will be easier for you or your mom to pick me up.

Thanks

[14] On October 3, 2007, he received the following email from Ms Ashraf:

The lawyer asked if you can come in and sign this afternoon, but I told him that it’s a little short notice. So tomorrow will be better, just give me a call and let me know where to meet you.

Call me whenever you get this message,...

[15] Ms Ashraf testified that she had not sent the emails, and had never talked to nor met Mr Pang until she and her mother were present on an occasion when Mr Pang viewed the property. She suggested that she was the victim of identity theft with respect to the emails.

[16] Ms Ashraf was not a credible witness. Her evidence was inconsistent, both internally and with respect to the evidence of her mother, Ms Abuid. She was unresponsive to questions during cross-examination, contradicted her earlier accounts of what had occurred and had a selective memory of events, tailored to fit her theory, which was only raised at trial, that she and her mother were the innocent dupes of her abusive husband, Malik Ashraf.

[17] I do not accept her testimony that she did not send the emails and also her evidence that she met with Mr Pang at the property, believing him to be interested as a purchaser. I accept Mr Pang’s evidence that he did not see the property until much later, when the scheme started to unravel and he was having problems getting his name off title.

[18] On or about October 4, 2007, Mr Pang was picked up by Nazmie Abuid, Ms Ashraf’s mother, and driven to the office of a lawyer, Douglas Sefcik. From that point, Ms Abuid became Mr Pang’s main contact. He was given papers to sign in a short, five to ten minute meeting with Ms Abuid and a female staff member at Mr Sefcik’s office. Mr Pang never met Mr Sefcik. He says he did not look at the documents he was signing or ask any questions, thinking that the documents were merely technicalities.

[19] On another occasion, Mr Pang could not remember whether it was before or after his attendance at the lawyer's office, Mr Pang was told by Ms Ashraf to meet a Mr Khan, who was Mr Ashraf's brother, near the North Hill branch of the Scotia Bank. At that time, he was taken into an office with Mr Khan and a bank employee and told to sign some documents. The meeting lasted about 15 to 30 minutes. Mr Pang said that, at this point, he was becoming suspicious, as the whole process was becoming more complicated and lengthy than he thought. He asked questions of Mr Khan and, later, his friend, Mr Fares, and received certain assurances. The answers did not completely satisfy him, but he knew that Mr Fares really needed the money he was going to get from the transaction. Mr Pang in fact loaned Mr Fares the \$3,000 he received from the scheme when he received it.

[20] Mr Pang testified that he gave "them" his bank information. His understanding was that the mortgage payments would be taken out of his bank account and that he would meet Ms Abuid on a monthly basis and that she would give him a cheque for the amount of the mortgage payments.

[21] Mr Pang referred to a series of cheques that he had received from Ms Abuid. She would meet him either at work or close to his work and give him the cheques. He spoke to Ms Ashraf on occasion, but his primary contact after the closing of the sale was Ms Abuid.

[22] The first cheque was dated December 30, 2007 and bore the notation "for 1327 house". Ms. Abuid conceded that the cheques were in her handwriting, and that she met with Mr Pang and gave them to him. The second cheque was dated January 1, 2008 and bore the notation "Mortgage #1545132", as did the cheque dated January 14, 2008. Mr Pang received the \$3000 "bonus" in cash on January 21, 2008 from Ms Abuid and deposited it in his bank account together with these mortgage cheques.

[23] The next cheque was dated February 26, 2008. He received a cheque for \$50 on the same date, which he advised was in appreciation for his help and because his name had not been taken off the property despite the lapse of three months. The next cheque was dated March 29, 2008, with a notation "for 1327 8 Ave". He received cheques for subsequent months, some of them noting that they were for the mortgage, until October 2, 2008, when the amount of the mortgage repayment taken from his bank account increased. After he questioned why the amount withdrawn from his account was higher, he was told that the mortgage had been renewed. This was the last cheque he received.

[24] Mr Pang's first child was born in April, 2008 and he went back to school to train as an occupational therapist in September of that year. He was becoming increasingly upset about the fact that title to the property was still in his name. He spoke to Mr Fares, and once to Mr Sefcik by telephone. Ms Ashraf and Ms Abuid stopped answering his calls. He occasionally spoke to them when he was able to call them from a blocked number, and they told him to be patient. He met once with Ms Ashraf, who suggested that she would get him off title by transferring the property to her brother. After Ms Abuid stopped reimbursing him for the funds being taken out of his bank account, he managed to talk to her on the phone, and she advised him to close his bank account, saying "that would be the end of it". He did not do this at first, but did so later when Scotia Mortgage began withdrawing funds from his student loan proceeds.

[25] Increasingly frantic, Mr Pang started reaching out to lawyers and a private investigator. This was when he went to the property for the first time, and discovered that it had been rented by Malik Ashraf to a family for a low rent in return for some painting services. After he advised

the tenants of his concerns, they disappeared. He contacted the Real Estate Council, the Law Society, CPS and the police fraud unit.

[26] He discovered that someone had taken out insurance on the home in his name.

[27] Mr Pang was finally served by Scotia Mortgage with a Statement of Claim in March of 2009, and this litigation commenced.

[28] Mr Pang was asked about a residential real estate purchase contract between Nazmie Abuid as seller and himself as buyer. I accept his testimony that the signatures and the initials on the contract that purport to be his are not his. He did not make a deposit of \$5,000 on the property. He noted that his first name was misspelled throughout the contract.

[29] Ms Abuid was also questioned about the purchase contract. At first she said that her signature was also a fraud. She then identified the initials on the contract as hers on cross-examination, only to contradict herself later in her testimony.

[30] Ms Abuid was not a credible witness. Her testimony suffered from the same problems as that of her daughter – internal and external inconsistency, selective memory and a sense that she was making up her answers as she testified, designed merely to support her submissions that she knew nothing about the fraudulent aspects of the scheme. She alleged from time to time in her testimony that she either trusted or was afraid of crossing her son-in-law, Mr Ashraf, depending on the subject of the cross-examination. I am satisfied that she executed the purchase agreement, and, from her conduct in meeting with Mr Pang to provide him with cheques, that she was aware of the nature of the scheme.

[31] Mr Pang was shown the Scotia Mortgage mortgage, and agreed that it was his signature on the mortgage and the affidavit of mortgagor. That affidavit was witnessed by Mr Sefcik, but Mr Pang maintained that he had never met him, and did not swear the affidavit in his presence.

[32] He was shown the transfer of land indicating that Ms Abuid had transferred the property into his name, and confirmed that he had not seen this document until it was produced during the litigation. He was shown a motor vehicle bill of sale that purports to be evidence that he sold a vehicle on July 13, 2007. It appears that the \$5,000 from this sale formed the down payment on the land purchase. He said that he had not seen it before the litigation, that he had not owned the vehicle in question and that it was not his signature on the bill of sale. Ms Ashraf identified the signature of the witness on that bill of sale as that of her brother.

[33] Mr Pang was shown a letter dated August 14, 2007 under the letterhead of Worldwide Employment Agency. This letter was signed by Dan Montario and indicates that Mr Pang was employed by that company, earning an annual salary of \$120,000. It was supported by pay stubs and a T4 for the year 2006 that indicated that Mr Pang earned employment income from Worldwide and a company called Tigerfol / UTR. Mr Pang first saw these documents during the litigation. He was never employed by either company.

[34] Mr Pang was also shown documents indicating the involvement of Tanya Meldona of Unisource Mortgage Corp in Mr Pang's qualification for mortgage approval. Mr Pang testified that he has never met Ms Meldona. These documents include a mortgage commitment form dated August 29, 2007, purportedly signed by Mr Pang. He confirmed that this was not his signature.

[35] Mr Pang entered into a settlement agreement with Scotia Mortgage. Under the agreement, he must pay \$100,000 of the roughly \$200,000 deficiency that resulted when the property was sold, by way of five annual payments of \$20,000. He has paid \$80,000 and will be liable to make the final payment of \$20,000 at the end of the year.

[36] Mr Pang was referred on cross-examination to a letter dated March 20, 2009 to counsel for Scotia Mortgage. In that letter, he advised the bank that he was unemployed at the time and attending school. He stated:

Because of my inability to make payments for the property, I did not feel right in residing or renting out the property, which is why it has been vacated. I assure you that the lands and premises are checked on regularly and I will provide proof of insurance via a scanned copy of the policy as I receive it.

The rest of the letter refers to his wish to settle the matter.

[37] Ms Ashraf and Ms Abuid submit that this statement provides some sort of confirmation that Mr Pang was involved in the fraudulent scheme and that he knew what was happening. I do not interpret the letter in that way, particularly given its date and its purpose in negotiating a settlement of the litigation.

[38] Ms Ashraf and Ms Abuid deny ever meeting Mr Fares, although Ms Abuid subsequently testified that he was present at the meeting they say that they attended at the property, along with Mr Pang, Mr Ashraf and Mr Khan. I do not believe that they met Mr Pang at such a meeting.

[39] In general, Ms Ashraf and Ms Abuid's defence was that they merely did what Mr Ashraf told them to do, either because they trusted him or they were afraid of him. I do not find credible Ms Ashraf's testimony that she was not Mr Pang's first contact with respect to the scheme, that she did not obtain his personal information for the purposes of the scheme and that she was not the author of the emails. As I indicated, Mr Pang was a credible witness, and I find his version of events to be true.

[40] Ms Ashraf conceded that she had become a licensed mortgage broker in 2008, but she attempted to imply that she really did not understand the mortgages, despite having passed the course and becoming licensed. Ms Ashraf denied that her mother asked her for advice about the transaction, but her mother testified that she had. Later, Ms Ashraf changed her testimony and said that she told her mother just to trust Mr Ashraf. She denied knowing Ms Meldona. She suggested that prior to the financial crisis of 2008, the Ashraf family was so busy that she had no chance to ask questions. She denied obtaining any benefits from the transaction.

[41] She said she finally became suspicious of Mr Ashraf, but did not go to the authorities because she was afraid of him. Both Ms Ashraf and Ms Abuid referred to Mr Ashraf as the "master mind" of the transaction.

[42] Ms Ashraf said she did not recall meeting with Mr Pang after the scheme began to go bad.

[43] In answer to questions about why the trial was the first time the defence that they were Mr Ashraf's innocent victims had been raised, and why there was nothing in the pleadings or the affidavits or cross-examination on the affidavits about this defence before trial, Ms Ashraf and Ms Abuid submitted that it was because they were afraid of Mr Ashraf. I do not believe that Ms Ashraf and Ms Abuid were unaware of the fraudulent scheme. Mr Ashraf may have been the

primary organizer of the scheme, but I find that Ms Ashraf and Ms Abuid knew what they were doing involving Mr Pang and aiding in the fraud. I do not accept Ms Ashraf's testimony that she was an innocent party in the fraud.

[44] Ms Abuid acknowledged that she had been on title of the property in question jointly with Mr Ashraf until shortly before the transaction in 2007, when the property was transferred to her name alone. She denied that she had participated in the scheme in order to obtain a profit.

[45] However, Ms Abuid was shown a letter dated October 9, 2007 from Mr Sefcik to her, reporting on the sale to Mr Pang. The trust statement indicates that the "client", which Ms Abuid agreed was her, was paid \$153,645.08 for the transaction. She denied ever receiving the letter or the money. She acknowledged attending Mr Sefcik's office frequently, but denied knowing what she was doing there, or the nature of the documents she was signing.

[46] Ms Abuid had no good explanation for why she was paying Mr Pang compensation for the mortgage payments that were coming out of his account. She continued to assert that she did so only because Mr Ashraf told her to, and that told her that he would pay her back when he sold the house. She maintained, however, that she believed the sale to Mr Pang to be a normal sale.

[47] Ms Abuid was referred to certain answers to undertakings that had been given on her behalf by Ms Ashraf in 2015. One answer indicated that the reason she gave Mr Pang the cheques was that it was a condition of the sale agreement. Ms Abuid denied telling her daughter that. She was also referred to an undertaking response indicating that she did not recall attending Mr Sefcik's office in October, 2007, when in her trial testimony, she said that she did recall this meeting. Again, she denied telling her daughter what was in the undertaking response. I do not accept Ms Abuid's testimony that she was an innocent party in the fraud.

III. Issues

[48] The issue in this trial was not Mr Pang's liability to Scotia Mortgage, but whether Ms Ashraf and Ms Abuid were involved in the fraudulent scheme and whether the doctrine of *ex turpi causa non oritur actio* prevents Mr Pang from recovering from the third parties if it is established that they were part of the scheme.

IV. Analysis

A. Were Nazmie Abuid and Reema Ashraf part of the fraudulent scheme involving the Scotia Mortgage?

[49] There is no doubt from the evidence that Scotia Mortgage was the victim of the tort of civil fraud. False representations were made to Scotia Mortgage about Mr Pang's financial situation, causing it to grant the mortgage and resulting in a loss to the Plaintiff, which it has recovered in part from Mr Pang: *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8 at para 21. The issue is whether the evidence establishes that Ms Ashraf and Ms Abuid were complicit in that fraud.

[50] Ms Ashraf and Ms Abuid submit that they were not involved in the scheme, and that, to the extent they had any involvement, they merely did what Mr Ashraf told them to do. As I have indicated, I do not find their testimony credible.

[51] The evidence establishes that Ms Ashraf obtained financial information from Mr Pang in furtherance of the scheme, and that she advised him, falsely, that he qualified for a mortgage. She arranged his attendance at Mr Sefcik's office and at the bank. Mr Pang had no dealings with the bank until he was escorted there to sign the mortgage. I find that Ms Ashraf was complicit in the fraud perpetrated on the bank. She reassured Mr Pang when the scheme began to become problematic and he was no longer receiving cheques to cover the mortgage payments, when he was able to contact her.

[52] I find that Ms Abuid was involved in the execution of the residential real estate purchase contract, and the transfer of the property to Mr Pang. She was also clearly part of the scheme as evidenced by her conduct in providing cheques to Mr Pang to cover the mortgage payments. I do not believe her testimony at trial about why she did this or that she believed this to be a normal transaction.

[53] I therefore find that Mr Pang has established on a balance of probabilities that Ms Ashraf and Ms Abuid were complicit in the fraudulent scheme.

B. Did Ms Ashraf and Ms Abuid defraud Mr Pang?

[54] I also find that Ms Ashraf and Ms Abuid defrauded Mr Pang. The scheme as described to Mr Pang by Ms Ashraf was misrepresented, in that he was advised that he qualified for a mortgage, and was not advised of the fraudulent employment and income information that was being provided to Scotia Mortgage. Ms Abuid was involved in misrepresenting the nature of the scheme to Mr Pang and by her conduct in becoming Mr Pang's main contact while the relevant documents were executed, and by providing cheques to him after the fraud was perpetrated.

[55] Mr Pang has established on a balance of probabilities the elements of a civil fraud:

- (a) Ms Ashraf and Ms Abuid made false representations to him;
- (b) these false representations were made either knowingly, or recklessly, careless whether they were the truth;
- (c) the false representations induced Mr Pang to act; and
- (d) he suffered a loss from his actions.

Bruno Appliance and Furniture Inc v Hryniak, 2014 SCC 8 at para 21.

C. Does Mr Pang's conduct bar his claim against the Ms Ashraf and Ms Abuid?

[56] As noted in the seminal case on this issue, the doctrine of *ex turpi causa non oritur actio* prevents a litigant from advancing a claim that depends at its core on an illegal act of the claimant: *Tran v Kerr*, 2014 ABCA 350 at para 27. Ms Ashraf and Ms Abuid bear the onus of establishing that Mr Pang's conduct should bar his recovery. When the claim is based in tort, as it is in this case, recovery is only barred in situations where providing a remedy to the claimant would compromise the integrity of the legal system: *Hall v Hebert*, [1993] 2 SCR 159 at para 5. As noted in *Tran*, the state of mind and moral culpability of the claimant is the central issue, and four possibilities exist in the typical mortgage fraud case:

- (a) the claimant was intentionally fraudulent, in that he intended to deceive the bank;

- (b) while not intentionally fraudulent, he was willfully blind, in that he knew there was something suspicious going on but did not inquire because he did not want to know the likely answer. As noted in *Tran*, legally this is the equivalent of fraud;
- (c) he was negligent, in that the circumstance should have raised concern, and he did not respond to the circumstances as would a reasonable person; or
- (d) he was completely innocent, and was a mere victim or dupe.

[57] The circumstances in this case give rise to two possibilities: that Mr Pang was willfully blind, in which case the doctrine of *ex turpi* is engaged, or that he was negligent.

[58] If Mr Pang had made misrepresentations in a mortgage application to the bank, this would be fraudulent conduct. However, the evidence indicates otherwise: that someone else submitted a mortgage application under his name that he did not sign, containing false information about his employment and salary. Nor did he sign the residential real estate purchase contract. He provided Reema Ashraf with his correct financial information, and had no part in what was eventually provided to Scotia Mortgage.

[59] As was the case in *Tran*, the evidence is that Mr Pang only signed unidentified documents in Mr Sefcik's office (presumably the transfer documents) and the mortgage at the bank, after the mortgage must have been approved on the basis of fraudulent information.

[60] Mr Pang acknowledged that he knew that the mortgage proceeds would benefit someone who did not qualify for a mortgage. That should have raised his concerns, but, as indicated in *Tran*, the fact that he did not respond appropriately to that concern does not make his negligent conduct fraudulent. I find that he did not know that the mortgage application would contain fraudulent information about his financial circumstances, and had no reason to suspect that that would be the case, given his interaction with Ms Ashraf and Ms Abuid.

[61] Therefore, I find that Mr Pang was negligent, rather than fraudulent, and that the *ex turpi* doctrine does not bar his recovery from Ms Ashraf and Ms Abuid.

[62] As was the case in *Royal Bank of Canada v Azizuddin*, 2015 ABQB 102 at paras 63-65, I find that, had Mr Pang been informed of the full state of affairs by the Ms Ashraf and Ms Abuid, he would not have agreed to participate in the scheme.

[63] Mr Pang is entitled to complete indemnity from the Ms. Ashraf and Ms Abuid, jointly and severally, in the amount of \$100,000.

[64] If the parties are unable to agree on costs, they may make written submissions no longer than five pages in length.

Heard on the 15th day of February, 2019.

Dated at the City of Calgary, Alberta this 1st day of May, 2019.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Brad Findlater
Anderson James McCall
for the Defendant

Reema Ashraf for herself and Nazmie Abuid
Self Represented Litigants