
CANADA / JUDGMENT

Xie v. Yuan

2017 BCSC 1766

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1766 Xie v. Yuan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xie v. Yuan,

2017 BCSC 1766

Date: 20170920

Docket: E121223

Registry: Vancouver

Between:

Shuang Xie

Claimant

And

Jun Yuan

Respondent

And

Guirong Xie and Efilcon Consulting Tech Ltd.

Respondents

by Counterclaim

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Counsel for Claimant:

C. Sprole

Counsel for Respondent:

G. Myers

Counsel for Respondents by Counterclaim:

G. Sherman

Place and Date of Hearing:

Vancouver, B.C.

September 12, 2017

Place and Date of Judgment:

Vancouver, B.C.

September 20, 2017

- [1] This is my ruling on the respondent's application to admit into evidence at trial a recording, its transcript and the English translation of that transcript (the "New Evidence"). The recording is of a meeting between the parties and a third party that took place in Beijing before the parties separated. The application was argued at the parties' request during a break in the trial, which is set to continue next week.
- [2] The respondent's position is that the New Evidence is admissible for two reasons. Firstly, the respondent contends that it provides objective and independent evidence about the creation and purpose of an important document, which is a receipt signed by the claimant purporting to indicate that she received just over 1.7 million RMB from the respondent as partial payment of property, including the property in dispute in this case (the "Richmond Property"). Secondly, the respondent argues that the New Evidence demonstrates the parties' intentions about ownership of the Richmond Property.
- [3] The respondent says the New Evidence contradicts the claimant's evidence given during trial. Since the plaintiff has closed her case, the respondent concedes that the admission of the New Evidence would entail the claimant having the right to take the stand again to address the New Evidence. He says that would negate any prejudice arising from the admission of the New Evidence such that the probative value of the evidence outweighs its prejudicial effect.
- [4] The claimant objects to the admission of the New Evidence because she says it does not meet the legal test for late admission of evidence. She also submits admitting the New Evidence will cause her to suffer prejudice that is greater than its probative value.

- [5] There are two issues to decide, which are somewhat interrelated: (i) does the New Evidence meet the legal test for late admission, and (ii) what is the probative value of the evidence?

Late Admission

- [6] The parties agree there is a four-part test to determine whether evidence disclosed late is admissible (*Houston v. Kine*, 2011 BCCA 358, at para. 12:
- a) whether the plaintiff would suffer prejudice if the use of the document was permitted;
 - b) whether there was a reasonable explanation for the failure to disclose the document;
 - c) whether excluding the use of the document would prevent the determination of the relevant issue on its merits; and
 - d) whether, in the circumstances of the case, the ends of justice require that the use of the document be permitted.

Will the claimant suffer prejudice if the use of the New Evidence is permitted?

- [7] The respondent submits any trial prejudice arising from the late admission of the New Evidence will be negated by allowing the claimant to take the stand and speak to the evidence, or by calling the third party on the recording. I note the claimant applied to have that witness testify at trial notwithstanding he was not on her witness list, but the respondent objected and I have already ruled the witness would not testify. The respondent argues the claimant's decision not to list that witness before trial was a choice the claimant must now accept.
- [8] The respondent also submits that even if some prejudice remains from admitting the New Evidence, that prejudice will be effectively abolished by the claimant being able to testify to address the New Evidence.
- [9] I do not agree. Both parties are entitled to shape the case they bring to court in the manner they see fit. The whole purpose of pre-trial disclosure of documents is to avoid "surprises" at trial. Strategic decisions are made based on the pre-trial disclosure by both parties. I agree with the claimant that there is a substantial possibility that had the New Evidence been disclosed prior to trial, it would have impacted how she presented her case. That prejudice cannot be undone by her taking the stand again. The claimant is further prejudiced by the New Evidence because she cannot call the third party witness to testify given I have already ruled that that witness will not testify.
- [10] The respondent also submits prejudice must be judged in the context of the history of this litigation. The respondent alleges the claimant has failed to produce relevant banking documents from China despite repeated requests to do so. His position is that because the claimant bears the burden of proof in this case, she ought not to complain about the admission of evidence that goes to a material point in the face of her alleged non-disclosure.

- [11] However, even if I were to find the claimant lacks candour and failed to disclose relevant documents, that is not part of the legal test. The prejudice is not weighed against the opposing party's conduct; it is weighed against the probative value of the evidence. Moreover, we are mid-trial and I have made no credibility findings. The respondent's allegations about the claimant's lack of candour and failure to disclose are submissions, not facts, at this stage. Even if the respondent could persuade me that the claimant has failed to disclose relevant documents, the potential relief would be adverse factual findings.
- [12] Accordingly, I am satisfied that admitting the New Evidence will cause prejudice to the claimant.

Does the respondent have a reasonable excuse for the failure to disclose the New Evidence?

- [13] The respondent deposes in his supporting evidence why the evidence was not disclosed before trial. He says he forgot that he had kept a number of things relating to the business affairs of the Alar Sugar Factory at his parents' house before coming to Canada. He left China for Canada in 2012 in fear for his safety because of existing or threatened litigation concerning alleged wrong-doing by the parties in receiving "kick backs" from government money given to them as an investment. He cites other difficulties: dealing with different issues in Canada and the U.S., including management of the Richmond Property; failed business investments, including in a seafood store, as well as a lawsuit he has started against a Canadian lawyer relating to one of those investments; and, both U.S. and Canadian immigration complications.
- [14] The respondent claims his son Paul returned to China this past summer to visit the respondent's parents. While there, Paul apparently asked the respondent if there were any family photographs at the parents' home. At that time, the respondent told Paul to search his possessions in his parents' home. In the course of this search, Paul found the "recording pens" and documents, and that is when the respondent claims he remembered about the existence of the New Evidence.
- [15] The respondent's explanation for late disclosure is rooted in his recurring theme that he has had difficulty being ready for trial, which resulted in the application for an adjournment heard and dismissed at the start of the trial. Those difficulties, however, are squarely in the respondent's control. Given this is the second time the case has come to trial, it would be unfair to the claimant and disrespectful of the court's time and trial process to place much weight on his complaint that he was unprepared for trial. If that is the case, he has no one to blame but himself.

- [16] More importantly, the respondent says his memory about the existence of the recording was prompted by his son's discovery of the recording pens and documents within the respondent's personal possessions at his parents' home in China. The respondent deposes his son returned mid-June, 2017. The trial continued on June 22, 2017; yet the respondent did not inform his lawyer about the recording until early July despite what he now says is the "crucial" nature of the evidence.
- [17] Some of the reasons for that delay given by the respondent are completely unrelated to the litigation, such as the failed business ventures, his immigration status complications and the lawsuit against the Canadian lawyer. No doubt litigation is time consuming and stressful for the parties, but that does not distinguish the respondent's condition from any other litigant. The respondent's explanation for why he did not disclose the evidence sooner is based on a simple lack of diligence about document disclosure and trial preparation, and his inattention to the litigation. In my view he has not established a reasonable excuse for late discovery of the New Evidence.

Will excluding the New Evidence prevent the determination of the relevant issue on its merits and do the ends of justice require that the New Evidence be permitted?

- [18] I will combine my discussion of the last steps of the test for admission of evidence disclosed late with my analysis of the probative value of the New Evidence. All three issues involve an assessment of the respondent's reasons for seeking the admission of the New Evidence.
- [19] The respondent says the evidence is "objective and independent" evidence that will assist me on two issues: the purpose of the receipt, and the parties' intentions regarding ownership of the Richmond Property. The respondent says the New Evidence illustrates the claimant is not credible and for that reason his evidence should be preferred.
- [20] There are a number of reasons why I do not agree with the respondent's position. Before addressing the procedural and legal issues with his position, I comment on the evidence itself.
- [21] I read the transcript as well as the excerpts from trial upon which the respondent relies to demonstrate the claimant's contradictory statements about the receipt. I do not see the stark contradictions the respondent points to, and in my view, the transcript gives me little assistance on any material issue for a number of reasons.
- [22] The transcript does not appear to start at the beginning of the meeting, raising the possibility it is incomplete or was edited. There are a number of gaps where nothing was apparently said, which is inconsistent with the apparent heated tone during some parts of the meeting. It may be the recording device failed or it was edited; the respondent does not address those gaps in his affidavit, although he does depose that he did not tamper with the recording. While I have no reason to disbelieve him, there remains the possibility the recording pen did not capture the entire conversation.

- [23] Furthermore, the certified translation indicates several places where idioms are used, or where the translator has made assumptions about the meaning of particular words or phrases because of ambiguities in the conversation. I do not necessarily agree with the claimant's submission that those explanations represent a lack of accuracy in the translation. Rather, it reflects the inevitability that some aspects of a Mandarin-to-English translation in a context like this will be imperfect. What I mean by that, is that without being given the context in which the conversation took place, it is not surprising that the translator may have questions about the meaning of some words or phrases.
- [24] In my view, that means that the transcript is simply more, not better, evidence about the receipt and the parties' intentions about the Richmond Property. As conceded by the respondent, both parties will need to testify about the transcript. The claimant has already filed an affidavit contesting parts of the translation. Normally I would ignore a party's disagreement about the accuracy of translation because it is only appropriate for the court to rely on a certified translation. However, in this case, I do take into account the claimant's assertions because the translator himself has identified ambiguities.
- [25] All of these considerations persuade me that the evidence is not objective or independent. I cannot make much use of it without accompanying explanations by the parties. That would result in more time needing to be added to a trial that is already scheduled to take seven days longer than it was originally set. That extension is particularly concerning since this is the second trial of these matters.
- [26] As to its independence, the respondent deposes that the recording was not tampered with. Even if I accept that assertion at face value (and I have no reason not to), that is not the only criterion for independence; as I have discussed previously, I have a concern about the completeness of the recording and transcript.
- [27] The respondent says the claimant knew the meeting was recorded; the claimant denies this. However, the respondent's evidence about recording meetings does not support his claim that the claimant knew the meeting was recorded. In his affidavit filed in support of the application on August 31, 2017, he states (at para. 23) that:

Private meetings of the member of my investment group were made and kept by me, as it was our habit of conducting the meetings. The recordings were made in the open. Fake Zhu, the Claimant, and Li Tien, another member of the group, were all aware that the private meetings were being recorded.

- [28] The respondent cannot provide evidence of another person's awareness of an event, in this case the claimant's awareness of being recorded. In the claimant's affidavit sworn on September 8, 2017, she stated at para. 6 that she "had no reason to expect the meeting would be secretly recorded" and she was not aware it was recorded. She pointed out the respondent did not announce he was recording it and the transcript is consistent with that lack of disclosure. She also says no recording device was visible to her. In his responsive affidavit sworn on September 11, 2017, the respondent states at para. 8 that the "claimant was aware

meeting was recorded as the recording pen was on the table when we were all talking".

- [29] Again, the respondent can only speak to where the recording pen was, not what the claimant's awareness was.
- [30] The respondent is consistent when describing the recording device as a "recording pen". I assume from that description that the recording device was something that looked like a "pen", which means he did not use a handheld Dictaphone or smartphone to record the meeting. Thus, even if the claimant saw a "pen" it is likely she thought it was simply a pen. There is no objective fact in the respondent's affidavit that supports my drawing an inference that the claimant knew he was recording the meeting. Thus, based on the evidence before me, I find that the claimant was unaware the meeting was recorded.
- [31] The parties referred me to a number of cases discussing whether surreptitious recordings are admissible. I was given cases on both sides of the issue, but in the British Columbia cases I was given, most cite and rely on Barrow J.'s discussion in *Mathews v. Mathews*, 2007 BCSC 1825. In that case, which involved recording information concerning a child's best interest in a custody dispute, he stated (para. 43) that, "it is clear there is a limited discretion to exclude relevant evidence in this context", and that "judicial exercise of that discretion involves a balancing of competing interest which can be usefully viewed as assessing the probative value of the evidence as against its prejudicial effect".
- [32] The context in that case is very different than the facts before me. Every case discussed by Justice Barrow on this issue dealt with children - either custody battles or information about child's welfare from a third party. Thus, the common thread in those cases was that the probative value of the surreptitiously recorded evidence to the best interest of the child. When considering issues relating to the custody of a child, the best interest of the child is the dominant and sometimes the only consideration before the court; the impact upon a parent of admitting recordings will be of minimal or of no relevance in deciding what is in the child's best interest.
- [33] In this case, the issue is property division, and particularly, whether a marriage agreement should be upheld or set aside under s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA", the new Act applies because the parties were divorced before 2013). The parties' interests are front and centre. The context of this case is entirely different from the cases considered by Justice Barrow.
- [34] What is key, however, is the relevance of the evidence. In my view, the late evidence the party wants to admit must have something greater than "general relevance" to issues in the case. That is because the test for late admission of evidence asks whether excluding the evidence would "prevent the determination of a relevant issue on the merits". That is a higher threshold than showing the evidence is generally relevant to an issue at trial.

- [35] With regard to the receipt, the transcript is silent on the most important aspect of it. The claimant admits that she wrote the receipt but the money was never actually paid. The respondent says the receipt was signed after they returned from the bank and the transfer of money had already taken place. The recording is silent on that issue. I would have to draw inferences from testimony from the parties about that controversial issue. The parties have already testified about their differing views of whether the money was transferred or not. Therefore, the absence of the New Evidence from the trial record will not prevent me from making a decision, if I need to, on that issue.
- [36] I also note, that the "intention" of the parties about who owned the Richmond Property is not a decisive, or material issue. It may (or may not be) one of several factors I have to take into account. The parties have already testified about their respective versions. Again, excluding the transcript from the New Evidence will not prevent me from making a finding about the parties' intentions about the property.
- [37] The fundamental problem with the respondent's application is that, with respect, it is nothing more than an attempt to impugn the credibility of the claimant by adducing a prior inconsistent statement. The respondent says the New Evidence contradicts the claimant's evidence during this trial that the meeting was not about money from "kick backs"/ equipment.
- [38] However, I agree with the claimant that the inconsistencies asserted by the respondent are not clear. As I have stated above, the transcript on its own is not very helpful. In other words, its probative value is very low. Given that the claimant was not confronted with this evidence while on the stand, recalling her in an attempt to repair the prejudice is inadequate given its low probative value.
- [39] The main issue in this trial is whether the claimant can succeed in setting aside a divorce agreement, which stated properties belong to those whose name appears on the registered title. The case is being decided under s. 65 of the FRA, which lists six factors to consider when deciding whether to re-apportion family property, which are:
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self-sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

- [40] No one factor is decisive. At most, the parties' intentions, as stated at one point in time, may be relevant only to the last factor. Even if I were to accept the claimant's statement in the transcript that the house was meant for the respondent (and I do not do so), that would not be decisive. That being the case, I cannot see how the ends of justice are served by allowing this late evidence to be admitted when I already have the parties' testimony about their intentions.
- [41] It is that much more problematic given the collateral fact rule and the rule in *Browne v. Dunn*, [1893] 6 R. 67 (HL). I raised the former with counsel during the hearing. Although neither addressed it directly, in my view, neither doctrine would support admitting the New Evidence.
- [42] For all those reasons, I do not admit the recording, its Chinese transcript or the English translation of that transcript into evidence.

"Sharma J."

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