

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Burnett v. Rexel Canada Electrical Inc.***,
2009 BCSC 314

Date: 20090310
Docket: S086352
Registry: Vancouver

Between:

Keith Burnett

Plaintiff

And

Rexel Canada Electrical Inc.

Defendant

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the Plaintiff

C. Forguson

Counsel for the Defendant

D.G. Plomp

Date and Place of Trial/Hearing:

February 10, 2009
Vancouver, B.C.

[1] This is an application by the plaintiff for judgment pursuant to Rule 18A to enforce a settlement agreement respecting a wrongful dismissal action.

[2] A summary trial application was set in the underlying action for December 4, 2008. It is the plaintiff's position that the parties negotiated and concluded a settlement agreement in November, 2008, which the defendant now refuses to complete.

I.

[3] The plaintiff worked for the defendant for twenty years. He was dismissed without notice on August 11, 2008. He was offered six months pay in lieu of notice, but rejected that offer, and was paid the statutory severance of eight weeks.

[4] The plaintiff commenced an action on September 9, 2008.

[5] After various offers back and forth, the defendant offered to settle the action on November 24, 2008 through an email from its lawyer, Mr. Plomp, to the plaintiff's lawyer, Mr. Forgyson, on the following terms:

Our client proposes:

1. It will pay a further lump sum amount of \$80,000 ("the Settlement Funds"), less required withholdings;
2. Prior to, and as a condition of this payment you will deliver to me
 - a) the enclosed statutory declaration, executed by your client
 - b) the enclosed Release and Indemnity, executed by your client
 - c) the enclosed consent dismissal order, executed by you.

The Settlement Funds would be in addition to the sum of \$10,181.32 that has already been paid to Mr. Burnett, Bringing the total to \$90,181.32.

[6] The statutory declaration read:

I, Keith Burnett, unemployed sales manager, of.....DO SOLEMNLY
DECLARE THAT

1. I am the Plaintiff in the Action, and as such have personal knowledge of the matters hereinafter deposed to.
2. Since the termination of my employment with the Defendant, Rexel Canada Electrical Inc.:
 - a) I have been diligently searching for alternative employment; and,
 - b) I have not received an offer of employment.
3. As of the date of this Statutory Declaration, I do not have any current expectation of receiving an offer of employment.

And I make this solemn declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

[7] On November 25, 2008, Mr. Forguson emailed Mr. Plomp:

I am seeking instructions, which I expect to be an acceptance. Can you confirm for me, as we discussed, that the settlement funds will be paid within a reasonable period of time and in a legal tax efficient manner (a portion direct to RRSP with no withholding and possibly legal paid directly with no withholding).

[8] Mr. Plomp responded the same day:

I see no issues with legal, tax efficient payment, but will confirm those instructions...I will also ask about the general timing for cheque processing; I anticipate it may take a few days to generate a cheque(s), then courier them from Montreal.

[9] A few hours later, Mr. Forguson emailed Mr. Plomp:

I have instructions to accept the offer set out in your letter subject only to the condition that the payments be received within 14 days and that Mr. Burnett may direct a portion of the settlement funds be paid directly to

an RRSP and/or account of legal fees without withholdings subject to your being satisfied that he has sufficient RRSP contribution room and the legal fee allocation is reasonable.

[10] On November 26, 2008, at 9:26 a.m., Mr. Plomp emailed Mr. Forgunson:

I am awaiting instructions on the payment timing.

[11] At approximately 10:00 a.m. to 10:15 a.m., Mr. Burnett went to Mr. Forgunson's office and executed the Statutory Declaration.

[12] At 2:14 p.m., Mr. Plomp emailed Mr. Forgunson:

This is acceptable, provided that the 14 days commences from the date that we have:

- a) an invoice [re legal fees]
- b) a notice of assessment [re RRSP's]
- c) a lawful amount [to transfer to the RRSP]
- d) the signed release, statutory declaration and consent dismissal order.

...my client's in-house counsel has requested that he see scanned copies of the above executed documents before I mail out the cheques. I understand you are okay with this.

[13] At approximately 4:30 p.m. or 5:00 p.m., Mr. Burnett received an offer of employment from Bartle and Gibson, an Alberta-based company with whom he had had an interview and employment discussions in September and October of 2008.

Mr. Burnett deposes that after his last discussion with the company, he was less optimistic than he had been earlier about the possibility of an offer of employment. No issue is taken with his statement that when he signed the statutory declaration in the

morning of November 26th, he had no knowledge that an offer was forthcoming, and no expectation of one.

[14] Mr. Burnett did not tell Mr. Ferguson of the offer of employment, which he accepted the next day.

[15] At 12:32 p.m. on November 27, 2008, Mr. Ferguson sent an e-mail to Mr. Plomp:

I will get you an invoice for legals later today.

Attached you will find a signed statutory declaration, release and CDO.
Originals will follow by courier.

[16] The rest of the e-mail is concerned with information relating to Mr. Burnett's RRSP.

[17] For some reason which is not covered in the information before the court, a period of time went by during which the original documents were apparently not sent to Mr. Plomp.

[18] On December 8, 2008, Mr. Plomp emailed Mr. Ferguson to say he would send a courier for the original documents, and once he had them, he would send the courier back with the cheques.

[19] However, in the afternoon of December 9, 2008, Mr. Plomp advised Mr. Ferguson by email that just after they had spoken the previous day, his client had learned that Mr. Burnett had begun work at Bartle and Gibson:

Our client is concerned that this is a breach of the conditions of settlement, under which Mr. Burnett swore a statutory declaration on November 26th stating [terms of the declaration were set out].

It is unlikely that Mr. Burnett was suddenly called for an interview, offered and commenced work in the short time following his statutory declaration, and that he had no current expectation of an offer at the time of his statutory declaration.

Please advise of your client's position on this.

[20] Mr. Ferguson emailed back about two hours later:

I was unaware of this until now. I am advised that when Mr. Burnett signed the statutory declaration on November 26 he did not have a job offer or current expectation of receiving a job offer...

Please advise if we will have to litigate this settlement.

[21] The answer to the last inquiry is now obvious. The defendant has refused to pay the settlement money and the plaintiff now seeks to enforce the agreement.

II.

[22] Since conducting discoveries, the defendant advances a second reason why it should not be compelled to complete the settlement. The defendant argues that term 2(a) of the statutory declaration required the plaintiff to do more than he would be required to do under the common law duty to mitigate his damages. It takes the position that the plaintiff did not diligently look for employment in the four months between the dismissal and his new job. This is based on Mr. Burnett's acknowledgment that although he checked several websites, he did not prepare a resume, sent out only one application online, and spoke to only one manager of a competing company. Mr. Burnett testified on discovery that, having worked for twenty years in the business, which was a small industry in which everyone knows everyone else, he relied on

contacts and word of mouth to become aware of postings, although he did check out the defendant's competitors online.

[23] During the course of his employment with the defendant, Mr. Burnett had been required to move to Squamish, and after he was dismissed, he looked for work only in the Squamish/Whistler "corridor." He said it would be difficult to move and to sell his home. He testified that he spoke to a number of suppliers, but admitted later he only spoke to one. He also said he contacted others by e-mail, but again admitted that he had only done this once. He did not follow the advice of a job assistance program and he did not apply for employment insurance. He said he did not take these steps because he felt he would be able to get a job.

[24] The plaintiff points to the affidavit sworn on November 18, 2008 by Mr. Mikes, the General Manager of the defendant, in respect of the original application for judgment, to which he attached a number of job postings that he believed the plaintiff might be able to fill. Thus, even before the settlement, the defendant was aware of the online postings, but still chose to make the offer it did. On discovery, Mr. Mikes said he was aware of only one possible opening amongst the postings. This opening was at the company where Mr. Burnett spoke directly to the manager.

[25] It is not suggested that there were a number of job opportunities available that the plaintiff was ignoring; what evidence there is is to the contrary. However, it is suggested that Mr. Burnett should have gotten his resume out to all competitors in case something came along.

[26] It is difficult to see this issue as a significant one, since the defendant argues that the plaintiff was not diligently pursuing employment opportunities, but at the same time seeks to rely on his having found a job quickly, thus making the settlement funds a windfall. The evidence shows that Mr. Burnett was looking for employment, although he was not using all the conventional methods to do so. He learned of the job with Bartle and Gibson through word of mouth, which he said was the most efficient way, given his experience and contacts, to learn of employment opportunities. In fact he did find a job within four months. If the meaning of “diligent” encompasses a consideration of results, then Mr. Burnett did search diligently and effectively.

[27] Given all of the circumstances, I am not persuaded that this aspect of the statutory declaration has been breached in a way that undermines the settlement agreement.

III.

[28] I will now turn to the issue of the timing of the execution of the statutory declaration and the offer of employment.

[29] The plaintiff argues that the settlement agreement was completed when there was offer and acceptance late on November 25, 2008. At that time, there was agreement on all essential terms, and the plaintiff complied with all of them. The timing of payment and the RRSP/legal fees issues were ancillary and do not affect the contract. The statutory declaration was not intended to be a continuing representation. It was true at the time it was sworn and that is all that was required in order for Mr. Burnett to be in compliance with the terms of the agreement.

[30] The plaintiff relies on ***Fieguth v. Acklands*** (1989), 59 D.L.R. (4th), 114, 37 B.C.L.R. (2d) 62 (B.C.C.A.) where the defendant sent settlement funds to the plaintiff, having deducted income tax. The plaintiff refused to accept the funds and proceeded to litigation on the basis that, by deducting the taxes, the defendant had varied the terms of the settlement, such that no final agreement was reached. The Court of Appeal held:

If there was an agreement of settlement, as both courts found, then the consequences of subsequent conduct relating to the exchange of funds and documents would not discharge either party unless it could be said that the party alleged to have repudiated the contract exhibited an unwillingness to carry out its terms.

...

One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[31] The defendant argues that the condition relating to the timing of the payment was indeed a new term as it was something upon which its counsel had to get instructions. The defendant then agreed to that term, but with further stipulations. Thus there was no unequivocal acceptance of the offer until November 27, 2008 at 12:32 p.m. when the documents were tendered by Mr. Ferguson, and by that time the statutory declaration was manifestly false.

[32] I am inclined to the plaintiff's position that the timing of the exchange of money and documents was ancillary to this agreement, but given the looming trial date, the fourteen day stipulation might assume additional significance. However, the additional

clarifications contained in Mr. Plomp's e-mail of 2:14 on November 16, 2008 are clearly only details and do not constitute a counter-offer. In fact, they merely reflect agreement with the concerns raised by plaintiff's counsel as to withholdings. Therefore, even if the term regarding time contained in Mr. Ferguson's last e-mail of November 25, 2008 was a counter-offer, acceptance occurred at 2:14 p.m. on November 26, 2008, after the declaration was signed, but before the event which has brought the parties back to court.

[33] That event is the offer of employment, and from the defendant's point of view, this means the plaintiff tendered a statutory declaration that was no longer true by the time it was received by the defendant's lawyer. The plaintiff knew the declaration was no longer true within a few hours of signing it, but did not tell his lawyer and allowed the lawyer to tender the no-longer-true document in completion of the agreement. The defendant contends that, looking at the process as a whole, the settlement meant and was intended by both parties to mean that the plaintiff was providing assurance to the defendant that it was not concluding a settlement that would result in a substantial windfall to the plaintiff.

[34] The defendant argues that the contract is now frustrated: having obtained employment the plaintiff can no longer sign the required declaration. However, that issue is subsumed in the determination that the agreement was already complete by the time the plaintiff received the offer of employment.

[35] Alternatively, the defendant attempts to characterize this series of events as a misrepresentation, either innocent or fraudulent, and relies on ***Brownlie v. Campbell*** (1880), 5 App. Cas. 925:

...when a statement or representation has been made in the bona fide belief that it is true, and the party who has made it afterwards comes to find out that it is untrue, and discovers what he should have said, he can no longer honestly keep up that silence on the subject after that has come to his knowledge, thereby allowing the other party to go on and, still more, inducing him to go on, upon a statement which was honestly made at the time when it was made, but which he has not now retracted when he has become aware that it can be no longer honestly persevered in. That would be fraud...

[36] The defendant refers to a number of cases in the same vein, but in each of them, the important factor is that the statement was untrue when it was made. Even though the fact that it was false was unknown to the maker at the time it was made, the maker is under a duty to advise the other party when he discovers the true state of affairs.

[37] In this case, the statement was true when it was made and when the agreement was concluded. The state of affairs that existed at the time the statement was made no longer existed when the statutory declaration was given to counsel for the defendant, but that does not make the declaration false. The statutory declaration was a snapshot of the plaintiff's employment status at the time that he signed it. It did not purport to be a continuing representation for an unspecified time.

[38] The defendant had other options and could have taken a more protective approach to the settlement. It could have let the plaintiff work through the notice period or proposed a schedule of payments that would have protected it against this

eventuality. However, the defendant chose to make this offer in order to avoid having a determination made at trial.

[39] While each side took a risk with the settlement – the plaintiff that he might be out of work for a long time and the defendant that the plaintiff might obtain employment within the notice period covered by the settlement – the key issue is whether the settlement was fully concluded and thus enforceable.

[40] The defendant required this particular statutory declaration. The plaintiff signed it. It was true at that time he signed it. He complied with all of the conditions of the agreement. I have some sympathy with the defendant's frustration at this peculiar sequence of events, but it is bound by the particular terms of the agreement it reached with the plaintiff.

[41] In the result, the plaintiff is entitled to enforce the settlement agreement as set out in the defendant's letter of November 24, 2008, which was accepted by the plaintiff by email on November 25, 2008, or, at the latest, at 2:14 p.m. on November 26, 2008.

[42] Unless there are matters of which I am unaware, the plaintiff will have his costs at Scale B.

“M.A. Humphries J.”

The Honourable Madam Justice M.A. Humphries