

CANADA / JUDGMENT

P2 Solar, Inc. v. Photo Violation Technologies Corp.

2009 BCSC 1558

COURT

Supreme Court of British Columbia

DECIDED

16 November 2009

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2009 BCSC 1558 P2 Solar, Inc. v. Photo Violation Technologies Corp. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: P2 Solar, Inc. v. Photo Violation Technologies Corp., 2009 BCSC 1558 Date: 20091116 Docket: S078417 Registry: Vancouver Between: P2 Solar, Inc. Plaintiffs And Photo Violation Technologies Corp., Fred Mitschele aka Fred Marlatt Defendants AND: Docket: S081159 Registry: Vancouver Between: Natco International, Inc. Plaintiffs And Michael Wallace Minor, aka Mike Minor, Jason Michael Joseph Mitschele, and Malisa Phoiliang Defendants Before: The Honourable Madam Justice Griffin Reasons for Judgment - Costs Counsel for the Plaintiff: R. Shore Counsel for the Defendant Jason Mitschele: A. Morrison Counsel for Defendant Fred Mitschele: R. Fleming Counsel for Defendant Michael Minor: S. Warnett In-Person: M. Minor as agent for Photo Violation Technologies Corp. Place and Date of Hearing: Vancouver, BC June 29, 2009 Place and Date of Judgment: Vancouver, BC November 16, 2009

- [1] This is a costs ruling in relation to the defendants' motions to strike all or part of the statements of claim in two actions brought by Natco International, Inc. ("Natco"), action no. S078417 ("Natco # 1") and action no. S081159 ("Natco # 2"). My reasons on the defendants' applications to strike the statements of claim (the "Pleadings Motions") are indexed at 2008 BCSC 1325. I concluded that the statements of claim should be struck due to pleading defects, but that Natco had leave to file an amended consolidated statement of claim in Natco #1. Natco subsequently filed the amended consolidated statement of claim in Natco #1. Natco has since changed its name to P2 Solar, inc. as reflected in an amended style of proceeding in Natco #1.
- [2] On the Pleadings Motions, the corporate defendant, Photo Violation Technologies Corp. ("PVT"), and all of the personal defendants except one, Michael Minor, were represented by one counsel, Mr. Howard Shapray. Mr. Shapray then filed a written submission dated October 22, 2009, seeking special costs on behalf of this group of defendants. This submission was laden with hyperbole, describing Natco's pleadings as a "vile goulash" and stating that "[a]nything that could be said to be proper in the pleading is contaminated by the offal deliberately larded on". The submission suggested that the court had been "generous, if not indulgent, to Natco...in permitting it yet again to attempt to cobble together

viable pleadings that properly articulate viable causes of action". The submissions stated "that the time has come for the court to signify its displeasure". In my view, this submission was disrespectful and committed many of the same sins that it railed against.

- [3] Subsequently, on this costs hearing, this group of defendants were no longer represented by the same counsel.
- [4] Counsel for Mr. Minor throughout, Mr. Warnett, delivered restrained and helpful submissions.
- [5] Each of the defendants seeks an order for lump sum special costs in relation to the Pleadings Motions. In essence, the nub of the defendants' position is that many of the allegations in the impugned Natco statements of claim were unnecessary and scandalous. They say that Natco advanced these allegations for ulterior motives, and as such abused the process. Even though Natco was given leave to file a new consolidated statement of claim, they say that the court should chastise Natco for its conduct in pleading such unnecessary and scandalous allegations.
- [6] It is clear that an award of special costs is warranted where a party's conduct is reprehensible in the sense of deserving of the court's rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 746, 45 B.C.A.C. 222 (C.A.).
- [7] Key to the defendants' submissions is the assertion that Natco advanced these scandalous pleadings for ulterior motives, to tarnish the reputations and business of the defendants, all the while hiding behind the protection of privilege given by the litigation process.
- [8] Despite Natco's poor pleadings, it must be noted that there is some substance to Natco's overall claim against PVT. Natco has proceeded against PVT on its debt claim, subsequent to my ruling with respect to Natco's pleadings. Natco's Rule 18A application against PVT was determined by me on July 23, 2009, with Reasons indexed at 2009 BCSC 1504. I granted judgment to Natco against PVT in the amount of \$1,485,000.00 plus interest. While this claim was a separate cause of action than the causes of action objected to by the defendants, it nevertheless illustrates that Natco's claim was not entirely without merit. That of course would not excuse unnecessary and scandalous allegations, but it does provide some context for the overall claim.
- [9] I also note that PVT advances its own claim against Natco and Natco's directors, Action No. S081852, Vancouver Registry. This subsequently became PVT's statement of defence and counterclaim to Natco's consolidated claim in Natco #1.

- [10] In PVT's statement of defence and counterclaim in Natco # 1, PVT pleaded a number of different claims against Natco under the headings: Breach of Confidence, Misrepresentation, Misuse of Confidential Information, Libel, Injurious Falsehoods, and Slander of Title. The allegations in the PVT counterclaim are very serious, and include the allegation that Natco has engaged in an abuse of process, as well as alleging other intentional torts by Natco and its directors.
- [11] Likewise, each of the personal defendants advanced his own statement of defence, alleging that Natco had made false representations and had committed other wrongful acts such as misuse of PVT's confidential information.
- [12] In short, this is a case where both Natco and PVT have advanced serious allegations against each other and each other's directors. The undercurrent theme of the allegations on both sides is personal dishonesty of the directors of the two companies. I find that this is not a case where I can determine, after a Rule 19(24) application, that one side's allegations are reprehensible and being advanced for ulterior motives. Until the merits of the claims are determined in substance, I am unable to conclude that Natco has engaged in conduct that is so deserving of rebuke that it justifies an award of special costs.
- [13] Nevertheless, I do agree that Natco's original pleadings were so incompetent as to merit an award of lump sum costs in any event of the cause. The prolix pleadings put the defendants to considerable wasted time and expense. Natco's lengthy and confused pleadings and submissions also substantially contributed to an unnecessarily lengthy 3 day hearing of the Pleadings Motions. In my view, costs should be on a lump sum basis pursuant to Rule 57(13.1)(a). I fix these costs at \$3,000 for Michael Minor; and \$3,000 in total for the remaining defendants, since they were represented by one counsel on the Pleadings Motions. These costs are payable forthwith. "S. Griffin J." The Honourable Madam Justice Griffin

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Prepared on 27 October 2026 · Esheria