

CANADA / JUDGMENT

Green Stream Botanicals Corp. v. Pivot Pharmaceuticals Inc.

2020 BCSC 166

COURT

Supreme Court of British Columbia

DECIDED

17 January 2020

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2020 BCSC 166 Green Stream Botanicals Corp. v. Pivot Pharmaceuticals Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Green Stream Botanicals Corp. v. Pivot Pharmaceuticals Inc.,

2020 BCSC 166

Date: 20200117

Docket: S199678

Registry: Vancouver

Between:

Green Stream Botanicals Corp.

Plaintiff

And

Pivot Pharmaceuticals Inc.

Defendant

Corrected Judgment: The front page of the judgment was corrected on February 14, 2020.

Before: Master Cameron

Oral Reasons for Judgment

Counsel for Plaintiff:

S. Nelligan

C. Chiu

Counsel for Defendant:

J. Rost

Place and Date of Hearing:

Vancouver, B.C.

January 14, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2020

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THE APPLICATION

- [1] The defendant, Pivot Pharmaceuticals Inc., applies to set aside a garnishing order before judgment. Pursuant to the order, the garnishee, National Bank of Canada, paid the sum of \$600,265 into the registry of the Supreme Court.
- [2] The facts and circumstances pertinent to the application can be easily distilled from the helpful written submissions provided by both parties.
- [3] The action concerns a claim for a fee payable under a finder's fee agreement.
- [4] The affidavit filed in support of the garnishing order before judgment was affirmed by Thuy Hanh Vu Nguyen on September 12, 2019, and filed September 13, 2019. The affidavit alleges at para. 3, the nature of the cause of action for which the action is brought is debt owing to the plaintiff under a finder's fee agreement.
- [5] At para. 4, the affidavit provides that the defendant is justly indebted to the plaintiff in the amount of \$600,000 in cash after making all just discounts.

[6] The amended notice of civil claim is attached as Exhibit A to the affidavit and describes the finder's fee agreement as an oral agreement, the terms of which were put into writing in or around April 2019. The affidavit does not attach the finder's fee agreement or provide the date of the agreement. The amended notice of civil claim does set out at para. 14 the following terms from the finder's fee agreement:

1.4 Finder's Fee

If during the term of this agreement the company enters into any agreement with any prospective investor introduced by the finder to the company during the term of this agreement, Pivot agrees to pay the finder as compensation a fee equal to 4 percent to be taken in cash and 4 percent to be taken in warrants of the company with exercised price at the same terms as the financing.

1.5 Fee Payment Terms

The fee shall be due and payable in cash and share purchase warrants by the company to the finder within 10 business days of the closing of any transaction.

[7] A finder's fee agreement matching the description contained in the amended notice of civil claim was located in Pivot's records and is dated April 10, 2019. The finder's fee agreement contains the following additional terms:

This agreement is dated the 10th of April, 2019 (the effective date).

1.1 Services

The finder shall use its commercially reasonable efforts to assist the company by introducing prospective investors to the company with a view to raising equity investment for the company. The company acknowledges and agrees that the services of the finder hereunder are nonexclusive to the company and that the finder may provide concurrent identical services to any third parties during the term of this agreement. The term of this agreement shall commence on the effective date. The finder shall document all potential partners that the finder approaches in the course of providing the services to the company and provide this information from time to time to the company as reasonably requested by the company. This agreement constitutes the entire agreement between the parties with respect to its subject matter and shall supersede and replace any other agreement or arrangement, whether oral or written, heretofore existing between the parties in respect of the services or the subject matter of the agreement.

[8] Paragraph 8 of the amended notice of civil claim alleges that Green Stream was contacted by Robert Higgins, who advised he had access to an investors group with up to \$20 million available for investment.

[9] Green Stream offers advisory services for business development specializing in the cannabis market. Aly Ismail is the founder and vice-president of business development of Green Stream.

- [10] A business relationship between Mr. Ismail and Pivot commenced in 2017. Pivot formally engaged Mr. Ismail as an advisor to assist in the development of Pivot's business plan.
- [11] Mr. Ismail also acted as a finder by referring investors to Pivot. In return, Pivot would pay a fee to Mr. Ismail for each successful referral. In each instance, the parties would formalize their oral agreement by executing a written finder's fee agreement after Mr. Ismail made the introduction to the investor or investors and Pivot secured the commitment of funds.
- [12] Green Stream was incorporated in 2018. The parties entered into an oral agreement as they did on previous occasions. The terms of the finder's fee agreement included:
- 1) Green Stream would locate investment funds for Pivot;
 - 2) Pivot would pay Green Stream a finder's fee for successfully referring investment funds to Pivot; and
 - 3) The finder's fee would be calculated as a percentage of the total amount of investment funds referred successfully to Pivot by Green Stream.

The investment transaction which is the subject of these proceedings was introduced to Pivot in this way.

- [13] On March 10, 2019, Pivot provided Mr. Ismail with Pivot's investor presentation, subscription agreement, and other documents that could be used to assist in finding investors in the Pivot opportunity.
- [14] On April 5, 2019, Robert Higgins texted Mr. Ismail requesting a call, and on that same day Mr. Ismail had a conversation with Mr. Higgins. On that call, Mr. Ismail states that Mr. Higgins advised that he had access to an investor group with up to \$20 million available for investment. Mr. Ismail advised Mr. Higgins that an opportunity to invest in Pivot was open to the investor group, although the private placement was scheduled to close later that day. Mr. Higgins indicated that the investor group was not interested in the private placement but would be interested in receiving a stake in the company and a leadership position. At Mr. Higgins' request, Mr. Ismail contacted Kan Dass of Pivot to discuss the Pivot opportunity.
- [15] On April 5, 2019, Mr. Ismail sent two emails to Mr. Higgins. Mr. Ismail emailed Mr. Higgins Pivot's investor presentation, subscription agreement and wiring instructions.
- [16] On April 6, 2019, Mr. Ismail sent conference call numbers for an introductory call. Patrick Frankhan, who was the CEO of Pivot at the time, attests that the people who participated on the call were himself, Mr. Ismail, Mr. Dass, Mr. Dattels and Mr. Toth, the latter two being affiliated with the investors.
- [17] On April 8, 2019, Mr. Dass and Mr. Frankhan called Mr. Ismail to thank him for the investor group referral. Pivot advised Mr. Ismail that the investor group had agreed to move forward and a press release was forthcoming.

- [18] That press release was issued on April 9, 2019, confirming that a private investment company had agreed to invest \$15 million of financing to Pivot.

THE POSITIONS OF THE PARTIES

- [19] The defendant submits that the plaintiff's claim for a finder's fee is in relation to an investment that the evidence will demonstrate was made by many investors that the plaintiff never spoke with, cannot identify, and can only speculate were affiliated in any way with Mr. Higgins as part of the investor group he spoke for. It is said that in these circumstances it is not possible for the plaintiff to specify the liquidated amount that is due and owing pursuant to the finder's fee agreement, which is an essential requirement under the Court Order Enforcement Act.
- [20] The defendant also challenges the entitlement to a finder's fee, alleging that the services provided by the plaintiff, including any introduction of the investors, occurred prior to the effective date of the agreement such that no fee is payable.
- [21] The defendant also asserts that there has been less than full and frank disclosure by the plaintiff in support of the garnishing order as follows:
- 1) The terms of the finder's fee agreement commenced on April 10, 2019, after the alleged introduction of Mr. Higgins to Pivot and the announcement of the transaction.
 - 2) Mr. Ismail has never been registered with the British Columbia Securities Commission and may be prohibited from receiving a finder's fee under the Securities Act, RSBC 1996, c. 418.
 - 3) Mr. Ismail did not introduce Robert Higgins to Pivot.
 - 4) Mr. Ismail did not meet or introduce any other investors to Pivot.
 - 5) Mr. Higgins did not represent an investor group.
 - 6) Green Stream does not know and cannot identify, or, alternatively, does not know and fails to identify, the investors who comprise the alleged investor group.
 - 7) Green Stream cannot confirm whether the individuals in the alleged investor group actually invested in the private placement if it cannot identify them.
 - 8) Mr. Nguyen did not have the requisite knowledge to affirm under oath that the defendant is justly indebted to the plaintiff in the amount of \$600,000.
- [22] The plaintiff asserts that it made full and frank disclosure of the material facts supporting the garnishing order and that by reference to the amended notice of civil claim and the supporting affidavit, all the requisite facts are pled to meet the requirements of s. 3(2)(d) of the Court Order Enforcement Act to establish:
- a) An action is pending.;
 - b) The time of its commencement.

- c) The nature of the cause of action.
- d) The actual amount of the debt, claim and demand.
- e) It is justly due and owing after making all just discounts.

[23] The plaintiff relies upon s. 8(2) of the Court Order Enforcement Act that provides that an affidavit referred to in s. 3:

need not show or disclose any knowledge of the facts, or the source or nature of any knowledge or the source or nature of any information or belief of the deponent and any other matter or to any further extent than is indicated by the words contained in the respective forms of affidavit in Schedule 1.

[24] Accordingly, the plaintiff says the requirement for the supporting affidavit to set out the nature of the cause of action is satisfied as long as the statement is sufficiently particular that it is not necessary for the court to guess about the nature of the claim.

[25] In respect of the specific deficiencies alleged by the defendant, the plaintiff submits that the evidence will show that the finder's fee agreement was amended as to the effective date from April 10, 2019, to February 25, 2019, thus bringing the services provided by the plaintiff within its terms; that the plaintiff made disclosure that it was exempt from registration requirements; that Mr. Higgins claimed to represent the investor group and that following upon the plaintiff's introduction of that investor group to Pivot through Mr. Higgins, an investment of 15 million dollars was made, such that on a simple calculation pursuant to the finder's fee agreement, the plaintiff was entitled to 4 percent of that investment amount, or \$600,000, being the amount claimed by the garnishing order.

[26] The plaintiff says that the fact that evidence tendered on this application by the defendant contradicts its entitlement to the finder's fee either in part or in whole does not mean that the statutory requirements of the Court Order Enforcement Act have not been met.

[27] The plaintiff also submits that it is not the role of the court on this application to determine the merits of the claim. On this latter point the defendant agrees.

THE LAW

[28] The parties are not in any real dispute about the applicable legal principles. The authorities they both referred to establish that:

- 1) There must be strict compliance with the statutory prerequisites for the issuance of a garnishing order.
- 2) The claim underlying the garnishing order must be for a liquidated sum.
- 3) The amount of the claim must be an already ascertained or readily ascertainable sum.
- 4) There must be full and frank disclosure of all material facts.

[29] The application to set aside a prejudgment garnishing order is not a summary trial, and the court need not and should not wade into a determination on the merits of the claim. This is made clear by the Court of Appeal in *Politeknik Metal Sdn Bhd v. AAE Holdings Ltd.*, 2015 BCCA 318. Paragraph 29 reads:

[the chambers judge] set the garnishing order aside on the basis that the plaintiff did not have an arguable case against the Defendant. In doing so, he effectively applied the first leg of the three-step test for granting injunctions and stays of proceedings that there be an arguable case or a serious question to be determined. There is nothing in the COEA or the applicable jurisprudence that imports the test for the granting of injunctions and stays into applications for the issuance of garnishing orders. If there is no merit to a plaintiff's claim, the remedy available to the defendant is to apply for the dismissal of the claim under Rule 9-6 (summary judgment) or Rule 9-7 (summary trial) of the Supreme Court Civil Rules and, if the defendant is successful, the garnished monies will be released from court to the defendant.

ANALYSIS

[30] In seeking to set aside the garnishing order, the defendant urged the court to test and weigh the merits of the plaintiff's claim, saying that it was deficient at every turn, that is, the defendant would establish that the plaintiff did not make any introduction of the investors, so that the claim must fail. If not that, then the introduction was of only a very few investors and only for a small amount of the \$15 million pledged by the investor group. If not that, then the terms of the finder's fee agreement as to its effective date precludes any recovery for any introduction of an investor made by the plaintiff.

[31] The plaintiff relied on a simple construct to support the garnishing order, that is, there was a written agreement that provided for the plaintiff to earn a fixed percentage of any amount invested by a party following upon an introduction of that party to the defendant by the plaintiff, and in this case the party introduced invested \$15 million, such that the fee was earned and remains due and payable.

DECISION

[32] After a careful review of the amended notice of civil claim and the affidavit in support of the garnishing order, I cannot conclude that there has been a failure on the part of the plaintiff to meet the statutory requirements.

The court is not left to guess about the claim and the basis upon which the actual amount has been arrived at or how it is said to be justly due and owing. In my view the duty to make full and frank disclosure has been met by the plaintiff, and it is not required that the evidence provided to support the garnishing order address the substantive defences on the merits that will be advanced by the defendant at trial. The application to set aside the garnishing order is dismissed with costs payable to the plaintiff in any event of the cause.

"Master Cameron"

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