

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110111
Docket: M120038
Registry: New Westminster

Between:

Richard David Toop

Plaintiff

And:

Canadian Electronics Corporation

Defendant

Before: Master Keighley

Oral Reasons for Judgment

In Chambers
January 11, 2011

Counsel for the Plaintiff

J.D. Wiegele

Counsel for the Trustee in Bankruptcy of
Defendant Corporation

C. Watson

Place and Date of Hearing:

New Westminster, B.C.
January 11, 2011

Place and Date of Judgment:

New Westminster, B.C.
January 11, 2011

[1] **THE COURT:** This is an application by the plaintiff for, although it is not phrased as such, interlocutory judgment against the defendant. The essential basis for the application is the failure of a representative of the defendant to attend for examination for discovery at a time and place appointed by the plaintiff. It is not denied by the defendant that its representative failed to attend. The context of this application is that it is brought on what is alleged to be the eve of the defendant's assignment into bankruptcy.

[2] The claim, if I can summarize it very briefly by reference to the statement of claim, is based upon the plaintiff's assertion that he originally founded and incorporated the defendant company, which thereafter, he says, entered into a contract of employment with him under which he was to have the benefit of salary and additional benefits including short and long-term disability insurance. The plaintiff alleges that on or about the 1st of June, 2007, in breach of his employment agreement, he was terminated without cause. The basis of his claim is a claim for damages for wrongful dismissal. The claim is resisted briefly but strenuously in a statement of defence filed under the old Rules on or about the 4th of June, 2010. The defence denies termination and alleges that the plaintiff resigned or relinquished his employment and, further, denies that the defendant suffered any additional losses. He alleges mental shock, distress, and harm as a result of the termination of his employment.

[3] Mr. Justice Leask on November 23, 2010, made orders which included an order directing the trial of this matter to take place over four days commencing the 9th of May, 2011, and also ordered that examinations for discovery take place "by January 23, 2010." I am assuming that should have read by January 23, 2011. It appears that on or about December 1st of 2010 the defendant served a Notice of Appointment on the plaintiff or perhaps on plaintiff's counsel, it matters not, with respect to an examination for discovery of the plaintiff to be conducted January 6, 2011. Five days later on December 6, 2010, counsel for the plaintiff served, I assume, counsel for the defendant and not the defendant itself with an appointment to examine a representative of the defendant, a Mr. Wagner, for discovery on

January 6, 2011. On January 5, counsel for the plaintiff received a letter from counsel for the defendant indicating that the defendant would not be proceeding with its examination of the plaintiff on the following day and that letter also indicated as follows:

I see no point in you carrying on with your discovery of Mr. Wagner when the *Bankruptcy Act* effects a stay of proceedings by a creditor as against the bankrupt unless leave of the court is granted. Further, I am unwilling to become an unsecured creditor for my fees to accompany a shortfall. Neither I nor Mr. Wagner will be at the discovery tomorrow.

[4] The opening paragraph to that letter had made reference to the impending bankruptcy and indicated that Mr. Watson, counsel for the defendant, had learned from Mr. Gurney, the trustee, that Mr. Gurney would be filing the notice of application for bankruptcy on behalf of the company within the next week which would take us to the 12th of January, tomorrow, and I gather from what Mr. Watson has said here today, that the hope is the bankruptcy application will be finalized tomorrow. Now, I granted short leave allowing the plaintiff to have this application heard today in light of that impending bankruptcy and I appreciate that it has placed Mr. Watson and the defendant under a significant time pressure and, in fact, they have been unable to file any material in response to the application. I take that into account.

[5] Now, as to the consequences of the defendant's failure to have a representative attend a scheduled examination for discovery, they are set out in Rule 22-7(5), specifically sub (5)(a) which would read under the heading "Consequences of certain non-compliance":

Without limiting any other power of the court under these *Supreme Court Civil Rules*, if a person, contrary to these *Supreme Court Civil Rules* and without lawful excuse,

- (a) refuses or neglects to obey a subpoena or to attend at the time and place appointed for his or her examination for discovery ...

And then we go down to sub (g):

... if the person is a defendant, respondent or third party, a present officer of a corporate defendant, respondent or third party or a partner in or manager of a partnership defendant, respondent or third party, the court may order the

proceeding to continue as if no response to civil claim or response to petition had been filed.

[6] Now, the only excuse offered for the defendant's failure to have a representative attend the examination is that it would serve no purpose given the pending application for bankruptcy. That, to my mind, does not constitute a lawful excuse. Mr. Watson raised a technical deficiency in that conduct money or witness fees were not served with the appointment, but I gather there was some controversy as to who might be examined for discovery or what expenses would necessarily be incurred by that witness and those were not resolved until more or less the last minute.

[7] In any event, there is the comment by the court in analogous circumstances in the case of *Stovicek Estate v. Napier International Technologies*, a decision of this court reported at 1996 CarswellBC 1529, a decision of Justice Harvey, with respect to which the court said, as follows, at paragraph 40:

Mr. Manson admitted when I pressed him that no such positions had been taken by him or anyone representing the plaintiff in the course of written or oral exchanges between counsel with regard to the arranging of the discovery dates. Counsel for the defendant referred me to one communication in January where his junior specifically inquired as to whether the plaintiff would waive the attendance fees which include meal allowances. In my view, it would be inappropriate, in the circumstances, to allow the plaintiff now to rely upon such a narrow and technical ground as this given the amount of communication regarding this Discovery that occurred between all the parties involved.

[8] Now, I have no evidence before me as to the details of the arrangements by which the examination date was agreed upon, but I think that the comments are analogous in the sense that it is inappropriately technical to raise this issue now as a basis for a lawful excuse.

[9] The defendant, that is, Mr. Watson on its behalf, alleges that granting the order sought would allow the plaintiff to exercise an unfair advantage in the pending bankruptcy proceedings. I do not agree that such is the case. If I grant the order being sought today, the plaintiff has interlocutory judgment and still faces the burden of establishing or quantifying its case against the defendant. If the assignment in

bankruptcy proceeds as it is anticipated it will tomorrow, the plaintiff is still left to deal with the stay of proceedings effected by s. 69.3 and s-ss. (2) and (3) of s. 69.4 and 69.5. The sum of those provisions seems to be that on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property or may commence or continue any action, execution, or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged.

[10] Ms. Wiegele raised the possibility of this plaintiff enhancing the likelihood that he might be appointed an inspector in the bankruptcy, and I am not sure if this is one of the advantages that Mr. Watson was referring to as an unfair advantage. I do note from looking through the annotation in *Bennett on Bankruptcy*, mine is the 9th addition, 2007, that no person is eligible to become an inspector if that person is a party to any contested action or proceeding by or against the estate. If there is a conflict of interest between an inspector and the estate, the inspector should resign. It may well be that securing judgment will not assist the plaintiff in securing such an appointment.

[11] This application has troubled me because it seems to me that whatever order I make is destined to have very limited effect if the bankruptcy proceeds tomorrow. As I have indicated, if I grant the order the plaintiff still is obliged to deal with the stay, and having regard to the nature of cases in which that stay has been "lifted" to allow an action to proceed, the plaintiff may encounter some difficulty in that regard. If I decline to grant the order sought it means I place absolutely no weight on a clear indication by counsel on behalf of a client that the client will not comply with the *Rules of Court*, will not comply with the requirement to attend a discovery on a date agreed upon between counsel.

[12] In terms of an order in the plaintiff's favour being a Draconian remedy, it seems to me that in those circumstances where a defendant clearly indicates that it does not intend to attend for examination, then that Draconian remedy is justified.

[13] Accordingly, I am going to order that this matter proceed as if no response or defence had been filed and grant the plaintiff interlocutory judgment.

[14] What about costs?

[15] MS. WIEGELE: I had asked for costs on this application, Your Honour.

[16] MR. WATSON: No submissions, Your Honour.

[17] THE COURT: The plaintiff will have his costs of this application to be assessed.



Master Kelghley