

CANADA / JUDGMENT

Sahmani v. Pasbakhsh

2023 BCSC 1565

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Supreme Court of British Columbia

DECIDED

9 March 2023

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2023 BCSC 1565 Sahmani v. Pasbakhsh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sahmani v. Pasbakhsh,

2023 BCSC 1565

Date: 20230309

Docket: E-210948

Registry: Vancouver

Between:

Samer Sahmani

Claimant

And

Mozhgan Pasbakhsh and Ramez Pasbakhsh

Respondents

Before: Master Robertson

(appearing by videoconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

A. James

Counsel for the Respondent Mozhgan Pasbakhsh:

A. Wormeli

No other appearances

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 3, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 9, 2023

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The respondent, Mozhgan Pasbakhsh, brings this application for various orders relating to the parties' financial matters, namely an order for the return of funds which the claimant admits to having removed from the corporate bank accounts for his restaurant, the Sofra (the "Restaurant") which the claimant operated with the other respondent, Ramez Pasbakhsh, who is Ms. Pasbakhsh's brother, and orders for disclosure of financial documents, accounting for a sale of a vehicle pursuant to an agreement between the parties, contribution towards a tax obligation, and fines.
- [3] For the purpose of these reasons, when I refer to the "respondent", I am referencing Ms. Pasbakhsh, and by the "parties" I mean the claimant and Ms. Pasbakhsh. I will refer to Mr. Pasbakhsh by his name.

Background

- [4] By way of background, the parties were married on June 3, 1997, and separated on March 6, 2021. There are two children of the marriage, aged 22 and 17, both of whom reside primarily with the respondent.
- [5] The respondent is currently employed as a paediatric nurse.
- [6] The claimant was a business owner operating the Restaurant with the Mr. Pasbakhsh. Since separation the Restaurant has closed with it ceasing operations and the assets being sold on July 8, 2022. I am advised that the claimant and Mr. Pasbakhsh have had an ongoing dispute as to the shutdown of the Restaurant including as to their respective entitlements to its, now, liquidated value.

- [7] Prior to the Restaurant closing, on November 23, 2021, the claimant removed \$450,000 from the restaurant's operating accounts and deposited those funds into his personal bank account at the Royal Bank of Canada.
- [8] The claimant deposes that these funds were transferred by him because of a concern he had about Mr. Pasbakhsh removing funds from the account and that he therefore took this step to safekeep the funds for the benefit of the corporation. In any event, upon learning of this transfer, on December 15, 2021, the respondent sought and obtained a without notice asset restraining order on the usual broad terms that the claimant was prohibited from disposing or transferring any asset in which the respondent may have an interest. The order granted liberty for the claimant to apply to have it set aside on five days notice.
- [9] By consent order pronounced February 8, 2022, the asset restraining order was varied to specifically provide that "the claimant may use the \$450,000 of funds for Sofra Restaurant Ltd., currently in the Royal Bank of Canada ("RBC"), in the ordinary course of business," and to allow him to pay himself no more than \$74,000 annually in salary, dividends or shareholder loan repayments without the respondent's agreement. As part of that order the claimant was obligated to also disclose the bank and credit card statements, the point of sale cash-out reports and payroll details for the Restaurant on an ongoing monthly basis, with those records to be delivered by the 15th day of the subsequent month. It is those records which the respondent says have not been produced to date, and, as such, she seeks a further order compelling their production.
- [10] As a result of further document disclosure given in the course of these proceedings after the variation order, the respondent learned that on January 24, 2022, in other words immediately prior to the variation order, the claimant had already transferred what appears to be the remaining amounts that were in the RBC bank account, that being \$299,799, into a bank account in the United States. It is not entirely clear who the account holders are for that recipient US account, as the wire confirmation is redacted. However, one of the named beneficiaries is "Khadoun Sahmani", who I am advised is the claimant's brother. The claimant deposes that he was not able to obtain records for that account as it has now been closed or otherwise dealt with.
- [11] On or around April 17, 2022, the Restaurant ceased doing business.
- [12] On or about July 8, 2022, the Restaurant's assets were sold for \$220,000. Those sales proceeds are being held by the corporate solicitor in trust pending agreement of the claimant and Mr. Pasbakhsh and/or resolution of their business dispute.
- [13] The respondent says that around the same time as the Restaurant was sold, the claimant moved to Dubai. The claimant denies that he has moved. However, it does appear that he is spending significant time out of the country. He deposes, however, that the purpose for him spending time in the United Arab Emirates is to temporarily to care for his parents who are elderly and sick, and that that is temporary.

- [14] In any event, as to these amounts, the respondent has provided a brief accounting of sorts, albeit with little to no specific receipts or back-up documents in support of same. He deposes that from the \$450,000 initially transferred into his private RBC account, \$130,000 was paid for rental arrears and approximately \$52,000 for business expenses, leaving \$268,000. Even on the respondent's numbers, the account is not entirely reconciled as there appears to be discrepancies in his figures. He has provided excerpts of his bank account statements, specifically the August and December 2022 statements, for the account into which the remaining funds were deposited in the United States, which show some ongoing small withdrawals, for example for groceries, which were made after the Restaurant was closed and after the variation order pronounced. Based on the December 2022 account statements, since that transfer the account balance appears to have been reduced by approximately \$20,000 USD.
- [15] The respondent is seeking a full accounting of the \$450,000 and business expenses which are alleged to have been paid. I understand that relief which was part of this application is going by consent. As such, these Reasons will address only the remaining funds to be paid into a lawyer's trust on terms similar to those on which the proceeds of sale of the restaurant's assets are being held.
- [16] In addition, given the failure to comply with the court ordered disclosure requirements and the alleged improper dealings with this \$450,000 fund, the respondent seeks the imposition of fines.
- [17] Trial is scheduled to commence on June 12, 2023. The parties hope that they can attempt, and will have sufficient time, to mediate prior to that.

Analysis

Return of Corporate Funds

- [18] I will deal firstly with the return of the remaining funds.
- [19] The respondent argues that the dealings by the claimant with the funds are suspicious and not only has he, for all intents and purposes, moved them to his personal account, he then proceeded to transfer the funds to a foreign bank so as to put them outside of the reach of the respondent's claims and, although not specifically argued, one would assume the claims of Mr. Pasbakhsh. She argues that this is in breach of the initial asset restraining order and the variation order.
- [20] Section 91(2) of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") grants the court the jurisdiction to make an order for the possession, delivery of, and safekeeping of property in issue.

- [21] The complicating factor here is that the \$450,000 fund was, at the time of its transfer, a corporate asset. Thus, the claimant argues the funds are not family property and will not be until such time as the funds are payable to the claimant by the corporation itself, which would likely be by virtue of a dividend or a repayment of a shareholder's loan.
- [22] At its simplest, as noted in *J.W.L.P. v. A.J.P.*, 2017 BCSC 1898 ("*J.W.L.P.*"), at para. 80, it is the shares that are the family property to be divided and dealt with under the FLA, not the assets owned by the corporation. This proposition was fully settled in *Jeerh v. Jeerh*, 2015 BCSC 1614, at para. 108:
- [108] When considering s. 66(3) of the FRA the nature of the asset has to be dealt with. Generally, as is the case here, it is the shares themselves, not their value, or that of the corporate assets, that will be construed as family assets, *Newson v. Newson*, 1993 CanLII 316 (BCCA) [*Newson*]. Before shares or their value can be treated as family assets, usually the court must find a link between the shares and the family: for example, a finding that the corporate asset is used for a family purpose *Volken v. Volken*, 2002 BCSC 426 [*Volken*], or that the non-shareholding spouse made a direct or indirect contribution to the company: *Newson*.
- [23] In addition, there are claims on those funds by third parties, such as Mr. Pasbakhsh, which are the subject of a separate and ongoing dispute over not only those funds but also the \$220,000 sales proceeds. The full particulars of those matters and whether or not there is ongoing litigation at this time were not before the court. In any event, the claimant argues, given that the funds are a corporate asset, the initial s. 91 order does not in any way apply to those funds as they are not yet family property.
- [24] The claimant points to the reluctance of courts to interfere with corporate assets, including due to the mischief that can be done if the ability to do business is interfered with, in support of his view that the s. 91 was not intended to apply to the corporate funds.
- [25] Thus, generally speaking, a s. 91 order that is made in the context of corporate undertakings will be one that prohibits the spouse from disposing of his or her shares or taking steps as a director, officer, or shareholder, that could have the effect of devaluing the business or the parties' interests. In support of that position is *Aquilini v. Aquilini*, 2013 BCSC 217. In that decision the court refused to grant a s. 91 order restraining disposition of corporate assets in which the husband held a direct or indirect interest, albeit as one of five minority shareholders.
- [26] In *J.W.L.P.* the court considered *Aquilini*, in particular the court's comments that the determination was largely based upon the fact that the spouse was not a controlling mind of the company. In *J.W.L.P.* the spouse was the controlling mind and as such the court found that the s. 91 order prohibiting use of the business assets was appropriate, with a reasonable financial limit so as to ensure that the operations could continue without interference.

- [27] Having regard to these circumstances, while the claimant is not a controlling shareholder, he is and has had control of the operating accounts given his ability to transfer the funds. As a result, it is only the claimant who has had control over these funds since then, having now moved them into a foreign personal account.
- [28] The Restaurant has ceased doing business and has now been liquidated. After payment of all remaining creditor claims and tax and corporate filings done to dissolve the corporation, the remaining value will be distributed to the shareholders in some fashion. The claimant has notably not given evidence as to any creditor claims that remain to be paid other than a vague reference to the fact that wind-up costs and final tax obligations will have to be paid. However, there is no indication as to what those costs would be or if any tax will be payable at the end of the day, for example, if there are losses on the company.
- [29] The evidence of the claimant falls far short of establishing that the funds are being safeguarded for, or used for corporate needs at all. For example, the claimant refused to pay storage costs of the company, which is addressed further below, there was a transfer of the funds to a foreign bank in a third party's name, and funds have been used for personal purposes, i.e., grocery expenses. Those facts suggest that the claimant is, and has been, fact treating the funds as his own.
- [30] Further, to the extent the claimant has any interest in the funds which he has unilaterally taken possession of, it would appear that it is his view that he has an entitlement to them as a shareholder, given the above circumstances and how he has been treating the funds. In other words, by his conduct, the claimant has effectively self issued a dividend to himself, as shareholder, meaning that they would not be a family asset.
- [31] In addition, I note that the position of the claimant on this application is at complete odds with the position taken when seeking to vary the initial restraining order. These assets have already been ordered to be restrained. The variation order specifically refers to both the original order and the \$450,000 fund itself. In other words, in obtaining that variation order it is clear that the claimant proceeded on the basis of, and court and the respondent understood that, the \$450,000 being preserved, subject only to the limited allowable uses noted therein, namely, payment of business expenses and a maximum annual payment of \$74,000. Had the claimant wished to take the position that the funds could not be restrained on the basis that they were not family property, then that should have been raised at that time. Certainly, the court should have been alerted to that issue. Having failed to do so, the court has already determined that those funds are subject to the restraint under s. 91 and made the order accordingly. This is, in many respects, merely a variation of that arising from the fact that the funds have now been transferred and put outside the reach of this court by any simple means.

- [32] As to the use of the funds since that order was pronounced, given that the Restaurant closed immediately thereafter, there ought to be no business expenses remaining to be paid, although such legitimate expenses could easily be accounted for. Given the ongoing disputes with the co-owner, it is unlikely the payments of salary, shareholder dividends or repayment of shareholders' loans have been agreed to. There was no evidence before the court that there is any agreement to any such ongoing payments at this time.
- [33] I agree with the respondent that it was contrary to the variation order and intended preservation under it, as well as the original order to have moved the funds outside of the country, potentially frustrating the ability to enforce any court order against those funds whether it be on the basis that they are currently a family asset, or a future one based on a formal recording of the proper transaction for their payment out to the respondent as a shareholder.
- [34] To the extent there may also be claims to these funds by the corporation itself, or Mr. Pasbakhsh, I am satisfied that such needs can be adequately addressed.
- [35] In that respect Mr. Pasbakhsh, the other shareholder, is a party to these proceedings by virtue of also being named as a respondent as a result of an amended notice of civil claim filed by the claimant on April 25, 2022. I am advised that he was given notice of this application. No responsive materials have been delivered taking issue with the relief being sought or raising any concern as to corporate debts that must be satisfied as part of a wind-up and liquidation of the company, an issue that would surely be at the forefront of the other shareholder's mind as it could have significant implications in terms of potential personal liability. If there was in fact an urgent corporate need for the funds I would expect that such a position would have been raised at this application by Mr. Pasbakhsh and, in all likelihood, an alternative suggestion could have been put in place in order to safeguard the funds for that purpose.
- [36] To the extent any order is made for the return of the remaining funds for safekeeping, any order could include adequate terms to ensure that the rights of the corporation to use those funds is not interfered with for any remaining obligations such as payment of third party creditor claims, tax obligations and legal fees or other professional expenses required for the wind-up, and thereafter any shareholder claims.
- [37] As such, I am satisfied that this is an appropriate circumstance for the court to order the delivery up and possession of these funds for safekeeping pursuant to s. 91(2) of the Family Law Act.

Document Disclosure

- [38] Turning then to the disclosure of documents. Some of the requests of documents have been consented to, and I make the orders in that regard which will be further detailed at the conclusion of these reasons as I pronounce the orders being made. As such, I will only address the disclosure issues which are in dispute.
- [39] For the post part, these documents have already been ordered to be produced. The claimant has failed to disclose the records and has, instead, provided an Excel spreadsheet setting out some of the information that would be contained in, for example, the point of sale and payroll records regarding the Restaurant. The reason given by the claimant for the failure to provide the source documents and reports themselves is that the assets of the company were sold, and the hard copy of financial records prior to the Restaurant closing were put into storage. The claimant says he has had no access to those, and that he has no control over them given that he is out of the country. He specifically deposes that the records were provided to Mr. Pasbakhsh's lawyer. In addition, the documents in storage, he deposes, were shared with the company's accountant.
- [40] In the materials before the court, the claimant exhibited email correspondence regarding the storage of the business records. Specifically, he advised corporate counsel that the storage locker fees were in arrears and had to be repaid, essentially taking the position that he was not obligated to pay it. This position is, once again, at odds with the position taken in sworn evidence as to his intention to use the \$450,000 fund to pay corporate debts, and safeguard those funds for such purposes.
- [41] In any event, after some back and forth with the solicitor for the corporation, the storage was paid up to date, at least up until January 2023. The emails in the materials before the court include a clear warning to the claimant from the storage company that if the storage is not paid, that the contents could be seized by the warehouse. It is unclear if further months have now been paid. As such, the claimant may in fact have already risked the locker contents to a seizure by not paying the storage fees.
- [42] In addition, the claimant argues that there is some disclosure that the respondent has failed to provide. However, there is no application before the court today as to the respondent's disclosure obligations. The argument was in essence that he was led down a path that strict adherence was not being required under the terms of the order given the respondent's own lack of disclosure.
- [43] I am reminded of the old adage that two wrongs do not make a right. Notwithstanding what the respondent has or has not done in terms of their own disclosure, it is clear that the claimant has not complied with his obligations under a court order.
- [44] Overall, the explanation of the claimant as to his inability to obtain the corporate records is not persuasive. Being out of the country does not absolve him of his disclosure obligation. He has the power and control over the records including the power and ability to direct

third parties to go and obtain the records if he cannot do so himself. He is the party with whom the warehouse has been communicating. He has a positive duty to safeguard them, particularly given the order that was made in February 2022 compelling him to provide the documents. One cannot shirk those obligations by exposing the documents to risk by not paying the storage fees, particularly when faced with a court order as was the case here. As such, I make the orders as sought as to the disclosure of the payroll and point of sale records.

Agreement for the Sale of the Vehicle

[45] With respect to the sale of the vehicle, by email exchange between counsel from April 28 to May 5, 2022, the parties specifically agreed to the sale of the vehicle on the following terms:

- a) that the respondent agree to the sale price;
- b) that the respondent be provided a copy of the sale contract; and
- c) sales proceeds would be paid into a trust account and then paid 50/50 to each of the claimant and respondent.

[46] After that agreement was reached, the claimant sold the subject vehicle. He did not immediately disclose the sale or seek pre-approval for the sale price itself, but has now, attached to his affidavit in these proceedings, provided a copy of the sale contract which indicates a sale of \$15,000. In addition, he deposes that he spent \$1,058 for insurance, \$133.27 for a new battery, and \$30 for fuel in the car in order to ready it for sale. It is not clear, however, if any of the insurance was refunded after the sale was effected, or what exactly the timing is respect of such insurance. The claimant says that he advised the respondent that he would only make the payment of 50% of the proceeds to her as her share for the vehicle once those expenses were taken into account. In response, the respondent said that those expenses would only be agreed to if the claimant also paid 50% of a child tax credit which she is required to repay in respect of the parties' residency in the United Kingdom but has not yet repaid (addressed further below).

[47] In any event, the claimant argues that, given the outstanding issues as to the accounting for the vehicle and other costs, that this should be dealt with at the conclusion of this matter. In this respect, he argues that there is a potential prejudice to him in paying the funds over as the assets, namely, the remaining funds from corporate assets, may be insufficient to satisfy the various claims against him, such that he may be prejudiced if he is required to advance funds for family property at this interim stage. There was not sufficient evidence before the court to fully weigh the financial positions of the parties with respect to such potential prejudice. It appears that there is prejudice to both parties with respect to whether or not the assets that may be available and exigible at the end of the day will be sufficient to satisfy any claims.

[48] Nonetheless, the agreement between the parties regarding the vehicle was clear and unambiguous in that the proceeds of sale were to be split and paid out to each of them 50/50. There is no reference to any holding costs such as insurance or any costs being needed to ready the vehicle for sale. As such I make the order as sought for the sum of \$7,250 to be paid as agreed to, subject to a final accounting for those holding and repair costs at the conclusion of this matter.

Reimbursement of Child Tax Benefit

[49] Dealing now with the reimbursement of the child tax credit. The respondent deposes that she has been assessed by the United Kingdom Revenue and Customs Department the sum of £3,595.78, which she says she is to repay with respect to child tax benefits received. She has not paid those funds yet but seeks to be reimbursed. Given that the trial date is imminent it is in my view not appropriate to make an order that she be reimbursed. These amounts can be accounted for at trial.

Fines

[50] With respect to the fines, the respondent argues that the circumstances of this case warrant the imposition of a fine pursuant to ss. 213 and 230 of the FLA given what she argues was an egregious disregard for the intention of the initial s. 91 order and order varying it, and what she says is a reasonable conclusion that the claimant was seeking to put the funds out of her reach in terms of enforcement measures that could be available to her at the end of the day. In addition, not only has he failed to disclose documents pursuant to a court order, but by not paying the storage fees or otherwise making arrangements to safeguard the records he has put the documents at risk of being destroyed.

[51] Notwithstanding those arguments, the respondent was agreeable to adjourning this portion of the application to determine if the claimant complies with further court orders made at this hearing, in particular with respect to the ongoing disclosure requirements and return of the funds. I agree with the respondent that it is appropriate to adjourn those orders. It is obviously the hope of the court that the claimant will realize that his compliance with court orders is necessary as well as the importance of his disclosure obligations and rectify his failings in this respect in order to avoid the imposition of a fine at a later date.

Summary of Orders

[52] In summary, I make the following orders:

1. Pursuant to s. 91 of the Family Law Act, and the orders pronounced on December 15, 2021 and February 8, 2022, the claimant shall return the remainder of the \$450,000 removed from the business account back to Canada and place it into a lawyer's trust account to be held as follows:

- (i) funds may be paid to satisfy any business obligations of Sofra Restaurants Ltd., provided that the claimant and the respondent, Ramez Pasbakhsh, agree in writing to the payment or by court order;
 - (ii) no funds are to be paid to the respondent, Ramez Pasbakhsh, without the written agreement of the claimant or further court order;
 - (iii) no funds are to be paid to the claimant or respondent, Mozhgan Pasbakhsh, without written agreement of all the parties or further court order.
2. By consent, by April 7, 2023, the claimant shall disclose all bank account statements for the accounts into which the \$450,000 fund or any portion thereof was deposited for the period September 2021 to present, as well as any documentation associated with the payment of business expenses including rental arrears.
 3. Pursuant to paragraph 1(c) of the order pronounced February 8, 2022, the claimant shall provide the monthly point of sale cash-out reports and payroll details enumerated therein by March 23, 2023.
 4. The claimant shall pay to the respondent, Mozhgan Pasbakhsh, the sum of \$7,250 as payment of the sales proceeds owing under the agreement for the sale of the vehicle, subject to a final accounting including in respect of any holding or repair costs incurred.
 5. By consent, by March 23, 2023, the parties shall mutually disclose to each other their bank and credit card statements from February 1, 2022, to present.
 6. Paragraph five of the notice of application relating to the reimbursement of the child tax benefit is adjourned to be dealt with by written agreement of the parties or at trial.
 7. Paragraph seven of the notice of application relating to fines is adjourned with liberty to reset it, if the previous terms of this order are not complied with.

[SUBMISSIONS ON COSTS]

- [53] THE COURT: Thank you. I think it is appropriate to order costs in favour of the respondent given the substantial success, notwithstanding that there is an argument that these funds, which was the primary focus of the application, may at the end of the day not be family assets. The concern of the court at this application was the fact that they were dealt with in a way that put them out of the reach of potential claims. Such self-help remedies are not to be encouraged.
- [54] As such, I make the order that the respondent, Mozhgan Pasbakhsh, shall be entitled to her costs, which I assess at the all-inclusive amount of \$2,500, that being the tariff amounts, disbursements and taxes as would be payable, to be paid at the conclusion of the matter.

"Master Robertson"

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