

CANADA / JUDGMENT

Jorgensen v. Archer Cleantech Inc.

2020 BCSC 977

COURT

Supreme Court of British Columbia

DECIDED

30 June 2020

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2020 BCSC 977 Jorgensen v. Archer Cleantech Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Jorgensen v. Archer Cleantech Inc., 2020 BCSC 977 Date: 20200630 Docket: S194711 Registry: Vancouver Between: Lars Jorgensen Plaintiff And Archer Cleantech Inc. and Chris Thunken Defendants Before: The Honourable Justice Branch Reasons for Judgment Counsel for Plaintiff/Applicant: T. Hakemi, M. Kampman No one appearing for the Defendants/ Respondents Place and Date of Written Submission: Vancouver, B.C. June 19, 2020 Place and Date of Judgment: Vancouver, B.C. June 30, 2020

- [1] The applicant seeks an order that the response to civil claim and the counterclaim filed May 22, 2019 by Archer Cleantech Inc. ("Archer") be struck, and default judgment be granted against Archer with damages to be assessed.
- [2] The plaintiff and the individual defendant, Chris Thunken ("Thunken"), are alleged to be partners in an entity called Green Globe Solutions ("GGS"). GGS was formed to develop and operate certain hybrid renewable energy facilities (the "JV Projects").
- [3] In order to advance the JV Projects, on or about July 13, 2018, GGS allegedly entered into a written agreement with Archer (the "JV Agreement").
- [4] In or around September 15, 2018, GGS and Archer purported to enter into a letter of intent (the "LOI"). Included in the LOI was a provision that declared that the LOI replaced the JV Agreement.
- [5] The plaintiff takes the position that he did not sign the LOI. He alleges that Archer and Thunken conspired to place his signature on the document. Alternatively, the plaintiff alleges that, since entering into the LOI, Thunken and Archer have conspired to exclude the plaintiff from participating in the development of the JV Projects. The plaintiff further alleges that the alliance between Thunken and Archer has induced Thunken to breach the GGS partnership agreement.
- [6] On July 8, 2019, Archer delivered a list of documents. The plaintiff alleges that Archer omitted to list certain relevant classes of documents, including:

- a) Written communications between Archer, Thunken, and Mr. Jorgensen pertaining to the negotiations of the JV Agreement and LOI;
 - b) Notes, agendas, and meeting minutes of any Archer meetings that relate to GGS or the plaintiff;
 - c) Cost estimates associated with the JV Projects and other projects that were being discussed by Archer and GGS; and
 - d) Documents relating to any business plans prepared for or by Archer that reference GGS, and copies of internal assessments done by Archer in relation to the plaintiff and Thunken.
- [7] Paul Blaha, a representative of Archer, was examined for discovery on October 17, 2019. At the examination, Mr. Blaha agreed that he was in at least weekly contact with Thunken through email, phone, and WhatsApp text messages. However, Archer has not produced any written correspondence between Mr. Blaha and Thunken.
- [8] On November 29, 2019, counsel for the plaintiff wrote to Archer making a detailed demand for several categories of documents pursuant to Rules 7-1 and 7-2. The plaintiff requested that Archer deliver an amended list of documents by December 19, 2019.
- [9] On December 18, 2019, counsel for Archer wrote to the plaintiff advising that they could not comply with the December 19, 2019 deadline for responses to document production and examination for discovery requests, and that they would provide a "progress update as soon as possible, but likely not until the new year".
- [10] On February 20, 2020, default judgment was obtained against Thunken after he failed to file and serve a response to civil claim.
- [11] On March 13, 2020, Archer was served with Notice of Application materials seeking to have their response to the civil claim struck and default judgment granted against them (the "Original Strike Application"). The Original Strike Application outlined possible alternative relief, being that the claim only be struck if the alleged discovery failings were not remedied within 14 days. The Original Strike Application was set down for hearing on March 27, 2020.
- [12] On March 23, 2020, Archer's counsel of record filed a Notice of Withdrawal and provided 530-625 Howe Street, Vancouver, BC as Archer's last known address.
- [13] The March 27, 2020 application did not proceed, presumably because of the COVID-19 restrictions.
- [14] On April 20, 2020, counsel for the plaintiff wrote to Wayne Tinker and Mr. Blaha at Archer advising them that Archer's deadline for serving a response to the Original Strike Application had expired but that the plaintiff was prepared to extend Archer's time to respond to May 4, 2020.

- [15] On May 11, 2020, in response to the April 20, 2020 letter, Mr. Tinker advised that Archer is bankrupt and insolvent, all consultants for the company have been dismissed, and Archer no longer has legal representation for this action.
- [16] On May 26, 2020, the plaintiff filed a fresh Notice of Application (the "New Strike Application"). The New Strike Application simply asks that Archer's response to civil claim and counterclaim be struck and seek default judgement. It was delivered by registered mail to the plaintiff's registered and records office at 3079 Ourtoland Road, Kelowna, but not to the last known address set out in the Notice of Withdrawal. Archer did not file any responsive materials or submissions prior to the referral of the written application to the Court.
- [17] Under Rule 22-7(2)(d), if there has been a failure to comply with the Rules, the court is empowered to strike out the response to civil claim and pronounce judgment. The rule is permissive. Whether a response is struck is a matter of discretion as informed by the individual circumstances of the case: *The Law Society of British Columbia v. Gill*, 2016 BCSC 2237 at para. 9.
- [18] The following principles should be considered on an application to strike under Rule 22-7:
- a) Only in extreme cases should pleadings be struck;
 - b) A party should be given a second chance to obey;
 - c) Punishment must "fit the crime" in terms of degree of delict and degree of sanction;
 - d) Alternative remedies must be considered; and
 - e) An explanation for disobedience may persuade the court not to strike pleadings. See: *VF Operations Canada Inc. v. Randhawa Farms Ltd.*, 2015 BCSC 1845 at para. 60
- [19] In this case, I find that the appropriate order is similar to the alternative relief sought in the Original Strike Application. The following factors call for moderation in the court's approach to the alleged failures:
- a) Archer did provide a list of documents. The debate is only over the extent of that list. It is difficult to opine on the perceived failings in the list absent submissions from Archer;
 - b) Archer did attend an examination for discovery. The debate is only over the production of outstanding requests from that discovery;
 - c) I am unable to conclude whether the alleged failings are willful, or simply the result of a lack of resources;
 - d) Any failings have not been prolonged, particularly when one factors in the COVID-19 disruption; and
 - e) There have been no previous orders sanctioning Archer for discovery misconduct.

[20] On the other hand, the fact that Archer seems to have little interest in continuing to defend this matter does call for the fashioning of a remedy that is essentially self-executing, assuming Archer chooses not to engage further. It should also embed the concept of a "second chance", given the lack of previous court sanction. Archer should also have an opportunity to provide an explanation, should there be one. Finally, the service terms should maximize the prospects of the order coming to Archer's attention given the serious nature of the remedy.

[21] As such, I find that the appropriate order is as follows:

- a) Archer's response to civil claim and counter claim are deemed struck, and default judgment is granted against Archer with damages to be assessed fourteen days after service of this order unless, within that period:
 - 1. Archer provides to the plaintiff:
 - i. Responses to the requests made at the examination of Paul Blaha on October 17, 2019, including copies of documents required to respond to such requests; and ii. An affidavit sworn by a representative of Archer verifying either Archer's list of documents or any new list of documents; OR
 - 2. Archer successfully applies to set aside this order.
- b) Service of this order shall be delivered by registered mail to both Archer's registered office and to 530 - 625 Howe Street, Vancouver, BC, V6C 2T6. "The Honourable Mr. Justice Branch"

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