

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beigi v. Sabaghchian*,
2024 BCSC 812

Date: 20240513
Docket: S212990
Registry: Vancouver

Between:

Abbas Beigi and International Design Group Limited

Plaintiffs

And

**Aliakbar Sabaghchian, Leile Kavishi, Niaz Sabaghchian, and Masoud Sab
Holdings Ltd.**

Defendants

Before: Associate Judge Bilawich

Reasons for Judgment

Counsel for Plaintiffs:

D. Dalke

Counsel for the Defendants:

H.C.R. Clark, K.C.

Counsel for the Affiant, Amir Taghiakbari:

J. Tam

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
April 3, 2024

Place and Date of Judgment:

Vancouver, B.C.
May 13, 2024

Introduction

[1] The defendant Niaz Sabaghchian (“Niaz”) seeks an order that she be allowed to cross-examine Amir Taghiakbari on two affidavits he has sworn in this proceeding. Niaz says this is necessary to help resolve her pending application to strike / for summary trial.

[2] Cross-examination is opposed by the plaintiffs and by Mr. Taghiakbari.

Background

[3] The plaintiffs filed their notice of civil claim on March 25, 2021.

[4] The plaintiffs allege they were involved in a number of business dealings with the defendant Aliakbar Sabaghchian (“Mr. Sabaghchian”). This included an alleged partnership to develop and sell properties in BC and a partnership to import polyurethane into Iran. The plaintiffs allege Mr. Sabaghchian owes them money arising from their various ventures. Mr. Sabaghchian denies the plaintiffs’ version of the alleged business arrangements, denies he owes them any money and has filed a counterclaim seeking judgment against the plaintiffs.

[5] The plaintiffs have included as defendants Mr. Sabaghchian’s wife, Leile Kavishi, and his daughter, Niaz. Niaz is currently a lawyer who practices in London, England. At the time the action was started, she was a law student. Niaz alleges that the plaintiffs named her as a defendant in order to improperly pressure Mr. Sabaghchian by alleging his daughter was involved in dishonest and fraudulent misconduct.

[6] The plaintiffs’ allegation against Niaz have changed over time. They originally alleged that she wrongfully received funds related to the sale of a BC property referred to as the “Queens Property”. The initial allegations were as follows:

47. In or about June 2017, Mr. Sabaghchian caused the BC partnership to sell the Queens Property at the price of \$3,844,470.11. The BC Partnership obtained a profit from the sale of the Queens Property, the particulars of which are not fully known to the plaintiffs.

48. Sometime after the sale of the Queens Property, the BC Partnership received a refund (the “Queens Refund”) of about \$70,675 in respect of the realtor commission fees which the BC Partnership had overpaid on settlement of the Queens Property sale.

49. Mr. Sabaghchian caused the BC Partnership to pay or transfer the Queens Refund to the defendant Niaz Sabaghchian or Leile Kavishi, without the plaintiffs’ knowledge or consent.

50. At all material times, the defendants Niaz Sabaghchian and Leile Kavishi knew or ought to have known that the Queens Refund belonged to the BC Partnership.

[7] The defendants say that the figures set out in the notice of civil claim were wrong and this was known to the plaintiffs. The Queens Property actually sold on May 10, 2017 for \$4,110,800.21, after adjustments. Mr. Sabaghchian negotiated a further reduction in the real estate agent’s commission. This resulted in the agent refunding to the partnership \$68,175.50. Mr. Sabaghchian was out of town at the time, so he arranged to have Niaz pick up the refund cheque, which was made payable to her personally. She in turn transferred these funds to her father, who deposited them into an account he was maintaining for the Queens Property. This was also reflected in the accounting records as an amount received from the realtor.

[8] Mr. Sabaghchian says he sent Mr. Beigi a copy of the refund cheque and had a detailed text exchange with him reporting the commission reduction he had negotiated. In November 2017, Mr. Beigi prepared his own accounting, which included the \$68,175.50 commission refund.

[9] On August 22, 2022, Niaz filed her first application for summary trial, seeking dismissal of the claim against her and special costs. Her application was adjourned several times and was eventually set for a hearing in late February 2023.

[10] On February 20, 2023, the day before they filed their response to Niaz’s application, the plaintiffs filed an amended notice of civil claim which deleted paras. 49 and 50 above and added an entirely new allegation that Mr. Sabaghchian had used misappropriated partnership funds to purchase several properties in Iran, including one referred to as the “Salar” property, which he registered in Niaz’s name. The new allegations are found at paras. 84 and 85:

84. The Polyurethane Proceeds were used in part to acquire and develop real property in Iran, specifically three properties known as Lavasan, Salar and Shomal. The Salar property has address at “No. 12, Salar St. On the Left Side, After Parkway, Valiy-e Asr St.” and is known by main plate No. 3542, located at District 11 of the Real Estate Registration District of Shemiran-Tehran Province. The Lavasan property is known by plates No. 136/62 at District 4 of Tonekabon, and No. 15/548 at District 11 Tehran. Mr. Sabaghchian has not provided an accounting in relation to the Lavasan, Salar and Shomal properties.

85. Mr. Sabaghchian, without the plaintiffs’ knowledge or consent, caused the Salar property to be registered with [Niaz] as the owner.

[11] The plaintiffs seek judgment against Niaz for restitution, unjust enrichment, tracing and a declaration they possess an equitable interest in her real and personal property on the basis of a constructive, result, implied and/or express trust.

[12] On February 23, 2023, Ms. Allen, a legal assistant working with plaintiff’s counsel, swore an affidavit stating she had been informed by Mr. Assanti, counsel for the plaintiffs, that on February 22, 2023, Mr. Taghiakbari had sent him copies of several documents relating to the Salar property which Mr. Taghiakbari indicated he had obtained while in Iran. These included Farsi language versions and official English translations of:

- a) A notarized title deed;
- b) Three notarized powers of attorney;
- c) A construction license;
- d) A government payment receipt; and
- e) A property appraisal.

[13] On March 31, 2023, Mr. Taghiakbari swore his affidavit #2, which included the following:

12. I affirmed my Affidavit #1 in this proceeding on January 11, 2023, shortly before I left Vancouver and travelled to Iran. While in Iran I obtained, from various public institutions in Tehran, Farsi-language documents relating to a property at No. 12 Salar St. in Tehran, Iran, (the "Salar Property"). These documents included a title deed, an appraisal report, a construction license, a payment receipt, and three powers of attorney (the "Salar Documents").

13. I took the Salar Documents to a certified translator in Tehran, known as Certified Translation Bureau No. 615 (the "Translation Office"). The Translation Office is owned and operated by Dr. Moghaddam Yazdani. The Translation Office translated the Salar Documents from Farsi into English. I provided these translated Salar Documents and their originals to counsel for Beigi. I have now reviewed Affidavit #2 of Patti Allen made February 23, 2023 and confirm that the Salar Documents and their translations are exhibits to Affidavit #2 of Patti Allen.

14. While in Iran, I then obtain the title deed relating to another property in Tehran, Iran (the "Lavasan Property") and a legal title registration number belonging to another property in the north of Iran known as Tonelabon. I took those documents, also in the Farsi language, to the Translation Office in mid-February 2023 for translation into English.

[14] It is Niaz's position that the Farsi language documents attached to Ms. Allen's affidavit are forged, were obtained fraudulently or may have been improperly altered.

Among the issues she raises:

- a) The title deed is missing certain numbers required by the Iranian title system;
- b) A title deed and powers of attorney can only be obtained from the Government Registration Office by either the property owner or someone authorized by the owner;
- c) Inquiries were made with the Notary who purportedly certified the title deed and he indicated he had no record of having done so. In Iran, notaries are government officials who keep government records.
- d) Inquiries were made with the Translator, who identified Mr. Taghiakbari in a photo as having passed himself off as Mr. Sabaghchian when obtaining the translations;
- e) Inquiries were made with the Appraiser, who advised that their seal and signature on the appraisal had been forged.

[15] Mr. Sabaghchian says that, based on affidavits from him and an Iranian lawyer, Mr. Negatpour, the Revolutionary Prosecutors Office issued arrest warrants for Mr. Beigi and Mr. Taghiakbari. Both were indicted in Iran for forgery. The appraiser also commenced proceedings regarding the appraisal.

[16] Mr. Sabaghchian says that in September 2023, a hearing took place in Iran concerning these charges. Neither Mr. Beigi nor Mr. Taghiakbari attended but Mr.

Taghiakbari was represented by counsel. The Iranian court found Mr. Taghiakbari guilty of forgery and related offences and sentenced him to a 3-year term of imprisonment. The charges against Mr. Beigi were adjourned.

[17] On June 30, 2023, Niaz filed a second application, seeking special costs relating to her first application and dismissal of the new claims in paras. 84 and 85 of the amended notice of civil claim. The application is made pursuant to R. 9-5(1)(d) [application to strike due to abuse of process] and 9-7 [summary trial]. She states in her application that her father purchased the Salar property in her name in or about 2011, whereas the alleged Polyurethane Partnership was not formed until three years later, in 2014. Niaz initially set the hearing of her application for July 25, 2023 and estimated it would require 90-minutes.

[18] The plaintiffs subsequently took the position that the hearing of the new application would require in excess of two hours, meaning it could not be set in regular chambers and would have to be scheduled via the long chambers process. They also took the position that the matter was not suitable for summary determination because the parties had not yet completed document discovery and no examinations for discovery had been held yet.

[19] On July 24, 2023, Niaz adjourned her application generally, by consent.

[20] Dates for examinations for discovery were initially scheduled for mid-August 2023, but the plaintiffs say Niaz's counsel had a scheduling conflict, so those dates "fell away" and have not been rescheduled. Document discovery has progressed at a very slow pace.

[21] On October 19, 2023, Niaz filed an application to compel the plaintiffs to produce for inspection the originals of the notarially sealed documents attached to Ms. Allen's affidavit #2. On November 15, 2023, the plaintiffs filed their application response opposing the relief sought. One of the affidavits they filed in support of their response was Mr. Taghiakbari's affidavit #3, which offered a much different

explanation for how he obtained the Salar property documents attached to Ms. Allen's affidavit #2.

[22] Mr. Taghiakbari states he did not obtain the Salar property documents from public institutions in Iran as previously indicated. He now said he went to city hall in Tehran, Iran to inquire whether the Salar property was still owned by either Mr. Sabaghchian or Niaz. He alleges Mr. Sabaghchian had previously promised him one of the units in that property as payment for his previous work with Mr. Sabaghchian through Mr. Taghiakbari's construction company "ATACO". He states:

5. As I was describing the Salar Property to the clerk at city hall, a man in the lobby overheard this conversation. He introduced himself to me by his surname "Ahmadi". It is customary in Iran for people to introduce themselves by their surnames.

6. Mr. Ahmadi said he was familiar with the Salar Property, and that he had documents relating to the Salar Property from a previous potential buyer of one of the apartment units at that property. These are the Salar Documents attached to the affidavit of Patti Allen made February 23, 2023 (the "Allen Affidavit").

7. When Mr. Ahmadi said that he had documents about the Salar Property from a potential buyer of a unit at the property, this was not surprising because it is common for buyers to do their due diligence on a property and receive documents about the property they are wanting to buy.

...

11. Mr. Ahmadi and I met again a week later at city hall in Tehran, where he provided me with the Salar Documents.

[23] Mr. Taghiakbari goes on to say he carried out searches to confirm the documents he had received from Mr. Ahmadi were truthful and accurate, including checking the website of Iran's National Organization for Registration of Deeds and Properties and other searches. The documents checked out, but he did not print out or photograph the search results. He arranged to ask an Iranian lawyer named Mr. Hosseini to carry out a similar search and confirm ownership of the Salar property. He denies the allegation that he misrepresented his identity to the Translator. He disputes the suggestion that the Notary had no record of having notarized the subject documents, stating that in his experience notaries in Iran do not always keep accurate records.

[24] Counsel for Niaz argues Mr. Taghiakbari's affidavits are replete with contradiction, illogical assertions and outright lies. They are also contradicted by Mr. Sabaghchian's sworn evidence. She argues that establishing the true facts via cross examination of Mr. Taghiakbari on his affidavits is necessary for proper determination of the issues raised in her June 30, 2023 application.

[25] The plaintiffs note that Mr. Sabaghchian has a separate action pending against Mr. Taghiakbari, namely Vancouver Action S-219236.

Applicable Law

[26] Rule 22-1(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as amended, addresses evidence on a chambers proceeding. It requires that evidence be given by affidavit and allows the court to order deponents of affidavits to attend for cross examination, either before the court or before another person, as the court directs.

Evidence on an application

(4) On a chambers proceeding, evidence must be given by affidavit, but the court may

- (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
- (b) order the examination of a party or witness, either before the court or before another person as the court directs,
- (c) give directions required for the discovery, inspection or production of a document or copy of that document,
- (d) order an inquiry, assessment or accounting under Rule 18-1, and
- (e) receive other forms of evidence.

[27] Rule 9-7(12) allows the court to order cross-examination on affidavits on or before the hearing of a summary trial application:

Preliminary orders

(12) On or before the hearing of a summary trial application, the court may order that

- (a) a party file and serve, within a fixed time, any of the following on which the party intends to rely in support of the application:

- (i) an affidavit;
- (ii) a notice referred to in subrule (9),
- (b) the person who swore or affirmed an affidavit, or an expert whose report is relied on, attend for cross-examination, either before the court or before another person as the court directs,
- (c) cross-examinations on affidavits be completed within a fixed time,
- (d) no further evidence be tendered on the application after a fixed time, or
- (e) a party file and serve a brief, with such contents as the court may order, within a fixed time.

[28] The test for when cross examination on affidavits is appropriate was summarized in *Stephens v. Altira Group, Inc.*, 2021 BCCA 396 at para. 5:

[5] Altria submits the correct test is that summarized by Justice W. Scarth in *Greenwood v. Greenwood*, [1999] B.C.J. No. 846 at para. 15, and cited in *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882. The three factors to be considered are:

1. whether there are material facts in issue;
2. whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and
3. whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

Other cases have identified additional considerations such as whether the information sought is available through other means, and whether the cross-examination will produce unreasonable delay, or generate unreasonable expense: *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995.

[29] It is not necessary for there to be a conflict in the affidavit evidence to justify cross-examination on affidavits. At para. 8:

[8] I do not read this passage as standing for the principle that cross-examination may only be authorized when there are conflicting affidavits. Reasons for judgment must always be read in the context of the facts of the particular case and the issues being addressed. *H.M.B.*, like many cases involving applications to cross-examine on affidavits, involved directly conflicting affidavits. When contesting affidavits are before the chambers judge, it is indeed appropriate to review them to determine whether there are material facts in issue. The affidavits are one consideration in that assessment; they are not a precondition to the exercise of discretion. Justice Hunter in *H.M.B.* relied in his reasons on the oft-cited passage from *Brown v. Garrison* (1967), 63 W.W.R. 248 (B.C.C.A.), where Justice Bull, speaking for the Court, said at p. 250:

Clearly, and it has been long so held, the judge has a discretion which he must exercise on proper principles as to whether or not cross-examination should be directed on the application of a party. There is no question that in the normal course where the affidavit on which the cross-examination is sought includes **facts that are in issue**, the deponent will so be ordered to attend if application therefor is sought.

...

[Emphasis and bold added.]

It is evident from *Brown* and other cases that the question is not whether there are conflicting affidavits, but whether there are conflicting material facts. In my view, that conflict may be grounded in the applicant's pleading. In a jurisdictional challenge, or an application to strike a fraud or conspiracy claim, the plaintiff often will not be in a position to swear to events that are largely within the knowledge of the defendant. It must be remembered that Rule 22-1(4)(a) governs applications to cross-examine on affidavits filed in a wide array of proceedings. The factors to be considered in the exercise of the judge's discretion remain the same, but their application must be sensitive to the context in which the application is brought. As Justice Hunter observed in *H.M.B.*, at para. 61, if the underlying application is one that, if successful, would result in the striking out of the plaintiff's claim without any consideration of its merits, that context may weigh in favour of granting cross-examination.

[30] In *Stanger v. Roman Catholic Bishop of Nelson*, [1998] B.C.J. No. 567, 1998 CanLII 1667, 50 B.C.L.R. (3d) 320 (BCSC) at paras. 7-8, the court declined to order cross-examination on affidavits in circumstances where a summary trial application had been adjourned generally and no new hearing date was contemplated:

7 ... In the present case, the application has not been totally disposed of but (having been adjourned generally with no new hearing date set or contemplated) it is not currently pending. ...

8 In the present case, the Rule 18A application is, effectively, in limbo. It is not pending, but it has not been finally disposed of. In my view, the right to apply for cross-examination on affidavits in support of that application should join it in limbo. ...

Position of the Parties

Niaz

[31] Niaz says there are conflicting material facts in issue, that cross-examination is relevant to an issue that may affect the outcome of her application to strike / summary trial application and it would serve a useful purpose in terms of eliciting evidence that would assist in determining that issue. Mr. Taghiakbari has sworn conflicting and contradictory evidence on a crucial issue. His affidavits have been

put forward as part of the plaintiffs' case. Cross-examination is appropriate in the circumstances.

The Plaintiffs

[32] The plaintiffs say Niaz has failed to identify how cross-examination of Mr. Taghiakbari would be relevant to any material issues in her proposed application. She has two summary trial applications, both of which have been adjourned generally and both of which are in limbo pending examinations for discovery. Her first application has been overtaken by the second one. They have not yet filed an application response to her second application, so it is not yet clear whether they intend to rely on either of Mr. Taghiakbari's affidavits #2 or #3. They suggest they will not be in a position to file a response for a considerable period of time. They say this application is premature and unwarranted.

[33] They also complain this application is another example of Mr. Sabaghchian attempting to discourage Mr. Taghiakbari from providing evidence in this proceeding. They allege he has previously threatened to cause problems for Mr. Taghiakbari and his family in Iran if he assisted Mr. Beigi and has improperly tried to leverage Iranian criminal proceedings to discourage him from giving evidence.

Mr. Taghiakbari

[34] Mr. Taghiakbari argues that Niaz's applications have been adjourned generally and at present there is no application pending. While the applications are in limbo, so too is any right she may have to cross-examine on affidavits. He also argues Niaz has not clearly identified what material facts are in issue on her application. The key allegations are (a) that Mr. Sabaghchian caused Niaz to be registered as owner of the Salar property and (b) that the Salar property was purchased using funds misappropriated from the Polyurethane Partnership with the plaintiffs.

[35] The conflict on which Niaz relies as the basis for needing cross-examination is the source of the impugned Salar property documents. He says the authenticity of

these documents is not a material fact; it is only a potential conflict in the affidavit evidence. Niaz has not filed affidavit evidence denying ownership of the Salar property. The impugned documents are not relevant to the source of the funds used to purchase the Salar property. It is unlikely that cross-examination of Mr. Taghiakbari would help determine either of those material issues. The parties are also able to obtain copies of Salar property documents from Iranian authorities as another means of assessing authenticity of the impugned documents.

Analysis

[36] A preliminary consideration on an application to cross examine the deponent of an affidavit is whether there is an active chambers application in which an opposing party is relying on the subject affidavit(s). The question is then whether the cross-examination is relevant to a material issue that may affect the outcome of the substantive application, and whether it would serve a useful purpose, in terms of possibly eliciting evidence that would assist in determining that issue.

[37] Niaz's efforts to summarily extract herself from this litigation have been complicated by the fact that the claims made against her have been somewhat of a moving target. The Queens Property allegations in paras. 49 and 50 of the original notice of civil claim were withdrawn after she challenged them in her first application and were replaced with the Salar property allegations in paras. 84 and 84 of the amended notice of civil claim. This caused Niaz to file a second application challenging the new allegations, but this was adjourned generally with the consent of all parties.

[38] The purpose of the adjournment appears to have been to allow the parties to pursue further discovery of documents and examinations for discovery, and presumably to secure a suitable long chambers date. For reasons which are not clear, there has been little or no progress made in terms of advancing discovery.

[39] Perhaps understandably, Niaz now wishes to get matters moving again by pursuing cross examination of Mr. Taghiakbari. The plaintiffs resist this, in part, by pointing to the lack of a fixed hearing date for her second application, their own

failure to file a response to her application advising whether and on what basis they are opposing it, and their own failure to pursue timely discovery.

[40] Niaz has attempted to address the lack of a pending hearing date for her application by unilaterally re-setting it for a hearing in regular chambers. The plaintiffs object to this, but owing to their own failure to file an application response they have had notice of since June 30, 2023, technically they have not taken the steps necessary to formally oppose her application. From their vigorous opposition to this application, it appears they intend to oppose the application, but they offer no insight into their basis for doing so.

[41] At this point in time it is not clear whether anyone intends to rely on Affidavits #2 and #3 of Mr. Taghiakbari at the eventual hearing of Niaz's application. Niaz indicates in her application filed June 30, 2023 that the materials she intends to rely on includes Affidavits #1 and #3 of Mr. Sabaghchian, Affidavit #1 of Darlene Purdy and Affidavit #1 of Mr. Nejatpour, an Iranian lawyer. The plaintiffs have not yet identified what affidavits or other materials they intend to rely on in opposition to Niaz's application. If no one ends up putting Affidavits #2 and #3 of Mr. Taghiakbari in evidence at the hearing, technically there appears to be no proper basis to cross examine Mr. Taghiakbari on them. They would not be "before the court" at the hearing of Niaz's application.

[42] It is not appropriate for the plaintiffs to continue to indefinitely delay Niaz's June 30, 2023 application based on their own inaction and delay. It is past time for them to file an application response, if they do intend to do so. I order that the plaintiffs file any application response within 21 days from the date of release of these reasons. This is not intended to prevent them from potentially taking the position that Niaz' application is not suitable for determination by summary trial application. If no application response is filed, Niaz can proceed on the basis that her application is unopposed.

[43] Based on the current state of the application materials, the application to cross-examine Mr. Taghiakbari on his affidavits #2 and #3 is premature. Niaz is at liberty to re-apply after the plaintiffs file their application response.

Conclusion

[44] If the plaintiffs intend to oppose Niaz’s application filed June 30, 2023, they are ordered to file an application response and any new supporting affidavit material within 21 days from the date of release of these reasons. This is not intended to prevent them from potentially taking the position that her application is not suitable for determination by summary trial application.

[45] Niaz’s application to cross examine Mr. Taghiakbari on his various affidavits is dismissed as premature. She is at liberty to re-apply to cross-examine Mr. Taghiakbari on his affidavits after the plaintiffs have filed an application response to her application filed June 30, 2023.

[46] With respect to costs, Niaz was not successful on this application, but that was due in part to the plaintiff’s failure to file their application response in a timely manner. The application was also arguably triggered by Mr. Taghiakbari tendering conflicting versions of how he came to possess the disputed Salar property documents. In these circumstances, it is appropriate that the parties and Mr. Taghiakbari each bear their own costs of this application.

“Associate Judge Bilawich”