
CANADA / JUDGMENT

Shen v. Chan

2021 BCSC 519

COURT

Supreme Court of British Columbia

DECIDED

23 March 2021

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2021 BCSC 519 Shen v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shen v. Chan,

2021 BCSC 519

Date: 20210323

Docket: S117400

Registry: Vancouver

Between:

Shang Chen Shen

Plaintiff

And

Edith Chan and Youti Wan

Defendants

And

John A. Gunson also known as

John Gunson Euro Canadian Construction Corp

Third Party

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

The Plaintiff, appearing in person:

S.C. Shen

Counsel for the applicant, Teresa Yun-Chu Tsai, Executor and Trustee of the Will of Youti Wan:

J.C. MacDonald

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

February 3-5, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 23, 2021

1. introduction

- [1] On November 3, 2011, the plaintiff, Shang Chen Shen ("Ms. Shen"), filed a Notice of Civil Claim, claiming damages as against the defendants, Ms. Youti Wan ("Ms. Wan") and Edith Chan ("Ms. Chan").
- [2] Ms. Wan passed away on April 6, 2014.
- [3] Ms. Shen's claim against Ms. Chan was dismissed on July 22, 2016: *Shen v. Chan*, 2016 BCSC 1370, upheld *Shen v. Chen*, 2018 BCCA 4.
- [4] As of the date of the hearing before me, the style of cause had not been changed to reflect either Ms. Wan's death or the dismissal of Ms. Shen's claim as against Ms. Chan.
- [5] Ms. Shen's claim is for damages to her full-floor condominium unit she says resulting from eight water leaks occurring in 2009, 2010, and 2011. Ms. Shen says the water originated from the full-floor condominium unit located immediately above her unit, which was owned at all relevant times by the late Ms. Wan.
- [6] In her Amended Notice of Civil Claim filed May 29, 2014, Ms. Shen seeks the following damages:
 - a. general damages in the amount of \$200,000 for the deprivation of the use and enjoyment of Shen's Unit;
 - b. special damages in the amount of \$200,000 for the estimated cost of repairing the water leakage and performing preventative repair work; and
 - c. special damages as follows:

- i. \$2,000 for insurance deductibles;
- ii. \$1,500 for damage to personal belongings;
- iii. \$400,000 for loss in property value;
- iv. \$16,524.75 for air fare to return to Vancouver;
- v. \$1,200 for cleaning costs;
- vi. \$1,600 for packing and moving costs;
- vii. \$3,646 for medical costs;
- viii. \$25,348.79 for renovation costs;

- [7] As noted, Ms. Wan died on April 6, 2014. She left a Will dated September 27, 2007. On March 13, 2017, Teresa Yun-Chu Tsai, Executor and Trustee of the Will of Ms. Wan ("Ms. Tsai") was granted Letters Probate.
- [8] On July 3, 2018, Ms. Tsai first applied to have Ms. Shen's claim dismissed for want of prosecution. On August 16, 2018, Justice Gropper heard and then dismissed Ms. Tsai's application: *Shen v. Chan*, 2018 BCSC 1568.
- [9] On December 20, 2019, Ms. Tsai applied again to have Ms. Shen's claim dismissed for want of prosecution, which application was heard before me from February 3 to 5, 2021. At the hearing before me, Ms. J. MacDonald confirmed that she acts as counsel for Ms. Tsai in her capacity as the Executor and Trustee of the Will of Ms. Wan.
- [10] For the reasons that follow, the order Ms. Tsai seeks is granted and Ms. Shen's claim in the within action is dismissed.

2. background

- [11] As noted, Ms. Tsai, in her capacity as Executor and Trustee of the Will of Ms. Wan, had applied previously to the Court to dismiss Ms. Shen's claim for want of prosecution.
- [12] As noted, on August 16, 2018, Justice Gropper heard Ms. Tsai's application and gave oral reasons for judgment the same day, dismissing her application.
- [13] In her reasons, Justice Gropper reviews the key background facts up to the time of the August 16, 2018 hearing. She concludes her reasons as follows:

Decision

- [15] I find that there has been delay in this case, at least one year and five months and perhaps up to two years, but I cannot, in the circumstances, find that it is inordinate or caused solely because of the plaintiff.

- [16] The estate issues particularly have occupied the parties since Ms. Wan's death in 2014 to probate in 2017.
- [17] The defendant has also not demonstrated actual serious prejudice. In this case Ms. Wan's death has no effect on the defendant's ability to defend the case.
- [18] The interests of justice, I find, are not served by dismissing the plaintiff's claim without hearing the case on the merits. On that basis, I dismiss the application.
- [19] I order costs in the cause. I appreciate that the plaintiff has been successful on this application, but, in bringing the application, the defendant has succeeded in moving the plaintiff to action. On that basis, costs of this application should be in the cause
- [14] In analyzing the current application, my primary focus is on the events after August 16, 2018 (the date of Justice Gropper's oral reasons).
- [15] On October 30, 2018, a case planning conference was held before Justice Saunders. Ms. Shen was represented by counsel at the conference.
- [16] Justice Saunders ordered that the parties were to comply with the following case plan:

CASE PLAN

1. Document production (Rule 7-1 of the Supreme Court Civil Rules)

The parties shall provide updated Lists of Documents by January 31, 2019.

2. Pleadings

The plaintiff will take all necessary steps to amend the pleadings to substitute the defendant Youti Wan by January 31, 2019.

3. Dispute resolution procedures (Rule 9-1 of the Supreme Court Civil Rules)

Any settlement conference or mediation must be attended by the representatives of all parties.

4. Examinations for discovery (Rule 7-2 of the Supreme Court Civil Rules)

Examinations for discovery to be completed by March 29, 2019

5. Expert witnesses (Part II of the Supreme Court Civil Rules)

Expert reports to be produced in accordance with the Supreme Court Civil Rules

6. Witnesses (Rule 7-4 of the Supreme Court Civil Rules)

Parties to comply with deadlines pursuant to the Supreme Court Civil Rules

7. Trial (Part 12 of the Supreme Court Civil Rules)

- a) Mode of trial is to be judge alone.

- b) Trial will be scheduled for 7 - 10 days.

c) Trial will be scheduled pursuant to the availability of the parties.

8. Other

Within 30 days following completion of the examinations for discovery, the plaintiff will provide the defendant and third party with its position on:

- a) Whether the plaintiff will take steps to add the third party as a defendant; or
- b) Whether the plaintiff will consent to the dismissal of the third party notice.

[17] Since January 28, 2019, Ms. Shen has represented herself in the current action.

[18] On June 6, 2019, Ms. Shen commenced an action against Mr. Allister David Chan ("Mr. A. Chan"), who she says is the current owner of the condominium unit immediately above her unit. She has also claimed against Ms. Chan and Mr. Tony Hak Ming Chan, who she says are Mr. A. Chan's parents. Ms. Shen also claimed against the relevant strata corporation (the "June 6, 2019 claim").

[19] In the June 6, 2019 claim, Ms. Shen seeks damages in connection with water leaks she pleads arose in 2017. She is represented by counsel in the June 6, 2019 claim.

[20] On February 5, 2021, the third day of hearing before me, Ms. Shen filed a further notice of civil claim (the "February 5, 2021 claim"). The defendants are Ms. Chan and Ms. Tsai. In the February 5, 2021 claim, Ms. Shen also represents herself.

[21] In the February 5, 2021 claim, Ms. Shen pleads fraud. Before quoting from the February 5, 2021 claim, I wish to state that none of the serious allegations pleaded have been proven or otherwise established.

[22] Under "Part 2: Relief Sought", Ms. Shen says (in part):

- 2. Defendant Chan and her son, Allister David Chan, conducted a fraudulent conveyance of Wan's estate unit 800. Defendant Chan and her husband Tony Hak Ming Chan placed a fake \$6.8 million mortgage lien on Wan's unit 800 when there has been a pending lawsuit between Wan and the Plaintiff. Even though the Plaintiff can win the lawsuit, the Plaintiff is unable to claim any of her loss and damages from Wan. The plaintiff claims Wan's ownership change of unit 800 be removed and the fake mortgage lien be discharged.
- 3. Defendant Tsai obtained Wan's probate grant by conducting probate fraud together with Defendant Chan. Defendant Tsai's grant should be revoked.
- 4. The Plaintiff has been living in a water damage and molded apartment over the past ten years till to date. Defendant Chan has refused to repair the Plaintiff's damages. The Plaintiff claims all her damage of residence, health, and mental anguish.

5. The Plaintiff claims the Defendant Chan and Defendant Tsai's for punitive damages on their estate fraud and probate fraud which has tied the Plaintiff up with the lawsuit for over 9 years.
 6. The Plaintiff was unable to move her civil claim against Wan due to Defendant Chan hiding Wan Information and fraudulent activities. The Plaintiff suffered and will continue to suffer loss and damages from living in a water damaged and molded apartment and being tied up with over 10 years pending legal battle.
 7. When the Plaintiff's then counsels helped Defendant Chan instead of the Plaintiff, the Plaintiff felt she was disliked by her lawyers. When the Plaintiff's civil claim against Defendant Chan was dismissed by counsels misleading the court, these all caused the Plaintiff extreme mental distress, anguish, and suffering.
- [23] With respect to Justice Saunders' October 30, 2018 Order requiring the amendment of the pleadings to substitute the defendant Youti Wan by January 31, 2019, a consent for such was sent by Ms. Shen's then counsel to defendant's counsel. Defendant's counsel signed and returned the consent. Ms. Shen's then counsel submitted the necessary amendment to the court registry for filing but it was rejected.
- [24] As noted, Ms. Shen has represented herself in this action since January 28, 2019. She has taken no further action to amend the pleadings as required by Justice Saunders. In her February 24, 2020 affidavit, Ms. Shen states:
- The Plaintiff won't consent to Tsai as Wan's daughter and estate executor as she knows Tsai is not related to Wan by blood. The Plaintiff have resisted being an accessory in the commission of fraud since [counsel for the defendant, Ms. J.C.] MacDonald provided the name of "Teresa Tsai" from September, 2014.
- [25] Justice Saunders also ordered that examination for discovery be completed by March 31, 2019. The defendant and third party scheduled examinations for discovery for March 13 and 14, 2019. At Ms. Shen's request, the examinations were rescheduled to March 28 and 29, 2019. On March 19, 2019, Ms. Shen stated that she would be unable to attend the examinations because of her anxiety.
- [26] On March 28, 2019, the defendant proceeded with examinations for discovery. Ms. Shen attended the March 28, 2019 the examination for discovery but refused to answer questions, other than some questions dealing with preliminary matters. Ms. Shen took the position that, Ms. MacDonald, defendant's counsel, was not qualified to examine her.
- [27] At the March 28, 2019 examination for discovery, Ms. MacDonald referred to the insurance coverage:

Ms. MacDonald:

Q I understand that you are upset and that you have issues with the estate of Ms. Wan. I have advised you that Ms. Wan has insurance coverage from December 28th, 2010, to December 28th, 2011, If you are able to prove liability during that time and you are able to prove your damages, there is insurance coverage for that time period. That is a good thing. That's where any money would be coming from if there is no money left in the estate -- if you obtain judgment.

A Okay. This is not --

Q The fact that I am here is more helpful than a problem, because if I -- if you are trying to claim that I have no status, then there will be no lawyer. Ms. Wan is passed away. And then what.

A This is not a money issue -- okay -- this water leakage case, this lawsuit case. Okay. The counsels, just as I addressed at appeal court -- okay.

THE REPORTER: I'm sorry, say that -- the counsel

THE WITNESS: All counsels [sic], they are aware of the fraud. I have addressed this at appeal court to the three judges. I told the three judges all counsels are aware of the fraud the realtor, Edith Chan, committed. Okay. Real estate fraud and identity fraud. They are -- okay. I know Edith Chan's family, big one - in person -- personally. I know they are not related to the owner, Youti Wan.

[28] With respect to Justice Saunders' Order requiring Ms. Shen to state her position with respect to the third party, she has not done so.

[29] Ms. MacDonald filed on behalf of Ms. Tsai a notice of trial on December 20, 2019 and a nine-day trial is set to commence June 28, 2021. Ms. MacDonald says that Ms. Shen did not respond to various requests to schedule the trial. At the hearing before me, Ms. Shen agreed that this was the case.

[30] In her application response, Ms. Shen states:

65. On December 20, 2019, MacDonald filed the Notice of Trial for a 9-day trial commencing on June 28, 2021. The Plaintiff did not believe that the trial should proceed as the Plaintiff's water leakage case has turned to a fraudulent case and the Plaintiffs civil claim case should proceed to Crown Prosecutors.

66. At this time the Plaintiff dared not hire a new counsel due to concerns that her previous then counsels were convinced by MacDonald to pressure her into accepting the fraud and that Wan's estate executor is Teresa Tsai.

[31] On January 31, 2019, Ms. Shen provided a further list of documents in accordance with Justice Saunders' October 30, 2018 Order. After various requests, on March 21, 2019, Ms. MacDonald's office was able to have a courier pick up copies of the listed documents.

- [32] In January 2019, Ms. Shen, with the assistance of her then counsel, had a report prepared by a plumber in order to investigate the source of the water leaks and to obtain the plumber's opinion respecting such. The plumber's opinion letter is dated January 28, 2019. It is attached as Exhibit "L" to Ms. Shen's February 24, 2020 affidavit.
- [33] In the plumber's view, the leaks into Ms. Shen's condominium unit originated from the five bathrooms in the condominium unit immediately above Ms. Shen's unit.
- [34] Ms. Shen has not retained counsel and has not taken any further steps since March 21, 2019 to advance her claim.
- [35] At the hearing, Ms. Shen told the Court that she refuses to accept Ms. Tsai as the Executor and Trustee of the Will of Ms. Wan.
3. Supreme Court Civil Rules and jurisprudence
- [36] Ms. Tsai has brought her application under Rule 22-7(7) of the Supreme Court Civil Rules. Rule 22-7(7) reads:

Dismissal for want of prosecution

- (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.
- [37] In 0690860 Manitoba Ltd. v. Country West Construction Ltd., 2009 BCCA 535 [Country West], Justice Low, writing for our Court of Appeal, provided the following guidance:
- [27] These cases suggest to me that a chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:
- (1) the length of the delay and whether it was inordinate;
 - (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
 - (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
 - (4) whether, on balance, justice requires dismissal of the action.
- [28] I consider the fourth question to encompass the other three and to be the most important and decisive question.

- [38] In considering an application to strike responses to a notice of civil claim on the basis that the defendants had failed to abide by the Supreme Court Civil Rules and Orders of the Court, I stated in *Morbank Financial Inc. v. 0476779 B.C. Ltd.*, 2013 BCSC 2008:
- [36] Our common law system is litigant-driven. Over many centuries our exceptional system has shown the ability to adapt to changing times and increasingly complicated relationships, and it is the envy of people in many other countries. Litigants may come to this Court to resolve disputes based on the evidence presented and the application of the law.
- [37] Only when the litigants are willing to follow the Rules of Court and Orders of the Court can a litigant-driven system work. Whether represented or unrepresented virtually all litigants accept and recognize the need to comply with the Rules of Court and Orders of the Court.
- [38] If a litigant, through actions and despite words to the contrary, does not comply with the Rules of Court and Orders of the Court, the Draconian measure of striking that litigant's pleadings must be considered.
- [39] In my view, the same general principles are engaged in connection with an application by a defendant to strike a plaintiff's claim for the want of prosecution.

4. analysis

- [40] In her submissions, including those at the hearing, Ms. Shen shows no desire to move forward with her claim.
- [41] The last step that Ms. Shen has taken to move her claim along was to deliver an updated list of documents to the defendant in January 2019 and then provide copies in March 2019. Even with the filing of the current application, Ms. Shen has not been moved to take steps to advance her claim.
- [42] As noted, Ms. Shen has also disregarded key aspects of Justice Saunders' October 30, 2018 Order following the case planning conference Justice Saunders conducted.
- [43] Ms. Shen does not suggest or state that she would be available or would participate in an examination for discovery.
- [44] As Ms. MacDonald notes, the June 28, 2021 trial cannot proceed as scheduled because examination for discoveries must be completed before the requisite trial certificate can be certified: Rule 12-4; Form 42.
- [45] Further, I agree with Ms. MacDonald, that Ms. Shen is fixated on fraud and has placed this action on hold. Contrary to her assertions in the Notice of Civil Claim for the February 5, 2021 claim, I find that Ms. Shen was able "to move her civil claim against Wan" and has failed to do so.

- [46] As noted, the eight pleaded water leaks in the subject action occurred in 2009, 2010, and 2011. As noted, Ms. Wan died on April 6, 2014 with Letters Probate granted to Ms. Tsai on March 13, 2017.
- [47] Ms. Shen has been in the position to move her claim against Ms. Tsai as the Executor and Trustee of the Will of Ms. Wan since the March 13, 2017 grant of probate.
- [48] In basic terms, Ms. Shen must prove that there were the pleaded eight leaks, that the source of leaks was Ms. Wan's condominium unit, and the damage caused.
- [49] If successful and if the judgment was not satisfied, Ms. Shen could then consider bringing an action under the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163. Ms. MacDonald stated, at the hearing of this application, that there was an insurance policy in place which would provide coverage for the period of December 28, 2010 to December 28, 2011.
- [50] In her October 26, 2017 affidavit, Ms. Shen swears that Mr. A. Chan became the registered owner of the condominium unit previously owned by Ms. Wan on April 7, 2014 (one day after Ms. Wan's death) based on a Form A Freehold Transfer dated December 24, 2013.
- [51] In her August 29, 2016 affidavit (filed September 26, 2016 in the Vancouver Registry - Probate - P161911), Ms. Tsai, in support of her application for Letters Probate, swears that no property passed to her as Ms. Wan's personal representative upon Ms. Wan's death.
- [52] As noted, Ms. Shen was represented by counsel in this action until January 28, 2019. From the fact that she was represented by counsel and the reference in her application response to a December 13, 2018 meeting with counsel where "fraudulent conveyance" and "estate fraud" were discussed, I am satisfied that Ms. Shen is aware that where a fraudulent conveyance is proven, the law provides a remedy.
- [53] In sum, Ms. Shen has been able to "move her civil claim" forward even if one were to accept, *arguendo*, that there was a fraudulent conveyance.
- [54] I find that the four factors set forth in *Country West* support dismissing Ms. Shen's claim at this time.
- [55] First, the delay from March 2019 to the date of the hearing of the current application is slightly less than two years. During this period, Ms. Shen has not taken steps to advance her claim and, as noted, despite the filing of the current application, she seems to have no intention to do so. The delay is inordinate.
- [56] Second, I do not find the inordinate delay to be excusable. As noted, Ms. Shen has focused on Ms. Chan and Ms. Tsai (as is further shown in the February 5, 2021 claim). She has not sought to take the usual litigation steps to obtain a favourable judgment based on the damages caused by the pleaded water leaks from the condominium unit immediately above her unit (even with the plumber's January 28, 2019 report in hand). As noted, our common law system is litigant-driven.

[57] Third, I am also satisfied that the delay has caused serious prejudice to the defendant. The pleaded leaks occurred approximately a decade or so or more ago. Ms. Shen has not attempted to rebut the presumption of prejudice: *Busse v. Chertkow*, 1999 BCCA 313, paras. 18-19.

[58] Finally, on balance, justice requires the dismissal of the action. Ms. Shen has not complied with key aspects of Justice Saunders' October 30, 2018 Order and is unwilling to drive her claim to resolution. Such is the antithesis of our common law system.

5. conclusion

[59] Ms. Tsai's application is granted. Ms. Shen's claim in the within action is dismissed.

6. costs

[60] If the parties wish to address costs, I ask that they arrange through Supreme Court Scheduling a 9 a.m. 55-minute hearing before me.

"Funt J."

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