
CANADA / JUDGMENT

Xu v. Xu

2020 BCSC 1529

COURT

Supreme Court of British Columbia

DECIDED

15 October 2020

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2020 BCSC 1529 Xu v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xu v. Xu,

2020 BCSC 1529

Date: 20201015

Docket: S200547

Registry: Vancouver

Between:

Zhuo Lin Xu

Plaintiff

And

Fu Sheng Xu and Ji Yu Xu

Defendants

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

D. Dalke

Counsel for the Defendants:

D. Sue-A-Quan

Place and Date of Hearing:

Vancouver, B.C.

September 15, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2020

Introduction

- [1] This plaintiff seeks an order permitting substituted service upon the defendants, who are believed to be resident in the People's Republic of China (the "PRC"). The defendants oppose the application, and say the plaintiff must first show that she has taken positive steps to attempt to effect service ex-juris under the provisions of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965 (the "Convention").
- [2] Counsel for the defendants appears on a limited retainer, only for the purpose of opposing the substituted service application.

Background

- [3] The plaintiff is the daughter of the defendant Fu Sheng Xu ("Fu Sheng"), and the sister of the defendant Ji Yu Xu ("Ji Yu"). In general - I say more about the pleadings, below - the plaintiff alleges against her father that he misled her into allowing a mortgage in his favour (the "Mortgage") to be registered against a real property he had gifted her - a residential property in Vancouver (the "59th Ave. Property") - and into giving him a promissory note (the "Promissory Note"), each of a value of \$1.45 million. As against her brother, she alleges that she helped to fund the cost of his renovating another Vancouver residential property, in which he owns a 99% interest (the "Marguerite St. Property").
- [4] The plaintiff says that her father moved the family - the plaintiff, her mother, and her brother, Ji Yu - from the PRC to the 59th Ave. Property in 2005. Her father, she says, lived there intermittently for a time, between trips to the PRC, where he does business. The plaintiff moved out of the 59th Ave. Property in or around May 2018. Her mother and Ji Yu moved to the Marguerite St. Property in or around June 2019, and the plaintiff then decided to sell the 59th Ave. Property.
- [5] The plaintiff contracted to sell the 59th Ave. Property in November 2019, for \$1,260,000, and says she only then discovered it was encumbered by the Mortgage. She commenced this action on January 15, 2020, seeking discharge of the Mortgage and a declaration in respect of the Promissory Note, and alleging an equitable interest in the Marguerite St. Property.

- [6] Service of the notice of civil claim ("NOCC") on the defendants at the Marguerite St. Property was attempted on January 23, 2020, but there was no one home. The plaintiff says she is estranged from her family because of the circumstances of the present action, and has no communication with them. Her father, to her knowledge, owns two separate residences in the city of Shantou, PRC, in two different districts, Zhongtai and Jinyedao, about 30 minutes apart by car; and another residence in the city of Haikou, approximately 1,000 kilometres from Shantou. She says she does not know whether Ji Yu currently resides in the PRC or in Vancouver.
- [7] On January 22, 2020 the plaintiff applied for an order discharging the Mortgage. The application was opposed by Fu Sheng. The application was dismissed, but by consent it was ordered that the Mortgage would be discharged if the plaintiff paid the full amount of \$1.45 million into court.
- [8] The defendants have not provided any admissible evidence as to their whereabouts. There is an affidavit from a legal administrative assistant at the law firm currently representing the defendants, Direction Legal LLP (the "Firm"), setting out inadmissible double hearsay: the legal administrative assistant deposed that she has been told by counsel that the defendants spoke to counsel in August 2020 and informed him that they "have always lived at the same childhood residence of the Plaintiff in Shantou". The plaintiff, in her responding affidavit, says that she knows this to be untrue because both her father and brother lived in Canada for some period of time. Additionally, she says that after her father acquired the Jinyedao home in 2005, she divided her time between there and the Zhongtai residence before moving to Canada.
- [9] The plaintiff proposes that the defendants be served substitutionally, by way of service on the offices of the defendants' present counsel, the Firm; or in the alternative, by way of email.
- [10] There is little room for doubt that service on the Firm would serve as an effective means of providing the defendants with notice of this action. In December 2019 - before this action was commenced, and at the point in time when the plaintiff, who was under contract to sell the Property, alleges she first learned of the Mortgage - a lawyer from the Firm corresponded with the plaintiff, describing Fu Sheng as a client of the Firm and setting out his terms for the discharge of the Mortgage. Present counsel appeared on Fu Sheng's behalf on a January 30, 2020 application by the plaintiff to discharge the Mortgage. In an affidavit filed August 14, 2020, Ms. Cheung, a legal administrative assistant with the Firm, attests to having been advised by present counsel that he spoke with the defendants on August 12, 13, and 14 concerning their place of residence. The defendants do not oppose this application on the basis of the suitability of the proposed method of alternative service, only on the basis of the plaintiff's entitlement to an alternative service order at this stage.

Rules Regarding Service

[11] Rule 4-3(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR] provides that a NOCC must be served by way of personal service, unless the court otherwise orders or unless the SCCR otherwise provides. Under Rule 4-3(2), personal service is effected on an individual by leaving a copy of the document with them.

[12] Rule 4-4 provides for alternative methods of service:

- (1) If it is impracticable to serve a document by personal service or if the person to be served by personal service
 - (a) cannot be found after a diligent search, or
 - (b) is evading service of the documents,

the court may, on application without notice, make an order for substituted service granting permission to use an alternative method of service.

[13] Here, the plaintiff relies on the impracticability of personal service.

[14] Rule 4-5 provides alternatives by which service may be effected on a person outside British Columbia, both with or without leave. Subrule (10) provides:

- (10) A document may be served outside British Columbia
 - (a) in a manner provided by these Supreme Court Civil Rules for service in British Columbia,
 - (b) in a manner provided by the law of the place where service is made if, by that manner of service, the document could reasonably be expected to come to the notice of the person to be served, or
 - (c) in a state that is a contracting state under the Convention, in a manner provided by or permitted under the Convention.

Canada and the PRC are contracting states under the Convention.

[15] Article 8 of the Convention allows for the free effecting by contracting states of service of judicial documents on persons abroad, though any state may declare its opposition to such service within its territory. Article 10 provides for, inter alia, judicial officers in the state in which judicial documents originate, or persons interested in a judicial proceeding, to effect service directly through judicial officers, officials or other competent persons of the state of destination, provided the state of destination does not object.

[16] The PRC has declared its opposition to Article 8, and its objection to Article 10. The system by which the PRC provides for service when a request for assistance is made is described in the affidavit, filed by the plaintiff, of Guangsheng Ren, a lawyer licensed to practice in the PRC. Mr. Ren says that the PRC Ministry of Justice conducts service of documents when a request for judicial assistance is received from a Convention member. Documents to be

served must be delivered to the PRC Ministry of Justice through either the Canadian embassy or consulate in the PRC, or through some competent authority or judicial assistant with the right to deliver such documents. Then, once the PRC Ministry of Justice receives a service request, generally, the documents to be served, with a Chinese translation, are forwarded to the Supreme People's Court within five days; the Supreme People's Court forwards the documents to a higher people's court, within five days; the higher people's court then forwards the documents to the relevant intermediate people's court or special people's court, within three days; and that intermediate people's court or special people's court then, in Mr. Ren's words, "shall complete the service within ten days". Mr. Ren explains that these time limits do not include delivery time for the documents between courts - just the processing time within each court. The PRC courts use government confidential delivery, rather than commercial courier services, and execution of a service request therefore takes about three to four months in ideal situations, but more commonly up to six months or even longer. Considering the current COVID-19 pandemic, he says, the service process time is now unpredictable.

- [17] Mr. Ren says that under Article 277 of the Civil Procedure Law of the People's Republic of China (2017 Amendment), no foreign agency or individual may serve documents or investigate and collect evidence, apart from this official method of service through seeking judicial assistance. There are no services such as process servers available in the PRC. Mr. Ren concludes:
7. Therefore, it is not feasible to effect personal service on an individual defendant of a foreign lawsuit in China.

Positions of the Parties

- [18] The plaintiff submits that where personal service is impracticable, the SCCR provides two alternatives: a substituted service order under Rule 4-4, or service through the Convention, under Rule 4-5. The plaintiff says that as a matter of convenience and efficiency, a substituted service order is clearly preferable.
- [19] In that regard, the plaintiff points to the lengthy delay that will result if she is obliged to follow the path of service under the Convention. On Mr. Ren's evidence, that could involve a delay of up to six months or longer - and that is even assuming that the defendants may be found at whatever particular address the plaintiff provides to the PRC authorities. There is no evidence that the authorities will accept a direction to attempt service at multiple locations; if only a single address may be provided at which service is to be effected, the fact that Fu Sheng owns three separate residences raises the prospect of the plaintiff having to make multiple attempts at Convention service, with the possibility of delay of a year or more.

- [20] Hence, from the plaintiff's perspective, allowing for substituted service in the circumstances of the present case, rather than forcing the plaintiff to first go through the alternative route of Convention service, would promote the object of the SCCR as provided in Rule 1-3: "the just, speedy and inexpensive determination of every proceeding on its merits".
- [21] With regard to the issue of the defendants' whereabouts, the plaintiff further submits that the uncertainty over where the defendants are currently located calls into question whether the Convention even applies. Article 1 of the Convention states that the Convention "shall not apply where the address of the person to be served with the document is not known". I do not, however, read that provision as relieving a plaintiff of the obligation to comply with the Convention when they are less than certain as to a defendant's whereabouts. The more natural and practical interpretation is that for the Convention to apply, a party seeking service abroad need only provide a specific address at which service is to be attempted.
- [22] Alternatively, the plaintiff relies on the analysis undertaken by Mr. Justice Perell in *Zaniewicz v. Zungui Haixi Corporation*, 2012 ONSC 4904 [Zaniewicz]. The Ontario rule for service that applied in that case - rule 17.05(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 - made service through a central authority of a member State, or in another manner allowed under the Convention, mandatory. Rule 17.05(3) provides that an originating process "shall be served" in that manner. The SCCR Rule 4-5(10), in contrast, uses the permissive phrase "may be served". In *Zaniewicz*, the defendants in a proposed class action included three residents of the PRC. Perell J. found that there were strong arguments that two of the defendants had already attorned to the jurisdiction of Ontario: they had, he found, particularly strong connections to Ontario, having served as directors and officers of an Ontario corporation, having been involved in the initial public offering that was at issue in the within action, and having appointed an Ontario company to be his agent for service. The third defendant had also served as CEO of the Ontario corporation, and had thereby, as Perell J. found at para. 25, "submitted to making himself accessible to justice in Canada". Perell J. concluded that he had jurisdiction to make an order for substituted service notwithstanding ongoing attempts to effect service under the Convention.
- [23] With respect to Fu Sheng, the plaintiff submits that Fu Sheng attorned to the jurisdiction when he opposed the plaintiff's application to discharge the Mortgage. With respect to Ji Yu, the plaintiff submits that as the owner of title to the Marguerite St. Property, he must be taken to have agreed to be subject to the laws of British Columbia.
- [24] The defendants rely on the decision of this court in *Luu v. Wang*, 2011 BCSC 1240, in which Mr. Justice Burnyeat set aside an order made by a Master for substituted service on a defendant located in Hong Kong. Burnyeat J. noted the lack of evidence before the Master as to whether personal service in China could be easily effected, or what it would cost. Burnyeat J. relied on statements made by McTaggart Co. Ct. J., as he then was, in *Malkin & Pinton Industrial Supplies v. Anglehart and Anglehart Furniture* [1977] B.C.J. No. 1077 (Co. Ct.), by van der Hoop L.J.S.C., as he then was, in *Credit Foncier Franco-Canadien v. McGuire* [1979] B.C.J. 944 (S.C.), and by Hall J., as he then was, in *Osburn v. Khoo*, [1996] B.C.J. No.

2702 (S.C.) [Osburn] as to the need to show real cost or inconvenience before allowing an exception to the usual rule of personal service. Burnyeat J. at para. 15 quoted a passage from Osburn:

- [11] As I analyze matters, if a defendant is to be called upon to attorn to the jurisdiction of the forum courts, it is desirable that if possible there should be personal service of process upon a defendant. I believe that the scheme of our Rules of Court recognizes this general principle. Having regard to the nature of modern communications, I do not consider that it could be argued with much force that service personally on this defendant, who is now apparently resident in Hong Kong, could be said to be impractical within the meaning of that terminology as used in the Rule and discussed in the authorities. It might be more convenient and less expensive to effect substituted service in British Columbia but a modest degree of inconvenience and expense does not in my view justify a departure from the ordinary rule of personal service. If the task is very onerous or the expense appeared likely to be very high, then different considerations may fall to be assessed.
- [25] The defendants' position is that there is simply no evidence of service in the PRC being very onerous or very expensive. The law attaches such importance to personal service that the plaintiff should be required at least to attempt Convention service before a substituted service order is granted.

Discussion

- [26] The plaintiff's primary position is premised on personal service under Rule 4-3 - that is, leaving a document with an individual - being in a different category from ex juris service under Rule 4-5. The plaintiff asserts that Convention service is one of two available alternatives when personal service is impracticable, the other being substituted service.
- [27] That interpretation does not follow from the wording of the SCCR. Personal service is one of the methods by which service can be effected under the SCCR (in contrast to ordinary service, pursuant to Rule 4-2). The rules for ex juris service in Rule 4-5 apply to both methods of service (personal and ordinary). It is not a separate category of service in and of itself. Under the SCCR, personal service may be effected within British Columbia, or, pursuant to Rule 4-5(10), in a state that is a contracting state under the Convention, in a manner provided by or permitted under the Convention. As I noted above, Mr. Ren's affidavit describes the obligation of the PRC Ministry of Justice and courts that culminates in the obligation of the relevant intermediate people's court or special people's court "to complete the service within ten days" of receipt of the documents. However, Mr. Ren's affidavit is silent as to how service is "completed" or effected by PRC courts.

- [28] Article 5 of the Convention provides that the central authority of a member State may arrange to have service effected by a method prescribed by its internal law, or by a particular method requested by the applicant, so long as that method is not incompatible with that State's law. In theory, at least, the Convention would seem to allow for the possibility of a PRC court having its officials effect personal service - i.e. locating an individual, and leaving the document with them.
- [29] The international body responsible for administering the Convention is the Hague Conference on Private International Law ("HCCH"). As a quasi-government body of which Canada is a member, the publications of HCCH as to legislative facts have a high degree of inherent reliability, and I therefore may take judicial notice of those facts. The HCCH website includes "Practical Information" concerning judicial assistance services provided by its members (HCCH, "14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" (2 October 2006), online: Hague Conference on Private International Law www.hcch.net/en/instruments/conventions/authorities1/print1/?cid=17). The "Practical Information" concerning the PRC includes a Frequently Asked Questions or FAQ document prepared by the Chinese Ministry of Justice (Chinese Ministry of Justice: "The Most Frequently Asked Questions and Answers" (27 June 2018), online (pdf): <https://assets.hcch.net/docs/5bbc302d-532b-40b1-9379-a2ccbd7479d6.pdf>). The FAQ document states at 3:

12. Is personal service or service by leaving the documents with the recipient available in China?

Yes. According to the Chinese Civil Procedure Law, personal service or service by leaving the documents with the recipient is possible. But the Forwarding Party should clearly specify this under Option a) of the Request Form if it requires so.

- [30] Personal service therefore appears to be possible in the PRC so long as the personal service is arranged through and conducted by the PRC courts, in accordance with their procedures for providing judicial assistance. As I noted above, Mr. Ren concluded that personal service in the PRC is "not feasible", but given the above, his conclusion would appear to be limited to personal service as conventionally effected in British Columbia - through a contractor such as a process server.
- [31] The issue before me is not whether substituted service is more convenient than Convention service; the issue is whether the plaintiff has shown personal service through the Convention to be impracticable, so that substituted service should be allowed.
- [32] The evidence relied on by the plaintiff does not satisfy me that such is the case. The possibility of a delay of the length discussed in Mr. Ren's affidavit - up to six months, or even somewhat longer due to the COVID-19 pandemic - in itself does not make service in the PRC "impracticable" within the meaning of Rule 4-4. Nor does the plaintiff's uncertainty as to the whereabouts of either defendant at any particular point in time. There appears to be a real and substantial possibility that the defendants might be served through reasonably diligent

efforts to locate them at the residence in Zhongtai. The plaintiff must at least make an attempt at having the defendants personally served there, through the Convention, before she can be heard to say that personal service is impracticable.

- [33] As to the plaintiff's alternative arguments concerning attornment, I find no basis for concluding that either defendant has attorned, so as to relieve the plaintiff of the burden of at least attempting Convention service. The plaintiff's position on attornment was not set out in the notice of application, depriving the defendants' counsel of the opportunity to provide evidence. Counsel for the defendants says that there were discussions with the plaintiff's previous counsel at the time of the discharge application that made it clear no attornment was intended by Fu Sheng in appearing on the application. In the circumstances, I am not satisfied that I can conclude attornment arose as a matter of law. In any event, counsel did not appear for Ji Yu on that application. Further, the contention that a defendant may not obtain the benefit of personal service in a foreign state simply because they own property in British Columbia is not supported in the case law and does not accord with the wording of the SCCR provisions for service.
- [34] I therefore dismiss the application. I provide the direction that follows with respect to amendments to the NOCC.

Amendment of the NOCC

- [35] The NOCC - which was not drafted by present counsel - is deficient in several respects:
- (1) Despite the allegation that Fu Sheng resides in China, there is no endorsement for service ex juris as required by Rule 4-5(2). The NOCC must be amended to state the circumstances under which it is claimed that service on the defendants outside of British Columbia without leave is permitted.
 - (2) In respect of the claim against Fu Sheng, the NOCC does not clearly state a cause of action. Part 3 of the NOCC states that the "legal basis" of the claim is that Fu Sheng made representations that the plaintiff was to receive a gift of the 59th Ave. Property; that the representations induced her to execute the mortgage documents without understanding them; that there was unequal bargaining power between the parties; that the plaintiff was misled; and, that the plaintiff would not have accepted title, and subsequently would not have listed the 59th Ave. Property for less than the face value of the Mortgage, but for her reliance on Fu Sheng's assurance that she was receiving a gift. These allegations of fact might conceivably support a claim; but the nature of the claim itself must be clearly stated in the NOCC. The NOCC goes on to state that the plaintiff relies on "the principles of equity" and "the principles of promissory estoppel", but it does not state how those principles apply to the facts alleged. Does the plaintiff claim against Fu Sheng in misrepresentation? In breach of trust? In deceit? In unconscionability? Or under some other doctrine of law or principle of equity? Any of these causes of action has its own set of essential elements, and Fu Sheng is entitled to know what cause or causes of action are being advanced.

(3) The allegation in Part 2: Relief Sought, para. 1(b) of the NOCC in respect of the Promissory Note reads:

1. The Plaintiff claims against the Defendant Fu Sheng as follows:

(b) A declaration that the promissory

The present application proceeded on the basis that this was meant to read, "A declaration that the promissory note is invalid". Obviously, this will have to be corrected.

(4) In respect of the claim against Ji Yu, Part 2: Relief Sought of the NOCC simply says at para. 2 that the plaintiff is claiming a certificate of pending litigation against the Marguerite St. Property, without stating the claim on which the certificate is based. The NOCC then goes on to state in Part 3: Legal Basis at para. 12:

12. Constructive trusts are equitable remedies available for acts such as fraud and unjust enrichment, where an interest in land is claimed based on a constructive trust, the question on an application to cancel a CPL is not whether the plaintiff will be successful in proving entitlement to a constructive trust. It is enough to establish that a constructive trust is a possible remedy to sustain the CPL.

It may be inferred from that paragraph that the plaintiff means to claim a constructive trust against the Marguerite St. Property. If so, this needs to be clearly stated, and the circumstances that are alleged to give rise to a constructive trust particularized.

[36] The plaintiff may be entitled to serve the NOCC in its present form outside of British Columbia without leave of the court under the SCCR. But in the circumstances, to allow the NOCC to be served in another jurisdiction without remedying the deficiencies I have identified, risks confusion. I am therefore directing that the NOCC be amended to address the aforementioned deficiencies before the plaintiff proceeds with attempting to serve it on the defendants outside British Columbia.

"A. Saunders J."

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