

CANADA / JUDGMENT

Fang v. Fang

2022 BCSC 1880

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1880 Fang v. Fang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fang v. Fang,

2022 BCSC 1880

Date: 20221027

Docket: S234347

Registry: New Westminster

Between:

Jing (Mandy) Fang

Plaintiff

And

Jun (Susan) Fang

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:

J. Wang

Counsel for the Defendant:

B.L. Borie

Place and Date of Hearing:

New Westminster, B.C.

October 11, 2022

Place and Date of Judgment:

New Westminster, B.C.

October 27, 2022

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Introduction

- [1] The plaintiff, Jing (Mandy) Fang, applies for an order striking out certain paragraphs of the amended response to civil claim filed by the defendant, Jun (Susan) Fang. Specifically, the plaintiff seeks to strike out four paragraphs in which the defendant claims set-offs against the amounts claimed by the plaintiff and a fifth paragraph summarizing those claimed set-offs. The plaintiff argues these are not proper set-offs. The plaintiff also seeks to strike two further paragraphs on the basis they are a combination of evidence and argument rather than material fact and thus not a proper pleading under Rule 3-3 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] The parties are sisters and since they share the same surname, I will refer to them as the "plaintiff" and the "defendant" to avoid confusion.

The Pleadings

- [3] In the action, the plaintiff sues the defendant over an alleged failure to complete a share purchase agreement, said to be dated December 24, 2019. No evidence has been filed on this application so the factual basis rests entirely on allegations in the pleadings which I must assume to be true.
- [4] The notice of civil claim alleges that in early 2015 the plaintiff bought 49% of the common shares in a company called Yuxin Global Health Management Ltd. (the "Company") for \$49,000. The defendant held the other 51% of the shares. The notice of civil claim does state whether the shares were issued to the plaintiff by the Company or whether they were transferred to her by the defendant.
- [5] The plaintiff claims that in early 2015 the Company joined a franchisor called "Big Feet Health Group" and in August 2015 she invested another \$189,000 in the Company to set up a franchise in Port Moody, B.C. The pleadings do not indicate whether the defendant made a reciprocating investment. However, in one of the impugned paragraphs in the amended response to civil claim, it is alleged that the plaintiff only invested \$100,000 in the Port Moody franchise and the defendant was required to cover the plaintiff's \$89,000 shortfall by borrowing money from friends. The defendant pleads that the plaintiff has never invested the \$89,000 or repaid the defendant for it.
- [6] In October 2016 the Company opened a second franchise in North Vancouver.
- [7] In October 2019, the plaintiff decided to give up her interest in the Company. There is some dispute over the reason. The plaintiff alleges it is because Big Feet Health would only renew its franchise agreement with the Company if the shares were wholly owned by one person. The defendant claims that the plaintiff failed to qualify for Canadian residency under an immigrant investor program and for that reason had to give up her interest in the Company.
- [8] Either way, it is alleged in the notice of civil claim that in December 2019 the parties agreed the plaintiff would sell "all her shares and investment in the Company" to the defendant for \$400,000 with the purchase price to be paid over time. Specifically, the defendant was to make an initial payment of \$50,000 immediately (which she did); a second payment of \$150,000 three days after the sale of the North Vancouver store or by March 31, 2020, whichever was earlier; and a final payment of \$200,000 by June 30, 2020.
- [9] The notice of civil claim alleges that by September 28, 2020 the defendant had paid only \$130,000 towards the second payment (thus leaving a shortfall of \$20,000 plus interest for that payment) and the \$200,000 payment due by June 30, 2020 was not paid at all. The plaintiff seeks judgment for the outstanding \$220,000 plus interest and costs.
- [10] The amended response to civil claim alleges the defendant paid the plaintiff \$380,000 in six separate payments and the plaintiff was credited a further \$13,400 for certain debts of the plaintiff to the defendant. The nature of these credits and debts is not particularized.

- [11] The defendant also claims certain set-offs against any amounts that she might owe the plaintiff under the share purchase agreement. These set-offs are at the heart of this application to strike.

The Claimed Set-Offs

- [12] The first claimed set-off, found in para. 2 of the amended response to civil claim, alleges that the purpose of the plaintiff's original investment in the Company was to qualify for Canadian residency as an immigrant investor. It is alleged that while the plaintiff initially paid \$49,000 for the purchase of the shares she later asked the defendant to refund \$40,000 of that back to her, which the defendant did. Thus, the defendant claims a set-off of \$40,000 for the amount she paid back to the plaintiff.
- [13] The second claimed set-off found in para. 3 of the amended response to civil claim is based on the allegation, discussed earlier, that the plaintiff did not invest the full \$189,000 for the Port Moody franchise and that the defendant covered the plaintiff's shortfall of \$89,000. The defendant claims any amounts owing to the plaintiff should be set-off by this shortfall.
- [14] The third claimed set-off, found in para. 4 of the amended response to civil claim, is based on a claim for occupation rent the defendant asserts against the plaintiff. The defendant alleges the plaintiff lived in a property in China owned by the defendant and did not pay rent in breach of an alleged agreement. She claims 140,000 RMB "plus living costs" as a set-off. She does not provide a conversion to Canadian currency for this amount.
- [15] Similarly, in the fourth claimed set-off, found at para. 5 of the amended response to civil claim, the defendant alleges the plaintiff and the plaintiff's daughter lived in a Vancouver property owned by the defendant without paying rent. The defendant claims \$48,000 "plus additional living costs" as a set-off for occupation rent in the Vancouver property.
- [16] None of these claims are the subject of a counterclaim or a separate action. They are each raised only as set-offs against the plaintiff's claim.
- [17] The plaintiff seeks to strike out each of these four paragraphs arguing they are not proper set-offs as they are unrelated to the plaintiff's claim. She also argues that the defendant is seeking to improperly raise these claims past their limitation period.
- [18] The defendant argues the set-offs are related and clearly connected to the plaintiff's claim. She says the first two set-off claims relate to the extent of the plaintiff's investment in the Company which is specifically raised by the plaintiff in her claim. She says the two claims for occupation rent are also the subject of the claim because, broadly speaking, the plaintiff's claim is really about the larger financial relationship between these two sisters and not just the investment in the Company.

Legal Principles

[19] The parties agree that the Court of Appeal's decision in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, 1985 CanLII 144 correctly summarizes the applicable principles for a valid claim of set-off:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
5. Unliquidated claims are on the same footing as liquidated claims.

[citations omitted]

[20] While the plaintiff accepts these as the applicable principles, she argues a narrower test applies when a claim is beyond its statutory limitation period under the Limitation Act, S.B.C. 2012, c. 13.

[21] As this application was brought under Rule 9-5(1) of the Supreme Court Civil Rules and without any evidence, I must accept that the facts as pleaded in the impugned paragraphs are true and determine on that basis whether the claimed set-offs are proper.

Discussion

The Investment Set-offs

[22] I am satisfied the claims for set-off based on the alleged repayment of the \$40,000 (para. 2) and the alleged payment by the defendant of \$89,000 to cover the defendant's shortfall in the investment for the Port Moody franchise (para. 3) are proper claims of set-off. They establish an equitable ground for the defendant to be protected against some amount of the plaintiff's demand. They go to the very root of the plaintiff's claim, namely her investment in the company and her entitlement to be repaid for that investment. Further, given the very close connection between the claimed set-offs and the plaintiff's claim, it would be manifestly unjust for the plaintiff to enforce payment on the share purchase agreement against the defendant without taking into account the plaintiff's own investment shortfalls in the Company that have been covered by the defendant.

- [23] The plaintiff argues the investment shortfalls are claims of the Company and not the defendant. She argues the \$40,000 the defendant claims to have paid back to the plaintiff was from the Company and thus it is Company and not the defendant who has a potential claim for that amount. Likewise, she argues that the \$89,000 shortfall was also to be an investment in the Company so the Company must make the claim against her for that amount.
- [24] I am not persuaded by either of these arguments. The amended response to civil claim alleges that the defendant was asked to refund the \$40,000 and the defendant transferred that money back to the plaintiff. It alleges that as a consequence of this payment "\$40,000 remained outstanding to the Defendant for the purchase of the shares." It may be that the plaintiff's argument could carry some sway at trial but on the face of the amended response to civil claim, which I must accept as true for this application, it is the defendant herself who is out-of-pocket the \$40,000.
- [25] Likewise, the amended response to civil claim pleads that the defendant covered the plaintiff's \$89,000 shortfall in the investment for the Port Moody franchise. The Company was apparently made whole by the defendant covering this amount. The Company has no loss to claim against the plaintiff or anyone else since the defendant covered the shortfall. Again, it is the defendant who is out the \$89,000.
- [26] I therefore find paras. 2 and 3 of the amended response to civil claim plead a proper set-off within the Coba Industries analysis.
- [27] The plaintiff further argues that, regardless of the Coba Industries principles, the set-off claims are barred by the Limitation Act. She argues that s. 22(1) of the Limitation Act, which potentially preserves the ability of the defendant to raise these issues, must be interpreted more narrowly than Coba Industries and excludes all the set-off claims. Section 22(1) reads:
- 22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
- (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim;
 - (b) third party proceedings may be brought;
 - (c) claims by way of set off may be advanced;
 - (d) new parties may be added or substituted as plaintiffs or defendants.

[Emphasis added]

- [28] The plaintiff argues that "relating to or connected with the first mentioned claim" creates a stricter approach defining set-off claims after the limitation period has expired than does the *Coba Industries* analysis. I disagree. First, the phrase "relating to" is by its very nature broad and open-ended: *Further Detention of Things Seized (Re)*, 2020 BCSC 1100 at para. 15. Second, s. 22(1)(c) expressly identifies a claim of set-off as a "related claim" under this section. The express reference to "claims by way of set off" imports the body of law that defines what is a proper claim of set-off, including *Coba Industries*.
- [29] Section 22(1) does not confer an absolute right to bring a "related claim" past the limitation period. The court still has the power to permit or prevent those proceedings having regard to the passage of the limitation period and its effect on the parties: *Lui v. West Granville Manor Ltd.*, 1987 CanLII 164 (B.C.C.A). However, as Lambert J.A. said in that case, when the related claim is only between the original parties to the original proceedings, which is the case here, "there is no injustice in permitting all issues to be raised that, in the words of s-s. 4(1) [now s. 22(1)], relate to or are connected with the subject matter of the original action." The plaintiff has pointed to no prejudice, other than delay, in responding to the claimed set-offs. In some cases inordinate delay will give rise to a presumption of prejudice but I find that is not the case here.
- [30] I therefore decline to strike paras. 2 and 3.

The Occupation Rent Set-offs

- [31] With respect to the set-offs claimed in paras. 4 and 5 for "occupation rent" and "related living expenses", I am satisfied these are not proper claims of set-off as they fail the second and third branches of the *Coba Industries* analysis. They do not "go to the very root of the plaintiff's claim" and are not "clearly connected" with the plaintiff's demand. In fact, I find they are wholly unrelated to the plaintiff's claim.
- [32] The claim is about damages for the alleged breach of the share purchase agreement in respect of shares in the Company. The amended response to civil claim alleges no nexus between the plaintiff's use of the properties in China or Vancouver and her investment in the Company. Contrary to the defendant's submission, broad-ranging family financial disputes between the sisters are not drawn into the claim. Its focus is on the investment in the Company.
- [33] The defendant argues the plaintiff has introduced other family financial disputes into the claim through her reply to the original response to civil claim. The reply alleges that a number of the payments the defendant claims to have made on the share purchase agreement were in fact payments for other matters as between the parties or other family members. However, far from expanding the claim to include these other financial disputes, the reply alleges these matters are not related to the share purchase agreement. Thus, the reply affirms the dispute is focused on the share purchase agreement and does not expand the claim to other extraneous family financial disputes.

- [34] The defendant also argues the question of whether paras. 4 and 5 raise proper set-offs is a matter that should be left for trial. I disagree. Applying the test applicable to Rule 9-1(a) and the framework for analysis in *Coba Industries*, I find it is plain and obvious that paras. 4 and 5 do not establish proper claims of set-off to the plaintiff's claim.

Other Impugned Paragraphs

- [35] The plaintiff also applies to strike paras. 9 and 10 of the Amended Response to Civil Claim on the basis they contain evidence and argument and thus are not proper pleadings under Rule 3-3. This part of the application was not vigorously pursued by the plaintiff.
- [36] Paragraph 9 of the response to civil claim pleads material facts supporting an assertion that the share purchase agreement was signed under duress or is unconscionable. This paragraph might be open to some criticism for being framed argumentatively but it is not so severe that I would order it be struck. In my view, it pleads material facts.
- [37] Paragraph 10 pleads that it is an implied term of the share purchase agreement that payments to the plaintiff would be subject to the Company's ability to maintain the business and cash flow. It pleads material facts respecting the COVID-19 pandemic and the defendant being diagnosed with cancer. It alleges these two events negatively affected the operation of the Company and thus frustrated the payment structure contemplated under the share purchase agreement. It also alleges these events frustrated the share purchase agreement itself, such that it is void and unenforceable.
- [38] The plaintiff has not challenged the factual or legal merits of this paragraph and I make no comment on that. She challenged it solely on the basis that it pleads evidence and argument contrary to Rule 3-3. I disagree. In my view, para. 10 sets out material facts offered in support of the assertions that the alleged implied term of the share purchase agreement excused the defendant's performance of the contract in the circumstances or that the contract was frustrated by those circumstances. I do not find these allegations to be argumentative or contain evidence and I therefore would not strike para. 10.

Conclusion

- [39] In summary, I decline to strike out paras. 2 and 3 of the amended response to civil claim as I am satisfied they plead proper set-offs. I find paras. 4 and 5 do not raise proper set-offs. This is plain and obvious and I order they be struck. It follows that subparas. 6(c) and 6(d) of the amended response to civil claim must also be struck but remainder of para. 6 will stand. I decline to strike paras. 9 and 10.
- [40] As success on this application was divided, I order that the parties bear their own costs.

"Kirchner J."

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