
CANADA / JUDGMENT

Miller v. Hall

2020 BCSC 461

COURT

Supreme Court of British Columbia

DECIDED

31 March 2020

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2020 BCSC 461 Miller v. Hall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Hall,

2020 BCSC 461

Date: 20200331

Docket: S1548187

Registry: Prince George

Between:

Bradley Douglas Miller,

Bam Bam Trucking Ltd.

Plaintiff

And

Esther Hall

Defendant

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for Plaintiffs:

R.D. Lyons

Counsel for Defendant:

N.L. Gidora

Place and Date of Trial:

Prince George, B.C.

January 13-17, 2020

Place and Date of Judgment:

Prince George, B.C.

March 31, 2020

OVERVIEW

- [1] The defendant, Esther Hall, provided bookkeeping and accounting services to the plaintiffs, Bradley Miller and his company, Bam Bam Trucking Ltd. ("Bam Bam") for about two years. In March 2015, the plaintiffs terminated Ms. Hall's employment. She commenced an action for wrongful dismissal in provincial court and obtained default judgement. Mr. Miller and Bam Bam commenced an action against Ms. Hall in this court. They obtained an order setting aside the default judgement. As a result, the claims were consolidated in this court. Mr. Miller and Bam Bam allege that Ms. Hall's work was so deficient that it amounts to negligence, breach of contract, and breach of fiduciary duty.[1] Ms. Hall counterclaims for wrongful dismissal and defamation. In addition, she seeks repayment of the outstanding amount on personal loans she advanced to the plaintiffs.
- [2] For the reasons that follow, I dismiss the plaintiffs' claims. With respect to the counterclaim, I find that Ms. Hall was wrongfully dismissed, that she was defamed, and that she was not fully repaid for the loans she advanced.

BACKGROUND FACTS

- [3] Ms. Hall obtained certification as a Certified General Accountant ("CGA") in 1993, after completing the requisite combination of online courses and work experience. She retired from that designation in 1995 in order to open her own home-based business providing bookkeeping and tax return services. She continues to operate that business.
- [4] Mr. Miller began operating Bam Bam as a sole proprietorship some years ago, providing various services including trucking, water delivery and garbage disposal. In or around 2011, he obtained lucrative contracts related to the construction of a gold and copper mine at Mt. Mulligan ("Contracts"). In order to service the Contracts, Mr. Miller had to hire many more employees and obtain additional equipment, including trucks.
- [5] This meant that Bam Bam's finances became more complicated. As Mr. Miller had no knowledge of bookkeeping, accounting or human resources, he hired others to assist him.
- [6] On the advice of a friend, Mr. Miller incorporated Bam Bam in December 2011.

- [7] Mr. Miller also obtained bookkeeping services from a series of bookkeepers. Initially, he retained a woman named "Sandy" to do the books. Mr. Miller testified that he learned from Debbie Coles, a bookkeeper at the mine, that Sandy was taking money from him, so he let her go and hired Ms. Coles instead. Ms. Coles testified that she worked for Bam Bam from January 2012 to August 2013. At some point in 2013, Mr. Miller retained Ms. Hall to prepare and file his 2008 to 2011 tax returns, which he had not filed. He also asked her to advise Ms. Coles, which she did. Ms. Hall testified that Mr. Miller told her that he was dissatisfied with Ms. Coles' work. He terminated Ms. Coles' employment and hired Ms. Hall to replace her in September 2013.
- [8] There was no written contract of employment. Ms. Hall's core responsibility was to keep Bam Bam's books, including making tax remittances, but there is conflicting evidence about the precise scope of those duties. Ms. Hall said the books were in a deplorable state when she received them. She worked on addressing that problem. However, a number of deficiencies still remained in March 2015, when Mr. Miller terminated her employment.
- [9] Subsequently, Mr. Miller retained Clarence Lowey to keep Bam Bam's books. A central issue between the parties is whether or to what extent Ms. Hall is responsible for the state of Bam Bam's books and the extent of those deficiencies at the time of her termination.
- [10] After the Contracts ended in 2014, Bam Bam had to downsize and suffered financially. Among other things, Mr. Miller had to refinance his home to address the problem.
- [11] From March 2014 until shortly before her termination, Ms. Hall issued a series of short-term loans to Bam Bam to cover cash flow problems. The parties disagree about whether these loans were fully repaid.
- [12] On March 2, 2015, Mr. Miller terminated Ms. Hall's employment with Bam Bam. He did not provide her with any notice or severance pay. The parties disagree about the reasons for the termination. Mr. Miller telephoned Jennifer Trainor, Bam Bam's office manager, and told her that Ms. Hall had ripped him off and misled him.

CREDIBILITY AND RELIABILITY OF PRINCIPAL WITNESSES

- [13] Mr. Miller's recollection of the relevant events was very poor. On direct examination, his typical initial response to the questions was that he did not recall; however, he went on give an answer that supported his position in the litigation. On cross-examination, he was quick to disagree with every proposition that was put to him; however, he would add either that he had no recollection or volunteer information favourable to him that was not responsive to the question.

- [14] Mr. Miller could not recall key facts. For example, he could not remember when he hired or fired Ms. Hall, what her job duties included, or whether he ever discussed them with her. He agreed that she loaned him or Bam Bam some money but could not recall when or how much. He gave inconsistent accounts of the reason for terminating Ms. Hall's employment. For these reasons, I find that Mr. Miller's evidence was not credible or reliable. I place no weight on it unless it is supported by other evidence.
- [15] By contrast, Ms. Hall's evidence was generally straightforward and clear. She gave detailed and responsive answers to questions in direct examination and cross-examination. In particular, her answers were detailed and convincing when numerous deficiencies about the state of Bam Bam's accounts were put to her on cross-examination. Although it was evident from some gratuitous remarks she made in cross-examination that Ms. Hall remains angry at Mr. Miller, this is understandable. I find that this does not detract from her credibility or the reliability of her evidence on the key issues.

PLAINTIFFS' CLAIMS

- [16] The plaintiffs' claim that Ms. Hall breached her fiduciary duty to them, was negligent in the performance of her duties, and breached the terms of the employment contract. However, in closing submissions, it became apparent that the core of the plaintiffs' claim is in negligence. Essentially, they say that Ms. Hall's performance of her bookkeeping/accounting work for Bam Bam fell below the requisite standard of care.
- [17] The elements of negligence are: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty by failing to exercise the requisite standard of care, (3) the breach caused the plaintiff's injury, (4) the injury was reasonably foreseeable, and (5) actual damage occurred. This is a fact-specific inquiry.
- [18] Where the defendant is a professional, a professional standard of care applies. That standard requires the professional to exercise reasonable care, skill and knowledge in the performance of the professional service, assessed in light of what it is reasonable to expect of a competent professional in similar circumstances. This is an objective standard, which is informed by the terms of the particular professional's engagement: *Newton v. Marzban*, 2008 BCSC 328 at paras. 297-299.
- [19] In considering the standard of care applicable to Ms. Hall, it is important to note that she gave up her professional CGA designation before she met Mr. Miller and there is no suggestion that she held herself out as a licenced accountant. However, Ms. Hall acknowledged that she did both accounting and bookkeeping for Bam Bam. She also had the authority over payroll and paid herself back for at least some of the loans she advanced to Bam Bam by authorizing payments to herself without needing to consult Mr. Miller. I am satisfied that a professional standard of care applies in these circumstances.

- [20] Usually, a plaintiff tenders expert evidence to establish the standard of care that applies to a professional. However, as recognized in *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2015 BCSC 845 (at paras. 26-27), there are two exceptions to the general rule:
- [26] The jurisprudence recognizes two factual contexts in which expert evidence is not required to establish a professional standard of care:
- a) where the plaintiff seeks to prove negligence about a matter that is non-technical or a matter of which an ordinary person may be expected to have knowledge: *317159 B.C. Ltd. v. C.A. Boom Engineering (1985) Ltd.*, [1990] B.C.J. No. 2699 (C.A.); *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88, at para. 36; and
 - b) where the impugned actions of the defendant were so egregious that it is obvious that his or her conduct had fallen short of the standard of care, even without knowing precisely the parameters of that standard: *Krawchuk* at para. 135; *Cosway* at para. 35
- [27] The onus is on the party seeking to prove professional negligence to establish the relevant standard of care: *Krawchuk* at para. 131, citing *Mileos v. Block Bros. Realty Ltd.* (30 September 1994), *Vancouver C913338 (B.C.S.C.)*.
- [21] The plaintiffs did not tender any expert evidence to establish the standard of care in this case, nor did they make submissions about the applicability of either of these exceptions. In my view, the first exception does not apply. The alleged deficiencies in Ms. Hall's work concern technical aspects of bookkeeping and accounting that are beyond the knowledge of an ordinary person. However, the second exception may apply, so I will consider whether the plaintiffs' have proved Ms. Hall breached the standard of care on that basis.
- [22] The plaintiffs' submission that Ms. Hall was negligent rests entirely on Mr. Lowey's evidence about the state of Bam Bam's books. Mr. Miller, the only other defence witness, said that he did not know anything at all about bookkeeping or accounting.
- [23] In assessing Mr. Lowey's evidence, I take into account that much of his evidence in direct examination was in response to leading questions. This reduces the weight I give his evidence.
- [24] Mr. Lowey gave extensive evidence about the flaws he saw in the books he received from Ms. Hall after he was retained by Mr. Miller. He said that, having seen the state of the books, he decided to disregard them entirely and recreate Bam Bam's books from original sources. He said that it took him and one of his employees about two years to do this, although they did not spend all their time on this project.
- [25] Mr. Lowey's criticisms of Ms. Hall's work were put to her in cross-examination. She had rational explanations for many of the steps she had taken, and she acknowledged that there were irregularities that she had not yet dealt with. It is not necessary to review this evidence in detail because the plaintiffs' claim fails for a different reason.

[26] Ms. Hall testified that, when she took over Bam Bam's books from Ms. Coles, they were in complete disarray. She said that she received five Simply Accounting files and a "suitcase" of documents from Ms. Coles. A great deal of information was missing and Ms. Hall described the efforts she made to find it. Mr. Miller was unresponsive to her inquiries, so Ms. Hall asked a couple of other employees to help. The problems Ms. Hall found included the following:

- Bam Bam's assets were not recorded in its books;
- there were inexplicable differences between bank and payroll;
- there were missing vendor invoices and information;
- Bam Bam, although incorporated, was still using its sole proprietorship business number;
- the books were structured for a sole proprietorship, not a corporation;
- there was inadequate separation between Bam Bam's finances and those of Mr. Miller; and
- the assets of the Bam Bam sole proprietorship had not been formally transferred to the Bam Bam corporation. No corporate tax returns had been filed to date.

[27] Ms. Hall testified that, at the time of termination, she was still engaged in the work of regularizing Bam Bam's books. She pointed to various outstanding issues that she had not been able to address by that point.

[28] Mr. Lowey testified that Mr. Miller did not tell him that Ms. Hall had taken over Bam Bam's books from Ms. Coles. He did not see the state of the books Ms. Hall received when she started working for Bam Bam in 2013 and could not know the extent of the problem. Mr. Lowey also acknowledged that the 2014 financial records were an improvement over the 2012 records.

[29] Mr. Lowey's evidence does not establish the Ms. Hall's work was so egregious that it is obvious she breached the standard of care. Mr. Lowey assumed that Ms. Hall was responsible for all of the deficiencies in the books. However, some problems arose from Ms. Coles' work and Ms. Hall had not yet addressed them. Other deficiencies that Mr. Lowey attributed to Ms. Hall's work were in fact attributable to Mr. Miller, including his refusal to authorize transfer of the assets to the corporation and his responsibility for missing information. Further, Ms. Hall was fired before she had finished regularizing the books. She agreed that certain problems were issues that she had not yet addressed and estimated it would have taken her three more months to fix the outstanding problems. Finally, Ms. Hall and Mr. Lowey disagreed about how certain items ought to be treated. Absent expert evidence, I have no basis upon which to prefer the evidence of one over the other.

[30] I conclude that the plaintiffs have failed to establish that Ms. Hall breached the applicable standard of care. It follows from this that the breach of fiduciary duty and breach of contract claims must fail as well, as they rest upon the same factual foundation as the negligence claim.

DEFENDANT'S COUNTERCLAIMS

[31] Ms. Hall's counterclaims are that she was wrongfully dismissed, that she was defamed, and that she is owed the outstanding amount of the loans she made to Bam Bam.

Wrongful dismissal

[32] Mr. Miller admitted that he dismissed Ms. Hall without notice. He said that the sole reason for the dismissal was an email inquiry he received from his credit union requesting Bam Bam's payroll records "from Feb 28, 2012 to Dec 19, 2013, as this business has had fraudulent activity go through account." He admitted that Ms. Hall did not start working for Bam Bam until September 2013, so could not have been responsible for any period before that. The inquiry letter is dated March 31, 2015, after Ms. Hall's termination on March 2, 2015. Neither party addressed that discrepancy.

[33] Mr. Miller also testified that he dismissed Ms. Hall because, "I had no work for her anyway" and "things weren't working out between us."

[34] Ms. Hall testified that Mr. Miller terminated her employment during a telephone call in which she told him that she could not lend him any more money. She testified that he said, "you're in over your head" and "I can't use you anymore", but did not say anything about suspicious or fraudulent activity.

[35] Based on this evidence, I am satisfied that Ms. Hall was dismissed without notice and without cause.

[36] Ms. Hall seeks an amount equal to two months' wages in lieu of reasonable notice based on common law. In the alternative, she seeks pay in lieu of notice under the Employment Standards Act, R.S.B.C. 1996, c. 113. As Ms. Hall was employed for 18 months, this would be an amount equal to two weeks' wages.

[37] The evidence of what Ms. Hall's wages were consists of the following paragraph in the parties' "Joint Chronology", which was an exhibit at trial:

The Plaintiffs and the Defendant do not agree on what the Parties agreed to regarding the Defendant's salary, but regardless, the Defendant was paid approximately \$6,360 per month from September 2013 to September 2014. From September 2014 to her termination she was paid approximately \$3,180.00 per month.

[38] There was no evidence about Ms. Hall's hours of work per week.

- [39] Ms. Hall did not provide any authority for her submission that the notice period at common law should be two months. In light of the absence of any evidence about how many hours she worked per week, it is not possible for me to compare her circumstances with other wrongful dismissal cases. Accordingly, I find that she has not proved the common law period of reasonable notice. I award her \$1,590, representing two weeks' wages at the time of her termination.
- [40] Ms. Hall also claims for unpaid wages for the month of February 2015. Bam Bam's payroll records show that she was last paid in November 2014. I find that she is owed for unpaid wages for February 2014, in the amount of \$3,180.

Defamation

- [41] In order to succeed in a defamation claim, Ms. Hall must prove three elements. First, she must prove that Mr. Miller wrote or spoke defamatory words, in that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person, taking into account the context in which it occurred. Second, she must prove that the words referred to her. Third, she must prove that the words were communicated to someone other than herself: *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28.
- [42] After Mr. Miller fired Ms. Hall, he telephoned Jennifer Trainor, who was then Bam Bam's office manager working in Fort St. James, and left a message. In her affidavit, Ms. Trainor deposes:

On or about March 31, 2015, I received a phone message from Mr. Miller that said: "This is Brad, just to let you know Esther hasn't been as honest as you think, she has taken me for over \$90,000" or words to that effect.

- [43] Ms. Trainor also deposes that she understood the words to mean that Ms. Hall had stolen \$90,000 from Mr. Miller and Bam Bam. Ms. Hall testified that she learned about what Mr. Miller had said from Ms. Trainor.
- [44] For his part, Mr. Miller acknowledged that he may have told Ms. Trainor that Ms. Hall had "ripped me off" and he conceded that the words were defamatory. I agree. Saying that a person committed theft goes beyond a merely offensive or insulting remark and would tend to lower Ms. Hall's reputation in the eyes of a reasonable person, especially given that Mr. Miller was Ms. Hall's boss and that he had just fired her. The words clearly referred to her and were communicated to a third person. I find that Mr. Miller defamed Ms. Hall.
- [45] While a finding of defamation attracts a presumptive award of damages, evidence of the harm caused to the plaintiff is necessary to justify a substantial award. Where a plaintiff does not lead such evidence, nominal damages may be awarded. Where the conduct technically constitutes defamation but the court considers that the claim should not have been brought, contemptuous damages may be appropriate: *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961 at paras. 19-36.

[46] Ms. Hall did not tender any evidence that Mr. Miller or Ms. Trainor communicated what he had said about her to anyone else. It is therefore not surprising that Ms. Hall provided no evidence of harm caused by the defamation. In these circumstances, and taking into account that Ms. Hall advanced the claim as one of several counterclaims, a nominal award is appropriate. I award Ms. Hall \$500 in general damages for Mr. Miller's defamatory statement.

Repayment of Loans

[47] Ms. Hall claims that the plaintiffs owe her \$18,713.82 representing the unpaid amount owing on loans she made to them. She tendered evidence of 18 cheques from her to Bam Bam from March to October 2014, totalling \$66,070 and one cheque to BC Hydro for \$380.89. Ms. Hall testified that this cheque was to cover Mr. Miller's personal BC Hydro bill in order to avoid his electricity being cut off. Ms. Hall testified that she also loaned Mr. Miller \$2,700 shortly before her employment was terminated to cover a certification fee for his airplane. She said she wrote a cheque, but cannot find it. Ms. Hall testified that the plaintiffs repaid her approximately \$50,000 based on her review of the books in which she recorded repayments.

[48] Mr. Miller testified that Ms. Hall had loaned him money on a few occasions. He said that he had paid her back, but then added, "I don't really know." He could not provide any details of repayment. Mr. Miller agreed that Ms. Hall had loaned him money to cover the certification fee for his airplane and in direct examination he said the amount was \$2,000. In cross-examination, he said the amount was \$1,300. Mr. Miller was not asked about the BC Hydro cheque.

[49] I accept Ms. Hall's evidence, corroborated by the cheques, that she loaned Bam Bam \$66,070. I am also satisfied based on her uncontradicted testimony that the BC Hydro cheque was to cover Mr. Miller's Hydro bill. Mr. Miller conceded that Ms. Hall loaned him money to cover the airplane certification fee. I accept her quantification of the amount over his on the basis of my assessment of their credibility and reliability as witnesses.

[50] In argument, the plaintiffs submitted that the burden was on Ms. Hall to prove that she had not been fully repaid. This is plainly wrong. Having proved the loans, Ms. Hall is entitled to repayment of the outstanding amount, which she quantifies as \$18,713.82. If the plaintiffs dispute this figure, it is up to them to lead the necessary evidence. They have not done so. I award Ms. Hall the \$18,713.82 she seeks.

CONCLUSION

[51] In conclusion, I dismiss the plaintiffs' claims against Ms. Hall. With respect to Ms. Hall's counterclaims, I award Ms. Hall the following:

- a) \$3,180 in lieu of notice for her dismissal on March 2, 2015;
- b) \$500 in general damages for Mr. Miller's defamatory remarks; and

c) \$18,713.82 for unpaid monies owing to her.

"Iyer J."

[1] The plaintiffs also alleged civil fraud but did not pursue that claim at trial.

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