

SUPREME COURT OF NOVA SCOTIA

Citation: *Zhang v. Chen*, 2021 NSSC 3

Date: 20210114

Docket: Hfx No. 492777

Registry: Halifax

Between:

Lijiao Zhang and Qinglu Liu

Plaintiffs

v.

Dan Chen and Idan Holding Inc.

Defendants

DECISION

Judge: The Honourable Justice M. Heather Robertson

Heard: November 3, 2020, in Halifax, Nova Scotia

**Final Written
Submissions:** November 6, 2020

Decision: January 14, 2021

Counsel: Joseph M. Herschorn, for the plaintiffs
Brian K. Awad, Q.C., for the defendants

Robertson, J:

[1] This is a motion for summary judgment on evidence. The plaintiffs, Lijiao Zhang (“Zhang”) and Qinglu Liu (“Liu”) are the parents-in-law of the defendant, Dan Chen (“Chen”) who married their son Yi Liu (“Yi”) in 2008 in the People’s Republic of China. All four lived in Beijing and each couple owned their own matrimonial home. All four worked in Beijing in their various workplaces. It was their plan to immigrate to Halifax, Nova Scotia. They intended to sell their homes in Beijing and purchase homes in Halifax that were near to each other.

[2] As the plaintiffs, Zhang and Liu, were then retired, they would provide childcare for the children of their son and daughter-in-law, while Chen, at first on a student visa, enrolled in a language institute to improve her English, then enrolled at the Nova Scotia Community College, taking a culinary arts programme. Chen became a permanent resident and then intended to sponsor her husband Yi. In the meantime, he would keep his job in Beijing and fund Chen, while his parents would child mind while in Canada each year until they all became permanent residents.

[3] The plaintiffs Zhang’s and Liu’s affidavits are before the court; Zhang’s affidavit dated October 7, 2019 chronicles her journey and transfer of assets to Canada, as further outlined in a supplemental affidavit dated December 27, 2019 and a second supplemental affidavit dated October 17, 2020. Liu’s affidavit dated October 7, 2019 addresses the defendant Chen’s dealing with his funds in his accounts.

[4] Chen, Zhang, and Liu arrived together in March 2017. The plaintiffs, Zhang and Liu, returned to China each year for six months and a day as they remained on visitor visas. They followed this calendar of travel:

Lijiao Zhang

- March 15, 2017 to July 28, 2017: Canada;
- July 29, 2017 to September 10, 2017: China;
- September 11, 2017 to February 7, 2018: Canada;
- February 8, 2018 to November 22, 2018: China;
- November 23, 2018 to May 20, 2019: Canada;
- May 21, 2019 to July 3, 2019: Canada;
- July 4, 2019 to present: Canada.

Qinglu Liu

- March 15, 2017 to July 28, 2017: Canada;
- July 29, 2017 to September 10, 2017: China;
- September 11, 2017 to February 7, 2018: Canada;
- February 8, 2018 to April 8, 2018: China;
- April 8, 2018 to May 20, 2019: Canada;
- May 21, 2019 to July 3, 2019: Canada;
- July 4, 2019 to present: Canada.

[5] Their son Yi visited his family in Halifax for a week in May 2017 and also spent two months of that summer in Nova Scotia. He next returned to Nova Scotia almost two years later, in August 2019 with a view to remaining. Each generation planned to bring its wealth with them to Canada.

[6] Upon settling in Halifax in May 2017, with funds sent to her by Yi between March and May 2017, Chen purchased a home at 42 Lakehill Drive and moved into this home with the plaintiffs.

[7] The plaintiffs sold their home in China in March of 2018 and they began the process of transferring their own funds to Canada, without incurring currency restrictions. They gave the proceeds of their house sale to eight relatives, who wired the funds totalling \$444,782.92¹ to several Canadian banks. These eight relatives' sworn affidavits and Zhang's second affidavit are before me and evidence the transfers. Zhang transferred another \$60,000 herself and Chen's brother wired \$61,300 making a total of \$566,082.92 in deposits from their house sale proceeds. Zhang also received a gift of \$65,070 from her sister, who has since passed away and could not provide affidavit evidence as to this transfer. The total of Zhang and Liu's funds deposited into these accounts was thus \$661,584.52.

[8] Zhang age 61 (a railway worker) and Liu age 64 (a steel plant worker) did not speak, read, or understand English. They were unfamiliar with basic Canadian banking practices. They relied on Chen, their daughter-in-law, to establish accounts and deposit their funds in Canadian banks. They opened the following accounts upon her advice and with her assistance: in Zhang's name a chequing account and a savings account at CIBC; in Liu's name a chequing account and a savings account at each of BMO and TD. Thus, six bank accounts were opened, and funds could flow from China, being all the plaintiffs' wealth.

¹ All dollar amounts referred to in this decision are Canadian dollars.

[9] Yi also transferred additional funds into these accounts, that he attributed to funds for his parents' future health care expenses or in the event they wished to buy a small home in Canada near Chen and Yi. That brought the total of these six accounts to \$901,851.52.

[10] Unfortunately, upon Yi's visit in the summer of 2019, their marriage was in difficulty and after one occasion of an allegation of sexual assault and a criminal charge, Chen asked for a divorce. The families' plans thus faltered, although Yi and Chen did come to amicable terms of separation.

[11] Yi's affidavits are dated December 27, 2019 and January 9, 2020. Yi records that between 2017 to 2019 he transferred over \$560,000 in total to bank accounts he had opened as well as a number of bank accounts belonging to his wife, the defendant Chen. He explains it was for the purchase of a house, a down payment of \$250,000 and the balance to support her and his children while she attended school.

[12] He further outlines how he transferred \$260,997 cumulatively to his parents' bank accounts, in case they wished to buy a small house near his and Chen's home in the Halifax area and to cover potential medical expenses. These latter funds are contested by Chen as matrimonial property and are not the subject of the current partial summary judgment application.

[13] He further explains his settlement of a business lawsuit in China for approximately \$800,000 and how he sold his house in China to meet this obligation. He attaches a copy of the settlement agreement as Schedule B.

[14] On two occasions, Yi recorded and then later had translated and transcribed two conversations he had with Chen concerning her acknowledgment of her having used his parents' funds. In a September 21, 2019 conversation, Yi and Chen discussed an agreement to divide their matrimonial assets, recognizing that his parents' funds are separate and independent. Chen appeared to calculate Zhang and Li's funds at \$550,000 and said:

The truth is, the money over here can't be clearly accounted for. But I'm willing to return all the money to your mom. I won't fight for this money. We'll write it here so its all crystal clear. So don't say in the future that I didn't give the money. This is clear. When I'll transfer the money. When I'll return it to her.

[15] In an earlier conversation, that Yi says took place on September 11, 2019 and which he recorded and had transcribed and attached to his affidavit dated January 9, 2020, Chen appears to acknowledge the funds belonged to Zhang and are not their joint matrimonial asset.

[16] In this motion for a partial summary judgment the plaintiffs seek the recovery of only those funds they have identified as the proceeds of the sale of their home in Beijing and the gift from Zhang's sister, which is in the amount of \$565,884.52, after deposit fees. They say these funds were converted by Chen for her own use and she completely depleted their bank accounts. Additional funds transferred into their accounts by their son are not the subject of this application as Chen argues that these funds are matrimonial property and the subject of the divorce proceeding commenced in the Nova Scotia Supreme Court, Family Division.

[17] To support their request for partial summary judgment, Zhang and Liu, the plaintiffs, have accounted for funds that were strictly the proceeds of their own home in China. That property sold in March 2018, four months before Yi and Chen's home sold. The plaintiffs argue their personal funds transferred to Canada can be discretely identified and should be returned to them in this proceeding.

[18] The defendant Chen had asserted that all the funds deposited into these six accounts belonged to her and Yi, as their own matrimonial property and therefore she was able to access them for her own use. However, by her own admission in conversations with her husband Yi, recorded by him and subsequently translated and transcribed, Chen acknowledges the plaintiffs' ownership of the funds they claim.

[19] The affidavit evidence of the plaintiffs is clear that they had not authorized Chen to access their funds or to make unauthorized investments using their funds as a down payment or security for an investment property held solely by Chen, as sole shareholder of Chen's corporation Idan Holding Inc. ("Idan"). The plaintiffs did not expect all their personal funds in these six bank accounts to be almost completely depleted by Chen.

[20] The balance remaining in the six accounts by September 2019 was as follows:

Bank	Type of Account	Amount Remaining
CIBC	Chequing	\$202.74

CIBC	Savings	\$4026.72
BMO	Savings	\$7.73
BMO	Chequing	\$1,000
TD	Chequing	\$2082.78
TD	Savings	\$0

[21] Zhang in her supplemental affidavit dated December 27, 2019, swore that she and her husband Liu did not speak, read, or write or understand English, both only speaking Mandarin. In the affidavit she describes how the defendant Chen took them to banks to set up personal accounts for the transfer of funds from China.

[22] In her second supplemental affidavit, Zhang provided documentary proof of the funds the plaintiffs seek to have returned to them. Zhang provides a printout of her Chinese bank account, Schedule A, with the proceeds of the sale deposited therein, the translated contract of sale for their home, Exhibit B, a table showing the proceeds of sale divided up and transferred to Canada, Exhibit C.

[23] The plaintiffs' counsel has outlined how the defendant Chen went about depleting the plaintiffs' bank accounts over two years:

Broadly speaking, Ms. Chen took the money in four ways:

- (a) By using the bank card she had obtained for the CIBC account to fund personal purchases, such as cosmetics, clothing, and a gym membership. The total amount of these purchases was \$13,673.97. Ms. Zhang and Mr. Liu did not know about or consent to these purchases.
- (b) The CIBC records also show that Ms. Chen made online transfers, using the password she had obtained. Ms. Zhang and Mr. Liu did not know of or consent to these transfers. They total \$16,900.
- (c) At various times, Ms. Chen took either Ms. Zhang or Mr. Liu to various bank branches, leading them to believe that the banks needed to see their passports to verify their identities. Relying on the fact that Ms. Zhang and Mr. Liu do not read or speak English, and are unsophisticated, Ms. Chen obtained bank drafts and counter cheques noting her as payee totally \$466,862.07.
- (d) Ms. Chen forged Ms. Zhang's signature on cheques written on her CIBC chequing account. The details are:
 - (i) In June 2018, Ms. Chen forged Ms. Zhang's signature on a cheque to the order of "Dan Chen" in the amount of 428,400. In October 2018, Ms. Chen forged Ms. Zhang's signature on two other

cheques associated with the CIBC chequing account, both to the order of “dan Chen” (one for \$55,000 and one for \$80,000).

- (ii) Ms. Zhang was in China when Ms. Chen forged cheques.
- (iii) The evidence shows that Ms. Chen practised Ms. Zhang’s signature before cashing the cheques.
- (iv) Ms. Chen received \$399,400 into her personal CIBC account as a result of her cheque forgery.

[24] This motion for a partial summary judgment was filed after the pleading closed, upon Ms. Chen filing her statement of defence.

[25] The plaintiffs rely on Rule 13.04:

(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

- (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
- (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

Issues

[26] The issues before the court are:

- (a) Is there a material dispute of fact underpinning Ms. Zhang and Mr. Liu’s allegation of conversion?
- (b) If there is no such material dispute of fact, is there a question of law to be determined?

Law and Argument

[27] Plaintiffs' counsel submits, relying on *Burton Canada Company v. Coady*, 2013 NSCA 95, the leading authority of our Court of Appeal before the recent amendment of Rule 13, the bipartite test for summary judgment was as follows:

1. Summary judgment engages a two-stage analysis.
2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.
3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions. (*Burton, supra*, at para. 87)

[28] They argue that following Rule 13's amendment, the Court of Appeal enhanced the analytical framework of *Burton* by expanding on the "real chance of success" question in *Shannex Inc. v. Dora Contraction Ltd.*, 2016 NSCA 89, where Fichaud, J.A. posed four sequential questions at para 34, that they submit must be addressed in this case.

- **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]

[. . .]

- **Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

[. . .]

- **Third Question: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: "Does the challenged pleading have a real chance of success?"**

[. . .]

- **Fourth Question: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?**

Material Fact in Dispute and the Tort of Conversion

[29] The responding party has an obligation to “put their best foot forward” in showing what the material fact could be, or what the question of law could be. No party can rely on conjecture and bald denials, *Shannex Inc. v. Dora Construction Ltd.*, *supra*, para. 36.

[30] In this proceeding, counsel for Ms. Chen has asserted that the application for partial summary judgment is at least premature. He views the material facts in dispute, the origin of the funds deposited into the six bank accounts, to be a tracing exercise, of where the funds came from – whether from the sale of Yi’s home or the plaintiffs’ home – which he asserts cannot be achieved without all of Yi’s banking records. These will eventually be produced in the course of the divorce proceeding and he suggests all these matters can be addressed by one judge in the Nova Scotia Supreme Court, Family Division, rather than a determination made by this court in which the suit over the conversion of these funds was commenced. Further he says the words of Chen as recorded, translated, and transcribed for the court and attached to Yi’s affidavits are not necessarily an admission by Chen that she took these funds for her own use.

[31] It is however required that the defendant “put her best foot forward” in showing what the material facts at issue could be. Chen has sworn an affidavit dated January 7, 2020. This affidavit is problematic as Chen continually addresses what she believes to be the intentions of Yi or the plaintiffs and their knowledge and understanding of the banking arrangements she made on their behalf. Ms. Chen does not provide any specifics of her explanations to the plaintiffs of her use of their bank accounts. She does not say she was authorized to use their funds, nor does she say that she told them of her use of their funds.

[32] Her affidavit is replete with large portions of hearsay, unsupported by any documentation. Nor has Chen made any attempt to have documents in Mandarin translated to support the assertions she has made. Only admissible evidence should be accepted by the court. (*Spidell v. LaHave Equipment Ltd.*, 2014 NSSC 255.) In this respect Chen’s affidavit evidence is wanting.

[33] This is in sharp contrast to the plaintiffs’ efforts to document all the relevant evidence. The affidavit of Shao-Pin Luo, a professor in Mandarin Chinese language, was sworn on October 15, 2020, and addresses the recorded evidence that is before the court, including the “divorce agreement” Yi and Chen were

working on at the Alderney Library in Dartmouth on September 21, 2019. This is also referenced in the Zhang affidavit of October 7, 2019.

[34] The plaintiffs have argued in paras. 37-56 of their brief, the principles of conversion that apply to the plaintiffs' allegations, so as to assess whether the evidence relevant to them raises material disputes of fact in these circumstances.

[35] Having considered the affidavit evidence before the court, I agree that the monies deposited in the plaintiffs' six accounts, as claimed in this proceeding were their accounts receivables from the banks and theirs alone. They were the sole owners of these respective accounts and the only people who could properly remove or direct these funds or pledge them as collateral. They were not joint accounts with the defendant Chen. It is clear from the evidence before me that Chen forged the plaintiff Zhang's signature on cheques and used the plaintiffs' passwords and personal identification numbers to transfer and use funds for her own purposes.

[36] It is also clear from the evidence before me that the defendant Chen converted the plaintiffs' funds to inject capital into the defendant corporation, Idan, to buy an apartment building with a \$400,000 down payment, derived from the plaintiffs' funds.

[37] Conversion is a strict liability offence. As stated by Gerald H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Carswell: 2010) at p. 117:

Conversion consists in a wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner. It is an intentional exercise of control over a chattel which seriously interferes with the right of another to control it. There must be a voluntary act in respect of another's goods amounting to a usurpation of the owner's proprietary or possessory rights in them. Before a person can be found responsible for conversion, the court must be satisfied that he either knowingly or carelessly, without ascertaining or attempting to ascertain who the true owner of the property was, took possession of goods and exercised some dominion over them in the real sense, not merely in the sense of a transporter changing their physical location. Succinctly put, conversion is a "positive wrongful act or dealing with the goods in a manner, and with an intention inconsistent with the owner's rights."

[38] In my view, there are no material facts in dispute with respect to the plaintiffs' claim of funds in this motion for partial summary judgment. Accepting the challenge of the defendants in their brief dated January 7, 2020, the plaintiff

Zhang in her second supplemental affidavit dated October 19, 2020, produced the documentary evidence proving the provenance of the funds.

[39] The amounts claimed by the plaintiffs are those funds transferred from the proceeds of sale of their Beijing residence in the amount of \$566,082.92, which after bank fees for the transfers, totalled \$565,884.52; as well as the sum of \$65,070.00, a gift from Zhang's now deceased sister transferred on July 7, 2017. (Zhang affidavit sworn October 7, 2017, Exhibit B.) These are the two discrete pots of money, severable from any additional funds transferred by the plaintiffs' son Yi which are contested by the defendant, Chen, in current divorce proceedings as possible matrimonial assets.

[40] The timing of these transfers is significant as most of the funds were transferred in March and April 2018, soon after the sale of the plaintiffs' home and before the sale of Yi's home some four months later, in July 2018. Further the affidavits of Zhang's relatives who transferred these funds confirm the source of the funds and dates of transfer of funds to Canada.

[41] The affidavit evidence, in support of the gifted funds of \$65,070, is Zhang's alone as her sister has died and could not provide an affidavit respecting the transfer of the funds.

[42] This court has the discretion to grant partial summary judgment. In my view, the early resolution of the discrete issue of these two sources of funds is appropriate and in the interest of justice.

[43] The plaintiffs' funds from the sale of their own home and the gift given to Zhang by her sister should not be caught up in the division of matrimonial assets of Yi and Chen, when clarity of ownership and clear acknowledgment of the personal nature of the plaintiffs' funds by Chen is before the court. In my view, Chen's own words of acknowledgment of the plaintiffs' ownership of their funds is clear and not open to any other interpretation.

[44] I recognize that the court should only exercise its discretion in granting a partial summary judgment in the clearest of cases. This is one such case. See *Proost v. Ferncroft Equities Ltd.*, 2014 NSSC 99:

[24] The basic principle quoted above becomes more refined when one looks at other cases dealing with this issue. Courts have established criteria on this question quite some time ago. Southey J. in *M. Schmitt Painting Ltd. v. Marvo Construction Co.* 1977 Carswell Ont 287 had this caution at para 10:

[10] In my view, the Court should not give judgment for part of a claim on a motion under Rule 63, unless it is perfectly clear that such part is severable. The Court should not give judgment in circumstances where one of the parties may reasonably contend that the judgment affects liability for the balance of the claim. In those circumstances a successful application would not result in a saving of time and would probably make the remaining proceedings more complicated. Such result is the direct opposite of what Rule 63 was intended to achieve.

[Emphasis added]

And in *Gold Chance International Ltd. v. Daigle and Hancock*, 2001 Carswell Ont 899 Justice C. Campbell stated the following at para. 78:

[78] ...partial summary judgement in such a complex commercial case could be granted in only the clearest of cases, where the issue on which the judgment is sought is clearly severable from the rest of the case and is supported by a self-contained and self-supporting set of uncontroverted evidence and/or admissions that are entirely dispositive of the issue and do not require the motions judge to engage in the type of factual adjudication that should be left to a trial judge.

[Emphasis added]

Also in *Corchis v. KPMG Peat Marwick Thorne*, 2002 Carswell Ont 1064, Justice Gillese said the following at para. 3:

...partial summary judgment ought only to be granted in the clearest of cases where the issue on which judgment is sought is clearly severable from the balance of the case. If this principle is not followed, there is a very real possibility of a trial result that is inconsistent with the result of the summary judgment motion on essentially the same claim. Permitting this possibility in proceedings where there are common facts, issues and parties does not advance the administration of justice...

[Emphasis added]

[45] The plaintiffs have shown the court that their funds have been traced to the sale of their own home and demonstrated that the funds belong to them alone. There is no material issue of fact with respect to these funds. Nor is the gift from Zhang's sister an issue of material fact raised.

[46] The plaintiffs' evidence remains uncontested. Chen and Idan are liable to the plaintiffs for the return of thee funds. There is no issue of law to be determined.

[47] Accordingly, I grant this motion for partial summary judgment in the amount of \$630,954.52.

[48] The defendant's motion for the transfer of this action to the Family Division is also denied. This motion assumed that this court would find that funds deposited in the plaintiffs' and defendant Chen's accounts were somehow "family" funds and might best be addressed by one court in the Nova Scotia Supreme Court, Family Division.

[49] This action was started in the Nova Scotia Supreme Court on October 7, 2019 and was answered by the defendants in their defence filed November 13, 2019. The matter has been properly before this court for more than a year and involved parties who are not related to the pending divorce proceeding between Yi and Chen. The subject matter of this action falls outside the area of family law and is properly before the trial division. There was no legal basis to consider a transfer of this action to the family division.

[50] In the absence of agreement on costs, I will receive submissions in writing from counsel.

Justice M. Heather Robertson