
CANADA / JUDGMENT

Emerald Passport Inc. v. MacIntosh

2009 BCSC 593

COURT

Supreme Court of British Columbia

DECIDED

30 April 2009

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2009 BCSC 593 Emerald Passport Inc. v. MacIntosh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Emerald Passport Inc. v. MacIntosh,

2009 BCSC 593

Date: 20090430

Docket: S071061

Registry: Vancouver

Between:

Emerald Passport Inc.

Plaintiff

And

Laurie MacIntosh, and the said Laurie MacIntosh dba Gold Key Marketing,

goldkeymarketing.com, goldkeyenterprises.info and

goldkeymarketing.net

Defendants

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

In Chambers

Counsel for the plaintiff:

J. L. Williams

Appearing for the defendant:

Laurie MacIntosh, In Person

Date and Place of Trial/Hearing:

March 19, 2009

Prince George, B.C.

[1] The defendant applies for various relief pursuant to his notice of motion filed February 24, 2009. The relief sought is set out in 7 paragraphs of the notice of motion as follows:

1. The Plaintiff and its [sic] employees, distributors and agents be restrained from publishing all copyright protected materials including concepts, layout, text, graphics, html code and script taken from any of the defendant's websites.
2. The Plaintiff and its employees, distributors and agents remove from all their websites all copyright protected materials including concepts, layout, text, graphics, html code and script taken from any of the defendant's websites.
3. The Honorable Madame Justice Hump[er]ies Order be amended to reflect the following:
 - a) The words "or any other internet website" be deleted from subparagraphs 2(b)(i) and 2(b)(ii).
 - b) Paragraphs 2(c), 2(g) and 2(h) be deleted.
4. The Plaintiff and its solicitors provide proof to the defendant within 14 days that they have sent a letter with a copy of this order by way of facsimile to Google Inc. withdrawing their complaint and requesting GoldKeyMarketing.net be restored to its original status.
5. The Plaintiff and its employees, distributors and agents be restrained from contacting any third party for the purpose affecting the status of the defendant's websites or any other form of marketing unless agreed otherwise in writing.
6. The Plaintiff and its employees, distributors and agents except for their counsel on record be restrained from coming within 100 meters of the defendant and his family or having any other contact with the defendant and his family which is to include telephone, email, written communications, and all forms of internet communication.
7. Any other form of relief this court deems necessary.

[2] This file was previously before the court on September 9 and 10, 2008, when the plaintiff applied for an interlocutory injunction in terms that had previously been granted on an interim basis, and at the same time the defendant applied for an order setting aside the interim injunction.

- [3] After hearing from counsel and Mr. MacIntosh, Mr. Justice Grauer determined that the plaintiff was entitled to an interlocutory injunction on an ongoing basis although he did make changes to the terms of the interim injunction which had previously been made by Humphries J. and later amended by Leask J. Mr. Justice Grauer dismissed the defendant's application to set aside the interim injunction which had previously been made. Costs were ordered in the cause. Grauer J.'s reasons are cited at 2008 BCSC 1289.
- [4] The background of the present litigation was canvassed by Grauer J. commencing at para. 12 and continued to para. 33. I do not intend to cover the background in the detail that was canvassed by Grauer J. except to say that his recitation of the evidence pertaining to the background appears consistent with the affidavit material that I have reviewed on this application. Essentially, the action commenced by the plaintiff company is for damages against the defendant and his various businesses for allegedly passing himself off as being connected to the plaintiff, breaching its trademark rights and competing unlawfully with the plaintiff by breaching Mr. MacIntosh's distributor agreement with the plaintiff. In addition the plaintiff claims damages for the defendant having defamed the plaintiff, misuse of confidential information and unlawfully interfering with the plaintiff's economic interest.
- [5] Since the decision of Grauer J. was handed down on September 26, 2008, additional affidavits have been filed as follows:
1. Affidavit of Laurie MacIntosh #12, filed February 24, 2009;
 2. Affidavit of Laurie MacIntosh #13, filed February 24, 2009;
 3. Affidavit of Maureen Bergh #4, sworn March 16, 2009;
 4. Affidavit of Ritchie Ho #1, sworn April 12, 2007;
 5. Affidavit of Laurie MacIntosh #15, filed March 19, 2009;
 6. Affidavit of Maureen Bergh #2, sworn March 10, 2009;
- [6] This matter is a Vancouver Registry action however pursuant to the order of Groves J. all interlocutory motions were to be held in Prince George. As a result, on the date of hearing, I did not have copies of all the recently filed affidavits so have merely referred to any unfiled affidavits by the date on which they were sworn.
- [7] The trial of this matter is presently set to commence in Vancouver on November 23, 2009 for 15 days.
- [8] The defendant has filed a counter-claim in these proceedings seeking special, general, aggravated and punitive or exemplary damages and monetary amounts in excess of \$1 million.

- [9] In Mr. MacIntosh's affidavits #12 and #13, he describes events that have transpired since Grauer J.'s decision of September 26, 2008. At para. 28 of his affidavit #13, he describes the impact that the interlocutory injunction now in place has had on him with respect to his attempts to seek employment. He states:
28. Emerald Passport's conduct in this matter has had and continues to have a severe impact on me. As an individual with a permanent disability, I am limited in the type of work I can do as I cannot do any heavy lifting or spend prolonged periods of time on my feet. I have therefore chosen internet marketing as my career. When Emerald Passport, through their deceptive conduct, had my website de-listed, I had no choice but to seek employment. I was hired by Visions Electronics to manage their Kiosk which would have made me responsible for computers, digital phones, PDAs, cameras, and camcorders. In our arrangement, I would have earned commission on personal sales, department sales volume, and all cell phone activations in addition to a department head salary and bonuses. However, on my first day of work, I was handed the Visions Hire Package which included consent forms to allow BackCheck to do a background check. A true copy of these consent forms are attached as exhibit "T". When I saw that part of their background check was a civil court check, I explained the situation to the [sic] Brandon Mutala who is the General Store Manager who hired me. Brandon told me that the background checks were mandatory and decisions arising from the results of background checks were made at their corporate head office and if I had a company suing me because I allegedly stole their customer list, I would not make it through their screening process. Emerald Passport has made serious allegations based on evidence of a prima facie nature and after two years, not only have they failed to provide any evidence to support their claim, but Jonathan Williams of Owen Bird Law Corporation has told me they have plans to drag this out for another three years. I believe the reason they intend to drag this out is they know they can't win because they don't have any witnesses left as almost every individual who has sworn an affidavit in support of Emerald Passport's action have now resigned and are now singing a different tune. The few that remain are like Christian Martin Desharnais who are involved in certain improprieties and would not be considered credible.
- [10] I will now turn to each of the items of relief sought in the defendants' notice of motion.
- [11] Paragraphs 1 and 2 seek injunctive relief. A review of the counter-claim issued by the defendant clearly demonstrates that the relief sought in paragraphs 1 and 2 do not relate to matters raised in the pleadings. The counter-claim appears to claim damages for misrepresentation and civil conspiracy only, and no claim is made out relating to the defendants' alleged copyright and breach of same.

[12] The pleadings represent the framework in which the court deals with issues arising in the litigation before the court. An injunction may not be granted in terms that go beyond the claims set forth in the pleadings. This point was addressed by McLachlin C.J.S.C., as she then was, in *MacLeod Lake Indian Band v. British Columbia*, [1988] B.C.J. No. 2560 (S.C.) where her Ladyship, at the second paragraph of that decision, said:

. . . An injunction may not be granted in terms that go beyond the claim set forth in the pleadings: *Atkins & Durbrow Ltd. v. Bell and Mainland Foundry Co. Ltd.* (1958), 14 D.L.R. (2d) 94 (B.C.C.A.).

[13] In the *Atkins* case, *supra*, Coady J.A. also made it quite clear that a case possibly made out by affidavits on the motion for an interlocutory injunction must correspond with the allegations in the statement of claim. At paragraph 7 of the *Atkins* decision, the court said:

7 The injunction must be interpreted in relation to the claim as set out in the endorsement. To interpret it otherwise would be to hold that the injunction was granted in terms beyond that which the party is entitled on the pleadings. As stated by Bergman J.A. in *Crichton v. Zelenitsky*, [1946] 3 D.L.R. 729 at p. 740, 54 Man. R. 79, "It is elementary that the case made out by the affidavits on the motion for an interlocutory injunction must correspond with the allegations in the statement of claim".

[14] Further damaging to the claim for injunctive relief is the fact that the actions of the plaintiff which Mr. MacIntosh alleges infringed on his copyright were discontinued immediately upon demand, and there is no evidence of further activity after demand was made.

[15] It is trite law that injunctions are granted by the court as a method by which the court seeks to maintain the status quo until trial. Therefore, at the time this matter came before the court, besides there being no pleadings to support the relief sought there appears to be no rights that are threatened which require the court's intervention to preserve alleged rights.

[16] Attached to the affidavit of Maureen Bergh #4, sworn March 16, 2009, was an unfiled sworn affidavit of Christian Desharnais, a principal of the plaintiff. In that affidavit, the plaintiff has admitted that it created a website which "mirrored" the defendants' website, however the sworn evidence is that that was solely for the purpose of researching the method by which the defendants' website continued to outscore the plaintiff's website.

[17] The Copyright Act, R. S.C. 1985, c. C-42, provides, at s. 29, that:

29. Fair dealing for the purpose of research or private study does not infringe copyright.

[18] Mr. Desharnais, in his affidavit, states that the purpose of the "mirror" website was to research the damage that was being caused to the plaintiff. Mr. Desharnais swears that the research was not to gain an unfair competitive advantage over the defendants but was rather to protect rights of the plaintiff. Further, Mr. Desharnais has sworn that the plaintiff has no copyright protected materials belonging to the defendants on any of its websites, and that the plaintiff has no intention of using any copyright protected material or any material

belonging to the defendants.

- [19] With respect to relief sought in paragraph 3, being the amendment to Madam Justice Humphries' order, there seems to be some confusion. Humphries J. only made an interim order while it is the order of Mr. Justice Grauer which is now the interlocutory injunction in place. Justice Grauer essentially adopted, after a full hearing, the wording of Humphries J.'s interim order and made it an interlocutory order.
- [20] I see no reason at law or on the basis of the evidence placed before me to amend the sections of the interlocutory order made by Grauer J. in his order of September 26, 2008. The basis for the relief sought simply does not justify any variation of the terms sought in paragraph 3 of the defendants' notice of motion.
- [21] I agree with the submissions of the plaintiff that the relief sought in paragraph 3 of the notice of motion is merely an attempt by the defendants to reargue the motion that was before Mr. Justice Grauer for two days. Upon a review of the affidavit material filed since the hearing on September 9 and 10, I find no new facts that have arisen since that date which would even justify a variation.
- [22] Grauer J.'s concern as to Mr. MacIntosh's legal obligations regarding possible marketing is apropos to this part of the defendants' notice of motion. At paragraph 41 of his September reasons, Justice Grauer stated:
- [41] As to the first point, I asked Mr. MacIntosh what it was that he wanted to do that he was now prevented from doing. The answer was, in essence, guerrilla marketing. It is not possible for me to determine to what extent the injunction actually prevents this. It seems to me that guerrilla marketing carried out in one way might be quite lawful, and therefore would not contravene the terms of the injunction as sought. Carried out another way, however, it might very well prove to be unlawful, and thereby restrained. It is certainly not clear to me on the basis of his past actions that Mr. MacIntosh has a healthy grasp of the reasonable limits of such activity.
- [23] I do not sit in appeal from an order made by another judge of this court.
- [24] With respect to the relief sought in paragraphs 4 and 5 of the defendants' notice of motion, again, the same comments I made with respect to the relief sought in paragraphs 1 and 2 of the defendants' notice of motion apply equally to the relief sought in these paragraphs. The relief sought simply does not relate to matters raised within the four corners of the pleadings that are presently in place and the facts alleged disclose no cause of action. The plaintiff did send a copy of the order of Madam Justice Humphries to Google but there is certainly nothing unlawful about such an activity. The matter later came before Mr. Justice Leask who clarified a portion of the order of Madam Justice Humphries but the order of Humphries J. was still in full force and effect. A review of Leask J.'s order certainly did not make the previous order of Humphries J. any less restrictive on the defendants.

- [25] The defendants are certainly free to communicate with Google and provide that corporation with its position.
- [26] Certainly, with respect to the relief sought in paragraphs 1 and 2 and 4 and 5 of the notice of motion, it is, I believe, necessary to set out for an in person litigant the factors that are considered by the court in assessing whether or not injunctive relief should be granted.
- [27] Irreparable harm must be demonstrated. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. Irreparable harm means harm that cannot be quantified in monetary terms. There, of course, are many factors to be considered in assessing the balance of convenience and those factors vary with each case that comes before the court. See *Canadian Broadcasting Corporation v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279, 42 C.P.R. (3d) 526 (B.C.C.A.); *RJR-Macdonald Inc. v. Attorney General of Canada*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.
- [28] I am of the view that notwithstanding the first problem described, being that the relief is not within the pleadings, that certainly with respect to the injunctive relief sought in paragraphs 4 and 5, the balance of convenience simply does not favour the defendants.
- [29] Finally, the relief sought in paragraph 6 of the defendants' notice of motion again does not relate to matters raised in the pleadings. Again, the facts alleged do not support the relief sought either.
- [30] No injunctive relief will be given by this court where the evidence provided is wholly insufficient and highly speculative in any event. This court will make inferences but those inferences must be based on probabilities and not pure speculation.
- [31] For these reasons I have determined that all of the relief sought by the defendants in the notice of motion filed February 24, 2009, must be dismissed.
- [32] At the hearing of this matter the plaintiff argued that, essentially, all the relief sought by the defendants is vexatious, preposterous, and outrageous. The plaintiff has submitted that the defendants have now brought on three applications in Prince George since applying to have the file moved to Prince George for all interlocutory applications. The plaintiff points to the fact that the first application brought by the defendants was adjourned with directions, while the second application was dismissed by Mr. Justice Grauer in his decision of September 26, 2008. With respect to this application, the plaintiff submits that the defendants have sought relief on the basis of claims made without merit and has made scandalous and reprehensible accusations against the plaintiff. As such, the plaintiff submits that an order for special costs is warranted and that to prevent further unmeritorious applications the plaintiff has sought an order that the defendants pay the costs of the plaintiff of this application forthwith in any event of the cause.

- [33] In submissions, the defendant MacIntosh inferred that he is short of monetary funds and no doubt that is why Groves J. ordered that all interlocutory proceedings be held in Prince George where Mr. MacIntosh is resident.
- [34] I have considered the application of the plaintiff for costs payable forthwith and have determined that such an order could possibly stymie the trial of this matter from proceeding. It is obviously a trial that Mr. MacIntosh wants and desires.
- [35] I have determined, for the reasons given, that the relief sought in this notice of motion was doomed from inception. It is therefore not appropriate to give an order for costs in the cause. I order that the plaintiff will have its costs of this hearing in any event of the cause, but not payable forthwith.
- [36] Thus, the defendants' notice of motion of February 24, 2009 is dismissed with costs to the plaintiff in any event of the cause.

"Chamberlist, J."

The Honourable Mr. Justice Chamberlist

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