

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhao v. Liao*,
2023 BCSC 701

Date: 20230406
Docket: S201144
Registry: Vancouver

Between:

Lijun Zhao and Tong “Heintz” Sun

Plaintiffs

And

Ying-Yi Liao

Defendant

Before: The Honourable Justice Basran

Oral Reasons for Judgment

In Chambers

The Plaintiffs appearing in person:

L. Zhao
T. Sun

Counsel for the Defendant:

D. Georgetti

Place and Date of Hearing:

Vancouver, B.C.
April 6, 2023

Place and Date of Judgment:

Vancouver, B.C.
April 6, 2023

Introduction

[1] Ms. Zhao and Mr. Sun are the plaintiffs in the underlying action and the respondents on this application. Ms. Liao is the defendant in the action and the applicant.

[2] Ms. Liao seeks an order that the amended notice of civil claim be struck pursuant to Rule 9-5 of the *Supreme Court Civil Rules* [Rules]. Alternatively, she seeks an order that the plaintiffs' claims be summarily dismissed in their entirety pursuant to Rule 9-6. In the further alternative, she seeks an order that the plaintiffs pay into court security for the defendant's costs in the amount of \$61,693.60 within 30 days, along with terms related to this order.

[3] Ms. Liao also seeks special costs of the action if it is dismissed and for this application.

Background

[4] The plaintiffs are vexatious litigants and subject to a vexatious-litigant order in BC. Mr. Sun has also been declared a vexatious litigant in Alberta: *Sun v. Mercedes-Benz Financial Services Canada Corporation*, 2021 BCSC 2575 (appeal dismissed as abandoned, Court of Appeal Docket No. CA 47996, April 4, 2022) [*Mercedes-Benz*]; *Sun v. Allwest Insurance Services Ltd.*, 2022 ABQB 230; and *Sun v. Tesla Motors Canada ULC*, 2022 ABQB 464.

[5] In *Mercedes-Benz*, Justice Fitzpatrick, in granting the BC vexatious-litigant order against the plaintiffs, outlined a persistent pattern of abuse of the court's processes. She noted a "substantial litany of litigation" in various jurisdictions, among those a series of actions similar to the underlying action involving "Airbnb or property-rental matters": *Mercedes-Benz* at para. 6.

[6] In *Sun v. Duan*, 2020 BCPC 167, the BC Provincial Court found that Mr. Sun was operating an Airbnb business unlawfully without regard to the relevant legal requirements.

[7] The plaintiffs have unpaid judgments in BC and Alberta of almost \$150,000 in respect of various matters.

Tenancy Agreement

[8] In early April 2019, Mr. Sun contacted the defendant seeking to rent the defendant's property for the purpose of operating an Airbnb business. At that time, the property was tenanted, and the tenancy was for a fixed term ending on July 31, 2019. However, the tenant was expected to move out on or about May 15, 2019, and in any event no later than June 1, 2019.

[9] On April 24, 2019, the defendant met with the plaintiffs and signed a tenancy agreement that included the following terms:

- the possession date would be June 1st, 2019; and
- the plaintiff would provide a deposit in the amount of \$3,050.

[10] On April 24, 2019, the plaintiffs paid the deposit amount of \$3,050. The defendant signed a deposit receipt that, as translated, states:

I received \$3,050 from [the plaintiffs] as a deposit towards the rent of 1079 Connaught Drive, Vancouver. The landlord [the defendant] will hand over keys or garage keys to [the plaintiffs] on May 15, 2019, and the rent will start from the date of June 1, 2019.

[11] On May 13, 2019, the tenant advised that she would require a few extra days beyond May 15, 2019 to move out. The defendant advised Mr. Sun of this but confirmed that the property would still be available on the possession date, June 1, 2019. In response, later that day, Mr. Sun wrote:

Yvonne, we had some discussion, because you are unable to hand over the key on May 15th, we do not know when exactly the moving would be. After some thinking, the conclusion is that you had better refund the deposit of \$3,050 to my mother.

[12] On May 16, 2019, the defendant returned the deposit to the plaintiffs.

Issues

[13] There are three issues to be determined in this matter:

- 1) Should the pleadings in this matter be struck pursuant to Rule 9-5?
- 2) Is there a genuine issue for trial as set out in Rule 9-6?
- 3) Should security for costs be ordered?

1) Should the pleadings in this matter be struck pursuant to Rule 9-5?

[14] Supreme Court Civil Rule 9-5 provides for the striking of pleadings:

Rule 9-5 - Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, 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,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

And the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1)(a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

- (a) the registrar may, despite any other provision of these Supreme Court Civil Rules,
 - (i) retain the document and all filed copies of it, and
 - (ii) refer the document to the court, and
- (b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

- (a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,

- (b) the person who filed the document may, within 7 days after being notified, apply to the court, and
- (c) the court may confirm, vary or rescind the order.

[15] The defendant alleges that the notice of civil claim does not disclose a reasonable claim. Importantly, no evidence is admissible on an application under subrule 9-5(1)(a) of the *Rules*.

[16] The defendant alleges that the two causes of action advanced by the plaintiffs—breach of contract and “detrimental reliance”—justify the striking of this pleading. The defendant asserts that the latter, detrimental reliance, is not a cause of action cognizant at law, and the former, breach of contract, has not been properly pled. Specifically, the tenancy agreement stipulated a possession date of June 1, 2019 and the plaintiffs' reliance on alleged misrepresentations regarding the provision of keys to the property on May 15, 2019 are not properly pled and not particularized as required by Rule 3-7.

[17] I understand the plaintiffs' position to be that the deposit receipt reference to obtaining the keys on May 15, 2019 constitutes a term that the parties agreed to in their original agreement.

[18] I am not satisfied that it is plain and obvious that the claim as pled has no reasonable prospect of success. I am required to assume the facts pleaded are true unless they are manifestly incapable of being proven. In this case, the deposit receipt and the tenancy agreement conflict on the question of the date on which the plaintiffs were to receive access to the property. For that reason, I am unable to conclude that the claim has no reasonable prospect of success.

2) Is there a genuine issue for trial considering Rule 9-6?

[19] Rule 9-6 of the *Supreme Court Civil Rules* provides for summary judgment if there is no genuine issue for trial:

Rule 9-6 - Summary Judgment

Definitions

- (1) In this rule:

"Answering party", in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;

"Claiming party" means a party who filed an originating pleading.

Application

(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

Response to application

(3) An answering party may respond to an application for judgment under subrule (2) as follows:

(a) the answering party may allege that the claiming party's originating pleading does not raise a cause of action against the answering party;

(b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

Claiming party may proceed

(6) If, under this rule, a claiming party obtains judgment against a person on a claim made against that person in the originating pleading, the judgment is without prejudice to the right of the claiming party to

(a) proceed with the action in respect of any other claim made, in the originating pleading, against the person against whom the judgment was obtained, and

(b) proceed with the action against any other person against whom a claim is made in the originating pleading.

Costs consequences

(7) Subject to subrule (8), if the party applying under subrule (2) or (4) obtains no relief on the application, the court may

(a) fix the costs of the party responding to the application, and

(b) fix the period within which those costs must be paid.

Court may decline to fix costs

(8) The court may decline to fix and order costs under subrule (7) if the court is satisfied that the application under subrule (2) or (4), although unsuccessful, was nevertheless reasonable.

Bad faith or delay

(9) If it appears to the court that a party to an application under subrule (2) or (4) has acted in bad faith or primarily for the purpose of delay, the court may

(a) fix the costs of the application as special costs, and

(b) fix the period within which those costs must be paid.

[20] Each side must put its best foot forward with respect to the existence or not of material issues to be tried. A summary judgment motion cannot be defeated by vague references to what might be adduced in the future. The determination is based upon the pleadings as framed and the evidence before the court, not on suppositions about what might be proven if the claim is allowed to proceed: *Royal Bank of Canada v. Superior Flood and Fire Restoration Inc.*, 2020 BCSC 1803 at para. 42.

[21] Rule 9-6 is a challenge based upon a limited review of evidence in which a defendant can succeed by showing that the plaintiff's case is unsound. If the court is satisfied that the plaintiff is bound to lose or the claim has no chance of success, the defendant must succeed. It must be manifestly clear that there is no genuine issue for trial: *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48–49 and 62–68.

[22] Based on my limited review of the evidence and the pleadings as framed, I am satisfied that Mr. Sun proposed a mutual termination of the agreement when he sought the return of the deposit funds. The defendant's return of these funds therefore constitutes a mutual termination of their agreement. For this reason, I am satisfied that there is no genuine issue for trial, and summary judgment ought to be granted to the defendant. Viewed objectively, the plaintiffs evinced an intention to no longer be bound by the agreement when they requested and received the return of their deposit funds: *Il Camineto Di Umberto Restaurant (1982) Ltd. v. Watson (1997)*, 47 B.C.L.R. (3d) 120 (C.A.) at para. 23..

[23] Furthermore, by requesting and subsequently accepting a return of the deposit funds, the plaintiffs repudiated the agreement, and the defendant accepted the repudiation. In my view, the plaintiffs are estopped from continuing with this action because the return of the deposit constituted a representation, promise, or assurance by both words and deeds that the return of the deposit terminated the agreement and all claims related to it. Importantly, the defendant relied on this representation.

3) Should security for costs be ordered?

[24] Based on the foregoing, it is not necessary for me to determine whether security for costs should be ordered. However, in the event that I was not satisfied that summary judgment ought to be granted, I would have ordered a significant amount as security for costs based primarily on the plaintiffs being vexatious litigants and the details of their unpaid judgments, amounting to almost \$150,000, in respect of various other matters in both BC and Alberta.

[25] I am mindful that this court and the Alberta King's Bench Court have independently come to the conclusion that the plaintiffs are vexatious litigants. This court found that Mr. Sun and Ms. Zhao are vexatious litigants and the Alberta court concluded that Mr. Sun is a vexatious litigant. In my view, this is an important and relevant circumstance for the purpose of a security for costs application.

Costs

[26] I will now hear your submissions on costs in respect of this application.

[SUBMISSIONS ON COSTS]

[27] THE COURT: The defendant is entitled to their costs at Scale B of this one-day application.

[28] I am dispensing with the plaintiffs' signatures on the order.

“Basran J.”