

CANADA / JUDGMENT

Sarband v. Joubin

2020 BCSC 2228

COURT

Supreme Court of British Columbia

DECIDED

2 December 2020

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2020 BCSC 2228 Sarband v. Joubin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sarband v. Joubin,

2020 BCSC 2228

Date: 20201202

Docket: S172815

Registry: New Westminster

Between:

Sara Mohammadi Sarband

Plaintiff

And:

Ramin Joubin

Defendant

Before: The Honourable Mr. Justice D.M. Masuhara

Oral Reasons for Judgment

Counsel for Plaintiff:

M. Magaril

Counsel for Defendant:

P.W. Cote

Place and Date of Trial/Hearing:

New Westminster, B.C.

December 2, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 2, 2020

- [1] THE COURT: The defendant has applied to reopen the trial of this matter pursuant to Rule 12-5(3). Though not expressly stated in the application, the applicant also relies on the inherent jurisdiction of the court.
- [2] The applicant seeks reopening to introduce the evidence of Dr. Sarband's parents, specifically:
 - (a) to have the two parents produce all bank records and statements from all bank accounts into which funds from the RBC line of credit were deposited or were concurrently owned with the plaintiff from 2006 and 2008; and
 - (b) examine the two under oath regarding the funds from the RBC LOC and joint bank accounts held with the bank from 2006 to 2008.
- [3] The application relates to a trial that was conducted before me over eight days between July 2018 and December 2018. My decision was issued in January.
- [4] The dispute between these formerly married parties was whether Mr. Joubin was obligated to pay Dr. Sarband about \$70,000 under a written agreement entered into at about the time the parties separated in September 2008.
- [5] After reviewing the documents and hearing the testimony of the parties, the only witnesses at trial, I found in favour of Dr. Sarband, namely, that she was entitled to payment of \$70,000 plus interest. I also held subsequently following submissions that she was entitled to indemnity costs under the terms of the agreement.
- [6] The defendant subsequently filed a notice to appeal. I am told that appeal is currently on the inactive list and no order from trial has been entered, as the parties have yet to agree to its terms.
- [7] Though the application does not state it, counsel for the defendant, in speaking to the application, seeks information about the record of bank accounts held by the parents jointly with Dr. Sarband. It is acknowledged in the words of counsel for the defendant, that "it would be highly unlikely" that the banking statements or contents of the accounts would still be available given the seven-year retention policies of organizations such as the bank. However, he submits with certainty that a record of any accounts would not be available.

- [8] The defendant argues that the reopening is justified on the basis that the plaintiff failed to prove the use of the line of credit by the defendant. He argues that how the money was moved out of the line of credit and used by the plaintiff and her parents is necessary to the plaintiff's claim to enforce the separation agreement.
- [9] The plaintiff opposes the application on various grounds, including that the actions of the defendant are simply to deny the plaintiff the fruits of her judgment, that the plaintiff is simply making moves to delay matters, that the defendant clearly knew of the evidentiary issues now being raised during the course of the trial (and even before the trial), and that the defendant has admitted that he chose strategically not to pursue the matter at trial.
- [10] The principles to apply in an application for reopening a trial were summarized by Ehrcke J. in *Zhu v. Li*, 2007 BCSC 1467 at para. 20, aff'd 2008 BCCA 239, and they are:
1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
 3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened, and that the new evidence would probably change the result.
 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
 5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.
- [11] I also note that the length of the delay in bringing the application is agreed by the parties to be a factor. The application here was filed March 13, 2020. No indication that an application was being considered was communicated to plaintiff's counsel on October 29. No specifics regarding the application were provided, though requested by counsel for the plaintiff. Also, at a pretrial conference, counsel for the defendant had stated that the application would be provided by December 20, 2019; however, no such materials were provided by that date.
- [12] It is relevant that this matter arose from a separation agreement made in 2008 and deals with activities that obviously predated it, starting in 2006. The trial, as mentioned, occurred in 2018.
- [13] As stated, this discretion, while wide, is one which for good reason should be exercised sparingly and with great care. Mr. Joubin is a trained lawyer, and throughout he has had the benefit of experienced counsel.

- [14] The miscarriage alleged by the applicant is that without this further process, he will face a large financial debt, which includes a large indemnity bill, a lot of which was premised only on the testimony of two witnesses, that is, the plaintiff and the defendant, and that the evidence sought should be obtained to avoid a miscarriage.
- [15] Though not determinative, a serious hurdle for Mr. Joubin in this regard is that it was apparent prior to trial that Dr. Sarband's recall of events had frailties, including her recollection of how monies were transferred from her RBC LOC to the Cayman Islands where she attended medical school and where Mr. Joubin attended law school. She had been open about her poor recall of the details in the examinations for discovery.
- [16] It was clear before trial that the U.S. joint account of Dr. Sarband and her mother had been opened two years after the Canadian LOC was opened. Further, there were many documents related to accounts. There was a ninth amended list of documents and two examinations for discovery conducted of Dr. Sarband which explored the area of banking, including the artificiality of the debt and an alleged conspiracy between Dr. Sarband and her family.
- [17] At trial Dr. Sarband was directly confronted in cross-examination with the assertion that her father had used the \$150,000 from the LOC and she denied it. Notwithstanding the assertions of conspiracy, the diversions of funds, the weaknesses in the recollection of Dr. Sarband, and the known availability of her parents to be called as witnesses, it is admitted by Mr. Joubin that a tactical decision was made not to pursue this line and the weaknesses in the testimony of Dr. Sarband through seeking further examination of documents and of the parents. In this regard, I cannot find that a miscarriage has been made out. Mr. Joubin does not come before this court with evidence that would change the outcome; rather, he comes before this court seeking the ability to make further inquiry to discern if evidence might arise in respect to whether the bank accounts existed, as well as an application seeking the statements.
- [18] The hope of the applicant is that if the evidence shows that an account existed or did not exist, this could change the result because of the frailties of the plaintiff's evidence. There is a real question as to whether such information is even available now, and no evidence to support its availability has been provided. I have simply received submissions from counsel with respect to this.
- [19] I will note here that Mr. Joubin was not a strong witness at trial as well, and his evidence on certain key points was not credible. At one point he was permitted to speak with his counsel while under cross-examination to determine whether further documentary evidence would be obtained to support his position regarding monies he contributed. For some reason that evidence was not presented at trial, despite an adjournment for that purpose.

- [20] From my perspective, the sought-after information will not be as effective as argued by counsel, as there are different routes by which the funds may have been transferred to Dr. Sarband. The basis provided is speculative. Moreover, there is the separation agreement, which Mr. Joubin negotiated and agreed to, the interpretation of which was reflected in my reasons for judgment. I also note that counsel for Mr. Joubin stated at trial that his strongest argument was his limitation defence. The issue of debt was secondary in strength.
- [21] Further, there is support for Dr. Sarband's position that Mr. Joubin is simply engaged in a process to deny her the fruits of her judgment. Counsel for the plaintiff argues that there is an irresistible inference that the purpose of this application is to delay the entry of a form of order and avoid triggering Mr. Joubin's professional obligation, or otherwise attempt to "attrition Dr. Sarband".
- [22] The present application comes long after my decision regarding debt. There has been some foot dragging as per the specifics provided by counsel for the plaintiff. There is also evidence of delay which was provided to me with respect to Mr. Joubin advancing his appeal. I also note here that Mr. Joubin did not serve this notice on the parents, who obviously have an interest in this matter, though he knew of the location of the parents.
- [23] Mr. Joubin wishes to have another kick at the can, having made a conscious tactical decision to not obtain the now sought-after information during the course of trial.
- [24] Based on all the foregoing, the relief sought has not been made out, accordingly, the application is denied. That concludes my arguments. Are there any submissions?
- [25] MR. MAGARIL: Is Your Lordship going to make any ruling with respect to the application to strike?
- [26] THE COURT: I am not going to hear the application to strike given my ruling.
- [SUBMISSIONS RE COSTS]
- [27] THE COURT: Dr. Sarband is awarded ordinary costs, Scale B, in any event. I think that concludes matters.
- [SUBMISSIONS RE COUNTERCLAIM]
- [28] THE COURT: The counterclaim is dismissed as per comments of Mr. Cote. I think that concludes the matter, does it? All right. Thank you.

"The Honourable Mr. Justice Masuhara"

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