

CANADA / JUDGMENT

Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.

2015 BCSC 2628

COURT

Supreme Court of British Columbia

DECIDED

31 August 2015

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2015 BCSC 2628 Owners, Strata Plan K855 v. Big White Mountain Mart Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Owners, Strata Plan K855 v. Big White Mountain Mart Ltd., 2015 BCSC 2628 Date: 20150831 Docket: S70713 Registry: Kelowna Between: The Owners, Strata Plan K855 Plaintiff And: Big White Mountain Mart Ltd. and Bank of Montreal Defendants And: Global Surface Solutions Inc. Third Party Before: The Honourable Mr. Justice Johnston Oral Ruling Re Admission of Documents Counsel for the Plaintiff: R. Burke Counsel for the Defendant: Big White Mountain Mart Ltd.: J.M. Hogg, Q.C. Counsel for the Third Party: Global Surface Solutions Inc.: C.K. Wendell Place and Date of Trial: Kelowna, B.C. August 24-28, 2015 and August 31, 2015 Place and Date of Judgment: Kelowna, B.C. August 31, 2015

- [1] THE COURT: The plaintiff has tendered a bundle of invoices, 17 in all, that relate to the construction of a new fire exit in its building, the allegation being that the defendant's work eliminated a fire exit that -- an exit that was required by the supervising fire authorities, fire chief, I gather. And the plaintiff wants the cost of replacing the fire exit, these invoices apparently adding up to some \$25,000, and so it is not an insignificant sum. The defendants objects to the admission of these documents on the basis that the defendant got notice of them about a week before the trial started when the counsel for the plaintiff sent along a copy of the documents although with, I gather, an amended list of documents showing this bundle of paper.
- [2] The objection of the defendant is that it has been ambushed just short of trial with documents that prove a significant amount of damages. The defendant relies on the decision of this court in Robitaille -- sorry, it's the Court of Appeal, Robitaille -- Robitaille Enterprises v. the Vancouver Hockey Club, which was a case, as I gather, where a document that had not been disclosed was produced during the trial so that counsel could cross-examine a medical witness, the document in question being the minutes of a meeting that either approved or disapproved, I cannot recall which, that the doctor was not at a meeting when he was supposed to have walked by the injured hockey player and effectively ignored his injury in the dressing room.

- [3] The objection having been raised, the matter was stood over for a few days so that counsel for the plaintiff could do his own research, and he has produced a decisions of this court, *Lam v. Chiu*, 2012, BCSC 442. That also was an objection which, according to paragraph 5, related to a document that was not listed on any list of documents.
- [4] The fact that the documents were produced without having been disclosed prior to trial, I think, clearly distinguishes these documents from those raised in the authorities. These documents have been listed. Their existence was disclosed. The real issue is that they were disclosed so close to the trial that their production at the trial may cause prejudice to the defendant. But the authority that would indicate that, in effect, hiding a document or not revealing its existence and then ambushing the opponent at trial had limited application to the question before me in my view.
- [5] That does not mean that the factors considered in *Lam* taken from the Court of Appeal decision in *Stone v. Ellerman* are not inappropriate. The first factor, prejudice to the party in that case and in this, the defendant is clear that these documents are admitted. The defendant has opinion lumbered just prior to trial with documents that establish the damages claimed as a result of the alleged delict of the defendant in eliminating a fire exit, and so that would tend to indicate that these documents ought not to be admitted.
- [6] The second factor, is there a reasonable explanation for the other party's failure to disclose? Well, the explanation is that given by Mr. Jaegli, and Mr. Jaegli said, well, some of these documents were available to him back in 2014, and that would appear from the fact that they are invoices dated in the fall of 2014 when, I gather, the work started. The balance of the work represented by the last three or four invoices started in April of this year, and the last invoice did not come in until July. Mr. Jaegli's explanation was that, well, it didn't occur to him that he should be sending these in as he -- as they came to him and/or that he waited until the costs had been finalized before sending them along to his lawyer. Not very good explanation from the party.
- [7] The third factor is whether excluding the document would prevent a determination of the issue on the merits, and clearly it would here. If the plaintiff does not prove the damages as a result of the alleged shoddy work in eliminating the fire exit, then that issue will not be determined by the court.
- [8] And the last issue is whether, in the interests of justice, the ends of justice require that the documents be admitted. Well, in order to do justice between the parties, the documents ought to be admitted. It is only in that wake that this issue can be finalized as between these two parties. There is, of course, an answer to the prejudice problem that does lie in favour of the defendants here, and that is that if the defendants require time to meet these documents, they are entitled to an adjournment of the trial in order to deal with the invoices. And that adjournment would -- although it would be deplorable in the circumstances of this case -- take care of the prejudice or any prejudice suffered by the late disclosure of these damages invoices.

- [9] I note that there has been in the pleadings a reference to liability for and damages claimed as a result of the elimination of the fire exit. That does not really help because parties can plead anything they like, but if they are not in a position at the outset of trial to prove damages as a result of bad acting, then that claim will fail. On balance, however, it seems to me that if I keep these documents out, I would do more harm to the plaintiff's interests than I could remedy. But if I let them in, I can at least assuage the defendants' prejudice by permitting the defendants an adjournment if requested to deal with these invoices.
- [10] And so on that balance, I admit the invoices as the next numerical exhibit. "R.T.C. Johnston, J." The Honourable Mr. Justice Johnston

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