

CANADA / JUDGMENT

Feng v. Antifaev

2020 BCSC 83

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 83 Feng v. Antifaev

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Feng v. Antifaev,

2020 BCSC 83

Date: 20200122

Docket: S182308

Registry: Vancouver

Between:

Tao Feng

Plaintiff

And

Todd Antifaev, Homelife Benchmark Realty Corporation,

Xin Li, Jordan Ponuick, Shawn Smith,

Shawn Smith Personal Real Estate Corporation, and

Bing Wu

Defendants

And

Jin Ling Zhang

Third Party

Before: Master Muir

Reasons for Judgment

Counsel for the Plaintiff:

N. Muirhead

D. Rogers, Articled Student

Counsel for the Defendants, Todd Antifaev, Homelife Benchmark Realty Corporation, and Jordan Ponuick:

S.G. Cordell

Defendants, Xin Li, Shawn Smith, Shawn Smith Personal Real Estate Corporation, and Bing Wu:

No appearances at this hearing

Third Party, Jin Ling Zhang:

No appearance at this hearing

Place and Date of Hearing:

Vancouver, B.C.

January 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2020

introduction

[1] This is an application by the plaintiff for the following orders:

- a) that Todd Antifaev attend a further examination for discovery at a date to be set;
- b) that Mr. Antifaev answer all proper questions, including questions objected to at his examination for discovery conducted August 28, 2019 (the "2019 EFD"); and
- c) that the time spent at the examination for discovery on August 28, 2019 will not be considered in calculating the time allowed for the examination for discovery pursuant to R. 7-2(2) of the Supreme Court Civil Rules.

[2] The plaintiff also seeks special costs of the preparation and attendance at the 2019 EFD payable forthwith, and the costs of this application as special costs.

Background

- [3] The plaintiff alleges that, in November 2017, he and his mother, Jin Ling Zhang, the third party to this action, decided to purchase a property located in Surrey, BC (the "property") that would be immediately suitable for his residence and, within two years, would be suitable to subdivide and redevelop into a number of smaller parcels on which single-family homes could be built (the "property requirements").
- [4] Ms. Zhang attended the offices of the defendant realty company, Homelife Benchmark Realty Corporation ("Homelife"), and spoke to a real estate agent, the defendant, Shawn Smith, who allegedly advised her that he was the agent for the vendors of a parcel of property that could be rezoned to allow subdivision in one to two years that would accommodate 16 houses.
- [5] Mr. Smith then introduced Ms. Zhang to another real estate agent at Homelife, the defendant, Jordan Ponuick. It is alleged that, on a later visit to the property, Ms. Ponuick represented that the property could be developed to build houses similar to the construction then underway on property across the street.
- [6] The plaintiff entered into an agency contract with a senior real estate agent, Todd Antifaev, Ms. Ponuick, and Homelife. An offer was made to purchase the property and the plaintiff advanced a \$350,000 deposit.
- [7] The plaintiff says that the property is not only not suitable for the desired development, but any development of the property is contrary to the community plan.
- [8] The plaintiff filed his notice of civil claim ("NOCC") on February 8, 2018, alleging, amongst other things, that the defendants, Mr. Antifaev, Ms. Ponuick, and Homelife breached contractual duties and were negligent in acting as the plaintiff's real estate agents. In addition, it is alleged that Ms. Ponuick made negligent misrepresentations to the plaintiff.
- [9] In this notice of application, the plaintiff alleges that Homelife was negligent in its training of Ms. Ponuick. The NOCC, however, does not include that allegation. It is alleged that the standard of care required Homelife to exercise reasonable care, skill, and diligence in training and supervising its real estate agents (NOCC, Part 1, para. 43) and that it breached its contract with the plaintiff, and was negligent in its supervision of Mr. Antifaev and Ms. Ponuick (NOCC, Part 3, para. 4).
- [10] There is no allegation that Homelife (or Mr. Antifaev) failed to train Ms. Ponuick properly.

Issues Arising at the 2019 EFD

- [11] The plaintiff says that the 2019 EFD of Mr. Antifaev lasted only 50 minutes and, during that time, Mr. Antifaev's counsel objected 19 times and commented 38 times.

- [12] The plaintiff argues that these disruptions were without merit and created a complete shambles of the 2019 EFD, causing plaintiff's counsel to adjourn the examination for discovery and bring this application.
- [13] From the transcript, it appears the 2019 EFD was relatively uneventful until question 52, when counsel for the plaintiff sought to inquire about what training relating to real estate Mr. Antifaev had given to Ms. Ponuick.
- [14] Ms. Ponuick had been Mr. Antifaev's assistant before she became licenced as a real estate agent. It is clear from the questions Mr. Antifaev did answer later in the examination for discovery that he gave Ms. Ponuick direction and instruction regarding his expectations of her as his assistant, but that he is not a real estate trainer and did not train Ms. Ponuick to become a real estate agent.
- [15] The questions asked by counsel for the plaintiff were initially very general and resulted in a request for clarification of what he meant by "training", which led counsel for the plaintiff to ask Mr. Antifaev what he meant by "training". That led to five or six pages of what appear to have been heated discussions between counsel about the appropriateness and relevance of the question.
- [16] Plaintiff's counsel took the position that regardless of the pleading, the questions were relevant to the alleged negligence of Ms. Ponuick.
- [17] After that go around, counsel for the plaintiff suggested a short break and resumed the examination after about ten minutes.
- [18] After the break, counsel for the plaintiff asked more specific questions and obtained answers from Mr. Antifaev such as:

Q While Ms. Ponuick was working as your unlicensed assistant, did you ever have a discussion with her in which you provided her with education relating in any way to real estate or the duties and responsibilities of a real estate agent?

A While she was unlicensed?

MR. MUIRHEAD: Can you read the question back, please.

(REPORTER READ BACK)

THE WITNESS: Not that I can recall.

Q Is it fair to say you had discussions with Ms. Ponuick in the time where she was your unlicensed assistant in which you provided her with general information about the duties and responsibilities of a real estate agent?

A No.

Q When I am asking you if you had discussions with Ms. Ponuick in which you provided her with general information about a topic, do you understand that to be different than providing training to her about a topic?

A Yes.

Q Is it fair to say that you didn't provide any training to Ms. Ponuick relating to the duties and responsibilities of a real estate agent while she was working as your unlicensed assistant?

A Yes.

[19] The 2019 EFD continued relatively uninterrupted until question 81, when there were questions generally about the "guidance and support" given by Mr. Antifaev to Ms. Ponuick, to which Mr. Antifaev repeatedly answered that, "If she has questions, I will answer them." Four pages of discussion followed.

[20] Counsel for the plaintiff then asked whether Mr. Antifaev ensured that the statements on his website were accurate, which was objected to. As was a question about whether Mr. Antifaev had an obligation to ensure that statements on his website were accurate.

[21] When counsel for the plaintiff narrowed his questions, Mr. Antifaev answered without objection from counsel and further evidence was obtained both as to training, guidance and the statements on the website. In particular, Mr. Antifaev gave evidence that he encouraged Ms. Ponuick to take all the courses she could through the company and that after she was licenced, he was satisfied that she was competent.

[22] After the matters set out above, relative calm prevailed until question 112, when counsel for the plaintiff asked:

Q Is it fair to say that some people who become licenced real estate agents don't have the necessary skills and expertise to competently represent a client who is interested in purchasing real estate at the time that they're licenced in your experience?

MR. CORDELL: It's an irrelevant question. I'm objecting on that basis and on the basis that it's not a question of fact but of opinion.

MR. MUIRHEAD: If you represent a client -

MR. CORDELL: We're not answering hypothetical questions.

MR. MUIRHEAD: Mr. Cordell, he's a professional and we have alleged negligence. I can ask him questions of opinion relating to his experience as a professional.

MR. CORDELL: You have my objection.

[23] Counsel for the plaintiff then, at 11 a.m., decided to take the lunch break so that he could send a case to counsel for Mr. Antifaev. The proceedings reconvened at 12 p.m., at which point the following discussion took place:

MR. MUIRHEAD: Over the break I sent an email to my friend setting out my position on two key points for the scope of discovery including all matters at issue between the plaintiff and the other parties, and second, that a professional who is being sued for negligence may be asked for his expert opinion. My friend doesn't want to discuss this off the record so since you have had the chance to think about it, what is your position?

MR. CORDELL: With respect to the first point, I do not believe I maintain an objection solely on the basis that a question could be asked of another witness. With respect to the second point, the case you have provided to me and the cases which deal with it do not stand for the proposition that you may ask hypothetical questions about standard of care. What they do is stand for the proposition that you may ask a person who has expertise in an area based on facts already known to him for an opinion. I maintain my objection that you may not elicit standard of care evidence based on hypothetical facts given to this witness.

MR. MUIRHEAD: All right. I'm going to adjourn the discovery, then, so we can address this in chambers.

Legal framework and analysis

- [24] The often cited decision of Madam Justice Griffin, as she then was, in *Kendall v. Sun Life Assurance Co. of Canada*, 2010 BCSC 1556, sets out the applicable rule and the approach that should be taken on an examination for discovery:
- [6] Rule 7-2(18)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules of Court] sets out the scope of examination as follows:
- (18) Unless the court otherwise orders, a person being examined for discovery
- (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action,
- [7] Despite a variety of substantive changes to the Rules of Court enacted effective July 1, 2010, the scope of examination for discovery has remained unchanged and is very broad.
- [8] The scope of discovery "relating to a matter in question in the action" is defined by the pleadings generally, having in mind that pleadings and particulars may be amended: *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 1979 CanLII 489 (BC CA), 11 B.C.L.R. 142 (C.A.) [Cominco] at paras. 8-9.
- [9] Furthermore, just because an area of examination for discovery may expose a great deal of material is not a reason to limit an otherwise proper area: *Cominco* at paras. 18-19.
- [10] Because of the nature of cross-examination and the generally wide scope of examinations for discovery, it will not always be clearly apparent that a single question will produce relevant evidence. Nevertheless, unless it is very clear that the answers may not be relevant to the issues, the better course is to allow the questions: *Cominco* at paras. 9, 63. In this regard, it has to be kept in mind that what might be a permissible question on discovery,

without objection, is not a concession that the question, and evidence it adduces, is admissible at trial.

- [11] The legal authorities emphasize the proposition that an examination for discovery is a cross-examination, and counsel for the examinee must not unduly interfere or interrupt the examination.
- [12] Counsel for the party being examined should not interfere on the cross-examination on examination for discovery unless it is "clearly necessary to resolve ambiguity in the question or to prevent injustice": *Day v. Hume*, 2009 BCSC 587 [Day] at para. 20. Any such intervention "should not be in a form that suggests to a witness what a desirable answer might be" (*Day* at para. 20). However, objections on the grounds of privilege are warranted as the scope of discovery does not extend to privileged matters: Rule 7-2(18)(a).
- [13] While the scope of examination for discovery has not changed with the new Rules of Court brought into force on July 1, 2010, the length of examination for discovery is now limited to seven hours or any greater period to which the person to be examined consents: Rule 7-2(2).
- [14] The newly imposed time limit on discovery makes it all the more important that the courts enforce the principle that counsel for the examined party must not unduly interfere or intervene during the examination for discovery. The time limit imposes a self-policing incentive on the examining counsel to be focused and to not waste time on questions that will not advance the purpose of investigating the case or obtaining admissions for use at trial.
- [15] While the time limit on examination for discovery creates an incentive on the examining party to be efficient, it unfortunately also creates a risk that counsel for the examinee will be inefficient by unduly objecting and interfering on the discovery, for the purpose of wasting the limited time available. If that party is economically stronger than the examining party, it also can strategically increase the costs of litigation this way, by burdening the financially disadvantaged party with having to bring a court application to obtain a proper discovery.
- [16] The proper conduct of an examination for discovery within the spirit of the Rules thus relies on the professionalism of counsel for the party being examined.
- [17] As held by the Ontario Superior Court in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.* (2006), 2006 CanLII 35612 (ON SC), 83 O.R. (3d) 438 at para. 4:

Improper interference by counsel in the other party's discovery undermines the purposes of discovery, prolongs it, fosters professional mistrust and generally offends the overall purpose of the Rules .

- [18] A largely "hands off" approach to examinations for discovery, except in the clearest of circumstances, is in accord with the object of the Rules of Court, particularly the newly stated object of proportionality, effective July 1, 2010. Allowing wide-ranging cross-examination on examination for discovery is far more cost-effective than a practice that

encourages objections, which will undoubtedly result in subsequent chambers applications to require judges or masters to rule on the objections. It is far more efficient for counsel for the examinee to raise objections to the admissibility of evidence at trial, rather than on examination for discovery.

- [25] As Griffin J. noted, objections and interruptions in examinations for discovery are to be discouraged, except in the clearest circumstances, as they often do no more than prolong the inevitable, and waste discovery time and, eventually, court time. That is exactly what happened here.
- [26] It is not apparent why counsel for Mr. Antifaev made such a fuss over the questions asked about "training". Had the witness been allowed to answer, his differentiation of training as a real estate agent versus instructions to Ms. Ponuick as his assistant, might have been evident much earlier and the disruption totally avoided. Unfortunately, that dispute seems to have coloured the rest of the attempted examination and fostered the professional mistrust noted in the Iroquois Falls decision quoted by Griffin J. above.
- [27] Given the allegations of negligence against both Mr. Antifaev and Ms. Ponuick, whether or not Mr. Antifaev had provided training to Ms. Ponuick was a suitable avenue to pursue on discovery and counsel's interference with this aspect of the examination for discovery was uncalled for.
- [28] Counsel for Mr. Antifaev obviously agreed that the subject of training was an appropriate one for examination, as he allowed questions later in the 2019 EFD that elicited evidence on that issue.
- [29] His objections on the training issue led to the objections on the "guidance" issue and the total effect was a wasting of the time available to counsel for the plaintiff in his examination of Mr. Antifaev. As noted by Griffin J., given the limited time available for examinations for discovery, courts must be vigilant to ensure that such actions are discouraged.
- [30] The next issue arose when counsel asked the witness:
- Q Is it fair to say that some people who become licenced real estate agents don't have the necessary skills and expertise to competently represent a client who is interested in purchasing real estate at the time that they're licenced in your experience?
- [31] The question clearly seeks an opinion from Mr. Antifaev.
- [32] In *Teachers' Investment & Housing Co-operative (Trustee of) v. Jennings*, [1992] 1 W.W.R. 505 (B.C.C.A.), Madam Justice Rowles, after setting out the normal rule that a witness could not be asked his or her expert opinion, noted the acknowledged exceptions and commented at 509:

The rationale underlying the second exception and its extension, Mr. Gill submitted, is that where a professional person is being sued for breach of duty, his own professional competence and conduct is clearly in issue and, accordingly, his judgment and opinions about the standard of care he was required to meet and his judgment with respect to what constituted a proper discharge of his duties and the applicable standard caused him to carry out the impugned course of conduct.

[33] Counsel for the plaintiff also referred me to the decision of Madam Justice Garson in *Forliti et al v. Woolley et al*, 2002 BCSC 858, where, at para. 9, she set out the following:

[9]

- (c) A witness need not answer questions soliciting an opinion on an examination for discovery. There is an exception to this rule where the party examined is asked questions regarding his or her professional conduct or competence where that conduct and/or competence is in issue in the action. Questions soliciting an opinion must pertain to the area of expertise of the individual being examined. The party being examined need not answer questions pertaining to the conduct of another defendant. For example in this case the doctor sued for professional negligence may properly be asked questions which solicit from him his professional opinion concerning his own treatment of Ms. Forliti during her labour and delivery, but he may not be asked questions which solicit from him an opinion as to the negligence of another doctor or a nurse.

Teachers' Investment & Housing Co-operative (Trustee of) Jennings Chong (Guardian ad litem of) v. Royal Columbian Hospital (1996), 2 C.P.C. (4th) 242

Gelt Holdings Ltd. v. Pannell, (1997), 13 C.P.C. (4th) 249 (B.C.S.C.).

Crocker v. MacDonald, (1992), 1992 CanLII 4500 (NS SC), 116 N.S.R. (2d) 181 (N.S.S.C.T.O.).

(But see also *Beber v. Bloch*, [2000] O.J. No. 3142 (Q.L.) (Ont. S.C.J.)) in which the Ont. S.C.J. per Lamak J. held that it was not "improper on discovery to seek the opinion of one defendant about the conduct of another".)

- (d) Hypothetical questions may properly be put to a witness where the witness has expertise and when the hypothetical question is relevant to some issue in the case, provided the question is not overly broad or vague.

***Motaharian v. Reid* (1989), 39 C.P.C. (2d) 141 (Ont. H.Court)**

[34] Counsel for the defendants on this application submitted that the decision in *Forliti* was per incuriam, particularly in regards to hypothetical questions, as it did not reference some of the leading cases on the issues. As noted by counsel for the plaintiff, *Forliti* is binding upon me, and I do not see any substantial difference between the principles set out therein and those in the other significant cases on these issues. Further, *Forliti* has been judicially considered many times without negative comment.

[35] It is useful to look at the actual quote from *Motaharian (Litigation guardian of) v. Reid* (1989), 39 C.P.C. (2d) 141 (Ont. S.C. - H.Ct.J.), referenced by Garson J. in *Forliti* regarding hypothetical questions. Mr. Justice Smith, in that case, held (at 142):

Hypothetical questions are not per se improper. They invariably seek an opinion, whether a general or specific one. They should be permitted where the witness has expertise, when relevant to some issue in the case, provided they are not overly broad or vague. Another proviso should be added: a witness need not defend other persons' actions or answer for their failures. No opinion should, therefore, be elicited from a medical doctor respecting the acts, omissions or judgment of other doctors, nurses or other hospital employees.

[36] I conclude that hypothetical questions designed to elicit an opinion relevant to some issue in the case from an expert witness are permissible providing they go to that witnesses' conduct and competence and with the caveat that they must not be too broad or vague.

[37] Counsel for Mr. Antifaev also argued that there were no factual allegations in the pleadings that Mr. Antifaev had done anything wrong, that there were no allegations that he had anything to do with the plaintiff, other than bald allegations of negligence. Hence, he argued, there is no factual matrix upon which Mr. Antifaev's opinion could be sought.

[38] It is pleaded, however, that Mr. Antifaev was a signatory to the agency contract with the plaintiff, that he had obligations to the plaintiff under that contract and owed him a duty of care, and that he breached that contract and was negligent.

[39] The particulars of the breach of contract and negligence of Mr. Antifaev are the general ones set out in para. 44 of the NOCC. They include, for example, that he and Ms. Ponuick failed to disclose to the plaintiff all known facts that may affect or influence his decision, that they failed to use reasonable care and skill in performing their duties, and that they failed to take any, or reasonable, steps to ensure that the property met the property requirements.

[40] That pleading is sufficient to found the claim against Mr. Antifaev, and in particular is a sufficient basis from which to conduct an examination for discovery.

[41] I conclude that questions directed at Mr. Antifaev's opinion as to his professional conduct or competence, and in particular questions related to the obligations alleged in para. 44 of Part 1 of the NOCC, are acceptable.

[42] And thus, hypothetical questions directed at Mr. Antifaev's own obligations and actions, particularly as set out in para. 44 of Part 1 of the NOCC, are acceptable. Questions asked of Mr. Antifaev and directed, for example, at the actions of Ms. Ponuick, are not.

[43] Given that the questions prior to question 112 were solely about the training and guidance of Ms. Ponuick, it was fair to assume that the question was wrongly attempting to elicit an opinion of her ability as an agent and, thus, objectionable.

[44] The question itself, however, is so vague and broad as to be objectionable in any event and I will not order that the question be answered.

Conclusion

[45] I have concluded that counsel for Mr. Antifaev made unnecessary objections and interruptions at the examination for discovery of Mr. Antifaev. As a result, the plaintiff's examination for discovery was delayed improperly and tainted with distrust and, hence, additional time should be allowed. I will grant the order sought in para. 2 of the plaintiff's notice of application that the time spent in 2019 EFD shall not be considered in calculating the duration of the examination for discovery of Mr. Antifaev.

[46] The application to require Mr. Antifaev to answer questions objected to is dismissed as, in my view, allowable questions were adequately answered later in the discovery. The hypothetical question 112 is improper as it is too vague and broad and it need not be answered.

[47] The application to require Mr. Antifaev to answer questions left as requests on the record was not argued by counsel and is, therefore, adjourned generally.

[48] I will not order that Mr. Antifaev, "answer all other proper questions", as, in my view, that type of order is unnecessary: *Scarmar Constructions Ltd. v. British Columbia Railway Co.* (1984), 43 C.P.C. 301 (B.C.S.C.) at para. 12:

The Rules of Court having established the procedures and remedies which regulate the issue between the parties, this Court should not exercise its discretion to give a mandatory order that the defendants or their representatives must attend for discoveries and must answer questions on the pleadings. The order is unnecessary.

[49] I do not consider that the actions of counsel for Mr. Antifaev warrant awarding the plaintiff special costs of preparation for and attendance at the 2019 EFD, but I am of the view that the plaintiff should have costs for that examination for discovery in any event of the cause and I so order.

[50] Given the mixed success on this application, the parties will bear their own costs.

"Master Muir"

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