

CANADA / JUDGMENT

Xiao v. Fan

2020 BCSC 69

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 69 Xiao v. Fan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xiao v. Fan,

2020 BCSC 69

Date: 20200120

Docket: S164615

Registry: Vancouver

Between:

Wei Xiao

and

Long Teng Technology Development Ltd.

Plaintiffs

And

Qian Fan also known as Sophie Qian Fan also known as Sophie Fan,

Canadian Top Consultant Ltd.,

Ping Wang also known as Peter Ping Wang also known as Peter Wang,

and Ding Mi

Defendants

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for Plaintiffs:

Song Xue

Counsel for Defendants:

David Gibbons

Henry Yu (A/S)

Place and Date of Hearing:

Vancouver, B.C.

November 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2020

I. introduction

- [1] The defendants apply for summary judgement under Rule 9-6 to strike two paragraphs of the Amended Notice of Civil Claim (the "Claim") that seek to impose certificates of pending litigation ("CPL") on two Richmond properties (the "Properties"): one owned by the defendant Ding Mi and the other owned by the defendant Sophie Fan.
- [2] The present action arises from alleged consulting and management agreements whereby the defendants Ms Fan and Mr Wang would assist the personal plaintiff in his immigration application to Canada. The plaintiffs allege that in the course of this relationship, the defendants improperly used the plaintiffs' funds for their own benefit, including, specifically, to "purchase, maintain and/or improve" the two Properties.
- [3] The defendants' application is limited to Rule 9-6. As set out below, the present circumstances are unusual in that no CPLs are presently registered on the title. The defendants accordingly do not and cannot bring an application under s. 256 of the Land Title Act, RSBC 1996, c 250 to discharge the CPLs on the basis that the CPLs are causing hardship and inconvenience.
- [4] The plaintiffs cross-apply to compel disclosure of banking and other records of the defendants. Specifically, they seek bank statements showing the defendants' receipt of money from the plaintiffs. They also seek financial records of the corporate defendant Canadian Top Consultant Ltd. ("Top Ltd") showing the payout of funds received from Mr Xiao.

II. facts

The underlying dispute

- [5] The following overview of the facts is largely summarized from the allegations in the pleadings, with reference to the affidavits filed for this application. These allegations are, of course, unproven and should not be regarded as decided by the Court.
- [6] The plaintiff is a businessman. He is the sole shareholder and director of the corporate plaintiff Long Teng Technology Development Ltd ("Long Ltd").
- [7] Mr Xiao is a Chinese national. He wished to apply for immigration to Canada.
- [8] The defendant Ms Fan was the sole director and chief executive officer of Top Ltd. In her affidavit, Ms Fan deposes that Top Ltd "ceased to carry on business in 2013."
- [9] The plaintiffs allege that Ms Fan fraudulently or negligently represented to Mr Xiao that Top Ltd could assist Mr Xiao in his immigration application, and that Top Ltd was certified by the Immigration Consultants of Canada Regulatory Council ("ICCRC") to provide those services.
- [10] The parties agree that in March 2013, Mr Xiao retained Top Ltd to advise him with respect to his immigration application.
- [11] The plaintiffs allege that Ms Fan advised Mr Xiao that he would have to make an investment under the British Columbia Provincial Nominee Program. Ms Fan also advised that Mr Xiao should hire a person to manage the required investment, and proposed the defendant Peter Wang for this role. In her affidavit, Ms Fan describes Mr Wang as her "business partner."
- [12] To that end, Mr Xiao and Mr Wang entered into a management agreement dated March 12, 2013. The management agreement, attached to Mr Xiao's affidavit, and signed by both Mr Wang and Mr Xiao, states that Mr Xiao "entrusts [Mr Wang] to act as his agent for business investments in the province of BC, with full authority to communicate with relevant government departments, institutions, lawyers, accountants, businesses, etc., and to obtain their specialized services. [Mr Wang] guarantees to complete the BC investment project for Mr Xiao".
- [13] In his counterclaim, Mr Wang sues Mr Xiao for failure to perform his obligations under the management agreement, including reimbursement of certain expenses.
- [14] As set out below, in his brief affidavit, Mr Wang does not address his actions and duties under the management agreement.
- [15] The Claim alleges that in March 2013, Mr Wang incorporated Long Ltd for the purpose of making and managing the required investment.
- [16] Long Ltd and Mr Xiao held bank accounts at CIBC. Ms Fan was authorized to access and manage the CIBC accounts, and made deposits and withdrawals into and out of these accounts. In her affidavit, Ms Fan refers to both herself and Mr Wang making payments out of the Long Ltd bank account.

- [17] Mr Xiao advanced various funds for deposit into the Long Ltd bank account. On March 8, 2013 Mr Xiao paid \$29,670 to Top Ltd, of which \$20,000 represented a retainer fee and the remainder reimbursements for Top Ltd's payment of hotel fees and other expenses for Mr Xiao's Canadian visit. On March 13, Mr Xiao deposited \$349,900 into the CIBC account as the fund for making the required investment and paying the operating expenses of Long Ltd.
- [18] Mr Xiao indicated that he wished to purchase a property for the purpose of making the required investment. He wound up purchasing a commercial property in Coquitlam owned by Mr Wang's wife, the co-defendant Ms Mi. In his affidavit, Mr Xiao claims that neither Mr Wang nor Ms Fan told him that the property suggested for purchase was in fact owned by Mr Wang's wife.
- [19] The purchase price was \$326,000. Mr Xiao complains that Ms Fan and Mr Wang had represented to him that the purchase price reflected the fair market value of the Coquitlam Property, but that it in fact exceeded it by approximately \$150,000. The attached BC Assessment Roll Report for the Property confirms the disparity between the assessed value and the purchase price. He also complains that the Coquitlam Property did not fulfil the required investment under the program, contrary to the reassurances of Ms Fan and Mr Wang.
- [20] For their part, Ms Fan and Mr Wang say that the purchase price was close to Mr Xiao's initial offer, and that they had clearly stated to him that it would not fulfil the required investment.
- [21] Mr Xiao used the Coquitlam Property as a rental property. Mr Xiao says that Ms Fan and Mr Wang managed that property on his behalf from 2013 to 2015. Mr Xiao alleges that they collected rental payments from tenants in the Coquitlam Property, and that they wrongfully retained those payments for their own use.
- [22] Ms Fan disputes that she was retained as a manager of the Coquitlam Property, but she says that she "worked very hard to market the Coquitlam Property" from 2013 to 2015. She acknowledges that she and Mr Wang performed certain transactions with respect to the Coquitlam Property, including the collection of rent and payment of expenses, that required depositing and withdrawing funds to and from the Long Ltd CIBC account. She says that she and Mr Wang never received any payments from Mr Xiao for these services.
- [23] Ms Fan also deposes that she contributed her own funds to renovate and market the Coquitlam Property, and that she withdrew funds from the Long Ltd bank account to reimburse herself for these expenses. Specifically, the parties are in general agreement that Ms Fan withdrew approximately \$19,000 (March 2013) and \$15,000 (July 2013) from the Long Ltd account.

- [24] With respect to the alleged defalcation of rents, Ms Fan deposes that Long Ltd "only received in the range of \$2,000-\$6,400 in rent from the Coquitlam Property." She does not indicate why only an imprecise range is given. As for the modest amount of rent collected in the two-year period, she refers to her efforts to attract renters, as well as to a rent cheque bouncing in May 2013, and some renovations from April to July 2013, but no more.
- [25] Mr Wang's affidavit is silent with respect to his involvement with the management of the Coquitlam Property but his counterclaim refers to the "considerable amount of time [Mr Wang and Ms Fan] have spent managing the Coquitlam Property" and complains that Mr Xiao has failed to "fully reimburse them for the personal funds they have used to ensure the maintenance of Long [Ltd] and the Coquitlam Property."
- [26] The relationship between the parties broke down in late 2015 when Mr Xiao did not receive his immigration approval. Mr Xiao claims that the immigration application was at first not submitted and, when it was submitted, that it contained material errors. He pleads that Ms Fan made misrepresentations with respect to the application status.
- [27] Mr Xiao avers that Ms Fan represented to him in 2013 that Top Ltd would be able to conduct the entire application process and had on staff a certified immigration consultant. The consulting agreement with Ms Fan includes a licence number purportedly issued by the "Canadian Immigration Advisers Association" (as translated). The license number belongs to a Hanhui Dai. Ms Dai provides an affidavit denying that she has ever worked with Ms Fan or Top Ltd, or has ever authorized Ms Fan to use her name or licence number for any purpose.
- [28] For her part, Ms Fan deposes that she told Mr Xiao soon after March 2013 that she could not provide consulting services, as she was shutting down her business. Instead, she connected him to a different immigration consultant, Ying Liu, who carried out the application, although she oversaw and assisted in that process.
- [29] Mr Xiao deposes that he does not know Ying Liu, and denies that any such person ever took charge of his immigration application. The ICCRC lists two certified immigration consultants with that name. Both deny working with Top Ltd.[1]

The Claim

- [30] The Claim alleges that the defendants owed the plaintiffs a fiduciary duty to act in their best interests.
- [31] The Claim also alleges that the defendants conspired to defraud the plaintiffs, and made fraudulent misrepresentations to induce Mr Xiao to provide the various funds. It specifically alleges that Ms Fan withdrew unauthorized funds from the Long Ltd bank account, and that Mr Wang and Ms Fan collected and retained rent from the Coquitlam Property for their own use.[2] It alleges that the defendants have been unjustly enriched at the expense of the plaintiffs.

- [32] The Claim also seeks a declaration that the defendants hold the money that they have received from or otherwise obtained from the plaintiffs in trust for the benefit of the plaintiffs. The Claim also seeks an order for an accounting and tracing of those funds, as well as rental funds received from the Coquitlam Property.

The CPL paragraphs

- [33] The impugned paragraphs of the Claim (49 and 50) allege that each of Ms Fan (herself and via Top Ltd) and Ms Mi applied monies that they "received or otherwise obtained" from Mr Xiao or Long Ltd to "purchase, maintain and/or improve" the Properties.
- [34] In response, both Ms Fan and Ms Mi depose broadly that they purchased the Properties with their own funds, and that they have never used any money received from Mr Xiao or Long Ltd to purchase, maintain or improve the Properties.

This proceeding and application

- [35] This action was started on May 24, 2016. Although procedurally it is at a rudimentary phase, it has had a long and active history.

The CPLs

- [36] The plaintiffs filed a CPL against the Fan Property at the same time as they filed the original notice of civil claim. They filed the CPL against the Mi Property on July 4, 2016, when they filed the amended notice of civil claim.
- [37] On March 9, 2017, the defendants successfully applied to this Court to cancel the CPLs on the basis that they did not properly claim an interest in land as required by s. 215 of the Land Title Act.
- [38] The March 2017 application was not brought under the present Rule 9-6 summary judgement application. Nor did the Chambers Judge have the benefit of Mr Xiao's 162-page affidavit that is before the Court in this application, providing evidence of at least some of the allegations in the Claim. The Chambers Judge noted this silence in her reasons: para. 10.
- [39] The plaintiffs successfully appealed the order setting aside the CPLs: *Xiao v. Fan*, 2018 BCCA 143. The Court of Appeal noted that since the March 2017 decision, the extent of the court's jurisdiction to cancel CPLs had been clarified in two appellate decisions: *Bilin v. Sidhu*, 2017 BCCA 429 and *Berthin v. Berthin*, 2018 BCCA 57. Specifically, the Court confirmed that where a defendant alleges there is no bona fide triable issue to support the claim of an interest in land, the proper approach is to first bring an application under Rule 9-6(4) for the summary dismissal of the part of the claim that relates to land. If that application succeeds, the successful party may then apply to cancel the CPL under s. 254 of the Land Title Act: para. 27.

- [40] The Court of Appeal set aside the order of the Chambers Judge, with liberty to the defendants to reapply based upon the clarifications provided in the three decisions. The defendants' present application takes up that invitation.
- [41] After the Court of Appeal decision setting aside the Supreme Court chambers decision setting aside the CPLs, the plaintiffs did not re-file the CPLs against the two Properties. They are content to hold the potential CPLs in abeyance pending resolution of this application.

Documents

- [42] In the Claim, the plaintiffs allege that they have asked the defendants for the corporate and financial records of Long Ltd since March 2016. On August 5, 2016, their counsel reiterated that request. Those records remain unproduced.
- [43] The plaintiffs sought a list of documents as well as dates for examinations for discovery before the defendants brought their application to set aside the CPLs: these requests date back to October 27, 2016. Following the Court of Appeal's reasons, the plaintiffs renewed their demands for discovery.
- [44] The defendants have provided a preliminary list of some 23 documents. The plaintiffs complain that the list fails to provide banking and other records showing the defendants' receipt of funds from the plaintiffs, as well as the use of the Coquitlam Property funds.

III. DISCUSSION AND DECISION

The defendants' summary judgement application

Summary judgment principles

- [45] The defendants bring their application under Rule 9-6, the relevant portions of which are:

Application by answering party

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

- (5) On hearing an application under subrule (2) or (4), the court,
- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

- (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
 - (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.
- [46] In the oft-cited *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, cited in turn by the oft-cited *Drummond v. Moore*, 2012 BCSC 496 at para. 25, Thackray JA set out the preliminary analysis of the sufficiency of the pleadings:
- [10] A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.
- [11] If insufficient material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a bona fide triable issue.
- [12] If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a bona fide triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
- [emphasis in original]
- [47] In her recent decision in *Nextgear Capital Corporation v. Corsa Auto Gallery Ltd.*, 2019 BCSC 1667, Jackson J provides a pithy and helpful summary of summary judgment principles, in the specific context of an application to dismiss pleadings setting out the basis for a CPL:
- [23] On a summary judgment application, the onus is on an applicant to establish that it is "manifestly clear" or "beyond a reasonable doubt" that there is no bona fide triable issue: 4 *Corners Properties Ltd. v. Boffo Developments (Smithe) Ltd.*, 2013 BCSC 1926 at para. 15 [4 *Corners*]. In 4 *Corners*, Justice Savage outlined the purpose of the summary judgment rule as follows:
- [20] The summary judgment rule serves an important purpose. In the civil litigation system, it prevents claims or defences that have no chance of success from proceeding to trial.

- [24] If a defendant is able to satisfy their burden, "the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal": *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 11, cited with approval at para. 21 of 4 Corners.
- [25] In considering whether there is a bona fide issue for trial, the court may review evidence, but must not weigh the evidence: *Tran v. Le*, 2017 BCCA 222 at para. 2; and *Jesson v. Wilkinson*, 2018 BCSC 1921 at para. 17
- [36] A summary judgment motion is to be determined based on the pleadings as framed and the evidence before the court on the application, not based on speculation or submissions about what might be proven if the claim is allowed to proceed: 4 Corners at para. 23, citing *Lameman* at para. 19.
- [48] A respondent to a summary judgement application may also argue that the application is premature as there may exist material evidence that has not yet come to light, but stands a reasonable prospect of emerging in the course of discovery and disclosure. This possibility forms an exception to the general rule that summary judgment applications should be determined on the evidence actually before the court. The purpose of the summary judgment rule "is to prevent claims or defences that have no chance of success from proceeding to trial and not to prevent actions that have some potential of succeeding from developing through the discovery process": *Nextgear* at para. 39. In other words, "there may be circumstances in which an application for summary judgment may be premature, such as where a party has not had an opportunity to develop evidence through the discovery process on issues raised in the pleadings": *Veritas Geophysical (Nigeria) Limited v. Energulf Resources Inc.*, 2010 BCSC 1253 at para. 34.
- [49] The mere fact that the discovery process is not yet complete is not enough in itself to resist summary judgment. Rather, the respondent must articulate "some specificity" for the claim that the discovery process may uncover relevant evidence: *Nextgear* at para. 39. As explained in *Bank of Montreal v. Scotia Capital Inc.*, 2002 NSSC 252 (cited in *Coady v. Burton Canada*, 2012 NSSC 257, which is cited in *Nextgear* at para. 39), there must be "an indication, at least in a very limited way supported by the circumstances, that the discovery, either oral or often more likely of documents, stands a possible opportunity to confirm an allegation" (at para. 23). In other words, the respondent must demonstrate there is a reasonable prospect further discovery will reveal the existence of a triable issue. In these circumstances, a final order of summary judgment is not warranted; there is still a reasonable doubt about whether a triable issue may yet emerge.

Discussion and decision

- [50] As to the first consideration, while greater particularity and clarity, as well as specific pleadings of knowing receipt and knowing assistance, would have been desirable, the plaintiffs have pleaded sufficient facts to support the relevant causes of action alleged: fraudulent misrepresentation, breach of fiduciary duty, and unjust enrichment.

- [51] The plaintiffs have also shown, both through the evidence advanced by the defendants themselves, and in their responsive evidence, that there exist bona fide triable issues.
- [52] Further, and finally, the plaintiffs have shown that it would be premature to dismiss the two CPL paragraphs before document and oral discovery of the defendants.
- [53] Before addressing the specific evidence adduced by both parties on this application, I will set out the overarching reasons for this decision.
- [54] First, without pronouncing on the specific allegation that the defendants owed fiduciary duties to the plaintiffs, or the nature of their business relationships, it is undisputed that Ms Fan and Mr Wang had access to and made use of the Long Ltd bank accounts, and performed business transactions on behalf of the plaintiffs. Apart from any litigation discovery obligations, the plaintiffs are entitled to full access to their own business and banking records generated through the actions of the defendants or in their possession. This principle speaks to both the summary judgment application, as well as the application for documents. There is sufficient specificity to the plaintiffs' argument that the provision of full banking and business records will allow the plaintiffs and the court to assess whether the plaintiffs' funds were used inappropriately.
- [55] Second, with respect to the allegations in the Claim, and to each of the funds in question, the defendants have failed in their primary obligation to prove "beyond a reasonable doubt" that there is no bona fide triable issue, and that the proprietary claims against the two Properties are bound to fail. Specifically, the evidence put forward by the defendants themselves itself raises a triable issue. The plaintiffs' evidence in response is out of necessity limited, given the allegations of fraudulent transactions that would likely be in the exclusive knowledge of the defendants, and which would be likely evidenced by business and banking documents in the exclusive possession of the defendants: documents that the plaintiffs have demanded but have not received.
- [56] In such circumstances, the Court would expect all defendants applying to strike a claim to fully address and refute all of the impugned allegations against them. This is especially so where the business affairs of the defendants are pleaded to be closely related, and which are likely intertwined. Ms Fan and Mr Wang are business partners. Mr Wang and Ms Mi are spouses. Ms Fan controls the corporate defendant. While the Fan affidavits address most of the allegations, the silence of the Wang affidavit with respect to the allegations concerning the Long Ltd bank accounts, the unaccounted rent, the sale of the Coquitlam Property, the management of the Coquitlam Property, and the breaches of fiduciary duty generally is in itself inadequate to satisfy the defendants' evidentiary burden.

- [57] Finally, as recited above, the plaintiffs have provided at least some evidence to support the framework of their claims, including some anomalies in the representations made by the defendants to Mr Xiao. These facts also indicate that there are triable issues or, more precisely, that the defendants have failed to discharge their onus to show that there are no triable issues.
- [58] I will now briefly address Mr Xiao's evidence with respect to the two Properties. I will then turn to the specific funds the Claim alleges the defendants diverted for their own benefit, and certain aspects of the evidence raised by the parties in the application with respect to those matters.

The evidence concerning the use of the funds

- [59] Mr Xiao adduces no evidence that any of the funds specifically flowed to purchase or maintain the Fan or Mi Properties. He relies instead on the evidence before the Court that Ms Fan and Ms Mi have been making mortgage payments on their Properties throughout the relevant period.
- [60] Both Ms Fan and Ms Mi make blanket assertions that the allegations against them are false, and that they have not used monies received or obtained from the plaintiffs to purchase, maintain or improve their Properties. They do not address whether funds were used directly or indirectly to pay the mortgages for the Properties.
- [61] Without discovery, Mr Xiao cannot be expected to provide further evidence in support of his allegations of the defendants' use of the funds. The anomalies in the defendants' evidence, and the plaintiffs' evidence of the foundational facts for the overall claim, nonetheless indicate that there exists a triable issue with respect to the CPL pleadings.
- [62] In this, the present case differs from Nextgear, where the Court struck out the pleadings on which the CPLs were based. There, the plaintiff had only alleged that the defendants had used funds for, specifically, construction and improvements of their property. In contrast to the present case, the Nextgear plaintiff did not plead or argue that the defendants had used those funds to pay for the mortgages on the property or maintain those properties: paras. 33, 42. The Court averted to the plaintiff's ability to apply for leave to amend the Claim to assert that the funds were used to maintain the property: para. 46. In further contrast to the present case, the Nextgear defendants had been cross-examined on their affidavits: para. 30. Unlike the plaintiffs in this case, the Nextgear plaintiff had the opportunity to learn more of and probe the defendants' evidence.

The Immigration Funds

- [63] The parties agree that the plaintiffs paid Top Ltd approximately \$29,000. They differ with respect to how that money was used, and whether its use was authorized.

[64] Ms Fan deposes that none of the Immigration Funds went towards the Properties. She claims to have disbursed these funds, all at Mr Xiao's direction, as follows:

- a) \$9,670 to reimburse Top for Mr Xiao's travel expenses;
- b) \$2,500 to He Mai, a friend of Mr Xiao;
- c) \$2,500 to Hi Jie, another friend of Mr Xiao; and
- d) \$15,000 to retain another immigration consultant, Liu Ying, on behalf of Mr Xiao.

[65] In support of this claim, Ms Fan attaches a receipt for \$15,000, allegedly received from Liu Ying. It bears a signature, but no printed name. There is no other documentary evidence in support of this claimed expenditure.

[66] Mr Xiao further deposes that he never authorized Top or Ms Fan to pay He Mai, nor Hie Jie, whom he claims never to have known.

[67] A triable issue exists with respect to the Immigration Funds, albeit a marginal one at this pre-discovery stage.

The CIBC Withdrawals

[68] Ms Fan admits that she had access to Long Ltd's bank account, but claims she only withdrew funds to make payments as directed by Mr Xiao, to make necessary expenditures for the company, and to reimburse herself for expenses paid on behalf of Long Ltd.

[69] Among other things, she alleges she transferred \$15,000 from Long Ltd's bank account on or about July 11 and 24, 2013 to reimburse herself for the costs of renovating the Coquitlam Property. In support of this Claim, she attaches her personal banking records from 2013.

[70] A triable issue is apparent on the face of the banking records Ms Fan has herself disclosed and attached to her affidavit. Specifically, the records show there is a real possibility that a portion of the funds she withdrew from the Long Ltd (legitimately or otherwise) bank account were put towards the Fan Property. In her affidavit, Ms Fan confirms that she withdrew \$15,000 from the Long Ltd account to reimburse herself for renovations to the Coquitlam Property, and attaches her banking records showing that transfer. Those same banking records show monthly mortgage payments made out of the same account during the same period.

[71] Again, the records disclosed do not provide evidence of whether those payments were authorized or not, or illegitimate or not, but they raise a sufficient triable issue to allow the pleadings to stand. They also, again, indicate that it would be premature to dismiss those pleadings without full disclosure. Ms Fan's evidence fails to prove the absence of such an issue beyond a reasonable doubt.

The Coquitlam Property rent

- [72] Once again, Ms Fan's evidence on its face indicates that there are triable issues with respect to the rental proceeds from the Coquitlam Property. Insofar as she was collecting rent and depositing the rent in the bank account, she ought to have been able to provide a precise figure for those amounts. Instead, she provides only a range.
- [73] Mr Wang is also alleged to have managed the Coquitlam property and used the Long Ltd bank account. Mr Wang's affidavit is brief. He does not address this aspect of the Claim. He does not address any aspect of his alleged management of Mr Xiao's affairs in Canada, his incorporation of Long Ltd on behalf of Mr Xiao, or the bank accounts he allegedly set up for Long Ltd and Mr Xiao. Instead, his affidavit asserts only that the Mi Property was purchased by Ms Mi herself, and that the CPL and lawsuit have caused stress and harm to his professional reputation. The affidavit is largely argumentative and substantially repeats the exact language of his wife's affidavit.
- [74] The defendants have failed to discharge their burden of showing that there is no triable issue with respect to the rents.

The Coquitlam Property sales proceeds

- [75] The applicants have also failed to prove the absence of a triable issue with respect to the allegation that the money transferred to Ms Mi to purchase the Coquitlam property was used to purchase, improve, or maintain the Mi Property.
- [76] Again, this conclusion is based less on the strength of Mr Xiao's case, than on the insufficiency of the evidence adduced by Ms Mi in support of her application.
- [77] Ms Mi deposes that she purchased the Mi Property in 2012, a year before the purchase of the Coquitlam Property. She attaches a land title search from 2016 showing the registration of Ms Mi's title in August 2012. That search also indicates an outstanding mortgage registered on title dated August 1, 2012. She does not address the source of mortgage payments.
- [78] As such, Ms Mi's evidence does not discharge her burden to provide a complete answer to Mr Xiao's allegations, insofar as it leaves open the possibility that misappropriated funds may have been put towards the mortgage on the Mi Property.

Summary

- [79] In summary, I find the defendants have failed to demonstrate the absence of a triable issue "beyond a reasonable doubt". As such, I conclude their application for summary judgment must fail.

The plaintiffs' document application

- [80] The defendants' primary argument against the plaintiffs' document application is that it is overly broad and outside of the scope of production required by Rule 7-1(10).
- [81] The documents sought are relevant to the pleadings and could be used to prove or disprove the material fact of the alleged misdirection of funds. They are properly producible under Rule 7-1(10).
- [82] The plaintiffs have not asked for every banking record of the defendants. They have limited the order sought to money received from the plaintiffs. On the pleadings, the date span for such transfers is neither broad nor ancient: likely only from March 2013 to the end of 2015. The document collection and production process would not be onerous. Finally, as stated above, the majority of the documents sought reflect transactions that were undisputedly carried out by at least Ms Fan and Mr Wang on behalf of the plaintiffs, for which the plaintiffs would be entitled to receive regardless of this litigation.
- [83] The Court grants the orders sought by the plaintiffs in paragraphs 1 and 2 of their notice of application, with the temporal modification sought by the defendants: the documents will be produced within 30 days of the date of this order.

IV. CONCLUSION

- [84] The plaintiffs have been successful in their application, and in responding to the defendants' application.
- [85] Another way in which the 2010 reforms fortified the summary judgment rule was the addition of special costs provisions designed to condemn oppressive misuse of the rule:

Costs consequences

- (7) Subject to subrule (8), if the party applying under subrule (2) or (4) obtains no relief on the application, the court may
- (a) fix the costs of the party responding to the application, and
 - (b) fix the period within which those costs must be paid.

Court may decline to fix costs

- (8) The court may decline to fix and order costs under subrule (7) if the court is satisfied that the application under subrule (2) or (4), although unsuccessful, was nevertheless reasonable.

[86] This case falls under subsection (8). The defendants' application was not unreasonable, particularly given the Claim's serious allegations that cast a shadow over their professional and personal reputations. At the end of the day the allegations may well be found to be baseless, and that while the CPL pleadings were entitled to withstand summary judgment, they ought not to have been registered in the first place.

[87] In such circumstances the words of Verchere J in *Toronto Dominion Bank v Fortin* (1978) 5 BCLR 224 (SC), concerning summary judgment (then Rule 18) costs, speak even more strongly:

[4] There is merit, I think, in the contention that the right to seek the summary disposition of an action should not be discouraged and a degree of support thus emerges for the view that an applicant under R. 18, regardless of whether he is the plaintiff or the defendant in the action, should not be penalized in costs if and when the application fails only because it has been made to appear that there exists an arguable defence, or a claim not totally without merit, as the case may be. An applicant for an order under R. 18 has a burden generally more onerous than that which his opponent is required to carry, and it can, therefore, well be thought, in my opinion, that his task should not be made more difficult by the fear of being mulcted in costs if, without being found at fault, he should fail in the performance of his task.

[5] More important, however, is the consideration that the failure of a motion under R. 18 does not mean that the other side's case will inevitably and ultimately prevail. Hence, it may well be the case that a party who has succeeded on an application under R. 18 fails miserably at the trial; and it may also well be the case that the trial judge, after hearing the evidence and argument in the matter, is compelled to say that the issue relied on was quite without merit. Nevertheless, if that party had been given the costs of the application under R. 18, the other party's ultimate success would be diminished by the amount of those costs and he might well be heard to complain of an element of injustice in that situation.

[88] Costs will be in the cause.

"Crerar J"

[1] While these are in the form of hearsay evidence, such evidence is admissible in response to a summary judgment application to show the unsuitability of that form of dismissal: *Lefebvre v. The Corp. of the District of Maple Ridge*, 2006 BCSC 326 at para. 33, citing *Progressive Construction Ltd. v. Newton* (1980), 25 BCLR 330 (SC).

[2] Paragraph 31(b) of the Claim presumably contains a typographic error, referring to "Xiao" instead of "Fan."

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