
CANADA / JUDGMENT

Zhang v. 0906825 B.C. Ltd.

2018 BCSC 13

COURT

Supreme Court of British Columbia

DECIDED

5 January 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 13 Zhang v. 0906825 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang v. 0906825 B.C. Ltd.,

2018 BCSC 13

Date: 20180105

Docket: S172669

Registry: Vancouver

Between:

Ping Zhang and 0841382 B.C. Ltd.

Plaintiffs

And

0906825 B.C. Ltd. and Juan Zhou

Defendants

Before: Master Muir

Reasons for Judgment

Counsel for the Plaintiffs:

A. Wade

Counsel for the Defendants:

B.G. Baynham, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

December 1, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 5, 2018

introduction

- [1] This is an application by the defendants to set aside three garnishing orders before judgment (the "garnishing orders") dated and filed on April 4, 2017 by the plaintiffs directed at the garnishees, Envision Financial, Royal Bank of Canada and TD Canada Trust. They also seek that the garnished funds paid into court by the garnishees, Envision Financial and the Royal Bank of Canada, be released to the defendants. The total amount of the garnished funds paid into court is \$200,347 (\$200,265 by Envision Financial and \$82 by Royal Bank of Canada).
- [2] The basis for the garnishing orders is the claim by the plaintiffs that the defendants are liable to them for a cheque in the amount of \$200,000 that was dishonoured when presented.
- [3] The defendants deny that the cheque in question was authorized by them and say that it was obtained and cashed under false pretences.
- [4] This is one of several actions involving the same parties.

Background

- [5] The defendant, Ms. Zhou, and her husband emigrated from China to Canada in 2009. They discussed acquiring an investment property with the plaintiff, Mr. Zhang, and he advised them about certain lands located in Delta, B.C. (the "Lands").
- [6] Mr. Zhang, through the plaintiff, 0841382 B.C. Ltd. (the "plaintiff company"), leased a building on the Lands to operate a restaurant.
- [7] On May 6, 2011, the defendant, 0906825 B.C. Ltd. (the "defendant company"), purchased the Lands. Shortly thereafter, it is alleged that the plaintiff company stopped paying rent to the defendant company and ceased operating the restaurant.
- [8] It is then alleged that Mr. Zhang asked Ms. Zhou and her husband to jointly purchase a Chinese restaurant with him in Maple Ridge, B.C. (the "new venture").
- [9] Each of Mr. Zhang and Ms. Zhou purchased 50% of the shares in the new venture. However, as Mr. Zhang did not have sufficient funds to pay for his shares, he, through another company, 0918645 B.C. Ltd., now known as J&J Financial Inc., executed a promissory note to repay the loan to a company incorporated by Ms. Zhou, 0914680 B.C. Ltd.

- [10] It is said that in exchange for financial assistance from Ms. Zhou, Mr. Zhang agreed to assist her in the re-development of the Lands.
- [11] The re-development project on the Lands commenced in April 2012. During the course of that project, it is alleged that Mr. Zhang would occasionally request, and Ms. Zhou would provide, pre-signed blank cheques issued by the defendant company.
- [12] Ms. Zhou says that in April 2012, Mr. Zhang asked for two cheques (the "cheques") from the defendant company to pay for fencing around the Lands pending construction.
- [13] It is alleged that four years later, without the knowledge or consent of the defendants, the plaintiffs attempted to cash one of the cheques dated November 11, 2016 and made payable to the plaintiff company in the amount of \$200,000. The cheque was dishonoured due to insufficient funds and returned.
- [14] Mr. Zhang admits that he wrote the payee, the amount and the "Re" line on the cheque, but claims that that was done four years earlier in the presence of Ms. Zhou.
- [15] The plaintiffs say that the cheque was in payment for the plaintiff company agreeing to surrender its lease on the Lands so that the re-development project could proceed.
- [16] The plaintiffs say that it was agreed between the parties at the time the cheque was signed that the cheque would not be cashed until the occupancy permit was obtained.
- [17] Mr. Zhang's evidence is that the occupancy permit was obtained on November 22, 2016. He alleges that he only presented the cheque upon the occupancy permit being granted.
- [18] The plaintiffs rely on the returned cheque as the basis for the garnishing orders.
- [19] On November 21, 2016, Mr. Zhang filed a builder's lien against the Lands for \$400,000. The defendants deny that Mr. Zhang ever provided services that would support such a lien on the Lands.
- [20] This action was commenced on March 22, 2017.
- [21] Mr. Zhang swore an affidavit in support of a garnishing order before judgment ("Mr. Zhang's affidavit"). Three garnishing orders were obtained from the court. On April 21, 2017, Envision Financial paid into court the sum of \$200,265 and on April 28, 2017, the Royal Bank of Canada paid into court the sum of \$82.

The Issuance of the Garnishing Orders

- [22] The plaintiffs rely on the Bills of Exchange Act, R.S.C. 1985, c. B-4.
- [23] The plaintiffs' position is that the dishonoured cheque is a bill of exchange as defined in the Bills of Exchange Act and, further, as defined in the Bills of Exchange Act, the defendant company is the drawer of the cheque, Ms. Zhou is the endorser and the plaintiff company is the holder.

[24] Section 57 of the Bills and Exchange Act provides:

Every party whose signature appears on a bill is, in the absence of evidence to the contrary, deemed to have become a party thereto for value.

[25] Section 81 of the Bills of Exchange Act provides:

Subject to this Act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary.

[26] Section 133 of the Bills of Exchange Act provides:

Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, are:

- (a) the amount of the bill;
- (b) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from maturity of the bill in any case; and
- (c) the expenses of noting and protesting.

[27] Therefore, the plaintiffs say that the defendant company and Ms. Zhou are liable and indebted to the plaintiff company in the total liquidated amount of \$200,000.

[28] Section 3(2) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 governs the making of prejudgement garnishing orders and provides:

- (2) A judge or a registrar may, on an application made without notice to any person by
 - (a) a plaintiff in an action, or
 - (b) a judgment creditor or person entitled to enforce a judgment or order for the payment of money,

on affidavit by himself or herself or his or her solicitor or some other person aware of the facts, stating,

- (d) if a judgment has not been recovered,
 - (i) that an action is pending,
 - (ii) the time of its commencement,
 - (iii) the nature of the cause of action,
 - (iv) the actual amount of the debt, claim or demand, and
 - (v) that it is justly due and owing, after making all just discounts,
- and stating in either case

- (e) that any other person, hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and
- (f) with reasonable certainty, the place of residence of the garnishee,

order that all debts due from the garnishee to the defendant, judgment debtor or person liable to satisfy the judgment or order, as the case may be, is attached to the extent necessary to answer the judgment recovered or to be recovered, or the order made, as the case may be.

[29] The defendants' first point is that the three garnishing orders should be set aside as the nature of the cause of action as disclosed in Mr. Zhang's affidavit in support of the garnishing orders is deficient.

[30] The defendants say that when Mr. Zhang's affidavit in support of the garnishing orders is read with the notice of civil claim, which was not attached to his affidavit, ambiguity and disharmony are created. The defendants assert that:

It is unclear what cause of action the plaintiffs are asserting for the debt and the Garnishing Orders ought to be rejected for these ambiguities.

[31] The defendants assert that it is not a straightforward debt claim, as the \$200,000 debt is alleged to be a term of an oral shareholders' agreement, which they deny, and the notice of civil claim does not seek stand-alone relief for judgment of \$200,000.

[32] The defendants rely on the decision in *Bazargan v. Milinx Business Services, Inc.*, 2001 BCSC 765, which provides:

[14] The courts have held that the true nature of the plaintiff's claim must, if a garnishing order before judgment is to be upheld, be for a sum certain or liquidated claim. In *Mitchell v. Fournier* [1949] 1 W.W.R. 349 (B.C.S.C.) Mr. Justice Manson, viewed those proceedings as an action for unliquidated damages. At page 352 he finds:

In the case at Bar we have a claim in the nature of damages but in the form of a liquidated claim. The mere phrasing of the endorsement on the writ cannot change the true nature of the claim.

[17] In *First Avenue Research Corp. v. Donar Chemicals Ltd.*, [1987] B.C.J. No. 192 Q.L. (S.C.), Mr. Justice Skipp found it was sufficient to support garnishment before judgment where there were a number of causes of action providing one was a liquidated claim.

[19] Section 3(2), (d), (3), of the Act, requires that an affidavit in support of a garnishing order before judgment must state "The nature of the cause of action.". Relying upon Knowles (Supra), that there must be meticulous observance of the requirements of the Act, the affidavit should not leave the judge guessing as to what is meant by the description of the cause of action. (*Marathon Realty Company Limited v. Unitow Services Ltd.*, 1979, 10 B.C.L.R. P.34, (B.C.S.P.) at P.38)

[20] I am satisfied that where an affidavit filed in support of a garnishment, sets out a clear and unambiguous statement describing a cause of action for a liquidated amount, such affidavit should be rejected where a review of the statement of claim creates ambiguity and disharmony. In this case the plaintiff deposes to a cause of action for a liquidated demand not found in the statement of claim.

[33] Mr. Zhang's affidavit in support of the garnishing orders provides:

3. The nature of part of the cause of action for which this action is brought is for debt, specifically a cheque for \$200,000.00 as provided by 0906825 B.C. Ltd which was due and payable on November 22, 2016. The cheque was presented to the bank of 0906825 B.C. Ltd. but was refused as there was insufficient funds in the account for the bank to honour the cheque. 0841382 B.C. Ltd. has demanded payment of the cheque but 0906825 B.C. Ltd has refused or neglected to pay the sum of \$200,000.00 or any part thereof.
4. In respect of the cause of action, the defendant 0906825 B.C. Ltd. is justly indebted to the plaintiff 0841382 B.C. Ltd. for \$200,000.00 after making all just discounts, and that sum is justly due and owing.

[34] The notice of civil claim in Part 1, Statement of Facts, provides, inter alia:

Shareholders Agreement between the Parties

32. By agreeing to relinquish and to terminate 0841's leasehold ownership of the Business to 0906 and by agreeing to discontinue the Business without requiring that the Repairs be completed and by also transferring [Zhang's] right to purchase the Lands for \$1,550,000.00 million [sic] dollars [sic], [Zhou] and 0906 offered [Zhang] and 0841 the following consideration and remuneration:
 - a) In return for relinquishing the Lease and in lieu of 0906 having to complete the Repairs which 0906 was obliged to do, 0906 would pay 0841 the mutually agreed purchase price of \$200,000.00, which was to be deferred and due and payable to 0841 by 0906 upon the receipt of the Occupancy Permit of the Project.
34. As security for the repayment of the deferred purchase price of \$200,000 for the redemption of the leasehold ownership of the Business, Zhou on behalf of 0906 provided [Zheng] and 0841 with an undated, pre-signed cheque for \$200,000 (the "Cheque") as signed by Zhou and made payable to 0841.

The NSF Cheque

100. In or about 2011 or 2012, [Zheng] was provided with the Cheque as signed by Zhou on behalf of 0906.

101. In or about December 2016, [Zheng] relying on the representation of Zhou that the [C]heque would be honoured with sufficient funds after the occupancy permit was received for the Project, deposited the Cheque to the account of 0841.
102. The Cheque is a bill of exchange as that term is defined in the Bills of Exchange Act.
103. 0906 is the drawer of the Cheque as that term is defined in the Bills of Exchange Act. Zhou is the endorser of the Cheque as that term is defined in the Bills of Exchange Act. 0841 is the holder of the Cheque as that term is defined in the Bills of Exchange Act.
104. 0831 presented the Cheque for payment, but 0906's bank has refused to honour the Cheque due to insufficient funds.

Debt Outstanding

105. As of the date of this Notice of Civil Claim, [Mr. Zhang] despite demand has not received any form or portion of the Remuneration whatsoever including the fact that the Cheque has not been capable of being honoured by 0906.
106. As of the date of this Notice of Civil Claim, 0841 has not received any type of dividend or payment from 0906 for the 0841 equity.

[35] In the notice of civil claim, Part 2, Relief Sought:

Shareholder Equity Dispute

12. An order pursuant to s. 227(2) of the Act:
 - (e) directing that 0906, if they have not already done so, pay 0841 the debt owed of \$200,000.00 in readily available funds as the agreed payment for relinquishing the Lease of 0841.

[36] And in Part 3, Legal Basis:

Bills of Exchange Act - Cheque

6. The Cheque is a bill of exchange as defined in the Bills of Exchange Act. The Bills of Exchange Act provides a right of action against the drawer and the endorsers of a bill of exchange when it is not honoured.
7. 0906 is the drawer of the Cheque. Zhou is the endorser of the Cheque.
8. Section 16 of the Bills of Exchange Act states that a cheque drawn on a bank is a bill as defined in the Bills of Exchange Act.
9. Section[s] 129 and 132 of the Bills of Exchange Act require the drawer and endorsers of a bill to engage that on due presentment, the bill will be accepted and paid and that if the bill is dishonoured, the drawer and endorser will compensate the holder.

10. Section 81 of the Bills of Exchange Act states that when a bill is dishonoured for non-acceptance, an immediate right of recourse against the drawer and endorser accrues to the holder and no presentment for payment is necessary.
 11. 0841 was the holder of the Cheque. 0841 presented the Cheque for payment, but they were dishonoured. 0841 has an immediate right of recourse against the drawer (0906) and the endorser (Zhou).
 12. Section 133 of the Bills of Exchange Act states that when a bill is dishonoured, the measure of damages, which are deemed to be liquidated damages, is the amount of the bill. A claim under the Bills of Exchange Act is a debt claim.
 13. 0906 (as drawer) and Zhou (as endorser) are liable and indebted to 0841 in the total liquidated amount of \$200,000.00.
- [37] I do not agree that a comparison of the notice of civil claim and Mr. Zhang's affidavit in support of the garnishing orders results in any confusion or ambiguity. Although there are several causes of action, it is clear that one of them is based on the Bills of Exchange Act and in accordance with that Act, the \$200,000 debt claimed as a result of the dishonoured cheque is a liquidated amount.
- [38] As a result, I conclude that the technical requirements of s. 3(2) of the Court Order Enforcement Act have been met and the garnishing orders were properly issued.

Setting Aside the Garnishing Orders

Disclosure

- [39] The defendants allege that the plaintiffs did not make full and frank disclosure of the facts in Mr. Zhang's affidavit in support of the garnishing orders. The defendants say the failure to disclose the complete circumstances around the issuance of the cheque should be sufficient to set aside the garnishing orders.
- [40] In addition, the defendants say that the plaintiffs, in Mr. Zhang's affidavit in support of the garnishing order, wrongly state that demand for payment had been made and the defendants had refused or neglected to pay the \$200,000 that is owing.
- [41] However, the plaintiffs say that when a cheque is presented for payment to a bank, that is a demand for payment by operation of law and, further, that notice is not required to be given to the defendants directly by virtue of s. 79(2) of the Bills of Exchange Act, which provides:
- 79 (2) When a bill is duly presented for acceptance and is not accepted within the time mentioned in subsection (1), the person presenting it must treat it as dishonoured by non-acceptance.
- [42] I note as well, the provisions of s. 81 of the Bills and Exchange Act:

81 Subject to this Act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary.

[43] I am of the view that had these circumstances been known, the garnishing orders would have, nonetheless, been granted and I cannot conclude these facts are sufficient to amount to non-disclosure such that the garnishing orders should be set aside.

Just in all of the circumstances

[44] The defendants assert that the garnishing orders should be set aside as they are not just in all of the circumstances.

[45] Sections 5(1) and (2) of the Court Order Enforcement Act provide:

5 (1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment, and if a judgment has been entered against him or her, for payment of the judgment by instalments.

(2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment and if he or she does and a judgment has been entered, he or she must set the amounts and terms of payment of the judgment by instalments.

[46] The defendants rely on *Sequoia Mergers & Acquisitions Corp. v. CAMACC Systems Inc.*, 2015 BCSC 2197, for the appropriate matters to be considered to determine if the release of a garnishing order would be just in all the circumstances.

[47] In *Sequoia*, Madam Justice Fitzpatrick noted as follows:

[19] When considering whether it is "just" to release a garnishment, the court must consider all relevant circumstances in the exercise of its discretion: *Webster v. Webster*, 101 D.L.R. (3d) 248, [1979] B.C.J. No. 2094 (C.A.) at 249-250.

[20] It is well-settled that a garnishment before judgment is an extraordinary remedy since, normally, a plaintiff is not allowed execution before it has actually proven its claim: *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857, at para. 17(a). The object of the remedy is to provide a plaintiff with security so as to avoid the possibility of a "dry judgment": *Key Insurance* at para. 17(b).

[21] In *Key Insurance*, at para. 17, Mr. Justice Voith discussed many of the common circumstances that the court will consider on such an application. These include:

- a) the relative strength of the parties' cases (although, needless to say, the court should not determine any issues);
- b) whether the defendant is suffering undue hardship; and

c) whether the garnishing order is necessary.

[48] The defendants here do not assert hardship. They do, however, say that the respective strength of the parties' cases and the lack of necessity for the garnishing orders militates in favour of setting them aside.

[49] The defendants say that, factually, the claim of the plaintiffs is weak. They say that the facts, many of which are uncontroverted, create suspicious circumstances surrounding the issuance of the cheque that suggest the cheque was obtained and cashed fraudulently.

[50] The defendants say that the fact that the cheque was negotiated when the parties' relationship was breaking down is particularly telling.

[51] This is not a summary trial. It is not for me to attempt to determine which party is to be believed. The parties have quite different stories, but looking at the face value of each, they appear about equally weighted. I cannot conclude that the respective merits militate in favour of setting aside the three garnishing orders before judgment filed April 4, 2017.

[52] The strongest argument in favour of setting aside the garnishing orders before judgment is that they are not necessary. Ms. Zhou deposes that she owns 100% of the shares of 0914679 B.C. Ltd., which is the sole owner of a commercial property in Maple Ridge, B.C. with equity of \$562,900.

[53] In addition, Ms. Zhou deposes that she and her husband own their residential property in West Vancouver, B.C., which has equity of \$7,683,602.63.

[54] Ms. Zhou's personal savings account has a current balance of approximately \$1.7 million.

[55] The plaintiffs suggest that I should consider that the defendants have placed large mortgages on their properties. According to Mr. Zheng's evidence, the Maple Ridge property previously had a mortgage of \$880,000 and the West Vancouver property has a mortgage registered in the face amount of \$8,800,000. The West Vancouver mortgage, according to Ms. Zhou's evidence, currently has a balance of \$1,737,397.37.

[56] What Ms. Zhou does not say is that she will retain sufficient funds and equity in those properties such that the plaintiffs' claim will be secure when this action eventually resolves.

[57] I have no evidence as to other obligations, actual or potential judgments, or planned uses for the funds available to Ms. Zhou.

[58] As noted in *Sequoia*, a garnishing order is an extraordinary remedy designed to avoid a dry judgment.

[59] The defendants rely on *Elkhorn Roadbuilding Ltd. v. Dorman Timber Ltd.*, 2005 BCSC 1568 in support of their submission that the financial circumstances of the personal defendant make the garnishing orders unnecessary and they should be struck. In that case, Master Patterson held:

- [14] In this case, while the plaintiff apparently has a strong case, there is little likelihood that if successful, it would be unable to recover the full amount of the judgment. The defendant company is a successful company in business for many years with a strong financial position, good earnings and many assets. It is worth commenting that the defendant company is in such a strong financial position that it was unnecessary for it to bring this application on the basis of hardship and further that the funds have been held for more than nine months in court without any application being made by the defendant.
- [15] In my view, the garnishing order should be released in its entirety, it was unnecessary for the plaintiff to garnishee the funds in the first place and it is therefore just in all the circumstances that the funds be released.
- [16] In similar circumstances, plaintiffs should weigh very carefully the circumstances in which pre-judgment garnishing orders are issued because the issue of an unnecessary pre-judgment garnishing order borders on abuse of process.
- [60] The circumstances here are very similar to those in Elkhorn. There is obvious financial strength in Ms. Zhou. The defendants have not argued necessity for the garnishing orders and the funds have been tied up for approximately eight months.
- [61] The distinguishing feature between this case and the Elkhorn case is that in the Elkhorn case, there was only one defendant and it was funds owing to the defendant that were garnished. Here, the defendant that was garnished was the defendant company not Ms. Zhou. I have no evidence as to the financial strength of the defendant company, nor do I have any undertaking by Ms. Zhou to be responsible for the obligations of the defendant company.
- [62] Given that the cheque was originally dishonoured, the defendant company may not have the financial wherewithal to satisfy a judgment. There is evidence that the defendant company posted \$400,000 to lift the builder's lien from title, but there is no evidence where those funds came from. Should the plaintiffs be successful against the defendant company, they might well end up with a dry judgment--the very reason for a garnishing order.
- [63] Both parties on this application seem to have assumed, without directing argument to the point, that the corporate veil will be lifted should judgment go against the defendant company.
- [64] I see no reason to assume that. Further, although the action on the \$200,000 debt is advanced against both the defendant company and Ms. Zhou, the defendants assert that Ms. Zhou was not an endorser, but presumably only an authorized signatory for the defendant company. Thus, there may be no personal liability for her with respect to the dishonoured cheque.

- [65] In my view, there is no basis on the evidence before me to conclude that the garnishing orders are not necessary. Thus, there is no basis to conclude that the garnishing orders are not just in all of the circumstances.
- [66] I am, thus, of the view that the application must be dismissed. As the parties appear to have given no consideration to this latter point, however, I dismiss the application without prejudice to the right of the defendants to re-apply.
- [67] As this important point was not addressed by either party, I order the costs of this application to be in the cause.

"Master Muir"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/00/2018BCSC0013.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/zhang-v-0906825-b-c-ltd-2018>

Prepared on 28 October 2026 · Esheria