

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhang v Fan*,
2018 BCSC 2162

Date: 20181206
Docket: E180483
Registry: Vancouver

Between:

Yinghui Zhang also known as Ying Hui Zhang

Claimant

And

Amei Fan and Shumeng Chen

Respondents

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the claimant:

J. Aucoin
C. Cattermole

Counsel for the Respondent, Amei Fan:

H. Chiu

Counsel for the Respondent, Shumeng
Chen:

F. Wu

Place and Date of Hearing:

Vancouver, B.C.
November 13 and 16, 2018

Place and Date of Judgment:

Vancouver, B.C.
December 6, 2018

Introduction and Procedural History

[1] These reasons address a notice of application of the claimant (hereafter “Mr. Zhang”) filed on October 30, 2018. Part one of the notice under the heading “Orders Sought” reads as follows:

1. Pursuant to s. 89 of the Family Law Act, the Order of Master Harper dated March 1, 2018, shall be varied to provide an interim distribution of family property in the amount of \$350,000 to the Claimant, and any shortfall shall be paid by the Respondent Amei Fan and/or the Respondent Shumeng Chen;
2. Alternatively, the Order of Master Harper dated March 1, 2018, shall be varied to provide that, within 30 days:
 - a. the Respondent Amei Fan will take all necessary steps to obtain a loan against the family home located at 4633 Woodburn Place, West Vancouver, BC, V7S 2W8, legally described as PID: 017-478-391, Lot E, Block E, District Lot 885, Plan LMP1530 (the "Family Home"); with interest-only monthly payments in the minimum principal amount necessary to receive loan proceeds of \$350,000, net of reasonable fees (the "New Mortgage");
 - b. the Respondent Amei Fan will register the New Mortgage against the Family Home;
 - c. the Respondent Amei Fan will forthwith provide all proceeds of the New Mortgage to the Claimant as an interim distribution of family property;
 - d. the Claimant and the Respondent Amei will equally share the monthly interest-only payments against the New Mortgage pending further order of this court or written agreement of the parties;
 - e. the Claimant will remove his Certificate of Pending Litigation No. CA6640960 for the purpose of obtaining and registering the New Mortgage, and he will re-register a Certificate of Pending Litigation subsequent to the New Mortgage being registered.
3. In the further alternative, the Family Home shall be listed for sale with the Claimant and the Respondent Amei Fan having joint conduct of sale, and the net proceeds of sale be held in trust with Clark Wilson LLP, with the Claimant and the Respondent Amei Fan each receiving an interim distribution of \$350,000 for legal fees;
4. In the further alternative, within 30 days, the Respondent Amei Fan shall purchase the Claimant’s interest in the Family Home in the amount of \$1,100,000, with the Claimant to receive those monies within those 30 days;

5. The Respondent Amei Fan shall produce to the Claimant all of her Canadian and US bank statements and credit card statements from January 2015 to the present, within 7 days, including, but not limited to:

- a. CIBC Account No. *8433;
- b. CIBC Account No. *8395
- c. BMO Account No. *921
- d. BMO USD Account No. *874
- e. BMO Account No. *059
- f. BMO Account No. *507
- g. BMO Account No. *182
- h. BMO Account No. *731
- i. BMO Account No. *058
- j. BMO Account No. *392
- k. BMO Account No. *735
- l. BMO Account No. *709
- m. BMO Account No. *2196
- n. BMO Account No. *0490
- o. BMO Account No. *2921
- p. RBC Account No. *5162979

6. On an interim and without prejudice basis, commencing November 1, 2018, and on the first day of each month thereafter until further written agreement or court order, the Respondent Amei Fan shall pay interim spousal support to the Claimant of \$1,423 per month;

7. Commencing November 1, 2018, and on the first day of each month thereafter until further written agreement or court order, the Claimant shall pay interim child support to the Respondent Amei Fan of \$231 per month, to be offset by the Respondent's spousal support payment; and

8. The Claimant is entitled to costs.

[2] The order of Master Harper of March 1, 2018, restrained the respondent Amei Fan (hereafter "Ms. Fan") from, *inter alia*, any dealings with "real property in the name of the respondents" pending final determination of this action. The respondent Shumeng Chen (hereafter "Ms. Chen") is the adult daughter of Ms. Fan from a previous relationship.

[3] I understand that Mr. Zhang and Ms. Fan have reached an agreement to accommodate the production of certain documents requested in para. 5 of part one of the notice of application.

[4] As this is an interlocutory application pending a trial scheduled for September 2019 any findings of fact in these reasons are only for the purpose of deciding the outcome of the present application. There is widespread disagreement between the parties on the facts.

Background Facts and Positions of the Parties

[5] Mr. Zhang is 51 years old and Ms. Fan is 56 years old. They began to live in a marriage like relationship in early 2003 and were married in October 2003 in China. In October 2004 Ms. Fan and her sister incorporated a company in China which I will refer to as “Trade Co. Ltd.” or “the Company”. Ms. Fan and Mr. Zhang have a son together who is now 12 years old.

[6] Mr. Zhang and Ms. Fan separated in late 2017 or early 2018. They do not agree on the date of separation but it is of little consequence for this application.

[7] They agreed to return to China for the purpose of obtaining a divorce and that proceeding was commenced in January 2018.

[8] There is controversy between Ms. Fan and Mr. Zhang about the disposition of Ms. Fan’s shares in Trade Co. Ltd. to Ms. Chen. The documentation of various transactions concerning that company is in dispute. A Chinese government document shows Ms. Chen as the sole shareholder of the company in 2015. Ms. Fan asserts that she no longer has an interest in Trade Co. Ltd. but Mr. Zhang disputes that. The extent of Mr. Zhang’s involvement in Trade Co. Ltd. is disputed.

[9] Mr. Zhang was employed as a police officer in China and received a modest salary. Nevertheless, he has significant assets in China. Ms. Fan appears to have been the controlling mind of the family finances during the marriage but Mr. Zhang insists he was also actively involved in Trade Co. Ltd.

[10] In 2011, when Ms. Fan filed an application to emigrate to Canada as an investor, she stated her net worth to be \$1,846,754 Canadian (all currency in CAD, unless otherwise noted). She stated that she owned 80% of the shares of Trade Co. Ltd., which had net assets of just over \$500,000. Although Ms. Fan asserts that she transferred her shares in Trade Co. Ltd. to Ms. Chen, she continues to play a role in the management of the Company and travels to China several times each year to oversee its affairs. I am also told that she travels to China for treatment for a chronic disease from which she suffers. Neither Ms. Fan nor Mr. Zhang is proficient in English.

[11] In January 2014, shortly after arriving in Canada, Ms. Fan and Mr. Zhang purchased a home on Woodburn Place in West Vancouver where Mr. Zhang and their child continue to reside. In 2015, another home was purchased in Lions Bay, apparently using a loan from Ms. Chen. I understand title to the Lions Bay home was initially registered in Ms. Fan's name but later legal and beneficial ownership was assigned to Ms. Chen. Nevertheless, Mr. Zhang claims he is a beneficial owner of the Lions Bay property. It is mortgaged to the Bank of Montreal with Ms. Chen as the sole mortgagor.

[12] There is much controversy about the financial dealings between Ms. Chen and Ms. Fan. The position of Ms. Fan, and of Ms. Chen, is that over the years since 2013, Ms. Chen has loaned large sums of money to Ms. Fan. The first loan was made in January 2013 in the amount of 1,538,400 RMB, which was then equivalent to just less than \$250,000, but the amount outstanding on the loan is now calculated to be approximately \$290,000. Ms. Fan and Ms. Chen assert that a further loan of 10,000,000 RMB was made by Ms. Chen to enable the Woodburn property to be purchased. That loan, with the effect of fluctuating currency rates and the accumulation of compound interest at 10% per annum, is now calculated by Ms. Fan and Ms. Chen to be almost \$2,400,000. Further loans were made for "living expenses" and for mortgage payments on the Lions Bay property. The total debt from Ms. Fan to Ms. Chen is calculated by them now to be \$6,272,248.01.

[13] Ms. Fan says that Mr. Zhang was aware of these large loans. He denies that he knew of them and insists they are fictitious.

[14] Mr. Zhang derives an annual income of approximately \$26,000 from China. He asserts that is his only income. He has not been gainfully employed since emigrating to Canada. His assets in China have been frozen by the Chinese court, which in due course will make a ruling on their ownership. The date when that will happen is unknown.

[15] Pending access to his assets in China Mr. Zhang deposes that he has no means to pay the cost of litigating this action in which he seeks various relief including child and spousal support as well as orders regarding the division of property. Mr. Zhang has provided a litigation budget for a 15-day trial which is in excess of \$400,000.

[16] Mr. Zhang has incurred a substantial debt with his present counsel, which he deposes he cannot pay when he has no access to his property in China. In light of Mr. Zhang's straitened financial circumstances, at least for the present, this Court ordered Ms. Fan to pay \$17,500 to Mr. Zhang from the proceeds of sale of a 2015 Audi motor vehicle. This was done to enable Mr. Zhang to purchase his own vehicle so that he could transport his son and for other purposes.

[17] Mr. Zhang complains that Ms. Fan has ignored a February 21, 2018 order of Master Scarth, made pursuant to s. 91 of the *Family Law Act*, SBC 2011, c. 25, restraining Ms. Fan from "disposing of any property in her possession" pending an application to be heard on March 1, 2018. Mr. Zhang submits that Ms. Fan, contrary to the order, withdrew \$920,000 from an investment account and used it to pay off the mortgage on the Woodburn property. A title search of November 8, 2018 shows a mortgage still registered against the title. Even though no mortgage payments have been made since February 2018, the mortgagee has taken no steps to foreclose. Mr. Zhang submits it is "unclear" what Ms. Fan did with the \$920,000.

[18] Ms. Fan accepts she used the \$920,000 from the investment account to pay down the mortgage on the Woodburn property but submits that the effect of doing so is that she has thereby lost an income earning asset and her income will decline “significantly”. On her Form 8 financial statement sworn on June 21, 2018, Ms. Fan deposed that after the \$920,000 was used to “pay out” the mortgage against the Woodburn property, the “majority of [her] income comes from dividends and interest on investments”. She deposed that her guideline income for child support purposes was \$112,113.66.

[19] Ms. Fan’s position on the application for an interim advance to Mr. Zhang is that her very substantial debt owing to her daughter Ms. Chen leaves her unable to make an interim advance. In effect, she argues that there is no money from which an advance may be made. She says she has no net worth.

[20] Mr. Zhang deposes that although he initially was much involved in Trade Co. Ltd., once it began to generate a substantial income, Ms. Fan refused to provide information to him about its finances. He believes the value of the real property owned by him and Ms. Fan in China is approximately \$4,800,000. In addition, he deposes they own “expensive jewelry and art work in China”, to which he does not have access.

[21] Mr. Zhang expresses scepticism that the debt incurred by Ms. Fan to Ms. Chen is valid. He submits the debt is poorly documented and that there is the appearance that Ms. Fan has contrived to reduce her net worth by means of fictitious borrowing from her daughter Ms. Chen. Ms. Fan submits that the loans are fully documented and approximately \$6,000,000 is properly owing.

[22] Ms. Chen opposes the interim advance. She takes the position that if it is ordered, the only source from which the advance may be obtained is the Woodburn property, but this property is also the only asset Ms. Fan owns in this jurisdiction against which Ms. Chen could, at least partially, be re-paid her loans. Moreover Ms. Chen submits it is all very well for Mr. Zhang to submit that, if he fails at trial in B.C. to achieve a favourable division of property, his assets in China may be

available to “make Ms. Fan whole” but China is not a reciprocating state under the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78.

[23] Ms. Chen submits that Mr. Zhang’s disparagement of the validity of the loans she made to Ms. Fan is not justified. Mr. Zhang is dismissive of the proposition that Ms. Chen, who is in her early 30s, could have, in only a few years, created a business that generated such substantial sums of money that she could lend her mother in excess of \$6,000,000. Ms. Chen, however, describes how she managed to create a rapidly growing and thriving business that generated very substantial income, out of which she was able to make the loans. I have no means on this highly contested application to make reasonable findings on that issue. Despite Ms. Chen’s favourable financial position, it is submitted that if an interim distribution of property were to be made out of the Woodburn property, it would jeopardize Ms. Chen’s ability to recover her loans, which would be prejudicial to her.

[24] I am not persuaded I should take into account the prejudice that Ms. Chen may experience if her ability to recover her loans to Ms. Fan is diminished by the delusion of an asset of Ms. Fan, as a result of an interim distribution payment made pursuant to s. 89 of the *Family Law Act*. No authority has been provided that a third party lender’s interests ought to be taken into account when an interim distribution is ordered out of property held by a party who has borrowed from that lender. Whether that lender is a family member or otherwise is of no consequence.

The Law on Interim Distributions

[25] Section 89 of the *Family Law Act* provides that:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[26] In *McKenny v. McKenny*, 2015 BCSC 1345, Fitch J. (now J.A.) wrote at paras. 56 and 57:

[56] With respect to the claim for an interim distribution of family property, the authority for such an order may be found in s. 89 of the *FLA*. This section provides that a court may make an order for an interim distribution of family property if satisfied that it would not be harmful to the interests of the spouse and is necessary to provide money to fund family dispute resolution, all or part of a proceeding under the Act, or to obtain information or evidence in support of a family dispute, resolution or application to a court.

[57] The claimant correctly notes that the order sought by the respondent is extraordinary in nature and must be assessed carefully. The test governing interim distribution of family property has two components:

- 1) The applicant must show an advance is required to mount a challenge to the other spouse's position at trial; and
- 2) The applicant must show that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position at trial.

[27] In *Drinkall v. Drinkall*, 2016 BCSC 373, Master McDiarmid held that the onus is on the applicant to satisfy the court that an interim distribution will not jeopardize the other party's position at trial.

Discussion of the Issue of an Interim Distribution of Family Assets

[28] I find Mr. Zhang is unable to fund this litigation unless there is an interim advance. The cost of the litigation has been, and will be, substantial. Mr. Zhang has a modest income and he has no present access to his assets in China. I conclude that without an advance, he will not be able to pay his counsel what he presently owes for legal fees and disbursements and it is probable that his counsel will withdraw. If that were to happen, Mr. Zhang would have much difficulty retaining other counsel. He cannot realistically act for himself. Quite apart from having no familiarity with the management of a complex family law case, he is not proficient in English. The cost of translation throughout a 15-day trial would be prohibitive

[29] The only family property that is a potential source of funds to make an advance is the Woodburn property. It has an appraised value in excess of \$2,000,000 and apparently has no financial encumbrance. If it is utilized to facilitate an advance, there is clearly some prejudice to Ms. Fan. Without an advance,

Mr. Zhang will probably abandon this litigation. The balance of prejudice favours an interim distribution.

[30] Ms. Fan does not argue that Mr. Zhang does not need an interim distribution to fund this litigation. Instead, she relies on the prejudice to herself if the distribution is ordered. Nor does Ms. Fan submit that, despite her modest income and overwhelming debt, some means must be found to provide an interim distribution to her. Her position is that there are no assets in Canada out of which any advance can be made: there are only debts owing to Ms. Chen. In effect Ms. Fan argues that all family “property” in Canada has been converted into debt owing to Ms. Chen. If there is such debt that was Ms. Fan’s decision. I do not accept this as a reasonable justification to deny the interim distribution of family property.

The Order in Regard to the Advance

[31] I order that Ms. Fan will as soon as reasonably possible, and in any event within 30 days, take such steps as are necessary to borrow against the security of the Woodburn property the sum of \$350,000, which will be distributed to Mr. Zhang. The cost of borrowing that sum, including any fees and interest, will be shared equally by Mr. Zhang and Ms. Fan until further order of this Court. To facilitate borrowing against the Woodburn Place property, Mr. Zhang will discharge his certificate of pending litigation to enable a mortgage to be registered against title. Once the distribution has been made, he will be entitled to register a new certificate of pending litigation.

[32] If Ms. Fan chooses to do so within 30 days of the date of this order, she may purchase Mr. Zhang’s interest in the Woodburn property for the sum of \$1,100,000 without prejudice to her claims in this action.

Spousal Support and Child Support

[33] Mr. Zhang has lived in Canada for approximately five years and has not had gainful employment during that time. He has been the stay-at-home parent for the parties’ child. Determining the parties’ respective guideline incomes is virtually

impossible on the conflicting and uncertain evidence on this application. Mr. Zhang deposes his income is approximately \$26,000 annually. In June 2018, Ms. Fan deposed to a guideline income of approximately \$112,000 but also deposes it was expected to be significantly reduced following the use of \$920,000 from the investment account to pay down the Woodburn property mortgage. Doing the best I can with the meagre evidence available, I impute a guideline income to Ms. Fan of \$80,000.

[34] Ms. Fan submits a guideline income should be imputed to Mr. Zhang greater than \$26,000. I am not inclined to do so on an interim basis. Mr. Zhang's English comprehension is apparently slight. I expect that there are areas of Metropolitan Vancouver where English is not necessary for employment, and where it may be possible for Mr. Zhang to obtain employment, but I doubt West Vancouver, where he lives, is one of them. If he needed to travel to other areas to find employment where his language skills would be useful, he would thereby become unavailable as the stay-at-home father for the child. I accept for the purposes of an interim spousal support and an interim child support order and that his guideline income will not exceed \$26,000.

[35] Spousal support in the low-range payable by Ms. Fan is \$414 each month, taking into account child support payable for the child who lives with Mr. Zhang. Child support payable by Ms. Fan, on a guideline income of \$80,000, is \$765 monthly. This results in a net payment by Ms. Fan to Mr. Zhang of \$1,179 monthly, which shall be paid on the first day of each month beginning on January 1, 2019, until further order.

[36] I am told that there have been no examinations for discovery in this action and it is apparent that the document discovery is incomplete. After discovery is complete, it may become apparent that my orders for spousal and child support ought to be varied. In that event the parties are entitled to make an agreement or, failing that, to apply.

[37] The costs of this application will be in the cause.

“Affleck J.”