
CANADA / JUDGMENT

Nail Cartel Inc. v. Duclos

2017 BCSC 2313

COURT

Supreme Court of British Columbia

DECIDED

14 December 2017

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2017 BCSC 2313 Nail Cartel Inc. v. Duclos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nail Cartel Inc. v. Duclos,

2017 BCSC 2313

Date: 20171214

Docket: S1610681

Registry: Vancouver

Between:

Nail Cartel Inc., dba International Nail Manufacturers

Plaintiff

And

Yvonne Duclos and

Ugly Duckling Nails Inc. (formerly known as Swan Nails Inc.)

Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

N. Godfrey

Counsel for the Defendants:

K.F. MacDonald

M. Hodgson

Place and Dates of Hearing:

Vancouver, B.C.

November 30,

December 4 and 5, 2017

Place and Date of Judgment:

Vancouver, B.C.

December 14, 2017

1. introduction

- [1] The plaintiff manufactures and sells professional nail products and accessories. The defendant, Ms. Duclos, has many years of experience in the nail esthetic industry.
- [2] The plaintiff and Ms. Duclos have had a lengthy business relationship. From around 2003 to 2008, a private corporation for which Ms. Duclos was a director and its directing mind distributed the plaintiff's products in Canada.
- [3] After 2008, Ms. Duclos was not involved directly or indirectly in the nail esthetic industry for approximately three years. Then, from around 2012 to early 2016, the corporate defendant of which Ms. Duclos is a director and its directing mind had a new arrangement in relation to the plaintiff's products.
- [4] The plaintiff calls the arrangement an "order-by-order" arrangement. The defendants categorize the arrangement as one of distribution. For the application at bar, the exact nature of the relationship is not relevant.
- [5] The plaintiff and the corporate defendant are now competitors.
- [6] In the action, the plaintiff has sued the defendants, pleading that the defendants have unlawfully used the plaintiff's confidential information and have committed the tort of passing-off. The plaintiff also says that the defendant, Ms. Duclos, is in breach of contractual obligations.
- [7] As reflected in the plaintiff's claim for relief, the plaintiff's allegations are serious. Among the relief sought, the plaintiff seeks "punitive, aggravated and exemplary damages" and costs on a "full indemnity basis".

- [8] In the current application, the defendants ask that certain paragraphs of the Amended Notice of Civil Claim ("ANOC") be struck, or in the alternative, particulars ordered to be provided. These paragraphs deal with the plaintiff's general allegation of the unlawful use of its confidential information by the defendants. The defendant also seeks an order for particulars regarding certain paragraphs of the ANOC dealing with the plaintiff's allegation of passing-off by the defendants.
- [9] For the reasons that follow, the Court will order particulars to be provided. At this time, none of the challenged paragraphs will be struck.
2. analysis
- a) Unlawful use of confidential information
- [10] The defendants ask that paragraphs 24 to 37 of Part 1: Statement of Facts, and paragraphs 1 and 2 of Part 3: Legal Basis, in the ANOC be struck, or in the alternative, that the Court order particulars.
- [11] For ease of reference, these paragraphs are attached as Schedule "A" to these reasons.
- [12] Preceding the current application, there has been considerable correspondence between counsel for the parties.
- [13] With respect to the plaintiff's allegation of unlawful use of confidential information by the defendants, defendants' counsel wrote to plaintiff's counsel on October 11, 2017 stating (in part):

Furthermore, your client has not pleaded any material facts -- let alone has any evidence produce in its documents to date -- to support its claims regarding the alleged misuse of confidential information, supplier information and/or customer information, including the outlying allegation that such information was passed along to third parties. Your client's allegations that it gave a variety of different types of confidential information to our client is not a material fact supporting the bald assertions that such amorphous information was then misused.

The Amended Notice of Civil Claim doesn't even properly alleged material facts upon which a duty of confidence can be placed on the Defendants; though through inferences, those allegations can at least be understood in that your client believes confidential information was passed to our clients and they were under a duty of confidence not to misuse the same.

However, in the case of the allegations regarding misuse of confidential information, those allegations cannot be understood without proper factual context or factual allegations. Our clients do not believe that they have taken or misused any "confidential information" and do not therefore in any way understand what your client is saying happened: our clients need the Plaintiff to tell them what they are alleged to have done by providing material facts supporting the bald allegations of misuse, and the jurisprudence requires that your client provide such material facts.

The ability for our client to have issued denials with respect to the Plaintiff's bald allegations of wrong-doing cannot be conflated with your client having provided enough information to actually understand the facts upon which your client's bald assertions are made. The deficiencies in your client's pleading cannot be rectified with reference to our clients having denied those allegations. Particulars perform a much greater purpose than to allow the other party to be able to deny allegations or plead in reply; they are required to ensure that the parties understand the case against them and that the issues between the parties are properly defined.

The problems encountered to date with documentary discovery are illustrative of the need for further particulars in this case: from our clients' perspective, they have no documents evidencing any misuse of alleged confidential information, and unless and until your client specifies what is supposed to have been confidential and taken or misused, our clients are unable to, and will not, provide a further response on the current overly broad request for documents.

In the normal course, if your client actually had material facts supporting its bald assertions, your client would provide us with known customer and supplier names and specific information said to have been misused, along with the names of any third parties to whom the information was allegedly imparted. That does not mean that your client would be precluded from exploring the alleged misuse on discovery, but at the very least your client must have some facts - names and specific information - upon which it is basing these allegations.

In view of your client's inability to provide any material facts on these claims, we can only assume that your client has no such material facts, but is rather merely speculating and engaging on a fishing expedition in the hopes that material facts will surface during the discovery process. Putting forth allegations of breach of confidence without any actual facts in support thereof is scandalous, frivolous and vexatious and an abuse of the process of the Court.

[Emphasis in original.]

[14] The reference to "scandalous, frivolous and vexatious and an abuse of the process of the Court" in the last sentence quoted above is a readily recognized reference to Rule 9-5 of the Supreme Court Civil Rules.

[15] Rule 9-5(1) reads:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) it discloses no reasonable claim or defence, as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [16] Pleadings must contain the facts alleged and not the evidence in support of the facts alleged: Rule 3-7(1) and *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.) at para. 4. Particulars are pleadings. Particulars are not details of a party's proposed evidence.
- [17] In *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (C.A.), Justice Lambert summarized the nature and function of particulars:
- [11] Those decisions delineate the difference between what is properly the subject matter of a Demand for Particulars and what is more properly the subject matter of a Demand for Discovery or material that should be obtained on an Examination for Discovery. At the heart of the distinction between the two lies the question whether the material demanded is intended to, and does, delineate the issues between the parties, or whether it requests material relating to the way in which the issues will be proved.
- [15] the function of particulars as stated in the White Book is as applicable in British Columbia as it is under the English practice, and six points are set out there in this way:
- (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
 - (2) to prevent the other side from being taken by surprise at the trial;
 - (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
 - (4) to limit the generality of the pleadings;
 - (5) to limit and decide the issues to be tried, and as to which discovery is required; and
 - (6) to tie the hands of the party so that he cannot without leave go into any matters not included.
- [18] Justice Wallace, as he then was, writing in this Court in *Flavelle v. Mahood* (1980), 25 B.C.L.R. 236 (S.C.) stated (at 242):

A pleading is an abuse of process if made knowing there is no factual basis for the allegations made or if made for some improper collateral purpose.

- [19] Justice Southin, as she then was, sitting in this Court, in *Proconic Electronics Ltd. v. Wong* (1985), 67 B.C.L.R. 237 (S.C.) stated (at 241):

I think a plaintiff who makes serious allegations of misconduct against someone who stands in a fiduciary relationship to him and who says he cannot give any particulars of those allegations must adduce some evidence even if very little in order to require a defendant to answer.

Defendants are not to be called upon to answer a bald allegation of breach of fiduciary duty of which there is no evidence and of which no particulars are given.

- [20] In the case at bar, the plaintiff makes the serious allegation that the defendants unlawfully used the plaintiff's confidential information, seeking among other relief, punitive damages and full indemnity costs. Punitive damages are awarded where a defendant's conduct straddles the border of civil law (compensation) and criminal law (punishment): *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at paras. 61-62.
- [21] A plaintiff should not plead a serious allegation, such as deceit, fraud, breach of fiduciary duty, or unlawful use of confidential information without some evidentiary basis. If a plaintiff has an evidentiary basis to support a serious allegation, the plaintiff should be able to plead the particulars of the material facts to delineate the issues.
- [22] The plaintiff's pleadings as they currently stand, despite their length, say little in connection with the unlawful use of confidential information. I agree with the defendants' counsel that they do not provide more than the understanding that the plaintiff "believes confidential information was passed to [the defendants] and they were under a duty of confidence not to misuse the same".
- [23] I would also add that the plaintiff defines "Confidential Information" in its ANOCC broadly. Without particulars, this leaves the defendants not knowing whether the unlawful use of confidential information refers to, say, the "buying habits of prospective customers" or, say, "toxicological data", or both, or neither.
- [24] I also cannot accept an argument along the lines that the defendants know what they did wrong and, accordingly, particulars are not required. In *United Food and Commercial Workers Union, Local 401 v. Westfair Foods Ltd.*, 2010 ABCA 120, the Alberta Court of Appeal addresses such an argument (at para. 27):

One argument against such particulars was an old fallacy. Paraphrased, it was this: "You do not need particulars, since it is your guilty conduct which is in issue." One flaw in that argument is that it presupposes that the person accused is guilty, not innocent. That the accused person says he is innocent (appellants' factum, paras. 57, 61) creates no exception or waiver of particulars. Another flaw is that it requires even a guilty person to examine his or her whole life, with total objectivity and perfect recall, in order to inventory all his or her past sins, and see which ones might be relevant. When one reflects that the respondent employer is a large company with many dozens of managers and hundreds of employees, but vicariously liable for the acts of all of them, the excuse that "you know your own conduct" descends below fiction to total inaccuracy. In ordinary civil procedure, that is not a valid objection to a request for particulars: *Caskey v. Guardian Ins. Co.* (1994) 148 A.R. 251, 255-56 (M.) (paras. 28-30, 38); cf. *Madden v. Madden* [1947] O.R. 866, 874-76 (C.A.).

- [25] The striking of a pleading is an extraordinary step: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) at 25, Justice McLachlin, as she then was, writing for our Court of Appeal; and Justice Fitzpatrick's carefully fettled summary in *Schwarzinger v. Bramwell*, 2011 BCSC 304 at paras. 105 to 140.
- [26] Having regard to the extraordinary nature of striking a pleading, I will not do so at this time. As Justice Fitzpatrick in *Schwarzinger* noted at para. 113, our courts generally give a "second chance".
- [27] I will order particulars to be provided to the defendants by or before 4 p.m. of January 17, 2018.
- [28] Failing proper and sufficient particulars, the Court may consider again the question of striking pleadings, if the defendants so apply.
- [29] At hearing, defendants' counsel referred to a draft order which sets forth the particulars the defendants seek. Defendants' counsel's request for particulars regarding confidential information is attached as Schedule "B" to these reasons.
- [30] As may be seen from Schedule B, the particulars requested include the names of the relevant customers and suppliers. Such names are material facts and not evidence: *Triathlon v. Kirkpatrick*, 2003 BCSC 1575 at para. 48.
- [31] In the case at bar, the requested particulars are well-founded and will serve to give the defendants proper notice of the case they must meet. I order that the plaintiff respond to the requested particulars.
- b) Passing-off
- [32] The defendants also seek particulars with respect to the plaintiff's ANOCC regarding its assertion that the defendants committed the tort of passing-off using the plaintiff's trademarks. I have attached the relevant paragraphs as Schedule "C" to these reasons.
- [33] The particulars the defendants seek, as described in the draft order, relate to the first dates of use of the trademarks and the associated use in terms of goods and services. The defendants' description of the requested particulars are attached as Schedule "D" to these reasons.
- [34] In my view, the date of first use for the plaintiff's claimed trademarks and associated use are necessary particulars of the material facts. The production of the requested particulars fall within the nature and function of particulars as described by Justice Lambert in *Cansulex*. Accordingly, I will order the particulars the defendants seek. Again, proper and sufficient particulars are to be given on or before 4 p.m. January 17, 2018.
3. conclusion

- [35] The particulars the defendants seek are ordered to be given on or before 4 p.m. January 17, 2018.
- [36] The paragraphs of the plaintiff's ANOCC will not be struck at this time. If proper and sufficient particulars are not provided, the defendants are at liberty to apply. In this regard, I will not seize myself of the matter. I would, however, ask counsel to canvas my availability through Supreme Court Scheduling if a further application may be desired.
- [37] The defendants were successful in their application after fair warning was given that particulars were required. The Court will award costs at Scale B to the defendants in any event of the cause. The hearing took a good part of a day of chambers and two subsequent 9 a.m. 55-minute hearings. In these circumstances, for speed and simplicity, the costs should be calculated as if the hearing were a one-day chambers matter.

"Funt J."

Schedule "A"

Schedule "B"

Schedule "C"

Schedule "D"

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