

CANADA / JUDGMENT

Crtrynbaum v. Gineaut Holdings et al.

2005 BCSC 1676

COURT

Supreme Court of British Columbia

DECIDED

18 November 2005

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2005 BCSC 1676 Crtrynbaum v. Gineaut Holdings et al IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Crtrynbaum v. Gineaut Holdings et al., 2005 BCSC 1676 Date: 20051118 Docket: S035257 Registry: Vancouver Between: Michael Crtrynbaum PLAINTIFF And: Gineaut Holdings Ltd., Max Cynader and Pierre Zakarauskas DEFENDANTS And: MCT II Enterprises Ltd. DEFENDANT BY COUNTERCLAIM Before: Master Barber Oral Reasons for Judgment In Chambers November 18, 2005 Counsel for Plaintiff and Defendant by Counterclaim A.I. Nathanson M. Prescott, A/S For Defendant Gineaut Holdings Ltd. No appearance Counsel for Defendants, Max Cynader and Pierre Zakarauskas J.A. Harris Place of Hearing: Vancouver, B.C.

- [1] THE COURT: The application before me today is one made by the plaintiff pursuant to a Notice of Motion dated October 4, 2005, wherein the plaintiff asks for an order that Pierre Zakarauskus re-attend at an examination for discovery to answer certain questions put to him, as set forth in the Notice of Motion.
- [2] The objection is that those were matters that were "without prejudice" and arose during settlement discussions. Thus, the defendant says that he should not re-attend.
- [3] The plaintiff argues that there is no way I can determine, at this stage today, when those discussions occurred, and whether or not they were, in the context of "without prejudice" discussions, or whether they were, in fact, more simply put, discussions which occurred between two parties prior to any actual settlement discussions, if any did occur.
- [4] The defendant asks that I decide the matter on the basis of *Middlekamp v. Fraser Valley Real Estate Board* (B.C.C.A.), [1992] B.C.J. No. 1947 and says that in particular I should consider paragraph 20 of that decision where it says, where Mr. Justice McEachern says: In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

- [5] There is no question that I accept that as the law. However, the problem in this particular case is that there is no decision that I have been made aware of, and counsel indicate that they have not been able to find one, where, in fact, it is the two parties who are having the discussions as to whether or not there can be examination as to what those discussions were, namely, as to when they took place and what was then the context and the actual tenor and content of those discussions.
- [6] I have been referred to *Arbutus Environmental Services Ltd. v. Peace River (Regional District)*, [2002] B.C.J. No. 202, which is a somewhat similar decision, a decision of Mr. Justice Hutchison, where he states as follows:
- [11] From the material before me, it is not clear that there was, at the relevant time, a lis in existence or contemplated being resolved between the parties and I agree with the learned Master when he held that the letter was not meant to resolve a dispute.
- [12] That having been said, however, it may be that the evidence led at trial, and not before the learned Master nor myself, would lead the trial judge to conclude that the letter itself is privileged since a complete review of the evidence may reveal that at the time the letter of May 21, 1998 was written, there was a litigious dispute, or lis, in contemplation, in which case, different considerations could be applied by the learned trial judge. Continuing on at paragraph 14: Counsel cannot expect to keep letters privileged by simply putting "Without Prejudice" on them. The criteria for the privilege must first be clearly shown. In the case at bar, no such clarity emerges from the affidavit material before me and it would be unfair to the defendants not to have an opportunity to explore the correspondence when the plaintiff claims substantial damages for breach of contract arising out of letters and oral communications. I note, however, that no contract emerged from the negotiations which Mr. Campbell suggests were privileged, as he argues, simply because they were negotiations of a dispute which ultimately arose between the parties.
- [7] The interpretation that counsel for the plaintiff asked me to put on Middlekamp is that, when His Lordship said "other parties" in paragraph 20, he meant third parties, and that he did not necessarily mean the parties such as there are in this case, namely, the plaintiff and one of the defendants, and he says that is the reasonable understanding of that paragraph.
- [8] When one looks at the other cases, I would say that that is an interpretation that I will accept. Here, I cannot conclude when these discussions took place as there is dispute between the parties, nor can I conclude with certainty that they were, in fact, settlement discussions or whether they were, as counsel said, discussions about a matter which then led to a dispute about which there were some settlement discussions.
- [9] Therefore, it seems to me that the defendant ought to re-attend and answer the questions which would, of course, be subject to the trial judge determining ultimately whether or not there was privilege, and whether or not these particular discussions would be admissible. That is a matter that I leave to the trial judge.

- [10] Is there anything further, counsel?
- [11] MR. NATHANSON: Just costs, Your Honour. I can take Your Honour to this, if it's necessary, but I would ask for costs in any event of the cause because I made the exact offer that is contained in Your Honour's order to my friend, and it was not accepted, and that's why the application was necessary.
- [12] MS. HARRIS: Your Honour, I would just submit that costs should be in the cause given the fact that there was no binding authority and this was an issue which needed to be decided.
- [13] THE COURT: I agree with Ms. Harris. I appreciate you made the offer, and I think that is a sensible one to make, but, on the other hand, I can see why counsel did press the issue, and I thank both counsel for their arguments.
- [14] I should have said in my reasons, as well, that I basically accept the submissions as set forth in the argument of Mr. Nathanson, and I adopt it for my reasons. "Master R.F. Barber"

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