

CANADA / JUDGMENT

Wang v. Shi

2020 BCSC 1774

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1774 Wang v. Shi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wang v. Shi,

2020 BCSC 1774

Date: 20201016

Docket: S202346

Registry: Vancouver

Between:

Jing Wang

Plaintiff

And

Dongmei Shi, Guangyao Hu and Kerrisdale Laser & Skin Care Ltd.

Defendants

Before: The Honourable Mr. Justice Veenstra

Oral Ruling Re Application to Set Aside a Consent Order

Counsel for the Plaintiff:

D. Chen

Counsel for the Defendants:

D.L. Cayley

Place and Date of Hearing:

Vancouver, B.C.

October 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 16, 2020

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[1] THE COURT: The defendants seek orders:

- a) setting aside a consent order made April 23, 2020 (the "Consent Order"), and a certificate of judgment granted May 1, 2020 in respect thereof, and
- b) cancelling the registration of the judgment filed in the Land Title Office against title to the home of the personal defendants.

In the alternative, if the primary order sought cannot be granted on a summary basis, the defendants seek an order staying execution on the Consent Order pending determination of the application.

- [2] The defendants allege that the consent was obtained through duress. They also argue that the plaintiff, having accepted the defendants' repudiation of the agreement underlying the Consent Order, is no longer entitled to enforce the judgment and rather is left to a remedy in damages.

Background Facts

- [3] The following summarizes the facts as they appear from the application materials and as they have been represented to me by counsel. The facts may not be complete and it may be that additional or even different facts are established in future proceedings in this matter.

- [4] The defendant Kerrisdale Laser & Skin Care Ltd. ("KLSC") operates a spa and nail salon in the Kerrisdale neighbourhood of Vancouver. The defendant Shi is the sole director and shareholder of KLSC. She and her husband, the defendant Hu, own a home in Delta as joint tenants (the "Family Home").
- [5] The plaintiff is currently living in China but was interested in investing in a business in British Columbia. One Marisa Wang, who I am told is not related to the plaintiff, appears to have acted as an intermediary to help negotiate terms by which the plaintiff agreed to purchase the shares of KLSC.
- [6] A written share transfer agreement ("STA") was prepared in the Chinese language and was signed by the plaintiff and by Ms. Shi. The STA was dated September 25, 2019. It provided for a purchase price of \$650,000 to be paid in four installments with the final installment due December 31, 2019. It also provided that if the plaintiff did not make all payments and a ten-day grace period had passed, then Ms. Shi could dispose of KLSC at her own discretion, retain all moneys paid to that point by the plaintiff until KLSC had been disposed of and then return to the plaintiff only the excess funds after payment to Ms. Shi of the original \$650,000 purchase price, interest and any expenses incurred in disposing of the company.
- [7] A supplementary agreement was entered into on about November 12, 2019, by which it was agreed that the third installment would be paid on November 15, 2019, and on that date the plaintiff or her representative could begin managing KLSC. However, the shares would only be transferred on payment of the purchase price in full. The third installment was paid on November 15, 2019, bringing the total amount paid to \$450,000. On that date, one Lily Wang, also apparently unrelated to the plaintiff, began to manage KLSC's business.
- [8] I am told that the \$450,000 was paid by the plaintiff to Mr. Hu in China in Chinese currency and deposited into a bank account there.
- [9] In December 2019, the plaintiff advised that she wished to terminate the STA. Ms. Shi advised that she would insist on strict compliance with the STA. The plaintiff did not pay the final installment by the December 31, 2019 deadline or within the further ten-day grace period, which expired on January 10, 2020.
- [10] On March 2, 2020, the plaintiff commenced the present action against Ms. Shi, Mr. Hu and KLSC. The action alleged that there had been pre-contractual misrepresentations as to the amount of prepaid credits from KLSC customers. It also alleged an oral collateral contract that Ms. Shi would provide two weeks of training to Lily Wang. It alleged that the STA had been lawfully terminated as a result of the misrepresentation and the breach of the collateral contract. It claimed for return of the funds paid to Mr. Hu based on unjust enrichment.

- [11] The claim further alleged that the money paid to Mr. Hu in China had been "used in whole or in part for the maintenance and/or improvement of" the Family Home. On that basis, the pleading claimed a constructive trust in the Family Home. The plaintiff obtained a certificate of pending litigation in respect of that claim, which it registered against title to the Family Home (the "First CPL").
- [12] There followed some negotiations, and on April 23, 2020, a Consent Order was made providing that:
1. The defendants shall pay to the plaintiffs [sic] \$300,000.00 according to the following payment schedule:
 - a. \$100,000.00 on or before May 30, 2020;
 - b. \$100,000.00 on or before July 30, 2020;
 - c. \$100,000.00 on or before September 30, 2020.
 2. Upon full satisfaction of the payments referred to in paragraph 1 of this order, the within proceeding shall be dismissed without costs to any party; and
 3. Such dismissal shall be for all purposes of the same force and effect as if judgment had been pronounced after a trial of the action on its merits.
- [13] The plaintiff obtained a certificate of judgment from the court registry and registered that certificate of judgment against title to the Family Home on May 1, 2020. On May 13, 2020, the First CPL was discharged from title to the Family Home.
- [14] The defendants did not make the first payment that was due on May 30, 2020.
- [15] The plaintiff responded by registering a new certificate of pending litigation against title to the Family Home on June 10, 2020 (the "Second CPL"). The notice of civil claim attached to the Second CPL was the original notice of civil claim in this action which had been filed on March 2, 2020. Thus, the claim to land underlying the Second CPL is the claim to a constructive trust in the Family Home arising from the unjust enrichment alleged in the notice of civil claim. I am advised that the Second CPL was eventually discharged from title, although that occurred after the present application was filed.
- [16] The plaintiff also issued subpoenas to debtor to each of the defendants in early August 2020.
- [17] Title to the family home is subject to two mortgages, including a second mortgage to a private lender (the "Second Mortgage"). The Second Mortgage came due on August 1, 2020. The current lender has advised that it will not renew the Second Mortgage. Mr. Hu and Ms. Shi have obtained a letter of commitment from a new private lender, but that letter of commitment includes a requirement that both the judgment and the Second CPL be removed from title prior to funding. The current mortgagee under the Second Mortgage has made demand and is threatening foreclosure proceedings if the Second Mortgage is not repaid or refinanced.

Contested Facts

[18] Ms. Shi gave evidence that shortly after midnight on February 14, 2020, she received a WeChat message from Marisa Wang asking if they could meet. Later that day Marisa Wang sent her a series of WeChat messages including:

- a) a text file setting out the name, address and telephone number for Mr. Hu;
- b) a text file setting out the Chinese national identification number of Mr. Hu and Ms. Shi;
- c) two surreptitious photographs of Ms. Shi's father taken outside his apartment in China;
- d) a text file setting out the address of Ms. Shi's father in China;
- e) a text file setting out addresses for Ms. Shi's brother and his wife in China; and
- f) a text file setting out various information about Ms. Shi's late mother, her brother and his immediate family, including children.

[19] Marisa Wang subsequently sent a further WeChat message stating:

I meant well in wishing everybody well. I also hope that Mr. Hu will understand!

[20] Ms. Shi's evidence is that:

Later that day, Marisa called me and told me that the plaintiff's husband had provided her with the information and photos . She told me that I must agree to return \$300,000.00 to the plaintiff. Marisa told me that if I did not agree, the plaintiff's husband, Lei Su, had strong connections with Chinese triads - which are organized crime groups in China - and that these triad members would hurt my father, brother and other family members, and that the plaintiff and her husband would ruin my reputation, my husband's reputation, and my business, which I understood to mean [KLSC].

Ms. Shi gave evidence that these threats were repeated numerous times by Marisa Wang.

[21] Ms. Shi stated that she did not have \$300,000 available to repay the plaintiff, so she asked her husband to provide her with funds. She said that she initially declined to tell her husband about the threats. Her husband initially refused to provide the funds and told her that because the plaintiff had breached the STA, she should maintain her position.

[22] Ms. Shi stated that later in March, her father told her that he had been approached by someone in China, and her father wanted to know if she was doing all right. Ms. Shi took this contact as a further implicit threat.

[23] Ms. Shi said that she became more desperate to accept the plaintiff's demands and ultimately persuaded her husband to agree. She continued to keep the threats to herself and not tell her husband. Mr. Hu arranged with a lawyer to sign the Consent Order on their behalf.

- [24] Ms. Shi said that in June she discovered that the plaintiff had posted a disparaging article on the internet regarding their dispute, including excerpts from the notice of civil claim. At that point she told her husband about the threats. Mr. Hu was adamant that they would not make any payments.
- [25] The plaintiff obtained an affidavit from Marisa Wang denying all of these allegations. She says that the information in the February 14 WeChat messages was sent at the request of the plaintiff's husband simply to "confirm its accuracy" and as part of due diligence being conducted by the plaintiff's husband in contemplation of bringing a lawsuit in China. She said that Ms. Shi responded to the WeChat messages with picture icons that expressed gratitude
- [26] An affidavit from the plaintiff's husband, Mr. Su, stated:
9. On or about January 24th, 2020, I tried looking for Ms. Shi, because I thought that Ms. Shi may return to China for Chinese New Year and I wanted to speak to her directly. However, to my knowledge, Ms. Shi did not return to China for Chinese New Year.
 10. After some efforts, I found her husband, Mr. Hu's Weibo photo on the Internet. Through that, I found his Chinese ID card photo from the police station of his hometown, and Ms. Shi's Chinese ID photo from a hotel they stayed at.
 11. With the newly discovered information about Ms. Shi, I asked my friend to go to Ms. Shi's hometown to hopefully find out when Ms. Shi will return to China. At that time, my friend found an old man at Ms. Shi's address but had difficulties communicating with this old man. The neighbours said that the old man has a hearing impairment.
 12. Since my friend was not able to confirm with the old man whether he is related to Ms. Shi, my friend took photos of the old man and left.
- ...
15. I had no intention of making any threats to any parties involved. My intention behind sending the information I had gathered was merely to confirm whether the information was accurate so I can bring a lawsuit and serve any necessary documents per the rules of the court. In order to avoid any further misunderstanding, I did not make any further inquiries as to the parties' identities again.

Issues

- [27] The issues on this application are:
- a) Should the Consent Order be set aside as a result of the plaintiff's filing of the Second CPL?
 - b) Is the court able to determine the allegations of duress, and if so, should the Consent Order be set aside on that basis?

- c) If the court is not able to decide these issues on the present application, should there be a stay of execution?

Analysis

[28] It was common ground that the court has inherent jurisdiction to set aside a consent order. As set out in *Racz v. Mission (District)* (1988), 22 B.C.L.R. (2d) 70 (C.A.) at 72:

An order entered by consent is in effect an agreement of compromise and such an order may be set aside on any ground which would invalidate a contract. A court in addition has inherent jurisdiction to set aside a judgment or order:

- d) which was obtained by consent on a ground which would invalidate a compromise not contained in a judgment or order.

While it may at one point have been required that a separate action be commenced to set aside a final order, the court in *Racz* (at 73) concluded that it was within the inherent jurisdiction of the court to grant that relief on a motion in the original proceeding.

[29] I conclude that I have the jurisdiction to grant an order setting aside the Consent Order should I conclude that a legal basis to do so has been made out.

Filing of the Second CPL

[30] The defendants allege that their failure to make the first payment under the Consent Order on May 30, 2020, was a repudiation of the Consent Order and the underlying settlement agreement. Upon that happening, the plaintiff had the option to either accept the repudiation, bringing the settlement agreement to an end, or affirm the settlement agreement and insist on its performance. The filing of the Second CPL, they say, was inconsistent with enforcing the settlement agreement. It indicated an intention to return to pursuit of the original claims, including recovery of the full \$450,000 and a constructive trust over the Family Home.

[31] Citing *Dosanjh v. Liang*, 2015 BCCA 18, at paras. 33 to 37, the defendants argue that this was an irrevocable election, and its legal result is that the Consent Order must be set aside so that the parties can pursue their original positions in the litigation. Inherent in the defendants' position is the assertion that by virtue of an accepted repudiation, the settlement agreement is rescinded ab initio and that the parties are returned to their original dispute in this action with respect to the STA.

[32] The plaintiff takes a different view of the law, relying on *Vanvic Enterprises Ltd. v. Mack* (1985), 66 B.C.L.R. 211 (C.A.), at 214-216, where Hinkson J.A. cited at length from the judgment of Lord Wilberforce in *Johnson v. Agnew*, [1980] A.C. 367, [1979] 2 W.L.R. 487, [1979] 1 All E.R. 883, at 889-890:

At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" it [sic] quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission *ab initio*". I need only quote one passage to establish these propositions. In *Heyman v. Darwins Ltd.* (1942) 1 All E.R. 337 at 360-361, (1942) A.C. 356 at 399., Lord Porter said:

"To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."

[33] Hinkson J.A. quoted further from *Johnson v. Agnew* at 892:

This is however the first time that this House has had to consider the right of an innocent party to a contract for the sale of land to damages on the contract being put an end to by accepted repudiation and I think that we have the duty to take a fresh look. I should certainly be reluctant to invite your Lordships to endorse a line of authority so weak and unconvincing in principle. Fortunately there is support for a more attractive and logical approach from another bastion of the common law whose courts have adopted a robust attitude, I quote first from a judgment of Dixon J, which with typical clarity sets out the principle, this, be it observed, in a case concerned with a contract for the sale of land:

"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."

[34] For purposes of analysis of the legal effect of an accepted repudiation, I will assume that the filing of the Second CPL constituted an acceptance, and assume for purposes of analysis that the plaintiff is the innocent party dealing with a wrongful repudiation.

- [35] If that is the case, then the principles in Johnson make it clear that the acceptance of the repudiation would not return the parties to their pre-settlement positions such that this action would then proceed to a determination on the merits. Rather, the effect of an accepted repudiation would be that the plaintiff is absolved from further performance of its obligations and entitled to claim damages in respect of any unperformed obligations of the defendants. Rights and obligations, like the right to receive \$300,000 from the defendants, would continue unaffected.
- [36] These principles are normally applied in executory contracts, like contracts for the purchase and sale of land where a series of future obligations remain to be performed. The acceptance of a repudiation in those cases generally leads to an assessment of damages based on the net impact of those unperformed obligations on the non-repudiating party.
- [37] In the present case, the only unperformed obligation is the defendants' obligation to pay \$300,000. There are no damages to be assessed in respect of contractual terms that go beyond the payment of money. In light of that, I see no purpose in setting aside the Consent Order only to immediately re-issue judgment in favour of the plaintiff.
- [38] As a result, if the defendants wish to attack and set aside the underlying settlement agreement, they will have to do so on the merits.

Duress

- [39] The parties argued at length the inferences that can be drawn from the affidavits and the documentary exhibits. The defendants suggested that the WeChat messages make sense only in light of the threats described by Ms. Shi and thus are consistent with her evidence.
- [40] The plaintiff argues that the settlement on its face is a compromise of a disputed claim. It provides for payment of \$300,000 in the face of a claim for \$450,000, which the plaintiff says is an obviously reasonable compromise. The plaintiff alleges that some of the other WeChat messages show reactions on the part of the defendants that are inconsistent with parties under duress. The plaintiff argues that the information her husband obtained in respect of the defendants' various relatives are simply reflective of due diligence in advance of the commencement of litigation.
- [41] I am unable to say, having reviewed the written record, and in the absence of cross-examination, that the position of one side or the other is established on a balance of probabilities. While this is not a summary trial application, I would take notice of summary trial principles in evaluating the case. This is a case with diametrically opposed versions of the facts in which the documentary evidence is insufficient to allow the court to weigh the evidence and prefer one side over the other.
- [42] I see three possible options to proceed.

- a) The first would be, in light of the discussion in *Racz*, to conclude that the defendants is required to start a new action seeking to set aside the Consent Order. *Racz* concluded that that is no longer required as a matter of course. I conclude given the mandate of our Supreme Court Civil Rules to find speedy, efficient, just and proportionate means to resolve cases, that the commencement of a new action should not be required. It is appropriate, in my view, that in the circumstances of this case the validity of the Consent Order be determined within the scope of this proceeding.
- b) The second option would be to order a trial of an issue pursuant to Rule 22-1(7)(d), which would permit orders for discovery to take place in advance of what should be a relatively brief trial of the issues.
- c) The third option would be to order cross-examination of the various affiants pursuant to Rule 22-1(4)(a). I would think that given the nature of the contested issues, that cross-examination should be before the court rather than before a court reporter.

I will invite the parties at the conclusion of these reasons to make submissions as to which of the alternatives they see as the most appropriate in the circumstances.

Stay of Execution

[43] If I am unable to order that the Consent Order be set aside on this motion, the defendants seek an order pursuant to Rule 13-2(31) staying execution on the Consent Order until their claim of duress has been determined. I was referred to *Concord Pacific Acquisitions Inc. v Oei*, 2020 BCSC 832, in which Voith J. reviewed at length the various expressions of the test for a stay of execution, ultimately citing *Nie v. Kwang Chyun Enterprise Ltd.*, 2017 BCSC 1941, at para. 62 to conclude that the applicable test is as follows:

First, the court must be satisfied that there is a serious question to be tried. Second, the court must determine whether irreparable harm would be suffered if the application were refused. Third, the court weighs the balance of convenience to determine which of the parties would suffer greater harm from the granting or refusing of the stay pending a decision on the merits.

[44] For the reasons set out above, I conclude that there is a serious question to be tried. With respect to irreparable harm, the defendants point to the potential for them to lose the Family Home. I can accept that the prospect of losing a family home through execution, and what the defendants say and may ultimately establish is a judgment obtained through duress, can in the circumstances of this case constitute irreparable harm.

[45] With respect to balance of convenience, I note that at para. 30 of *Concord Pacific*, Voith J. notes that in the context of a stay pending an appeal, the court will ensure that the position of a successful litigant is protected. In my view, the registration of the judgment against title to the Family Home provides that protection to the plaintiff.

- [46] I have been provided no evidence suggesting any lack of equity in the Family Home. I recognize that the registration of the judgment against title is causing difficulties to the defendants in renewing the Second Mortgage. However, in weighing the balance of convenience, I must consider both the possibility that the defendants will succeed in setting aside the judgment, and the possibility that the plaintiff will succeed in maintaining the judgment. I do not think it would be reasonable in these circumstances to order cancellation of the registration of the judgment.
- [47] In light, however, of the registration of that judgment and in the absence of any lack of equity in the Family Home, I will grant a time-limited stay of any further steps to execute on the judgment. It is important that having obtained such a stay the defendants move rapidly to bring this matter back before the court for a determination of their claim of duress. I would grant that stay of further actions to execute on the judgment for a period ending April 30, 2021.
- [48] When this application was heard, counsel canvassed briefly the possible courses of action under Rule 22-1, but it would be appropriate to receive further submissions in light of what I have said, and in light of the stay of execution, on the appropriate means to resolve this matter.

[SUBMISSIONS]

- [49] What I will do is direct that there be a trial of the duress issue, and the application to set aside the Consent Order on the basis of duress will be referred to the trial list pursuant to Rule 22-1(7)(d). For the purposes of that trial:
- a) the notice of application and the application response will stand as the pleadings;
 - b) the parties will produce lists of documents within three weeks;
 - c) the parties will complete examinations for discovery within eight weeks;
 - d) the trial will proceed under the fast track rule; and
 - e) the trial should be scheduled for the earliest available three-day time.

[SUBMISSIONS]

- [50] The examinations for discovery of the plaintiff may be by video and no conduct money will be required in that event.

[SUBMISSIONS]

- [51] Mr. Cayley, I think you're going to have to go through the usual procedure should you wish to do pre-trial examinations of other witnesses.

[SUBMISSIONS]

- [52] Costs in the cause.

"Veenstra J."

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