

CANADA / JUDGMENT

Cohen-Rose v. Cohen, et al.

2004 BCSC 1668

COURT

Supreme Court of British Columbia

DECIDED

15 December 2004

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2004 BCSC 1668 Cohen-Rose v. Cohen et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cohen-Rose v. Cohen, et al.,

2004 BCSC 1668

Date: 20041215

Docket: L030245

Registry: Vancouver

Between:

Sandra Cohen-Rose

Plaintiff

And

Barrie Cohen, David Cohen, Harold Cohen, Merrilee Cohen,

Rachel Cohen-Lunning, Stephanie Cohen, Rifka Cohen, Tamara Stein

Defendants

Before: Master McCallum

Reasons for Judgment

Counsel for the Plaintiff:

John L. Leathley, Q.C.

Counsel for the Defendant,

Barrie Cohen:

Ellen Bond

Date and Place of Hearing:

November 17, 2004

Vancouver, B.C.

- [1] This matter came on before me in Vancouver on November 17, 2004 for the hearing of the plaintiff's application to compel the production of documents from the defendant Barrie Cohen. During the hearing an issue arose as to the status of Barrie Cohen. It was apparent that the plaintiff took the position that Barrie Cohen was sued in his personal capacity and his capacity as executor of his mother's will. The style of proceedings made no such reference, although Barrie Cohen was described in the statement of claim as executor. Following the hearing, counsel for the plaintiff advised he was intending to apply to add Barrie Cohen in his capacity as executor. I elected to await the outcome of that motion before preparing these reasons. Barrie Cohen has now been added as a defendant in his capacity as executor and these reasons are based on that change to the action.
- [2] Sandra Cohen-Rose ("Sandra") is suing her siblings and the executor of her mother's will. She maintains that her mother made inadequate provision for her in the will and that Barrie Cohen, as executor, ("Barrie") has failed to accurately disclose the assets and liabilities of his deceased mother. In this motion, Sandra says Barrie should be ordered to produce certain specified documents, produce income tax returns for his mother's business, produce medical records of his mother, produce a supplemental list of documents and provide answers to certain questions asked at his examination for discovery.
- [3] Barrie says he is willing to produce many of the requested records. He says some of the requests relate to irrelevant documents or information and declines to produce them. He says finally that he is not in possession or control of some of the documents and that Sandra has not been sufficiently precise in her request for specific documents.
- [4] Some items from the notice of motion may be resolved summarily. Items 2 and 3 are the subject of an order made by Master Bolton on July 29, 2003. Barrie is required to produce those documents and Sandra has a remedy if the order is not obeyed. I make no order with respect to Items 2 and 3 of the motion.
- [5] Item 4 of the motion requests production of a supplemental list of documents. Barrie has agreed in his affidavit sworn October 25, 2004 to produce other documents and will, inevitably, have to prepare a supplemental list of documents. No order need be made with respect to Item 4.

- [6] Item 5 relates to questions asked at Barrie's examination for discovery held May 18, 2004. The examination was adjourned to allow Barrie to inform himself. His answers to the questions are found at paragraph 23 of his affidavit sworn October 25, 2004. No order need be made with respect to Item 5.
- [7] Item 1 of the motion requests production of documents listed in sub paragraphs (a) through (w). I propose to deal with the items in that order.
- [8] Items 1(a), (b) and (c) relate to bank statements of the testator for a three-year period prior to her death. Sandra says the documents are relevant given the wide ambit of the test for relevance in British Columbia and the pleadings in this Wills Variation Act action. I agree with Sandra. Barrie should produce bank statements (or give authorizations for their production) for accounts of the testator (including business accounts) for three years prior to her death. Following her death the business accounts appear to have been continued by Barrie. There will be an order that Barrie produce those statements (or give authorizations) to the present.
- [9] Item (d) asks for "sales records from 1998 forward". Sandra says she requires those records in order to establish the value of the deceased's business. Barrie has agreed to produce books recording the monthly gross income of the business from 2000 to present. The earlier records are relevant given the wide discretion to vary a will and the factors to be considered in making that decision. There will be an order that Barrie produce the books recording the monthly gross income of the business from 1998 to present.
- [10] Item (e) refers to income tax returns of the deceased from 1994 to her death. To the extent they are different from those dealt with under Item 2 of the motion; Barrie has agreed to search for them. There will be an order that Barrie sign an authorization to allow the plaintiff to obtain the returns directly if he cannot locate and produce the returns.
- [11] Item (f) relates to an income tax return Barrie has agreed to produce. That order will go by consent.
- [12] Item (g) is only relevant to the extent that Item (e) cannot be completed. There will be an order that Barrie sign an authorization allowing Sandra access to those records.
- [13] Item (h) refers to a document requested at the examination for discovery. Barrie says he does not have possession or control of the document. The evidence discloses no reason to doubt him. No order will be made with respect to that document.
- [14] Item (i) asks for production of "evidence of the goodwill calculation" which was referred to at the examination for discovery. It is apparent from the transcript (Q 412 - 422) that Barrie was to inform himself. He says in his affidavit that no such document exists. No order will be made with respect to Item 1(i).
- [15] Item (j) refers to a document that Barrie agrees to produce. The order will go as requested.

- [16] Item (k) refers to a record Barrie agreed existed. The document is relevant. There will be an order that Barrie produce the record.
- [17] Item (l) refers to "Mr. Cohen's T4 summaries". It is apparent from the transcript that Barrie referred to that material; but he says in his affidavit that he must have been mistaken since he was not required to prepare or produce such a document. The request is not sustained by the evidence. No order will be made.
- [18] Items (m) and (n) do not refer to specific documents but are apparently follow-up requests from the examination for discovery. Barrie has agreed to obtain copies of GST statements for the testator's business from the appropriate authority for the period from 1994 to present and provide them to Sandra. That order will go by consent.
- [19] Item (o) refers to payroll records that Barrie agrees to produce for the period from 1999 forward. That order will go by consent.
- [20] Item (p) refers to "receipt books" which apparently exist. Barrie objects to production on the basis that the sales information is contained in other documents agreed to be produced. These records contain information about customers of the business that Barrie says ought to be kept confidential. Barrie also says the records will disclose details about his business practices which are not necessary for the purposes of the lawsuit. Given that these records do involve third parties and given their marginal relevance, I order that request adjourned. Once disclosure of the other records has been made, Sandra may be able to show that these records are sufficiently relevant to warrant disclosure.
- [21] Item (q) refers to the testator's "citizenship certificate". Barrie denies the document is in his possession or control but agrees to provide a copy of the testator's passport. No order will go for production of the citizenship certificate.
- [22] Item (r) is no longer in dispute.
- [23] Item (s) refers to Barrie's income tax returns from 1995 to present. No specific reason was advanced for production of returns for that period. Barrie has agreed to produce his returns from the date of death to present. That order will go by consent.
- [24] Item (t) refers to Barrie's 2003 T4 slip that he has agreed to produce. That order will go by consent.
- [25] Item (u) refers to "the last bank statements" for Barrie's bank accounts. These documents are said to be relevant because Sandra alleges that Barrie, as executor, has failed to make adequate disclosure of the testator's assets and liabilities. A comparison of Barrie's records with the business records might assist in that inquiry. Barrie has agreed to produce statements for September 2004 with details of the account redacted to protect his privacy. That order will go by consent. If Sandra can demonstrate the relevance of the account numbers that issue can be addressed on another occasion.

- [26] Item (v) refers to tax returns of "Barrieco Actionsystems for the period since 1995". Barrie agrees to produce tax returns for Barrieco Actionsystems Ltd. for the period from 2000 to present. That order will go by consent. Sandra's material does not demonstrate the relevance of the documents for any other period.
- [27] Item (w) refers to a document Barrie has agreed to produce. That order will go by consent.
- [28] I leave a summary of the orders made to the diligence of counsel. I close these reasons with the observation that the material in support of Sandra's motion did not support, in many respects, the orders requested. The material ought to have demonstrated that the specific documents for which production was sought were relevant and were in Barrie's possession or control. In most instances, the material originally filed (K.A. Jones' Affidavit 1) merely recited that documents had been requested at the examination for discovery. Many documents were not described specifically or accurately. Barrie, to his credit, joined the issue squarely. In those circumstances I was able to make a decision on the merits of the requests. For that reason, costs of the motion will go to Barrie as costs in the cause.

"Master W. McCallum"

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