
CANADA / JUDGMENT

Rezaian v. Saraie

2018 BCSC 1088

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1088 Rezaian v. Saraie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rezaian v. Saraie,

2018 BCSC 1088

Date: 20180703

Docket: S186739

Registry: Vancouver

Between:

Seyed Roghieh Rezaian

Plaintiff

And

Farhad Dordar Posht Saraie, Shahla Dordar and

K Fitness Ltd.

Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

A. Nuraney

Counsel for the Defendants:

R. Alam

Place and Dates of Hearing:

Vancouver, B.C.

June 26 and 28, 2018

Place and Date of Judgment:

Vancouver, B.C.

July 3, 2018

- [1] The plaintiff, Ms. Rezaian, has applied seeking injunctive relief in connection with a kickboxing school she operated through 0852471 B.C. Ltd. ("471 B.C. Ltd.") under the name K Fitness at a studio located at 2674 West Broadway Avenue, Vancouver, B.C.
- [2] Ms. Rezaian and one of the defendants, Mr. Farhad Saraie, are married. The defendant, Ms. Shahla Dordar is Mr. Saraie's sister. K Fitness Ltd. is a company Mr. Saraie incorporated in December 2017.
- [3] In separate proceedings, on May 24, 2018, Mr. Saraie filed a Notice of Family Claim seeking, among other orders, an order for the equal division of family property and debt. A party claiming that a property is excluded property falling outside of family property has the burden of demonstrating such.
- [4] Ms. Rezaian and Mr. Saraie were married in Iran in 1985. Ms. Rezaian says that they separated on May 15, 2007 as she says is reflected in a separation agreement dated May 15, 2007 but which was executed on May 8, 2017. In the Notice of Family Claim, Mr. Saraie says that the separation date is January 1, 2017 (in his June 21, 2018 affidavit, he says they separated in April 2017).
- [5] Mr. Saraie apparently signed the separation agreement on May 8, 2017 in order to "mislead the tax authorities", as his counsel was taken to understand.
- [6] Ms. Rezaian says she incorporated 471 B.C. Ltd. in 2009 and registered herself as the corporation's sole shareholder. Ms. Rezaian says that the school has 210 students registered for classes.
- [7] Ms. Rezaian says that she "did not trust [Mr. Saraie] to run or manage the company so I gave him administrative tasks to perform." She also remarks that Mr. Saraie "has made bad decisions and bankrupted himself". She also says that Mr. Saraie was retained "to assist with the marketing, operations, and general management" of 471 B.C. Ltd. She says that Mr. Saraie "had experience in operating martial art schools and managed numerous martial art schools".
- [8] In his June 21, 2018 affidavit, Mr. Saraie swears:

2. On or about May 22nd, 2009, I registered a Numbered company 0852471 BC Ltd (hereinafter Numbered Company) through Morton Law, who was the lawyer for my previous martial arts business, Kikara Martial Arts Chain. Due to legal issues I had at the time associated with the 2008 economic breakdown, I decided to make my wife at the time, Seyed Roghieh Rezaian (the "Plaintiff"), the sole director and shareholder of the said company.
 3. In April of 2013, I decided to move my clients and business operation from my Company International Martial Arts Academy (hereinafter "IMA") situated at 1727 West Broadway, to the new location at 2674 West Broadway.
- [9] Mr. Saraie also says that the "K Fitness" trademark was created by him and is registered in his name. He says that 471 B.C. Ltd. "was allowed to use my brand and logo, but only because I gave them permission to do so as husband".
- [10] In her June 13, 2018 affidavit, Ms. Rezaian swears:
7. In or about May, 2013 I entered into a 5 year lease agreement with BP Real Estate Inc. (hereinafter referred to as "BP") to operate my kickboxing school from the property situated at 2674 West Broadway, Vancouver, BC (hereinafter referred to as the "Studio"). I provided BP with post-dated cheques from the TD Business Account for the rental of the Studio. My recollection is that I signed a lease for the Studio. It was my understanding that the rent for the Studio would increase on a yearly basis.
- [11] Ms. Rezaian says that, without her knowledge, in December 2017, Mr. Saraie incorporated K Fitness Ltd. and then in April and May 2018 effectively orchestrated the closing of 471 B.C. Ltd.'s operations with such operations now undertaken by K Fitness Ltd. This includes 471 B.C. Ltd.'s bank account information, website, customer information, goodwill, and the lease and occupancy of the kickboxing studio.
- [12] Attached as Exhibit "E" to Mr. Saraie's June 21, 2018 affidavit is a 41 page 5-year lease agreement between BP Real Estate Inc. and K Fitness Ltd. with a commencement date of May 1, 2018 for the studio premises.
- [13] BP Real Estate Inc. had been 471 B.C. Ltd.'s landlord. I understand that BP Real Estate Inc. is unrelated to both Ms. Rezaian and Mr. Saraie and deals at arm's length.
- [14] In a June 6, 2018 email to counsel for Ms. Rezaian, BP Real Estate Inc. states (in part):
- With respect to context: while negotiations regarding the lease remained at an impasse, the Tenant nonetheless took possession and occupied the Premises without any finalized lease agreement signed by either the Landlord or the Tenant and occupied the space for the approximate 5 year period from possession until April 30, 2018. From the onset and throughout 0852471 BC LTD's occupancy the rent was chronically in arrears, and rent collection was very cumbersome and problematic for our office. Given the chronic rent payment delinquency we did not have the interest nor inclination to continue lease negotiations, especially as we contemplated on numerous occasions terminating the tenancy in order to find a quality tenant

that would pay the rent when due. And therefore we made no effort to and did not execute a lease agreement with 0852471 BC LTD or any other party prior to or during such period.

With regard to the current tenancy: as per our prior correspondence, we do not release to any third parties any of our current tenancy information or documentation as this information is private and confidential. And therefore we cannot oblige with respect to your request for access to such information regarding the current tenancy.

[15] Ms. Rezaian seeks the following orders:

1. An order that the Defendants restore the bank account information with PerfectMind Technology Inc (hereinafter referred to as "PerfectMind") so that the automatic payments from customers are deposited into 0852471 B.C. LTD's TD Bank Account number 5218367.
2. An order that the Defendants return the funds that should have been deposited into 0852471 B.C. LTD's TD Bank Account number 5218367 since May 18, 2018 to date.
3. An order that the Defendants transfer control of the account with PerfectMind to the Plaintiff.
4. An order that the Defendants deliver to the Plaintiff the keys to the premises situated at 2674 West Broadway, Vancouver, BC. immediately or in the alternative, for a bailiff to change the locks at the premises and provide the Plaintiff with the new keys.
5. An order that the Defendants cease and desist the occupancy of the premises situated at 2674 West Broadway, Vancouver, BC.
6. An order that the Defendants either terminate or assign their lease of the premises situated at 2674 West Broadway, Vancouver, BC to the Plaintiff and bear any costs that may be incurred with respect to same.
7. An order that the Defendant, Farhad Dordar Posht Saraie, provide the access of 0852471 B.C. LTD's account for online filing with the BC Corporate Registry so that the Plaintiff has exclusive access and control.
8. An order that the Defendant, Farhad Dordar Posht Saraie, provide the access of K Fitness.com website including Webserver, routers and other infrastructure as well as domain name registry records so that the Plaintiff has exclusive access and control.
9. An order that the Defendant, Farhad Dordar Posht Saraie, provide the access of the email server as well as the domain name registry records for kickboxing.net so that the Plaintiff has exclusive access and control.
10. An order that the Defendants cease and desist from using the name K Fitness Ltd. as the Defendants have stolen the goodwill of the Plaintiff.

[16] PerfectMind Technology Inc. is described in Ms. Rezaian's June 13, 2018 affidavit as follows:

In or about May 2009 Farhad retained the services of PerfectMind Technology Inc (hereinafter referred to as "PerfectMind"), a cloud based business automation software company, to manage the monthly credit card and direct bank transfer payments received from students. The account with PerfectMind was set up to have weekly deposits to be paid into the TD Business Account. Funds were deposited into the TD Business Account from 2009 up until the last deposit made on or about May 18, 2018. Farid Dordar, who is Farhad's brother is the sole director of PerfectMind.

- [17] I understand from Ms. Rezaian's counsel that neither BP Real Estate Inc. nor PerfectMind Technology Inc. were served with the application at bar. Mr. Nuraney stated that they were mistakenly described as "defendants" in the Notice of Application.
- [18] The nature of the relief sought is largely that of a mandatory interlocutory injunction. In particular, under the current lease for the studio premises, the assignment of the 5-year lease may only occur with the written approval of the BP Real Estate Inc.
- [19] An injunction is an equitable remedy and should only be granted where it is just and equitable in all of the circumstances.
- [20] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Court set forth three key elements for analysis. The Court in *R. v. Canada Broadcasting Corp.*, 2018 SCC 5 summarized the three elements:
- [12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and then again in *RJR-MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious (*RJR-Macdonald* at pp. 334-35). The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused (*RJR-Macdonald* at pp. 334 and 348). Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-Macdonald* at p. 334).
- [21] With respect to the first element where a mandatory interlocutory injunction is sought, the Court stated:
- [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR-MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel

(Injunctions and Specific Performance, at paras. 1.510, 1.530 and 2.640). Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial" (Sharpe, Robert J. Injunctions and Specific Performance, 4th ed. (Toronto: Canada Law Book, 2012) at para. 2.640). The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in RJR-Macdonald as "extensive review of the merits" at the interlocutory stage (RJR-MacDonald, at pp. 338-39).

- [22] With respect to the meaning of a strong prima facie case, the Court stated:
- [17] the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
- [23] With respect to the interests of third parties, our Court of Appeal in *Edward Jones v. Voldeng*, 2012 BCCA 295 stated:
- [46] In addition, the interests of third parties are properly taken into account when considering the balance of convenience; in a case such as this, the interests of the clients of an investment advisor should be considered. Their interests are relevant to the question of whether an injunction should issue and to the scope of any injunction that is ordered.
- [24] In the materials there is a lack of detail. For example, I do not have the financial statements for 471 B.C. Ltd. which would show assets, liabilities, revenue, and expenses (including wages and management fees). I also do not have details relating to the use of the K Fitness trademark. (I understand that a written agreement was not prepared).
- [25] In the initial application materials filed, reference was not made by Ms. Rezaian to the affidavits filed in the family case. Of particular note, there were two affidavits of Mr. Saraie sworn June 17 and 18, 2018. The June 18, 2018 affidavit attaches as Exhibit "C" a "Mutual Agreement" dated November 6, 2017, the body of which reads:

Subject: Confirmation and agreement for equally joint Assets

This agreement is to clarify and certify that Mr. Farhad Dordar Posht Saraie and Mrs. Seyed roghieh Rezaian have the equal joint ownership of the Family assets which is under the name of Mrs. Seyed Roghieh Rezaian currently.

Assets are as below:

1 House at the address 4287 Madeley Road North Vancouver BC Canada V7N 4E1 including all the house hold equipments, furniture, carpets, etc.

2 Kfitness Martial arts Academy and it's company registered BC at the address of 2674 West Broadway Vancouver BC Canada.

3 The 2009 white ML Mercedes Benz owns %100 by Seyed Roghieh Rezaian and the 2007 BMW 650i owns %100 by Mr. Farhad Dordar Posht Saraie.

4 Both Parties are equally responsible for family business debts. In any case of divorce or separation both parties can decide to sell their asset and divide equally

NOTE: This agreement is in one page. In a case of any parties decease the assets will be divided equally between the party who is alive and the son of the family Arleo Dordar (Arash Dordar).

[26] Ms. Rezaian says she did not sign this document.

[27] Attached to Mr. Saraie's June 17, 2018 affidavit as Exhibit "A" is an April 28, 2016 letter from Thorsteinssons LLP to Ms. Rezaian in which they terminate (in a proper and professional manner) their representation of Ms. Rezaian in relation to a tax dispute. The letter reads (in part):

You have provided us with documents that we believe to have been back-dated. Submitting a back-dated document to the CRA may constitute a criminal offence, such as fraud, under the Criminal Code. We advise you not to submit any back-dated documents to the CRA.

You have continued to ask us to file Notices of Objection on the basis of these back-dated documents. Accordingly, there has been a serious loss of confidence between us and you, and more importantly, it would be unethical for us to continue to act for you in these circumstances.

I enclose a draft of the Notices of Objection that we prepared for you before the issues described above came to light. These Notices of Objection object to the assessment on the two grounds described above and on the basis that a separation agreement was signed in 2007. If no separation agreement exists that was in fact signed in 2007, we advise you to remove all reference to it from the Notices of Objection.

[Emphasis in original.]

[28] The letter serves to raise serious question as to the date of separation.

[29] I will not grant the injunctive relief sought for several reasons. First, I am not satisfied that there is the requisite "strong likelihood" of success at trial. The date of separation in the final analysis may be important as the nature of the parties' relationship may also be. There are serious questions raised by each party as to the credibility of the other party. In the particular circumstances at bar, the Court cannot make such determinations without further context and the cross-examination of each party.

[30] With the burden of showing a strong likelihood of success at trial, a determination of Ms. Rezaian's credibility is essential. On the materials before me, I am not able to make a definitive finding as to her credibility.

- [31] Second, the balance of convenience weighs against granting the mandatory injunctive relief. Much of the relief sought involves the studio premises. It would not be equitable and just to force BP Real Estate Inc. to take on a tenant without its prior approval, especially given its stated past history with Ms. Rezaian. As noted, BP Real Estate Ltd. was not served with the application at bar.
- [32] Third, I realize that 471 B.C. Ltd. may arguably suffer irreparable harm but with a documented history of past profitability and similar financial details, a reasonable assessment of damages may be made if Ms. Rezaian is successful at trial. On the materials before me, I have been unable to undertake an "extensive review of the merits" or make a reliable determination of irreparable harm, especially in regard to the degree that harm is caused by BP Real Estate Inc.'s apparent unwillingness to enter into a lease with Ms. Rezaian or 471 B.C. Ltd.
- [33] Fourth, the person who would benefit directly from injunctive relief is 471 B.C. Ltd. and not Ms. Rezaian. This, in turn, may reflect the family nature of the proceedings.
- [34] Fifth, the proceedings should be part of the family law proceedings. The Family Law Act, S.B.C. 2011, c. 25 (FLA) and the Supreme Court Family Rules, B.C. Reg. 169/2009 (SCFR) are designed to address property issues arising between spouses. For example, ss. 91, 212 and 222 of the FLA provide the court with considerable flexibility in dealing with family conflicts including property, disclosure, and conduct of the parties. Rule 12-4 of the SCFR provides rules with respect to injunctions.
- [35] In connection with the family proceedings, I understand that a judicial case conference is set for a mid-July date. Under the SCFR, Form F8 Financial Statements must be filed at least seven days in advance.
- [36] The Form F8 Financial Statement is designed to give full and complete financial disclosure. Rule 5-1 of the SCFR requires detailed and particular financial disclosure where corporations or other business vehicles are part of the parties' or either party's financial affairs.
- [37] The disclosure provisions require liability, including tax liabilities, to be disclosed. Such tax liabilities would include a liability arising under s. 160 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), a provision to which I made passing reference during submissions.
- [38] Bifurcated proceedings are to be avoided. Injunctive relief in family-related matters should be brought in the family law proceedings. In the case at bar, several affidavits from the family file were not produced to the Court until the second day of hearing. Hearing inefficiency resulted.
- [39] As the successful party, Mr. Saraie will be entitled to costs at Scale B.

"Funt J."

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