IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Acuren Group Inc. v. Tremblay,* 2011 BCSC 49

Date: 20110119
Docket: S102317
Registry: Vancouver

Between:

Acuren Group Inc.

Plaintiff

And

Daniel Tremblay, William James Cecchin and Horizon Testing Inc.

Defendants

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Plaintiff:	D. Boyle
Counsel for the Defendants:	B. Curtis
Place and Date of Hearing:	Vancouver, B.C. December 17, 2010
Place and Date of Judgment:	Vancouver, B.C. January 19, 2011

INTRODUCTION

[1] This is an application for summary judgment, to settle the terms of orders, and to determine the matter of costs arising out of my judgment in *Acuren Group Inc. v. Tremblay*, 2010 BCSC 689. In that judgment, I dismissed the plaintiff's application for an interlocutory injunction to restrain conduct by the defendants alleged to constitute a breach of contract and a violation of fiduciary duties. The underlying basis for the judgment was a finding that the court lacked jurisdiction over the subject matter of the dispute. Instead, I concluded that the collective agreement governing the parties' relationship clothed an arbitrator with exclusive jurisdiction to hear and determine the issues in dispute. Based on this ruling, the defendants now seek summary dismissal of the plaintiff's underlying action. The defendants also seek to settle the terms of the order arising out of this judgment dated May 14, 2010, and the defendants' bill of costs.

[2] Prior to the conclusion of the hearing into the above matter, I issued certain interlocutory orders pending a final judgment with respect to the injunction application. These orders are dated April 21, 2010 and May 7, 2010. Subsequent to my judgment, I issued an order dated June 9, 2010. These orders had not been entered due to a dispute between the parties in regard to their terms.

[3] At the hearing of this matter, the parties came to an agreement with respect to the terms of the orders issued in this action dated April 21, 2010, May 7, 2010, May 14, 2010 and June 9, 2010. The two issues for determination remained the matter of the defendants' bill of costs and the defendants' application for summary judgment.

SUMMARY JUDGMENT APPLICATION

[4] The plaintiff argued that the defendants were not entitled to summary judgment on three grounds. First, procedurally, the defendants were not entitled to apply for summary judgment because they had failed to file a statement of defence to the within action. An appearance notice was not sufficient under Rule 9-6. Second, the dismissal of the application for an interlocutory injunction did not

address all of the relief sought by the plaintiff in the within action. Third, and alternatively, the order of Mr. Justice Sewell dated April 14, 2010 was a final order enjoining the defendants' use of confidential information belonging to the plaintiff.

[5] Turning to the first argument, in the circumstances of this case, I find that Rule 9-6 does not require the responding party to file and serve a statement of defence prior to seeking relief pursuant to this provision. It must be noted that this action was filed before the Supreme Court Rules were amended on July 1, 2010. As a consequence, it was necessary for the defendants to file appearance notices in response to the writ and statement of claim filed by the plaintiff. Rule 24-1(6) provides that where a party files an appearance notice under the old rules, with or without a statement of defence, the appearance notice is deemed to be a "response to civil claim".

[6] Rule 9-6(4) permits an answering party to apply for summary judgment after he has served a responding pleading on a claiming party. An answering party is defined by Rule 9-6(1) as a party who has served on the claiming party a responding pleading related to the claim. In my view, the defendants in this case have complied with this provision by filing appearance notices pursuant to the old rules as a consequence of the transitional provisions of Rule 24-1(6).

[7] Addressing the second argument, I find the defendants are entitled to summary judgment dismissing the plaintiff's action for breach of contract and breach of fiduciary duties. I am satisfied that there is no genuine issue with respect to the plaintiff's claim because the court lacks jurisdiction over the subject matter of the dispute. While my judgment only dealt with the plaintiff's application for an interlocutory injunction restraining conduct of the defendants, the underlying basis for my decision was a conclusion that the court lacked jurisdiction over the subject matter of the dispute. Further, I held that an arbitrator appointed pursuant to the terms of the collective agreement between the parties had exclusive authority over the dispute and possessed the authority necessary to grant all of the relief claimed by the plaintiff. Accordingly, there is no residual jurisdiction retained by the court to

address the dispute. While I granted the plaintiff's request to retain jurisdiction in the event that an arbitrator appointed under the collective agreement refused jurisdiction, this order cannot assist the plaintiff in this application because it has neither sought nor obtained a ruling from such an arbitrator.

[8] Lastly, addressing the third argument, the order of Mr. Justice Sewell was clearly an interim order to bridge the gap created by the defendants' motion to adjourn the plaintiff's application for an interlocutory injunction. Mr. Justice Sewell made it very clear that he was not addressing or commenting upon the merits of the application in making this interim order for a fixed period of time. Thus I must reject the plaintiff's argument on this point.

THE DEFENDANTS' BILL OF COSTS

[9] The plaintiff disputes a number of items included in the defendants' bill of costs and a disbursement claimed for an expert report prepared by FDR Forensic Data Recovery.

[10] The plaintiff argues that the disbursement is excessive and was not entirely necessary to respond to its application for an injunction. The defendants argue the expert report was in direct response to the plaintiff's claim that they had unlawfully downloaded client lists and client information to their personal computers. In my view, the cost of the expert report is neither excessive nor unwarranted. The total cost was $2,799.00. This included the preparation of a report and the examination of the hard drives. It also included an evaluation of the material prepared by the plaintiff's expert and an evaluation of that expert's computer searches that went beyond the order I issued in respect of this matter. I also find that this expert report was necessary to respond to the plaintiff's claim of an unlawful downloading of confidential information which underlay the plaintiff's claim for an injunction to preclude the defendants from using the confidential information. Thus I approve the disbursement.

[11] The parties do not dispute that I ordered costs at Scale B or that the tariff rate for Scale B costs is $110 per unit. The parties also agree there were 3.5 hearing

days, including one-half day for this application for summary trial. The remaining issues are as follows:

1. Item IA – The defendants claim 6 units for correspondence, conferences and instructions prior to commencement of the proceeding and the plaintiff argues only 1 unit is appropriate because there was no correspondence issued before the action was commenced. The plaintiff sent a demand letter to the defendants that led them to consult with legal counsel who provided advice and took instructions from the client. I find 5 units appropriate in the circumstances.

2. Item 1B – The defendants claim 20 units for correspondence, instructions, investigations or negotiations after the commencement of the action. The plaintiff argues it should be 10 units because no defence was filed and there were no discoveries. The defendants argue that the plaintiff's injunction application raised complicated issues involving the court's jurisdiction over a labour relations dispute and thus extensive time was invested in the investigation of the claim. I agree that the plaintiff's action raised unusual and complicated issues surrounding the jurisdiction of the court to entertain the action. Based on the varied and substantial case law that was submitted to me in support of the defendants' position, I find 20 units is reasonable in the circumstances.

3. Item 3 – The defendants claim 10 units for correspondence, conferences, instructions or negotiations after the hearing to enforce a final order. In this regard, the defendants claim for correspondence with regard to attempts to have the several orders made by the court entered, to settle their terms and negotiations about the bill of costs. The plaintiff argues there was no correspondence to enforce an order. I find the defendants are entitled to claim for the time spent attempting to have the orders entered and their terms settled under this item; however, 10 units is the maximum permitted and I do

not regard this case as warranting that level of costs. Instead, I find that 5 units is reasonable.

4. Item 7 – The defendants claim 7 units for all process, which provision is not made elsewhere, for defending a proceeding. There was no statement of defence filed and although there was preparation time necessary for defending against the injunction application, I find that is included in tariff Item 21, preparation for a hearing. The defendants claim 9 units for that item and the plaintiff does not dispute this amount.

5. Item 17 and Item 18 – The defendants claim 10 units with respect to correspondence and consultations with their expert and 5 units for interviewing witnesses and correspondence associated with witnesses. The plaintiff says there would be no witnesses and only a consultation with their single expert. The defendants argue that they had to interview all of the parties to prepare affidavits and contact other persons to verify information. They also met with their expert to consult with regard to their case and the material prepared by the expert retained by the plaintiff. I find the units claimed under these headings are reasonable. The expert evidence was complicated and required an order from the court establishing the parameters of the search permitted given the importance of preserving the defendants' privacy interests. The question of whether the plaintiff's expert violated my order required additional correspondence and an appearance before me.

[12] The plaintiff does not dispute Items 21, 22, 26 and 27 in the defendants' bill of costs. The defendants acknowledge that Items 29 and 30 of the bill of costs overlap with other Items claimed and thus are not reasonable.

[13] Item 36 is for a written argument and the maximum of 10 units is claimed. There was an extensive written argument prepared by the defendants in this case. The plaintiff argues 5 units is appropriate. In my view, 8 units more appropriately reflects the time required to prepare the brief that was submitted on the jurisdictional issue. Item 41 is not disputed but Item 38 is disputed on the ground that there was

no appearance to speak to a trial or hearing list. The defendants did not disagree with the plaintiff's position on Item 38 and they acknowledged that Item 42 was essentially covered by other tariff items. Thus Items 38 and 42 should be deleted.

[14] Subject to the adjustments described herein, the defendants' bill of costs is approved as presented to the court.

[15] Costs of this application are approved at Scale B and awarded to the defendants. These costs should be incorporated in the bill of costs submitted by the defendants on this application.

"Bruce J."