

CANADA / JUDGMENT

Kasian Estate v. Kasian

2021 BCSC 538

COURT

Supreme Court of British Columbia

DECIDED

18 February 2021

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2021 BCSC 538 Kasian Estate v. Kasian

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kasian Estate v. Kasian,

2021 BCSC 538

Date: 20210218

Docket: S168444

Registry: Vancouver

Between:

Kelay Ohlhauser, Executrix of the Estate of Laura Kasian

Plaintiff

And:

Don Kasian

Defendant

Before: Master Elwood

Oral Ruling Re Application to Grant Leave to File a Counterclaim

In Chambers

Counsel for the Plaintiff:

K. McEwan, Q.C.

E.L. Kotz

Counsel for the Defendant:

D. Taylor

Place and Date of Hearing:

Vancouver, B.C.

February 12, 2021

Place and Date of Ruling:

Vancouver, B.C.

February 18, 2021

Introduction

- [1] THE COURT: The defendant, Don Kasian, applies for leave to file a counterclaim in an action that is set to go to trial next Monday, February 22, 2021. The action is by the estate of Mr. Kasian's deceased former spouse, Laura Kasian, for enforcement of a settlement agreement concerning the division of family assets and spousal support.
- [2] Mr. Kasian submits that the proposed counterclaim merely normalizes the existing pleadings by moving any affirmative relief into a counterclaim. He argues it is just and convenient for leave to be granted to file a counterclaim so that the full issues between the parties can be decided at trial.
- [3] The estate argues that the proposed counterclaim is properly brought, if at all, in an existing family law proceeding, because the claims impugn an agreement respecting family property and spousal support and seek relief under the Family Relations Act, R.S.B.C. 1996, c.128, and the Family Law Act, S.B.C. 2011, c. 25, that can only be granted by the family law court.
- [4] Further, the estate argues that all of the proposed counterclaims are time barred, and the only explanation for the lengthy delay is Mr. Kasian's complaint that he was not put on notice by the estate of deficiencies in his pleadings. Adding these claims on the eve of trial, the estate submits, invites a "procedural train wreck".

Background

- [5] Mr. Kasian and the late Ms. Kasian separated on or about September 1, 2010. Ms. Kasian commenced a family law case on May 5, 2011. The parties obtained a divorce on January 24, 2013.

- [6] Mr. and Ms. Kasian entered into an agreement entitled "Minutes of Settlement" on November 22, 2013. The Minutes of Settlement provided that Mr. Kasian would pay Ms. Kasian the sum of \$2 million net of tax over time for her interest in the Kasian group of companies. The Minutes of Settlement also addressed the spousal support Mr. Kasian would pay Ms. Kasian.
- [7] Ms. Kasian died on December 4, 2015. Her estate commenced this action on September 13, 2016.
- [8] In his original response to civil claim filed October 31, 2016, Mr. Kasian alleged that the Minutes of Settlement were entered into under a mutual mistake of the parties based on an error in a valuation report on his businesses. He pleaded that the Minutes of Settlement are subject to rescission and that the issues dealt with in the Minutes of Settlement are "subject to re-adjudication".
- [9] Mr. Kasian pleaded in the alternative that, if the Minutes of Settlement are not rescinded, then the division of family property is unfair under s. 65(1) of the Family Relations Act and must be reapportioned in his favour in light of Ms. Kasian's death and the error in the valuation report.
- [10] Mr. Kasian further pleaded that, on a proper interpretation of the Minutes of Settlement or pursuant to an implied term, the yearly payments to Ms. Kasian ceased upon her death.
- [11] On July 24, 2017, Mr. Kasian's previous legal counsel in both proceedings advised the estate's counsel that Mr. Kasian would be delivering a notice of intention to proceed in the dormant family law case and that:

We plan to bring an amended counterclaim within this existing family law claim to engage the jurisdiction of the family court and seek the necessary relief under s. 68 of the Family Relations Act. We will be asking for your consent to a consolidation of the family claim with this action or for the actions to be tried together.

As you know, the response to civil claim in this action claims relief under s. 65 of the Family Relations Act. We will be amending this in due course to claim under s. 68, and we presume your consent to such amendment.

- [12] Mr. Kasian filed the notice of intention to proceed, but did not take any further steps in the family law case. He did not file an amended counterclaim in the family law case. He did not apply to vary or set aside the Minutes of Settlement.
- [13] Mr. Kasian filed an amended response to civil claim in this action on August 23, 2019. The amendments added a plea that the Minutes of Settlement be varied under s. 68 of the Family Relations Act and s. 93 of the Family Law Act.
- [14] Mr. Kasian subsequently changed lawyers in this action. His current legal counsel became counsel of record on December 9, 2019.

- [15] From January to June 2020, the parties sought to schedule a summary trial application by the estate. They eventually obtained hearing dates for September 8 and 9, 2020. The estate's summary trial materials, delivered on August 19, 2020, set out its position that a number of the pleadings in Mr. Kasian's amended response cannot be advanced by way of a response in the civil action.
- [16] On September 3, 2020, Mr. Kasian's counsel requested an adjournment of the summary trial so that his client could bring an application for leave to file a counterclaim and leave to issue a third party notice against the lawyer and law firm who acted for him in connection with the Minutes of Settlement.
- [17] Mr. Kasian filed this application on September 8, 2020. He has not applied for leave to issue a third party notice. Mr. Kasian did not take steps to have this application heard until a date for the hearing was scheduled at a trial management conference on January 22, 2020.
- [18] The trial is set to commence on Monday, February 22. It was originally set for ten days. At the TMC, the parties agreed they are otherwise ready for trial and that the trial can be completed in five days.

Analysis

- [19] Rule 3-4(1) of the Supreme Court Civil Rules requires that a defendant in an action who wishes to pursue a claim against the plaintiff within that action file a counterclaim within the time limit set for a response to civil claim. Rule 22-4(2) authorizes the court to extend this or any other deadline under the Rules.
- [20] The general considerations that guide the decision whether to extend the time to file a counterclaim are well-established. They may be found, for example, in Mr. Justice Gomery's reasons for judgment in *Syukur v. Yeh*, 2018 BCSC 1826.
- [21] The estate does not dispute the general discretion to add a counterclaim to an existing action. However, it argues Mr. Kasian is precluded from pursuing the proposed counterclaim in this action because the court does not have the jurisdiction in this proceeding to grant the relief he seeks.
- [22] As stated, the proposed counterclaim seeks to reapportion family assets under s. 65 of the Family Relations Act and to vary the Minutes of Settlement pursuant to s. 68 of the Family Relations Act and s. 93 of the Family Law Act.
- [23] In *Suckau v. Suckau*, 2002 BCCA 300, the Court of Appeal held that a reapportionment of property based on the family asset provisions of the Family Relations Act was out of time if it was brought more than two year after a divorce. This is because a person needed to be a spouse to enforce the family asset rights in part 5 of the Family Relations Act and, by definition in s. 2, a spouse stopped being a spouse two years after the divorce and instead became a former spouse (*Suckau* at paras. 6-8).

- [24] In *Halliday v. Halliday*, 2015 BCCA 82, the Court of Appeal held that there was no jurisdiction to hear applications for spousal support or division of assets under the Family Relations Act if proceedings were brought more than two years after the divorce. The Court further held there was no provision in the Family Relations Act pursuant to which the time to bring an action could be extended (*Halliday* at para. 34).
- [25] I note parenthetically that, while *Suckau* and *Halliday* settled the issue with respect to a judicial reapportionment under s. 65 of the Family Law Act, s. 68 appears to include in subsection (3) a discretion to extend the time to bring an application or exercise the court's power to review a marriage settlement agreement.
- [26] The Family Law Act takes a slightly different approach to limitations. Section 92(2) requires, in the case of spouses who were married, a party who seeks an order to divide family property or for spousal support must bring the action within two years of the divorce. Section 198(3) requires that if a party seeks to set aside or replace an agreement respecting property or support, and replace it with an order under the Act, they must bring the application within two years after they first discovered, or reasonably ought to have discovered, the grounds for making the application.
- [27] Under either statute, the Court of Appeal held in *Halliday*, the legislation contains provisions that effectively limit when claims may be brought to court following a marriage breakdown. Division of family assets is entirely regulated, the Court said, by the provincial legislation. Parties can divide their assets by way of an agreement or seek assistance of the court. In cases where the parties have entered into an agreement, the agreement can be challenged in court, but the legislation contains provisions that prescribe procedures and time limits to bring proceedings or to vary or set aside the agreement.
- [28] The estate argues these principles are jurisdictional, and they mean in this case that Mr. Kasian can not challenge the Minutes of Settlement by way of counterclaim commenced seven years after the parties divorced.
- [29] Neither *Suckau* nor *Halliday* concerned a counterclaim in an action to enforce a postnuptial settlement agreement. A counterclaim gives rise to the potential application of s. 22(1) of the Limitation Act, S.B.C. 2012, c. 13. This legislative provision provides the court with a discretion to permit "related claims," including "proceedings by counterclaim" even though "a limitation period applicable to either or both of the claims has expired":

Counterclaim or other claim or proceeding

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.
- [30] The question is whether s. 22(1) allows a claim for relief under the family law legislation to be added to an existing civil action based on contract. Are the time limits in the family law legislation a "limitation period" within the meaning of s. 22(1) of the Limitation Act? Do the specific limits in the family law legislation prevail over the general discretion in the Limitation Act to allow a counterclaim to be added to an existing action? I have not been referred to any authority on these questions.
- [31] It is not my place on an application for leave to file a counterclaim to decide the merits of the claim. In my view, I cannot deny leave based on the jurisdictional argument advanced by the estate unless it is plain and obvious that the proposed counterclaim is bound to fail. Otherwise, I must apply the general considerations for extending the time to file a counterclaim.
- [32] In *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315 (C.A.), the Court of Appeal held that the purpose of the predecessor to s. 22(1) of the Limitation Act was to avoid the mischief that would result if plaintiffs could wait until the last minute to start an action and thereby clear the "battlefield" of any competing claims or counterclaims for which the limitation period will have expired by the time the plaintiff delivers pleadings. Section 22(1) avoids this mischief, the Court said, by allowing related claims and counterclaims to be joined to the plaintiff's action after the expiry of a limitation period.
- [33] In my view, there is an argument to be made that, when a former spouse commences an action to enforce a marriage settlement agreement more than two years after the parties divorced, the defendant may rely on s. 22(1) of the Limitation Act to seek by way of counterclaim related relief under the family law legislation that could have been sought within the two years.
- [34] Put another way, because of the potential application of s. 22(1) of the Limitation Act, it is not plain and obvious that Mr. Kasian is time barred from seeking related relief under the family legislation by way of counterclaim in an action brought by Ms. Kasian or her estate for the purpose of enforcing the Minutes of Settlement.
- [35] Moreover, it is not plain and obvious that the provisions of the family law legislation are exclusive such that Mr. Kasian cannot challenge the Minutes of Settlement except by way of an application under the family law legislation. I note, without further comment, that s. 69 of the Family Law Act provides that the rights under part 5 of the Family Law Act are in addition to, and not in substitution for, rights under equity or any other law.

- [36] The jurisdiction and limitation issues raised by the estate require a comprehensive interpretation of the various provisions of the three statutes at play, which is better decided, in my view, by the trial judge with the benefit of having heard the evidence and more extensive submissions of learned counsel.
- [37] The estate's second argument is that the relief sought in the proposed counterclaim can only be granted by the family court. By this, the estate does not suggest the BC Supreme Court sits as a separate court in family law cases. Rather, it argues the Supreme Court Family Rules create a complete code of procedure for proceedings that seek relief under the family law legislation.
- [38] Rule 1-1 of the Supreme Court Family Rules defines a proceeding in which an order under the Family Law Act is sought as a "family law case." Rule 22-3(1) extends this definition to a proceeding in which an order under the Family Relations Act is sought. Rule 3-1 provides that, except for certain special situations not relevant here, every family law case must be started by filing a notice of family claim.
- [39] In my view, Rule 3-1 applies to originating proceedings. Its purpose is to provide guidance as to whether new proceedings are to be commenced by notice of family claim, petition, or requisition. Rule 3-1 does not say the court has no jurisdiction to grant relief under the family law legislation except in an action commenced by notice of family claim.
- [40] Notably, Rule 3-1 does not speak to counterclaims. Rule 4-4(1) provides that a respondent in a family law case may bring a counterclaim for an order under the family law legislation. Rule 4-4(2) provides that to seek such relief, a party named as a respondent must file a counterclaim in form F5.
- [41] Mr. Kasian does not seek relief as a respondent in a family law case. In my view, the Supreme Court Family Rules do not require Mr. Kasian to seek the relief he claims in this action by way of a counterclaim in the dormant family law case.
- [42] In short, while the estate has raised serious and important issues, I am unable to conclude on this application that it is plain and obvious that the proposed counterclaims are bound to fail.
- [43] It remains for me, therefore, to apply the considerations for extending the time to file a counterclaim in this action.
- A) What was the length of the defendant's delay between receiving the notice of civil claim and proposing the draft counterclaim?
- [44] Mr. Kasian received the notice of civil claim in October 2016. He proposed the draft counterclaim in September 2020. Clearly, there was a very lengthy delay.

- [45] On its face, the delay was inordinate. Mr. Kasian discovered the mistake in the valuation of the businesses in 2015. He could have filed a counterclaim in this action within the time under the Rules. Nothing has changed since then to explain the delay.
- [46] There is also evidence that Mr. Kasian has been aware of the jurisdictional issue raised by the estate since at least July 2017. At that time, his former counsel said Mr. Kasian intended to bring an amended counterclaim in the family law case, in counsel's words, to "engage the jurisdiction of the family court" and seek relief under s. 68 of the Family Relations Act.
- [47] Confusingly, however, counsel also said Mr. Kasian intended to amend his counterclaim in this action to seek relief under s. 68 of the Family Relations Act, which it did. I do not think much can be read into the statements of former counsel except that Mr. Kasian was aware of issues with his existing pleadings and took no steps to obtain leave to file a counterclaim in this action.
- [48] The proposed counterclaim generally tracks the response to civil claim that Mr. Kasian filed in late September 2016. For the most part, Mr. Kasian repeats and relies upon the facts pleaded in his original response. The legal bases of the counterclaim are substantially the same as the original response. Additional legal grounds were added by the amendment in August 2019, and now the draft counterclaim. However, those grounds are based on the same basic facts as the original response.
- [49] So, while the delay in seeking leave to file a counterclaim was inordinate on its face, it was mitigated by the timely, although procedurally flawed, notice to the estate of the proposed claims in the original response to civil claim.
- [50] I do not attach much importance to the delay since September 2020. While Mr. Kasian might have pursued a hearing of this application with a good bit more vigour, I think it is fair to say that access to the courts has been challenging since the outbreak of COVID-19. In my view, judges and masters should be cognizant of the frustrations for litigants in having lengthy chambers matters in particular heard in a timely way right now. I find it difficult to fault counsel for not having sat in telephone chambers waiting to be heard before this application was scheduled at the trial management conference.

B) What were the reasons for the delay?

- [51] Mr. Kasian says the reason for the delay was the lack of notice of an objection by the estate. With respect, this explanation rings hollow. It was not for the estate to tell Mr. Kasian that his response was procedurally or legally flawed. A more frank explanation of the delay is oversight by Mr. Kasian's former and, to a lesser extent, present counsel.
- [52] Mr. Kasian himself had a clear intention to advance the claims he now asserts in the proposed counterclaim during the time allowed for a counterclaim. This is evident in his original response to civil claim. I am reluctant to deny Mr. Kasian the opportunity to advance those claims at trial due to the oversight of counsel: see Syukur at para. 34.

C) Would the counterclaim be time barred but for s. 22(1) of the Limitation Act?

[53] Different aspects of the proposed counterclaim give rise to different limitation issues. However, all of the claims would be time barred but for s. 21 of the Limitation Act, if it applies.

[54] The claims based on the family law legislation are clearly out of time for the reasons discussed above. The contract claims for revision or rectification, to the extent they constitute a claim to which the Limitation Act applies, are subject to the basic two-year limitation period, and are also out of time.

[55] This factor weighs against an easy extension of time to file a counterclaim.

D) What is the degree of connection between the proposed counterclaim and the plaintiff's claim?

[56] This action by the plaintiff and the proposed counterclaim both arise out of the same agreement between Mr. and Ms. Kasian. Both engage consideration of the rights and obligations of the parties under a marriage settlement agreement following the death of one of the former spouses. Both engage the issue of mistake of the parties.

[57] Mr. Kasian's proposed counterclaim raises additional legal issues. A judicial reapportionment of family assets would be based on different factors and different law than a common law contract argument.

[58] However, the family law issues in the counterclaim arise out of the same dispute as the underlying contract action. For example, Mr. Kasian does not appear to be seeking reapportionment or variation based on the parties' relative contributions to the business during the marriage. Rather, the pleaded grounds for relief are the same effect of Ms. Kasian's death and the same alleged error in the valuation report. So, while the degree of connection is not high, it is not low either. Certainly, the proposed counterclaim is more closely related to the plaintiff's claim in this action than it is to the late Ms. Kasian's claims in the dormant family law case.

E) Will there be prejudice to the defendant if he cannot bring the counterclaim such as by preventing him from making full answer and defence to the claim brought against him?

[59] If Mr. Kasian is not permitted to bring a counterclaim in this action, there is a possibility that the trial judge would be unable to grant him any affirmative relief, whether under the family law legislation or at common law.

[60] Thus, if the action by the estate prevails on the merits of its interpretation of the Minutes of Settlement, Mr. Kasian may be prevented from making a full answer based on arguments he would naturally be entitled to make, had he brought the counterclaim in a timely way. In my view, this would constitute prejudice to the defendant: See Syukur at para. 40.

F) Will there be prejudice to the plaintiff?

- [61] Mr. Kasian's amended response to civil claim purported to seek rescission, rectification, and variation of the Minutes of Settlement, as well as reapportionment of assets if the Minutes of Settlement are enforced. The proposed counterclaim formalizes these claims.
- [62] In my view, the proposed counterclaim does not give rise to factual issues not already addressed in the pleadings and canvassed on discovery.
- [63] As I understand it, the estate intends to call as its only witness Mr. Kasian as an adverse party witness. I was not alerted to any additional witnesses or additional discovery the estate would require if the counterclaim had been filed in a timely way. In my view, the estate is ready and able to advance its case and respond to the counterclaim on jurisdictional, factual, and legal grounds. I have not determined the jurisdiction issues raised by the estate on this application. The various limitation defences will not be lost.
- [64] I respectfully disagree with counsel's concern the counterclaim will cause a procedural train wreck. Additional issues will need to be argued, but those issues are well within the grasp of the experienced and well-prepared counsel in this case. If the trial is prolonged unnecessarily by the counterclaim and arguments related by the relief sought in the counterclaim, the estate may seek a remedy from the trial judge in the form of costs.
- [65] In the final analysis, the interests of justice favour an extension of time. There has been inordinate delay, largely unexplained; however, in the absence of actual prejudice to the estate, Mr. Kasian should not be prevented by his counsel's oversight from seeking the relief he may be entitled to on the merits in this action. I should not, by denying him leave to file the counterclaim, determine the final outcome of important issues between these parties.

Conclusion

- [66] The time to file and deliver the counterclaim is extended to today's date, February 18, 2020. The order granting Mr. Kasian leave to file a counterclaim is without prejudice to the estate's right to raise any jurisdictional, procedural, or limitation argument at trial.
- [67] The existing pleadings may stand as a response to the counterclaim. Should the estate wish to file a formal response to the counterclaim, it may do so at any time prior to the end of the trial or at such other date as the trial judge may direct.
- [68] The costs of this application are reserved to the trial judge.

"Master Elwood"

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