

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fan v. Zhang*,
2015 BCSC 2352

Date: 20151124
Docket: E150150
Registry: Vancouver

Between:

Hui Hong Fan aka Iris Fan

Claimant

And

**Hang Zhang and
Rocky International Investment Ltd.**

Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

L.N. MacLean, Q.C.
F. Wu

Counsel for the Respondents:

D. Chen

Place and Date of Hearing:

Vancouver, B.C.
November 24, 2015

Place and Date of Judgment:

Vancouver, B.C.
November 24, 2015

[1] **THE COURT:** The claimant in this matrimonial dispute applies for interim relief prior to the trial of this action currently scheduled to commence on March 14, 2016, for two weeks.

[2] The claimant seeks orders:

- i) imputing the income of the respondent, Hang Zhang (“the respondent Zhang”) at \$263,863 rather than his claimed current income of \$5,500;
- ii) that the respondent Zhang pay interim child support of \$2,166 per month rather than the \$1,000 per month he currently pays, pursuant to a separation agreement the parties signed on March 28, 2012;
- iii) that the respondent Zhang pay interim spousal support of \$5,020 per month rather than the \$1,000 per month he currently pays pursuant to the separation agreement;
- iv) that the respondent Zhang and his bank disclose various financial document; and
- v) that paragraphs 3, 4 and 5 of Schedule 5 of the respondents’ counterclaim be struck on the basis that they either do not disclose a reasonable cause action or are unnecessary, scandalous, frivolous and vexatious.

[3] The claimant’s notice of application also seeks various other orders relating to the appointment of joint experts pursuant to Rules 13-3 and 13-4 of the *Supreme Court Family Rules*, B.C. Reg. 169/2009. During the course of the hearing, I ordered that a forensic accountant having offices in both Vancouver, B.C. and China be appointed pursuant to Rules 13-3 and 13-4 for the purposes of auditing and determining the extent and details of the respondents’ respective worldwide financial assets.

[4] I did so because it was abundantly apparent from the materials provided to me that the respondents have failed to provide full and frank financial disclosure and

further have, likely deliberately, engaged in a practice of failing to report income and assets. I make no determination at this stage, and it will be subject to the findings of the forensic audit and I will leave that to the determination of the trial judge. Suffice it to say that, at the moment, it appears to me that the respondents have been deliberate in their failure to report income and assets.

[5] Indeed, the respondents' disclosure to date is so rife with discrepancies, undocumented alleged loans and other transactions, unsubstantiated expenses and other glaring inconsistencies that I advised counsel for the respondents I did not believe his clients' evidence regarding their finances.

[6] I should add that the respondent, Rocky International Investment Ltd., is a company whose shares are wholly owned by the respondent Zhang.

[7] I also ordered during the course of the hearing that the first \$50,000 of costs in respect of the forensic audit be funded by the respondents and that any costs exceeding \$50,000 be funded by the claimant and the respondents equally in a 50-50 percent split.

[8] The claimant's applications for orders for the appointment of a business valuer and a property appraiser and that the respondents' pay a fine for non-disclosure and for special costs were adjourned, pending receipt of the forensic auditor's report.

IMPUTING INCOME

[9] Clearly, the respondent Zhang does not deal at arm's length from the respondent Rocky International Investment Ltd. Section 18 of the *Federal Child Support Guidelines* ("Guidelines") provides that:

Where the Court is of the opinion that the amount of the spouse's annual income does not fairly reflect all of the money available to the spouse for the payment of child support, the Court may determine the spouse's income to include the pre-tax income of the corporation.

[10] Section 19 of the *Guidelines* provides that:

The Court may impute such amount of income to a spouse as it considers appropriate in the circumstances, including where it appears that income has been diverted and where the spouse reasonably deducts expenses from income.

[11] In the absence of full and frank financial disclosure, as I have found is the case here, the Court looks to the evidence available to it for the purposes of imputing income. *A.G. v. B.R.*, 2005 BCSC 96, at para. 57; affirmed 2005 BCCA 471.

[12] The onus rests with the parent seeking to deduct expenses from income to provide meaningful supporting documentation supporting the deductions: *Ehiagwina v. Ehiagwina*, 2013 ONCJ 18 at para. 16.

[13] As I have stated, on the basis of the evidence before me, I do not accept that the respondent's income is as he deposes. Rather, it is substantially higher. I have no difficulty accepting the submissions of counsel for the claimant that the respondents' income should be imputed to be \$263,863 for the reasons set out in his very thorough and helpful written submissions.

CHILD SUPPORT AND SPOUSAL SUPPORT

[14] The claimant also seeks to have child and spousal support each increased beyond the \$1,000 per month currently provided for in the separation agreement that the parties signed on March 28, 2012.

[15] A major issue in this dispute is the validity of the separation agreement. The claimant's position is that she was forced to sign the agreement by the respondent's threats of violence, coercion and financial pressure. She also maintains that the respondent failed to disclose the existence of substantial assets and income at the time the agreement was signed.

[16] The respondent maintains that the separation agreement was entirely the claimant's idea, that she drew it up and that she knew precisely what she was doing when she signed it.

[17] The law is well established that a court is not bound by any agreement between the parties when it exercises a statutory power to award support and where the agreement is not in substantial compliance with the objectives of the *Divorce Act*, R.S.C.1985, c. 3 (2nd Supp.), *Hyman v. Hyman*, 1929 AC 601, a decision of the House of Lords, *Miglin v. Miglin*, 2003 SCC 24, *L.M.P. v. L.S.*, 2011 SCC 64 at para. 41.

[18] I accept that the court should be slow to award interim support in the face of a separation agreement that provides for support payments to the contrary. If the separation agreement is set aside at trial, the court can award retroactive support, *Hall v. Sabri*, 2011 ONSC 5495.

[19] However, in this case, the evidence is overwhelming that the respondent Mr. Zhang has failed to disclose his true financial wherewithal. In the circumstances, I am satisfied that the terms of the separation agreement regarding the payment of child and spousal support each in the amount of \$1,000 per month should be varied, at least on an interim basis for the following reasons:

- i) the claimant has satisfied me that the respondent Zhang has failed to fully disclose his financial circumstances, many of which have only recently been revealed, which constitutes a material change in circumstances;
- ii) I accept the claimant's evidence of need as set out at paras. 74 to 84 inclusive of her affidavit # 4 sworn August 26, 2015;
- iii) counsel for the respondent concedes that his client has the ability to pay;
- iv) it is clear on the evidence that the separation agreement is *prima facie* vulnerable to attack; and
- v) I am satisfied that if the separation agreement is upheld at trial, the claimant has the ability to repay any support overpayments through at least the equity in her home and/or the respondent's ongoing support obligations that will continue under the upheld separation agreement.

[20] It is also my view that based on the evidence before me and pending the receipt of a forensic audit, the separation agreement is not in substantial compliance with the objectives of the *Divorce Act*. The claimant is left in a significantly disadvantaged position by the separation agreement.

[21] Based upon the claimant's 2014 income of \$82,974 and the respondent's imputed income of \$263,863, the child support payable by the respondent to the claimant pursuant to the *Guidelines* is \$2,166 per month. Accordingly, I am ordering that the respondent pay child support to the claimant in that amount on an interim basis pending the trial of this action. The respondent has liberty to apply to vary this interim order upon receipt of the forensic auditor's report.

[22] Based upon those same respective incomes, the spousal support payable by the respondent to the claimant pursuant to the mid-range of the *Spousal Support Advisory Guidelines* is \$4,157 per month. I am ordering that the respondent pay spousal support to the claimant in that amount on an interim basis pending the trial of this action. The respondent has liberty to apply to vary this interim order upon receipt of the forensic auditor's report.

PRODUCTION OF DOCUMENTS

[23] I am satisfied on the evidence before me that the claimant's applications for the orders that the respondents produce the financial documents and categories of financial documents as set out in Schedule "A" to the notice of application should be allowed. In doing so, I acknowledge the concession on the part of counsel for the respondents that his client is prepared to do so.

[24] I am ordering that the respondent Zhang make all reasonable efforts to produce those documents to the extent that they are in his possession or his control within 30 days of today's date, failing which he will provide to this court details of all of the efforts he has made to produce those documents together with documents supporting those efforts. In other words, I am making it clear that the respondent either produces those documents within 30 days or provides a fulsome explanation

for all of the efforts he has made to do so, supported by documentation setting out his efforts.

[25] I am also satisfied that an order should go requiring that the HSBC produce the various financial records and documents in its possession or control as set out in Schedule “A” of the notice of application.

[26] With respect to the application for an order striking paras. 3, 4 and 5 of the respondent’s counterclaim, those paragraphs read as follows:

[3] An order for the return of financial records and personal documents belonging to the Respondents and wrongfully retained by the Claimant, and damages for wrongful conversion.

This order is sought on the grounds that while the Claimant and the Respondent Hang Zhang were sharing accommodation during 2012 to 2014, the Claimant gained access and took possession of the Respondent’s financial records and personal documents. When the Respondent Hang Zhang moved out in August 2014, the Claimant wrongfully detained the documents and deprived the Respondents of their use. The Respondent Hang Zhang repeatedly demanded the Claimant to return the documents to him, but the Claimant refused when directed to do so.

[4] An order pursuant to Rule 4-4(1) and Rule 12-4 of the *Supreme Court Family Rules* and general law of tort and defamation, an order for the loss of profit and damages that Rocky International Investment Ltd. has suffered due to the conduct of the Claimant.

[5] Pursuant to Rule 4-4(1) and Rule 12-4 of the *Supreme Court Family Rules* and general law of tort, an order for general damages for the pains, suffering, physical and psychological stress that the Claimant has caused to the Respondent Hang Zhang.

[27] Rule 11-2 of the *Supreme Court Family Rules* provides that:

At any stage of a family law case, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that:

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

...

The pleading will be struck only if it is plain and obvious that it is bound to fail: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 36.

[28] I cannot conclude that the respondents' pleading at para. 3 of his counterclaim alleging wrongful conversion discloses no reasonable claim and is bound to fail. However, the pleading as it now stands is devoid of any particulars as to the documents allegedly converted to the claimant's own use. There are also no particulars of the damages allegedly suffered. In my view, both are required. The respondent has 30 days in which to provide those particulars to claimant's counsel, failing which the claim in para. 3 of his counterclaim is struck.

[29] When pleading libel and slander, the plaintiff must set out the exact words complained of in the pleadings, *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 at para. 107.

[30] Here the respondent Zhang has provided no particulars whatsoever of his claim in defamation. The claim is vague in the extreme. In an attempt to remedy this flaw, the respondent Zhang filed an affidavit. The respondent Zhang did not amend his claim, but rather filed his affidavit # 3 sworn September 16, 2015 deposing at paras. 79 to 81 inclusive as follows:

[79] The Claimant has, since December 2014, via verbal and electronic means, made defamatory remarks against me. The remarks were made to common acquaintances of the parties and to the students who were staying at the Selkirk property as homestay students.

[80] The remarks included things such as "Zhang Hang (me) cannot cook and he is a terrible husband who abandoned his wife to sleep with his new girlfriend."

[81] Result of the claimant's defamatory remarks, eight of the homestay students that were living at the Selkirk property left and are no longer renting at the Selkirk property.

[31] No particulars have yet been provided regarding who the "common acquaintances" or the students who allegedly heard the defamatory remarks were, when they were heard by them, or by what means. In my view, the respondent's pleadings at para. 4 of his counterclaim are vexatious in the extreme. Accordingly, para. 4 of the respondent's counterclaim is struck.

[32] Finally the tort of intentional infliction of mental suffering has no place in family law proceedings: *Frame v. Smith*, [1987] 2 S.C.R. 99. Counsel for the

respondent could provide no authority to the contrary. As a result, para. 5 of the respondent's counterclaim is struck.

[33] Now, is there anything else?

[34] MR. MacLEAN: My Lord, the start date for the support, we filed the application on August 27, so I would say the start date should be September 1 and the issue with respect to any retroactive support for prior to that date is up to the trial judge, is the way I would -- that is how long my friend has had notice of this, and he is had a bit of a payment holiday as it is --

[35] THE COURT: No, the start date for the new payments will be December 1, all right, these new support payments.

[36] MR. MacLEAN: And then in terms of the costs for today, that'll be dealt with after the forensic audit, or?

[37] THE COURT: Right. That'll be up to the trial judge, but I am hopeful that the forensic audit will answer a lot of the many unanswered issues in this case.

[38] MR. MacLEAN: Just to be clear in drafting the order, you had indicated that they were adjourned until after the forensic audit, but would they be then ...

[39] THE COURT: They be?

[40] MR. MacLEAN: The costs issue, the special costs, the fine --

[41] THE COURT: Oh, right. They are adjourned --

[42] MR. MacLEAN: -- adjourned until after the forensic with liberty to apply, or? We have four items.

[43] THE COURT: Right.

[44] MR. MacLEAN: The two experts --

[45] THE COURT: They are adjourned until after receipt of the forensic audit.

[46] MR. MacLEAN: Thank you, My Lord. And in terms of we cannot agree within the 48 hours, we would deal with you in terms of appointment of the expert?

[47] THE COURT: Right.

[48] MR. MacLEAN: We will put that in the order as well?

[49] THE COURT: And if you do not agree, I will require names, and availability, CVs, and costs.

[50] MR. MacLEAN: CVs, costs. Thank you, My Lord.

“G.C. Weatherill J.”