

CANADA / JUDGMENT

Bai v. MLGB E-Sports Inc.

2018 BCSC 679

COURT

Supreme Court of British Columbia

DECIDED

30 April 2018

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2018 BCSC 679 Bai v. MLGB E-Sports Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bai v. MLGB E-Sports Inc.,

2018 BCSC 679

Date: 20180430

Docket: S178598

Registry: Vancouver

Between:

Chao Bai, Bai Wang, and Wenwei Zhu

Plaintiffs

And

MLGB E-Sports Inc. and Zhiheng Zhou

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiffs:

R. Gunnarsson

Counsel for the Interested Non-Party, Mr. S. Jeon:

B. Tarnow

Counsel for the Defendants:

No Appearance

Place and Date of Hearing:

Vancouver, B.C.

March 27, 2018

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2018

[1] There are two applications before the Court. The first is brought by the plaintiffs seeking:

1. an order pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, striking the defendants' counterclaim; and
2. an order pursuant to Rule 9-6 of the Supreme Court Civil Rules for summary judgment in the amount of \$500,000 plus interest at the rate of 20% per annum, calculated from the date payments came due.

[2] The second application, filed with short-leave on March 22, 2018, is by a non-party, Simon Jeon ("Jeon"). Jeon seeks the following orders:

1. the pre-judgment garnishing orders obtained by the defendants on September 15, 2017 and September 29, 2017 in this action be set aside;
2. \$40,000 of the funds paid into court pursuant to the garnishing orders be paid to Jeon in care of his solicitor;
3. the plaintiffs in this action be enjoined from applying for any further garnishing orders prior to obtaining final judgment; and
4. alternately, the funds paid into court pursuant to the garnishing orders not be paid out to the plaintiffs until such time as the Director under the Employment Standards Act, R.S.B.C. 1996, c. 113 [ESA], has made a determination concerning Jeon's claim for unpaid wages.

BACKGROUND

Claims between the plaintiffs and defendants

[3] In his supporting affidavit, the plaintiff Chao Bai ("Bai") deposed that the plaintiffs are friends and business partners. The defendant MLGB E-Sports Inc. ("ML") is a BC corporation, and the defendant Zhiheng Zhou ("Zhou") is a shareholder, director, and officer of ML. ML carried on the business of an internet café in Vancouver.

- [4] From November 2015 to December 2016 the plaintiffs delivered to Zhou a total of \$1,010,000. This was pursuant to an agreement with Zhou to finance the establishment of a new business in Richmond, BC, to be operated by ML. After delays in establishing the new business, the plaintiffs decided to not pursue the business and demanded return of their money. On May 24, 2017, the plaintiffs and defendants entered into a settlement agreement (the "Settlement Agreement") in which the plaintiffs agreed to accept certain funds, after which they would release the defendants from liability.
- [5] Under the Settlement Agreement, the defendants agreed to pay the plaintiffs \$100,000 upon execution, and could choose between two options to pay the remaining settlement amount. Option (a) was payment of another \$600,000 by June 23, 2017. Option (b) was payment of a total of another \$700,000 in three payments of \$200,000 by July 23, 2017, \$200,000 by September 23, 2017, and \$300,000 by November 23, 2017. Post-dated cheques were to be delivered at the time of execution of the Settlement Agreement.
- [6] On May 24, 2017 upon execution of the Settlement Agreement, by solicitor's trust cheque, the defendants paid \$100,000 to the solicitor for the plaintiffs. Further, on the same date, a numbered company (the former name of ML) delivered a cheque in the amount of \$600,000 payable to the trust account of the solicitor for the plaintiffs.
- [7] Shortly thereafter Zhou advised Bai that ML did not have the funds to honour the \$600,000 cheque and advised him not to deposit the cheque.
- [8] On or before July 23, 2017, Zhou delivered to the solicitor for the plaintiffs a cheque for \$200,000, thereby electing Option (b) rather than the initial choice of Option (a).
- [9] Since that time, despite written and oral demands, neither of the defendants have paid any further funds to the plaintiffs or their solicitor, nor have they delivered any cheques representing the two remaining payments of \$200,000 and \$300,000.
- [10] On September 13, 2017, the plaintiffs filed the notice of civil claim in this action.
- [11] In their response to civil claim, the defendants plead that: (a) the parties executed the Settlement Agreement on May 24, 2017; (b) pursuant to the Settlement Agreement ML delivered to the plaintiffs \$100,000 upon execution of the agreement; and (c) pursuant to Option (b) ML delivered to the plaintiffs \$200,000 on or before July 23, 2017.
- [12] Despite these pleadings, in the response to civil claim, the defendants deny they breached the Settlement Agreement and deny that any amounts are owing under it. They do not plead any facts as to how they met the terms of the Settlement Agreement or did not breach it.

- [13] The defendants also plead that subsequent to the execution of the Settlement Agreement, the plaintiff Bai defamed them to new potential investors in ML. In addition to claiming special and general damages, the defendants plead the defamatory statements caused potential investors not to invest in ML. They say that if the plaintiffs are entitled to the amounts claimed under the Settlement Agreement, the defendants claim a right of set-off for the alleged defamatory statements.
- [14] On October 18, 2017, the defendants filed a counterclaim repeating the allegations of defamation in their response to civil claim. The legal basis of the counterclaim is "the torts of libel, slander, injurious falsehood, intentional infliction of emotional distress, intentional interference with economic relations, assault, and invasion of privacy".
- [15] At the hearing, plaintiffs' counsel advised that this notice of application and supporting affidavits were delivered to defendants' counsel on the afternoon of March 9, 2018. Plaintiffs' counsel subsequently had a telephone conversation with defence counsel in which the latter acknowledged receipt of the materials and advised he had forwarded them to his clients. On March 23, 2018, counsel for the defendants filed a notice of withdrawal of lawyer. The defendants have not filed a response to the application and did not appear in person or by counsel at the hearing.

Claim of Jeon for unpaid salary

- [16] Jeon swore two affidavits in support of his application. On July 29, 2017, he was offered and accepted employment as general manager with ML. His discussion regarding the terms of his employment took place with Zhou. He commenced employment with ML on August 1, 2017. A copy of the letter from Zhou offering him this position and setting out the terms of his employment is attached to his affidavit. Jeon's salary was \$10,000 per month and Jeon was told by Zhou that he would be paid once per month, in arrears, on the 5th of the month.
- [17] Jeon was never paid his salary for the month of August, but was assured by Zhou that he would be paid. Despite these assurances, he never received his salary for August. He was paid his salary for the months of September, October and November 2017, however he was not paid his salary for the months of December 2017, January and February 2018. He was assured by Zhou he would be paid all his outstanding salary and would be reimbursed for expenses he had incurred. Jeon deposes that in total he is owed \$40,000 in unpaid salary. In addition, Jeon says that he incurred approximately \$36,000 in expenses for which Zhou said he would be reimbursed, and which has not been reimbursed.
- [18] On March 5, 2018 Jeon brought a complaint for unpaid salary to the Director of Employment Standards. Employment Standards is currently investigating his complaint.

- [19] Jeon continued to work for ML until March 7, 2018. On that day, he had arranged to meet with Zhou to obtain \$10,000 toward partial payment of his outstanding salary. Shortly prior to the meeting, Zhou left him a voicemail message stating that: (a) the company's assets were frozen; (b) he wouldn't be meeting with him to give him a cheque; (c) ML was closing its business; and (d) he would be permanently leaving for China. Zhou suggested Jeon contact the lawyer for ML with respect to collecting his unpaid salary and expenses.

Garnishing orders before judgment

- [20] On September 15, 2017, the plaintiffs obtained a pre-judgment garnishing order directed to the Canadian Imperial Bank of Commerce ("CIBC"). On October 3, 2017, CIBC paid into court the sum of \$1,754.05.
- [21] On September 29, 2017, the plaintiffs obtained a pre-judgment garnishing order directed to the Toronto Dominion Bank ("TD"). On October 5, 2017 counsel for ML and Zhou wrote to TD and advised that \$46,589.11 of the funds in the bank were required for wages to be paid to employees of ML and requested that those funds be released so that ML could pay its employees. On November 23, 2017, TD paid into court the sum of \$73,756.07.

JEON'S APPLICATION

- [22] Jeon is concerned that if the plaintiffs obtain judgment and obtain the garnished funds prior to him proving his claim before the Director of Employment Standards, he will have a dry judgment.
- [23] I will first address the arguments raised by both counsel on Jeon's application, and then address the relief sought by Jeon.

Standing

- [24] Jeon's counsel submits that Jeon is an interested party and has standing in these proceedings. He refers to ss. 17 to 19 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 [COEA] and submits these provisions give a third party or other interested person standing to apply to the court with respect to garnished funds.

- [25] Sections 17 to 19 of the COEA read as follows:

17 If, after an order for the attachment of debts, obligations or liabilities has been made, it is suggested by the garnishee that the debt, obligation or liability sought to be attached belongs to or is claimed by a third person, or that a third person has a lien or charge on it, a judge may order the third person to appear and to state the nature and particulars of his or her claim on it.

18 After hearing the allegations of the third person under the order, and of any other person whom the judge, by the same or a subsequent order, may order to appear, or if the third person or other person does not appear when ordered, the judge may order payment by the garnishee, or may order any issue or question to be tried or determined, and may bar the claim of the third

person or other person, or may make any other order as the judge sees fit, on terms, in all cases with respect to the lien or charge, if any, of the third person and as to costs, as the judge thinks just and reasonable.

19 A judge may take evidence on and hear and dispose of summarily, in chambers, any question as to the liability of the garnishee, or as to the claim of a third party or other person, without directing a formal trial of an issue.

[26] Jeon has filed a complaint to the Director of Employment Standards for a determination of unpaid salary owing. Sections 87(1) and (3) of the ESA provide that once a determination is made, there is a lien in favour of the Director, which as of the date the wages were earned, attaches to all of a wage debtor's real or personal property, and has priority over certain claims and rights of others.

[27] Those sections state:

87(1) Despite any other Act, unpaid wages constitute a lien, charge and secured debt in favour of the director, dating from the time the wages were earned, against all the real and personal property of the employer or other person named in a determination, a settlement agreement or an order, including money due or accruing due to the employer or other person from any source.

(3) Despite any other Act but subject to subsection (5), the amount of a lien, charge and secured debt referred to in subsections (1), (1.1) and (2) is payable and enforceable in priority over all liens, judgments, charges and security interests or any other claims or rights, including the following:

- (a) any claim or right of the government including, but not limited to, the claims and rights of the Workers' Compensation Board;
- (b) any claim or right arising through contract, account receivable, insurance claim or sale of goods;
- (c) any security interest within the meaning of the Personal Property Security Act.

[28] Jeon's counsel submits that Jeon's rights to the garnished funds crystallized when they were earned in August 2017 prior to the garnishing order being served on the garnishee. As for the salary owing for the months of December 2017 to February 2018, if there is a determination in favour of Jeon, the Director still has a lien in priority to the claims of the plaintiffs to the funds held in court.

[29] Plaintiffs' counsel submits that Jeon does not have standing in these proceedings. He submits that sections 17 to 19 of the COEA are only triggered by a "suggestion of the garnishee". In this case there was no "suggestion" by the garnishees.

[30] Plaintiffs counsel refers to *Jay & Associates Foods Brokers Inc. v. Hub City Fishing* (1984) Ltd., [1990] B.C.J. No. 2811 [Jay & Associates] at paras. 24 to 25 (S.C.) for the assertion that s. 17 is only triggered by a suggestion of the garnishee:

Section 14 [now section 12] of the Court Order Enforcement Act gives no indication as to how any issues arising out of an application for payment out of court are to be decided. Section 18 [now section 16] deals with the procedure where the garnishee disputes the existence of a debt. Section 19 [now section 17] deals with the procedure where it is suggested by the garnishee that the debt sought to be attached belongs to or is claimed by some third person. The garnishee has made no such suggestion in this case. It is the judgement debtor who is making that suggestion. The garnishee is presumably indifferent as to who gets the money and may be unaware of which particular entity it was dealing with since its dealings were with somebody acting under a trade name.

Section 25 [now section 23] of the Court Order Enforcement Act provides that all matters referred to in Section 1 to 24 of the Act are governed by Part I notwithstanding any Rules of Court on the subject. Section 21 [now section 19] provides that a judge may take evidence on and hear and dispose of summarily in chambers any question as to the liability of the garnishee or as to the claim of a third party of other person, without directing a formal trial of an issue. This section seems to be part of the procedural scheme set out in Sections 19 and 20 [now sections 17 and 18] and, if so, then the section only applies where a garnishee "suggests" that the debt attached belongs to or is claimed by some third person.

- [31] Plaintiffs' counsel further submits that it is only the Director of Employment Standards that has a lien for wages, not Jeon.
- [32] In response, Jeon's counsel submits that it would be unjust to have the right of a third person to appear and make submissions regarding garnished funds, dependant upon the decision of a garnishee.
- [33] I find that Jeon has standing in these proceedings for the following reasons.
- [34] He is an interested third person. At this point in time, his claim for unpaid salary has not yet been determined by the Director. Until a determination is made by the Director, Jeon is the logical person to assert an interest in the funds. If his claim for unpaid salary is proven and a determination is issued by the Director, the Director will then have a lien and has enforcement powers under the ESA.
- [35] As for ss. 17 to 19 of the COEA, I agree with Jeon's counsel that it would be unjust to have the right of an interested third person to make representations solely determined by the decision of a garnishee, who could be mistaken or wrong. I also agree with plaintiffs' counsel that at least ss. 17 and 18 relate to the situation when a garnishee finds itself with competing claims and there has been a suggestion of the garnishee. Master Horn's comment that s. 19 [previously s. 21] appears to be part of the scheme of ss. 17 and 18 is obiter, and he did not decide the issue. I do not need to decide the issue because ss. 17 to 19 are not the only provisions within the COEA which would give a third party standing.
- [36] Section 13(5) of the COEA states:

Payment out must not be made under subsection (1) or (4) [payment out of court without order] if it is suggested in the course of the garnishing proceedings that the money belongs to or is claimed by a third person, or that any third person has a lien or charge on it.

[37] Unless s. 19 applies generally to competing claims with respect to garnished funds, the COEA is silent as to the procedure to be followed when there is a suggestion there is a claim by a third person. Section 13(5) does not set out a specific procedure to follow, but it is clearly implied that the third person has some right to make representations regarding the funds. It has been asserted by Mr. Jeon that he has a claim, with priority, to the garnished funds. He therefore has the right to make representations regarding the claim, and has standing.

Whether garnished funds are the property of ML

[38] Counsel for the plaintiffs submits that Jeon has not proven that the garnished funds are the property of ML. He submits that it is not clear whether the funds received under the garnishing orders were from funds in accounts in the name of ML, or Zhou, or both.

[39] The notices of payment into court filed by CIBC and TD do not indicate the owner of the accounts.

[40] There is insufficient evidence upon which I can find that the garnished funds are not the property of ML, and that Jeon therefore does not have a potential interest in them. Further, even if the accounts were in the name of Zhou alone, that is not in my view sufficient to prove Jeon does not have an interest in the funds. The proceedings before the Director have not yet been determined, and I make no findings with respect to this, but it is possible that if Jeon proves his claim, Zhou may be personally liable for up to two months wages as a director and officer of ML: see s. 96(1) of the ESA.

Garnished funds may exclude funds to be used for wages

[41] Counsel for the plaintiffs refers to the letter defendants' counsel wrote to TD after the garnishing order was served. This letter advised that certain funds in the account were to be used to pay the wages of employees of ML. Subsequently, TD paid moneys into court. Counsel for the plaintiffs submits there are two possible reasons for this: either the bank account is in the name of Zhou alone; or TD did not remit all of the funds in the account, and the amount said to be required for wages, was not paid into court.

[42] Again, there is insufficient evidence upon which I can make a finding that Jeon does not have an interest in the garnished funds. The arguments as to what TD may or may not have done in response to the letter from defendants' counsel is speculation. All of this points to the need to have a hearing of Jeon's or the Director's entitlement (if a determination is made in favour of Jeon) to the garnished funds and once further evidence can be obtained from the CIBC and TD.

Whether the employment standards claim is out of time

- [43] Counsel for the plaintiffs submits that Jeon's complaint to Employment Standards for the August 2017 salary is out of time as s. 80 of the ESA is limited to wages that become payable in the six months prior to filing the complaint. This argument, if successful, would only reduce the quantum of Jeon's claim, as there is no argument that the claim for the unpaid wages after August was made out of time.
- [44] Counsel for Jeon submits that the claim for the August salary was made in time. The verbal agreement with Zhou was that the wages would be paid in arrears on the 5th of the month, and therefore the salary was not payable until September 5, 2017. Counsel advises that the complaint to Employment Standards was filed on March 5, 2018, within the six month window.
- [45] Again, there is insufficient evidence before me upon which I can find that the claim for the August salary is out of time. Whether Jeon's claim is out of time is yet to be determined by the Director.

RELIEF SOUGHT BY JEON

Pre-judgment garnishing orders be set aside

- [46] Jeon seeks an order that the garnishing orders be set aside. Just as there is insufficient evidence upon which I can determine Jeon's claim or priorities to the garnished funds, I do not have sufficient evidence upon which I can determine the plaintiffs do not have a claim to the garnished funds. There is insufficient material before me upon which I can find facts which would justify setting aside the garnishing orders. I therefore decline to make an order that the pre-judgment garnishing orders be set aside.

\$40,000 of funds paid into court be paid out to Jeon

- [47] Jeon's notice of application seeks an order that \$40,000 of the funds in court be paid out to Jeon. During argument this was modified to seek an order that \$10,000 be paid out to his solicitor now, and an injunction prohibiting the payment out of the remainder of the funds until his claim for unpaid salary is determined. I decline to make an order that \$10,000 or \$40,000 be paid out. Jeon has not yet proven his claim for salary, there is lack of clarity regarding the ownership of the accounts from which the funds were garnished, and the plaintiffs and the Director may have submissions to make once Jeon's claim for unpaid salary has been adjudicated. I discuss the injunction in the next section.

The plaintiffs be enjoined from applying for further garnishing orders before judgment; and

The funds paid into court not be paid out to the plaintiffs until such time as the Director has made a determination concerning the complaint for unpaid wages

- [48] Jeon seeks two injunctive orders - that the plaintiffs be prevented from applying for further pre-judgment garnishing orders, and that they be prevented from applying for payment out of court until such time as the Director has made a determination concerning Jeon's complaint for unpaid salary. Counsel for the plaintiffs submits that the injunction sought by Jeon is akin to a Mareva injunction. The bar for obtaining Mareva injunction is high, and Jeon has not provided evidence of a real risk that assets will be disposed of or dissipated such that without the order, any determination by the Director in favour of Jeon would be dry.
- [49] Jeon's counsel disagrees that this is akin to a Mareva injunction and submits that his client has made out the test for an interlocutory injunction, being a serious issue to be tried, irreparable harm, and balance of convenience: *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
- [50] I do not think the orders sought are akin to a Mareva injunction as Jeon is not seeking to freeze all of the plaintiffs' potential assets. I am also not persuaded that an injunction is the appropriate order to make in this situation. Pre-judgment garnishment is a statutory remedy and it would be unusual for an injunction to issue to prevent a party from exercising it. Jeon has not established that he would suffer irreparable harm if an interlocutory injunction were not granted, and has not met the test for an injunction. The funds are already in court and therefore safe until further order of the court. Section 13(5) of the COEA prohibits payment out of funds without court order when there is a suggestion that there is a competing claim to the funds in court. Plaintiffs' counsel now has notice of Jeon's claim.
- [51] I decline to make the orders for interlocutory injunctions. Instead, I order that if the plaintiffs apply to have the funds paid out of court, notice of the application be given by the plaintiffs to Jeon and the Director of Employment Standards at least eight business days before the date set for the hearing of the application.
- [52] Costs of this application by Jeon should be determined at the hearing to pay out funds.

PLAINTIFFS' MOTION RE ML AND ZHOU

Summary Judgment Application

- [53] I will first address the application for summary judgment on the plaintiffs' debt claim under the Settlement Agreement. Bai's affidavit provides evidence of the Settlement Agreement and the defendants' failure to make the payments required under the Settlement Agreement. The defendants have not filed any response to the application.
- [54] Rule 9-6(2) of the Supreme Court Civil Rules provides that after the close of pleadings, a party may apply for judgment. Pursuant to Rule 9-6(5)(a), if the Court is satisfied there is no genuine issue for trial with respect to a claim or defence, it must pronounce judgment or dismiss the claim accordingly.

[55] Rule 9-6(3)(b) provides as follows:

An answering party may respond to an application for judgment under subrule (2) as follows: (b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

[56] As noted previously, in the response to civil claim the defendants admit the Settlement Agreement and the first two payments that were made pursuant to it, but deny any liability under the Settlement Agreement. The defendants do not plead any facts which would support a legal defence to the debt claim and have not filed any materials on this application. The response to civil claim does make a defamation claim, and although not specifically pleaded as such, this is presumably the basis upon which the defendants deny they breached the Settlement Agreement and deny they owe any amount under it. This is not a defence to a debt claim. No triable issue has been raised by the defendants to the debt claim.

[57] The next issue is whether summary judgment should be granted on the main claim when there is set-off claimed in a counterclaim. Summary judgment may be granted even though there is a counterclaim so long as the set-off at issue does not go to the root of and represent a true defence to the plaintiff's claim. If it is a related, but separable cross-claim, judgment may still be granted: *XY, Inc. v. IND Lifetech, Inc.*, 2009 BCSC 453, at paras. 32 to 38.

[58] In this case, the defamation allegations in the counterclaim are factually related to the Settlement Agreement only to the extent the statements allegedly took place at about the same time payments were to be made under the Settlement Agreement and arise out of the dispute between the parties. The legal basis of the debt claim and the defamation and other claims in the counterclaim are entirely distinct. Further, although there is a counterclaim against all the defendants, the only defamation allegations in the counterclaim relate to Bai and not the other plaintiffs. I see no reason to deprive the other plaintiffs of their judgment when there is no specific allegation being made against them. I therefore find that the summary judgment application may be granted despite the counterclaim.

[59] I order that the plaintiffs have judgment against the defendants for \$500,000 plus interest from the due date of payment to the date of this judgment at 20% per annum. As to the interest rate, the Settlement Agreement provides that if any payments are not made by the due dates, the unpaid portion of the settlement amount will become immediately due and payable and will bear interest at the rate of 20% per annum.

Counterclaim

[60] I turn now to the application to strike the counterclaim under Rule 9-5(1) of the Supreme Court Civil Rules. That rule provides:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be

[61] The plaintiffs seek an order that the entire counterclaim be struck. Plaintiffs' counsel argued the application solely with respect to defamation. However, Part 3 of the Counterclaim seeks relief based on the "torts of libel, slander, injurious falsehood, intentional infliction of emotional distress, intentional interference with economic relations, assault, and invasion of privacy". Plaintiffs' counsel did not make submissions as to whether the notice of civil claim pleaded facts which could support a claim for any of the torts which did not concern defamation. I will therefore will only address the defamation allegations in the counterclaim. It follows that I will not be dismissing the counterclaim on the claims for "injurious falsehood, intentional infliction of emotional distress, intentional interference with economic relations, assault and invasion of privacy". If the plaintiffs wish to make submissions with respect to these other claims, I grant them leave to file another application.

[62] The response to civil claim and the counterclaim (which relies on the facts in the response to civil claim) allege that the plaintiff Bai made the following statements to "Potential Investors":

- 1) Zhou stole one million dollars from the Plaintiffs;
- 2) Zhou used the money to open the Richmond store; and
- 3) Zhou refuses to either hand over the Richmond store or to return the stolen money.

[63] Following receipt of these pleadings, on December 12, 2017 counsel for the plaintiffs wrote to counsel for the defendants demanding particulars of the allegations of defamation. Counsel's letter to defendants' counsel demanded as follows:

- 1) Provide the identity of the alleged Potential Investor;
- 2) Provide the exact words spoken or published by Mr. Bai to the alleged Potential Investor;
- 3) If the Defamatory Statements were published, then provide particulars as to:
 - i) how the Defamatory Statements were published;
 - ii) the medium in which the Defamatory statements were published;
 - iii) the date of publication; and
 - iv) the persons who read that publication.
- 4) If the Defamatory Statements were spoken, provide particulars as to:

- i) the time and location of each time the alleged Defamatory Statements were made to the Potential Investor.
- [64] In response, on January 8, 2018, counsel for the defendants responded to the demand for particulars. The response states:
- a. the Potential Investors were Fei Gao, Shuai Xiao, Shan He, and Zihao Zhou;
 - b. the precise words spoken by Bai are not within the Defendants' knowledge, however, they are substantially as follows:
 - c. Zhiheng Zhou's company spent over one million dollars of money that was stolen from me to open its store, and now Zhiheng Zhou refuses to either return my money or hand over the store. Do not invest in his company.
 - d. the Defamatory Statements were spoken to the Potential Investors between October to November 2017, at or near Richmond, British Columbia.
- [65] Plaintiff's counsel submits that these particulars are not sufficient. He relies on *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 [Christian Advocacy], at paras. 107 to 109:
- [107] The law with regard to pleadings for defamation causes of action is simply stated: the plaintiff is required to set out the exact words in the pleadings unless those words can only become known after examination for discovery: *Central Minera Corp. v. Lavarack*, 2001 BCSC 349 at para. 12.
- [108] The pleading requirements were set out as follows in *Cooper* at para. 18:
- The material facts in a defamation suit must include the publication made by each defendant, the words published by that defendant, which plaintiff was defamed by the publication, the time and place of the publication, the manner of the publication, and to whom the publication was made. It is not sufficient to name multiple defendants in a paragraph of the pleading unless all of the defendants committed the alleged conduct. If such is the case then the pleading should so state.
- See also *Brown on Defamation* at 19-31.
- [109] The plaintiff cannot rely on a vague, general statement of the defamatory words: *Fraser v. Central Ready-Mix Ltd.*, [1999] B.C.J. No. 2061 (S.C.) at para. 12.
- [66] Plaintiffs' counsel submits that the defendants admit in the response to particulars that the precise words spoken are not within their knowledge. They do not specify an exact date or time or location, or who was present when any of the alleged defamatory statements were made. Further, plaintiffs' counsel points to the inconsistency between the pleadings which state that the defamatory statements were made "from about May 2017 to the date of the filing of this Response to Civil Claim" and the response to particulars which states that the defamatory statements were made "between October to November 2017". I note here that the response to civil claim and counterclaim were filed on October 18, 2017.

- [67] With respect to whether the exact words of the alleged defamatory statements were not available to the defendants at the time the pleadings and particulars were delivered, plaintiffs' counsel refers to Christian Advocacy at paras. 111-112:
- [111] However, in instances where the plaintiff does not know and has no means of ascertaining the exact words spoken except by extracting them from the defendant, the plaintiff may determine the exact words spoken through examination for discovery if they are able to establish they have a good cause of action: *Central Minera* at para 14. (1982), 37 B.C.L.R. 23 (S.C.). The plaintiff would be able to amend their pleadings once they obtained the new information through discovery.
- [112] The plaintiff is not relieved from their obligation to plead particulars when they can determine the precise words by investigating them. In *Isaac v. Guardian Capital Group Ltd.*, 2004 BCSC 254, the court held that the plaintiff failed to indicate in his pleadings that he had attempted to ascertain the precise words, forming one of the bases for striking the defamation claim (para. 35).
- [68] Plaintiffs' counsel submits that the defendants could have interviewed the potential investors and determined the exact words that were said, the date and time and exact location, and who was present. The defendants have failed to do that and they should not be relieved of their obligation to plead exactly when the information was available to them. At the very least, the defendants have failed to indicate in the pleadings or the particulars that they could not, through investigation, obtain better particulars of the alleged defamatory words.
- [69] I am satisfied that the pleadings and particulars are not sufficient for the reasons submitted by plaintiff's counsel. Although there is some particularity to the words pleaded, the date, time, exact location, and persons to whom the statements were made are not indicated in the pleadings or particulars. It is not even clear on how many occasions the statements were allegedly made. In the response to particulars, the defendants did not indicate that better and more particular information was not available to them. Further, they did not explain the inconsistency in dates between the response to civil claim, the response to particulars, and the timing of the filing of the response to civil claim and counterclaim.
- [70] I therefore strike the defendants' counterclaim pursuant to Rule 9-5(1) insofar as it makes a claim of defamation. The difficulty is in deciding what paragraphs of the counterclaim should be struck. The only fact pleaded in the counterclaim is the statement that "[t]he Defendants repeat the facts contained in the response to civil claim".
- [71] Plaintiffs' counsel did not address the claims of "injurious falsehood, intentional infliction of emotional distress, intentional interference with economic relations, assault, and invasion of privacy". Without deciding the issue, it is difficult to see how the facts alleged in the response to civil claim could support some of these torts. In the circumstances, as I have not heard argument on this, and as I have decided only whether the defamation claim has been sufficiently pleaded, I order only that the words "libel, slander" in Part 3, paragraph 1 of the

counterclaim be struck, and that the words "defamatory" "libel" and "slander" wherever they appear in Part 2, Division 3 and Part 3 of the response to civil claim, be struck. As indicated earlier, the plaintiffs have leave to file another application with respect to the other torts pleaded.

[72] The plaintiffs will have their party and party costs of this application at Scale B.

"Norell J."

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