
CANADA / JUDGMENT

Avro Capital Corp. v. Biosign Technologies Inc.

2011 BCSC 1332

COURT

Supreme Court of British Columbia

DECIDED

5 October 2011

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2011 BCSC 1332 Avro Capital Corp. v. Biosign Technologies Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Avro Capital Corp. v. Biosign Technologies Inc.,

2011 BCSC 1332

Date: 20111005

Docket: S106070

Registry: Vancouver

Between:

Avro Capital Corp.

Plaintiff

And

Biosign Technologies Inc. and Radu Leca

Defendants

Corrected Judgment: The front page of the Judgment

was corrected on October 7, 2011

Before: Master MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

J. Shields

Counsel for the Defendants:

T. Cohen

G. Cameron

Place and Date of Hearing:

Vancouver, B.C.

September 14, 2011

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2011

The Background to the Action

- [1] Briefly, this action concerns a dispute over the financing and marketing of a medical device developed by Biosign Technologies Inc. and its principal, Dr. Radu Leca.
- [2] In its Notice of Civil Claim, Avro claims fees, options, warrants, and commissions it says it is entitled to pursuant to a July 2008 agreement (the "July Agreement") it entered into with Biosign whereby Avro was to raise funds and provide services to Biosign. Avro alleges that it raised more than \$2 million pursuant to the July Agreement. Avro also seeks damages from Biosign and Dr. Leca for breach of the July Agreement, fraud and deceit. Alternatively, Avro seeks compensation on the basis of unjust enrichment. Avro further seeks punitive, aggravated and exemplary damages from Dr. Leca or, alternatively, Biosign. Avro seeks to set aside a Termination and Mutual Release of Liability ("Termination and Release") executed by the parties in November 2008 on the basis that it was executed in reliance on misrepresentations made by Dr. Leca or was obtained by fraud and deceit.
- [3] In their Response to Civil Claim, the defendants defend the claim on the basis that the July Agreement did not contain the whole of the parties' agreement. They say that there is no fee or entitlement owing to Avro under the July Agreement because Avro was to raise the funds by a certain date and failed to do so. Biosign also alleges that Avro made certain misrepresentations about the nature and location of its business. Biosign says that Avro did not produce any evidence that it had performed under the July Agreement and was thus entitled to compensation. The defendants also say that the Termination and Release is enforceable and a bar to Avro's claims. In the alternative, if the Termination and Release is not enforceable, Avro is barred by law from receiving the fees, options and warrants claimed because it is not a registered broker, or dealing in Canada or in the U.S. The defendants further deny any independent cause of action against Dr. Leca.

The Applications

- [4] The plaintiff examined the defendants for discovery on February 21 and 22, 2011. At that time, former counsel for the defendants concluded that Avro had not made full disclosure of its documents and that he would require an amended List of Documents, and copies of the documents, prior to examining Avro's representative. A chain of correspondence ensued. Avro ultimately disagreed that further disclosure was required. New counsel for the defendants now applies for further production.
- [5] As part of the same application, both defendants sought leave to file an amended response to civil claim and Biosign sought leave to extend the time for filing a counterclaim. The amendment applications were argued before Master Bouck on September 9, 2011. The parties did not have sufficient time to argue the disclosure application. In his submissions before me, Avro's counsel agreed that the outcome of the amendment applications might change his position on the disclosure application. I asked the parties to advise me whether their position changed following receipt of Master Bouck's reasons. In reasons delivered orally on September 15, Master Bouck permitted both the amendment to the response to civil claim and the filing of a counterclaim.
- [6] On September 26, 2011, Avro's counsel advised that: it was appealing Master Bouck's decision; the appeal date had yet to be set; the plaintiff continued to oppose the defendants' application for further documents; and that I should proceed to render my decision on this disclosure application.

The Submissions on the Disclosure Application

- [7] The defendants seek an order that: Avro amend its List of Documents to list additional categories of documents; serve the amended list within 21 days of the date of the Order; make the originals of the newly listed documents available for inspection and copying, or provide copies to the defendants as requested by them; and costs.
- [8] In particular, the defendants seek disclosure of the following additional categories of documents. Beside each, I set out the basis on which the defendants say they are entitled to disclosure of the requested documents:
- a) all drafts of reseller agreements prepared by the plaintiff for consideration by Biosign

Consented to, see paragraph 10 below.

- b) emails, correspondence, draft agreements and other documents between Messrs. Walter, Sargent and Au on the one hand and the "people who are interested in stepping directly into the market with buying in addition to supporting an investment (financing) in the company" identified in Mr. Au's June 2, 2008 email

These documents relate to the allegations in the response to civil claim about the plaintiff's misrepresentations and ability to perform the July Agreement

- c) emails, correspondence, and other documents passing between Avro and the "very wealthy individuals who have made some very lucrative investments lately and have invested with Chris and Brett previously" mentioned in Mr. Au's July 16, 2008 email and any other documents relating to the presentations made to those individuals

These documents relate to the plaintiff's alleged misrepresentation about its ability to bring in funds.

- d) emails, correspondence, draft agreements and other like documents between Avro and the "world-class team" that Mr. Walker represented he had assembled "to put together the sales offering" referred to in defendant's production 94

These documents, and the documents referred to in e) below, relate to the plaintiff's breach of the July Agreement and the defendants say that they are entitled to investigate whether what was said in the emails is true.

- e) emails, correspondence, draft agreements and other documents between Avro and the "customers wanting to sign up and start paying" referenced in Mr. Walker's October 6, 2008 email
- f) emails, correspondence, draft agreements and other documents between Avro and the "team" that Mr. Walker advised Biosign he had assembled as of October 6, 2008

These documents relate to the plaintiff's breach of the July Agreement and the defendants say that they are entitled to investigate whether what was said in the emails is true. The defendants wish to explore whether the "team" referred to here is the same team referred to in d) above.

- g) records of the purchase of Biosign's shares by Avro, Mr. Walker and/or Mr. Sargent between June 1 and November 30, 2008, and all records of their subsequent sale of such shares and the proceeds realized therefrom

These documents relate to the allegation that the plaintiff breached the July Agreement and potentially relate to an argument that the plaintiff failed to mitigate its damages.

- h) emails, correspondence, and other communications passing between Avro and the investors in Biosign during the period July through December 2008 (and possibly later) for which it takes credit

These documents relate to the claim that the plaintiff breached the July Agreement. Whether the plaintiff raised funds is relevant to whether they were performing its obligations under the July Agreement and the plaintiff's damages claim.

- i) emails, correspondence, and other communications passing between Avro (inclusive of Mr. Sargent) and Global (inclusive of Mr. Hindle and Mr. Stefaniuk) during the period July through December 2008

These documents are relevant to a private placement that was done through Global and whether it was the plaintiff or Global which was raising investment funds. As a result, they are relevant to the allegation that there was a breach of the July Agreement.

- j) emails, correspondence, and other communications passing between Avro and Mr. Borrelly and/or Mr. Stevenson

These documents relate to the claim for breach of the July Agreement. They go to the issue of whether the plaintiff was bringing in investors, and therefore entitled to compensation, or whether others were bringing in the investors, disentiing the plaintiff to compensation.

- k) emails, correspondence, and other communications passing between Avro and the "world-class companies ...with thousands of existing paying patients" that Mr. Walker represented that Avro (or he) was able to deliver to Biosign

These documents relate to the breach of the July Agreement and the misrepresentation claims and to the damages allegation raised by the defendants.

- l) emails, correspondence, and other communications relating to the "dozen meetings" set up by Mr. Walker for the week of October 20, 2008

These documents relate to the breach of the July Agreement and the misrepresentation claims and to the damages allegation raised by the defendants.

- m) calendars maintained by Mr. Walker and Mr. Sargent during the period June 1 - December 31, 2008

These calendars relate to the period during which the plaintiff was to be performing its obligations and will show what activities, if any, occurred. They are relevant to whether the plaintiff is entitled to compensation under the July Agreement or on another basis.

- n) notes made by Mr. Walker and/or Mr. Sargent in respect of their telephone conversations with Dr. Verrico and other investors for which they take credit

Consented to, see paragraph 10 below.

- o) emails, correspondence, and other communications between Mr. Walker and Ms. Sache

These documents relate to whether Ms. Sache was performing obligations under the July Agreement as alleged and whether the plaintiff is entitled to compensation as a result.

- p) emails, correspondence, and other communications passing between Mr. Walker and Mr. Au concerning the domain name "glucosign.com"

The plaintiff will argue that what it was doing with respect to Glucosign.com benefitted the defendants. As a result, these documents, and the ones referred to in q) below, are relevant to the unjust enrichment claim.

- q) documents relating to the development of glucosign.com, including website development

- r) Avro's telephone records for the period May 1 - December 31, 2008 inclusive of the records for (250) 864-3100 and (415) 323-8713 and any other telephone used by Avro and cell phone numbers used by Messrs. Walker and Sargent.

These documents relate to the plaintiff's allegation of breach of the July Agreement and the defendants' misrepresentation claims.

- [9] In addition to the specific arguments which I have summarized above, the defendants submit that, when applying a proportionality principle, I should take into account the seriousness of the allegations in this proceeding and, in particular the claims for fraud and deceit, and aggravated and punitive damages. They submit that these serious allegations of misfeasance are being levelled at a public company which should be entitled to broader disclosure in order to appropriately defend itself.
- [10] The plaintiff has consented to produce, to the extent they exist, the documents set out in subparagraphs 8(a) and (n).
- [11] With respect to the balance of the documents, the plaintiff says that the defendants have left their request too close to the trial date and that they did so at their peril. They have chosen not to pursue examinations for discovery and, on the eve of trial, have applied to amend their defence to the action, add a counterclaim, and for further disclosure. The plaintiff says that the existing response to the civil action does not raise set off claims for relief arising from alleged misrepresentations by it and there is no counterclaim. As a result, the plaintiff says the documents sought cannot relate to a matter in issue in the action.
- [12] The plaintiff says that the documents sought are not proportional to the matters in issue in this action as they do not relate to a matter in question in the action and the defendants have not taken the steps contemplated under Rule 7-1(11) to demand the additional documents with reasonable specificity, indicating the reason why such additional documents should be disclosed. As a result, the plaintiff says that it was not obliged to formally respond under Rule 7-1(12).

Conclusion

- [13] The parties do not disagree about the Rules which apply in this case. I will consider the disclosure application based on the pleadings as they existed before the amendment applications.
- [14] A review of the notice of civil claim and response in this action makes clear that the Court will have to decide three major issues. First, whether Avro made misrepresentation which induced the defendants to enter into an agreement with it. Second, under the terms of the July Agreement, whether Avro is entitled to any compensation and, if so, how much? This will require a consideration of the extent to which Avro fulfilled its obligations under the July Agreement. Based on Avro's alternative argument, the Court will have to consider whether Biosign has been unjustly enriched by Avro's efforts and, if so, to what extent? On

either basis, I agree that the defendant is entitled to know, in advance of trial, what Avro says it did that entitles it to compensation and to assess the quality of that performance. These are material facts in issue between the parties.

- [15] As a result, I conclude that the documents sought, and set out in subparagraphs 8(c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (o), (p), (q) and (r) above, only insofar as they post-date the July Agreement, could be used by a party to prove or disprove a material fact as set out in Rule 7-1, and should be listed.
- [16] With respect to the documents sought in subparagraph 8(b), and those documents in 8(g), 8(m) and 8(r) which predate the July Agreement, I conclude that they are relevant to the misrepresentation allegation, which, the defendants say was part of the reason for the Termination and Release. These are material facts between the parties and documents should be listed and produced.
- [17] Finally, the Court will have to decide whether the Termination and Release is binding. This will require consideration of whether there was consideration for its execution which, in turn, will require the Court to consider whether Avro misrepresented its capacity to the defendants and whether the terms of the July Agreement were fulfilled in whole or in part.
- [18] In all the circumstances, I am satisfied that the requested documents should be listed and produced. I reached this conclusion without considering the amended response to civil claim or the counterclaim. However, the need for this disclosure is reinforced by those changes to the pleadings.

"MacNaughton M"

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