

CANADA / JUDGMENT

Son v. Kim

2024 BCSC 1011

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1011 Son v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Son v. Kim,

2024 BCSC 1011

Date: 20240611

Docket: E230824

Registry: Vancouver

Between:

Miyoung Son

Claimant

And

Myungjong Kim and Seung Geun Kim

Respondents

Before: The Honourable Justice Chan

Reasons for Judgment

Counsel for Claimant:

L. Yeom

Counsel for Respondent, Myungjong Kim:

S.Y.S. Kim

Counsel for the Respondent,

Seung Geun Kim:

J.A. Janzen

Place and Date of Hearing:

Vancouver, B.C.

May 16, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 11, 2024

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Introduction

- [1] Myungjong Kim ("Mr. Kim Junior") and Seung Geun Kim ("Mr. Kim Senior") are father and son. They bring this application to set aside an asset restraining order obtained in May 2023 by Miyoung Son ("Ms. Son"), the wife of Mr. Kim Junior, in the context of a family law action. Ms. Son and Mr. Kim Junior separated in January 2023.
- [2] Ms. Son filed a notice of family claim in April 2023. She also started an action against Mr. Kim Senior as he is the registered owner of the couple's home. On May 5, 2023, Ms. Son applied in court without notice to the respondents for an order pursuant to s. 91 of the Family Law Act, S.B.C. 2011, c. 25 (FLA) and R. 12-1 and 12-4 of the Supreme Court Family Rules, restraining both respondents' assets. This order was granted on May 5, 2023 (the "Order"). The respondents argue that the Order should be set aside due to non-disclosure of material facts, lack of an undertaking as to damages by Ms. Son and irregularities in how the

supporting affidavit was commissioned.

Factual Background

- [3] Ms. Son filed one affidavit, dated May 4, 2023, in support of her application for the Order ("Son Affidavit No. 1"). I take the following from Son Affidavit No. 1.
- [4] Ms. Son is currently 38 years old and Mr. Kim Junior is 40 years old. The couple married in Seoul, South Korea, in August 2010.
- [5] The couple moved to British Columbia in 2014. Mr. Kim Junior's parents were already residing in the Vancouver area at that time. The couple lived in a residence at 7647 Haszard Street in Burnaby since 2016.
- [6] The couple separated in January 2023. On approximately January 22, 2023, Ms. Son returned to South Korea, intending the visit to be temporary. On March 29, 2023, she filed a notice of family claim, seeking to register a certificate of pending litigation ("CPL") against the Haszard Street home. However, she was not able to register the CPL as the home was registered in the name of Mr. Kim Senior. Another notice of family claim was filed in April 2023, adding Mr. Kim Senior as a party. The CPL was registered.
- [7] Ms. Son deposed that soon after returning to South Korea, Mr. Kim Junior wrote her a long message asking her to return to clean out her belongings from the home. Mr. Kim Senior also wrote her on January 25, 2023, advising her she has two weeks to pack up her belongings from the home.
- [8] Ms. Son deposed that the home was purchased without a mortgage and was registered in the name of Mr. Kim Junior as of February 10, 2023. She deposed the money used to purchase the home came from Mr. Kim Senior and his wife. She deposed the money was provided as a gift. However, Ms. Son and Mr. Kim Junior paid the expenses for the home, including maintenance of the swimming pool and repair of a side gate. Ms. Son deposed Mr. Kim Junior transferred the home to his father in February 2023 without her knowledge for \$1. The home had a value in excess of \$2.5 million.
- [9] Ms. Son deposed that Mr. Kim Junior's income largely consisted of dividends he received from Young Jin Rental Business Ltd., a company of which Mr. Kim Senior is a director. She deposed that she has concerns that family assets including the home, various bank accounts and two vehicles would be transferred by Mr. Kim Junior to hide them from her. She deposed that she is fearful that Mr. Kim Junior will dispose of assets once her lawyer sends him a copy of her notice of application for the asset restraining order.
- [10] The Order was granted on the basis of Son Affidavit No. 1. The Order contains the following provisions:

3. Pursuant to s. 91 of the Family Law Act, and Rules 12-1 and 12-4 of the Supreme Court Family Rules, the Respondent, Myungjong Kim, be restrained and enjoined transferring, selling, assigning, converting, disposing of, encumbering or in any similar manner dealing with any family property, or of any property in which the Claimant has, or may have, an interest, pending final determination of this proceeding without the consent in writing of the Claimant, or further court order, and in particular, without restricting the generality of the foregoing, the following property:
 - a. Real properties in the name of the Respondent, Myungjong Kim, over which he has a legal or beneficial interest;
 - b. Household goods currently located at 7647 Haszard Street, Burnaby, British Columbia;
 - c. All bank accounts, savings, investments, stock options, mutual funds RRSPs, pensions, annuities, shares and other financial instruments, held in the personal name of the Respondent, Myungjong Kim, or held jointly by him and another party, including but not limited to HSBC bank account with number ending in 0150, and RBC direct investing account with number ending in 0548; and
 - d. Any and all property held by the Respondent, Myungjong Kim, or over which any of property in which he has a legal or beneficial interest, within or outside of British Columbia, which include but are not limited to:
 - i. The personal property of the Respondent, Myungjong Kim;
 - ii. All vehicles registered to the Respondent, Myungjong Kim, including 2017 Honda Accord and 2014 BMW x5;
 - iii. Shares in any corporation in the name of the Respondent, Myungjong Kim, including his shares with the business, Young Jin Rental Business Ltd.; and
 - iv. Any other asset worldwide registered to the Respondent, Myungjong Kim, or held by the Respondent, Myungjong Kim during the relationship or yet to be vested in him.
4. Pursuant to Rules 12-1 and 12-4 of the Supreme Court Family Rules, the Respondent, Seung Geun Kim, be restrained and enjoined from transferring, selling, assigning, converting, disposing of, encumbering or in any similar manner dealing with any family property, any property in which the Respondent, Myungjong, has beneficial interest, or of any property in which the Claimant has, or may have, an interest, within or outside of British Columbia, pending final determination of this proceeding without the consent in writing of the Claimant, or further court order, and in particular, without restricting the generality of the foregoing, the Respondent, Seung Geun, be restrained and enjoined from:
 - a. altering of the shareholdings of the company, Young Jin Rental Business Ltd. (the Company);
 - b. the transferring, encumbering, converting, or exchanging into another form any shares of the Respondent, Myungjong, held in the Company;

- c. transferring, encumbering, converting or exchanging into another form any real properties, vehicles, bank accounts, savings, investments, stock options, mutual funds RRSPs, pensions, annuities, shares and other financial instrument, in which the Respondent, Myungjong, or the Claimant holds an interest.
5. Either Respondent is at liberty to apply to set aside the above orders on 3 (three) clear business days' notice;
- [11] However, both respondents argue there are material facts which were not before the Court on May 5, 2023. The couple's lifestyle was almost completely financed by Mr. Kim Senior. After coming to Canada in 2014, Mr. Kim Junior did not work until 2018. From 2018 to 2022, Mr. Kim Junior earned approximately \$50,000 a year as a machinist. Ms. Son never earned an income in Canada. The couple lived in three homes, all purchased by Mr. Kim Senior. The couple never made any financial contributions to the purchase of any of the homes, other than Mr. Kim Junior using money provided by his father to maintain the properties. Mr. Kim Junior had obtained a mortgage on the Haszard Street property so he can have access to extra funds. He did not advise his father about the mortgage. After separation, Ms. Son approached Mr. Kim Senior and asked how much money he could give her. This request angered Mr. Kim Senior and he sent his son a demand letter, requesting that title to Haszard Street be transferred to his name. Mr. Kim Junior complied. It was at this time that Mr. Kim Senior learned about the mortgage that his son had registered against the property.
- [12] Mr. Kim Senior deposed that the couple was aware the houses they lived in all belonged to Mr. Kim Senior, and he was simply allowing them to live there rent-free. When the houses were sold, the proceeds were provided to Mr. Kim Senior. He never intended to provide the couple the Haszard Street property as a gift. His view is the home was his investment. At times during the couple's relationship, Mr. Kim Senior loaned money to his son, including a loan of \$100,000 in 2017 so Ms. Son can obtain her landed immigrant status and a loan of \$110,000 in 2022 due to the couple having bad credit. With respect to Young Jin Rental Business Ltd., shares of that company were provided to Mr. Kim Junior in 2008, before his marriage to Ms. Son. The company is controlled by two extended families. Mr. Kim Junior has never done any work for the company and does not draw any income from it. Mr. Kim Junior from time to time received dividends income from the company. His company shares are beneficially owned by his father.

Should the Without Notice Order Be Set Aside?

Non-Disclosure of Material Facts

- [13] Applicants on a without notice application must make full and frank disclosure of all material facts. An order will be set aside if there is material misrepresentation or non-disclosure: *Martinuik v. Martinuik*, 2001 BCSC 424 at para. 8, citing *Gulf Islands Navigation Ltd. v. Seafarer' International Union of North America*, 18 D.L.R. (2d) 216, 1959 CanLII 291 (B.C.S.C.).

- [14] However, the fact that a respondent denies, or gives evidence that conflicts with the evidence relied on in support of a without notice application does not mean the applicant misrepresented the facts: *Martinuik* at paras. 11-12.
- [15] A material fact is one that may affect the outcome of the application: *Northwestpharmacy.com Inc. v. Yates*, 2018 BCSC 41 at para. 16, citing *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 37-38.
- [16] Justice Dley set out the relevant principles for consideration on an ex parte application in *Pierce*:
- [36] I would also set the Order aside even without considering the merits of the application because there has been a complete and utter failure by Mr. Pierce to provide full and frank disclosure of all material facts as required on an ex parte application.
- [37] On an ex parte application, the relevant principles include the following:
- 1) the applicant must make full and frank disclosure of all material facts;
 - 2) a material fact is one that may affect the outcome of the application;
 - 3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;
 - 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
 - 5) the extent of the inquiries required depend on the circumstances of the particular case;
 - 6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;
 - 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
 - 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the ex parte hearing;
 - 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and
 - 10) not every omission necessarily results in the order being set aside.

Giocredit Bank Artiengesellschaft Der Sparkassen v. Heidrun Hedwig Bader; Anton Hans Bader and Tomax Enterprises Ltd., (25 June 1998) Vancouver CA 021618 (B.C.C.A.) at para. 45; *Procon Mining and Tunneling Ltd. et al. v. McNeil, Bonnar et al.*, 2007 BCSC 454 at paras. 10 - 11.

- [38] An ex parte applicant must be "fastidious" in disclosing all important aspects of the evidence and pointing out what defenses may be available to the opposing party. An applicant is not to exaggerate or misrepresent the strength of the claim being advanced. The duty of disclosure is onerous, particularly when seeking the draconian nature of Anton Piller relief: *Green v. Jernigan*, 2003 BCSC 1097, at paras. 24-25.
- [17] In my view, there were material facts which were not disclosed in the application for the Order. Family property is defined in the FLA as all real and personal property on the date of separation owned by at least one spouse or in which at least one spouse beneficially has an interest: s. 84 of FLA. Exceptions to this rule are set out in s. 85 of the FLA. Ms. Son did not disclose that almost all the couple's money came from Mr. Kim Senior, and that proceeds of the sales of past homes they had lived in were given to Mr. Kim Senior, and did not go to the couple. That fact does not support her assertion that the home was gifted to them, and seriously undermines her assertion that it is family property. In her response to this application to set aside the Order, Ms. Son does not deny that the couple was funded by Mr. Kim Senior. Ms. Son's position is that the funds to purchase the homes and other funds provided to them were gifts and not loans.
- [18] There is a rebuttable presumption that funds advanced by a parent to an adult child is held in trust for the parent: *Pecore v. Pecore*, 2007 SCC 17 at para. 36. While the Haszard Street home may meet the definition of family property as it was in the name of Mr. Kim Junior on the date of separation, evidence that the funds used to purchase the home came from Mr. Kim Senior is material, as there may be a rebuttable presumption that Mr. Kim Junior held the home in trust for his father. Ms. Son did not disclose that throughout their relationship, the couple's lifestyle was funded by Mr. Kim Senior. That fact may materially affect whether any of their assets are family property. It can be inferred that Ms. Son was aware that it was Mr. Kim Senior who funded the couple's lifestyle, as after separation, she went to him to ask for money. In my view, if the funds to purchase any of the couple's assets came from Mr. Kim Senior, and not Mr. Kim Junior, that may be pivotal in the determination of what are family assets. It was material for the Court to know the source of the funds used to acquire the assets, as the Court needs to determine if the presumption of trust has been displaced.
- [19] It was also not disclosed that shares held by Mr. Kim Junior in Young Jin Rental Business Ltd. were provided to him in 2008, before marriage. That fact may make those shares excluded property.

Lack of Undertaking as to Damages

- [20] Rules 12-1(5) and 12-4(5) of the Supreme Court Family Rules state that unless the court otherwise orders, an order for preservation of property or a pre-trial injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages. No such undertaking was contained in Son Affidavit No. 1.

- [21] The transcript of the hearing does not contain any discussion by the Court of the need for an undertaking. It cannot be said that the Court made an order that an undertaking is not required. Further, this was not a limited asset restraining order that may qualify for an exception to the undertaking rule. The Order that was granted was broad, and covered a large array of real properties, vehicles, bank accounts, stock options, other financial instruments and interests in property worldwide.

Irregularities in the Commission of the Affidavit

- [22] The respondents take issue with how the Son Affidavit No. 1 was commissioned.
- [23] Ms. Son was in South Korea at the time. It appears her counsel in Vancouver emailed her a copy of the affidavit. Her counsel on May 3, 2023, translated the affidavit into Korean while both parties met on Zoom. Her counsel then signed the endorsement of interpreter, and provided Ms. Son a copy of the affidavit with her endorsement. That endorsement indicates it was signed on May 4, 2023, when it should have read May 3, 2023. Ms. Son then took that copy to a commissioner for taking affidavits in Korea and swore or affirmed it in the presence of that commissioner on May 4, 2023. There was never an occasion where Ms. Son, her counsel in Vancouver, and the commissioner were together, either online or in person. That is, when the commissioner in Korea took Ms. Son's affidavit, the commissioner had no way of knowing if the affidavit was the same one that was translated by her counsel in Vancouver. That is, the commissioner had no way of confirming before the oath or affirmation was administered if Ms. Son understood the contents of the affidavit.
- [24] The respondents argue these irregularities around the circumstances of the commission of the affidavit ought to have been made clear to the Court at the hearing. Further, the respondents argue these irregularities go to the heart of the administration of justice, as the Court needs to be able to rely on affidavits as having been properly sworn with affiants having full understanding of their contents. For this reason, the respondents argue the Son Affidavit No. 1 ought to be struck from the record.
- [25] Counsel for Ms. Son argued that the irregularities only pertained to the procedure of how the affidavit was sworn, and do not call into question the contents of the affidavit. She urges the Court to consider the urgency of the matter to Ms. Son at the time, and the fact that Ms. Son was in South Korea, making the process more complicated.
- [26] It appears the procedure adopted by counsel for Ms. Son was a hybrid procedure. The Son Affidavit No. 1 was sworn in person by Ms. Son in South Korea. It contains a notarial certificate on the cover page, and indicates it was sworn before Kim Jung Ki, a commissioner for taking affidavits for Republic of Korea. There appears to be a seal affixed. As such, it appears to comply with s. 63(f) of the Evidence Act, R.S.B.C. 1996, c. 124, making the affidavit valid in British Columbia.

- [27] However, the translation of the affidavit was done remotely, with Ms. Son in Korea and her counsel in Vancouver. During the pandemic, the Court had in effect COVID-19 Notice No. 2, dated March 27, 2020, which allowed for the swearing of affidavits using video technology, where the affiant and the commissioner were not physically present in the same place. Ms. Son and her counsel however did not use this method for commissioning her affidavit.
- [28] Where an affidavit needs to be translated, R. 22-2(7) of the Supreme Court Civil Rules and R. 10-4(7) of the Supreme Court Family Rules require the affidavit be interpreted to the person swearing to it by a competent interpreter, who must certify on the affidavit by endorsement that he or she has interpreted the affidavit to the affiant. The endorsement is to appear on the affidavit, and must be signed by the interpreter in the presence of the commissioner and the affiant. This element is lacking in the Son Affidavit No. 1. It is clear on the evidence the interpretation was done at a different time and place (remotely with her counsel in Vancouver) from the swearing of her affidavit (in person before a notary public in Korea). While arguably the method used to translate the affidavit, via Zoom, may have been acceptable, what was not acceptable was the two-stage process--having the affidavit translated remotely first, then having the affidavit commissioned in person. I would note it is also generally not best practice for counsel to act as the translator, as counsel risks becoming a witness should issues with respect to the adequacy of the translation arise.
- [29] In my view, I share the concerns of the respondents. With respect, this is not a minor procedural irregularity. Courts routinely accept affidavits, and courts must be able to rely on the oaths of affiants. Ensuring the procedural requirements are followed is important to the functioning of the justice system. However, in this case, Ms. Son has filed a subsequent affidavit, sworn in person in Vancouver, confirming that the Son Affidavit No. 1 was not altered between the time her counsel translated it to her and when it was sworn. In these circumstances, I will not strike Son Affidavit No. 1.

Conclusion on Set Aside Application

- [30] Due to material non-disclosure and the lack of an undertaking as to damages, the Order must be set aside. If the evidence about the couple's reliance on Mr. Kim Senior's money was brought forth, it may have affected the outcome of the hearing. Further, the Order granted is overbroad, and does not allow the respondents access to their funds to meet reasonable living expenses. This is another reason the Order cannot stand.

De Novo Application

- [31] When an application is made to set aside an ex parte order, whether or not there was a material misrepresentation, the hearing is de novo as to the law and facts of the original application: *Kliman v. Kinrade*, 2022 BCSC 1193 at para. 42.
- [32] Ms. Son argues she continues to meet the test for an asset restraining order. She cites *Yang v. Williams*, 2019 BCSC 156 for the test to be met:

[21] As authority for her application for a restraining order against Fred and Annabell, the claimant relies on Rule 12-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 which reads:

(1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a family law case or as to which a question may arise

[22] The test under this rule is essentially the same as that for an injunction, as follows:

- a) Is there a fair or serious question to be tried, on the evidence and not just on the pleadings, as to the plaintiff's entitlement to a proprietary interest in property?
- b) Is there a fair or serious question to be tried, on the evidence and not just on the pleadings, that the property is threatened with disposition or transfer outside the jurisdiction?
- c) Does the balance of convenience favour the granting of the injunction?

(Chahal v. Chahal, 2016 BCSC 1814 at para. 25)

[23] The burden is on the respondents to establish that the claimant's claim will not be defeated if the Welcher property is disposed of: Steinberg v. Miller, 2013 BCSC 2443 at para. 26.

[33] With respect to the first part of the test, a serious question to be tried, I will assume this part of the test has been met. Ms. Son and Mr. Kim Junior have been married for 14 years and she is alleging that she is entitled to family property upon separation and divorce.

[34] However, on the second part of the test, I do not find there is evidence that the home or other assets are threatened with disposition or transfer outside the jurisdiction. There is currently a CPL registered against the Haszard Street home. In my view, the main alleged family asset is sufficiently protected from disposition without the need for an asset restraining order. With respect to shares in the company, there is little evidence those shares are family property, as the shares were provided to Mr. Kim Junior before marriage. With respect to the other assets such as bank accounts, the evidence is weak that they are family property. Further, I find the evidence does not support that these alleged family assets are threatened with disposition.

[35] With respect to the balance of convenience, I find it does not favour the granting of an asset restraining order. There is a CPL registered against the main alleged family asset already. On the evidence at this time, Ms. Son's potential entitlement to any other asset is weak. Further, Ms. Son has still not provided an undertaking as to damages. On the evidence, Ms. Son has few assets to secure the respondent's potential damages.

Conclusion

[36] The asset restraining order of May 5, 2023 is set aside.

[37] If the parties wish to make submissions on costs, they are to make their submissions in writing, up to five pages. These written submissions should be filed with the registry within 30 days of this ruling, and provided to the other parties on the same day they are filed. If no submissions are made within 30 days, then the respondents will be awarded the costs of this application in the cause.

"Chan J."

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