

CANADA / JUDGMENT

Chiang v. Hu

2018 BCSC 2262

COURT

Supreme Court of British Columbia

DECIDED

18 December 2018

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2018 BCSC 2262 Chiang v. Hu IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Chiang v. Hu, 2018 BCSC 2262 Date: 20181218 Docket: E163475 Registry: Vancouver Between: Pei Hsuan Chiang Claimant And Chia-Yu Hu Respondent Before: The Honourable Mr. Justice N. Smith Reasons for Judgment Counsel for the Claimant: E.G. Wong Counsel for the Respondent: S.K. Chen Place and Date of Hearing: Vancouver, B.C. November 27, 2018 Place and Date of Judgment: Vancouver, B.C. December 18, 2018

- [1] One party to a separation agreement applies to enforce its provisions while the other party applies to set aside that agreement. However, both counsel appear to have overlooked the fundamental need for pleadings that properly invoke the court's jurisdiction and define the issues.
- [2] When I heard the matter in chambers on November 27, 2018 and reserved judgment, neither party had included copies of the underlying pleadings in their application record. When I reviewed the court file, I discovered that this action was commenced by a Notice of Joint Family Claim seeking only a divorce. The divorce order was made on February 8, 2017.
- [3] There is no Notice of Family Claim, Response to Family Claim or Counterclaim that refers to the separation agreement or that raises any of the issues or seeks any of the relief sought in these applications.
- [4] Ms. Chiang, who is applying to enforce the separation agreement, seeks to do so on summary trial under Rule 11-3 of the Supreme Court Family Rules. Rule 11-3(2) reads:
- (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:
- (a) a family law case in which a response to family claim has been filed;
 - (b) a family law case that has been transferred to the trial list under Rule 10-3 (7) (d);
 - (c) a family law case by way of counterclaim in which a response to counterclaim has been filed.
- [5] None of those prerequisites to the court's jurisdiction under the Rule exist in this case.

- [6] Ms. Hu, in her cross-application, seeks relief under s. 93 of the Family Law Act, S.B.C. 2011, c. 25 which gives the court jurisdiction to set aside agreements respecting property division. Her notice of application does not refer to a summary trial under R. 11-3. It refers instead to R. 10-5 (1) and (2). Rule 10-5(1) refers to the procedures for making an application and R. 10-5(2) reads:
- (2) Subrule (1) applies to applications for the following orders:
- (a) an interim order;
 - (b) to change, suspend or terminate a final order;
 - (c) to set aside or replace the whole or any part of an agreement filed under Rule 2-1;
 - (d) to change or set aside a determination of a parenting coordinator filed under Rule 2-1.1;
 - (e) to change, suspend or terminate an arbitration award.
- [7] None of those descriptions apply to Ms. Hu's application, which seeks a final order. Rule 10-11 says:
- (1) To obtain a final order, other than at trial, in a defended family law case begun by the filing of a notice of family claim, a party must apply by way of summary trial in accordance with Rule 11-3.
- [8] Of course, if Ms. Hu had applied under R. 11-3, the application would suffer from the same fatal flaw as Ms. Chiang's application. There is no defended family law case in which a final order for this relief could be granted.
- [9] The issues raised in these applications may or may not be suitable for summary trial in an action where the relief claimed has been properly pleaded. As presented, both applications are misconceived and seek relief that the Court has no jurisdiction to order in this proceeding. Both applications must therefore be dismissed. "N. Smith J."

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