

CANADA / JUDGMENT

Natural Trade Ltd. v. MYL Trading Ltd.

2020 BCSC 47

COURT

Supreme Court of British Columbia

DECIDED

3 January 2020

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2020 BCSC 47 Natural Trade Ltd. v. MYL Trading Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Natural Trade Ltd. v. MYL Trading Ltd.,

2020 BCSC 47

Date: 20200103

Docket: S1710413

Registry: Vancouver

Between:

Natural Trade Ltd. and Global Forest, S.A. de C.V.

Plaintiffs

And

MYL Trading Ltd., Michel Mizrach, Juan Carlos Quintana,

Damian Niron, Eduardo Garcia Elizondo,

Valley Lumber & Packing Trading LLC,

Proterey, S.A. de C.V., Tarimas El Sabino S de RL, and

Maderas Y Pallets EYM, S.A. de C.V.

Defendants

Before: Master Muir

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

H.J. Harris

Counsel for the Defendants, MYL Trading Ltd., Michel Mizrach, and Juan Carolos Quintana:

C.R. Repel

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

January 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 3, 2020

[1] THE COURT: This is an application by the plaintiffs to adjourn a summary trial application brought by the defendants, Michel Mizrach and Juan Carlos Quintana (collectively, the "Mizrach defendants"), for a hearing on January 13 and 14, 2020. The plaintiffs' application is brought in accordance with Rule 9-7(11)(a) of the Supreme Court Civil Rules which provides:

On an application heard before or at the same time as the hearing of a summary trial application, the court may

(a) adjourn the summary trial application,

background

[2] This is an action that was commenced in November 2017. There is presently a trial set for six weeks to begin September 28, 2020. For simplicity's sake, I will simply call this an action against the Mizrach defendants, former employees of the plaintiffs, for breach of confidence, breach of fiduciary duty, and theft of corporate opportunity, apparently involving the other corporate defendants.

[3] The matter has already been in chambers for lengthy applications before Mr. Justice Marchand. From June 20 to 22, 2018, Marchand J. heard an interlocutory injunction application brought by the plaintiffs and granted the relief sought in that application. The reasons provided by Marchand J. on July 13, 2018 (indexed at 2018 BCSC 1176) were referred to me. At paras. 46 and 50, His Lordship said:

- [46] There is no serious contest that Mr. Mizrach and Mr. Quintana owe duties of confidence, loyalty, fidelity and/or good faith to at least Natural Trade, as a result of their employment and/or confidentiality and non-disclosure agreements, at common law and/or in equity.
- [50] It may well be that the employment, and confidentiality and non-disclosure agreements are unenforceable; that there is an explanation for the business apparently transacted by the Mizrach defendants for their own benefit in December 2016; that the Mizrach defendants have used only publicly available information to build their business; and that the Mizrach defendants are simply outcompeting the plaintiffs through their general know-how and perseverance. Nevertheless, the evidence easily satisfies me that there are a number of serious issues to be tried.
- [4] Mr. Justice Marchand also dealt with a lengthy application for production of documents and a forensic analysis of certain of the defendants' computer records. That was dealt with from May 8 to 10 and June 4 and 5, 2019, and in reasons delivered August 15, 2019 (indexed at 2019 BCSC 1368), Marchand J. said, amongst other things:
- [38] The parties have very different views regarding this litigation.
- [39] The plaintiffs submit that they have already suffered losses approaching ten million dollars, and identify many important issues that are in dispute, including the alleged inappropriate use by the Mizrach defendants of the plaintiffs' confidential information. The plaintiffs also submit that the proceeding is complex, involving many causes of action and remedies.
- [40] The Mizrach defendants characterize the case as a relatively straightforward wrongful dismissal case. They submit that the plaintiffs' claim rests in large part on unenforceable written confidentiality and non-competition agreements. They say they are running a small operation out of a home in North Vancouver and that the plaintiffs' losses cannot be to the scale they assert.
- [41] I am not in a position to weigh in on the merits and, if the plaintiffs succeed, it remains to be seen whether their losses are modest or significant. Either way, there are important issues in play and, despite the Mizrach defendants' wish that it were otherwise, the proceeding is certain to be complex. The case involves many causes of action related to the international trade in lumber. There are many parties. Many documents are in Spanish. If the plaintiffs succeed, determining losses will not be a mere accounting exercise.
- [42] The fact of the matter is that extensive documentary disclosure will be required on liability and remedy issues.

His Lordship then made orders with respect to production of documents and a forensic review.

- [5] The extent of the defendants' compliance with that order is presently in issue and the parties intend to bring cross-applications before Marchand J. in that regard.

- [6] Mr. Justice Marchand issued a direction for those applications on December 24, 2019. He was assuming that the plaintiffs and defendants both wished to file applications and his directions were as follows:
- i) the applicants were to file and serve their notices of application and supporting affidavits by January 15, 2020;
 - ii) the responding parties were to serve and file their responses and any affidavits by January 29, 2020; and
 - iii) any reply materials were to be filed by February 5, 2020.
- [7] It is the existence of that schedule that, in part, prompts today's application for the adjournment by the plaintiffs, but the application is also founded on other procedural and allegedly prejudicial factors.
- [8] I should add that the intent of the summary trial application is to ascertain, primarily, the enforceability of the alleged employment agreements between the Mizrach defendants and the plaintiffs.

positions of the parties

- [9] The procedural issues that the plaintiffs raise as a ground for seeking the adjournment of the summary trial application include that the summary trial materials were delivered on December 20, 2019, which was, unfortunately, the last day before the December-January holiday period of the court.
- [10] The plaintiffs say they had no notice that this summary trial was contemplated or that the defendants were seeking dates or had obtained dates for a summary trial hearing.
- [11] Apparently, the defendants, without notice to the plaintiffs, had been seeking such dates since August 2019 and had become somewhat frustrated in the process, to the point where a letter was sent to Supreme Court Scheduling complaining of their inability to obtain such dates and seeking early dates for a hearing.
- [12] Although it was not raised at the hearing, this is contrary to Practice Direction 27, as the views of the plaintiffs were not sought prior to sending this letter, the plaintiffs' position, as a result, was not provided to Supreme Court Scheduling, and the plaintiffs were not provided with a copy of this letter or advised that it had been sent.
- [13] In the letter to Supreme Court Scheduling, the defendants took the position that the summary trial application had to be heard before the end of February in order to allow time for the court to deliver reasons well in advance of the scheduled trial dates. Having the summary trial application heard, they submitted, could significantly shorten the trial time.

- [14] In response to that, Ms. Smolen of Supreme Court Scheduling advised them that the Chief Justice was prepared to hear the matter on January 13 and 14, 2020. No other dates were offered by Supreme Court Scheduling.
- [15] As to the lack of notice given to the plaintiffs of the proposed summary trial application and, indeed, of the dates advanced by Supreme Court Scheduling, the defendants say that there is no obligation in the Rules to canvass such dates with other parties. That position, of course, ignores the obligation under Practice Direction 27. It also ignores the very real need for cooperation between counsel in litigation matters. Failure to properly consult does a disservice to all and often results, as it has here, in the need for an application to resolve matters - using valuable court time.
- [16] Further, the defendants say that the plaintiffs in this action unilaterally set down an injunction application in June without conferring as to the defendants' counsel's available dates and that counsel for the defendants' had to actually retain other counsel to deal with that injunction application.
- [17] In reply on that point, the plaintiffs say, first of all, an injunction application is of a markedly different category than a summary trial application brought some nine months before the trial of the action. By its very nature, an injunction application alleges irreparable harm and, by granting the injunction, Marchand J. must have found irreparable harm was being suffered, or would be suffered, by the plaintiffs. As such, there is an inherent urgency in an injunction application that is not present in the summary trial application brought by the defendants here.
- [18] I agree. I do not think those two are comparable, nor, even if I did, would I agree that that is an appropriate way to conduct litigation. The "tit-for-tat" argument is not one that reasonable counsel should rely on in failing to provide as much notice as possible to other counsel of their intentions with respect to applications and otherwise in litigation.
- [19] The plaintiffs also advance allegedly prejudicial issues: first of all, the two main employees of the plaintiffs involved in the court action have been away. One returned, I gather, last night. The other is still away and is not expected back until January 7.
- [20] In addition, lead counsel for the plaintiffs, who has handled all of the court hearings in this matter to date, is not available on the summary trial hearing dates as he is conducting an examination of an out-of-town party on another matter on January 14 and has another lengthy chambers application commencing January 16.
- [21] The defendants suggest that Mr. Michael Robson, who is second chair, if I can put it that way, in this action for the plaintiffs, should be able to fill in. Mr. Robson, in reply to that position, has provided his own affidavit setting out serious family difficulties which details I will not go into for the purposes of these reasons, but suffice it to say, that satisfy me that Mr. Robson is not going to be available on the dates suggested.

- [22] The plaintiffs point to their obligations under the timetable directed by Marchand J. for the applications regarding document disclosure and forensic analysis, and say there is simply not sufficient time to properly prepare for those applications and the summary trial application if it proceeds on the dates scheduled.
- [23] In addition, the plaintiffs note that examinations for discovery of the defendants have not been completed. A continuation of the examination for discovery of Mr. Mizrach is now set for January 31, 2020, after approximately a month of trying to find a convenient date as between counsel and the witness.
- [24] The plaintiffs also submit that, given that Marchand J. has had a significant involvement in this matter and has yet to deal with the issues on the document disclosure and forensic analysis order, he is the natural person either to have a case planning conference to deal with proper scheduling of a summary trial application or, indeed, to hear the summary trial application himself. A formal request in that regard was apparently sent to Supreme Court Scheduling this morning. An informal request was advanced earlier, however, that was rejected by Supreme Court Scheduling for not being properly brought.

LAW

- [25] The law with respect to adjournments in these circumstances, perhaps not surprisingly, is largely based on whether or not the matter is suitable for a summary trial. That issue is not before me.
- [26] The question here is, given the prejudice asserted by the plaintiffs, the procedural matters that are ongoing including the state of document disclosure and the incomplete examinations for discovery, and the lack of prejudice advanced by the defendants, whether an adjournment is appropriate.
- [27] I agree with counsel for the plaintiffs that *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at paras. 18-21, sets out factors that are proper considerations on an application of this nature. I will note that the court in that case determined that the paramount consideration was the interest of justice in ensuring that there will remain a fair trial on the merits of the action.

analysis

- [28] While I appreciate that the defendants are anxious to proceed and undoubtedly believe that they have a strong case for bringing a summary trial application on the nature and extent of the employment agreements that are alleged, I am satisfied that it is inappropriate to proceed with a summary trial application at this juncture.
- [29] I am not satisfied that the evidentiary foundation as disclosure presently stands would ensure that the plaintiffs were treated fairly on such a summary trial application. The inability of counsel for the plaintiffs to be available, the fact that significant plaintiffs'

witnesses have been unavailable and are still presently unavailable, that there are other applications which the plaintiffs must be addressing in this action as well as in other actions, all, in my view, militate against having a summary trial application at this juncture. As I said, I appreciate that the defendants wish to have this dealt with as soon as possible, but in my view, it would be a miscarriage of justice to stampede a summary trial application on in the circumstances.

[30] Thus, I have concluded that the application of the plaintiffs should be allowed as in paragraph 1 of their notice of application. The summary trial application presently scheduled for hearing on January 13 and 14, 2020 is adjourned generally.

[31] I have heard a little bit about costs, but I will hear you further on costs if that is appropriate.

[32] MR. HARRIS: Thank you, Your Honour. On minor thing that paragraph 1 includes, "Summary trial adjourned" and including the responses for the summary trial, that aspect is also adjourned generally?

[33] THE COURT: Yes. Yes.

[34] MR. HARRIS: Thank you, Your Honour, just to clarify that.

[SUBMISSIONS ON COSTS]

[35] THE COURT: All right. I must say that I am cognizant of the fact that these types of difficulties arise in part because of the lack of judicial resources available to the court to provide dates to counsel that are timely for these kinds of summary trial applications and, in the circumstances, I think the normal rule should apply. So the plaintiffs will have their costs of this application in the cause.

"Master Muir"

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