

CANADA / JUDGMENT

Zhang Estate v. Yin

2024 BCSC 1164

COURT

Supreme Court of British Columbia

DECIDED

5 March 2024

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2024 BCSC 1164 Zhang Estate v. Yin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang Estate v. Yin,

2024 BCSC 1164

Date: 20240305

Docket: S2010412

Registry: Vancouver

Between:

Junjie Tao, Executor of the Estate of Tong Zhang

aka Tony Zhang, Deceased

Plaintiff

And:

Hang Yin, Yan Chun Liu, Yun Yin, 1011066 BC Ltd.,

1079770 BC Ltd., 1032734 BC Ltd., and 1085842 BC Ltd.

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

D.L.R. Yaverbaum

Counsel for the Defendants:

M. Laity

Place and Date of Hearing:

Vancouver, B.C.

March 5, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2024

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The plaintiff brings this application for an order permitting alternative service of application materials in which he seeks an order that the defendant, Hang Yin ("Mr. Yin"), is in contempt of court. The defendants are represented by counsel in these proceedings. As such, instead of being the typical without-notice application, the application was brought on notice. The defendants oppose the order being sought.

Litigation History

- [3] This matter involves complex litigation involving allegations of fraud. Briefly, the plaintiff, now deceased and represented by his estate, alleges that Mr. Yin misappropriated funds from between 2015 and 2018 under the guise that those funds were being invested into real estate development projects within British Columbia. The plaintiff alleges that instead of it being a valid investment, Mr. Yin wrongfully diverted the plaintiff's funds into the hands of himself and the other defendants, who are closely held corporate entities and family members, as part of an overall scheme to defraud him of the equivalent of approximately \$45 million Canadian.
- [4] The action was commenced on October 16, 2020, with pleadings being closed by November 30, 2020. To date, two trial dates have been set. The first was scheduled to commence in September 2022. That date was adjourned by consent with new counsel then coming on record for the defendants shortly thereafter in December 2022. The second trial date, which had been scheduled for September 18, 2023, was adjourned by court order pronounced September 1, 2023 (the "September Order"), on application by the defendants. The adjournment was made on a peremptory basis as against the defendants with a number of conditions being imposed, including specific disclosure obligations with respect to certain real property investments as had been particularized in the notice of civil claim. The third

trial date, secured since that adjournment, has now been set for March 31, 2025.

- [5] The plaintiff's position is that the disclosure obligations under the September Order have not been met.
- [6] Accordingly, on December 7, 2023, the plaintiff filed the contempt application which is the subject of this application.
- [7] In addition to seeking a declaration that the defendants are in breach of the September Order, the plaintiff seeks an order that they purge such contempt by providing the missing documentation as enumerated therein within ten days. The notice of application and supporting affidavits have been delivered to counsel for the defendants; however, no personal service has been effected.

Service Efforts

- [8] On December 5, 7, and 13, 2023, counsel for the plaintiff made inquiries with counsel for the defendants as to whether they would accept service of the subject application materials on behalf of the defendants, with counsel advising on December 15, 2023 that they would not.
- [9] The corporate defendants were then served as required on January 15, 2023.
- [10] However, the plaintiff has not yet personally served Mr. Yin, his daughter, Yan Chun Liu ("Ms. Liu"), or his wife, Yun Yin (Ms. Yin, and collectively with Mr. Yin and Ms. Liu, the "Personal Defendants").

Service on Ms. Liu

- [11] Based on the affidavit of attempted service, on Thursday, January 18, 2024, at 3:16 p.m. and Friday, January 19, 2024, at 10:29 a.m., a process server attended at the West Vancouver residence of Ms. Liu (which is the address which Ms. Liu confirmed to be her residential address at her December 1, 2021 examination for discovery).
- [12] The process server left a message to be contacted. Thereafter, the process server received a phone call further to that message on January 19, 2024. The caller, who the process server deposes spoke very little English, advised that she would be home at the address at 2:00 p.m. As such, the process server returned to the address at 2:01 p.m. and spoke with an adult female, who again spoke little English, but denied that she was Ms. Liu.
- [13] In correspondence between the parties, Ms. Liu's counsel suggested that the issue with service upon Ms. Liu is related to the language barrier, suggesting that the issue arose because the plaintiff failed to use a Mandarin-speaking process server. However, counsel's correspondence seems to confirm that Ms. Liu could be served at her home at that address.

Service on Ms. Yin

- [14] With respect to Ms. Yin, based on the affidavit of attempted service, the process server attended at her residence (which is the address which was confirmed by Ms. Yin to be her address at her examination for discovery conducted on February 22, 2023), on Thursday January 18, 2024, at 3:06 p.m. but was unable to gain access due to a security gate. The process server dialled the intercom on the gate with no answer and left a message on the gate to be contacted.
- [15] The process server attended again on Friday, January 19, 2024, at 10:37 a.m. noticing that message was still there on the gate as had been posted the previous day. Again, the process server was unable to gain access to the property due to secured gate and received no answer on the intercom when she again attempted to phone.
- [16] By letter of February 12, 2024, the defendant's counsel confirmed Ms. Yin's address as that used by the process server but advised that Ms. Yin was in China for lunar new year. As such, counsel for Ms. Yin noted it was not a case of Ms. Yin evading service, just that she was travelling.

Service on Mr. Yin

- [17] The situation with respect to Mr. Yin is much more complicated. Mr. Yin has sworn various affidavits in these proceedings which speak to his personal circumstances, all of which have affected the carriage of these proceedings.
- [18] In particular, he deposes that he moved back to China in 2019 and because of investigations by the Chinese government into allegations that the deceased plaintiff had engaged in money laundering, which may relate to the exchange of funds which form the basis of this action, have resulted in him being a government witness. As a result, he deposes, he is no longer entitled to leave the country, with the government having taken his passport and ID. He is under strict conditions in terms of his ability to communicate with anyone in any way regarding the issues that the Chinese government is investigating, which includes those matters relating to this lawsuit.
- [19] Specifically, prior to taking any step in this litigation or meeting with anyone regarding it, he must first seek the approval of the public security bureau in China (the "PSB").

Analysis

- [20] The defendants' counsel is not inclined to accept service on behalf of the defendants, although it not quite taking the position that personal service is required.

- [21] While not providing any particular reason for not doing so for Ms. Liu and Ms. Yin other than what they describe as a lack of robust attempts for personal service by the plaintiff, including what they say is the plaintiff's neglect in contacting them for current addresses for these parties, counsel has indicated that they will not accept service for them until Mr. Yin is served first, given that he is the primary defendant.
- [22] Further, with respect to Ms. Yin, they also say that their willingness to accept service is subject to her being back in Canada, which they expect "should happen by April."
- [23] With respect to Mr. Yin, they are not agreeable to accepting service for Mr. Yin, citing various problems that have occurred in communicating with their client remotely, as illustrated by problems that they say arose during the plaintiff's remote examination for discovery of Mr. Yin, including technical issues and logistical issues as a result of PSB conditions, including a sudden appearance of a fire wall, which appeared to interfere with the connection.
- [24] In order to address these issues, one of the partners in counsel's office travels to China every few months to personally meet with Mr. Yin and obtain instructions.
- [25] In an affidavit sworn February 22, 2024, a member of counsel's firm deposes that the partner "is planning to travel to see Mr. Yin in the middle to late March 2024." As such, as noted in that same affidavit, defence counsel is prepared to accept service "only if the application takes place after the next time the partner at our firm is travelling to China."
- [26] The plaintiff argues that it is impracticable to personally serve Mr. Yin in accordance with either the Rules, in a manner allowed for China through which it would be reasonably expected to come to his attention, or in accordance with the Hague Service Convention (the "Convention"). However, the plaintiff has not tendered any evidence to show what efforts, if any, have been done to either attempt service through a process available under the Rules, or what steps would be required if applying Chinese law, which effectively makes such service impracticable.
- [27] Rather, the plaintiff has tendered evidence with respect to the requirements for service under the Convention, namely a printout from the Chinese Ministry of Justice International Legal Cooperation Centre, which governs service requests. This printout indicates that the process requires the Central Authority of China to refer the document to the "competent court," which will then serve the document either personally, and "to the extent not contrary to Chinese law", or in a method otherwise allowed by the civil procedural law of China. The documents must also be translated into Chinese, with the time for such service to be noted to be "around six months."
- [28] It is not clear what impact, if any, the investigatory conditions on Mr. Yin may have on the Chinese court's approval of a service request under the Convention. However, it is reasonable to assume that given the required approval of the PSB in respect of any steps being taken that the usual process may require an extra step to obtain that approval.

- [29] In their filed response to this application, counsel for the defendants take the position that they would consent to the order sought if "the underlying application for which alternative service is being sought is set no later than April 5, 2024" to allow the defendants' counsel sufficient opportunity to bring the process to the attention of the defendants and seek instructions related thereto.
- [30] In this respect, the defendants also argue that the contempt application is without merit, as they have complied with the September Order to the best of their abilities. Of course, on an application such as this, it is not the role of this court to look into the merits of the underlying application.

Legal Framework

- [31] In order to comply with the service requirements in Rules 4(3)(1)(i) and 22-8(11) of the BC Supreme Court Civil Rules (the "Rules"), alleged contemnors are to be personally served with any application materials whereby a finding of contempt is being sought.
- [32] However, pursuant to R. 4-4, if it is impracticable to do so, the court can make an order for alternative means of service of documents that are otherwise required to be served by personal service if the party cannot be found after a diligent search, or is evading service.
- [33] Given that Mr. Yin is in China, the basis on which personal service can be effected upon him is wider given that pursuant to R. 4-5(10), personal service may be effected outside British Columbia in such manner as provided by the law in the place where service is carried out, or by the process set out in the Convention, in addition to the processes available under the Rules.
- [34] Given that by their nature alternative service applications are generally without notice, there are only a handful of cases that address what need to be shown to establish that personal service is impracticable.
- [35] In *Luu v. Wang*, 2011 BCSC 1240, Justice Burnyeat considered an application to set aside an alternative service order that had been made on the basis that it was impracticable to serve a party in China through use of the Convention, noting as follows:
- [13] In interpreting that Rule, McTaggart Co. Ct. J., as he then was, in *Malkin & Pinton Industrial Supplies v. Anglehart and Anglehart Furniture* (1977), 5 B.C.L.R. 285 (C.C.N.W.) made the following statements:

The purpose of such rule is not to save the plaintiff "trouble and expense of effecting personal service, if personal service can be made". The mere fact that it may be a matter of some difficulty to reach him (unless, for example, he is evading service) does not of itself relieve the plaintiff of the obligation of serving him personally:

De Camps v. Sainsbury (1921), 1921 CanLII 478 (ONSC), 49 O.L.R. 131, 64 D.L.R. 53, per Orde J.; see also *Morrow v. Morgan* (1920), 47 O.L.R. 97.

In considering the present rule the first question to answer is what is meant by the word "impractical".

The Shorter Oxford English Dictionary, 3rd ed. (1975), vol. 1, pp. 1034-35, gives the following:

Impractical, ... 1. Impracticable.

Impracticable, ... 1. Not practicable; that cannot be carried out or done; practically impossible 1677. 2. That cannot be put to use or practically dealt with; unmanageable, intractable, unserviceable 1653. 3. An impracticable person 1829.

"In matters of business a thing is commonly treated as impossible when it is impracticable, and as impracticable when it cannot be done without laying out more money than the thing is worth": *Rosetto v. Gurney*, 11 C.B. 186, cited in *Devitt v. Providence Washington Ins. Co.* (1902), 61 App. D. 390, 70 N.Y.S. 654, affirmed 173 N.Y. 17, 65 N.E. 777

(at paras. 5-8)

- [36] In *Luu*, as there was no evidence before the court as to the cost of personal service in China, there was no evidence by which the court could conclude that service would "cost more than the matter was worth" or that personal service could not easily be effected. Here, given the amount in issue, cost or proportionality is not a factor.
- [37] In *Xu v. Xu*, 2020 BCSC 1529, the court considered *Luu* and the extent of the evidence needed in order to relieve a party from service in accordance with the terms of the Convention, in light of R. 4-5. At para. 17, the court noted that article 277 of the civil procedural law of the People's Republic of China (2017 amendment), provides that no foreign agency or individual may serve documents or investigate and collect evidence apart from the official method of service through the judicial assistance provided through the process under the Convention.
- [38] In other words, the court concluded that there is no ability to effect personal service in China. However, no evidence of that impediment was before the court on this particular application.
- [39] In any event, In *Xu*, the court found that the evidence before the court, namely as to a risk of delay of at least six months or even longer given backlogs due to COVID-19, was insufficient to establish that the process available under the Convention rendered service as impracticable.
- [40] The plaintiff argues here that the threshold to establish impracticability ought to be lower where there is counsel retained for the party as the concern that the document may not come to the party's attention is less of a concern given that, as long as they engage with counsel, they will be apprised not only of the steps being taken but have the opportunity to seek advice from their counsel.

- [41] In response, the defendants argue that a more relaxed approach is contrary to the requirement for personal service of contempt applications, relying on 1063664 BC Ltd. v. Perehudoff, 2021 BCSC 2136, at para. 29 for the proposition that given the quasi-criminal nature of contempt proceedings, strict adherence with procedural requirements such as personal service is required, and any doubt in respect of such procedural requirements is to be resolved in favour of the alleged contemnor.
- [42] Notably, at para. 30 of that decision, the court referenced LLS America LLC (Trustee of) v. Dill, 2018 BCSC 2316, at para. 56, where the court rejected such an argument, finding as follows:
- [56] In the present case, there can be no doubt that the defendant had reasonable notice of the grounds of the contempt application and of the material to be used in support thereof. He has fully responded to the application, while maintaining the technical objection that the material was not personally served on him. The procedural irregularity in this case is minor and inconsequential, and I am satisfied that the object of the service rules have been met. I therefore conclude that the lack of personal service does not vitiate the contempt proceeding.
- [43] A similar finding was, in fact, made in Perehudoff.
- [44] The difference here, the defendants argue, is that if the defendants are served by a means other than personal service, it is not likely to come to their attention given the language barriers with respect to Ms. Liu, and the fact that Mr. Yin and Ms. Yin (although temporarily) are in China, with Mr. Yin being subject to the additional PSB restrictions.

Analysis

- [45] Both parties are of the view that the position of the other on this particular application is based on strategic considerations rather than practical ones.
- [46] The plaintiff suggests that the defendants are evading service, and in the case of Mr. Yin have made themselves essentially service proof.
- [47] The defendant suggests that the plaintiff's attempts to bring a "long line of applications to wear down the defendants" is meant to take advantage of the unique and trying circumstances involving Mr. Yin to gain advantage in this litigation.
- [48] An order for alternative service is a discretionary one guided by the overall principles of proportionality and interest in assuring there can be a fair determination of the issue such that it is in the overall interests of justice to make the order being sought. In the context of alternative service, the analysis of what is impracticable is to be considered based on the facts before the court on the application before it. Thus, service in accordance with the Convention may be practical in one case but impracticable in another.

- [49] In addition to the usual factors that are generally relied upon, namely that there have been unsuccessful attempts by a process server to effect service, which may be indicative of a party evading service or an inability for that party to be found, although not necessarily entirely definitive, there are at least four factors which are relevant to the analysis in this case.
- [50] The first is that all parties are represented by counsel and are well aware that proceedings are underway. It is not reasonable to believe that the defendants are not aware of either the contempt application, or this application for alternative service. Notwithstanding that contempt proceedings are quasi-criminal and of a nature that personal service is required as the starting point under the Rules, it is also of note that these defendants have appointed a lawyer as their representative for the purposes of these proceedings.
- [51] As a result of them having appointed counsel, the only way that the documents if served by alternative service to their counsel would not come to their attention is if there arose a complete inability of counsel to communicate with them.
- [52] In this case, the issue is not that the documents will not come to the defendant's attention, but rather how long it will take for that to occur in a way that is meaningful, which includes the time required for their counsel to explain the documents to them, particularly Mr. Yin. Specifically, while the defendants say that there may be problems with their ability to communicate with Mr. Yin, they admit that the difficulties are not such that all communication will be permanently severed, just delayed.
- [53] The second is that there is a trial date scheduled for approximately one year from now, which is peremptory on the defendants.
- [54] Two prior trial dates have been compromised, with the second adjournment being conditional upon the document disclosure which is the subject of the contempt application. Insofar as the parties are concerned, there is a disagreement as to whether there has been compliance. However, as noted, that is not relevant for the purpose of today's application.
- [55] What is relevant is the ability to deal with what is and is not required for document disclosure, issues that ought to be decided in a timely manner to ensure that discoveries arising from any such document disclosure can occur, expert evidence can be obtained in respect of those documents if any is being sought, and the trial can be ready to proceed rather than be lost for a third time. It is the avoidance of this risk that resulted in the adjournment being on a peremptory basis as against the defendants in the first place.
- [56] This is also in the context of the defendants having three of their own extant notices of application, which they note they have been seeking to set down for hearing on the long chambers list, for the past five and a half months. In other words, it is taking time to get discovery issues addressed, and further delay which may be caused by effecting service through the Convention.

- [57] While the defendants argue that the trial is a far distance off, any service that depends upon the Chinese government taking "around six months" means that this application will be pushed to, at best, five or six months before trial. If as the defendant suggests it will be needed to put over a full-day hearing, then it likely will not be resolved until the eve of trial.
- [58] The third factor, although specific to Mr. Yin it does impact the timing in respect of the others counsel argues he must be served prior to the others given his role as primary defendant, is that he is subject to the conditions imposed upon him by the PSB.
- [59] This means that Mr. Yin is unable to take a step in this litigation, and faces serious consequences of doing so, without the PSB's approval. Thus, while the plaintiff has not tendered the usual evidence as to attempts to personally serve Mr. Yin in China, in the unique circumstances of this case, the evidence establishes that Mr. Yin would not likely be able to cooperate in any event by responding to a process server for fear of being viewed as taking a step in this litigation without the PSB's approval.
- [60] Finally, as a result of the Chinese investigation and conditions upon Mr. Yin, as defence counsel points out, their ability to instruct and obtain instructions from Mr. Yin is severely limited. The evidence included various examples as to how those restrictions have already impacted Mr. Yin in the course of this litigation.
- [61] The defendants ultimately argue that there is no prejudice in requiring personal service, and that while it may be inconvenient to do so, it is not impracticable to do so, or more accurately the plaintiff has not met the burden upon it to establish that it is, in fact, impracticable.

Conclusion and Orders Made

- [62] In the circumstances of this case, while more efforts could have arguably been made to personally serve Ms. Yin and Ms. Liu in British Columbia, I am satisfied that in the context of the facts underlying this application, that it is appropriate to grant the order for alternative service for Mr. Yin and Ms. Yin.
- [63] Given Ms. Yin's lengthy absence from the Lower Mainland, I am satisfied that she cannot be reasonably found. Rule 4-4 implicitly includes that the party can be found, and personally served, within a reasonable period of time. It should not be open to a party to make themselves unable to be found, or to evade service effectively halting the ability of a party to move forward with their litigation simply by leaving town for extended periods of time, in this case, for several months. It is incumbent upon parties to ensure that they can remain servable once they have appeared in an action.
- [64] As to Mr. Yin, it is impracticable to serve him either personally or through the Convention for the reasons I have previously set out. The unique circumstances of this case, particularly with the PSB involvement and conditions imposed, it is appropriate to grant an order for alternative service as sought.

- [65] With respect to Ms. Liu, however, given that there were only two attempts to serve her, with the evidence suggesting she is in Vancouver, and that the issue seemed to be more in the nature of a language barrier with the process server, I am not satisfied that she would have understood sufficiently that someone was attempting to contact her for any specific purpose that her lawyer could not be handling for her, such that it can be said that she was either evading service, or could not be found.
- [66] In making an order for alternative service, the court has the discretion to impose appropriate terms that will, in keeping with the purpose of the Rules, maximize the likelihood of the documents coming to the attention of the recipients and to ensure that they have sufficient time to enable an opportunity to obtain legal advice, for example if they are in a remote location it is not unusual to include a term that they have a longer period of time to respond to the documents being served.
- [67] With respect to Mr. Yin, the issues that impair that from occurring are the same issues that are the basis for making the order in the first place. I agree with the defendants that given those issues, the term that they have included as a basis on which they would consent to the order is therefore appropriate.
- [68] Accordingly, I make the order that:
- a) The applicant has leave to serve the notice of application for contempt filed December 7, 2023 and supporting materials along with a copy of this order (the "Documents") on Hang Yin and Yun Yin by emailing the documents to [redacted].
 - b) Service in the above manner shall be deemed good and sufficient personal service upon Hang Yin and Yun Yin, seven days after both emails have been sent.
 - c) The contempt application will not be set for hearing any earlier than April 5, 2024.
 - d) The application for alternative service in respect of Ms. Liu is adjourned generally.
- [69] I will hear quick submissions on costs.

(SUBMISSIONS ON COSTS)

- [70] THE COURT: Costs of this application shall be left with the discretion of the presider of the contempt application or a further court order. If there is no contempt application set down, you are free to bring the issue of costs back to be argued. Thank you.

"Associate Judge Robertson"

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