

CANADA / JUDGMENT

Zhao v. Li

2020 BCSC 1362

COURT

Supreme Court of British Columbia

DECIDED

2 July 2020

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2020 BCSC 1362 Zhao v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhao v. Li,

2020 BCSC 1362

Date: 20200702

Docket: S199119

Registry: Vancouver

Between:

Lijun Zhao and Tong Sun

Plaintiffs

And

Sang Li, Wen Li and Kapok Furniture Inc.

Defendants

Before: The Honourable Madam Justice Marzari

On appeal from: orders of the Provincial Court of British Columbia, dated August 15 and 30, 2019 (Sun v. Li, Richmond File No. 28149).

Oral Ruling Re Application to Strike an Appeal

In Chambers

The Plaintiffs, appearing in person:

L. Zhao

T. Sun

Counsel for the Defendants:

K. Yang

Place and Date of Hearing:

Vancouver, B.C.

July 2, 2020

Place and Date of Ruling:

Vancouver, B.C.

July 2, 2020

[1] THE COURT: This is an application to strike an appeal to two orders of the British Columbia Provincial Court made August 15, 2019, and August 30, 2019. The application is for orders:

- a) to strike the appeal summarily;
- b) that the Provincial Court orders no longer be stayed as a result of the appeal under the Small Claims Act, R.S.B.C. 1996, c. 430;
- c) that the moneys paid into court by the appellants in the Provincial Court action be paid to the respondent on account of the judgment; and
- d) in addition, the appellants pay the Provincial Court's award for penalties, fees and expenses, and
- e) costs of the appeal in this Court.

[2] In response, the appellants, Ms. Zhao and Mr. Sun, who represent themselves in this matter, say that they require an adjournment of this application to strike their appeal because they were not properly served with the application materials prior to today's hearing. In particular, they say they should have been served with hard copies of the application record and materials and that because Mr. Sun is not present in the Lower Mainland right now, he was not able to receive any copies in any event.

[3] However, they agree that their appeal is set to be heard next week, and that they have no intention of proceeding with it. Indeed, they say they formed that intention more than six months ago, prior to an earlier December 2019 hearing of this application.

- [4] I am satisfied that the respondents did properly serve their materials in accordance with the appellants' notice of address for service, which is by email. I am also satisfied that the appellants were aware of this application given admitted correspondence that they had last Friday with Mr. Yang, counsel for the respondents. Finally given that their appeal is still set to be heard next week, I find it was necessary for them to be monitoring their email address for service with respect to correspondence relating to their appeal.
- [5] Procedurally, this application to strike the appeal has already come before this Court once before in December 2019 before Justice Russell. Although I do not have a transcript of those proceedings or her reasons, in her order, Justice Russell gave the appellants a second opportunity to perfect their appeal by January 31, 2020. Justice Russel ordered that the respondents had the right to bring the application to strike the appeal peremptory on the appellants at that time.
- [6] Finally, the appellants request today that I adjourn this application to strike their appeal to September makes no sense in light of the fact that the appeal is set to be heard next week. If the appellants, as they say, are not prepared to proceed with the appeal and indeed do not intend to pursue the appeal, the result would be the same. The appeal would be struck, and the suspension of orders would no longer be in effect pursuant to the Small Claims Act, and there would be no reason the money paid into court would not be released to the successful respondents in the BC Provincial Court. Court time and party expense would be wasted. I therefore will not adjourn this application.
- [7] I am satisfied that the application was served in accordance with the notice of service or the address for service of the appeal, and I am satisfied that there is no time, given the date for the appeal, to adjourn this matter any further. I deny the adjournment request that was made today.
- [8] I am now going to move on to the question of whether or not the relief sought in the notice of application should be granted. The appellants agree that the appeal must be struck--they do not intend to pursue it. The appellants say that they believed that as soon as they did not comply with the requirements for the appeal, by not obtaining or filing transcripts of the Provincial Court proceedings, that their appeal would be struck automatically. The striking of the appeal is not opposed, and I make that order.
- [9] Generally, following the making of the order striking the appeal, the suspension pending appeal would also be lifted as sought by the respondents. Furthermore, moneys paid into court pending appeal would generally then be paid to the respondents in this matter.
- [10] The appellants say, however, that those aspects of the application should not be granted because in December 2019 they accepted an offer to settle the damages claim at just over \$1,800 on the basis that no costs would be payable in this Court in relation to the appeal, and in addition that the expenses and penalty aspect of the BC Provincial Court would also not be collected. They seek to enforce that agreement as a term of the striking of the appeal.

- [11] The respondents say that the appellants have misconstrued their offer to settle last fall, and that no settlement agreement was ever reached on this point.
- [12] This issue was already before Justice Russell on December 18, 2019, when the respondents sought to strike the appeal and the appellants sought to enforce their alleged agreement not to pay costs in this Court or below.
- [13] I accept Ms. Zhao's unsworn information before me, which is corroborated by counsel, Mr. Yang, who is an officer of the court, that Justice Russell told the parties that they could continue to discuss settlement. However, there is no support for the suggestion that Justice Russell found that an agreement had been reached that the appellants would withdraw their appeal and limit the amount that they would have to pay with respect to the BC Provincial Court orders. Indeed, the appellants did not withdraw their appeal. Hence our situation today.
- [14] Had Justice Russel accepted that the appeal had been settled on the terms alleged by the appellants, she would have struck the appeal on that basis. Instead she gave the appellants an extra six weeks or so to complete their materials if they wished to proceed with the appeal.
- [15] The appellants nevertheless continue to argue that they had reached a settlement before December 2019, and say that they did not want the additional time ordered by Justice Russel to pursue the appeal in the absence of a settlement.
- [16] With the consent of the parties, I have reviewed the email correspondence between the parties with respect to the alleged settlement negotiations to resolve this issue. I find on the basis of that correspondence that no agreement was reached with respect to settlement of the appeal or the Provincial Court orders on the bases alleged by the appellants, or at all.
- [17] Having rejected the appellants' grounds for maintaining the suspension of the Provincial Court orders, I grant the orders sought in the notice of application. The appeal shall be disposed of summarily and struck. The orders and judgments of the Honourable Judge Chen made August 15 and the order for fees, penalties and expenses of \$3,562.20 made August 30, 2019 in BC Provincial Court are immediately enforceable and no longer suspended, and the moneys paid into court by the appellants in this matter are to be paid to the respondents on account of those orders in the Provincial Court.
- [18] I turn now, then, to costs in this Court.
- [19] Ms. Zhao and Mr. Sun argue that they had believed that there was no need for this application because they had believed that the appeal would be automatically struck and that they did not need to actually discontinue their appeal. The respondents say that is somewhat disingenuous given Mr. Sun's legal training and experience with court proceedings.

- [20] I find there has been substantial correspondence with respect to this issue by which the appellants were advised of the requirement to withdraw the appeal and the costs consequences of not doing so. There was also a hearing in December where that requirement would have been apparent. The appeal was never withdrawn, and there is no question that the respondents have been put to unnecessary cost on two occasions to strike an appeal which the appellants had no intention of proceeding with. I therefore order costs of the appeal to the respondents.
- [21] Given the simplicity of the issue due to the fact that the appellants did not intend to proceed with this matter and had not filed any materials, I order that the costs be at Scale A rather than Scale B.

(SUBMISSIONS ON COSTS)

- [22] THE COURT: I am going to order \$1,500 in lump sum costs to the respondents, which is a substantial discount over the costs that would be ordered under the bill of costs provided, and I am satisfied that the appellants could not do better if they went to the Registrar.
- [23] The application is granted, with lump sum costs of \$1,500 payable to the respondents by the appellants for costs in this Court payable forthwith.

"Marzari, J."

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