

CANADA / JUDGMENT

Zhang v. Zhang

2022 BCSC 2459

COURT

Supreme Court of British Columbia

DECIDED

17 October 2022

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2022 BCSC 2459 Zhang v. Zhang IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Zhang v. Zhang, 2022 BCSC 2459 Date: 20221017 Docket: S1913633 Registry: Vancouver Between: Ming Zhang and Xiaoqin Yang Plaintiffs And Guang Ning Zhang and Ping Hui Lu Defendants And Yue Zhang and Can-Pacific Enterprises Ltd. Plaintiffs by Counterclaim

- and - Docket: S2013500 Registry: Vancouver Between: Xiaoqin Yang and Ming Zhang Plaintiffs Defendants by Counterclaim And Ping Hui Lu, Unison International Holdings Ltd., Baocheng Su, Yong Jiu Jiang, and Chang Jun Qiao Defendants And Ping Hui Lu Plaintiff by Counterclaim Before: The Honourable Justice G.C. Weatherill Oral Ruling re: Application to Introduce In Evidence a Letter dated November 25, 2020 Counsel for Xiaoqin Yang and Ming Zhang: J.A. Henshall E. Bojm H. Nie Counsel for Guang Ning Zhang and Ping Hui Lu: D.P. Davison D.R. North Place and Date of Trial: Vancouver, B.C. October 17, 2022 Place and Date of Judgment: Vancouver, B.C. October 17, 2022
- [1] THE COURT: These actions were commenced in 2019. The trial commenced in June 2022. Today is day 27 of the trial.
- [2] On March 24, 2020, during the course of the litigation, defendants' counsel wrote to plaintiffs' counsel regarding certain shares held by the defendants, the ownership of which is a major issue in one of these two actions, namely Vancouver Registry Action S1913633. That letter stated, in relevant part: Further, we are advised by our clients that the 125,000 common shares of Electrameccanica Vehicles Corp. (the "EVC shares"), which is the subject of the above captioned matter, have not been disposed of and remain in the possession of Guang Ming Zhang. Our clients agree not to dispose of the EVC shares without a written agreement between the parties or a court order. At all material times, the EVC shares were publicly traded.
- [3] The defendants seek to introduce in evidence a letter dated November 25, 2020 from defendants' counsel to plaintiffs' counsel which pointed out that the trading in EVC shares is volatile, that there has been a recent unprecedented surge in the share price and that: Given the foregoing it is our clients' position that the Solo stock -- (I pause to say Solo and EVC refer to the same entity) -- should be sold in its entirety ("the transaction") and that any tax consequences as a result of the transaction be paid from the proceeds realized from the

transaction. The letter is headed "with prejudice" and goes on to state: Our client reserves the right to bring this correspondence to the attention of the presiding judge or master in respect of this dispute.

- [4] The November 25, 2020 letter was plainly written to support a future argument at trial that the plaintiffs failed to take reasonable steps to mitigate any loss arising from the EVC shares.
- [5] In the days both immediately preceding and following November 25, 2020, there was an exchange of correspondence between counsel referencing the volatility of the EVC shares and exchanging settlement proposals regarding, not the need for the sale of the EVC shares, but rather the terms upon which the sale proceeds would be distributed. All of that correspondence was expressly without prejudice.
- [6] The plaintiffs apply for a declaration that despite the November 25, 2020 letter having been expressly stipulated to have been written with prejudice, it is nevertheless subject to settlement privilege and is inadmissible. In the alternative, if the November 25, 2020 letter is ruled to be admissible, the plaintiffs seek a declaration that all of the without-prejudice communications preceding and following the November 25, 2020 letter are also admissible.
- [7] The plaintiffs submit that the November 25 letter was written in the midst of and as part of a continuum of settlement negotiations. They submit that the fact that a communication that is plainly a privileged settlement communication but purports to be with prejudice does not make it so, citing *Leonardis v. Leonardis*, 2003 ABQB 577, at para. 8.
- [8] Having read all of the settlement correspondence both prior to and after the November 25, 2020 letter, it is plain that the parties were in agreement that the EVC shares should be sold with any tax liability arising from the sale being paid from the sale proceeds. The dispute being negotiated in the without-prejudice communications and which was the subject of the negotiations related to the terms regarding how the balance of the sale proceeds would be held or distributed.
- [9] In my view, the November 25, 2020 letter was not written in furtherance of those settlement discussions. Rather it was written in furtherance of counsel's agreement that the EVC shares would not be sold without the plaintiffs' consent or a court order. The November 25, 2020 letter was an attempt to obtain the plaintiffs' consent to the sale in order that the value of the shares could be preserved in the volatile market pending the settlement negotiations. There is no indication in the November 25, 2020 letter that it was written with the intention of furthering the negotiations of the disputed terms, it contains no hint of compromise. The November 25, 2020 letter is admissible.
- [10] In the alternative, the plaintiffs submit that the public interest in admitting the surrounding without-prejudice communications outweighs the public interest of encouraging settlement by not allowing the disclosure of such negotiations and, hence, they should be admitted in evidence. They submit that without the surrounding communications, the plaintiffs will be muzzled in their attempts to justify their failure to accept the sale of the EVC shares on the

terms proposed in the November 25, 2020 letter. They submit that the surrounding correspondence will put the November 25, 2020 letter in context.

[11] As already stated, it is my view that the November 25, 2020 letter stands alone. There is no need for context. The plaintiffs will not be muzzled and will be fully capable of making submissions regarding whether their failure to accept the terms set out in the November 25, 2020 letter was reasonable.

[12] The application is dismissed. "G.C. Weatherill J."

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