

CANADA / JUDGMENT

B.I. Incorporated v. Au

2017 BCSC 2476

COURT

Supreme Court of British Columbia

DECIDED

13 December 2017

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2017 BCSC 2476 B.I. Incorporated v. Au

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.I. Incorporated v. Au,

2017 BCSC 2476

Date: 20171213

Docket: S1710534

Registry: Vancouver

Re: Section 53 of the Evidence Act, R.S.B.C. 1996 c. 124, and Section 46 of the Canada Evidence Act, R.S.C. 1985, c. C-5

Re: Commission to Examine Witness Issued by the Supreme Court for the County of Onondaga, State of New York

Between:

B.I. Incorporated, B.I. of Colorado,

and The GEO Group, Inc.

Petitioners

And

Simon Au,

Sheila K. Ben, Esq., as Court Appointed Guardian of the Property of Jane Doe, (an Infant Proceeding Under an Assumed Name), an Infant Under the Age of 14, Susan Doe (a Person Proceedings Under an Assumed Name), as Administrator and Fiduciary of the Estate of Lori A. Bresnahan, Decedent,

and Sendum Wireless, Corp.

Respondents

Before: The Honourable Madam Justice Gropper

Oral Ruling

In Chambers

Counsel for the Petitioners:

E.A. Kirkpatrick

Counsel for Simon Au and Sendum Wireless, Corp.:

H.D. Edinger

A. Morrell (A.S.)

Place and Date of Hearing:

Vancouver, B.C.

December 6, 2017

Place and Date of Ruling:

Vancouver, B.C.

December 13, 2017

Introduction

[1] The petitioners, also referred to as the "B.I. parties", seek to enforce letters rogatory issued on October 23, 2017, by the honourable James P. Murphy, J.S.C. of the Supreme Court for the County of Onondaga, State of New York (the "New York Court") in Consolidated Proceeding No. 2014EF656 (the "New York proceedings"). The respondents Simon Au and Sendum Wireless Corp. oppose this petition. I will refer to Mr. Au and Sendum Wireless collectively as "Sendum" as their positions are the same.

Background

[2] At the hearing of a motion by the B.I. parties in the New York Court to issue letters rogatory on September 28, 2007 in the New York proceedings, Judge Murphy gave his reasons for granting the letters rogatory after a short argument:

I understand your argument, and I'm - - while I am sympathetic to the costs that may be involved, given the severity of this case and the issues that are involved, I am not finding that persuasive as far as how we should proceed here.

I think certainly everybody had spent enough time and effort and money in trying to proceed this forward, and at this point to me those costs seem minimal based on what everybody has gone through by way of discovery to date.

I am granting the Letters. I do believe - - and certainly if expense becomes an issue or timeframe, I think there is an argument to be made that it could be done electronically.

Certainly if Mr. Au shows up with an attorney and make arrangement to go there, I think that is all something that could be considered down the road.

At this point I am granting it, and that will be up to the Canadian Court to determine whether they want to follow my order or not. So you need to submit the proposed Letters. All right.

- [3] The letters rogatory describe that it is necessary and relevant for the purpose of justice and for due determination of the matters in question between the parties that Simon Au, a resident of Richmond, British Columbia, be examined by deposition in British Columbia in the New York proceedings.
- [4] There are two actions before the New York Court. The Ben action was commenced in the New York Court on March 12, 2014. The Doe action was commenced in the New York Court on March 13, 2014. The actions have been consolidated. In those proceedings the plaintiffs assert product liability and negligence claims against the B.I. parties among others. The allegations of product defect against Sendum and B.I. are defective design of the strap tamper, defective design of the proximity tamper and its consequent disability on the ET1, and the failure of the no-motion technology to be state of the art.
- [5] The product that is the subject matter of the product liability claim is the ET1, an electronic monitoring device. The ET1 was developed by the petitioner B.I. Inc., as well as Sendum. Evidence in the New York proceedings indicates that while Mr. Au was an employee at Sendum, he was one of three engineers primarily responsible for the development and engineering of the software for the ET1. He was responsible for the engineering of the physical interfaces between the hardware and the software on the ET1, including functionality of the strap tamper. He was the sole Sendum engineer performing empirical experiments related to the range values for the straps. He was the primary Sendum engineer involved in the design of the Texas Instruments board for the ET1, which controls function with regard to strap tampers, the proximity tamper and the no-motion alert.

Matters to be Canvassed

- [6] The letters rogatory specified those matters to be canvassed with Mr. Au during his examination:
 - a) Mr. Au's employment with Sendum;
 - b) The scope of the relationship between Sendum and B.I. Inc.;
 - c) The scope of the relationship between Sendum and ByMethod;

- d) Any communication Mr. Au has had with any party's counsel to this litigation;
- e) The scope of the work performed by Mr. Au in regard to the subject electronic monitoring bracelet, the ET1;
- f) Mr. Au's involvement in the development and engineering of the electronic monitoring bracelet the ET1 from the years 2008 to March 14, 2013;
- g) Mr. Au's involvement in the development and engineering of the Texas Instruments board for the ET1 from the years 2008 to March 14, 2013;
- h) Mr. Au's involvement in the development and engineering of the function of the strap tampers on the ET1 from 2008 to March 14, 2013;
- i) Mr. Au's involvement in the development and engineering of the function of the proximity tamper from for the ET1 from 2008 to March 14, 2013;
- j) Mr. Au's involvement in the development and engineering of the function of the no-motion tamper for the ET1 from 2008 to March 14, 2013;
- k) Mr. Au's involvement in the development and engineering of the hardware for the ET1 from 2008 to March 14, 2013;
- l) Mr. Au's involvement in any troubleshooting he engaged in for the engineering performance of the ET1 post-manufacture of the device from 2008 to March 14, 2013.

Legal Framework

- [7] The law in respect of the enforcement of letters rogatory received from a foreign court was canvassed in *Monster Energy Company v. Craig*, 2016 BCCA 290, at paras. 10 to 13:
- [10] The authority of the Supreme Court to enforce letters rogatory received from foreign courts is found in s. 53 of the Evidence Act, R.S.B.C. 1996, c. 124 and s. 46 of the Canada Evidence Act, R.S.C. 1985, c. C-5.
- [11] In responding to a letter of request, the starting point is the presumption that the request from the foreign court will be granted unless it would be contrary to Canadian public policy to do so or would otherwise be prejudicial to Canadian sovereignty or to Canadian citizens: *R. v. Zingre*, [1981] 2 S.C.R. 392; *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225.
- [12] *Halsbury's Laws of Canada, Extradition and Mutual Legal Assistance* (2015 Reissue) describes letters rogatory and their purpose this way:

Letters rogatory are letters submitted by a court seeking the assistance of a foreign court. The enforcement of letters rogatory is a matter within the discretionary power of the courts and is based upon international comity or courtesy proceeding from international law. Inherent in the idea of international comity is a mutuality of purpose and power: *Westinghouse Electric Corp. v. Duquesne Light Co.*, [1977] O.J. No. 2287, 16 O.R. (2d) 273 at 290 (Ont. H.C.) ("[a]s a matter of principle Courts of justice of different countries are in aid of justice under a mutual obligation

consistent with their own jurisdiction to assist each other in obtaining testimony upon which the rights of a cause may depend; so generally are individuals under a duty to give their testimony to Courts of justice in all inquiries where it may be material. Courts in Canada recognize, and have often said, that, in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries"). See also *Gulf Oil Corp. v. Gulf Canada Ltd.*, [1980] S.C.J. No. 41, [1980] S.C.J. No. 41 (S.C.C.); *National Telefilm Associates Inc. v. United Artists' Corp.*, [1958] O.J. No. 275, 14 D.L.R. (2d) 343 (Ont. H.C.).

[13] In *EchoStar* at para. 38, L. Smith J. summarized the factors to be considered in determining whether to give effect to letters rogatory:

1. Relevance;
2. Whether the evidence is necessary for trial and will be adduced at trial if admissible;
3. Whether the evidence is otherwise obtainable;
4. Whether the order sought is contrary to public policy;
5. Whether the documents sought are identified with reasonable specificity;
6. Whether the order sought is unduly burdensome having in mind what the witness would be required to do and produce were the action to be tried locally.

[Emphasis in original.]

[8] The factors in dispute here are the relevance of Mr. Au's testimony, whether the evidence is otherwise obtainable and whether the order sought is unduly burdensome.

Discussion

Relevance

[9] The petitioners rely on the affidavit of Douglas FitzMorris, the attorney representing Sendum before Judge Murphy in the New York proceedings on September 28, 2017, when the matter of letters rogatory was heard. Mr. FitzMorris describes Sendum's role in the proceeding, that is, B.I. subcontracted with Sendum to design and manufacture the ET1 according to B.I.'s specifications. Mr. FitzMorris says that Sendum was added to the proceedings midway through the discovery of the plaintiffs when it became apparent that only Sendum had certain documentation that the plaintiff sought.

[10] Sendum was added to the proceedings on August 30, 2016, on the basis that along with B.I. they were negligent, careless and reckless in regard to the design, manufacture, sale, distribution, delivery, monitoring and otherwise in respect of the ET1.

- [11] Additional allegations by the plaintiffs against Sendum are that it was engaged in the business of manufacturing the ET1 as a white label product to be sold to B.I. for the ultimate retail sale to law enforcement, and it negligently and carelessly manufactured, designed, assembled, marketed, sold and distributed the ET1.
- [12] The causes of action against Sendum and B.I. include a breach of express or implied warranty, negligent infliction of emotional distress and strict liability in court. They also include wrongful death.
- [13] Mr. FitzMorris describes the previous discovery of Kerry Zoehner of Sendum, who deposed in the New York proceeding on August 1, 2017.
- [14] Mr. FitzMorris says that the issues in which B.I. seeks to examine Mr. Au in the letters rogatory have been canvassed in depth in the prior depositions and document disclosures.
- [15] On the basis of Mr. FitzMorris's affidavit, the petitioners argue that there cannot be a reasonable assertion that the topics are not relevant to the products liability action. Even if the evidence has already been given in respect to the matters delineated, it cannot be suggested that Mr. Au's evidence is not relevant.
- [16] The respondents argue that the New York Court did not make a specific finding that the evidence sought from Mr. Au is relevant in the New York proceedings. The letters rogatory, Sendum says, list a number of very broad areas of examination, only parts of which could conceivably be relevant to the New York proceedings.

Analysis

- [17] Judge Murphy considered that Mr. Au's evidence was necessary and relevant. I agree with the petitioners that it is not for this Court to decide if that conclusion was wrong.
- [18] Madam Justice Smith addressed relevance in *EchoStar Satellite Corporation v. Quinn*, 2007 BCSC 1225, at para. 47:
- [47] First, the California Court has stated that it considers the proposed evidence to be relevant, necessary for trial, and not otherwise obtainable. In addition, affidavit material to that effect has been filed. I accept the petitioners' submissions that, to the extent the evidence sought relates to the respondents' knowledge of the nature and extent of the alleged conspiracy, it is not obtainable otherwise than through the respondents. I further accept that it must be assumed that the California Court acted responsibly in issuing the Letter of Request. As well, although there may be discovery purposes served by obtaining the evidence, that does not preclude an order if the evidence is needed for trial.
- [19] I agree that the proper role of this Court is to be satisfied that there is some probative value to the proposed evidence and that the areas to be canvassed during the examination are relevant to the New York proceedings. I am satisfied that the factor of relevance is amply met.

The Evidence Sought is Available Elsewhere

- [20] The petitioners say that Mr. Au, as an engineer at Sendum, played a key role in the design of the ET1. The question for this Court is not whether those areas were spoken to by others, but whether the evidence that Mr. Au may have to give is of the same value.
- [21] Sendum says that the petitioners have not clearly indicated that the evidence they seek from Mr. Au is not available elsewhere. Judge Murphy did not consider the issue because there is no requirement of the New York civil procedure to demonstrate that the evidence is not available elsewhere before seeking the examination of a non-party witness. Sendum says that a review of the plaintiff's claims in the New York proceeding and the deposition testimony in that proceeding reveal that the areas in which the petitioners seek to examine Mr. Au have been dealt with in other depositions and in the documents produced. Finally, Sendum says that the petitioners should have asked questions of Mr. Zoehner about the evidence they seek to obtain from Mr. Au before making this application.

Analysis

- [22] It appears that Mr. Au is the only one who knows what steps he took in conducting the tests that he conducted. He has direct knowledge of the work that he performed on the ET1 while at Sendum.
- [23] In *Connecticut Retirement Plans and Trust Funds v. Buchan*, 2007 ONCA 462, the court addressed this factor at para. 19:

I would read this criterion as meaning that evidence of the same value as that sought from the person to be examined cannot otherwise be obtained.

- [24] I consider that applying the proper criterion yields the conclusion that Mr. Au's evidence, even if it is obtainable elsewhere, is evidence of some value that cannot otherwise be obtained. The evidence concerning Mr. Au's involvement in the design, development and testing of the ET1 while he was employed at Sendum demonstrates that his evidence will be of some value. I find that this factor is satisfied.

Whether the Deposition Sought Is Unduly Burdensome

- [25] The petitioners seek an order that Mr. Au be deposed on a date before January 1, 2018, to be agreed on by counsel, for a total duration of not more than seven hours. The deposition is to take place at the office of the petitioners before an official court reporter in British Columbia. Mr. Au's evidence will be recorded by video and be reduced to writing in a transcript. Mr. Au will have the right to review the video and the transcript and note any corrections in writing. Mr. Au's evidence shall only be used in the New York proceedings and not for any other purpose. The petitioners assert that these conditions do not place an undue burden on Mr. Au.

[26] Sendum refers the Supreme Court Civil Rules of British Columbia, particularly Rule 7-5 that provides that examinations conducted on all parties of record cannot exceed three hours unless otherwise ordered. The respondents assert that a seven-hour deposition may lead to a "fishing expedition". Sendum also asserts that from a public policy point of view, this Court should consider the different rules about conducting litigation in this jurisdiction, particularly our rules regarding proportionality and specifically how we deal with this issue of the United States Courts' instinct to depose everyone who has something to say. Sendum suggests that in weighing the burden the Court ought to address that differently than was apparently addressed by Judge Murphy. The test ought to be that the petitioners show that the person to be examined has material evidence to give.

Analysis

[27] Mr. Au has not given evidence about whether such an examination would be burdensome on him and as such there is no basis to conclude that it would be unduly burdensome. I agree with the petitioners that the task before this Court is to address the notion of comity, not to engage in a comparative analysis of the rules that apply to the New York proceeding in the context of our Rules of Court. Monster Energy makes this clear when it quotes Halsbury Canada, particularly in this state:

... in the interests of comity, judicial assistance should whenever possible be given at the request of Courts of other countries.

[28] Based on that clarification, I am satisfied that the deposition sought of Mr. Au will not be unduly burdensome. I also note that the order sought specifies that this Court has a discretion to make further orders, and this may be addressed if the deposition does become unduly burdensome on Mr. Au.

Conclusion

[29] I find that based on international comity and courtesy proceeding from international law that this Court should recognize that in the interests of comity, judicial assistance should be provided at the request of the New York Court. I therefore grant the orders in the petition

[30] I will award the petitioners costs at Scale B.

"Gropper, J."

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