
CANADA / JUDGMENT

Dong v. Hofer

2016 BCSC 2440

COURT

Supreme Court of British Columbia

DECIDED

5 December 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 2440 Dong v. Hofer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dong v. Hofer,

2016 BCSC 2440

Date: 20161205

Docket: S152575

Registry: Vancouver

Between:

Steven Vinh Phat Dong

Plaintiff

And:

Michael Josef Hofer

Defendant

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

In Chambers

Appearing on his own behalf:

S. Dong

Counsel for the Defendant:

T.W. Clifford

Place and Date of Hearing:

Vancouver, B.C.

November 22, 2016

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2016

Introduction

- [1] In this action, the plaintiff, Mr. Dong, asserts that the defendant, Mr. Hofer, is liable to him in damages for defamation and for intentional interference with economic relations. The claims have their origins in events in May and June 2012, when Mr. Dong was working as a realtor with West Coast Realty Ltd. doing business as Sutton Group - West Coast Realty ("Sutton"). At the time, Mr. Hofer was the managing broker with Sutton.
- [2] The action is set for an eight-day trial beginning January 3, 2017.
- [3] Mr. Hofer now applies for dismissal of the action on a summary trial.
- [4] Mr. Dong says that the application should be dismissed because the matters are not suitable for disposition by way of summary trial. However, Mr. Dong also opposes the application on the merits.
- [5] For the reasons that follow, I have concluded that, with respect to the defamation claims, I am unable on the whole of the evidence to find the facts necessary to decide the issues, and that it would be unjust to decide those claims on a summary trial.
- [6] However, I have reached a different conclusion with respect to Mr. Dong's claim for damages based on the tort of intentional interference with economic relations. In my opinion, Mr. Dong has failed both to plead and to prove an essential element of the cause of action, namely, the defendant's unlawful act against a third party. The necessary consequence is that that claim must be dismissed.
- [7] Because I have concluded that the defamation claims are not suitable for disposition by summary trial, I will say very little concerning the merits of those claims. However, I will set out some background as context for my conclusions that these issues are not suitable for summary trial.

Background

- [8] Mr. Dong alleges that he was defamed by Mr. Hofer on four occasions: in discussions with a client, Ms. Jacqueline Orina, in early June 2012; in an email message sent to Mr. Hofer's general manager in June 2012; in a telephone call between Mr. Hofer and the general manager of another real estate firm, Andrew Peck; and in a letter dated July 4, 2013, that Mr. Hofer sent to the Real Estate Board of Greater Vancouver (the "Board") in July 2013.
- [9] In response, Mr. Hofer denies that he made any statements that were defamatory and says that Mr. Dong cannot prove publication of the email. Mr. Hofer also raises a variety of defences, including justification, fair comment and, in relation to the letter to the Board, absolute privilege.
- [10] Mr. Dong began working as a realtor with Sutton in late June 2011. Mr. Hofer was his managing broker there. These facts are not contested.
- [11] In late May 2012, Ms. Orina (and another) entered into a contract of purchase and sale to purchase a property on E. 29th Avenue, Vancouver ("E. 29th"). The sellers were Mr. and Mrs. Leelh, who are the parents of another realtor working at Sutton, Mr. Raj Leelh. The completion date was in July 2012. These facts are also not contested.
- [12] A dispute developed between Mr. Dong and Mr. Leelh concerning their respective entitlements to commission in relation to the sale of E. 29th. This fact is not contested.
- [13] According to Mr. Hofer, when the commission dispute arose, he, in his capacity as Sutton's managing broker, contacted Ms. Orina and assured her that the purchase and sale of E. 29th was not in jeopardy. What exactly Mr. Hofer communicated to Ms. Orina is contested.
- [14] Mr. Dong alleges that Ms. Orina informed him that Mr. Hofer called her and said that: (a) Mr. Dong writes incredibly poor contracts; and (b) Mr. Dong is incompetent and she is better represented by Mr. Leelh. Mr. Dong alleges that Mr. Hofer's words to Ms. Orina were defamatory of him. This is a claim of slander.
- [15] In her affidavit filed on the summary trial application, Ms. Orina disputes Mr. Dong's version of the facts. Mr. Hofer also disputes Mr. Dong's version of the facts.
- [16] In the course of dealing with the commission dispute, Mr. Hofer sent an email communication (the "June 13 Email") to his superior, Ms. Merrily Hackett, the general manager for Sutton. This fact is not contested. A copy of the June 13 Email is found at Exhibit "R" to Mr. Dong's Affidavit No. 3. Mr. Dong alleges that statements made in the June 13 Email are defamatory. This is a libel claim.
- [17] Mr. Dong left Sutton in late June 2012. In late June 2012, Mr. Dong joined Royal Pacific Realty (Kingsway) Ltd. ("Royal Pacific") as a realtor. Mr. Peck was Royal Pacific's general manager. Mr. Dong remained with Royal Pacific until December 2013. These facts are not contested.

- [18] In June 2013, Mr. Dong filed a complaint with the Board against Mr. Hofer and Mr. Leelh concerning the commission dispute. This fact is not contested.
- [19] I turn then to the third occasion on which Mr. Dong alleges he was defamed by Mr. Hofer.
- [20] Mr. Hofer and Mr. Peck had a telephone conversation about Mr. Dong (the "Peck Conversation"). This fact is not contested. Mr. Dong asserts that during the Peck Conversation, Mr. Hofer "provided Mr. Peck with the following particulars" set out in para. 25 of the amended notice of civil claim. Mr. Dong asserts that all of these "particulars" are defamatory. This is the second slander claim.
- [21] The evidence on the summary trial concerning when the Peck Conversation took place is contradictory.
- [22] In his Affidavit No. 2, Mr. Hofer says that he phoned Mr. Peck "[s]hortly after [Mr.] Dong began employment with" Royal Pacific. If true, this would likely be sometime in 2012, since Mr. Dong joined Royal Pacific in late June 2012. However, Mr. Hofer also says that he asked Mr. Peck whether Mr. Peck was aware of Mr. Dong's complaint to the Board. It is not contested that Mr. Dong's complaint was not made until 2013.
- [23] For his part, Mr. Peck also describes the Peck Conversation as occurring shortly after Mr. Dong began employment with Royal Pacific, but he also says that he and Mr. Hofer discussed Mr. Dong's complaint to the Board.
- [24] In their affidavits, both Mr. Hofer and Mr. Peck deny that Mr. Hofer uttered the particulars alleged in para. 25 of the amended notice of civil claim.
- [25] I turn then to the final occasion on which Mr. Dong alleges Mr. Hofer defamed him.
- [26] Mr. Hofer was asked to respond to Mr. Dong's complaint to the Board. He did so by letter dated July 4, 2013 (the "July 4 Letter"). These facts are not contested.
- [27] Mr. Dong asserts that many statements in the July 4 Letter are defamatory and that, in addition to the Board, Mr. Hofer sent a copy of the Letter to Ms. Hackett and Mr. Leelh, thereby publishing the defamatory statements. Mr. Dong's claim in relation to the July 4 Letter is a libel claim.
- [28] One of the defences raised by Mr. Hofer in respect of the July 4 Letter is absolute privilege. Alternatively, Mr. Hofer says that the words in the July 4 Letter were not defamatory and that Mr. Dong cannot prove publication. Mr. Hofer also relies on the defences of justification and fair comment.
- [29] As of July 2013, Mr. Hofer was no longer working at Sutton. This fact is not contested. Mr. Hofer admits that he sent a copy of the July 4 Letter to Ms. Hackett. In his affidavit filed on the summary trial application, Mr. Leelh says that Mr. Hofer did not give him a copy of the July 4 Letter. Mr. Hofer's affidavits are silent on this point. In his Affidavit No. 2, Mr. Hofer also misidentifies the July 4 Letter as a letter dated June 25, 2014. I note that Mr. Leelh's

letters to the Board (dated July 5 and July 22, 2013, Exhibit 12 to Mr. Dong's Affidavit No. 3 and Exhibit "G" (pp. 49 and 50) to Mr. Hofer's Affidavit No. 1, respectively) mention "Refer to Mike's statement". An inference might be drawn (in the absence of some further explanation) that Mr. Leelh had been given a copy of the July 4 Letter, contrary to what Mr. Leelh says in his affidavit. Thus, an important factual issue, relevant to publication of the July 4 Letter, cannot be resolved on the basis of the paper record.

- [30] With respect to Mr. Dong's claim for damages based on alleged intentional interference with economic relations, Mr. Dong alleges in the Legal Basis section of the amended notice of civil claim, and in relation to Ms. Orina:
45. Defendant intended to injure the plaintiff economic interest by calling Ms. Orina and instructing her to deal with Mr. Leelh, as a result this economic relationship ended and plaintiff suffered the damages set out above.
- [31] The facts pleaded in Part 1 in support of this claim are set out in paras. 10 and 35 to 37. In para. 10, Mr. Dong alleges:

Intentional Interference with Orina

10. On and around June 8, 2012, Defendant wrongfully called Ms. Orina without Plaintiffs' [sic] knowledge and instructed her to deal with Mr. Leelh regarding the 29th Property. Ms. Orina informed Plaintiff of this phone call.
- [32] The facts alleged in paras. 35 to 37 are the facts alleged in support of Mr. Dong's first slander claim.
- [33] Next, in relation to his claim concerning alleged intentional interference with his economic relations with Sutton, Mr. Dong alleges in the Legal Basis:
46. Defendant intended to injure the plaintiff economic interest with Sutton by unlawfully making the defamatory remarks particularized above to Ms. Hackett, whereby the Plaintiff was unable to join any of the 17 Sutton offices and as a result the plaintiff suffered the damages set out above.
- [34] The "defamatory remarks" are alleged in Part 1 to have been made in the June 13 Email: see the amended notice of civil claim paras. 12 to 16.
- [35] Finally, in relation to his claim concerning alleged intentional interference with his economic relations with Royal Pacific, Mr. Dong alleges in the Legal Basis:
47. Defendant intended to injure the plaintiff economic interest with [Royal Pacific] by making defamatory remarks. As a result [of] this unlawful act, the economic relationship between plaintiff and [Royal Pacific] was terminated and plaintiff suffers the damages as set out above.
- [36] The facts are alleged in paras. 24 to 30 of the amended notice of civil claim.

Discussion

[37] A summary trial is, of course, governed by Rule 9-7 of the Supreme Court Civil Rules. Rule 9-7(15) provides that:

(15) On the hearing of a summary trial application, the court may:

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application[.]

[38] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed (at p. 211) that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so." In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[39] To this list has been added other factors including: the cost of the litigation and the time of the summary trial; whether credibility is a critical factor in the determination of the dispute; whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and whether the application would result in litigating in slices. See *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263, at para. 12, aff'd 2006 BCCA 369.

[40] All parties to an action must come to a summary trial hearing prepared to prove their claim or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner.

[41] A summary trial, although heard on affidavits in chambers, remains a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proof of establishing his or her claim(s) and the defendant (even if not the applicant) retains the burden of establishing any defence that is raised. See *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.), at p. 352. This, in my opinion, is particularly important in the context of the defamation claims, where, for example, Mr. Hofer has raised the defence of absolute privilege in relation to the July 4 Letter.

- [42] The fact that there are conflicting affidavits does not necessarily make this matter unsuited to summary trial. On this point, McEachern C.J.B.C. observed in *Inspiration Management* that a chambers judge is not obliged to remit a case to the trial list just because there are conflicting affidavits. The Chief Justice observed that other admissible evidence could make it possible to find the facts necessary for judgment to be given. However, where credibility is a material issue, and cannot be resolved by the body of written evidence, the courts have often found it difficult to find the necessary facts based on the contradictory affidavit evidence of witnesses alone, and have also found it unjust to decide the issues without allowing for cross-examination.
- [43] On behalf of Mr. Hofer, Mr. Clifford submits that the issues in this action are suitable for disposition by summary trial, particularly having regard to the object of the Rules as being to "secure the just, speedy, and inexpensive determination of every proceeding on its merits." In Mr. Clifford's submission, this includes conducting the proceeding in ways that are proportionate to the amount involved, the importance of the issues in dispute and the complexity of the proceeding.
- [44] The basic principles applicable to defamation claims, including defences such as absolute privilege, are conveniently summarized by Kloeckman J. in *Fouad v. Longman*, 2014 BCSC 785, beginning at para. 62. I have considered whether disposition of this action on a summary trial is appropriate in the light of these principles. In the discussion of the defence of absolute privilege, for example, Kloeckman J. (at para. 90) sets out four factors to be considered in deciding whether a tribunal is sufficiently judicial to warrant absolute immunity in regard to its proceedings. In relying on the defence of absolute privilege in relation to the July 4 Letter, Mr. Hofer wishes the court to find these factors are satisfied in respect of the Board. However, such a finding requires admissible evidence.
- [45] I do not agree with Mr. Dong's argument that this matter is too complex to be decided on a summary trial. Mr. Dong submitted a very substantial volume of material in his Affidavit No. 3, which contained over 130 exhibits. Much of that material was of questionable relevance and admissibility, and was unpersuasive in support of Mr. Dong's argument concerning complexity. As Chief Justice McEachern observed in *Inspiration Management*, at para. 60: it should not be good enough in such serious matters, for a party to throw up volumes of ill-considered affidavits and exhibits which do not squarely raise or answer the real issues in the case.
- [46] However, I have concluded that, with respect in particular to the slander claims, credibility is a material issue and it cannot be adequately resolved on the basis of a paper record, nor would it be just to do so. With respect to the Peck Conversation, for example, Mr. Hofer's and Mr. Peck's credibility and reliability are significant matters, and the contents of their affidavits filed on the summary trial application raise questions about both. In addition, on the whole of the evidence presented on the summary trial application, Ms. Orina's credibility and reliability as a witness appears questionable. This is something that could pose a serious problem for Mr. Dong in the prosecution of one of his defamation claims.

However, the credibility and reliability of these witnesses are not issues that can be resolved on the basis of a paper record, without cross-examination. Further, Mr. Leelh's assertion in his affidavit that he did not receive a copy of the July 4 Letter from Mr. Hofer appears to be at odds with some of the content of his own responses to the Board. The evidence on this point is relevant to publication of the July 4 Letter, and cannot be resolved on the basis of a paper record, in my opinion.

- [47] Moreover, in my opinion, the evidence presented on the summary trial does not allow me to find the facts necessary to reach a conclusion on the defence of absolute privilege, and I have concluded further that it would be unjust to both parties to attempt to do so.
- [48] I have considered whether I could make the necessary findings of fact to deal with discrete claims, for example, the defamation claim in relation to the June 13 Email. However, even if I were to do that, a decision on that particular claim would, at best, decide a "slice" of the litigation, and I cannot see any justification for such piecemeal decision-making in relation to the defamation claims in this case.
- [49] Accordingly, I conclude that the defamation claims are not suitable for disposition by summary trial.
- [50] However, in my opinion, Mr. Dong's claim for damages based on the tort of intentional interference with economic relations is on quite a different footing from the defamation claims.
- [51] There is no dispute between the parties concerning the essential elements of the tort. They are set out in, for example: 0856464 B.C. Ltd. v. TimberWest Forest Corp., 2012 BCSC 597, at para. 30; and Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57, at para. 81.
- [52] One of the essential elements is that the interference is by way of illegal or unlawful means.
- [53] In A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, Cromwell J. (for the court) explained this requirement. He wrote [underlining added]:
- [23] The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party): [citations omitted]. There is no dispute here that this is an intentional tort; the focus of the dispute in this case is on the unlawful means element.

...

- [26] The scope of the unlawful means tort depends on the answers to three questions. First, does the unlawful conduct have to be actionable by the person at whom it is immediately directed? In my view, the conduct must be an actionable civil wrong or conduct that would be actionable if it had caused loss to the person at whom it was directed. . . .
- [54] Cromwell J. concluded on this essential element [underlining added]:
- [76] I conclude that in order for conduct to constitute "unlawful means" for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.
- [55] Here, Mr. Dong has neither pleaded, nor, in response to the defendant's application for a summary trial, has he proved any conduct perpetrated by Mr. Hofer against any third party that would give rise to a civil cause of action by that third party. The allegations in the amended notice of civil claim that I have referred to above might provide support for the defamation claims. However, based on Bram, they are wholly insufficient to support the claim for intentional interference with economic relations.
- [56] It follows that Mr. Dong's claim for damages based on intentional interference with economic relations must be dismissed, as he has failed to make out an essential element of the cause of action, and I so order.

Disposition

- [57] In summary, Mr. Dong's claim for damages based on intentional interference with economic relations is dismissed. However, with respect to his claim for damages for defamation, I conclude that I am unable, on the whole of the evidence, to find the facts necessary to decide the issues and that it would be unjust to decide them on a summary trial.
- [58] With respect to costs of this application, I consider the appropriate order, subject to any submissions that the parties wish to make at this time, to be to reserve the costs of this application to the trial judge;
- [59] That concludes my reasons.

"Adair J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/24/2016BCSC2440.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/dong-v-hofer-2016>

Prepared on 27 October 2026 · Esheria