

CANADA / JUDGMENT

Equustek Solutions Inc. v. Jack

2018 BCSC 329

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 329 Equustek Solutions Inc. v. Jack IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Equustek Solutions Inc. v. Jack, 2018 BCSC 329 Date: 20180226 Docket: S112421 Registry:

Vancouver Between: Equustek Solutions Inc., Robert Angus and Clarma Enterprises Ltd.

Plaintiffs And Morgan Jack aka Matt Garcia aka Matt Garci aka Ian Taylor, Andrew Crawford aka

Derek Smythe, Datalink Technology Gateways Inc., Datalink 5, Datalink 6, John Doe, Datalink

Technologies Gateways LLC, Lee Ingraham aka Darren Langdon, Mike Bunker, Igor Cheifot aka

Jolio Fernandez, Alexander Cheifot aka Randy Schtolz, Frank Geiger aka Felix Fernandez, Alfonso

Doe and Colin Marsh and Kathleen Marsh Defendants Before: The Honourable Madam Justice

Sharma Oral Reasons for Judgment In Chambers Counsel for the Plaintiffs: J. Zeljkovich Counsel

for Google LLC: T.M. Cohen R. Schechter Place and Date of Hearing: Vancouver, B.C. February 26,

2018 Place and Date of Judgment: Vancouver, B.C. February 26, 2018

- [1] THE COURT: This is my judgment on this application for an adjournment brought by the plaintiffs in the underlying action. Google has set down an application to be heard on March 6 and 7 seeking to vacate, or in the alternative vary, the order of Madam Justice Fenlon, which was granted in 2014. That order was an interim injunction requiring Google to remove from all search results, certain web sites, based on the action that the plaintiffs have brought against the defendants (which is set for trial in April). That underlying action is a complicated proceeding relating to alleged theft of trade secrets.
- [2] It is important to note that Google is not a party to the action. It describes itself as an innocent third party because it is not the author of any of the content published on the internet that the plaintiffs say has harmed them. Nor is it alleged that it is.
- [3] Google says that it has always had the right to seek a variation of Madam Justice Fenlon's order: It is a term of the order itself. That right to apply to vary has been recognized and commented on in the prior decisions in the matter in the Court of Appeal and the Supreme Court of Canada. The plaintiffs do not disagree that the right exists. Google further submits that it has not had the ability to apply to vary until recently given some of the comments in the prior judicial decisions. It needed to gather evidence. Google received a decision favourable to it late last year from a US District Court.

- [4] The plaintiffs say that the application set for March 6 and 7 should be adjourned for a number of reasons. Firstly, they say that counsel is not available and that given the complexity and history on this file, the plaintiffs are entitled to insist on counsel of choice to respond to this matter.
- [5] I am not satisfied on the evidence that counsel is not available, but rather that counsel would prefer not to have to deal with this matter before the underlying trial, set to begin in April. In emails exchanged by counsel, counsel stated he had set aside almost all days in March for trial preparation and would not give dates in March when Google's application could be set down. However, that correspondence also reveals that prior to definitely saying he was not available, counsel was trying to gauge how much time would be needed for both the preparation and length of the hearing of Google's application. In addition, I cannot ignore that, in part, his denial of availability was based on the other ground that the plaintiffs emphasized before me, which is their assertion that Google's application has no particular urgency. The plaintiffs also say I should place some weight on their preference to have Google's application heard after trial.
- [6] I disagree with the plaintiffs. Google does not have to demonstrate urgency in order to set down its application. It has no relevance at all. However, Google says even if it did have to demonstrate urgency, it has done so.
- [7] Google is not a party to the action. It has a clear right to seek to vary the order. It has proceeded expeditiously upon receiving judgment in the United States to have this matter heard based on its assertion (confirmed by the US judgment) that each day the interim injunction is in place, causes Google harm. Google's counsel sought in early January to have Madam Justice Duncan hear the matter because she is judicially managing the underlying action, but was advised to place the matter on the regular chambers list. Absent plaintiff's counsel's agreeing to a hearing date before trial, the matter was set down for March 6 and 7 as soon as chambers dates for March were made available.
- [8] The plaintiffs also say, in relation partly to what it says is the lack of urgency but also to what it says is judicial economy, that the application ought to be heard, or would be better heard, and certainly more conveniently heard, after the trial; I do not agree.
- [9] Google is not a party to this action. Obviously it is implicated in the action, but it is not a party. While it is true that if the plaintiffs fail in their action, the injunction expires, it is not for the plaintiffs to insist that Google wait around for end of trial, which it has done, I note, for a number of years. This is despite the fact that the trial has been adjourned a number of times. That is not being critical of the plaintiffs, because I do understand the circumstances in which the defendants they have been chasing are perhaps elusive defendants. However, that is not Google's burden to bear.

- [10] Google has referred me to comments in the previous decisions in this action that if Google had evidence, or could demonstrate, concerns that another jurisdiction felt the injunction negatively impacted core values of freedom of expression or comity, it had the ability to come back to this Court to seek to vary the order. It has done exactly that, and it proceeded as quickly as it could.
- [11] It is of considerable importance that the US District Court has made a final finding that the enforcement of the Canadian injunction in the US is causing irreversible harm to Google. I agree with Google's counsel that the authority and basis of that judgment does engage the core values of freedom of expression in the United States. That right is treated differently than it is in Canada, and comity, with respect, warrants that this Court be very concerned if parties are going to insist on enforcement of a judgment, which another jurisdiction has found is not in compliance with its own laws. In fact, that is exactly the situation referred to by the British Columbia Court of Appeal and the Supreme Court of Canada that would justify Google's application to vary the injunction.
- [12] For all those reasons I do not grant the application for an adjournment. I add that while it is always preferable for counsel to be able to agree on a hearing date, I am satisfied Google's counsel, in these circumstances, proceeded respectfully and appropriately in setting the matter down as she did. She is appropriately advancing the right and interest her client to get a hearing in front of the British Columbia Supreme Court as soon as possible.
- [13] I am also satisfied that Google's application clearly raises a meritorious issue. It is for the judge hearing the application to decide the issue, but I would think the existence of the US judgment is an extremely important change in circumstances relevant to an application to vary Madam Justice Fenlon's order. "Sharma, J."

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