

CANADA / JUDGMENT

Zhejiang Asset Management Limited v. Li

2023 BCSC 1234

COURT

Supreme Court of British Columbia

DECIDED

1 June 2023

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2023 BCSC 1234 Zhejiang Asset Management Limited v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhejiang Asset Management Limited v. Li,

2023 BCSC 1234

Date: 20230601

Docket: S203948

Registry: Vancouver

Between:

Zhejiang Asset Management Limited

Plaintiff

And

Hong Xia Li and Yu Cao He

Defendants

Before: The Honourable Justice Marzari

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

R. LaPlante

Defendant Hong Zia Li:

No appearance

Counsel for the Defendant Yu Cao He:

C.E. Chisholm

Place and Date of Hearing:

Vancouver, B.C.

May 29, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 1, 2023

- [1] THE COURT: This is an application to discharge a certificate of pending litigation ("CPL") on property pursuant to ss. 256 and 257 of the Land Title Act, R.S.B.C. 1996, c. 250. It is brought by the defendant Mr. Ho.

The Pleadings / Judgment

- [2] The action pursuant to which the certificate of pending litigation is filed, seeks to enforce a 2015 default judgment by a Chinese court in an amount equivalent to approximately \$3.7 million, plus substantial interest, against the defendant, Ms. Li.
- [3] The judgment is in favour of a bank in China, and made against a company operating in China, as well as related persons including the defendant Ms. Li, who was found in that judgment to be a guarantor of the company's loan. The judgment is made jointly and severally against the company and others, including Ms. Li.
- [4] The plaintiff before me is a Chinese company which says it took assignment of the judgment and several other judgments from the Chinese bank by way of an assignment contract. These assignments were disclosed at the hearing with a slightly different name for the plaintiff. I assume for the purposes of this application that the plaintiff will be able to prove it is entitled to seek to enforce the Chinese judgments against Ms. Li and others on the basis of the assignment contract for which it paid the bank, albeit at a substantial discount.
- [5] The pleadings plead the enforceability of that judgment and that Ms. Li, as a guarantor of the debt and having been found jointly and severally liable for it, must pay the plaintiff the debt.
- [6] The notice of civil claim also pleads fraudulent conveyance of a property located at 1331 West 59th Avenue in Vancouver (the "Property") in 2012 by Ms. Li to her son, the defendant Mr. Ho, who is the applicant before me.

- [7] The notice of civil claim does not plead a direct interest in the Property, a constructive trust over the Property, or tracing of proceeds. It does plead fraudulent conveyance of the Property, and a right to have judgment enforced against the Property on that basis.
- [8] Mr. Ho brings this application to remove the CPL from the Property. He states that the Property is his residence. His mother, Ms. Li, filed a response in support of this application but does not appear. The plaintiff opposes.

Defendant Ho's Position to Discharge the CPL

- [9] Mr. Ho applies on the basis that he is the registered owner of the Property, and is suffering hardship and inconvenience as a result of the CPL pursuant to ss. 256 and 257 of the Land Title Act. He is seeking discharge with a nominal amount of security. If the CPL is not discharged, Mr. Ho says there should be an undertaking and substantial posted security because the plaintiff has no presence in Canada.
- [10] Mr. Ho has not applied to remove the CPL under s. 215 of the Land Title Act on the basis that the CPL does not disclose an interest in land. As I understand it, this is because of the decision of Justice Tucker of this court in 2022, *Pacific West Systems Ltd. v. D&S Enterprise Ltd.*, 2022 BCSC 1646, where s. 215(1)(b) was found to allow for CPLs to be maintained on the basis of a right of action in respect of land pursuant to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, even where there is no right of interest in the land directly.
- [11] As a result, this application is brought solely pursuant to ss. 256 and 257 of the Land Title Act.

Facts

- [12] The evidence before me discloses a number of relevant things with respect to which I must make the following findings.
- [13] The Chinese debt, which is the basis for the judgment sought to be enforced by the notice of civil claim, was borrowed by a Chinese company from a Chinese bank in 2013. The debt was defaulted on in 2014 and default judgment was granted by a Chinese court in 2015.
- [14] The plaintiff also has provided a series of other default judgments made by Chinese courts in favour of other Chinese lenders to which Ms. Li was found jointly and severally liable for as a guarantor. Those loans appear to have been taken out between June 2012 (in one case) and 2014, with corporate defaults largely in or around 2014.
- [15] With respect to the Property, it seems to be generally accepted that it was purchased by Ms. Li in 2008, and was transferred to Mr. Ho in or about October 2012 just after his 19th birthday, for one dollar. There is affidavit evidence before me that this transfer was intended to be a gift in accordance with cultural tradition. It is also a transfer to a close relative without consideration.

- [16] Mr. Ho has lived in Canada since 2008 when he moved here as a teenager and now works, as I understand it, for the Federal Government in Canada.
- [17] Ms. Li is also a Canadian citizen. I have no evidence of her assets or her ability to satisfy a judgment against her in Canada (or in China) other than if the fraudulent conveyance action is made out and she is found to have a recoverable interest in the Property.
- [18] The plaintiff is a Chinese company. It has no ties to Canada, and its address for delivery for this action only is a law firm in Vancouver. There is no evidence that it has any other Canadian presence or assets.

History of Action

- [19] The action before me started in Canada in 2020, and has two main aspects. The first is a claim for the recognition and enforcement of the Chinese judgment against Ms. Li; and the second is a fraudulent conveyance action against both Mr. Ho and Ms. Li which seeks a declaration that the Property is held in trust by Mr. Ho, with Ms. Li as the beneficial owner of the Property. It is on this basis that the plaintiff seeks that the judgment against Ms. Li can be enforced against the Property. In the alternative, the plaintiff seeks an order that the Property be transferred directly into Ms. Li's name to allow for creditor access.
- [20] The first aspect of the case, that is whether or not the Chinese judgment is valid and enforceable against Ms. Li, is strongly contested by Ms. Li in the pleadings. Ms. Li takes the position, I take it, that the loan guarantee was not signed by her, and she was not served with the debt proceedings resulting in the default judgment against her. This aspect of the claim has not proceeded since 2020 and the plaintiff blames Ms. Li for this. She has not been forthcoming with documents, despite the comments of Madam Justice Sharma last summer at a summary trial proceeding.
- [21] Mr. Ho says that the CPL has been languishing and the action has not been proceeding. It has been 10 years since the alleged loan guarantee, eight years since the 2015 default judgment, and three years since the CPL was put on the title. He says that the plaintiff has an obligation to pursue this action which contains a CPL diligently and that it is not enough to blame Ms. Li for the delays.
- [22] The plaintiff says it is caught. It cannot proceed to satisfy the requirements of alacrity of proceeding with respect to its claim against the Property and the CPL while Ms. Li drags her feet. The plaintiff suggests there is some sort of collusion between Ms. Li and her son here, one delaying the proceeding, while the other presses and complains of the delay.
- [23] Overall, I am satisfied in this case that it would not be appropriate to give great weight to the factor of delay given the uniqueness of the facts of this case.

- [24] Mr. Ho also raises an issue with the adequacy of the evidence as to whether there has been Chinese collections against the other parties that are jointly and severally liable for the debt claimed against Ms. Li. There is also Chinese property that was frozen by the default order itself, and so Mr. Ho questions whether or not the claim with respect to the fraudulent conveyance is for the full amount sought by the plaintiff.
- [25] The plaintiff has taken me to some evidence that there have been no collections against the debt, and again without deciding, I assume the full amount of the debt may be proven to be recoverable from Ms. Li for the purposes of this application. I further assume that if the plaintiff can successfully prove fraudulent conveyance, the full amount of the debt may be secured by a judgment against the Property.

Sections 256 and 257 Test

Hardship

- [26] With respect to the application to remove the CPL under ss. 256 and 257, the first question is whether Mr. Ho has proven hardship.
- [27] Mr. Ho claims that the CPL is causing him hardship and that it is interfering with his ability to sell the Property, which he decided to do after his application for summary trial on the fraudulent conveyance action was dismissed.
- [28] Mr. Ho is paying almost or close to \$6,000 per month in mortgage costs, and he is paying the mortgage on a variable rate where the interest rate has approximately doubled since May 2020.
- [29] He is making fixed payments that are no longer covering both principal and interest and he is now in a negative amortization position.
- [30] Mr. Ho is seeking to sell the Property as a result of these increasing costs, and because he has been having to service the Property with various expenses including the payment of property taxes in 2022 and in 2023 exceeding \$30,000.
- [31] After the summary trial, when Mr. Ho decided to sell the Property, there was some negotiations between the parties. The plaintiff provided to Mr. Ho a discharge letter of the CPL that could be used only if he sold the Property for its assessed value (per BC Assessment) of just less than \$5.3 million. Pursuant to these settlement discussions, which both parties waived privilege over, the CPL would be removed in that case, and that the proceeds would be held in trust and would not be dealt with until the funds could be dispersed by agreement or court order.

- [32] The Property was listed but the evidence discloses that the only offer received in 2022 was for \$4.7 million: about half a million dollars short (or 10% short) of the assessed value that would allow for the release of the CPL. The offer was not accepted by Mr. Ho both because the offer was too low in his view, and because he could not discharge the CPL for anything less than the assessed value.
- [33] The same purchaser came back in January of 2023 with a slightly increased offer subject to satisfactory title review. Mr. Ho countered at \$5.35 million but the purchaser responded that the pending litigation was complicated and no further negotiations ensued with respect to finding a purchase price.
- [34] The plaintiff is unwilling to allow the sale to proceed at an unspecified lesser amount, with proceeds to be held in trust pending this litigation, unless the CPL can remain on title until the offer is accepted and the plaintiff can consider the offer. The plaintiff understandably is concerned that without a CPL the Property could be further mortgaged and equity depleted without the sale.
- [35] Mr. Ho says the evidence establishes that the CPL is dissuading buyers and depressing the price.
- [36] The plaintiff acknowledges that all it is seeking is damages and that damages are an adequate remedy, but says that hardship has not been proven. The plaintiff says that Mr. Ho was not prepared to sell the Property at below assessed value regardless of the CPL. The plaintiff also says the CPL is not deterring offers given that there is also evidence that since last fall, the interest rates are going up and the real estate market is slowing. The plaintiff says that the CPL is not, therefore, the cause of Mr. Ho's hardship, but its removal would allow the Property to be sold or encumbered in such a way as to deprive the plaintiff of its interests altogether.
- [37] Section 256 sets out the conditions to be met for the court to act on these provisions, while s. 257 sets out the remedies that are available to the court in its discretion: *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at paras. 16-17.
- [38] The applicant must establish hardship and inconvenience before the court can have recourse to these provisions: *Liquor Barn* at para. 26. There must be more than just general allegations of inconvenience: *Liquor Barn* at para. 37. To be relevant, the hardship and inconvenience must be causally connected to the registration of the CPL: *Liquor Barn* at para. 37.
- [39] The nature of the inquiry into hardship and inconvenience was discussed in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388, where, at para. 28, the court said:

I doubt that the Legislature intended the threshold under s. 256 to be surmounted by proof of hardship that is only "trifling". On the other hand, I agree that a court should not be "exacting" in its analysis of hardship and inconvenience.

[40] In this case I find that Mr. Ho has made out the test for hardship and inconvenience.

[41] The evidence establishes that the Property has not been sold at the 2022 market value despite strong marketing efforts.

[42] Part of this is because of rising interest rates leading to a declining market, but the evidence establishes that the CPL was also a factor for one interested purchaser. It is a cloud on title that decreases the ability to sell and negotiate for value, and accept offers.

[43] I find that because of increasing interest rates and his variable rate mortgage, Mr. Ho's mortgage payment has doubled and he is losing ground in his equity and is now in a negative amortization position.

[44] I am satisfied that continuing to pay a mortgage and property taxes on a property he wishes to sell, in a situation where he has a variable rate mortgage and the interest rate has gone up substantially and payments have doubled, is a hardship on Mr. Ho: *Watson Island Development Corp v Prince Rupert (City)*, [2015] BCJ No 1801, 2015 BCSC 1474 paras 38-41. I find that the hardship and inconvenience that was established as meeting the threshold in *Watson* is equally established in this case.

Damages Will Provide Adequate Relief

[45] Where hardship and inconvenience are established, then the court must consider the appropriate remedy. As noted by Madam Justice Newbury in *Youyi* at para. 29:

[29] Once hardship and inconvenience are shown, it does not follow as a matter of course that the application under s. 256 must be granted. Section 257 provides that the court may order the cancellation of a CPL on satisfaction of the two conditions in that section, or that the court may refuse to order the cancellation, in which case it may order the party in whose name the CPL has been registered . . . to enter into an undertaking as to damages and to give security in an amount and subject to such terms and conditions as the court considers proper. Thus even where hardship and inconvenience are shown, the cancellation of a CPL remains a discretionary matter.

[46] One of the first factors to consider under s. 257(1)(a) is whether damages will provide adequate relief. That is not an issue here. The plaintiff admits that money is the sole matter at issue in this case; it has no claim or interest in the Property itself.

[47] So, after considering s. 257(1)(a) - that damages will provide adequate relief - I must consider the adequacy of security, or whether the CPL should be kept but an undertaking for damages or security might be appropriate.

Security

- [48] The amount of security and whether it is to be posted by the owner or the plaintiff requires the consideration of the probability of success of the plaintiff in the action pursuant to s. 257(3). Generally, that assessment is on the plain and obvious test.
- [49] Mr. Ho says it is plain and obvious that the merits are low and there should be nominal security posted by him if the CPL is cancelled in the range of \$20,000.
- [50] The plaintiff says any security for removing the CPL should protect the equity in the Property, and seeks to have Mr. Ho post over \$3.7 million before the CPL can be removed.

Merit to Claim against Ms. Li

- [51] There needs to be some merit to both the debt claim against Ms. Li, as well as the fraudulent conveyance claim relating to the Property, to support the posting of security.
- [52] On the materials before me, the plaintiff can do no better than to say that it has arguments, and an expectation that it will be able to muster evidence, that Ms. Li signed the guarantee and that she was served with the Chinese debt proceedings, despite her evidence that these things did not occur.
- [53] These are issues that will need to be decided in the future, and I cannot say that there is any factual evidence to help me make that determination. All I can say is that there may be merit to that claim, but that merit cannot be determined at this point.
- [54] The enforceability of the Chinese judgment is therefore at issue still, and there are live issues of the natural justice of the default order and whether service was achieved, including whether personal service should have been required. The evidence on this aspect of the claim thus far is fairly weak, but I find an arguable case may be met may be met with respect to the debt claim against Ms. Li.

Merit to Fraudulent Conveyance Claim

- [55] The main issue I must consider is the merits of the claim that supports the CPL: Stonewater Ventures (No 185) Ltd v Stonewater Ventures (No 168) Ltd, [2022] BCJ No 113, 2022 BCSC 114; Pacific West. It is the merits of the proprietary right or interest in land that is at issue that I primarily have to consider. I turn now to that consideration.
- [56] The defendant Mr. Ho says there is no merit to this claim, so only nominal security is appropriate.
- [57] The evidence before me is that Ms. Li transferred the Property to Mr. Ho in 2012, around the time when he turned 19. The 2013 guarantee that supports the Chinese judgment was made approximately a year later, after the Property had already been transferred to Mr. Ho. The default on that judgment was not until 2014.

- [58] There is no pleading that Mr. Ho actively participated in a fraud at the time the Property was transferred to him, or that his credibility is at issue.
- [59] The fraudulent conveyance case at its best, according to Mr. Ho, would give the plaintiff an entitlement to register the judgment against the land, but not a CPL. If successful, Mr. Ho would still be the owner but the plaintiff would have a claim on the value of the land. That is set out in *Guthrie v. Abakhan*, 2017 BCCA 102, a decision of our Court of Appeal, where Madam Justice Newbury explains that the fraudulent conveyance remedy creates only a situation where the transfer continues to be valid against the grantor (in this case, Ms. Li). The claim is against the proceeds of sale if the grantee sells the land, but it does not reverse the sale or cause a change in the title in the Land Title Office.
- [60] The plaintiff says that the transfer is invalid if the transfer was to frustrate any creditors, even creditors that pre-date the debt they are seeking to collect, and says the evidence of there being four other Chinese default judgments indicates that the companies were financially struggling and eventually defaulted in 2014.
- [61] It says the evidence of the other Chinese judgments shows that Ms. Li was borrowing vast amounts around the time of the transfer to Mr. Ho in 2012, as well as in 2014, and that those loans were going to default within a year after the transfer in any event. He points to a series of default judgments that were filed in translation, the earliest being July 2012, which was a loan guarantee on behalf of a Chinese cable company; another one in August of 2012 that was guaranteed in October of 2012; another in November of 2013; and another in 2014. The plaintiff says that the knowledge of these guarantees and the financial state of the companies is enough to lead this Court to infer that Ms. Li was trying to build up corporate debts, and profits in her own hands, while avoiding creditors in relation to these loans as early as 2012.
- [62] The plaintiff says that the law does not require that they were a present creditor at the time of the transfer as long as the transfer is proven to be for the purpose of putting the Property outside the reach of creditors. Furthermore, that need not be the only intent: *Wu v. Gu*, 2020 BCSC 396. I would note that that is also the law reflected in the *Guthrie* decision that is relied upon the plaintiff.
- [63] So even if the Property was intended to be a gift to her son in 2012, the plaintiff says it is sufficient for it to show that Ms. Li foresaw that creditors would be seeking recovery from her in the future, and she was seeking to put assets outside their reach. The plaintiff says that I can infer that, for example, if I find that Ms. Li's finances were in disrepair and that this transfer divested her of her assets.
- [64] The plaintiff further says that the burden is on Ms. Li because she transferred the Property to a near relative with no consideration, and the transferor has the burden to prove the absence of fraud with respect to gifts to a family member as these are the badges of fraud.

Findings on the Merits of Fraudulent Conveyance Claim

- [65] While I accept the law as set out by the plaintiff, that to be successful in recovering a judgment from a fraudulently conveyed property, a creditor need not be the specific creditor being sought to be avoided at the time of the transfer. However, that is not what is pled in this case, and the evidence relied upon by the plaintiff to establish that this was the case in 2012 is entirely speculative.
- [66] First, it is clear that any lender loaning funds to the Chinese companies of for whom Ms. Li is alleged to be a guarantor, was not relying on the Property to secure those loans, as the Property had already been transferred to Mr. Ho at the time of the debt at issue, and most of the other loans relied upon by the plaintiff. Furthermore, there is no evidence that there was any debt that Ms. Li was trying to avoid at the time of the transfer of the Property. The only evidence of debt in 2012 is of one loan, and that was made to a corporation, not to Ms. Li directly. There had been no call on Ms. Li to guarantee that debt. There had not even been a default by the company, and there has certainly been no creditor proceedings established by the evidence before me against those companies, let alone against Ms. Li. In fact, several lenders went on to lend substantially more funds in 2013 and 2014.
- [67] I simply do not know why the Chinese companies defaulted in 2014. I do not know what the financial situation in China was in 2014, but the facts that banks were willing to loan the companies millions of Renminbi, equivalent to millions of Canadian dollars, in 2012, 2013 and 2014 does not, in my view, support an inference that these companies were already in financial disarray and running from their creditors. I also find the link from the companies' finances to Ms. Li's finances to be speculative.
- [68] I recognize that there that this was a transfer to a child with no consideration, and that this is a potential "badge of fraud" as set out in para. 84 of Wu. However, para. 84 of Wu also sets out a series of other factors that are resolutely not present in this case. There is no evidence of financial problems on Ms. Li's part at the time of the transfer. There is no evidence that in 2012 this left Ms. Li without assets of her own at the time. Finally, on the evidence before me, Mr. Ho lives in the Property and pays the mortgage.
- [69] The timing factor is particularly problematic in this case as there is no evidence of creditors of Ms. Li seeking recovery of assets at the time of the 2012 transfer, even if I accept the Chinese default judgments as evidence.
- [70] It has already been admitted, and I think appropriately, that the claim does not give rise to an interest in land. There is no arguable case on that basis to maintain the CPL.

[71] The alternative argument pursuant to the Pacific West line of authority, that a fraudulent conveyance claim gives rise to a claim under s. 215(b) as a right in respect of land, is the only pleading before me to support the CPL. Ultimately, I find that the claim that the Property was fraudulently conveyed by Ms. Li in 2012 to avoid unknown creditors, other than the creditor at issue (who was not a creditor at the time), is very weak, and is not pled in any event.

Conclusion

[72] I therefore find that Mr. Ho has made out his case for removal of the CPL, and I find that the security should be nominal based on the merits of the fraudulent conveyance claim, and I set it at \$20,000.

[73] All right. So Mr. Ho will also be entitled to costs of this matter unless there is anything further to say about costs?

[74] CNSL R. LAPLANTE: Nothing further, Justice.

[75] THE COURT: All right.

[76] CNSL C. CHISHOLM: Thank you.

[77] THE COURT: Thank you.

[78] CNSL R. LAPLANTE: Thank you, Justice.

"Marzari J."

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