

CANADA / JUDGMENT

Malak v. Hanna

2021 BCSC 517

COURT

Supreme Court of British Columbia

DECIDED

22 March 2021

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2021 BCSC 517 Malak v. Hanna

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malak v. Hanna,

2021 BCSC 517

Date: 20210322

Docket: S133981

Registry: Vancouver

Between:

Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd.

d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc. ,

Western Traffic Inc. d.b.a. Flaggirls Traffic Control, and

Island Traffic Services Inc.

Plaintiffs

And

Remon Hanna, Philip Keith Jackman, Valley Traffic Systems Inc.,

John Doe, Jane Doe, Richard Roe, Chris Sloe

and Trevor Paine

Defendants

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

R.D. McConchie

A. McConchie

Counsel for the Defendant, Remon Hanna:

D.W. Burnett

Counsel for the Defendants, Philip Keith Jackman, Valley Traffic Systems Inc. and Trevor Paine:

D. Stainsby

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 12, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 22, 2021

Introduction

[1] In this defamation case which was commenced by the plaintiffs in May 2013, the plaintiffs seek damages from the defendants arising from the publication of defamatory statements on internet sites and by email in June 2012. The plaintiffs claim that these defamatory statements resulted in them not obtaining lucrative traffic control services contracts, including a contract from BC Hydro (the "BC Hydro Contract"). The plaintiffs and defendants are competitors in the traffic control services industry.

[2] This case is case managed and I am the case management judge.

[3] In reasons for judgment issued December 30, 2019 (indexed as 2019 BCSC 2257), I granted the plaintiffs' application to file a fourth amended notice of civil claim to include, inter alia, the alternative remedy of disgorgement of profits.

[4] On May 21, 2020, the plaintiffs filed a fourth amended notice of civil claim (the "Fourth ANOCC") which includes a claim for the following relief:

Part 2: RELIEF SOUGHT

The plaintiffs therefore claim against the defendants, jointly and severally, as follows:

- d. special damages, or alternatively, an Order that each defendant account for and disgorge the profits resulting from the defamatory expression in respect of which each defendant is found to be liable, relating to or arising from the BC Hydro Contract.

[Emphasis in original.]

- [5] On November 12, 2020 the plaintiffs served the defendants with a demand pursuant to Rule 7-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 for various documents related to the plaintiffs' claims for special damages and disgorgement of profits. In December 2020 counsel for the defendants Valley Traffic Systems, Philip Jackman and Trevor Paine (the "Valley Defendants") and counsel for the defendant Remon Hanna responded advising that they would not produce documents until their application to strike the plaintiffs claim for the remedy of disgorgement of profits had been heard and decided.
- [6] In reasons released on January 26, 2021 (indexed as 2021 BCSC 115) I dismissed the applications of the Valley Defendants and Mr. Hanna, made pursuant to R. 9-6 of the Supreme Court Civil Rules for dismissal of the plaintiffs' claim for the remedy of disgorgement of profits.
- [7] On January 29, 2021 counsel for the plaintiff wrote to defence counsel following up on the November 12, 2020 demand for documents. Counsel for the Valley Defendants left a voice-mail message in response stating, inter alia "We are going to get you the documents on disgorgement As I understand it, we have got everything pretty much together in boxes I know that both of us need to get this to accountants in order to get expert reports in advance of trial. and hopefully we'll have documents to you with any luck next week "
- [8] Despite the plaintiffs' demands the defendants have not updated their lists of documents to include those related to the claim for special damages and the remedy of disgorgement of profits. The plaintiff brings this application pursuant to Rule 9-7(13) and (14) for an order that the defendants comply with the plaintiffs November 12, 2020 demand that they produce documents relevant to the plaintiffs' claims for special damages related to an alleged loss of income arising from not receiving the BC Hydro Contract and their claim for the alternative remedy of disgorgement of profits.
- [9] The trial is set to commence on June 14, 2021 for 19 days.

Documents Sought by the Plaintiffs

- [10] The Plaintiffs' seek the following classes of documents from the Valley Defendants:
 - a. Documents related to compensation paid to the Valley Defendants under the BC Hydro Contract including records of payments;
 - b. Documents related to the terms and conditions of the BC Hydro Contract;
 - c. Invoices issued by the Valley Defendants to BC Hydro pursuant to the BC Hydro Contract;

- d. Financial statements and financial records and corporate tax returns of Valley Traffic Systems Inc. from 2013 until the BC Hydro Contract was terminated;
 - e. Documents evidencing payments by Valley Traffic Systems Inc. to Domcor Traffic Control Inc. related to the BC Hydro Contract;
 - f. Reports called "TaiRox reports" for BC Hydro dispatches (for traffic control services) from April 2013 until the BC Hydro Contract was terminated;
 - g. All documents related to financial compensation paid to Remon Hanna, his company Advanced Traffic Solutions Inc. ("Advanced") or related persons or entities by the Valley Defendants;
 - h. All documents evidencing an agreement between Remon Hanna and Advanced and the Valley Defendants for financial compensation related to the BC Hydro Contract - including a scribbled note evidencing the terms of financial compensation payable to Hanna or Advanced; and
 - i. Invoices issued by Remon Hanna or Advanced to the Valley Defendants pursuant to their agreement and documents evidencing payment by the Valley Defendants to Remon Hanna or Advanced.
- [11] The Plaintiffs seek, in summary, documents from Remon Hanna related to financial compensation paid to him or Advanced by the Valley Defendants in respect of the BC Hydro Contract and documents concerning the underlying agreement between Remon Hanna, Advanced and the Valley Defendants and relevant financial, accounting and tax records.

The Position of the Parties

- [12] Mr. Hanna objects to searching for and producing the requested documents, which may be in his possession, on the basis that doing so is disproportionately onerous and invasive. He submits that the time and expense required to search for, analyze and then produce such documents is likely going to be wasted as a result of what he contends is the "strong likelihood that the disgorgement claim will fail". Further, he submits that the time set aside for trial in June 2021 will be fully occupied on the remaining liability and damages issues related the plaintiffs' claims.
- [13] With respect to why producing the documents sought will be disproportionately onerous, Mr. Hanna has sworn that if it is necessary to produce the financial documents sought and to prepare calculations of the revenue and overhead from revenue he received from the Valley Defendants he will be challenged to do so before trial as he is currently too busy with other work. He says he does not have a book keeper who can provide the requested documents and will have to conduct a search for documents himself.

- [14] The Valley Defendants say that the volume of documents being demanded is significant, including 3,300 documents submitted electronically to BC Hydro with respect to the BC Hydro Contract, 1,500 PDF documents and 42 boxes of subcontractor related documents. The subcontractor documents include, in my understanding, documents with respect to work carried out by subcontractors engaged by Valley Traffic Systems Inc. or by Mr. Hanna on its behalf, to provide traffic control services pursuant to the BC Hydro Contract.
- [15] The Valley Defendants say that the requested documents go to the issue of disgorgement of profits, which is a novel claim in the context of a defamation action, and a review of these documents would essentially result in a detailed accounting exercise, taking up much of the 19 days set aside for trial.
- [16] Mr. Hanna and the Valley Defendants do not strenuously oppose the plaintiffs' application for production of documents on the basis of a lack of materiality. In essence, they contend that for reasons of proportionality, the determination of what profits the Valley Defendants and Mr. Hanna earned as a result of the BC Hydro Contract can be dealt with after trial, through an accounting before the Court's registrar.
- [17] With respect to one particular document request, being the scribbled notes prepared by Mr. Paine setting out an agreement under which Mr. Hanna would receive compensation for amounts earned by the Valley Defendants under the BC Hydro Contract, the Valley Defendants say that they have responded to this request. They say that they have not been able to locate this document at this time.
- [18] The plaintiffs contend that many of the requested documents concern both their claim for special damages and their claim for the alternative remedy of disgorgement of profits. Accordingly, whether or not the remedy of disgorgement of profits is granted the documents are required.
- [19] With respect to the claim for special damages the Plaintiffs say that despite the fact that this lawsuit was commenced in 2013, they have not received any documents with respect to the nature of BC Hydro Contract including the Valley Defendants' bid documents. They seek these contract documents and documents evidencing the work carried out by the defendants in respect of this contract. The plaintiffs say that the requested documents are required in order to determine what special damages they have sustained.
- [20] With respect to the Plaintiffs' claim for the alternative remedy of disgorgement of profits, the Plaintiffs say that documents concerning what amounts were paid to the defendants as a result of the BC Hydro Contract and what their costs were, are required in order to determine what profits were made.
- [21] The plaintiffs say that they do not require the production of the 42 boxes of subcontractor documents from the defendants at this time. I note though that these documents may be relevant, based on submissions of counsel for the Valley Defendants that these documents may include evidence concerning the nature of work carried out by subcontractors pursuant

to the terms of the BC Hydro Contract. That is, the subcontractor documents will itemize the work completed under the BC Hydro Contract, which is relevant to the plaintiffs' special damages claim.

- [22] The plaintiffs say that they do not require a detailed, itemized list of documents in the possession of the defendants but are content to receive a general, itemized list showing the nature, categories and source of available documents.

Analysis

- [23] In my view the materiality of the requested documents is not in issue - both to the claim for special damages and the remedy of disgorgement of profits. In addition, it is not an excuse to avoid production of relevant documents on the basis that the claim for alternative remedy of disgorgement of profits is weak and may ultimately fail.
- [24] With respect to documents in the possession of the Valley Defendants, with the exception of the scribbled notes which they say they are unable to locate, it appears that the documents have been identified and have been set aside. The issue of proportionality does not arise in respect of production of these materials as the work to locate them has already been done.
- [25] I am not satisfied that Mr. Hanna will be disproportionately inconvenienced by reviewing his records and producing relevant documents. He has simply stated that he is too busy to complete this work before trial. He did not provide evidence with respect to how long it will take to gather the relevant materials. In addition, given that the document request was made in November 2020 I have little sympathy for Mr. Hanna in not taking steps to locate and produce relevant documents sooner. Counsel for Mr. Hanna submits that it was not practical for him to do so until the defendants' application to strike the claim for disgorgement of profits was heard and decided. I reject this explanation. In my view, it was a mistake for Mr. Hanna to delay a search for relevant documents simply on the hope that a strike-out application concerning the claim for the remedy of disgorgement of profits would be successful.
- [26] What is really in issue is whether it will be more efficient in the circumstances of this case to deal with evidence, including the expert accounting evidence, with respect to the nature of the work completed by the defendants pursuant to the BC Hydro Contract and the profits earned for such work, after the issue of liability and entitlement to special damages or alternatively disgorgement of profits is determined at trial.
- [27] I am not satisfied at this time that it would be appropriate to defer the calling of evidence and the quantification of the plaintiffs' special damages or the alternative remedy of disgorgement of profits remedy, if such damages are awarded, to assessment before the Registrar after trial.

- [28] As I indicated to the parties during submissions, the issue appears to be evidence concerning the quantification of the plaintiffs' special damages or if the alternative remedy of disgorgement of profits should be dealt with after the liability issues are determined at trial. That is, is it better to sever these issues and deal with them in a second phase of the trial? No such application is before me and evidence with respect to the basis for severance is required.
- [29] As I mentioned at the outset this matter is case managed and a case management conference is set to take place before me on April 1, 2016. Should the defendants choose to do so, I grant them leave to file and serve an application to sever (pursuant to Rule 12-5(67)) the issues of the quantification the plaintiffs' special damages and quantification of the defendants' profits. In order to be heard on April 1, 2016 I order that the defendants file and serve their materials by no later than March 24, 2021 and the plaintiffs will have until March 30, 2021 to file their response.
- [30] With respect to the plaintiffs' applications for production of documents, I order that the Valley Defendants and Remon Hanna comply with the demand for documents made by the plaintiffs on November 12, 2020 and list the additional documents specified - if they exist. The Valley Defendants shall serve their amended list of documents (which may be a general itemized list showing the nature, categories and source of available documents) within seven days of the dates of this order. Remon Hanna shall serve his amended list of documents within thirty days of this order.

"Mayer J. "

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Prepared on 26 October 2026 · Esheria