

CANADA / JUDGMENT

Taherkhani v. Este

2021 BCSC 1746

COURT

Supreme Court of British Columbia

DECIDED

16 July 2021

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2021 BCSC 1746 Taherkhani v. Este

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taherkhani v. Este,

2021 BCSC 1746

Date: 20210716

Docket: E131501

Registry: Vancouver

Between:

Mehran Taherkhani

Claimant

And

Rosa Donna Este also known as Rosa Donna Taherkhani also known as Donna Este

Respondent

Docket: S151066

Registry: Vancouver

Between:

Rosa Donna Este

Plaintiff

And

Mina Esteghamat-Ardakani also known as Mina Estegahamat-Ardakani,

Francis Amir Este and Craig Blackburn

Defendants

And

0831295 BC Ltd.

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Giaschi

Oral Ruling Re Applications for Production of Documents and Information and Other Relief

In Chambers

(via videoconference)

Counsel for Mehran Taherkhani:

J. Shewfelt

Counsel for Francis Amir Este and Mina Esteghamat-Ardakani in their personal capacities and as trustees of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1, and Vitality Holdings Corp.:

K. Thompson

Appearing on her own behalf:

Donna Este

Place and Date of Hearing:

Vancouver, B.C.

April 6-9 and July 12-16, 2021

Place and Date of Ruling:

Vancouver, B.C.

July 16, 2021

[1] THE COURT: I will deliver my oral reasons now. I reserve the right to amend these reasons for grammar and clarity and to include full citations and quotations, but the result will not change as a sequence of any such amendments. To avoid confusion and for purposes of clarity, I will refer to the parties by their first names or in the case of Rosa Donna Este by her middle name. I mean no disrespect in so doing.

Applications

- [2] Mina and Francis make two applications. The first is pursuant to a notice of application filed January 22, 2021, in action E131501 (the "Family Action"), in which they request an order that Donna and Mehran produce all communications and documents in their possession addressing the sending, receiving, or filing of materials from action S151066 (the "Civil Action"). The second application is also brought by Mina and Francis pursuant to a notice of application filed June 28, 2021, in the Civil Action. In the second application they request the following orders:
- a) Leave to cross-examine Donna on her affidavit DE3B made January 25, 2021;
 - b) That Donna produce:
 - i. all communications with legal advisors since the commencement of the Civil Action in relation to the implied undertaking ; and
 - ii. the file materials of Dr. Scott relating to the letter dated February 27, 2020, and any documents in his, Dr. Scott's, possession which are relevant to matters of substance in that letter or his credibility.
 - c) That Donna's affidavits identified as DE2, DE3A, and DE6 filed in the Family Action and DE6 filed in the Civil Action be struck in their entirety.
- [3] In both applications an order is also sought adjourning applications that are outstanding and that relate to alleged breaches of the implied undertaking and waiver of the implied undertaking, pending the cross-examination and production of the requested communications and documents.
- [4] Before addressing the particular orders requested in the applications, I note that Rules 10-3(4) and (7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 and Rules 22-1(4) and (7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 expressly provide that the court may order an affiant to attend for cross-examination and may give directions for the discovery, inspection, or production of documents.

Production of Communications and Documents

- [5] The test for production of documents for the purpose of a chambers application is set out in *Wilkie Garment Company Ltd. v. Interlock Holdings Ltd.*, 1993 CanLII 2163 (B.C.S.C.), which was recognized as the leading case by Chief Justice Bauman in *Galloway v. A.B.*, 2020 BCCA 106, at paras. 49 to 50:
- [49] These cases do not discuss the independent authority for the court to require the production of documents on an interlocutory application given by Rule 22-1(4)(c).

[50] That rule (as A.B. does point out) was considered by Master Grist in *Wilkie Garment Company Ltd. v. Interlock Holdings Ltd.*, 1993 CanLII 2163 (BCSC), [1993] B.C.J. No. 2604. This has been recognized as the "leading case" on the rule: *Royal Bank of Canada v. British Columbia*, 2016 BCSC 2195 at para. 46. Master Grist (as he then was) said this at para. 9 of Rule 52(8)(c), now Rule 22-1(4)(c):

Rule 52(8)(c) has particular relevance to this application. The Rule is discretionary and should be applied weighing the degree of relevance to the issues arising on the application and factors of comparative prejudice. In the context of the continuing proceedings under the Mareva injunction, the issues arising would seem to be the likelihood of removal of exigible assets from the jurisdiction, the sufficiency of security and the prejudice to the defendant through the freezing of assets. In my view full disclosure of material is necessary to permit the full cross-examination ordered by the Chief Justice. The material can be made available with little prejudice to the defendants and accordingly the order should be allowed.

[6] As indicated, in determining whether to order production of documents for an application, the court is required to weigh the degree of relevance of the materials and the prejudice.

[7] Mr. Shewfelt submits that production of the requested documents is not necessary as it could not affect the outcome of the implied undertaking applications. I do not agree. The pending applications will concern whether there has been a breach or breaches of the implied undertaking and, if breaches are found, the appropriate remedy. In my view the requested documents are relevant as they go both to what breaches occurred and what is the appropriate remedy.

[8] Mr. Shewfelt further submits that litigation privilege attaches to the requested communications. I do not agree.

[9] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para. 44, Justice Fish acknowledged that litigation privilege does not protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct.

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.

[10] Similarly, at para. 45, he states that disclosure of documents protected by litigation privilege could be ordered upon a prima facie showing of actual misconduct by the other party in relation to the proceedings with respect to which the litigation privilege is claimed.

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a prima facie showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

- [11] In my view, the exceptions outlined in paras. 44 and 45 of Blank apply here.
- [12] The communications and documents requested are relevant to the question of whether there has been a breach of the implied undertaking and to the nature and extent of the breach or breaches. Moreover, there is no prejudice to either Donna or Mehran in requiring them to provide such communications and documents.
- [13] Accordingly, I order that Donna and Mehran are to produce all communications and documents in their possession that relate to the sending, receiving, or filing of materials from the Civil Action.
- [14] During submissions counsel for Mina and Francis requested that the order for production of documents and communications should include not only personal communications between Donna and Mehran but also communications involving Mehran's legal counsel.
- [15] In my view, an order for communications with legal counsel is one that ought to have been expressly and specifically set out in the notice of application. Given the way in which the notice of application was drafted, it cannot be necessarily inferred or implied that an order for production of communications between Donna and Mehran includes communications with solicitors. Communications with legal counsel could involve important questions of solicitor/client privilege, and if that privilege is to be attacked, then it is incumbent on the applicant to make that clear in the notice of application. The applicants have made such a clear request in the notice of application filed June 28, 2021, in the Civil Action in relation to communications between Donna and her legal advisors, but the notice of application filed January 20, 2021, in the Family Action makes no such clear request in relation to Mehran.
- [16] Accordingly, the order for production is granted but only in relation to communications and documents exchanged between Mehran and Donna. To be clear, communications involving Mehran's legal counsel are exempt.
- [17] The documents and communications I have ordered produced shall be produced by August 13, 2021.

Production of Dr. Scott Materials

- [18] I now address the request that Donna produce the file materials of Dr. Scott relating to the letter dated February 27, 2020, and "any documents in his possession which are relevant to matters of substance in that letter or his credibility".

- [19] The February 27, 2020 letter of Dr. Scott is attached as Exhibit A to Donna's affidavit DE3A made January 14, 2021. The letter purports to address Donna's medical and psychological status. It contains the opinion of Dr. Scott that during the period from March 2013 to mid 2014, Donna's reasoning and decision-making abilities were impaired. He states her mental disabilities explain how she could have made false representations at the time of her divorce.
- [20] There is no need to require production of documents from Dr. Scott. First, the February 27, 2020 letter is obviously inadmissible. It is expert evidence, and Dr. Scott has not been qualified as an expert. Second, the letter is not in the least relevant to the issues to be determined upon return of the various applications related to breaches of the implied undertaking. His letter addresses the period March 2013 to mid 2014. That period predated the commencement of the Civil Action and obviously predates the alleged breaches of the implied undertaking. Whatever Donna's mental state was in 2013 and 2014, it is completely irrelevant to the issues to be decided on the implied undertaking applications.
- [21] Hence, I decline to order that Dr. Scott's file materials be produced.

Production of Communications with Legal Advisors

- [22] Mina and Francis request that Donna produce all communications with legal advisors since the commencement of the Civil Action in relation to the implied undertaking. In my view, they are entitled to such an order. Although communications with legal counsel are privileged and not normally subject to production, that privilege can be waived, and any such waiver can be implied: *Brown v. Clark Wilson LLP*, 2014 BCCA 185, at paras. 29 to 30.

- [23] In affidavit DE3B at para. 4, Donna deposes:

At all relevant times I have been a lay litigant and self-represented. At times I provided the evidence from the civil action in the family action. I did not know I was or may be doing something improper. Any breach of undertaking by me was not deliberate or malicious.

- [24] Donna has specifically deposed that she did not know she was doing anything improper when using documents and transcripts from the Civil Action in the Family Action. By necessary implication, she is saying that she was not told by her legal advisors or anyone else of the existence of the implied undertaking or its nature and scope. This puts in issue the advice, if any, that she received from her legal counsel relating to the implied undertaking and amounts to an implied waiver of the legal privilege that otherwise attaches to any such advice.
- [25] Accordingly, I order that Donna is to produce any communications from her previous legal counsel that relates to the implied undertaking. In the event that any particular communication includes matters that go beyond the implied undertaking, then the correspondence shall be appropriately redacted. Only the portion addressing the implied undertaking needs to be produced.

[26] Those documents shall be produced by August 13, 2021.

Cross-Examination

[27] Mina and Francis also request an order permitting a cross-examination of Donna on her affidavit DE3B. As addressed above, in that affidavit Donna deposes to being unaware of the implied undertaking and to not breaching it deliberately. By so deposing, she has put in issue the extent of her knowledge of the implied undertaking and her motivation.

[28] The affidavit also raises possible issues of credibility. There is evidence before me that suggests, contrary to what is deposed to in affidavit DE3B, that Donna may have had at least some knowledge of the nature and scope of the implied undertaking rule. In particular, in the early stages of the Civil Action it appears that the rule was relied upon to prevent disclosure of documents from the Family Action. There are several letters from Donna's then counsel addressing the implied undertaking.

[29] In *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882, at para. 6, Justice Fenlon notes that cross-examination on an affidavit is a discretionary order, and she sets out the three factors to be considered in the exercise of that discretion. The factors are: first, whether there are material facts in issue; second, whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and third, whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

[6] Rule 22-1(4)(a) provides that the Court may order cross-examination of an affiant in a chambers proceeding. It is, thus, a discretionary order. That discretion must, of course, be exercised judicially. In *Greenwood v. Greenwood*, [1999] B.C.J. No. 846 at para. 15 (S.C.), Mr. Justice Scarth summarized three factors to be considered in the exercise of the court's discretion: first, whether there are material facts in issue; second, whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and third, whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

[30] In my opinion, all three factors are present in this case. First, there are material facts in issue; the extent of Donna's knowledge of the implied undertaking. Second, a cross-examination could affect the outcome of the implied undertaking motions. Specifically, although it appears that there is no serious issue as to whether the implied undertaking was breached, whether that breach was intentional or deliberate or with knowledge could affect the remedy or penalty. Finally, I am satisfied that a cross-examination could serve a useful purpose in eliciting relevant evidence.

[31] I therefore order that there is to be a cross-examination of Donna on her affidavit DE3B. That cross-examination is to be conducted by August 20, 2021.

Striking of Affidavits

- [32] Before addressing the submissions of Mina and Francis in relation to the striking of affidavits, it is worthwhile to consider generally what the rules require in terms of affidavits.
- [33] Affidavits are governed by Rule 22(2) of the Supreme Court Civil Rules and 10-4 of the Supreme Court Family Rules. In summary, these rules require that:
- a) an affidavit be expressed in first person;
 - b) the affidavit be divided into numbered paragraphs;
 - c) the affidavit be sworn or affirmed;
 - d) each exhibit referred to in an affidavit must be identified by including a certificate on the exhibit signed by the person swearing or affirming the affidavit;
 - e) exhibit pages be numbered sequentially; and
 - f) the affidavit must contain only what the affiant would be permitted to state in evidence at trial unless the affidavit evidence is stated to be based on information and belief and the source of the information and belief is given. However, affidavits on information and belief are not permissible on applications for a final order or for a variation, suspension, or termination of a final order.
- [34] The rules also provide that a defective affidavit, one that is irregular in its form, may be used with the leave of the court.
- [35] The rules relating to affidavit evidence serve at least two purposes. First, they ensure that decisions are made on the basis of proper evidence. This is why the type of evidence allowed in affidavits is limited. A second purpose is to ensure that applications can be addressed in an efficient manner. Efficiency is the reason that affidavits are required to have numbered paragraphs, separately identified exhibits, and page numbering of exhibits. Efficiency is also the reason the courts have said that affidavits should be confined to the facts.
- [36] I note that inadmissible evidence in affidavits can be struck under Rule 9-5(1) or ignored by the decision maker: *Chamberlain v. School District #36 (Surrey)*, 1998 CanLII 6723 (B.C.S.C.), rev'd on other grounds, 2000 BCCA 519.
- [37] Mina and Francis make a compelling argument for the striking of affidavits DE2, DE3A, and DE6, filed in the Family Action, and the second copy of DE6 filed in the Civil Action. These affidavits are all similarly drafted. They contain an introductory paragraph in which Donna asserts she has personal knowledge of the matters deposed to or, where the matters are said to be made on information and belief, that she verily believes such matters are true. The second paragraph of the affidavit then references a single attachment as Exhibit A. However, the attached exhibit is not a single document but a bundle of documents, sometimes several hundred pages in length.

[38] Affidavit DE6 filed from the Civil Action on March 24, 2021, contains no breakdown or descriptions of the various documents that make up Exhibit A. Paragraph 2 of that affidavit merely states:

Attached hereto and marked as Exhibit A are true copies of my documents, filed material, and communications between counsel and parties in the actions.

[39] The attached Exhibit A is approximately 100 pages in length.

[40] Affidavit DE3A filed in the Family Action is somewhat more detailed than DE6 filed in the Civil Action. At para. 2 of affidavit DE3A, there are subparagraphs with page references and descriptions. At para. 2(a) she describes pages 1 to 3 as a physician's letter dated February 27, 2020. At para. 2(b), she describes pages 6 through 15 as "statements of fact filed on January 8, 2021". However, in fact what is at pages 6 to 15 is a part of a third-party notice filed in the Chilliwack Action. At para. 2(c), she then states that pages 4 through 74 of Exhibit A are copies of documents, emails, and communications between myself, counsel for other parties, and evidence in the civil proceeding. There is an obvious overlap in the page references between paragraphs 2(b) and 2(c), which is a cause of confusion. More importantly, the documents that are, in fact, at those page references do not contain any emails or communications between the parties. Rather they include pleadings from various actions and parts of transcripts from various proceedings that are all attached with no apparent organization. At times, it is impossible for me to tell what a particular document actually is.

[41] Affidavit DE2, made January 10, 2019, in the Civil Action and the copy of DE6 made March 26, 2021, filed in the Family Action contain much more informative subparagraphs with page references and more detailed descriptions of the various documents comprising Exhibit A. However, there are still deficiencies, including only parts of some documents are included, the documents are in no apparent order, single documents are broken apart and scattered haphazardly throughout the exhibit, and despite the descriptions, it is not always possible to tell what a particular document actually is.

[42] In my view, the impugned affidavits do not comply with the rules. The rules require that documents be attached as separate exhibits to an affidavit and properly identified and authenticated by the affiant. It is not sufficient to merely attach a bundle of disconnected documents as a single exhibit. Moreover, the deficiency is not overcome by including subparagraphs with page references and descriptions of the documents at those pages.

[43] I appreciate that attaching documents as separate exhibits is slightly more inconvenient than including all documents in one exhibit. However, this is done so that each document or exhibit can be individually identified and authenticated.

- [44] I am advised by Donna that one reason she includes all documents as a single exhibit is because she is charged by a notary for each exhibit stamp. She says it is too expensive to mark each document individually. I sympathize with her, but the cost of having the affidavits notarized cannot justify the failure to follow the rules or the inefficiency that results to the court and the parties when the rules are not followed.
- [45] Accordingly, it is my view that the objections to the various affidavits are sound. However, I am not convinced that it is necessary to strike the affidavits.
- [46] With respect to affidavit DE2, that affidavit was made more than two years ago. It is a bit late in the day for Mina and Francis to now apply for it to be struck. The application to strike it should have been brought long ago, not on the eve of the hearing of the applications which have long been scheduled.
- [47] With respect to the other affidavits, they are disorganized, but for the most part, they are not so disorganized that the parties cannot determine what the documents attached are. They are not incomprehensible. Moreover, given that most of the attachments are either transcripts of proceedings, documents filed in the proceedings, or communications between the parties, the authenticity of the documents cannot be seriously in issue.
- [48] I also take into account that Ms. Este is a self-represented litigant. She does not have any legal training and is doing the best she can without representation. This is not to say that as a self-represented litigant she can ignore the rules. However, her situation must be taken into account.
- [49] I therefore decline to strike the various affidavits and exercise my discretion to grant leave to Donna to rely on the defective affidavits.
- [50] However, the February 27, 2020 letter of Dr. Scott attached to affidavit DE3A made January 14, 2021, is struck as being inadmissible and irrelevant.
- [51] Moreover, I wish to stress that going forward it is expected that Donna will discontinue the practice of filing multiple documents as one exhibit. There are many examples in these proceedings of how an affidavit attaching exhibits should be prepared. I have in mind the various affidavits of Tsiu and Florio that have been filed. By way of guidance, I also provide a few general rules:
- a) When transcripts of proceedings are attached as an exhibit, they should be identified in the body of the affidavit with the relevant information such as the action the proceedings relate to, the nature of the proceeding, the presider at the proceeding, and the date. The cover pages of the transcript should also always be provided;
 - b) Documents should not generally be broken apart with the separate pages included as separate exhibits. The relevant document should be identified in a single paragraph of the affidavit and attached once as a single exhibit;

- c) Most documents should be included in their entirety and not just excerpts. However, for lengthy documents such as some transcripts, it may be appropriate to include only parts of the document intended to be relied upon; and
- d) Finally, the exhibits should be organized in some fashion. When there is no obvious preferable organization method, attaching exhibits in chronological order will usually suffice.

Adjournment

- [52] Finally, Mina and Francis request an adjournment of the outstanding implied undertaking motions. I would have been inclined to grant the application for an adjournment given that I have ordered production of documents and cross-examination. However, an adjournment is necessary in any event as there is not sufficient time remaining to hear the implied undertaking applications.
- [53] The outstanding applications are therefore adjourned to a date to be set with scheduling. The adjourned applications are:
- a) Mehran's application filed November 28, 2018, in action E131501;
 - b) Mina and Francis' application filed January 22, 2021, in action S151066;
 - c) Donna's application filed January 25, 2021, in action S151066; and
 - d) Donna's application filed March 25, 2021, in action E131501.
- [54] In regards to setting a new date for the hearing of the applications, I suggest that the parties arrange with scheduling for them to be heard the week of September 20, 2021, which is already reserved for a trial of the Family Action, which trial I understand is going to be adjourned.
- [55] The dates I have set for production of documents and cross-examination can be varied by the parties with agreement.

(DISCUSSION RE COSTS)

- [56] The costs of these applications will be addressed after the implied undertaking applications are heard.

"Giaschi, J"

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