

CANADA / JUDGMENT

Meridian Distribution Ltd. v. Endeavor Design Inc.

2020 BCSC 916

COURT

Supreme Court of British Columbia

DECIDED

3 February 2020

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2020 BCSC 916 Meridian Distribution Ltd. v. Endeavor Design Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Meridian Distribution Ltd. v. Endeavor Design Inc., 2020 BCSC 916 Date: 20200203 Docket: S149270 Registry: Vancouver Between: Meridian Distribution Ltd. Plaintiff And Endeavor Design Inc. Defendant Before: The Honourable Madam Justice Francis Oral Reasons for Judgment Re: Costs Counsel for the Plaintiff (appearing via teleconference): P.K. Sandhu Counsel for the Defendant: G.N. Harney Place and Date of Trial/Hearing: Vancouver, B.C. December 19, 2019 Written Submissions of the Plaintiff: January 17, 2020 Written Submissions of the Defendant: January 24, 2020 Place and Date of Judgment: Vancouver, B.C. February 3, 2020

- [1] THE COURT: In giving oral reasons for judgment on December 19, 2019 in this matter, indexed as 2019 BCSC 2406, I indicated that I would be inclined to order that the plaintiff should have its costs at Scale B, since the plaintiff was substantially successful in the summary trial. However, counsel for the defendant sought and received leave to make submissions on costs and I set a timeline for written submissions. I have reviewed the written submissions of the parties and these are my reasons for judgment on costs.
- [2] This action was a claim in contract brought by Meridian Distribution Ltd. ("Meridian"), a distributor of snowboards and winter sports equipment, against Endeavor Design Inc. ("Endeavor"), a company that manufactures snowboards and other winter sports equipment. In 2012, Endeavor terminated a long standing distribution agreement with Meridian. The issue in the summary trial was whether Meridian was entitled to reasonable notice of the termination of its agreement with Endeavor. I held that Meridian was indeed entitled to notice, and I ordered damages against Endeavor. I further ordered that Meridian had failed to mitigate its loss by accepting Endeavor's offer to share in a portion of its sales during the year following termination of the agreement and I ordered that the value of Endeavor's offer (the "Mitigation Amount") must be deducted from the damages payable by the defendant to the plaintiff. There was no evidence before me at the summary trial that would enable a quantification of the Mitigation Amount, so I referred the calculation of the Mitigation Amount to the registrar, in the event the parties could not agree. Success at Summary Trial

- [3] The plaintiff's position is that it should receive costs because it was substantially successful. The defendant argues that success was mixed because the court found that the defendant breached the contract between the parties but the plaintiff failed to mitigate its loss.
- [4] I have no trouble finding that the plaintiff was substantially successful in this matter.
- [5] While I did find that there was a failure to mitigate on the part of the plaintiff, the vast majority of the summary trial time was spent on the issue of whether the plaintiff was entitled to notice of the termination of the contract. The defendant made a very brief submission that the plaintiff failed to mitigate its loss, but did not provide the court with any authorities in support of its mitigation argument (indeed, the defendant did not provide the court with any case authorities at all). To the extent that time and resources were expended in researching and analyzing the defendant's successful mitigation argument, they were the time and resources of the court, not the defendant. Therefore, I find that, in accordance with the regular rule, the plaintiff is entitled to its costs. Offers to Settle
- [6] The plaintiff made two offers to settle, one before litigation started and one on May 31, 2019. The one that was made before the litigation started was made by way of a letter dated May 8, 2014, and in that offer the plaintiff offered to settle the matter for \$141,310.58. The second offer was a formal offer to settle, by letter dated May 31, 2019, in which counsel for the plaintiff made an offer to settle for \$150,000 (the "Formal Offer"). Only the Formal Offer complies with the requirements of Rule 9-1, and, as such, that is the only offer I will consider for the purposes of the plaintiff's double costs claim.
- [7] Rule 9-1(5)(b) allows the court to award double costs of all or some of the steps taken in a proceeding after delivery of a formal offer to settle. Pursuant to Rule 9-1(6), the factors to consider in making a double costs award are:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date [it] was delivered or [on a] later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [8] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to accept an offer to settle that should have been accepted.
- [9] This matter is somewhat complicated by the fact that the precise damages payable by the defendant to the plaintiff remain uncertain. This is because I ordered that the damages payable to the plaintiff must be reduced by the Mitigation Amount. The Mitigation Amount has yet to be resolved between the parties or determined by the registrar. Consequently, the answer to the question of whether the defendants would have been financially better off had they accepted the Formal Offer is also uncertain. I understand from the submissions of the

plaintiff that the determination of the Mitigation Amount is currently pending before the registrar and a prehearing conference before the registrar has taken place.

- [10] In the matter before the registrar, Mr. Jenke swore an affidavit for the purposes of establishing the Mitigation Amount at the registrar's hearing. That affidavit was submitted as evidence on this costs hearing and it sets out the position of the defendant on the Mitigation Amount. To be clear, the value of the Mitigation Amount is before the registrar, it is not before me. In considering costs, I am expressly not making any finding about the Mitigation Amount. However, in assessing the impact of the Formal Offer on costs, it is helpful to know the position of the defendant as to what amount should be deducted from the damages payable to the plaintiff.
- [11] For the purposes of assessing the Formal Offer, I have looked at the defendant's best case scenario, which is that Mr. Jenke's evidence is accepted by the registrar and there is a Mitigation Amount deducted from the damages award in the amount of \$69,847.75. This would mean that the defendant's liability to the plaintiff would be \$143,139.96. The defendant's liability to the plaintiff may be more than this, depending on the findings of the registrar, but it is unlikely to be less.
- [12] By May 31, 2019, the date of the Formal Offer, documents had long since been exchanged and discoveries had taken place. The defendant ought to have known that it had significant risk, on the basis of the legal authorities relied on by the plaintiff, of being liable to pay damages to the plaintiff. While the Mitigation Amount has not been determined at this point by the registrar, it is important to note that the defendant, as at May 31, 2019, was in a position to determine the Mitigation Amount on the basis of its own records.
- [13] If the defendant's evidence about the Mitigation Amount were accepted by the registrar, the defendant would be liable to pay an amount that is approximately \$6,800 less than the Formal Offer.
- [14] If this proves to be the case, the plaintiff will not have "beaten" its Formal Offer at trial. However, the difference between the Formal Offer amount of \$150,000 and the \$143,139.96 payable by the defendant on its best case scenario before the registrar is not significant.
- [15] Further, the relationship between the terms of the settlement offer and the final judgment is just one of the factors that I must consider under Rule 9-1(6). This must be considered in the context of the considerable legal fees that were incurred in litigating the matter, including the legal fees that were incurred between May 31, 2019 and the end of the summary trial, which I have no doubt were more than \$6,860.
- [16] On that basis, I find it would have been reasonable for the defendant to accept the plaintiff's Formal Offer on May 31, 2019.
- [17] I therefore find that the plaintiff is entitled to costs at Scale B for all steps in the proceeding up to May 31, 2019 and double costs after that. Costs of November 25, 2019 Appearance

- [18] I wish to make one final note about a point that was raised in the reply submissions of the defendant. If I understand the defendant's reply submissions on costs correctly, the defendant is arguing once again that it ought not be liable for the \$1,000 lump sum costs award I made against it on November 25, 2019. This is notwithstanding the fact that the defendant has previously applied to reopen the matter of costs of the November 25, 2019 appearance and I declined to reconsider that order.
- [19] Our Supreme Court Civil Rules, B.C. Reg. 168/2009 only work if counsel communicate in good faith with one another. On November 25, 2019 counsel for the plaintiff was required to travel from Vancouver to Chilliwack to speak to the scheduling of the hearing because counsel for the defendant refused to give her the courtesy of a response when she inquired about his availability that week.
- [20] As I noted on November 25, 2019, Ms. Sandhu's client ought not to bear the cost of her attendance in Chilliwack to speak to scheduling when such attendance was necessitated by Mr. Harney's failure to return her calls. The plaintiff was entitled to costs thrown away for that appearance and that is what I ordered. So for the third time I will state that my costs order stands with respect to the November 25, 2019 appearance. "Francis J."

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