

CANADA / JUDGMENT

Gross v. Peak Products Manufacturing Inc.

2022 BCSC 1332

COURT

Supreme Court of British Columbia

DECIDED

29 April 2022

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2022 BCSC 1332 Gross v. Peak Products Manufacturing Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gross v. Peak Products Manufacturing Inc.,

2022 BCSC 1332

Date: 20220429

Docket: S213994

Registry: Vancouver

Between:

Phil Gross

Plaintiff

And

Peak Products Manufacturing Inc., Peak Products International Inc., Peak Innovations Inc., Peak Products America Inc., Peak Products USA Corporation, Peak RSG Services Inc., Peak Products Corporation, Peak Products Industries Inc., Peak Products Industrial Inc., Mountaintop Holdings Inc., 561885 BC Ltd., Synergize Innovations Inc., West Coast Summit Holdings, Peak Installations Inc., H2Go Installations Inc., Onpoint Compliance Solutions Inc., Superspike Inc., Synergize International Inc., 6191533 Canada Inc., 6251242 Canada Inc., 7260326 Canada Inc., 7259158 Canada Incorporated, 7258356 Canada Inc., 6504558 Canada Inc., Peak Products Pty. Ltd., Synergize Incorporated, and all other corporations and entities, wherever situated, captured by the February 1992 Agreement (Individually and collectively referred to as the "Peak Group of Companies") and John Anthony Gross aka John Gross

Defendants

Before: The Honourable Justice E. McDonald

Oral Ruling Re Application for a Declaration Authorizing a Solicitor to Provide an Affidavit

In Chambers

Counsel for the Plaintiff:

W.G. Wharton

Counsel for the Defendants:

I.G. Nathanson, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

April 26, 2022

Place and Date of Ruling:

Vancouver, B.C.

April 29, 2022

- [1] THE COURT: I am delivering my reasons for judgment in respect of the plaintiff's application orally. Should the parties request a transcript of my reasons, I may edit and add citations, but the result of my reasons will not change.
- [2] This application arises out of a dispute between brothers. The plaintiff, Phil Gross, alleges in his claim that many years ago he and his brother, the defendant John Gross, entered into an agreement to share assets. The plaintiff asserts that the alleged agreement has been breached. The defendants deny the existence of the alleged agreement, and they counterclaim seeking damages for, among other things, wrongful interference with contractual relationships and defamation.
- [3] Although this proceeding is in the early stages of the pre-trial process, a number of applications have been heard, including the defendants' partially successful application to strike out portions of the plaintiff's claim. As a result of that application, the plaintiff filed an amended notice of civil claim on January 31, 2022 ("the Claim").
- [4] On March 30, 2022, the plaintiff filed an application to obtain certain evidence from Mr. Hatch, a solicitor who in the past acted for the plaintiff and the defendant, John Gross. The plaintiff specifically seeks a declaration authorizing Mr. Hatch to prepare an affidavit. In the alternative, the plaintiff seeks permission to conduct an examination of Mr. Hatch.

Background

- [5] The Claim alleges the existence of an agreement that the plaintiff says he entered into with his brother, the defendant John Gross, "prior to and leading up to February 1992". As I mentioned, the defendants deny there is an agreement.
- [6] The Claim alleges that in February 1992, a solicitor, Mr. Hatch, received instructions from the plaintiff and the defendant, John Gross, regarding the terms of the agreement. On February 27, 1992, Mr. Hatch delivered the agreement to them along with a cover letter.
- [7] The defendants deny the facts related to the agreement and the involvement of Mr. Hatch. During the hearing, counsel for the defendants submitted that while the defendants deny that an agreement was reached, they do not deny the authenticity of the documents delivered on February 27, 1992, by Mr. Hatch.
- [8] Counsel for the plaintiff has been in contact with Mr. Hatch. They discussed Mr. Hatch's evidence. They discussed what Mr. Hatch's proposed affidavit would say. However, eventually, Mr. Hatch advised that it would not be appropriate for him to provide an affidavit unless he also had consent from the defendant John Gross.
- [9] Counsel for the plaintiff provided a draft of Mr. Hatch's proposed affidavit to counsel for the defendants, advising that although Mr. Hatch was prepared to make the affidavit. However, Mr. Hatch before doing so wished to have the consent of the defendant, John Gross. Consent was not provided. It should be noted that no claim of privilege with respect to the potential evidence of Mr. Hatch is asserted by any party.
- [10] The plaintiff seeks affidavit evidence from Mr. Hatch in anticipation of the defendants' proposed application to sever certain issues from the trial of the Claim. The plaintiff asks the court to declare that Mr. Hatch is authorized to provide an affidavit concerning the authenticity of certain documents and his recollection of the circumstances surrounding the creation of those documents. In the alternative, the plaintiff seeks an order authorizing the plaintiff to examine Mr. Hatch pursuant to Rule 7-5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].
- [11] The plaintiff submits that by failing to provide Mr. Hatch's consent to provide an affidavit, the defendant John Gross is effectively obstructing the plaintiff from gathering highly relevant evidence for use in an interlocutory application. The plaintiff points out that even if Mr. Hatch was examined, the plaintiff would not be able to use the examination transcript at the hearing of an interlocutory motion.

- [12] The defendants oppose the application. They submit that it would be inappropriate for the court to issue a declaration because the plaintiff is seeking an interlocutory declaration that in effect invites the court to decide whether Mr. Hatch's professional obligations prohibit him from making an affidavit in the circumstances. The defendants also say that the application is an attempt by the plaintiff to avoid making his own affidavit about the circumstances surrounding the creation of the documents that were delivered by Mr. Hatch.
- [13] The defendants point out that the case before me does not involve a situation where the potential evidence of a third party, that is Mr. Hatch, is unknown. In fact, Mr. Hatch gave a detailed responsive statement to the plaintiff related to his knowledge of the matters in question, and he even provided a draft affidavit. The defendants say that in the circumstances, the requirements of Rule 7-5 have not been satisfied, and no third-party examination of Mr. Hatch should be ordered.
- [14] To determine this application, I must decide whether it is appropriate to grant the declaration sought to effectively assist the plaintiff in obtaining affidavit evidence from a third party. If the declaration is not granted, I must also consider whether it is appropriate to require the third party to attend an examination conducted by the plaintiff.

Issue One: Should I Grant the Declaration Sought?

- [15] In *Monimos Equities & Developments Inc. v. Esquimalt Dockyard Branch 172 of the Canadian Legion*, 2016 BCSC 2057 [Monimos], the court considered an application by the plaintiff to stay or dismiss claims against it or to restrain the defendants from listing property for sale. In a cross-application, a defendant sought a declaration that an assignment and certain contractual amendments were null and void.
- [16] The chambers judge determined that since there was no application by the defendant for summary judgment or summary trial, he lacked jurisdiction to grant interlocutory relief or "declarations having more than interim effect on an interlocutory basis": Monimos, para. 15 citing *Novopharm Limited v. British Columbia (Health)*, 2008 BCSC 82 at paras. 25-32 [Novopharm]; *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at para. 53.
- [17] In *Novopharm*, the plaintiff applied for certain interlocutory relief pending trial, including a declaration that the defendants refrain from continuing the tender process or that the defendants list the plaintiff's drug at a certain price. The court considers its jurisdiction to make an interlocutory declaration pending trial, and after reviewing the authorities concluded that in British Columbia the court lacks jurisdiction to make an interlocutory declaration.
- [18] In *Fraser v. Houston*, [1996] B.C.J. No. 2096 at paras. 29-31 [Fraser], the court considers what is required for the court to have declaratory jurisdiction:

29 It is my opinion, that while there need not necessarily be a cause of action between the parties before the court will have jurisdiction to grant declaratory relief, and that jurisdiction is quite broad, it is not at large or unfettered. A litigant seeking declaratory relief must demonstrate that he or she has a right which has been infringed by, or requires protection from, the other party. If the right cannot be demonstrated, the party does not have standing and the court does not have declaratory jurisdiction.

30 The authorities have defined the right or interest sufficient to entitle a party to seek a declaratory judgment in general terms. But clearly some right or interest must exist. Mr. Justice Gibbs searched for, but was unable to ascertain, the source of the right in *Heller*. Chief Justice McEachern found that there was a legal relationship between the parties, which gave rise to a real issue concerning their rights. In *Kaiser* Mr. Justice Bouck found that the applicant had to show the infringement of its right, listing the various possible sources of such a right, statute, common law and equity. And I do not read *British Columbia Ferry Corp.*, which is based on the decision of Bankes, L.J. in *Simmonds*, at page 627, the passage to which I have already referred, as saying anything to the contrary. Nor do I read the case as saying that Lord Dunedin's dictum in the *Russian Commercial* case, as regards the proper case for granting declaratory relief, is too restrictive of the court's jurisdiction to grant that relief. In the *Russian Commercial* case Lord Dunedin simply stated that the person seeking declaratory relief must have a real interest to raise the issue. I will refer to what Lord Dunedin said further in a moment when I refer to what I consider to be the leading case on the subject matter, *Solosky v. The Queen* (1980), 1979 CanLII 9 (SCC), 105 D.L.R. (3d) 745 (S.C.C.).

31 Generally there must be a dispute, and some privity in law, between the parties. In this regard it is stated in *The Law of Declaratory Judgments* at page 23:

A proper case for a declaratory judgment generally requires some privity in law between parties concerned, an existent right and an interference or dispute concerning the right. A petitioner who has no right in the nature of a claim capable of being enforced or redressed in a civil action cannot seek a judicial declaration for the evident reason that he cannot take advantage of or suffer the consequences of such an order: The lack of standing to sue robs the court of its declaratory jurisdiction.

Questions which are purely academic, hypothetical, obscure or of no relevance to the parties cannot form a suitable basis for an application for relief.

[19] The plaintiff's counsel submits that the plaintiff has shown a right of interest sufficient to allow him to seek a declaration. That right is asserted in the Claim. As well it is submitted that the plaintiff has an interest in having his former counsel provide evidence about the agreement, which interest is being thwarted by the non-consent of the defendant John Gross.

- [20] The defendant's counsel submits that the plaintiff lacks a legal right to seek declaratory relief. In the defendant's view, there is no legal right being infringed since Mr. Hatch has given a responsive statement.
- [21] The fact that Mr. Hatch will not provide an affidavit without the consent of both of his former clients is due to his professional obligations, and the defendant submits that the court's jurisdiction to grant interlocutory declarations does not extend to "advising solicitors on how they are to fulfill their ethical obligations."
- [22] The plaintiff's counsel referred me to *Konicek v. Vantown Infrastructure Invesco Inc.*, 2021 BCSC 1237 [Konicek], where in the context of the plaintiff's application to examine a third party solicitor under Rule 7-5, the court issued a declaration that certain communications between a solicitor and the individual defendants were not subject to solicitor/client privilege. The court also ordered the solicitor to attend an examination even though he was not uncooperative in the "pejorative sense," but rather the solicitor was behaving cautiously due to his professional obligations: Konicek, para. 47.
- [23] In *Konicek*, the individual defendants asserted solicitor/client privilege, and as part of deciding whether the solicitor should be examined, the court was required to address whether privilege was attached to their communications. In other words, a declaration was necessary to determine whether certain communications were subject to solicitor/client privilege because that was a precursor issue to the examination of the solicitor.
- [24] That is different from the situation before me. As I already noted, no party before me asserts solicitor/client privilege in respect of their communications with Mr. Hatch. Rather, the question before me is whether the court should issue a declaration that in effect authorizes a solicitor to provide an affidavit at the request of one client when the solicitor's other client has not consented.
- [25] While I appreciate that the plaintiff wishes to capture Mr. Hatch's evidence in an affidavit, I am not satisfied that it would be appropriate in all of the circumstances to make the declaration sought. I am of that view because the right asserted by the plaintiff is the right to have his former solicitor make an affidavit about his involvement with the plaintiff and the defendant John Gross.
- [26] In my view, that is not the type of right or interest discussed in *Fraser*, and I note that in *Fraser* the court quoted at para. 31 as follows from *The Law of Declaratory Judgments*:
Questions which are purely academic, hypothetical, obscure or of no relevance to the parties cannot form a suitable basis for an application for relief.
- [27] In my view, given that the parties have a responsive statement from Mr. Hatch, the question of whether his professional obligations prevent him from providing one former client with an affidavit where the other former client does not agree is not relevant, nor does it raise a real question that is amenable to the remedy of declaratory relief in the circumstances: *Solosky v. The Queen* (1980), 1979 CanLII 9 (SCC), 105 D.L.R. (3d) 745 (S.C.C.) para. 753, citing

from *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438.

- [28] I understand the plaintiff's concern that in his view, the defendant John Gross is unreasonably and possibly for wholly strategic purposes withholding his consent to allow Mr. Hatch to make the affidavit. However, I find myself in agreement with the submission of counsel for the defendants that in effect the court is being asked to direct a solicitor as to carrying out his professional obligations when that is not the role of the court in making declaratory relief. As a result, I find it would not be appropriate for the court to issue a declaration about Mr. Hatch's ability to make an affidavit in the circumstances before me.
- [29] It was briefly mentioned during the plaintiff's submissions that there is always some risk that a witness, such as Mr. Hatch, might not be available to testify at trial. It was further suggested that if Mr. Hatch could not provide an affidavit, his evidence might never come before the court. However, to the extent there is a possibility that Mr. Hatch may be unavailable to testify at trial, a deposition under Rule 7-8 provides an avenue to address that concern.
- [30] Therefore, on the evidentiary record that is before me, and for the reasons that I have explained, including that I do not regard the issue raised as amenable to declaratory relief, I decline to make the declaration sought.

Issue Two: Should the Solicitor Be Required to Attend an Examination Pursuant to Rule 7-5?

- [31] Rule 7-5 provides for the pre-trial examination of a witness. Rule 7-5(3) stipulates that the evidence in support of an application must, among other things, set out how the evidence may be material to a matter in question in the action and that the proposed witness either "has refused or neglected on request" to give a responsive statement or given conflicting statements.
- [32] In *Gardner v. Viridis Energy Inc.*, 2014 BCSC 232 [Gardner], the court considered the defendant's application for a pre-trial examination of an individual and a solicitor, as well as a declaration that the individual had waived solicitor/client privilege in respect of the legal advice received from the solicitor. The solicitor opposed the application on the basis that solicitor/client privilege had not been waived. The individual opposed the application on the basis that he had provided a responsive statement, and although he denied being a client of the solicitor he submitted that solicitor/client privilege had not been waived.
- [33] The court in *Gardner* at para. 10 refers to the decision in *Sinclair v. March*, 2001 BCSC 102, regarding the "purposes, policy and scope" of Rule 7-5, and states as follows:
- [10] As discussed by Madam Justice Dillon in *Sinclair v. March*, 2001 BCSC 102, aff'd, 2002 BCCA 65 (CanLII), 97 B.C.L.R. (3d) 17 (C.A.), the purposes, policy and scope of the Rule for pre-trial examination of witnesses are as follows:

- (a) The purpose of the rule is to provide an investigative technique to facilitate full disclosure of the facts before trial, thus avoiding a party being taken by surprise and ensuring that all relevant evidence is brought before the court (at para. 10);
- (b) The policy of the Rule is to permit examination of an uncooperative witness (at para. 10);
- (c) The purpose of the Rule is to provide information, not to record evidence or provide admissions. The scope of the inquiry is broader under Rule 7-5 than in the examination for discovery of a party because it not limited to matters at issue between the parties as defined in the pleadings but includes all that is generally relevant between all parties (at para. 13);
- (d) The Rule is to be interpreted liberally so as to eliminate the element of surprise at trial (at para. 14).

[Underlining added]

- [34] In Gardner, the court refused the request to conduct a pre-trial examination of the solicitor on the basis that solicitor/client privilege had not been waived. The court dismissed the application for a declaration that the individual had waived solicitor/client privilege. The court further found that the individual had given conflicting statements concerning matters in question in the action, and therefore as the applicant satisfied the requirements of Rule 7-5, an examination of the individual was ordered.
- [35] The plaintiff seeks an order that Mr. Hatch attend a pre-trial examination by the plaintiff's counsel. As Mr. Hatch drafted and provided a form of agreement to the parties under the cover of his letter dated February 27, 1992, he may have material evidence related to the existence of the alleged agreement, which is a matter in question in the Claim.
- [36] However, what is absent in the evidence before me is an indication that Mr. Hatch has refused or neglected to provide a responsive statement or that he has made conflicting statements. Mr. Hatch has communicated with counsel for the plaintiff and the defendants. He has participated with counsel for the plaintiff in drafting a proposed affidavit. He has stopped short of making the affidavit because he does not have the consent of one of his former clients, the defendant John Gross.
- [37] Based on the requirements of Rule 7-5 and the discussion of the purposes, policy and scope of the rule set out in Gardner, and after considering the evidentiary record that is before me, I am of the view that the application to examine Mr. Hatch must be dismissed. I have reached this conclusion for reasons including that Mr. Hatch has provided a responsive statement, and there is no conflict in his statement.
- [38] In coming to my conclusions on this application, I have taken into account the need to ensure that, to the extent possible, a full evidentiary record can be presented by the parties to the court. I have also considered that Mr. Hatch appeared willing to provide an affidavit to the plaintiff as long as both of his former clients agreed.

[39] However, after considering all of the circumstances, I do not think this is a situation where potential material evidence might be suppressed or lost due to my declining to make the orders sought. That is because Mr. Hatch had already supplied a responsive statement, and he invited the plaintiff to provide him with a subpoena. Mr. Hatch's evidence is known by the parties, and either party may decide to call him as a witness.

Disposition

[40] As a result, the plaintiff's application filed on March 30, 2022, is dismissed with costs.

"E. McDonald J."

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Prepared on 28 October 2026 · Esheria