

CANADA / JUDGMENT

Soltani v. Fadaee

2022 BCSC 2163

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2163 Soltani v. Fadaee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Soltani v. Fadaee,

2022 BCSC 2163

Date: 20221116

Docket: E190401

Registry: Vancouver

Between:

Zohreh Soltani

Claimant

And

Payman Fadaee (by his Litigation Guardian, Marzieh Fadaee), Hossein Fadaee (by his Litigation Guardian, Sassan Tabatabaei Zavareh), and Robabeh Modabber Sobhandost

Respondents

Before: The Honourable Madam Justice Burke

Oral Reasons for Judgment

(Re: Adjournment of Trial)

Counsel for the Claimant:

R.G. Sherman

M. Tiwana

N. Nasser

Counsel for the Respondent Payman Fadaee:

H. Faramarzi

Counsel for the Respondents Hossein Fadaee by his Litigation Guardian, Sassan Tabatabaei Zavareh, and Robabeh Modabber Sobhandost:

R. Choudhry

J. Chan, Articled Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 14-16, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 16, 2022

INTRODUCTION

- [1] These are my oral reasons for judgement. When I delivered these reasons, I reserved the right to edit and/or add to them if necessary in any written judgement or transcript. The substance, however, has not changed.
- [2] This is a family law matter. At the commencement of the trial, scheduled for ten days commencing November 14, 2022, the claimant sought an order for adjournment.

BACKGROUND

- [3] The claimant seeks this adjournment on the basis that she has retained new counsel who is unavailable for the trial dates and, in any event, would not have the time to ready the case for trial given his schedule. The claimant further argues that, even with properly instructed counsel, the matter is not ready to proceed to trial as updated appraisals ordered at the September 2022 trial management conference are not ready; discoveries are not completed; a significant amount of documentation has not been received, including certain hospital records; certain RCMP records; and numerous property and income documents, including those containing information concerning Iranian properties owned by the claimant's late husband, Payman Fadaee.

- [4] The claimant argues she would be considerably prejudiced by attending trial without counsel and that, of all the parties, she is the one most affected by the adjournment, as her claim for property division and spousal support would need to await a future trial date.
- [5] The respondents argue that the claimant has a history of changing lawyers for the purpose of causing delays and has already applied for multiple adjournments. Essentially, the respondents argue the claimant has engaged in a wilful and deliberate pattern of conduct aimed at delaying this matter by changing counsel, filing notices of intention to act in person, and purposefully retaining counsel who are not available for the trial dates set in this matter.
- [6] In addition, the respondents allege these deliberate attempts taken to delay the trial, as well as complaints she has filed with the Law Society of British Columbia against counsel for the respondent and court-appointed expert counsel, amount to abuse of the Court's process.

SHOULD THIS TRIAL BE ADJOURNED?

Legal Principles

- [7] *Navarro v. Doig River First Nation*, 2015 BCSC 2173, provides a succinct summary of the legal principles concerning adjournments:
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).
- [8] In *Dion v. Dion*, 1999 CanLII 6213 at para. 20, [1999] B.C.J. No. 2102 (S.C.), the court concluded there must be evidence of a "wilful and deliberate plan to essentially sabotage the proceeding by dismissing [their] counsel" to ground a finding of abuse or deliberate delay. In *Dion*, the court noted that the petitioner had two or three counsel prior to present counsel but "clients are entitled to change counsel and counsel are entitled to withdraw from cases and the court does not normally enquire into the reasons": para. 20. Because the court found insufficient evidence that the petitioner was deliberately trying to delay the trial, it concluded that it "must infer that there were the usual and much less sinister reasons [for the delay]: counsel and client simply did not see eye to eye on the conduct of the file; legal fees became an issue, and so on": para. 20.

Application of the Legal Principles

- [9] In my view, the essential argument of the respondent is that the claimant is deliberately trying to delay this trial by dismissing her counsel at critical times in the process.
- [10] In assessing whether an adjournment should be granted, I note first that I am persuaded that this matter is not ready to go to trial. I turn to the particulars now.
- [11] The claimant came to Canada from Iran in December 2014 on a student permit. She moved from Montréal to Vancouver when she married the respondent, Payman Fadaee, on August 27, 2016. He sponsored her application for permanent residence. The parties separated on February 5, 2019, and there are no children of the marriage. Unfortunately, Payman Fadaee passed away on February 5, 2020, and since then his sister, Marzieh Fadaee, has been the estate trustee under his will. Mr. Hossein Fadaee and his mother, Robabeh Modabber Sobhandost, are the beneficiaries under the will.
- [12] The trustee is represented by Mr. Hossein Faramarzi, and the parents are represented by Ms. Rizwana Choudhry.
- [13] The claimant has brought family proceedings that, at this point, largely concern the beneficial ownership of three properties located in British Columbia. The claimant's notice of family claim, filed on February 15, 2019, seeks spousal support and the division of family property.
- [14] The matter was originally scheduled for a ten-day trial beginning on November 16, 2020. On October 29, 2020, the trial was adjourned by Justice Groves. The case was then set to commence on November 14, 2022, for ten days. A trial management conference was concluded on September 26, 2022.
- [15] There are said to be numerous unresolved matters that require resolution prior to trial, and I agree. I will not review all matters between the parties in detail. Instead, I will set out highlights of certain elements that I consider important in this matter.
- [16] At the judicial case conference of August 23, 2019, Justice Saunders made an order by consent for the parties to jointly obtain current appraisals, as well as historical valuations as of the date of marriage and the date of separation, for the three properties. While these appraisals were delivered in October 2019, the matter of updated appraisals was brought up at a trial management conference held on September 26, 2022. At this conference, Justice Crossin ordered those appraisals be obtained by November 4, 2022.
- [17] The parties disagreed as to who should pay for these appraisals and when they should be paying. While that issue was ultimately resolved by parties, at present those appraisals are not available for trial and the joint retainer agreement for updated appraisals has not been delivered to the appraiser. Furthermore, there is an outstanding issue as to when certain improvements were made to at least one of the properties and whether that improvement should be considered by the appraisers.

- [18] There are also outstanding issues with respect to other properties located in Iran owned by Mr. Payman Fadaee. On October 22, 2020, Justice Elwood directed that the trustee sign an authorization for an agent, Mr. Jafar Mostafa, to obtain financial documents pertaining to these properties. There have, however, been disagreements as to both the cost of obtaining these documents as well as Mr. Mostafa's expertise and ability to undertake this task. While the respondents say these matters were not at issue with the claimant's previous counsel, the extent of any such agreements is not clear and this matter remains unresolved.
- [19] More significantly, examination for discovery of Payman Fadaee's parents and the trustee have not been completed. Payman's father, Hossein, was due to be examined for discovery on November 22, 2021. Shortly before that date, counsel for Mr. Hossein Fadaee advised that they would not attend the discovery. A certificate of non-attendance for Mr. Hossein Fadaee was obtained. Some seven to eight months later, by a letter dated June 16, 2022, counsel for Mr. Hossein Fadaee delivered a report by psychiatrist Dr. Kathryn Fung alleging that Mr. Hossein Fadaee was not mentally competent to give evidence.
- [20] Counsel for the claimant sought to proceed with the examination for discovery of Mr. Hossein Fadaee. In September 2022, however, his son-in-law, Mr. Zavareh, was appointed Mr. Hossein Fadaee's litigation guardian. The claimant's former counsel then attempted to schedule discoveries for both parents and the trustee. The respondent, however, only provided available dates during the week of November 7, 2022. In addition, the respondent provided a further list of documents only on November 3, 2022, which counsel for the claimant says has impacted their ability to review these documents prior to discoveries.
- [21] On this point, the respondents maintain that the delay in conducting these discoveries falls upon the claimant, who did not diligently pursue the discovery of Mr. Hossein Fadaee. In particular, the respondent points out that, originally, examinations for discovery were scheduled in October 2021 to occur on November 24, 2021. The respondent says that, when possible issues associated with Mr. Hossein Fadaee arose, they notified counsel for the claimant, indicating he was not available for an examination for discovery and that they were awaiting medical reports. While the claimant obtained a non-attendance order, the respondent points out that the claimant did nothing further with respect to setting down the examination for discovery. While a medical report was obtained seven to eight months later, the next email from claimant's counsel concerning the examination for discovery was only sent in April 2022. The respondent says the claimant had plenty of time to do examinations for discovery, and the claimant's inaction should not adversely impact on the respondent's right to have the trial proceed.
- [22] I do not agree that the delay in conducting the examination for discovery falls wholly on the claimant. Rather, as evidenced by the transcript of the proceedings before Justice Groves on October 29, 2020, counsel for Mr. Hossein Fadaee had some concerns about the mental capacity of her client at that early stage. On March 25, 2021, counsel for the claimant sought to set down examinations for discovery. Those were ultimately set for November 2021. As reflected above, shortly before the examination for discovery, counsel for Mr. Hossein

Fadaee, indicated that her client would not attend, and a certificate of non-attendance was subsequently obtained. Counsel did not provide reasons (other than that she was unable to disclose those reasons). In April 2022, counsel for the respondent indicated she was seeking a medical expert report to determine whether Mr. Hossein Fadaee was fit for an examination for discovery. She did not indicate the specifics or nature of that report. That report was finalized in May 2022, and on June 22, 2022, counsel for Mr. Hossein Fadaee filed a certificate of fitness.

- [23] In August 2022, claimant's counsel applied for an examination for discovery of Mr. Hossein Fadaee. At this hearing, a cross-application seeking a litigation guardian for Mr. Hossein Fadaee was also made. While the application for the examination for discovery was ultimately adjourned, the cross-application was granted on August 24, 2022. On September 22, an application to appoint a litigation guardian was finalized. When counsel for the claimant again sought dates for examination for discovery, the dates provided by the respondent were in November 2022, shortly before the trial.
- [24] This series of events is not one that can be attributed solely to the claimant, and I view the fact that essential examinations for discovery have not been completed before the trial as an important factor in my reasoning.
- [25] There is also a significant issue associated with hospital records. Payman Fadaee is said to have signed an affidavit of his trial evidence on the date he died. On August 31, 2022, Master Vos ordered the trustee to authorize the release of medical records from Vancouver General Hospital ("VGH") concerning that day in the hospital. The authorization, however, was rejected by VGH due to a clerical error, and the request has now been resubmitted. When advised it would take three months to produce the records unless expedited by a \$50 payment, on October 28, 2022, the claimant paid that amount to expedite the records, but they have yet to be received.
- [26] The claimant says there are outstanding issues with respect to documents that have not been delivered, including rental agreements from 2020 to date for all three properties, mortgage amounts on all three properties from July 2021 to date, and an accounting from the trustee of the estate regarding income and expenses for one of the properties (which is an estate asset that had been in the sole name of Payman Fadaee at his death).
- [27] In addition, the claimant has obtained a handwriting analysis report connected to her allegation that Payman Fadaee forged her signature on a transfer of her vehicle to himself after their separation. There is an RCMP file regarding the alleged forgery that has been ordered to be produced. These records, however, have not yet been produced.
- [28] In my view, it is clear that there is a need for the updated appraisals and the completion of the examinations for discovery. There is also a need for the production of the medical records from VGH, the documents concerning the properties, and the RCMP file. These are not insignificant issues.

- [29] While some of these matters were raised at the trial management conference, it appears matters became increasingly difficult as late dates for discovery were proposed and delays in obtaining the necessary updated appraisals were encountered. This is very unfortunate, as it is often the case that completing the final necessary steps for trial require extensive cooperation between the parties. While each party is entitled to press its position, this may result in challenges that ultimately cannot be overcome.
- [30] I note also that it is particularly concerning that the parties did not allot adequate time for this matter, as the trial briefs alone appear to indicate the need for a trial of 20 days--significantly more than the ten days that were scheduled. While the witness list can be pared down, it is unlikely that it can be reduced to the extent that it cuts the needed trial time in half.
- [31] Despite this, the respondents wish to proceed.
- [32] The respondents say this is a two-and-a-half-year marriage which has resulted in litigation spanning over four years, including at least two applications for adjournment of set trial dates. The respondents point out the claimant's second request for the adjournment of the trial reiterates similar if not identical reasons to those put forth in her first request for adjournment.
- [33] The respondents argue that an adjournment should not be granted based on the above-cited principles drawn from Navarro and Dion.
- [34] Taking into account those principles and factors, the respondents point out that the present request is not timely, coming as it does on the morning of trial. This is the second time the claimant had sought an application for adjournment for essentially the same reasons. In addition, significant prejudice to the respondents will result if an adjournment is granted, including the costs of multiple preparations for trial and the declining health of the witnesses and respondents (which includes the death of one of the respondents and now the loss of a second respondent due to medical incapacity). There is also the reasonable desire for the elderly respondent parents to move on from this matter.
- [35] Furthermore, the respondents say the history of the matter demonstrates overwhelming evidence of deliberate delay and misuse of the court process. Using tactical delays, which are considered inexcusable by the Court, should result in the refusal of an adjournment.
- [36] The respondent alleges that the claimant's failure to comply with orders or file an accurate financial statement, filing notices of intent to act in person on the eve of trial, and application for an adjournment are all part of a wilful or deliberate plan--which also involves dismissing her previous counsel and hiring new counsel who is unavailable for the trial to justify yet another adjournment--to sabotage the proceeding. The respondent notes that this is the second time this has happened and, in both instances, the adjournments have been connected to issues with the claimant's representation at trial, demonstrating a pattern of conduct that establishes the claimant's abuse of process.

- [37] With respect to this latter point, I note such an allegation needs to be substantiated by sound evidence. I must therefore determine if, as set out in *Dion*, such a "willful and deliberate plan" has been initiated by the claimant to essentially cause delays and abuse the Court's process.
- [38] While I do not consider the filing of notices of intent to act in person and the dismissal of counsel alone to be, on their own, sufficient to establish an abuse of process, I agree such actions are pertinent when they occur at critical times in the process. In this case, however, I am not convinced that the circumstances reflect a pattern of willful conduct to delay the proceedings or abuse the process.
- [39] Each time that the claimant has applied for an adjournment, she has retained a lawyer to argue the adjournment (despite having filed notices of an intention to act in person). In the present situation, counsel indicates that, if the adjournment application is successful, he would remain counsel of record. While I acknowledge that each time an adjournment application has been made counsel has raised very similar issues with respect to the outstanding matters that need to be addressed in order for the claimant to be ready for trial and ensure a fair trial process, the reality is that these issues remain and this is not wholly the fault of the claimant.
- [40] I have already dealt in detail with the question of the examination for discovery of an important witness, but I also refer to the evidence concerning the medical documentation not yet produced by VGH, other documentation relating to the three BC properties, and the RCMP file. It would indeed be very difficult for the claimant to proceed to trial in this matter without at least some of these documents. She also requires a proper examination for discovery of Mr. Hossein Fadaee--a situation that was fluid until very recently.
- [41] Furthermore, in terms of conduct, I do not conclude that counsel for the claimant unilaterally set down this ten-day trial without some consultation with the respondents and indeed did so in conjunction with at least one of the respondents' counsel availability, as demonstrated by emails between the parties.
- [42] With respect to the claimant's wilful refusal to follow orders, I note that the respondents' main concern relates to issues related to having Mr. Mostafa conduct certain research on the Iranian properties. I conclude that, while the claimant was ultimately directed by a consent order issued after a judicial case conference to sign an authorization for Mr. Mostafa to undertake this work, her failure to provide this authorization appears linked to a difference in the parties' faith regarding whether Mr. Mostafa was able to properly undertake this task. In addition, as reflected in the claimant's recent affidavit, the claimant states that she relied upon Mr. Mostafa to provide her with the authorization needed so he could search for the assets. He did not specify requiring any other documents or information, and there may well be some confusion between him and the claimant as to what was needed to comply with what was agreed to in the consent order. I am, however, not in a position to determine any of that as part of this application.

- [43] I do not find there to be any prima facie egregious omissions in the claimant's financial statements, which I understand have been updated, and, once again, I am not in a position to determine if that is the case at this stage. That is a matter for trial.
- [44] My main concern at this point is the health and age of the elderly respondents. However, when this factor is weighed with all other considerations, on balance, I conclude that an adjournment should be granted to ensure there will remain a fair trial on the merits of the action as per the test in Navarro.

CONCLUSION

- [45] In brief, the matter is not ready for trial. Before there can be a fair trial on the merits, a number of important steps in the litigation process need to be completed. While both respondents say they are ready for trial, there appear to be outstanding issues with respect to various aspects of the properties as well as the need for updated appraisals. Important examinations for discovery have not been completed. The time allotted for trial has been significantly underestimated.
- [46] Importantly, I have found that that these deficiencies are not wholly attributable to the claimant. Further, I have not found evidence of a wilful and deliberate plan by the claimant to delay or sabotage these proceedings by dismissing and seeking new counsel for trial.
- [47] Accordingly, I grant this adjournment, albeit with some reluctance due to the age and health of the respondents. I do so on the basis that the trial adjourned on a peremptory basis to 2023, or the earliest available date for a 20-day trial.

"Burke J."

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