

CANADA / JUDGMENT

Zaepernick v. Somani

2024 BCSC 2067

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Supreme Court of British Columbia

DECIDED

11 October 2024

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2024 BCSC 2067 Zaepernick v. Somani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zaepernick v. Somani,

2024 BCSC 2067

Date: 20241011

Docket: E211990

Registry: Vancouver

Between:

Rudy Zaepernick

Claimant

And

Sofia Somani aka Sofia Sayani, Ice Queen Brands Inc.,

Ocean Drive Holdings Ltd., Portofino Management Inc.,

0913234 B.C. Ltd., Marine Drive Investments Inc., and 1226 Capital Corp.

Respondents

Before: Associate Judge Robinson

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant (by video):

S. Stanislaus

Counsel for the Respondents:

P. Sheppard

Place and Date of Hearing:

Vancouver, B.C.

October 4, 2024

Place and Date of Judgment:

Vancouver, B.C.

October 11, 2024

- [1] THE COURT: I am providing reasons for judgment in respect of two applications in the context of what is clearly an acrimonious family law dispute. The applications were addressed concurrently one week ago on October 4, 2024. In characterizing litigation as acrimonious, this matter has been the subject of multiple hearings before this court resulting in numerous orders. The number of applications has resulted in the production of several voluminous affidavits, many of which were before me on the present application and contained in an application record which consisted of five volumes. Notwithstanding that, counsel can be assured that I have reviewed the joint application record fully in arriving at my decision.
- [2] I am providing the reasons orally. In the event a transcript is ordered, I reserve the right to make revisions to, among other things, address grammatical issues and to include additional citations where applicable. However, those revisions, if made, will not affect the substance of my decision.
- [3] At the outset, I clarify this proceeding concerns a number of respondents, consisting of Sofia Sayani, as well as a number of corporate entities in which Ms. Sayani has or is alleged to have an interest. In providing these reasons, my reference to "the respondents" is intended to refer to them collectively. Whereas when I refer to "Ms. Sayani," I am referring to her as an individual litigant.

The Applications Before the Court

- [4] Turning now to the applications before me. The respondent's application was largely resolved prior to the hearing, and accordingly most of the claims for relief were adjourned generally. Specifically, the relief sought at paras. 1 through 4, inclusive, of part 1 of the respondent's notice of application were adjourned generally.

- [5] With respect to the relief sought at paragraph 5 of the respondents' notice of application, the respondent sought an order pursuant to Rule 13-6 of the Supreme Court Family Rules, BC Reg 169/2009, extending the time for service of an updated expert report relating to the parties' guideline income until Friday, October 25, 2024. The claimant disclosed a willingness to agree to an extension but took the position the deadline should be set at October 23, 2024, for both parties' expert reports related to guideline income. At the outset of the hearing, the parties agreed to resolve this matter by consent such that the deadline for service of updated expert reports related to the parties' guideline income will be Thursday, October 24, 2024.
- [6] Having reached an agreement on that issue, the remaining matters for resolution arise from the notice of application of the claimant. In this regard, the claimant seeks an order pursuant to s. 89 of the Family Law Act, SBC 2011, c 25 or an interim distribution of \$200,000 to pay legal expenses associated with the upcoming trial of this matter, which is set to begin on November 18, 2024, a little more than one month from now. As well, the claimant seeks an order pursuant to Rule 9-1 for the production of certain documents. I note that by the time this matter came on for hearing, many of the documents sought had been produced, and the outstanding requests relate to financial records related to various corporate entities and trusts.

Background

- [7] At the hearing of this application, counsel made extensive submissions concerning the background to this litigation, much of which was not relevant to the issues before me.
- [8] The facts that are salient to the present applications are capable of being stated succinctly.
- [9] In this regard, the claimant and Ms. Sayani were never married. However, it is not disputed the two of them were involved in a marriage-like relationship. The claimant contends that relationship began in 2011 and ended in 2020. Ms. Sayani argues the marriage-like relationship began in 2012 and ended in 2019.
- [10] Central to this litigation is a cohabitation agreement dated March 20, 2017, and signed by both the claimant and Ms. Sayani. The cohabitation agreement expressly states, *inter alia*, that both the claimant and Ms. Sayani:

... waive any and all rights and obligations relating to property that have arisen or that may arise under the Family Law Act and any other applicable legislation or law now or in the future, at law or in equity, from the relationship and/or in the event of a breakdown of the relationship.

- [11] With respect to the parties' respective rights to spousal support in the event of a breakdown of the relationship, the cohabitation agreement expressly preserves those rights and provides that neither party intends to release any rights they may have against each other for spousal support:

In the event of a breakdown of the relationship, each party will have such rights to receive financial support from the other and will be under such obligations to provide financial support to the other as are given or imposed upon each party by the Family Law Act.

- [12] It appears on the evidence that through the relationship, the parties maintained separate finances. The claimant owned real property in his name, and Ms. Sayani did the same. There is no evidence the two shared any bank accounts.
- [13] Following the breakdown of the relationship, a property owned by Ms. Sayani and located in West Vancouver was sold. It generated sale proceeds of approximately \$3.5 million, and those monies are being held in trust pending the outcome of this litigation. It is from those monies that the claimant seeks an interim distribution.
- [14] Since the breakdown of the relationship, the claimant has not received any spousal support from Ms. Sayani. He has sustained himself by liquidating one of the real properties which he owned, by availing himself of credit, and by eroding his savings. The claimant has proffered an affidavit which estimates his legal expenses associated with an 18-day trial at \$200,000, which aligns with the amount of the interim distribution sought.

Application For Interim Distribution

- [15] The law to be applied on an application for interim distribution is not contentious. Section 89 of the Family Law Act provides:

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

- [16] The forgoing makes clear that an applicant for interim distribution must meet two conditions. The first is that the distribution will not be harmful to the distributing party. The second is that the applicant needs the money to fund one or more of the enumerated purposes. Even where those conditions are met, the issuance of an interim distribution remains a discretionary exercise, as s. 89 provides that the court may make such an order. Consequently, in exercising discretion, under s. 89, the court must consider whether, in the particular circumstances of each case, it would be in the interests of justice to grant the order sought: *Bartch v. Bartch*, 2018 BCCA 271, at para. 56.

[17] Section 89 does not expressly address the third factor, which in my view must be considered in certain contexts, namely whether the applicant has established a *prima facie* right to compensation. This factor is of particular importance where the parties' rights are subject to or governed by a prior agreement such as a cohabitation agreement, which may operate to preclude any entitlement whatsoever. Those circumstances were addressed by this court in *I.F. v. R.J.R.*, 2015 BCSC 793. In that case, Madam Justice Ballance considered an application for interim distribution of the proceeds arising from the sale of family property. In considering the application, she began with an acknowledgment of the general rule at paragraph 125:

... where the marriage is admitted and need is proved interim support should be ordered without adjudicating the issues, unless the action is frivolous or vexatious.

[18] She continued at para. 126:

[126] While the other relevant factors that inform the issue of spousal support are to be considered to the extent possible, the respective needs and means of the parties are ordinarily the central factors, if not the most prominent, on an interim application. The corollary is that considerations such as compensatory factors and the need to achieve self-sufficiency often hold less significance: *R.C.J. v. C.L.G.*, 2010 BCSC 1596, at para. 11; *Goriuk* at para. 33.

[19] However, her analysis did not end there. Madam Justice Ballance then turned to consider the impact of a marriage agreement entered into by the parties, which she described as a "complicating factor." She held at paragraph 170:

[170] It is within the court's discretion to make an interim order for spousal support despite the existence of a marriage agreement that purports to disentitle the applicant from support, provided the applicant is seeking to have the agreement set aside at trial: *Thompson v. Thompson*, [1987] B.C.J. No. 2339 (S.C.); *Ziniuk v. Ziniuk* (1986), 1986 CanLII 1317 BC CA), 2 R.F.L. (3d) 398 (BCCA). The twin factors that typically dominate the analysis, beyond the applicant's financial need and the payor's financial means and ability to pay, are the strength of the applicant's case to set aside the agreement and his or her capacity to repay the amount awarded on an interim basis.

[20] The passage I have just cited requires me to expand the scope of the inquiry beyond simply considering the harm to the payor and the needs of the payee. Where a previous agreement exists which purports to disentitle an applicant to any support, it is necessary to also contemplate the relative merits of the applicant's case to set aside the agreement. Any doubt as to these requirements is addressed with reference to paragraph 194 of Madam Justice Ballance's decision as follows:

[194] In cases where the applicant may be precluded from entitlement to the family property based on a pre-existing agreement, the notion of being harmful to the other spouse's interests could also take the form of the court permitting a distribution so as to enable the

funding of an unmeritorious claim. A reasonable way to attenuate that manifestation of harm is to require the applicant to show there is a reasonable prospect of success of impeaching the subject agreement. The claimant in the case at hand has satisfied that hurdle. [Emphasis added]

- [21] A similar conclusion was reached by our Court of Appeal in *Bartch*, at paras. 57 to 63.
- [22] While instructive and no doubt a correct statement of the law, the circumstances of the present application are different and distinguishable from those in *I.F. v. R.J.R.*, such that the need to carry out a preliminary assessment of the relative strength of the claimant's ability to impeach the cohabitation agreement is less compelling. This is because the cohabitation agreement in the present case expressly preserves the claimant's right to spousal support following a breakdown of the parties' relationship. Whereas, depending on the determination of the issues at trial, his claims for property division may be precluded by the existence of the cohabitation agreement, his right to spousal support, if any, is unaffected by that agreement and is not dependent on his ability to have it set aside or varied. This is not a case, in other words, where the existence of a prior agreement constitutes a threshold issue or where the validity of enforceability of the agreement will be determinative of all the issues.
- [23] Such a case was before this court in *Gallant v. Layco*, 2023 BCSC 2218, which concerned an application for interim distribution of property under s. 89. In that case, there was a genuine dispute as to the duration of the unmarried parties' period of cohabitation, and accordingly a genuine dispute as to the applicant's status as a "spouse" for the purposes of the Family Law Act. The relief sought by the applicant in *Gallant*, *supra*, required the court to make a kind of preliminary ruling regarding her status as a spouse: see para. 34.
- [24] I reiterate that because the claimant's *prima facie* entitlement to spousal support is not contingent on resolving a threshold issue, there is a significantly less compelling reason to make a similar preliminary ruling in this context. Accordingly, I find that in determining the application for interim distribution on the present application, the issues for determination are:
- a) Whether an interim distribution would cause harm to Ms. Sayani. Subsumed in this is a consideration of the applicant's ability to repay the interim distribution if he does not prevail at trial; and
 - b) Whether an interim distribution is necessary to enable the claimant to fund the continued litigation.

- [25] In resolving these issues, the principles to be applied were summarized by our Court of Appeal in *Etemadi v. Maali*, 2021 BCCA 298, at paras. 50 to 53. First, a chambers judge must determine whether the applicant is economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution. If so, then it may be appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution.
- [26] Second, in determining whether to order an interim distribution, a judge must go through a preliminary assessment of the circumstances and arguments that touch on both requirements, whether the applicant could show that it would not be harmful to distribute property and whether it is necessary for the purpose listed in section 89. A "preliminary assessment" means determining whether the applicant can establish "a prima facie case of sufficient merit to warrant pursuant." Each issue that is raised with respect to necessity and potential harm must be examined contextually with a view to the objectives endorsed in the FLA.
- [27] Third, determining whether an interim distribution is necessary for a purpose enumerated in s. 89 involves careful consideration of the amount or quantum required. This follows from the principle that such orders are extraordinary in nature and must be assessed carefully. Finally, a judge must also exercise their discretion by deciding whether, in the particular circumstances of the case, it is in the interests of justice to grant the order sought.

Principles Applied to the Current Application

- [28] I turn now to apply these principles to the facts of the present application. With respect to the applicant's need, the claimant's evidence is that in early 2021, he realized proceeds of slightly more than \$400,000 from sale of real property. Over the ensuing three years, he has largely expended those proceeds. His affidavit includes banking records which indicates that as of September 20, 2024, his chequing account is overdrawn, and he has outstanding credit card balance of more than \$35,000.
- [29] On the other hand, he is the registered owner of real estate which has been the subject of an assessment in this proceeding. That assessment indicates the value of the claimant's equity in the property to be in the range of \$1.6 million. Consideration also needs to be given to the fact that the claimant is employable and has been able to sustain himself following the breakdown of the relationship. The evidence discloses that he has a prospective guideline income of \$348,000 per annum and that he has earned on average \$205,000 per year over the previous three years.
- [30] There can be no doubt that the claimant is capable of financial independence and indeed throughout the parties' relationship, he was seemingly financially independent. Notwithstanding that, I am confronted with a grim picture of the claimant's present financial circumstances. Despite relatively high earnings and high earning potential, the claimant discloses significant expenses. Some of those expenses might be fairly

characterized as extravagant and unnecessary, but it would not be appropriate for me to embark on an in-depth analysis of financial statements on the present application. It will suffice to recognize that based on the evidence, the claimant is spending everything he earns and does not appear to have the wherewithal to fund his ongoing participation in this litigation.

- [31] With respect to the claimant's potential ability to avail himself of some or all of the approximately \$1.6 million in equity in the real property that he owns, that property is subject to a certificate of pending litigation filed by or on behalf of Ms. Sayani. The CPL is likely to discourage refinancing. Nevertheless, Ms. Sayani has proposed to remove the CPL in her response to the present application. While this gesture might allow the claimant to access equity in the property, that is far from certain. It will take time for the claimant to apply for credit against the equity and longer still for an application to be approved. Moreover, it may not be approved at all. In the circumstances, it cannot be said that he has the means available to him to address his need for funding in the ongoing litigation.
- [32] When assessing necessity, reference must also be had to the payor's relative financial position. In this regard, little needs to be said about Ms. Sayani's financial position. Her ability to withstand the costs of litigation are not in doubt. When her situation is measured against that of the claimant, she enjoys a significant economic advantage. This is salient, in my view, because an applicant's need under s. 89 must be assessed contextually, having regard for the relative positions of each party. This must be so having regard for the fact that a central consideration is a levelling of the metaphorical playing field.
- [33] With respect to potential harm arising from an interim distribution, it is clear from the authorities that harm will be found where an interim distribution compromises or undermines the ability of the payor to participate in litigation. Harm might, for example, exist where an interim distribution requires the payor to assume debt or where an interim distribution affects the payor's ability to retain and instruct counsel.
- [34] Where, as in the present case, the alleged harm arises from the payee's ultimate difficulty in repaying the interim distribution if so ordered, the harm is less likely to constitute "harm" as contemplated by s. 89. This conclusion is supported by the reasoning of the court in *I.F. v. R.J.R.* In that case, Madam Justice Ballance addressed the harm arising from an applicant's potential liability to repay an interim distribution and noted that repayment, if required, could take several years. However, she declined to adopt a strict interpretation and held that an interim distribution was not dependent on being satisfied that the applicant could repay the distributed funds more or less immediately upon being ordered to do so, holding at para. 197 that if such approach is taken by the court:

... it would follow that a distribution might only be sanctioned where the applicant has assets equal or greater to the amount of the distribution, or a corresponding borrowing power or an assured minimum entitlement to family property so the court could be confident of repayment. Such an interpretation would place the most economically disadvantaged spouses beyond the reach of s. 89 and is not harmonious with a purposive approach.

- [35] In every case where an interim distribution is sought, it is necessary for the applicant to demonstrate need. In other words, the application is dependent on an applicant being unable to withstand the costs of continued participation in litigation. With that obligation in mind, it would be counterintuitive to require the same applicant to demonstrate an ability to comply with repayment obligations forthwith if he or she does not prevail at trial. Such applicants would, in many if not most cases, not be able to establish the requisite need for an interim distribution.
- [36] I am satisfied on the evidence before me that if an interim distribution is granted, there will be no "harm" to Ms. Sayani, as that term is understood for the purposes of s. 89. In the event she prevails at trial and the claimant is required to repay all or some of the interim distribution, he has exigible assets in British Columbia. Moreover, he has a demonstrated capacity to earn a relatively high income as a contractor. While repayment may not be immediate, Ms. Sayani will have various means of recourse available to her.

Preliminary Assessment of the Claimant's Entitlement

- [37] Having addressed both need and harm, I turn now to a preliminary assessment of the claimant's entitlement. The threshold to be met on this application is not onerous. The law only requires that I be satisfied that the claimant has a *prima facie* case of sufficient merit to warrant pursuit. In this respect, significant time was spent by the claimant pointing out the basis on which the cohabitation agreement was vulnerable and potentially unenforceable. As I have already held, it is not necessary in my view to consider those positions. In assessing whether the claimant has established a *prima facie* case of sufficient merit to warrant pursuit, reference need only be had to the fact that the claimant's right to spousal support is unaffected by the cohabitation agreement. This is not to say that the claimant is necessarily entitled to spousal support, and indeed counsel for Ms. Sayani offered several compelling reasons why such an award will not be made following a trial. However, notwithstanding those arguments, I am unable and unwilling to disabuse my mind of the objectives and criteria for an award of spousal support as set out in ss. 160 through 162 of the FLA.
- [38] Here the parties were in a marriage-like relationship for at least seven years. It appears on the evidence that following the breakdown of the relationship, the claimant has realized certain economic disadvantages when compared to his previous situation. Moreover, given the relatively disparate economic positions of the parties, the claimant's *prima facie* case for spousal support cannot, in my view, be seriously disputed. I reiterate, this is not to say that he is entitled to spousal support, but rather that the evidence discloses a *prima facie* case of

sufficient merit to warrant pursuant.

- [39] Having reached those conclusions and keeping in mind that orders for interim distributions are extraordinary in nature, it now becomes necessary to carefully consider the amount required to achieve one or more of the purposes enumerated in s. 89. In doing so, I reiterate that the claimant's evidence includes an affidavit sworn by counsel which provides an estimate of future legal expenses to be incurred between now and the conclusion of trial. The various anticipated expenses total \$200,000. That estimate was not challenged by Ms. Sayani, and in my view the estimate fairly approximates the costs associated with an 18-day trial. If anything, the evidence may underestimate the expenses the claimant will incur in this litigation going forward.
- [40] Accordingly, in my view an interim distribution in the amount of \$200,000 is required to fund the claimant's anticipated costs from the date of this order until the conclusion of the trial pursuant to s. 89(b) of the FLA. Accordingly, I grant the relief sought at para. 1 of the claimant's notice of application and order that the claimant receive \$200,000 as an interim distribution from the proceeds of sale of the property located at 5517 Ocean Place in West Vancouver, British Columbia. This order is made without prejudice to Ms. Sayani's right to deny all liability in this proceeding and without prejudice to her right to recover some or all of the interim distribution depending on the outcome at trial.

Document Disclosure

- [41] Turning now to the issue of document disclosure. As indicated, many of the documents sought by the claimant were provided in the time between the serving of the notice of application and the hearing of this application. To the extent that certain request for documents have not been met, they relate to corporations and trusts. While an application for further and better production of documents is expressly and clearly contemplated by Rule 9-1, an application should only be granted in circumstances where the court is satisfied that the documents sought are within the power, possession, and control of the application respondent. Moreover, even where that threshold is met, it is necessary for the applicant to establish the relevancy of the documents sought as a precondition to production.
- [42] In my view, the claimant fails to meet either threshold. Indeed, the evidence indicates that none of the documents sought are within the power, possession, or control of Ms. Sayani. I refer to a comprehensive letter dated September 26, 2024, written by Ms. Sayani's solicitors which conveys clearly to the claimant that the documents do not exist or are not within her possession or control. No evidence was proffered to refute the positions taken in that letter.
- [43] Indeed, having regard for the fact that the various corporate entities to which the documents relate are owned and controlled by members of Ms. Sayani's family and not Ms. Sayani herself, the positions taken by her solicitors are not surprising. That said, even if I were satisfied that the documents existed and that Ms. Sayani of capable of producing them, I would not grant the orders sought because I am unpersuaded as to the relevance of the

documents. In saying that, I am compelled to point out the claimant made virtually no submissions in this regard and instead opted to place reliance on the fact that the documents had been requested as proof of the fact that they had to be produced.

- [44] While making a demand for further and better production is a precondition to an application under Rule 9-1, once that application is brought, it is incumbent on the applicant to meet the requirement for production with evidence. That has not occurred in this case. Accordingly, to the extent that the application seeks production of documents from Ms. Sayani, the application is dismissed.

Conclusion

[45] In conclusion, I order:

- a) By consent, pursuant to Rule 13-6 of the Supreme Court Family Rules, the time limited for the exchange of updated expert reports related to the parties' guideline income is extended to Thursday, October 24, 2024.
- b) The claimant shall receive an interim distribution in the amount of \$200,000 to be paid from the proceeds of the sale of the property located at 5517 Ocean Place in West Vancouver, British Columbia. This amount shall be paid to the claimant no later than October 25, 2024, two weeks from the date of this order.
- c) The claimant's application for further and better production of documents is dismissed.

Costs

- [46] Insofar as costs are concerned, while the application as originally constituted involves several issues, the hearing was largely focused on the claimant's right to an interim distribution. The claimant was successful on that issue and accordingly has a presumptive entitlement to costs. However, costs in my view should not be ordered payable forthwith. Nor should they be payable in any event of the cause. Instead, I order the claimant receive his costs of this application in the cause.

"Associate Judge Robinson"

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