IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhou v. Liu,*
2025 BCSC 1088

Date: 20250613
Docket: S240218
Registry: Vancouver

Between:

Zhi Ying Zhou

Plaintiff

Zhen Li

Plaintiff and
Defendant by Counterclaim

And

Xiaohong Liu
Zhongping Xu
Canada Sparkle Holdings Ltd.

Defendants and
Plaintiffs by Counterclaim

Hong Guo (a.k.a. Hong Chen)
Guo Law Corporation

Defendants by Counterclaim

Before: The Honourable Justice Underhill

Reasons for Judgment

Counsel for the Plaintiffs:	D. Moonje
Counsel for the Defendants, Xiaohong Liu, Zhongping Xu and Canada Sparkle Holdings Ltd.:	D.D. Way N. Tam
Place and Date of Hearing:	Vancouver, B.C. May 13, 2025
Place and Date of Judgment:	Vancouver, B.C. June 13, 2025

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Introduction

[1] The defendants bring an application to summarily dismiss the plaintiffs' claim under Rule 9-6 as being time-barred. In the alternative, they say the claim should be struck as an abuse of process under Rule 9-5.

[2] For the reasons that follow, I find that the limitation period issue cannot be determined by way of a summary judgment under Rule 9-6. Further, I am unable to determine that the plaintiffs' claim is an abuse of process that should be struck under Rule 9-5. The defendants' application is therefore dismissed.

Background

[3] The defendants, Xiaohong Liu ("Ms. Liu") and Zhongping Xu ("Mr. Xu"), are spouses. They were business partners with the plaintiffs Zhi Ying Zhou ("Ms. Zhou") and Zhen Li ("Mr. Li"), who are also spouses. The corporate defendant, Canada Sparkle Holdings Ltd. ("Canada Sparkle"), is a company incorporated in British Columbia. The defendants by counterclaim are a former lawyer, Hong Guo ("Ms. Guo") and her law firm, Guo Law Corporation. Ms. Guo and her firm did not appear on this application.

[4] While the background facts are complex and somewhat difficult to follow from the materials before me, I understand that the central dispute between the parties is a business opportunity referred to as the "Minoru Project", which involved acquiring the titles to real property located on Minoru Boulevard in Richmond, BC (the "Minoru Properties").

[5] The plaintiffs contributed funds to acquire the Minoru Properties. In brief, they now seek to be repaid their contribution, plus interest. Their claim is based in debt, or alternatively breach of contract and breach of trust.

[6] The plaintiffs' notice of civil claim was filed on January 11, 2024. For the purposes of this application, the following allegations are relevant background. All of these allegations have yet to be proven and are not to be taken as findings of fact:

a) In 2012, the parties agreed to pursue the Minoru Project. A verbal agreement (the "Initial Agreement") was made regarding the involvement of each party in the acquisition of the Minoru Properties. Mr. Li agreed to supply the funds to acquire the Minoru Properties. Mr. Xu agreed to incorporate a new company that would be the entity to acquire the properties. This company became Canada Sparkle. Under the Initial Agreement, Canada Sparkle was to be owned by a Hong Kong company called Double Wealth International Investments ("Double Wealth"), which would in turn be owned by a British Virgin Islands company of which Mr. Li and Mr. Xu were both shareholders.

b) Over several transactions beginning in early 2013, Mr. Li caused approximately $8 million CDN to be transferred to Canada Sparkle for the Minoru Properties acquisition.

c) In 2013, Mr. Xu also engaged another couple as partners in the Minoru Project. They are Kai Ming Yu and Qing Yan, together referred to as the "Yu Family." In May 2013, the defendants and the Yu Family entered into a joint venture agreement to acquire the Minoru Properties, and incorporated a company called Vancouver Soho Holding Ltd. ("Vancouver Soho") for this purpose. Vancouver Soho acquired the Minoru Properties in August 2013.

d) In August 2015, the Yu Family sought to sell their interest in Vancouver Soho to another company called 1032821 BC Ltd. ("1032"). That deal fell through, and the Yu Family filed a petition against the defendants on June 21, 2016. That proceeding is referred to by the parties as the "Soho Litigation". The petition is primarily based in oppression under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, as well as breach of fiduciary duty and negligent misrepresentation.

e) In 2018, as part of the Soho Litigation, the Minoru Properties were sold. The sale proceeds are currently being held in trust pending the outcome of litigation (the "Soho Trust Funds").

f) During the Soho Litigation, the plaintiffs learned that contrary to the Initial Agreement, Mr. Xu was the sole owner of Canada Sparkle, rather than Double Wealth. Around this time, the plaintiffs began speaking to the defendants about a refund of their contributions to the Minoru Project and a return on their investment.

g) In 2018, the parties established a "New Agreement" through WeChat messages between Mr. Xu and Mr. Li's assistant, Lijun Chang. Under the New Agreement, the parties agreed to set the amount owing to the plaintiffs at $10.4 million CDN plus an annual interest rate of 6%, as well as 6.7 million Renminbi. The parties also agreed at this time that the defendants would make an initial repayment of $900,000 CDN.

h) On April 25, 2019, Mr. Li received a payment of $900,000 from Mr. Xu or Canada Sparkle, consistent with the New Agreement.

i) In August 2022, a further WeChat conversation between Mr. Chang and Mr. Xu took place. In that conversation, Mr. Xu advised that the plaintiffs should commence litigation to establish what the plaintiffs had advanced to the Minoru Project. Mr. Xu promised that once this amount was established, the plaintiffs would be repaid from the Soho Trust.

j) In October 2023, Mr. Xu met with Ms. Zhou in Vancouver. During the meeting, Mr. Xu again advised that the plaintiffs should commence litigation to confirm the amount advanced by the plaintiffs to the Minoru Project. He again promised that once that amount was confirmed, it would be paid to the plaintiffs through the Soho Trust. Finally, Mr. Xu agreed to cause the release of $1.0 million dollars CDN to the plaintiffs from the Soho Trust. To date, this release has not yet occurred.

[7] This version of events is attested to in Ms. Zhou's first affidavit sworn March 7, 2024, and in Mr. Li's second affidavit sworn September 20, 2024. The October 2023 meeting and the promises that Mr. Xu is alleged to have made at that meeting are further attested to in Ms. Zhou's third affidavit sworn November 27,

2024, and the affidavit of a translator named Fan Zou, who attests to have been present at that meeting.

[8] Mr. Li's assistant, Mr. Chang, swore an affidavit on September 20, 2024, which attaches certified translations of WeChat messages between himself and Mr. Xu between March 2019—December 2019, and November 2021—November 2022. The plaintiffs assert that these messages demonstrate the formation of the New Agreement.

[9] The defendants dispute many of these facts. Of particular relevance to this application is the defendants' evidence that there was never a repayment agreement between the parties. In Mr. Xu's second affidavit made on May 20, 2024, he makes the following statements:

> 7. . . . The Plaintiffs claimed that for the purchase of the Minoru Project, Li and I entered into the Initial Agreement. This statement is false as there was no initial agreement.
>
> . . .
>
> 26. . . . The Plaintiffs claim that I agreed for myself and behalf [*sic*] of the other Defendants to repay to Li $10.4 million CDN. This statement is false. I have never agreed or acknowledged to repay Li the amounts that he specified.
>
> . . .
>
> 28. . . . The Plaintiffs claim that I made a $900,000 payment to them pursuant to the New Agreement. This statement is false. There was no New Agreement. I made a $900,000 payment to Li as a sign of good faith that I was hopeful in resolving the matter amicably. However, as the Soho Litigation progressed, it became more apparent that Li misrepresented the amounts that he claimed he contributed for the Minoru Project.
>
> . . .
>
> 30. . . . I have always disagreed with the amounts Li has claimed he advanced for the Minoru Project. I did not make any promise of repayment to Li or agree to release any funds, but instead, i indicated that a determination by the court with respect to the actual amounts that Li had advanced for the Minoru Project would have to be made to settle the dispute.

[10] Mr. Xu's affidavit makes no mention of the alleged October 2023 meeting, and the defendants made no submissions on this point.

[11] Finally, the defendants also allege that during the Soho Litigation, the Yu Family and the plaintiffs had both hired the same lawyer under a joint retainer

agreement. As evidence of the alleged joint retainer, the defendants point to the following:

a) The husband of the Yu Family, Mr. Yan, made an affidavit in support of the Soho Litigation on September 28, 2017. In that affidavit, he states that: "Mr. Li Zhen has also jointly retained Ms. Wiebe's firm to attempt to recover money from the Respondents he loaned to finance parts of this same deal."

b) Another affidavit filed in the Soho Litigation was made by an individual named Fan Zou on October 3, 2017. The affidavit mentions correspondence between the affiant and Mr. Li's son, in which the latter mentions that the Li family had retained a lawyer along with the Yu Family to pursue claims against the Mr. Xu and Ms. Liu.

c) On October 3, 2017, an application was heard by Justice McEwan in the Soho Litigation. Submissions by counsel for the Yu Family in that application included a representation that Mr. Li and Ms. Zhou were also their clients.

[12] The defendants have also drawn my attention to Mr. Yan's first affidavit in the Soho Litigation, filed on June 21, 2016. The defendants say that two dates mentioned in Mr. Yan's affidavit are relevant to the present application:

a) On December 16, 2015, the Yu Family was contacted by an individual named Mr. Mu, who the Yu Family understood to be a business partner of Mr. Xu and Mr. Yu, and a co-director of the Hong Kong company Double Wealth. Mr. Mu informed the Yu Family of several concerns he had with Mr. Xu's conduct, including that he believed Mr. Xu had acted without authority respecting the affairs of Vancouver Soho and Canada Sparkle in the acquisition of the Minoru Properties.

b) On May 23, 2016, the Yu Family learned that Mr. Xu had been removed as a director of the British Virgin Islands company that he co-owned along with Mr. Li.

Analysis

Rule 9-6 and the Limitation Issue

[13] For purposes of this application, the relevant portion of Rule 9-6 of the *Supreme Court Civil Rules* provides:

> **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,
>
> . . .

[14] In *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 [*Dickin*], the Court of Appeal described what it means for there to be "no genuine issue for trial":

> [25] As noted in [*Canada (Attorney General) v. Lameman*, 2008 SCC 14] at para. 19, "[a] motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future". A defendant applying for summary judgment may succeed either by demonstrating that the plaintiff's case is unsound or by adducing evidence that provides a complete answer to the plaintiff's case: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 48 [*Beach*]. While an application under Rule 9-6 invokes the court's consideration of evidence it is not a summary trial. The judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is "incontrovertible". If the court is satisfied that it is manifestly clear (or beyond doubt) that the plaintiff is bound to lose, the defendant must succeed on the Rule 9-6 application: *Lameman* at paras. 10—11, *Beach* at paras. 48—49. Conversely, if the plaintiff submits evidence contradicting the defendant's evidence in some material respect, the application must be dismissed: *Beach* at para. 48.
>
> [Emphasis added.]

[15] Given the Court's limited power to weigh evidence on a summary judgment application, Rule 9-6 is ill-suited to resolving issues where there are legitimate credibility concerns that go to the core of the case: *Northwest Organics, Limited Partnership v. Maguire*, 2015 BCSC 1918 at para. 39.

[16] Likewise, the Rule 9-6 procedure is rarely suitable for resolving issues that are highly fact-dependent, as is frequently the case for limitation issues: *Rooney v. Galloway*, 2024 BCCA 8 at para. 167.

[17] However, as stated in *Smith v. SaNOtize Research and Development Corp.*, 2024 BCSC 386 [*SaNOtize*] at para. 52, *Rooney* does not preclude the use of summary judgment to determine limitation issues. The question is whether I can determine, without weighing evidence beyond determining whether it is incontrovertible, that it is "manifestly clear (or beyond doubt) that the plaintiff[s] [are] bound to lose" because of a limitation period imposed by the *Limitation Act*: *SaNOtize* at paras. 53—54, *Dickin* at para. 25.

[18] The defendants say that ss. 6(1) and 8 of the *Limitation Act* determine the limitation period that applies to the plaintiffs' claims. Those provisions state as follows:

> **Basic limitation period**
>
> **6** (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
>
> ...
>
> **General discovery rules**
>
> **8** Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> > (a) that injury, loss or damage had occurred;
> >
> > (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
> >
> > (c) that the act or omission was that of the person against whom the claim is or may be made;
> >
> > (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[19] The defendants submit that the plaintiffs "discovered" their claim in 2016, during the Soho Litigation. They say that the evidence of a joint retainer agreement should lead this Court to conclude that anything discovered by the Yu Family in the Soho Litigation was also discovered by the plaintiffs at the same time. Specifically, they say that the affidavit of Mr. Yan made on June 21, 2016, illustrates that the Yu Family learned key facts underlying both the Soho Litigation

and the present action on December 16, 2015 (when the Yu Family says they were contacted by Mr. Mu with concerns about Mr. Xu's conduct), and on May 23, 2016 (when the Yu Family says they learned that Mr. Xu had been removed as director of a company based in the British Virgin Islands).

[20] I will start by observing that it is not clear to me how the dates pointed to by the defendants amount to discovery of material facts underlying the plaintiffs' claims in this action. The plaintiffs' claims – as I understand them – arise from their allegation that the parties had agreed that Mr. Li would be repaid for his contribution to the Minoru Properties, plus interest. The potential misconduct on Mr. Xu's part is perhaps relevant background, but I do not see it being directly material to the plaintiffs' claims, at least on the record before me. In my view, the discovery of these facts in the Soho Litigation is not self-evidently the starting point for the running of the limitation period for the claims in this proceeding.

[21] The plaintiffs' position on the limitation issue evolved over the course of the hearing from their initial written application response. By the end of the hearing, I understood their argument to be grounded in the proposition that the limitation period on a debt claim is reset when a new repayment agreement is formed, and reset further if that agreement is subsequently amended. The plaintiffs say that a repayment agreement was formed in 2018 through the WeChat messages between Mr. Li's assistant and Mr. Xu, and that the most recent amendment to that agreement was formed during the October 2023 meeting between Mr. Xu and Ms. Zhou.

[22] Although the plaintiffs did not provide me with authority on this point, there does appear to be case law to support their position. For example, in *Yoshikawa v. Dilon*, 2022 BCCA 180, the Court of Appeal wrote:

> [21] As this Court established in *Rosas v. Toca*, 2018 BCCA 191, parties to a contract may agree to vary its terms without fresh consideration, absent duress, unconscionability or other public policy concerns. Such agreements may include modifications to the repayment date of a loan, or agreements to forbear, the effect of which will delay the running of the limitation period.

[23] The plaintiffs say that the limitation issue raises questions of fact on disputed evidence, and therefore it cannot be determined on a summary judgment

application. I agree. In particular, to resolve the limitation issue on this application, I would need to make findings of fact regarding:

a) Whether a joint retainer agreement existed between the plaintiffs in this action and the petitioners in the Soho Litigation, and if so, whether the plaintiffs discovered the facts underlying their claim during the Soho Litigation;

b) Whether a New Agreement was formed by the WeChat communications (which is a question of fact, as per *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 22); and

c) Whether the New Agreement was amended or modified after its creation, and if so, the substance of those modifications and the date(s) on which they occurred.

[24] I cannot make such findings without weighing the evidence before me. While there is some evidence to the effect that a joint retainer agreement may have existed, that does not determine the limitation issue if – as the plaintiffs suggest – the parties later established a repayment agreement or a forbearance agreement that delayed the running of the limitation period. The parties are at odds regarding whether the WeChat messages constitute a repayment agreement and further dispute whether any subsequent discussions between the parties amended that agreement.

[25] Accordingly, it is not manifestly clear that the plaintiffs' claims are barred by the *Limitation Act*. There remains a genuine issue for trial regarding the limitation period, and by extension, regarding the issues raised by the plaintiffs' claim.

[26] The remaining question is whether the plaintiffs' claim should be struck as an abuse of process under Rule 9-5.

Rule 9-5 and Abuse of Process

[27] Rule 9-5(1)(d) provides that a claim may be struck if it is an abuse of the court's process:

> (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.

[28] The abuse of process doctrine empowers courts to prevent proceedings that are "unfair to the point that they are contrary to the interests of justice": *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63 [*C.U.P.E.*] at para. 35. This power should be used sparingly: *Strata Plan KAS 1691 v. City of Kamloops*, 2004 BCSC 1231 at para. 20.

[29] Proceedings which seek to relitigate matters that have already been adjudicated can raise abuse of process concerns. This was discussed by the Supreme Court of Canada in *C.U.P.E.*:

> [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[30] The defendants argued that the following excerpt from *Ari v. Insurance Corporation of British Columbia*, 2021 BCCA 180, supports their position that the plaintiffs' claim is an abuse of process because it seeks to relitigate matters from the Soho Litigation:

> [76] In *The Owners, Strata Plan LMS 908 v. Polygon Town Centre Development Ltd.* (15 March 2002), Vancouver C983598 (B.C.S.C.), Justice Boyd struck an action as an abuse of process despite the absence of any "underhanded or nefarious" intent, finding that the new action was "essentially identical to or, at the very least, substantially similar to the first action" and the law was clear that this amounted to an abuse of process (at para. 43).

[77] That approach has fallen into disfavour, or at least been modified. In *Strata Plan KAS 1691 v. City of Kamloops*, 2004 BCSC 1231, Rice J. canvassed the jurisprudence in detail:

> [15] The rule that commencing a second action in a similar matter is an abuse follows the often quoted *Williams v. Hunt*, [1905] 1 K.B. 512, where the Court stated as follows:
>
> > Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started.
>
> [16] In *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (B.C.S.C.), the Court indicated that when a second action is commenced, and it amounts to abuse, it may be dismissed:
>
> > Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression.
>
> [17] The cases that the defendants rely on are mainly concerned with situations where a defendant is sued in both actions. Cases that have applied the rule include: *Earl Poulett v. Viscount Hill*, [1892] 1 Ch. 277 (C.A.), *Acme Masonry Ltd. v. Bird Construction*, [1985] B.C.J. No. 732 (B.C.S.C.), *Paterson v. Jaikumar* (1979), 10 B.C.L.R. P-48 (B.C.S.C.), *Great Pacific Contracting Ltd. v. Harwyn Properties Ltd.*, 1981 CanLII 734 (BC SC), [1981] B.C.J. No. 1701 (B.C.S.C.), *Royal Canadian Legion, Hastings East Branch No. 185 v. BCGEU*, [1990] B.C.J. No. 2907 (B.C.S.C.), *Elpiro Holdings Inc. v. Shenkman* (1975), 1975 CanLII 561 (ON CA), 8 O.R. 433 (Ont. C.A.), *Kybich v. Mangus*, 1919 CanLII 726 (AB KB), [1919] 3 W.W.R. 532 (Alta. S.C.).
>
> [18] <u>I agree that where a defendant is sued in two actions over the same matter, it will almost certainly create an abuse</u>. However, it is a different matter if all of the defendants in the second action are different than those in the first. A plaintiff has the right, and the rules do not curtail that right, to sue a defendant as the plaintiff wishes, so long as there is no ulterior or improper purpose or design to use or deceive the courts: see *Babavic v. Babowech, supra*, *Great Pacific Contracting Ltd. v. Harwyen Properties*, 1981 CanLII 734 (BC SC), [1981] B.C.J. No. 1701 (B.C.S.C.).
>
> [19] In an application pursuant to Rule 19(24), the onus is on the applicant to show that it is “clear or plain and obvious” that the allegations in the statement of claim constitute an abuse: *347202*

> *B.C. Ltd. v. Canadian Imperial Bank of Commerce*, [1995] B.C.J. No. 449.
>
> [20] While the Court has discretion to prevent abuse of its process, its power to do so should be exercised sparingly: *Chapman v. Canada* 2001 BCSC 420.
>
> [Emphasis added in *Ari.*]
>
> [78] It is noteworthy, in my view, that despite his view that the strict rule precluding multiple actions should be relaxed to permit separate actions against different defendants, provided there is no ulterior or improper purpose in doing so, Rice J. saw no basis for relaxing the rule that the maintenance of two actions against the same parties "almost certainly create an abuse".

[31] I do not agree that *Ari* is dispositive of the abuse of process issue in this case. *Ari,* and the cases cited therein, involved circumstances where a second action was an abuse of process because the applicant/plaintiff was pursuing the same remedy against the same defendant(s) in another action. That is not the case here.

[32] The plaintiffs in this action have a right to pursue their claim against the defendants, and that right is independent of the Yu Family's right to pursue whatever claims they may have. I was not pointed to any authority which supports the proposition that the plaintiffs were required to advance their claim at the same time that the Yu Family advanced theirs.

[33] Further, the present action does not seek to relitigate issues that were already resolved by the Soho Litigation because the two actions seek different relief on the basis of different legal principles. The plaintiffs in this action seek to enforce a monetary claim on the basis of debt and contract law. In the Soho Action, the petitioners sought to enforce their rights as shareholders under the *Business Corporations Act* and the law of fiduciary duty.

<u>Conclusion</u>

[34] I have found that there is a genuine issue for trial regarding whether there is a limitations defence available to the defendants, such that the application under Rule 9-6 must be dismissed. Further, I am unable to determine that there is an abuse of process as a result of any overlap between the plaintiffs' claims in this action and Yu Family's claims in the Soho Litigation. The defendants' application is

therefore dismissed in its entirety. Unless there is something of which I am not aware, the plaintiffs shall have their costs to be assessed at Scale B.

“Underhill, J.”