

CANADA / JUDGMENT

Yu v. Xu

2020 BCSC 1291

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1291 Yu v. Xu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yu v. Xu,

2020 BCSC 1291

Date: 20200831

Docket: S187297

Registry: Vancouver

Between:

Kai Ming Yu and Qing Yan

Plaintiffs

And

Zhong Ping Xu, Xiao Hong Liu, Hong Guo, 1032821 B.C. Ltd.,

Vancouver Soho Holdings Ltd. and Canada Sparkle Long Holdings Inc.

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

In Chambers

(Via Teleconference)

Counsel for the Plaintiffs:

G. Forrester

Counsel for the Defendant 1032821 B.C. Ltd.:

D. Chen

Counsel for the Defendants Zhong Ping Xu, Xiao Hong Liu, Vancouver Soho Holdings Ltd. and Canada Sparkle Long Holdings Inc.:

M. Lithwick

The Defendant Hong Guo

No appearance

Place and Date of Hearing:

Vancouver, B.C.

August 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2020

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Introduction

- [1] The plaintiffs and the defendant, Canada Sparkle Long Holdings Inc. ("Canada Sparkle"), are in a dispute arising from a joint venture agreement respecting a commercial development project in Richmond, BC, that they entered into in May 2013. The plaintiffs are claiming for an oppression remedy arising from allegations of a breach of reasonable expectations, breach of fiduciary duty, knowingly assisting in a wrongdoer or fiduciary's breach, conspiracy and bad faith. In addition, the plaintiffs claim that the defendants made fraudulent and/or negligent misrepresentations, failed to disclose share transfers, failed to disclose a conflict of interest and acted in breach of contract.
- [2] It is alleged that the plaintiff, Kai Ming Yu, provided approximately \$12 million to the trust account of the defendant, Hong Guo, who was counsel for the defendant Vancouver Soho Holdings Ltd. ("Vancouver Soho"), a company Ms. Guo incorporated for the purpose of the joint venture agreement. The amount provided is in dispute.
- [3] In July 2013, Vancouver Soho purchased three properties in Richmond, BC (the "Minoru Properties").
- [4] In December 2014, the defendant, Zhong Ping Xu, who was the director of Canada Sparkle, and the plaintiffs agreed that the plaintiffs would sell their shares in Vancouver Soho to a third-party purchaser.
- [5] It is alleged that Ms. Guo located a third-party purchaser, being the defendant, 1032821 B.C. Ltd. ("1032"), who would provide \$14 million in consideration for a loan that the plaintiffs allegedly provided to Canada Sparkle and Ms. Yu's 40% shareholdings of Vancouver Soho. He Zhang is the sole shareholder of 1032.
- [6] In August 2015, Ms. Yu executed a share transfer agreement that contemplated the price of \$14 million in consideration for the transfer of her shares and the Canada Sparkle Loan (the "Share Transfer Agreement"). One of the terms of the agreement provided that \$2.5 million was due and payable to Ms. Yu within 30 days of the execution of the agreement. The parties appear to agree that 1032 never made this payment.
- [7] On the evidence before me, it is not clear whether 1032 made any direct payment to Ms. Yu in accordance with the Share Transfer Agreement.
- [8] I will refer to the defendants, except for Ms. Guo and 1032, in the reasons as the "Vancouver Soho defendants".

Litigation Background

- [9] The plaintiffs first commenced this action as a petition on June 21, 2016.
- [10] The petition was scheduled for hearing on October 17 and 18, 2016, but was adjourned by order of Justice Smith. Justice Smith further ordered that the net proceeds from any sale of the Minoru Properties would remain in trust with the solicitors acting on behalf of Vancouver Soho until otherwise agreed to between the parties or pursuant to court order (the "Smith Order").
- [11] The defendant, Ms. Guo, filed a response to the petition on January 23, 2017.
- [12] On July 27, 2017, the plaintiff, Ms. Yu, filed an application that included a request for an order that the petition be converted to a notice of civil claim. On May 16, 2018, Master McDiarmid ordered, by consent, that there would be a trial of this proceeding generally and this proceeding would continue as if it had been commenced by a notice of civil claim. The notice of civil claim was filed on June 27, 2018.
- [13] The defendant, Ms. Guo, did not file any response to the notice of civil claim. As a result, a default judgment with damages to be assessed was obtained against Ms. Guo on October 26, 2018.
- [14] On April 2, 2018, the Minoru Properties were sold to a third party and the net proceeds of the sale, in excess of \$28 million, were paid into the trust account of Kahn Zack Ehrlich Lithwick LLP, in accordance with the Smith Order.
- [15] On September 21, 2018, the plaintiffs filed an application pursuant to Rule 9-7 of the Supreme Court Civil Rules, BC Reg. 168/2009 [Rules] (the "Summary Trial Application"). The Summary Trial Application was set for hearing on October 31, 2018. It was adjourned on October 30, 2018.
- [16] Counsel for the parties agreed in February 2019 that 14 days would be sufficient to complete the trial of this matter. The plaintiffs filed the notice of trial on March 29, 2019, setting the trial for 14 days, commencing on June 15, 2020.
- [17] The Summary Trial Application was reset for hearing on March 14 and 15, 2019.
- [18] On March 14, 2019, the parties, except Ms. Guo, appeared before Justice Mayer and consented to the following orders (the "Mayer Order"):
1. This application is adjourned generally and shall not proceed as the parties have agreed to proceed to trial on all remaining issues, unless settled by consent of the parties;
 2. From the proceeds of the sale of the Minoru Properties (as defined in the plaintiffs' Notice of Application dated September 21, 2018) held in trust by Kahn Zack Ehrlich Lithwick LLP,
 - a. FIVE (5) Million Dollars shall be released forthwith to the plaintiffs;

- b. FIVE (5) Million Dollars shall be released forthwith to the defendant Canada Sparkle Long Holdings Inc.; and
 - 3. This Order including paragraph 1 and 2 is without prejudice to the position of any party regarding the remaining issues, including and not limited to the parties' positions with respect to the number of shares of Vancouver Soho, held by the parties.
- [19] On May 29, 2020, the Vancouver Soho defendants filed an application returnable on June 5, 2020, seeking to adjourn the trial.
- [20] A trial management conference was scheduled for June 4, 2020. The plaintiffs' trial brief provided that they anticipated that the trial could be completed within the scheduled time.
- [21] The trial brief of the Vancouver Soho defendants stated that an estimate of time needed for the trial could not be provided and they expected that a further eight days of trial would be needed in addition to the 14 days scheduled.
- [22] The trial brief of 1032 estimated that it needed 21 hours to present its case at trial and requested an adjournment of the trial on two grounds:
- a. the amount of time estimated for trial was insufficient; and
 - b. Mr. Zhang could not travel from China to Canada because of COVID-19.
- [23] The trial management conference was heard by Master Cameron, who ordered that the trial date set for June 15, 2020 be adjourned and that the parties needed at least six more days to complete. The trial was to be reset for at least 20 days. The application of the Vancouver Soho defendants to adjourn the trial set for June 5, 2020 was adjourned.
- [24] The parties have secured a new trial date for August 23, 2021 for 24 days.

Nature of Application

- [25] The plaintiffs filed an application on July 10, 2020, seeking the following relief:
- 1. An order that the Plaintiff Kai Ming Yu and the Defendant Canada Sparkle Long Holdings Inc. each receive an interim release of \$2 million (the "Interim Release") from the proceeds held in trust by Kahn Zack Ehrlich Lithwick LLP (the "Trust Funds"); and
 - 2. An order setting aside or voiding paragraph 1 of the Consent Order made before the Honourable Mr. Justice Mayer on March 14, 2019.
 - 3. Further or in the alternative, a declaration that the consent order made before the Honourable Mr. Justice Mayer does not preclude the Plaintiffs from proceeding summarily against the Defendant 1032 B.C. Ltd.
 - 4. Costs of this application against the Defendant 1032821 B.C. Ltd., payable forthwith.

- [26] I will first address the Interim Release issue, and then the issue of whether the plaintiffs are prohibited from proceeding with a summary trial against 1032.

Interim Release Issue

Position of the Parties

Plaintiffs' Position

- [27] The plaintiffs reside in Jinzhou City in China, which is within approximately 160 kilometers of the city of Wuhan, where the pandemic is alleged to have originated. The whole province has been through several months of lockdown since February 2020. The plaintiffs have significant business obligations in China, including outstanding debts through borrowings made in China to fund the purchase of the Minoru Properties.
- [28] Mr. Yan's principal business in China is as an owner of commercial real estate and hotels. He states that he has encountered significant challenges as a result of the COVID-19 crisis, including reduced revenues as a result of significant challenges in collecting rent from tenants, with no hope of recovery for a period of months to years.
- [29] On March 22, 2020, Mr. Yan received a collection notice from the Rural Commercial Bank of China of Jinzhou City for the total amount of 64.5 million RMB in terms of principal and interest owed by three of his companies.
- [30] The plaintiffs submit that the Interim Release is required in order to alleviate pressing financial obligations and the damage to their business caused by the COVID-19 crisis. They further argue that there will be no prejudice to 1032 if the Interim Release is made, since 1032 has refused to quantify its claim, and there are no foreseeable circumstances in which 1032's claim could exceed the remaining Trust Funds after the Interim Release, which would amount to over \$14 million.

Vancouver Soho Defendants' Position

- [31] Since 1032 did not consent to this release, the Vancouver Soho defendants take no position on the plaintiffs' application for the Interim Release.
- [32] Counsel for Vancouver Soho advised that the current amount held in trust is \$18,401,461.20.

1032's Position

- [33] 1032 opposes any further release of funds on the basis that the ownership of the Trust Funds is in dispute. It argues that the plaintiffs are seeking a final order for the distribution of \$2 million when there has been no judicial determination with respect to the distribution of these funds. The Interim Release is sought in order for the plaintiffs to pay off creditors. The plaintiffs have not provided any undertakings or security that in the event the \$2 million released is determined not to be the property of the plaintiffs, that the plaintiffs will have sufficient funds or security to pay the funds back.

Analysis

[34] The plaintiffs, in oral submissions, referenced R. 10-1(3) of the Rules, which provides:

Allowance of income from property

- (3) If property is the subject matter of a proceeding and the court is satisfied that the property will be more than sufficient to answer all claims on it, the court at any time
 - (a) may allow the whole or part of the income of the property to be paid, during such period as the court may direct, to a party who has an interest in it, or
 - (b) in the case of personal property, may order that part of the personal property be delivered or transferred to a party.

[35] In my view, this subrule is not applicable since the funds held in trust are not income from property, nor are they personal property. Subrule 10-1(2) of the Rules deals with the court's ability to make orders securing funds that are in dispute in a proceeding.

[36] This Court does have the jurisdiction to release monies it has ordered to be held in trust. The issue is whether this is an appropriate case to do so.

[37] The plaintiffs have provided compelling reasons to support a further interim distribution of some of the Trust Funds. They are facing an additional delay in the scheduled trial through no fault of their own. Due to the COVID-19 crisis, they are facing financial stress.

[38] The only concern I have is whether there will remain sufficient funds in trust to compensate the potential claim that the Vancouver Soho defendants and 1032 may have. Pursuant to the plaintiffs' application request, the Vancouver Soho defendants will also be receiving a further interim distribution of \$2 million. I further note that the Vancouver Soho defendants had proposed the same interim distribution in early June, contingent on an agreement of the parties. I see no prejudice to the Vancouver Soho defendants if a total of \$4 million is distributed, and no prejudice was argued.

[39] This leaves the potential claim of 1032. The plaintiffs submit that there is no possibility that any claim of 1032 could come close to the over \$14 million in Trust Funds that would remain after the further distribution.

[40] I note that in oral submissions, I asked Mr. Chen what prejudice 1032 would suffer if the further distribution was made. Mr. Chen advised that it was not clear what amount 1032 was owed and the \$14 million that would remain in trust may or may not be sufficient because the parties will not know until trial what portion of the money belongs to 1032 and how many shares it is entitled to.

[41] Based on the evidence given by Mr. Zhang, as the representative of 1032, at his examination for discovery, in which he agreed that he never made a direct payment to Ms. Yu for the shares, it is not clear to me how 1032's claim could exceed the \$14 million that will remain in

trust if the interim distribution is ordered. Mr. Zhang, in his affidavit #2 sworn on March 10, 2019, admits at para. 42 that he "refrained from fulfilling the payment obligations under the Yu/1032 Share Transfer Agreement because of the difficulty [he] was having ascertaining how much [money] was actually invested by Yu". He further swore that:

- 46. Subsequent to the execution of the Yu/1032 Share Transfer Agreement, Yu requested for an immediate payment of \$1,000,000 and 1032 paid. This payment was made in consideration for Ms. Yu's 40% shares in Vancouver Soho.
- 47. This amount was loaned to 1032 by Vancouver Soho.
- [42] Although there is a dispute about whether the financial statements of Vancouver Soho record this payment as a loan to 1032, this is not determinative for this application.
- [43] The issue is whether there is any prejudice to 1032 if a further distribution is made out of the Trust Funds when there would still remain in excess of \$14 million of Trust Funds to satisfy the potential claims.
- [44] In my view, there is no prejudice to 1032 so long as the distribution is made on the same basis as the distribution made under the Mayer Order, being that the distribution is without prejudice to the position of any party regarding the remaining issues, including but not limited to the parties' positions with respect to the number of shares of Vancouver Soho held by the parties.
- [45] This should address 1032's concerns that the plaintiffs were seeking a final determination that they are entitled to the \$2 million dollars. The final determination of who is owed what will be for the trial of this action.

Summary Trial Issue

Position of the Parties

Plaintiffs' Position

- [46] The plaintiffs' position is that they should be entitled to proceed with a summary trial against 1032. Their position is that the Mayer Order does not prohibit a summary trial proceeding because the agreement to adjourn the summary trial was premised on an understanding that the trial being referenced was a 14-day trial scheduled for June 15, 2020. The agreement did not contemplate this trial date being adjourned and the trial length being increased from 14 to at least 20 days.
- [47] The plaintiffs further argue that implied in the Mayer Order was a term that the trial was to proceed in June 2020 and not at some later point in time for a longer period.

- [48] The plaintiffs argue that the increased time estimate by 1032 amounted to a breach of its agreement that the trial would be 14 days in length. In the alternative, the plaintiffs say that the increased length of trial and the COVID-19 crisis were not contemplated by the parties and rely upon the doctrines of mistake, mutual mistake and frustration to say that the agreement between the parties is void.
- [49] The plaintiffs seek that paragraph one of the Mayer Order should be set aside or voided to allow a summary trial to proceed against 1032.

Vancouver Soho Defendants' Position

- [50] The Vancouver Soho defendants take no position on this aspect of the plaintiffs' application on the understanding that the plaintiffs do not intend to bring a summary trial application against them.

1032's Position

- [51] 1032's position is that the agreement that was reached allowed for the payment of \$5 million to the plaintiffs on the agreement that the summary trial application which had been filed would not proceed and the parties would proceed to trial on the remaining issues. If the plaintiffs now wish to renege on this agreement, then the plaintiffs should be paying back into trust the \$5 million they received.
- [52] 1032 further argues that there was no agreement that the trial being referenced in the Mayer Order was the agreed upon trial date of June 15, 2020. It disputes that there was an implied term that the reference to "trial" meant the trial date that had been agreed to by the parties. The order was not contingent on when the trial would take place.
- [53] 1032 disputes that the estimate it provided in its trial brief of 21 hours was unreasonable or was done in an attempt to delay this trial.

Legal Principles

- [54] The court when interpreting a consent order should consider the following:
- a) the starting point for interpreting a consent order is determining what the parties were agreeing to settle: *Bankirk Developments Ltd. v. Orca Estates Ltd.*, 2006 BCCA 238 at para. 11.
 - b) once the purpose of the consent order has been determined, the court should make sense of its provisions. As the consent order forms a contract between the parties, general contractual interpretation principles apply, and the court should strive to give meaning to each and every provision in the order: *Bankirk* at para. 12, citing *Streifel v. First Heritage Savings Credit Union*, [1992] B.C.J. No. 2472 (C.A.) at para. 8.

- c) in determining the parties' mutual intention, the circumstances in which the order was made and the intention of the parties must be viewed objectively, considering the language of the order itself, viewed against the factual matrix in which the order was made: *Bankirk* at para. 13, citing *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226 at para. 76.
- d) if the words of the order produce a clear ambiguity that must be resolved in order to achieve the object of the order, regard may be had to other evidence: *Bankirk* at para. 14. In such cases of ambiguity, the court may look at documentary evidence leading to the drafting and signing of the order, and to a lesser degree, what has occurred since the order was signed: *Maximum Separation Systems v. Solometex Inc.*, 2004 FC 689 at para. 12.

Agricultural Land Commission v. Munro, 2006 BCSC 1408 at para. 69.

- [55] Since a consent order is, in effect, a contract, a party may seek to set it aside on any ground which would invalidate a contract, such as lack of authority of counsel, common mistake, fraud, collusion, duress and illegality: *Harbelah Enterprises Ltd. v. O'Neill*, [1994] B.C.J. No. 1269 at para. 17 (S.C.).
- [56] A party seeking to imply a term into a contract bears the onus of persuading the court of that necessity. "It is not sufficient to show that it would be reasonable or logical to imply such a term, or that the parties would probably have agreed upon such a term if they had put their minds to it, or, that having put their minds to it, chose not to express it. A higher burden of proof must be met ": *Olympic Industries Inc. v. McNeill*, [1994] 86 B.C.L.R. (2d) 273 at para. 31 (C.A.).
- [57] The presumption of the law is generally against implying terms in a contract except in certain defined circumstances: *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 27. However, the law does recognize that to avoid an absurd result, the court will find an implied term in the contract if the implied term is not in conflict with an express term: *Zeitler v Zeitler (Estate)*, 2010 BCCA 216 at para. 25.
- [58] The law recognizes three types of mistake: common, mutual and unilateral. A common mistake occurs when the parties make the same mistake, a mutual mistake occurs when there is a misunderstanding between the parties and a unilateral mistake occurs when only one party makes a mistake and the other party knows, or is assumed to know, of that mistake: *Kidder v. Photon Control Inc.*, 2011 BCSC 1016 at para. 203. A contract entered into by common mistake may be rendered void from the fact that fundamental "mistake may indicate that the process of offer and acceptance misfired: what the parties thought as a contract turns out not to be so because they were not, in fact, agreed on, for example what the contract was about": *Kidder* at para. 207.

Analysis

- [59] The only evidence before me as to the contract that the parties entered into is the words of the Mayer Order. The words are clear that the parties agreed that the Summary Trial Application was adjourned generally and "shall not proceed as the parties have agreed to proceed to trial on all remaining issues." There is no requirement that the "trial" take place on a certain date or for a certain time period. It should have been apparent to the plaintiffs that there is no certainty that any trial will proceed on any scheduled date.
- [60] In my view, if the plaintiffs wanted to make a term of the agreement that the trial had to take place on a certain date and for a prescribed length, that should have been made an express term of the agreement.
- [61] In Mr. Yan's affidavit, he states that:
36. My agreement by way of the Consent Order to proceed to trial on all remaining issues was premised on the existing agreement between the parties that the trial would last 14 days and would proceed as scheduled on June 15, 2020.
- [62] The plaintiffs have provided no evidence to support that the other parties also agreed to those terms.
- [63] In my view, the plaintiffs have not met the onus of establishing that an implied term should be read into the Mayer Order that the reference to trial meant a trial to be heard on June 15, 2020 for 14 days. It is more logical that the defendants would be seeking an agreement that the plaintiffs were giving up on their right to schedule a summary trial in exchange for the agreement of the parties to the distribution of the \$5 million.
- [64] I equally am not convinced that the plaintiffs have established that a mistake has occurred. Although the notice of application claims there was a mutual mistake, as I understand their submissions, the plaintiffs say that all parties were mistaken about the same thing--being the length of time and the date of the trial--which would be a common mistake. There is no evidence that supports that the Vancouver Soho defendants and 1032 had understood that the trial referenced was the trial scheduled for June 15, 2020. I am not able to find that the parties were under a common misapprehension of the facts such that the contract should be set aside.
- [65] In my view, what the plaintiffs are seeking to do is to renege on the agreement reached allowing the payment of \$5 million to the plaintiffs in exchange for their agreement not to proceed with the summary trial and to have a trial of the remaining issues.
- [66] The plaintiffs are bound by the terms of the Mayer Order and are not permitted to set down a summary trial against 1032. The issues as between the parties are to be decided at trial.

Conclusion

[67] The following orders are made:

1. From the proceeds held in trust by Kahn Zack Ehrlich Lithwick LLP:
 - a. TWO (2) million dollars shall be released forthwith to the plaintiff Kai Ming Yu;
 - b. TWO (2) million dollars shall be released forthwith to the defendant Canada Sparkle Long Holdings Inc.;
2. The release of funds is without prejudice to the position of any party regarding the remaining issues, including and not limited to the parties' positions with respect to the number of shares of Vancouver Soho, held by the parties;
3. The plaintiffs' application to set aside or void paragraph one of the order of Justice Mayer pronounced March 14, 2019 is dismissed;
4. The plaintiffs' application for a declaration that the order of Justice Mayer pronounced March 14, 2019 does not preclude the plaintiffs from proceeding summarily against the defendant 1032821 B.C. Ltd. is dismissed; and
5. The costs of this application will be in the cause.

"Forth J."

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