

CANADA / JUDGMENT

Xie v. Lai

2020 BCSC 295

COURT

Supreme Court of British Columbia

DECIDED

3 March 2020

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2020 BCSC 295 Xie v. Lai

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xie v. Lai,

2020 BCSC 295

Date: 20200303

Docket: S169261

Registry: Vancouver

Between:

Tonggui Xie, Canphoenix Enterprises Ltd.,

Inspire Group Trites Project Corporation, and

Inspire Group Development Corporation

Plaintiffs

And

Terry Lai a.k.a. Terry Kin Keong Lai, 0999334 B.C. Ltd., 1016138 B.C. Ltd.,

Ng Kam Hai, BH Koh Soong Zarin & Partners, Julie Cheah Yut Sum,

Crystal Yang, Sun & S Contracting Ltd., Soo Kin Teh and

Fraser River Terminal Holdings Inc.

Defendants

Before: Master Dick

Reasons for Judgment

Counsel for the Plaintiffs:

S. Pun

Counsel for the Defendant, 1016138 B.C. Ltd., Fraser River Terminal Holdings Inc.:

D. Fitzpatrick

Place and Dates of Hearing:

Vancouver, B.C.

August 21, 2019

December 11, 2019

January 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2020

APPLICATION

[1] The defendant Fraser River Terminal Holdings Inc. ("FRTH") applies for relief including:

- a) a declaration that Norman Kwan is not adverse in interest to the plaintiffs;
- b) a declaration that Norman Kwan is adverse in interest to FRTH;
- c) an order that FRTH shall be authorized and directed to nominate Soo Kin Teh as representative of FRTH for the purposes of an examination for discovery in this action;
- d) an order that Soo Kin Teh shall be examined by the plaintiffs as a representative of FRTH;
- e) an order that evidence of Norman Kwan is binding only upon him as an individual or as a representative of 1017055 B.C. Ltd. and Kwan Investments Ltd., but not binding on FRTH; and
- f) an order that FRTH shall be entitled to cross examine Norman Kwan and Tony Wen on their affidavits.

[2] In this matter, 1017055 B.C. Ltd., Norman Chu Fai Kwan, CCH Investment (B.C.) Inc. and Zun Yong Wen are represented by Greg Allen. 0999334 B.C. Ltd. and Soo Kin Teh are represented by Michael Morgan. Neither counsel appeared at this application nor filed materials in response.

[3] To avoid confusion, because there are many individuals involved in this case, I will refer to them by their last name only for clarity and intend no disrespect.

BACKGROUND

- [4] This matter involves a joint venture agreement entered into between the plaintiff, Tonggui Xie ("Xie") and the defendant, Terry Lai ("Lai"). Xie invested \$2,000,000 into a joint venture with Lai. The joint venture company acquired a commercial property on Trites Road in Richmond known as the "Trites Lands".
- [5] The funds were advanced by Xie but the terms of the joint venture agreement were not met. The plaintiff and Lai subsequently entered into two settlement agreements, wherein Lai would repay Xie his investment with interest. Lai failed to meet the terms of either agreement.
- [6] The Trites Lands were sold. Lai was a director of the defendant, Inspire Group Trites Project Corporation and the sole director of Inspire Group Development Corporation ("Inspire Group") at the time of the sale. Lai distributed the sales proceeds to various parties including Xie and 0999334 B.C. Ltd. ("099"). On September 29, 2016, Lai was removed as a director and Xie was appointed director of Inspire Group.
- [7] FRTH and its wholly owned subsidiary 1016138 B.C. Ltd. ("138") bought a warehouse in Richmond for \$20,300,000 in November 2014 (the "FRTH Warehouse"). The shareholders of FRTH are 099, CCH Investment (B.C.) Inc. ("CCH") and Kwan Investment Inc. and 1017055 B.C. Ltd. (collectively, "KwanCo").
- [8] 099 owns 70% of the shares in FRTH. Its sole shareholder is Soo Kin Teh ("Teh").
- [9] CCH owns 20% of the shares of FRTH. Its sole shareholder is Tony Wen ("Wen").
- [10] KwanCo owns 10% of the shares of FRTH. Its sole shareholder is Norman Chu Fai Kwan ("Kwan").
- [11] FRTH's directors from November 2014 to December 2, 2016 were Kwan, Wen and Teh. Teh has been FRTH's sole director since December 2, 2016.
- [12] This action was commenced October 6, 2016.
- [13] FRTH and 138 are under court ordered receivership. The FRTH Warehouse was sold by the receiver in 2018 for \$28,500,000. There is \$9,000,000, in trust for distribution. The \$9,000,000 cannot be distributed until Xie's claim is discharged.
- [14] The receiver is D. Manning and Associates. They are represented by Alan Frydenlund. The accountants to FRTH are Manning Elliott LLP.

PARTIES POSITIONS

- [15] The allegations in this action are that the \$1,000,000 advanced by Xie has been misappropriated by Lai and those funds can be traced into the acquisition of the FRTH Warehouse.

- [16] The claims against 099 and Teh are grounded in conspiracy. The pleadings allege that 099 and Teh are the alter egos of Lai. It is alleged that the defendants have conspired to use funds that properly belong to Xie to purchase and maintain the FRTH Warehouse. Xie claims that the defendants hold assets, including the FRTH Warehouse in trust for the benefit of Lai including shares of 099, and the shares in FRTH.
- [17] FRTH denies receiving any monies from Xie that assisted in the acquisition or maintenance of the FRTH Warehouse. Their position is the rents paid the mortgage and expenses.
- [18] Teh and 099 in their response to civil claim, claim monies were loaned to Xie at the request and direction of Lai. They contend that any money that found its way into the accounts constitutes a repayment of that loan.
- [19] Xie seeks to enforce his claims against the FRTH Warehouse. He seeks a declaration that Teh is an alter ego of Lai and that she holds her shares in trust for Lai in at least three companies. It is further alleged that Teh has misappropriated the plaintiffs' funds and been unjustly enriched by those actions. Any share paid to Xie would be removed from FRTH as an asset.
- [20] FRTH's directors as at December 2, 2016 were Wen, Kwan and Teh.

OTHER ACTIONS

- [21] There are other actions relevant to this matter. Kwan and Kwanco have leave to file a petition for a declaration that the affairs of FRTH are conducted in a manner that is oppressive to them. Kwan seeks an order invalidating the resolution passed removing him and Wen as directors and appointing Teh as a director in their place. He seeks substitution of Kwan and Wen as directors with a prohibition against Teh for voting her shares.
- [22] In Supreme Court action number S160980, Kwan seeks further shares of FRTH from Teh or Tehco. He alleges there was an agreement between himself, Teh and Wen that the share distribution would be in accordance with their monetary contributions such that he should have 60% of the shares.
- [23] CCH sought leave to sue Tehco making the same allegations as Kwanco and seeking an order that Tehco holds shares in trust for it.
- [24] Jackiant Ventures Ltd. and 1017161 B.C. Ltd. claim an interest in FRTH under declarations of trust executed by Tehco for \$300,000 and \$730,000, respectively.
- [25] On December 1, 2016, Kwan and Wen authorized the commencement of a Supreme Court action under number S161138, by FRTH against Teh, Lai and Tehco. The following day, their authority as directors was revoked. A response to civil claim was filed by Lawson Lundell LLP on April 21, 2017. No further steps have been taken in the action.

[26] It came to the attention of counsel during the hearing that another action has been filed with related parties. That action is HKY Investment Inc. and Kwan v. Inspire Group Development Corporation et al, Supreme Court action number S1611421. In that action Kwan sues Inspire Group regarding the contributions towards a house on yet another property.

LAW

[27] The plaintiff wishes to examine Kwan as the representative of FRTH. FRTH seeks to disqualify Kwan and nominate replace him with Teh as its representative.

[28] Supreme Court Civil Rules Rule 7-2(5) states:

Unless the court otherwise orders, if a party to be examined for discovery is not an individual,

- (a) the examining party may examine one representative of the party to be examined,
- (b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party, and
- (c) the examining party may examine
 - (i) the representative nominated under paragraph (b), or
 - (ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

ANALYSIS

[29] The plaintiff, Xie, swore an affidavit on November 16, 2019 in support of his application for a Mareva injunction against Lai. In that affidavit Xie deposes that prior to commencing this action, Kwan advised him that Teh is the assistant, girlfriend or mistress of Lai. Kwan also advised him that Teh holds her shares in FRTH in trust for Lai and acts on instructions from Lai with respect to her responsibilities as a director. It was Kwan who advised Xie that the FRTH Warehouse was in the process of being sold.

[30] Kwan swore an affidavit in this matter on or about June 8, 2017, in support of Xie's application to join FRTH in the action and to extend the Mareva order made by Sigurdson J. on November 18, 2016 to 099 and 138. In that affidavit, Kwan deposed that between October 2014 and March 2017 Teh and Lai controlled the accounts of FRTH and exercised unilateral control over the accounts. It was in that time period that the FRTH Warehouse was purchased and maintained until a receiver became involved in 2017. Kelleher J. relied on Kwan's affidavit and made findings against FRTH and indicated he had serious concerns about Teh's credibility. Leave was granted for Xie to join FRTH in this matter and to cross-examine Teh on her affidavits.

- [31] Kwan was at all material times a director of FRTH. He was the single largest investor in FRTH with an investment of \$2,000,000. Kwan has indicated that he did not have control over FRTH's bank accounts nor did he authorize any transactions.
- [32] I understand Xie's position to be that Teh should not be the corporate representative for several reasons, including:
- a) she has been discovered in her personal capacity in this proceeding;
 - b) there are two other orders requiring her to be cross-examined on her affidavits which has not happened;
 - c) she has been found to have taken differing irreconcilable factual positions (credibility issues); and
 - d) she has sworn affidavits to support her accounting and she has not been cross-examined on her affidavit.
- [33] The objective of Xie is to recover funds from the sales proceeds of the FRTH Warehouse thereby reducing amounts available to creditors and the shareholders.
- [34] FRTH's position is that Kwan is not adverse in interest to the plaintiffs and that is a necessary pre-requisite for him to be the representative of FRTH. He has provided an affidavit in support of the plaintiffs' request for a certificate of pending litigation ("CPL") against the FRTH Warehouse. FRTH argues not only did Kwan swear an affidavit in support of the plaintiff in this action which is a relevant consideration on this application, he also provided the necessary information to the plaintiffs that supported the filing of the CPL. Kwan further provided the evidence that FRTH had property that was in the midst of being sold. He willingly provided evidence to support the plaintiffs' case.
- [35] Kwan's information formed part of the basis for Kelleher J. ordering that there be a CPL filed and that Teh be examined on her affidavit. FRTH argues that Teh has since that time provided affidavit material in support of her accounting that includes bank drafts and schedules for the accounting records. This evidence was not before Kelleher J.
- [36] FRTH notes that the plaintiffs have not cross-examined Teh on her affidavits despite being entitled to do so. They further argue the receiver's reports that are in evidence support the reconciliations done by Teh and that there is no evidence from the receiver or the accountants to indicate there has been a misappropriation of any funds.
- [37] FRTH argues that Kwan is in a position of conflict with regard to them as he is hostile to the company. He has been expelled as a director and has sworn materials that support action against the interests of the company. He also has leave to pursue a claim against the company.

DECISION

- [38] The law in this area is clear. The examining party has a prima facie right to examine its chosen representative and that choice is only to be displaced on application to the court. There is discretion in the court to override that right in order to achieve fairness between the parties.
- [39] Both parties accept that Kwan and Teh qualify to be a representative of the company as they both have been directors of FRTH.
- [40] Counsel further agree that before substituting a name for the examining party's chosen representative the court must find the prejudice suffered by the company is greater than the prejudice suffered by the examining party if that party does not have its choice. The examining party's choice may be set aside if overwhelming or significant prejudice is shown. In the absence of overwhelming prejudice the court should defer to the choice of the examining party. *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 339 at para. 46.
- [41] A common ground for substitution is a demonstration of conflict of interest between a chosen representative and the corporate party. As noted in *MacDonald v. Roth*, 2000 BCSC 1670 at para. 37:
- Standing alone, this is not a sufficient ground, but may be taken into consideration by the Court in determining whether the balance of prejudice favours substitution.
- [42] The onus is on FRTH to demonstrate that Kwan is not the appropriate person to be examined on the basis of the balance of prejudice.
- [43] In 2017, Kwan swore an affidavit in support of the plaintiff's position to join FRTH in this action. The outcome of the application was that monies from the sale of the property may be available to the plaintiffs if they are successful in this action. The company wishes to have the CPL lifted so the \$9,000,000, in trust can be distributed to some of the shareholders and creditors. FRTH argues Kwan is in a position of conflict with the company and hostile to their position as he supported the plaintiff's position that allowed the CPL to be registered and enlarge the potential recipients of the funds.
- [44] FRTH submits Kwan is already participating in this matter as a witness for the plaintiffs and as a result Kwan is now adverse in interest to them. They argue that Kwan is not adverse in interest to Xie as matters stand as Kwan has provided evidence to support Xie's position to the detriment of FRTH's interests.
- [45] Kwan has leave to pursue FRTH in another action. FRTH argues it cannot be appropriate that he be adverse to FRTH in the proposed petition yet supportive of FRTH interests in this action.

- [46] If the representative is to be Kwan, FRTH would say he is not adverse in position to the plaintiffs so his transcript cannot be used. He may be a party on the opposite side of the litigation but given his involvement cannot be said to be adverse in interest. Kwan has not remained neutral in this litigation.
- [47] I understand that the plaintiffs have examined Teh in her personal capacity in this matter. Her evidence is that she was the one who handled all the financial transactions for the company. She has given documents and assisted the receiver in doing financial statements, reconciliations, etc. She collected rent, paid expenses, and reconciled contributions to the FRTH Warehouse. She was not involved in the discussions between Lai, Kwan and Chen, nor did she negotiate the creation of FRTH with Wen and Kwan or the investment by others into the land. Kelleher J. has found that there were serious questions about her credibility. She was the person who took funds from FRTH, collected rents from the property and handled the banking activities. She has reviewed and supplied further evidence, including documents to support the tracking of funds related to the FRTH Warehouse.
- [48] Even if Teh is the person with the most relevant evidence relating to these financial transactions, that is only one of the considerations in this matter. The plaintiff is entitled to nominate its choice of representative to be examined on behalf of a corporate opponent. Hostility on the part of that representative does not constitute a complete bar to discovery of that person. As stated in *Anffi Enterprises Ltd. v Kenco Salon Services Ltd.*, 1996 Carswell BC 847 at para. 11:

In my view, evidence of hostility is only one of the factors to be considered. The Court must, for example, give consideration to the fact that the plaintiff is entitled, as a general rule, to examine the employee of the corporation who has personal knowledge of the facts in issue. *Bank of British Columbia v. North Shore Motors Ltd.* (1979), 12 C.P.C. 292 (B.C.S.C.); per Anderson, J.

- [49] Kwan's production will not be of assistance in ascertaining what monies were used to purchase the property or pay ongoing maintenance expenses.
- [50] FRTH is vigorously defending these claims and the allegations made that support the filing of the CPL. Their position is that to ask the defendant to defend the claim with Kwan as its representative significantly prejudices them. Kwan's interests do not align with those of the FRTH as indicated in his sworn testimony and willingness to be a witness for the plaintiffs.
- [51] I am satisfied that the balance of prejudice supports the replacement of Teh for Kwan as FRTH's representative at the examination for discovery. Teh was in control of the company's day to day transactions, at the relevant times. The land in question was purchased two years after the plaintiffs' claim against Lai allegedly arose. Kwan supported FRTH being added as a party in this action by presenting evidence on behalf of Xie and by supplying him with information to support his claim. This is not in FRTH's interest. Kwan also has leave to file a claim against FRTH, putting him in a position of conflict with FRTH. Kwan has willingly provided evidence in support of the plaintiffs' position in this matter already. Having the representative in a position of conflict with the company is a factor in determining

prejudice.

[52] I have carefully considered the balance of prejudice in this matter. I have considered the evidence before me, the thorough arguments presented by both sides, and the authorities. I find that the prejudice to FRTH is significant if Kwan is examined as their corporate representative and outweighs any prejudice to the plaintiff in having Teh examined. I would therefore set aside the appointment of Kwan as representative and direct that Teh be appointed as the representative of FRTH for examination for discovery purposes.

[53] I will adjourn the other aspects of FRTH application, generally.

[54] Costs shall be in the cause unless counsel wishes to speak to the issue.

"Master Dick"

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