

CANADA / JUDGMENT

Kondori v. Bakhtiar

2016 BCSC 960

COURT

Supreme Court of British Columbia

DECIDED

27 January 2016

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2016 BCSC 960 Kondori v. Bakhtiar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kondori v. Bakhtiar,

2016 BCSC 960

Date: 20160127

Docket: S153652

Registry: Vancouver

Between:

Amir Kondori and 1020825 B.C. Ltd.

Plaintiffs

And

Shahab Bakhtiar, 999494 B.C. Ltd. a.k.a. View64, New Country Appliances Inc., Anuradha Garg a.k.a. Ann Garg, Ruby Garg, Ram Garg, Shiv Garg, Nejat & Company Law Corporation d.b.a. Newjat & Company Legal Counsel, Homayoun Sebastian Nejat, John Doe, Jane Doe and John Doe Corporation

Defendants

Before: Master Muir

Oral Ruling

In Chambers

Counsel for the Plaintiffs (Applicants):

H. Faramarzi

Counsel for the Defendants (Respondents), New Country Appliances Inc., Anuradha Garg a.k.a. Ann Garg, Ram Garg, Ruby Garg and Shiv Garg:

N. Aggarwal

Place and Date of Hearing:

Vancouver, B.C.

January 27, 2016

Place and Date of Ruling:

Vancouver, B.C.

January 27, 2016

[1] THE COURT: This is an application by the plaintiffs for the following:

- a) orders striking the response to civil claim of the defendants, New Country Appliances Inc. and the Garg family defendants, which are Anuradha Garg, a.k.a. Ann Garg, Ruby Garg, Ram Garg, and Shiv Garg, and to pronounce judgment against those defendants as if no response had been filed (collectively the "respondent defendants");
- b) an order that they are relieved from the payment of the last installment of an agreement to purchase a store from the respondent defendants in the amount of \$95,000; and
- c) an order that the respondent defendants pay \$500,000 to the plaintiffs, or for an order that the plaintiffs have default judgment with costs to be assessed, plus costs and other orders.

[2] The respondent defendants take issue with all of the orders sought.

[3] The essential facts are that the plaintiff, Mr. Kondori, and his family emigrated from Iran to British Columbia, Canada through the B.C. Provincial Nominee Program in 2014. As part of that program, he had two years to purchase and operate a business in B.C. for a minimum value of \$200,000.

[4] Through a process, which is not important to the case here, Mr. Kondori entered into a licence agreement with the respondent defendants to purchase one of their stores, which is the Chilliwack branch of their appliance stores. The store was apparently for the sale of scratch/dent and refurbished LG appliances.

- [5] Mr. Kondori then alleges that there were fraudulent or false misrepresentations made that New Country Appliances Inc. is the only licensee of scratch/dent and refurbished LG products in North America, that the respondent defendants produced forged and fabricated financial documents, including annual sales and revenues reports -- and this is a summary, of course, the pleading is much more fulsome, and that they made fraudulent representations that he would receive inventory with a 30 to 35 percent discount.
- [6] He alleges that the respondent defendants did not provide him with the true sales and revenue documents of the business, that they misrepresented themselves as to them being the exclusive licensee of these LG products, and as to the discount.
- [7] In addition, the plaintiffs say that these respondent defendants requested they charge customers environmental handling fees ("EHF"). It is said that these fees must be remitted to the government frequently, but the respondent defendants had asked Mr. Kondori to charge customers, not to remit to the government, and include it in his profit.
- [8] Mr. Kondori says that he believes that the respondent defendants had misrepresented themselves when they provided their sales and profit figures by including the EHF which should have been remitted to the government.
- [9] Mr. Kondori also alleges that these respondent defendants have breached the terms of the licence agreement entered between the parties by directly selling to customers in Chilliwack in his location, and failing to provide him with the alleged discount.
- [10] The notice of civil claim was filed May 5, 2015, and the response to civil claim was filed on June 29, 2015. The matter came to a case planning conference on October 9, 2015 in front of Mr. Justice Voith where it was ordered that both parties produce their lists of documents on or before October 31, 2015.
- [11] The plaintiffs produced a list of documents at that time numbering some 331 documents. The respondent defendants produced a list of documents with three documents on it, namely, the offer to purchase, the licence agreement and a letter of June 26, 2015.
- [12] When counsel for the plaintiffs complained about the respondent defendants' list of documents, counsel for the respondent defendants indicated that those were the documents they intended to rely on, and if the plaintiffs wanted more documents, then that they should list them and request them. Counsel for the plaintiffs took issue with that saying that they had an obligation under the Supreme Court Civil Rules to produce all documents which would prove or disprove a material fact.
- [13] That was not resolved between the parties, and an application was brought before Master Baker. Unfortunately, that application, although it was served on the offices of counsel for the respondent defendants, was served when he was away in the United States. He did not return until the day of the hearing of the application before Master Baker, and therefore, these respondent defendants were not represented at that hearing. An order was made by Master Baker for the production of certain categories of documents within ten days of the

hearing. Master Baker's order was then served upon the respondent defendants, but they did not comply with the order.

- [14] On January 5, 2016, counsel for the respondent defendants sent a letter to counsel for the plaintiffs with an amended list of documents, taking the position that some of the documents they were ordered to produce were irrelevant, and that the majority of the rest of the documents has been produced.
- [15] Unfortunately, the documents produced in the list of documents do not encompass all of the documents ordered to be produced, and several of the categories of documents, including the May 27, 2009 agreement with the appliance manufacturer LG, the 2014 financial statements, the invoices for all sales made, and the bank statements from 2011 to 2014 were indicated not to be in their possession or control.
- [16] In addition, I gather there was some discussion, and although it was contained in "without prejudice" correspondence, it is not clear to me that it is without prejudice, taking issue with the service of the notice of application for the application heard by Master Baker.
- [17] I am satisfied that counsel for the respondent defendants has now accepted that his office was served, although it was in his absence, and he, regardless, takes full responsibility for that procedural problem.
- [18] Since then, after threatening to bring this application, a further list of documents has been produced on January 24 by the respondent defendants. However, there are no new documents. The only change that has occurred is that the 2014 financial statements are now said to be within their possession or control, as are all the invoices and the bank statements for 2012, 2013 and 2014.
- [19] I should say there is no affidavit from any of the respondent defendants personally. There is only an affidavit from the assistant of the respondent defendants' counsel.
- [20] With respect to the agreement with LG, counsel for the respondent defendants submits that there is a confidentiality provision in that agreement, and that agreement covers not just the store that was the subject of the sale, but all of the stores or "both stores" -- I am not sure how many stores that are run by the respondent defendants. And, therefore, they have made inquiries of LG as to whether they can disclose the agreement, but LG has not responded.
- [21] I pointed out to counsel for the respondent defendants that there is a court order that the document be disclosed, and that should cover the confidentiality issues. However, if there are concerns that the details of other deals would be disclosed, then counsel should take the opportunity to redact the document as necessary, and that can be discussed in chambers if required.

- [22] The other issue is the bank statements for 2011. Apparently, counsel for the respondent defendants submits that the bank does not retain those statements here, but they have to come from its head office and he says that, although the request has been made, those documents have not yet been forthcoming from the bank.
- [23] In the meantime, New Country Appliances Inc., the defendant company in the action before me, has commenced a new action against Mr. Kondori for basically specific performance of the licence agreement and payment of the \$95,000, which is being held in trust by counsel for the plaintiffs in this action.
- [24] There is no real dispute on the law. The documents have been ordered to be produced. There has been no application to amend or vary the order of Master Baker. Indeed, there is no such application before me. Counsel for the plaintiffs takes the position that, in the circumstances, the respondent defendants have failed to comply with two orders of the court, the order of Mr. Justice Voith and the order of Master Baker, and that I should, accordingly, strike their response to the notice civil claim and grant judgment against them.
- [25] Case law on point is also not in dispute. I will simply quote from one of the decisions submitted to me. That is Northwest Organics Limited Partnership v. Maguire, 2015 BCSC 1918 at para. 25:
- [25] Striking pleadings under Rule 22-7 for non-compliance is a draconian remedy, only to be granted in the most egregious of cases (*Besic v. Kerenyi*, 2012 BCCA 187). Even if the defendant had argued Rule 22-7, in my opinion, she has not shown that the plaintiffs have engaged in a pattern of non-compliance that is sufficient to support the remedy she seeks.
- [26] The Plaintiffs rely on cases on the other hand such as *Dhillon v. Pannu*, 2007 BCSC 1991 and *XY LLC v. Canadian Topsires Selection Inc.*, 2015 BCSC 912, for the proposition that where a party has failed to comply with two orders of the court, it is appropriate to order that their response to civil claim be struck and further that the onus is on the respondent defendants to establish a lawful excuse and explain the reason for their non-compliance, and that they have failed to do. And I agree that the respondent defendants have failed to do so.
- [27] There is no evidence here from the respondent defendants, period, so there is no question that they have tried to excuse their non-compliance. That concerns me, but I am also concerned that no injustice be visited upon the respondent defendants, and in the circumstances of their counsel's error in having someone accept service of a document when he was unavailable or failing to advise plaintiffs' counsel that he was away and unavailable, whatever that reason for the non-attendance at the hearing before Master Baker, I am of a view that there should be one more chance given to the respondent defendants to comply.
- [28] However, I am also of the view that this is an extraordinary circumstance and I am concerned that the respondent defendants are not taking their obligations under orders of the court or as parties to this litigation sufficiently seriously.

- [29] In all the circumstances, I am going to order that all documents ordered to be produced in the order of Master Baker of December 2, 2015 be listed on an amended list of documents of the respondent defendants within seven days of today.
- [30] The respondent defendants are then to produce copies of all of those documents to the plaintiffs within ten days of today, other than the 2011 bank statements. Those bank statements are to be listed within two days of receipt on a further amended list of documents. If they are not received within 30 days, the plaintiffs are to be given formal notice so that an application can be made for production of those documents directly from the bank.
- [31] The plaintiffs are to pay a reasonable amount for photocopies of those documents forthwith upon receipt of them. The \$95,000 being held in trust by plaintiffs' counsel is to be retained by him in an interest bearing trust account until agreement to pay out is given by the plaintiffs and the respondent defendants, or until there is a further court order.
- [32] The respondent defendants are to produce an affidavit within ten days of today certifying that all documents ordered to be produced in the order of Master Baker have been produced, and identifying where on the fourth amended list of documents those documents are listed.
- [33] MR. FARAMARZI: Yes. Before we go to cost, I just want to clarify.
- [34] THE COURT: Yes.
- [35] MR. FARAMARZI: Regarding the order of Master Baker, tab 6 number 1H:
- Any and all other relevant documents regarding the issues in the pleadings.
- [36] THE COURT: Yes.
- [37] MR. FARAMARZI: So we want the respondent defendants to specify in their affidavits that there is no other relevant document.
- [38] THE COURT: Yes.
- [39] MR. FARAMARZI: Because we do not know what other relevant documents they may or may not have.
- [40] THE COURT: Yes, that was something that was ordered to be produced by Master Baker, and the respondent defendants must comply with my order, which is to produce an affidavit that all of those documents have been produced, including any other relevant documents to the litigation.
- [41] MR. FARAMARZI: Yes.
- [SUBMISSIONS AS TO COSTS]

[42] THE COURT: All right. With respect to costs, as I said before, I am not satisfied that the respondent defendants have taken their obligation as parties to this action seriously or as seriously as they should as affected parties under orders of this court, regardless of the submissions of counsel for the respondent defendants. There is nothing before me from his clients with respect to their intentions, why they did not comply with court orders or anything else for that matter. And I am of the view that costs in the amount of \$1,500 should go against the respondent defendants, being New Country Appliances Inc. and the Garg defendants, payable forthwith in any event of the cause.

[43] All right. I will return your binders.

[44] MR. AGGARWAL: Your Honour.

[45] THE COURT: Yes, sir.

[46] MR. AGGARWAL: Any order that is to the claim and the new notice of claim.

[47] THE COURT: Oh, yes, I am sorry. I meant to say that. There will be a further term of the order, and essentially, by consent of both parties, that the Vancouver Registry Action S160920 will be consolidated with this action for all purposes. The notice of civil claim in S160920 will stand as a counterclaim in this action, and of course, the plaintiff, Mr. Kondori, is free to do a defence to counterclaim as provided by the Rules.

"Master Muir"

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