

CANADA / JUDGMENT

Lim v. Zhu

2018 BCSC 2415

COURT

Supreme Court of British Columbia

DECIDED

20 August 2018

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2018 BCSC 2415 Lim v. Zhu IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Lim v. Zhu, 2018 BCSC 2415 Date: 20180820 Docket: S154197 Registry: Vancouver Between: William H. Lim Plaintiff (Defendant by Counterclaim) And: Xiao Yang Zhu, Wai Tung Loong Kong Chicken Ltd., Winnie Chan, Daniel Chan, W & K Produce Ltd., Cham Ki Chau, Zhan Zhou (also known as Wan Qi Zhou), Cost Watcher Food Ltd., Alan Gao also known as Linxu Gao, JC Bunny Bunny Trading Co. Ltd., Hai Min Lu (also known as Jacky Lu), Gar-Lock Seafoods (1996) Ltd., Li Wei, Wingsum International Trading Inc., Zuoyu Wan, Kick Yick Trading Co. Ltd., Patrick Ip Defendants (Plaintiffs by Counterclaim) And: Cheng-Hsiung Huang, Manli Liu, Nu Shanghainese Bistro Ltd., 1026658 B.C. Ltd. and Min-Jian Chen Defendants by Counterclaim Before: The Honourable Madam Justice Adair Oral Ruling on Application for Cross-Examination on Affidavits In Chambers Counsel for the Plaintiff: D.J. Reid Counsel for the Defendant Xiao Yang Zhu: N.M.G. Chantler Counsel for the Defendants W & K Produce Ltd., Cost Watcher Food Ltd., JC Bunny Bunny Trading Co. Ltd., Gar-Lock Seafoods (1996) Ltd., Wingsum International Trading Inc., Cham Ki Chau, Zhan Zhou (also known as Wan Qi Zhou), Alan Gao also known as Linxu Gao, Hai Min Lu (also known as Jacky Lu) and ZuoYu Wan: B.E. McLeod S. Horricks Counsel for the Defendants by Counterclaim Manli Liu and Nu Shanghainese Bistro Ltd.: M.S. Oulton B. Duong No other appearances Place and Date of Hearing: Vancouver, B.C. August 20, 2018 Place and Date of Ruling: Vancouver, B.C. August 20, 2018

- [1] THE COURT: The trial of this action began on February 19, 2018, and was set for 19 days. Some of the procedural background is set out in two earlier rulings, one dated February 19 (on an application to adjourn), and one given February 21 (on an application by the Suppliers for production of documents). The applications were for the most part dismissed. The Suppliers were then to open their case on their counterclaim on February 22.
- [2] On February 22, counsel advised that the claims had been settled. One of the terms was that the Suppliers and Mr. Zhu would have costs either as awarded by the court on application and assessment or as may be agreed. Another term was that the settlement and its terms were confidential.
- [3] The costs hearing was set for March 9, 2018, for one day. A sealing order was made to ensure that the confidentiality of settlement was preserved.

- [4] Notices of application were filed on March 1 (by the Suppliers) and February 28 (by Mr. Zhu) in relation to their claims for costs. Both the Suppliers and Mr. Zhu seek special costs based on what they say were unsubstantiated and recklessly made allegations of fraud against them. The applications are opposed. A substantial record (consisting of four binders) was filed.
- [5] In the result, the hearing on March 9 was adjourned. At that time, I made it clear to counsel that I was not going to be conducting the equivalent of a summary trial application in the context of the costs hearing. I also said that the costs hearing would not be an adjudication of the claims on the merits and pointed out that the parties had given up that right when they agreed to a settlement.
- [6] The costs hearing has now been set for three days: September 17, 18, and 19.
- [7] By notices of application filed August 7, 2018, the Suppliers and Mr. Zhu, who I will refer to as the "applicants," seek an order that Ms. Liu and Mr. Lim attend at the costs hearing for cross-examination on their affidavits filed in this proceeding. The expectation is that the cross-examinations would occupy a half-day each.
- [8] The applications are opposed by Mr. Lim and Ms. Liu, who say that the applications must be dismissed.
- [9] The applicants say that cross-examination is justified because the court can best determine the facts material to the disposition of the Suppliers' and Mr. Zhu's costs applications if Ms. Liu and Mr. Lim are cross-examined at the hearing. They say that this is an effective and proportionate use of the court's time because one of the things that they hope to demonstrate through cross-examination is that neither Mr. Lim nor Ms. Liu is credible. They also say that the amount of costs, especially in respect of their claim for special costs, is significant.
- [10] Generally speaking, and as I noted earlier, the applicants seek special costs on the grounds that Mr. Lim and the defendants by counterclaim, including Ms. Liu, made unfounded allegations of fraud, conspiracy and knowing participation in breach of fiduciary duty against them. I note that such allegations were made in the notice of civil claim filed May 22, 2015. However, those claims were discontinued by consent pursuant to the order of Master Dick pronounced March 20, 2017. However, despite those claims being discontinued, the applicants say that Ms. Liu and NSB continued to maintain what amounted to allegations of fraud in their defence to the counterclaim. The applicants say that the affidavit evidence of Mr. Lim and Ms. Liu being relied on in opposition to the costs applications is implausible, untenable and contradicted by other reliable evidence. They say further that cross-examination of Ms. Liu and Mr. Lim would "expedite determination of key issues" on the costs application.

- [11] Mr. Lim and Ms. Liu say that the applications for cross-examination represent an attempt to litigate the merits of the underlying claims, which the applicants elected to settle, and that the court should not be asked to make findings of fact or credibility with respect to a settled action in which the only outstanding issue is entitlement to costs. They point out that, in relation to litigation of the claims on the merits, both of them were examined for discovery (Mr. Lim for two days and Ms. Liu for three days), and the applicants had the opportunity at that time (to the extent they wished) to examine both of them with respect to the matters on which they now seek cross-examination. They say that this is a reasonable basis for the court now to refuse to exercise its discretion to order cross-examination.
- [12] Mr. Lim and Ms. Liu say further that the cross-examinations can serve no useful purpose in assisting the court to determine whether costs, or special costs, should be awarded in favour of any of the applicants and certainly would not serve any purpose sufficient to overcome the goals of efficiency, economy and proportionality. In addition, they say that, based on the arguments advanced in the notices of application, there are no material conflicts in the evidence such as would justify cross-examination. To the extent the applicants have identified conflicts, they relate either to the merits of the claims, which will not be adjudicated in the context of a costs hearing where the claims have been settled, or are with respect to peripheral issues only.
- [13] Rule 22-1(4)(a) provides that the court may order cross-examination of an affiant in a chambers proceeding. The order is discretionary. That discretion must, of course, be exercised judicially. Generally, the factors to be considered are: whether there are material facts in issue; whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.
- [14] I have not been persuaded that cross-examination of Mr. Lim and Ms. Liu can be justified.
- [15] In my view, one of the key objects of the cross-examination (despite protestations to the contrary) is to return again to the merits of the litigation. However, the facts material to the merits of the claims are not before the court on the costs applications. There will never be a judicial determination of whether an allegation has been proved or not. The parties gave up the right to have the court make determinations of facts relating to the merits, and the opportunity to have witnesses tested by cross-examination, by settling the claims on February 22. Moreover, allowing the applicants now to pursue what amounts to selective cross-examination of only certain witnesses deprives the application respondents of one of the benefits of settlement, namely, bringing an end to further litigation over the merits.
- [16] I am not persuaded that the cross-examinations proposed will serve any useful purpose, given the issues that will be before the court on the costs hearing. Credibility findings - so far as they may be necessary in the context of a costs hearing - can certainly be made in the context of a paper record. There must be something more than speculation that something relevant may arise on cross-examination before cross-examination should be ordered.

[17] The applications are, accordingly, dismissed.

[18] That concludes my ruling. "ADAIR J."

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