

CANADA / JUDGMENT

Hui v. Onemove Technologies Inc.

2022 BCSC 800

COURT

Supreme Court of British Columbia

DECIDED

27 April 2022

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2022 BCSC 800 Hui v. Onemove Technologies Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hui v. Onemove Technologies Inc.,

2022 BCSC 800

Date: 20220427

Docket: S151482

Registry: Vancouver

Between:

Chi Yang Hui

Plaintiff

And

Onemove Technologies Inc., Matthew Proud, Plantro Ltd., Seastone Investments Limited and
2352512 Ontario Inc.

Defendants

Before: The Honourable Justice Girn

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff

T.W. Clifford

Counsel for the Defendants:

R. Moore

Place and Date of Hearing:

Vancouver, B.C.

April 12, 2022

Place and Date of Ruling:

Vancouver, B.C.

April 27, 2022

[1] THE COURT: These are my oral reasons for judgment. I reserve the right to edit them for grammar, errors, citations and context as necessary, provided such changes do not affect the final disposition.

Introduction

- [2] The plaintiff applies for an order under Rule 22-7(2)(b) of the Supreme Court Civil Rules B.C. Reg. 168-/009 ("Rules") striking the response to civil claim filed jointly by the defendants and that judgment be entered for the plaintiff on liability with damages.
- [3] Additionally, the plaintiff seeks a declaration that the defendants be held in contempt of court and that they be ordered to pay a fine as a result of this alleged contempt. Finally, the plaintiff seeks special damages.
- [4] In support of this application, the plaintiff alleges that the defendants have repeatedly failed to comply with the Rules and court orders. In response to these alleged non-compliances, the plaintiff has previously filed multiple applications to strike, all of which have been adjourned. However, this is the first application to strike that has actually proceeded. As well, there has been one previous order made by Master Baker relating to document production ("Baker order").
- [5] I have read the materials filed by the plaintiff in support of this application, the defendants' response and the relevant case law.
- [6] For the reasons below, I decline to strike the response to civil claim filed by the defendants. As well, I decline to declare that the defendants are in contempt of a court order. However, I will make certain orders that will allow the action to proceed in a timely manner.

Background

- [7] By way of background, the plaintiff alleges that the defendants collectively undertook a series of transactions between 2010 and 2013 to take control of Onemove Technologies Inc. ("Onemove"). The plaintiff is a registered shareholder of Onemove and alleges that these various transactions were illegal. In the notice of civil claim, the plaintiff asks the court to set aside these transactions pursuant to s. 227 of the Business Corporations Act S.B.C. 2002, c 57 (as amended).
- [8] For the purposes of this application, it is not necessary for me to go into the specific details of these transactions. Since the filing of the notice of civil claim in 2015, there has been considerable history despite no trial date having been set thus far. For the purposes of this application, I will outline the relevant details that have emerged from the supporting materials and submissions of counsel. They are as follows.
- The action was commenced by the plaintiff with the filing of a notice of civil claim on February 23, 2015.
 - The defendants filed a joint response to civil claim on April 22, 2015.
 - The plaintiff served his list of documents on June 28, 2016.
 - Having demanded and not received the defendants' list of documents, on September 21, 2016, the plaintiff filed their first application to strike the response to civil claim or in the alternative, for an order that the defendants provide a list of documents.
 - The next day, the defendants produced their joint list of documents and the application to strike was adjourned by consent.
 - The plaintiff then made a formal demand for an amended list of documents. After receiving no response from the defendants, the plaintiff filed an application for document production. That application was heard on November 7, 2017 by Master Baker, who ordered certain categories of documents be produced within ten days. Costs were ordered against the defendants in any event of the cause.
 - There was non-compliance when the defendants failed to provide an amended list of documents within the required time provided for in the Baker order. As a result, on December 5, 2017, the plaintiff filed a second application to strike.
 - Following the service of this application, the defendants provided a joint amended list of documents on December 13, 2017 and the application to strike was once again adjourned.
 - On January 19, 2018, the defendants provided a joint second amended list of documents. Having found the second amended list of documents to be deficient and no response to their demand for additional documents, the plaintiff filed a third application to strike on August 3, 2018.

- On the same day (August 3rd), the defendants provided a joint third amended list of documents, and once again, the third application to strike was adjourned. At this point, the plaintiff had received thousands of documents from the defendants.
- Throughout the course of this action, the plaintiff has indicated an intention to proceed with the action by filing and serving notices of intention to proceed in accordance with the Rules.
- As early as February 2019, the plaintiff requested dates from the defendants for scheduling examination for discovery.
- On April 9, 2021, the plaintiff served an appointment to examine Matthew Proud on April 16, 2021, after some back and forth communications with the defendants' counsel. However, this examination date was adjourned by consent. On multiple occasions thereafter, the plaintiff requested that Matthew Proud be made available for examination. Matthew Proud controls one of the defendant companies.
- Having not received a response from the defendants' counsel, on June 7, 2021, the plaintiff served another appointment to examine Matthew Proud on June 28, 2021. The defendants did not confirm receipt of the appointment.
- On June 28, 2021, Matthew Proud did not attend the scheduled examination for discovery, and the plaintiff obtained a certificate of non-attendance.
- Throughout July and August 2021, the plaintiff made multiple attempts with defendants' counsel to schedule another date to examine Matthew Proud without any success. On August 24, 2021, the plaintiff filed a fourth application to strike or, in the alternative, for an order to require Matthew Proud to attend an examination for discovery on September 14, 2021.
- On September 9, 2021, the parties agreed to a consent order for Matthew Proud's attendance for examination on September 14, 2021. The defendants also agreed to pay costs to the plaintiff in the amount of \$2,500.
- On September 14, 2021, Matthew Proud appeared by video conference for the examination. After one hour, he left the examination without any explanation. Since then, no examination of any defendants has taken place.

Applicable Law

Dismissal Orders

- [9] In *Breberin v. Santos*, 2013 BCSC 560, Justice Willcock provides a succinct discussion of what level of non-compliance warrants dismissal of an action at paras. 53 to 64:

- [53] The order sought by the defendants is not readily granted. Dismissal is a "blunt tool, to be used sparingly" in response to procedural delay: *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483 at para. 28 [House of Sga'nisim]. The remedy is a "draconian" one, "only to be invoked in the most egregious of cases": *Homer Estate v. Eurocopter S.A.*, 2003 BCCA 229 at para. 4. It is to be avoided where it is reasonable to do so: *House of Sga'nisim* at para. 30.
- [54] Where failure to comply with the Rules or failure to comply with the terms of a court order is established, the party at fault bears the onus of proving a lawful excuse for the non-compliance or non-observance: *Balaj v. Xiaogang*, 2012 BCSC 231 at para. 36 [Balaj]; *Eisele v. B.A. Blacktop Ltd. Et al*, 2004 BCSC 521 at para. 15.
- [55] In this context, a "lawful excuse" is "one which, in the discretion of the judge acting judicially, is worthy of acceptance": *United Furniture Warehouse LP v. 551148 B.C. Ltd.*, 2007 BCSC 1252 at para. 24.
- [56] Because an action may be struck when the lack of production has been occasioned by negligence, the degree of negligence required should be more than moderate on a scale ranging from mere negligence to gross negligence.
- [57] Fundamental failures, such as failure to make appropriate disclosure of documents or records, must be treated as a serious default.
- [58] A dismissal order will not usually be granted on a first application for relief arising from procedural delay, even intentional delay. Injustice might result from such a course of action.
- [59] A dismissal order will not usually be granted until the plaintiff has been warned that result will follow upon further delay or obstruction.
- [60] Lesser sanctions ought to be considered where any are available and appropriate.
- [61] A self-represented litigant cannot be held to the same standards as a professional lawyer in terms of compliance with court procedures and rules. That said, a litigant who chooses to represent him- or herself cannot ignore his or her responsibilities with impunity.
- [62] A persistent pattern of delay on the part of the plaintiff, as well as a persistent failure to comply with the Rules of Court and court orders, may result in a dismissal order. Defaults must be seen in context. The plaintiff's conduct of the claim from its inception does have a bearing on the seriousness of the default before the court.
- [63] When persistent conduct prevents the litigation from progressing at all, and when trial dates are lost through deliberate defaults, the failures may have an irreparable negative effect on the just determination of a case. Failing to comply with an order in a manner that causes an adjournment of trial is seriously prejudicial to the defendants.

- [64] Refusal to comply with an order for reasons raised before the court and rejected amounts to an overt and deliberate flouting of the court order: *Balaj; House of Sga'nisim; Dhillon v. Pannu*, 2008 BCCA 514; *Kemp v. Dickson*, 2006 BCSC 288.

Civil Contempt

- [10] In *Wei v. Chiu*, 2019 BCSC 441, Justice Dillon, discussed civil contempt power at paras. 27 and 28:
- [27] The contempt power is discretionary, to be used as an enforcement power of last resort (*Carey v. Laiken*, 2015 SCC 17 (CanLII), [2015] 2 S.C.R. 79 at para. 36). No one can be found in contempt without full consideration of all the relevant information, including any explanations for the conduct (*Larkin v. Glase*, 2009 BCCA 321 at para. 9).
- [28] There are three elements that must be proven beyond a reasonable doubt to establish civil contempt: First, the order must state clearly and unequivocally what should or should not be done; second, the party alleged to have breached the order must have actual knowledge of the order; and, third, the party that is alleged to have breached the order must have intentionally done the act that the order prohibited (*Carey* at paras. 32-35; *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 186 at para. 24; *XY, LLC v. Canadian Topsires Selection Inc.*, 2014 BCSC 2629 at para. 13; *Unifor Local Union No. VCTA v. Sunlover Holding Co. Ltd.*, 2018 BCSC 922 at para. 33).

Analysis

- [11] For the most part, the defendants have engaged in conduct that comes close to the line of non-compliance. For example, the plaintiff filed three applications to strike, and a formal court order by Master Baker was issued before the defendants ultimately provided their complete list of documents as required by Rule 7-1. Similarly, scheduling of an examination for discovery of Matthew Proud required a court order, albeit by consent.
- [12] Despite all of this, this is the first application to strike that has been heard by the court, and the defendants have not received a previous warning that further delay or obstruction will result in a dismissal order. To grant such an extreme remedy would result in injustice, especially to the other defendants. The other defendants should not be punished for Matthew Proud's conduct, at least as it relates to the examination for discovery. As well, the court must consider lesser sanctions if they are available and appropriate, and I find they are.
- [13] In relation to the examination for discovery, I note that Matthew Proud was one individual the plaintiff intended to examine but not the only one. In their correspondence with the defendants' counsel, plaintiff's counsel indicated that they also wished to examine Tyler Proud and Gerald Proud. If Matthew Proud was not available, the plaintiff had the option to examine the others but chose to begin with Matthew Proud. Counsel for the plaintiff has argued commonality of interest. However, I need not decide this issue in order to determine

whether the defendants' response ought to be struck.

Contempt

- [14] I find that Matthew Proud did not fail to comply with the order that required him to attend for examination. In fact, he did attend but chose to leave before the session concluded and without any explanation.
- [15] When I consider the three elements that must be proven beyond a reasonable doubt to establish civil contempt, I find that the consent order does not clearly and unequivocally state what should or should not be done. In fact, the order contains no conditions or rules other than that Matthew Proud is to attend on September 14, 2021 for examination. While Matthew Proud had actual knowledge of the order, I am unable to find that he breached it given that he, in fact, did attend.
- [16] Finally, I have no evidence to conclude that Matthew Proud must have intentionally done the act that the order prohibited. Again, the order does not set out any conditions other than to appear. I am also mindful that the contempt power is discretionary and should be used as an enforcement power of last resort.

Conclusion

- [17] In all of the circumstances, I am not persuaded that the defendants' conduct to date attracts the severe sanction of outright dismissal of the defendants' response to the civil claim. The facts presented do not bring it to an "extreme case". Striking the pleadings against all defendants because of the conduct of one would be a "disproportionate" response. In my view, lesser remedies can "cure the default and inspire confidence" that court orders or rules will be respected in the future.
- [18] Additionally, I am unable to conclude that Matthew Proud is in contempt of court for leaving the examination for discovery before its conclusion.
- [19] However, conduct of the defendants to date cannot continue, and it is unfair for the plaintiff to continue to put in the time and expense of bringing on further applications. Deadlines must be set so that this action can ultimately be decided on its merits. While this may be the first application to strike that has been heard by the court, let this be a warning to the defendants that their conduct to date will not be tolerated going forward.
- [20] I hereby make the following orders.
- [21] In regards to the scheduling of a date to conclude the examination of Matthew Proud, I order the plaintiff's counsel to provide to the defendants' counsel three possible dates within the next 90 days for the examination of Matthew Proud. Matthew Proud will be required to attend on one of the proposed dates at his option.

[22] I further order that Matthew Proud will answer all reasonable questions put to him by the plaintiff's counsel that are relevant to the issues set out in the notice of civil action and in the response.

[23] The plaintiff sought special costs of these proceedings. I am not persuaded that the defendants' conduct is deserving of rebuke in the form of an award of special costs. The defendants, however, will pay the plaintiff's costs of this application in any event of the cause payable forthwith in the amount of \$1,000 inclusive of disbursements.

"Girn J."

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