

CANADA / JUDGMENT

Brewster & Collens v. Rominn Laboratories Inc. et al

2004 BCSC 1677

COURT

Supreme Court of British Columbia

DECIDED

15 December 2004

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2004 BCSC 1677 Brewster & Collens v. Rominn Laboratories Inc. et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brewster & Collens v. Rominn Laboratories Inc. et al

2004 BCSC 1677

Date: 20041215

Docket: S64773

Registry: Kelowna

Between:

Jackie L. Brewster and

Stephen T. Collens

Plaintiffs

And

Rominn Laboratories Inc., Robert A. Bowie,

Helena C. Cormier, Giuseppe Minnella and

Santina Minnella

Defendants

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the plaintiffs:

W. Alton

Counsel for the defendants:

D. Crerar

Date and Place of Hearing:

December 9 & 10, 2004

Kelowna, B.C.

Introduction

- [1] This is the plaintiffs' Rule 18A motion for judgment on a portion of their claims against the defendants. The defendants argue that it would not be just to summarily decide the issues the plaintiffs bring forward.
- [2] For the reasons that follow I have concluded that this matter is not suitable for disposition by summary trial.
- [3] The defendants have brought their own motion seeking an injunction restraining the plaintiffs, removal of the personal defendants from the suit, discovery of certain documents from the plaintiffs, and an order that the plaintiffs provide answers to questions posed in their respective examinations for discovery.

Summary Trial

The Causes of Action

Plaintiffs' Suit

- [4] The plaintiffs allege that at all material times the corporate and the personal defendants were alter egos and agents for one another. The plaintiffs say that they each made employment contracts with the defendants. The terms of employment were that the plaintiffs would provide services to the defendant Rominn Laboratories Inc. (Rominn) in accord with their respective abilities, in return for which Rominn would pay them \$5,000 per month plus expenses. In the case of Mr. Brewster, he says that he expected to work full time, or 160 hours per month. Mr. Collens' counsel says that Mr. Collens expected to work some number of hours per month and that he would be paid whatever proportion the number of hours he actually worked bore to full time work of 160 hours per month. Mr. Collens does not actually articulate that formula in his affidavits.
- [5] Mr. Brewster alleges he worked 1,190 hours for the defendants between January 5 and May 24, 2004, and says his remuneration for that work should be \$34,331.50, less \$2,600 he received from the defendants. In addition Mr. Brewster says he expended \$2,328.29 on Rominn's behalf. Mr. Collens says he worked a total of 260 hours for Rominn and should be

compensated \$10,400 under his contract of employment. The plaintiffs say they have demanded payment pursuant to the terms of their employment contracts but the defendants have refused to comply.

- [6] The plaintiffs' statement of claim alleges that they were wrongfully dismissed from their employment and were given no notice of their termination. The statement of claim does not allege that the contracts of employment contained expressed or implied terms requiring a specific period of notice, or a reasonable notice of termination. It is an open question whether party can recover damages for breach of a term of contract without first pleading and proving that the term on which they rely existed.
- [7] Alternative to their claims in contract, the plaintiffs say that if there was no contract of employment the defendants must compensate them for the value that their efforts bestowed upon the defendants. This is a claim for an equitable remedy based on quantum meruit. The plaintiffs quantify their quantum meruit claims identically to their claims for breach of contract.
- [8] The plaintiffs also allege that the defendants negligently misrepresented that the plaintiffs would become shareholders in Rominn, that the representation was not accurate, that they reasonably relied upon that misrepresentation, and they suffered damage as a consequence of their reliance.
- [9] The plaintiff's claims are, therefore, grounded in contract, equity, and tort. In this summary trial the plaintiffs seek judgment only for the salary they say they are owed, or in the alternative for the equitable remedy of quantum meruit. The plaintiffs say their claims for damages for negligent misrepresentation and whatever losses may be attributable to their not becoming shareholders in Rominn, and their claims for wrongful dismissal can be tried another day.

Defendants' Counter-Claim

- [10] The defendants allege that after their separation from Rominn the plaintiffs interfered with Rominn's economic relations with its suppliers, distributors, sales and service personnel, and its customers. The defendants further say that the plaintiffs told untruths to third parties with the intent of harming the defendants, thus committing the tort of injurious falsehood. Generally, the defendants say that the plaintiffs told other persons that the plaintiffs had obtained or had applied for a United States patent on the device that the defendants had developed and was trying to market. Ownership of the intellectual property relating to the device and the parties' respective entitlement to patent protection of are, therefore, among the issues raised by the counter-claim. The defendants allege that they suffered loss as a consequence of the plaintiffs' actions and claim damages therefore. The defendants do not seek summary judgment on the counter-claim, and the plaintiffs do not seek to summarily dismiss it.

Internal Inconsistencies Affecting the Plaintiffs' Claims

- [11] In the summary trial the plaintiffs argued that their employment contracts entitled them to pay of \$5,000 per month for full time work, or more or less salary if they worked more or less than full time. They said that full time work was 160 hours per month. Their statement of claim alleges contracts for \$5,000 per month but makes mention of pro-rating that sum to the number of hours they worked. This is not necessarily a fatal flaw - that discontinuity could be remedied with an amendment easily sought and readily granted.
- [12] What cannot be overlooked, however, is the discontinuity between the formulas the plaintiffs propose to calculate their wage entitlement and the amounts they claim for those wages. Accepting for the moment the plaintiffs' assertion that full time work is 160 hours per month and their \$5,000 salaries were predicated upon that number of hours, then under the terms of the alleged contract each should have earned \$31.25 per hour. Mr. Brewster says that he worked 1,190 hours. The product of 1,190 and \$31.25 is \$37,187. Mr. Brewster does not claim that amount. Instead, he claims \$34,331 less the \$2,600 he acknowledges receiving from the defendants.
- [13] Similarly, Mr. Collens alleges that he worked a total of 260 hours for the defendants. Under the terms of the contract he asserts his salary ought to have been the product of 260 hours and \$31.25, or \$8,125. Instead, Mr. Collens claims \$10,400.
- [14] Neither Mr. Brewster nor Mr. Collens explain in their affidavits how the terms of the alleged contracts could be manipulated to produce those numbers. Given their pleading that the contracts were for a specific sum per month and their position at summary trial that that sum was based on 160 hours per month, their failure to actually follow the formula they assert is, in my view, fatal to their attempt to obtain summary judgment for breach of those alleged contracts.
- [15] The interpretation most generous to the plaintiffs is that they are confused about the employment contracts they say they had with the defendants. Their state confounded what would otherwise be a straightforward description of the contract and of the facts to plug into their compensation formulas, and of their resulting claim for salary earned.

Conflicts in the Evidence

- [16] Leaving aside internal inconsistencies in the plaintiffs' materials, there remains a conflict in the evidence on whether there were any employment contracts at all. The plaintiffs insist that they were promised regular pay of \$5,000 per month. They do not consider their entitlement to salary to be contingent on their performance or on the company's ability to pay. The defendants filed affidavit evidence to the effect that never were the plaintiffs promised a salary. The defendants say the arrangement with the plaintiffs was that if the company generated enough revenue from sales to pay a draw, then the plaintiffs along with several other participants might receive up to \$5,000 per month. Basically, the plaintiffs think they were salaried employees whose income did not depend on the company's success,

while the defendants think the plaintiffs agreed to invest their time and effort in return for a share of the company's eventual net income. The parties' affidavits revealed, therefore, a fundamental difference in their respective understanding of the circumstances under which the plaintiffs could receive remuneration. I cannot turn to the documents to resolve the issue. Some of the documents, particularly minutes of meetings, could be read to support the plaintiffs' or the defendants' version of events. Which interpretation to take will ultimately depend in large part on the credibility of the parties.

- [17] If the plaintiffs' breach of contract claims cannot be summarily judged, can their claim for quantum meruit? In my view it cannot. That is because there is simply too much conflict in the evidence presented by the parties on this issue. The plaintiffs' affidavits assert that they were essential players in the development and marketing of the defendants' device. They list a variety of tasks they successfully undertook to advance the defendants' interests. The defendants list a different set of tasks the plaintiffs did. Read collectively the defendants' materials paint a picture of the plaintiffs as marginally effective workers. Those two views cannot be reconciled with one another. The documentary evidence supports, to varying degrees, each party's position. That is to say one can find snippets in the documents to corroborate the plaintiffs' testimony that they were quick, efficient, and valuable to the defendants. One can also find bits and pieces in the documents to support the defendants' portrayal of the plaintiffs as barely useful and occasionally inept workers. Deciding what services the plaintiffs supplied to the defendants and the value of those services must depend in part if not entirely upon findings of credibility. Those findings are, of course, critical to any assessment of a quantum meruit entitlement. The court cannot make those findings on the basis of conflicting affidavit evidence in a summary trial.

Interrelationship of Claim and Counter-Claim

- [18] The counter-claim alleges that the plaintiffs used knowledge they gained while associated with the defendants to set themselves up in competition with the defendants. That competition was the plaintiffs' filing of an application for a patent on the defendants' device. The defendants say the plaintiffs put their knowledge to use in the course of committing intentional torts against the defendants. Those torts were committed when the plaintiffs contacted and warned off suppliers, distributors, and customers. If those allegations are made out - and I make no finding in that regard - then the plaintiffs may run afoul of the maxim 'those who seek equity must do equity'. It would be wholly wrong for the court to consider the plaintiffs' claim for an equitable award without at the same time examining whether the plaintiffs' conduct disentitles them to that remedy. The evidence in this summary trial was not adequate to determine the merit of the defendants counter-claim. It is not, therefore, adequate to determine whether, in all the circumstances, the plaintiffs merit damages for quantum meruit.

- [19] In any event, to decide the salary and quantum meruit aspects of the plaintiffs' claims would require the court to make certain findings of fact and credibility. The judge who tries the remainder of the plaintiffs' issues and the counter-claim will hear evidence bearing on those same facts and credibility. There exists, therefore, a risk that the trial judge will hear evidence compelling him or her to make a finding contrary to the summary trial judge's conclusions. That alone is reason enough to decline the plaintiffs' summary trial application.

Plaintiffs' Application to Adjourn

- [20] As the application developed, the plaintiffs asked for an adjournment. The application was on two grounds. The first was that in the course of the summary trial a document came to light which reflected upon the defendants' credibility. It developed that this was a document Mr. Brewster himself generated and sent to Mr. Bowie in May 2004. The plaintiffs say that this document proves false some aspect of the defendants' evidence concerning the promised shares in Rominn. As such, that document bears on an issue the plaintiffs did not ask the court to decide in this trial. In so far as it relates to credibility, I have already concluded that the evidence here is not adequate for me to determine credibility, and this document, peripheral as it is to the issues in the summary trial, is not likely to be determinative of all credibility issues.
- [21] The second ground for an adjournment was so that the plaintiffs could cross-examine the defendants on their affidavits. The plaintiffs' argument is that they received the defendants' materials so late as to not be able to respond to them.
- [22] Presumably the plaintiffs knew when the summary trial started that they had not had an opportunity to respond to the defendants' materials. The plaintiffs did not ask for an adjournment then. Neither did they object to the defendants' affidavits going into evidence in the summary trial. Their request for an adjournment came up in reply to the defendants' argument. Under these circumstances the proper time to seek adjournment is before the trial starts, not in its midst as things appear to be going sideways.
- [23] The plaintiffs' request to adjourn the summary trial for examination and further evidence is denied.

Conclusion

- [24] This case is not suitable for summary trial. The parties may set the matter for a conventional trial at their convenience.

Defendants' Applications

Set Aside Garnishing Order Before Judgment

- [25] It is trite law that a garnishing order before judgment must strictly comply with all particulars of the Court Order Enforcement Act. It must fully and accurately disclose the plaintiffs' claim for liquidated damages. The plaintiffs' affidavits in support of the garnishing order mirrored their claims in contract described earlier. The amount of those claims cannot be reconciled with the plaintiffs' description of their pay formula. The garnishee affidavits are, therefore, at least unclear, perhaps misleading, and possibly untrue. The order they underwrote cannot stand.
- [26] The plaintiffs did not seriously contend that the garnishing order before judgment should survive challenge.
- [27] The garnishing order must be set aside, and any funds captured by it must be paid out to the defendants.

Remove Parties

- [28] The defendants argued that the court should make an order in the summary trial dismissing the claims against the personal defendants. I have already concluded that this matter is not suitable for summary disposition, and so no orders will flow from the summary trial for or against the parties.
- [29] Alternatively the defendants say that the court may rely on Rule 15(5)(a)(i) to release the personal defendants. That rule is:
- (5) (a) At any stage of a proceeding, the court on application by any person may
- (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
- [30] I note that the statement of claim alleges that the defendants were not candid, reasonable, honest, or forthright and that they acted in bad faith with respect to the plaintiffs. If the personal defendants committed those acts they might, conceivably, be found to be personally liable to the plaintiffs for those acts. The claims against them may be tenuous and difficult to prove, but the claims are not unknown to law. I cannot at this juncture say that the personal defendants are not proper and necessary parties.

Production of Patent Documents

- [31] The plaintiffs' statement of defence to the counter-claim cites their having applied for a patent on a device they invented. In their pleading the plaintiffs assert that their device is different from the defendants' device. This assertion bears upon issues raised in the counter-claim. That is because if the plaintiffs were aware that they had not invented something new or if they were aware that their patent application had no merit, then their subsequent actions vis-à-vis the defendants might be unlawful and might then bottom the plaintiffs'

claim against them for unlawful interference with economic relations.

- [32] The patent application and materials relating to it are relevant to issues raised in the pleadings. The plaintiffs must give discovery of those materials.

Answer Discovery Questions

- [33] The plaintiffs are directed to give responsive answers to the defendants' discovery questions with respect to issues relating to patents.

Injunction

- [34] The defendants presented compelling evidence that after May 2004 the plaintiffs had interfered with the defendants' business. That evidence suggested that:
- a) The plaintiffs contacted Mr. Nicholson. Mr. Nicholson was a potential investor in Rominn and was interested in distributing the device in the U.S. The plaintiffs told Mr. Nicholson that they had or had applied for a patent on the defendants' device and they warned him away from promoting the defendants' device to potential customers.
 - b) Mr. Brewster contacted Ms. Lafontaine. Ms. Lafontaine was a sales person for Rominn. Mr. Brewster's conversation with her gave her to understand that Rominn would not be able to pay any money it might owe to her and intimated that she ought not work for Rominn in the future.
 - c) Mr. Brewster contacted Mr. Bays. Mr. Bays is a potential customer of Rominn. Mr. Brewster told Mr. Bays that he had a patent on the Rominn device, that Rominn had no right to sell the device, and that Mr. Bays would risk his money if he did business with Rominn instead of Mr. Brewster.
 - d) Mr. Brewster contacted Mr. Baker. Mr. Baker is trying out a Rominn device and is a potential customer and referral source for Rominn. Mr. Brewster said words to Mr. Baker to the effect that Rominn did not have the right to sell the device, that Mr. Brewster owned a patent on the device, and that Mr. Brewster wished to replace the Rominn device with one of his own.
 - e) Mr. Brewster contacted Mr. Dowkes. Mr. Dowkes is a manager of a company that manufactures the Rominn device. Mr. Brewster told Mr. Dowkes that he had a patent for "on demand water heaters" and that Mr. Baker's company should not be manufacturing the Rominn device. Mr. Baker says that as a consequence of this communication his company has stopped manufacturing the device.
- [35] The plaintiffs say generally that they do have a patent and, therefore, they have the right to make the alleged statements to third parties. There has been no discovery of the patent information. The plaintiffs have not shown they have a patent and the defendants have not shown that they do not. Further, neither party came prepared to show the court what rights would flow from an issued patent or from an application for a patent. Whether what the plaintiffs did was right or wrong may turn on whether they have a patent for their device.

The evidence here was not sufficient to illuminate that issue.

- [36] The injunction application came too early in the process for proper adjudication. The injunction application is adjourned generally pending production of further and better evidence from both parties. The procedures of Rule 51A shall apply to that application when and if it is brought forward.

Costs

- [37] The defendants were substantially successful in the summary trial and their motions. They were represented by single counsel and their interests were wholly coincident with one another. The defendants shall have a single bill of costs as between them for the summary trial and a single bill of costs as between them for their notice of motion. All costs shall be on Scale 3. The defendants may assess their bills when they wish, but enforcement of the resulting certificates of costs shall be stayed pending resolution of the claim and counter-claim.

- [38] I am not seized of this matter.

"P. Rogers, J."

The Honourable Mr. Justice P. Rogers

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