

CANADA / JUDGMENT

Progressive Automations Inc. v. Jahromi

2018 BCSC 1015

COURT

Supreme Court of British Columbia

DECIDED

20 June 2018

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2018 BCSC 1015 Progressive Automations Inc. v. Jahromi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Progressive Automations Inc. v. Jahromi,

2018 BCSC 1015

Date: 20180620

Docket: S172154

Registry: Vancouver

Between:

Progressive Automations Inc.

Plaintiff

And

Shawn Jahromi, Shahed Foroughi Jahromi, Saleh Foroughi Jahromi, Sajed Foroughi Jahromi, Mo Foroughi Jahromi, Afsaneh Haji Tehrani and

Target Tech Solutions Inc.

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

W.D. MacLeod

Counsel for the Defendants:

B. Tarnow

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 16, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 20, 2018

Introduction

- [1] The defendant Shawn Jahromi was briefly employed by the plaintiff Progressive Automations Inc. ("Progressive") in December 2016. Progressive alleges that after his employment ended, Mr. Jahromi used confidential information obtained during his employment to improperly compete with Progressive in breach of the terms of his employment agreement.
- [2] Progressive now seeks an order restraining Mr. Jahromi from competing with it, soliciting business from any of Progressive's clients and from using any confidential information obtained as a result of his employment. At the outset of the hearing, I was advised that the parties have agreed to a consent order with respect to the use of confidential information.

Background

- [3] Progressive is a BC company with a place of business in Richmond, BC. It is in the business of selling linear actuators, parts for linear actuators, control systems and accessories. In his affidavit dated March 7, 2017 sworn in support of the application, Progressive's president, Mr. Arora, describes linear actuators in these terms:

linear actuators are electrically driven devices designed to generate motion in a straight line, such as in a forward and backward piston. They are used in a wide range of applications, such as power door locks in an automobile up to electrical lifts capable of lifting hundreds of pounds.

- [4] Mr. Jahromi received a diploma in Electrical and Computer Engineering Technology Automation and Instrumentation Option from the BC Institute of Technology in May 2016.
- [5] The other named individual defendants are members of Mr. Jahromi's family, specifically his brothers and his parents. I am told that the action has been discontinued against his brother Saleh Foroughi Jahromi, who is a minor.
- [6] The corporate defendant, Target Tech Solutions Inc. ("Target Tech"), is a BC company which was incorporated on January 18, 2017. The directors of Target Tech are all members of the Jahromi family, including Mr. Jahromi.

- [7] In December 2016, Mr. Jahromi applied to Progressive for a job. On December 19, 2016, Progressive hired Mr. Jahromi as a full-time customer service representative. According to Mr. Arora, it was contemplated that Mr. Jahromi would eventually become an engineer with the company.
- [8] Progressive and Mr. Jahromi executed a written contract of employment (the "Contract") that contained the following material terms:

Confidentiality

The Employee covenants and agrees that he will not, directly or indirectly, whether as owner, shareholder, director, agent, officer, employee, consultant, independent contractor or in any other capacity whatsoever, of a corporation, partnership or proprietorship:

- (a) make use of Confidential Information except to the extent that such use is pursuant to his duties as an employee of the Company;
- (b) disclose Confidential Information, in whole or in part, to any person or entity, except to the extent that such disclosure is pursuant to his duties as an employee of the Company.

[The Contract then defines "Confidential Information" in broad terms]

Non-Competition

The Employee acknowledges that in the course of his duties, he has had and shall have access to marketing and other information of the Company relating to its operations and products and that if the Employee were to compete against the Company or be employed or in any way be involved with a person or company that was in competition with the Company during and following the termination of his employment with the Company, the Company would suffer irreparable damage. Accordingly, the Employee covenants and agrees that he will not, directly or indirectly, whether as owner, shareholder (except to the extent of a less than five per cent ownership interest of the outstanding shares of a publicly held corporation), director, agent, officer, employee, consultant, independent contractor or in any other capacity whatsoever, of a corporation, partnership or proprietorship:

- (a) compete with or engage or be financially concerned or interested in or advise, lend money to, guarantee the debts or obligations of or permit his name to be used or employed by any person engaged or concerned with or interested in any aspect of the business of manufacturing or selling Company's products anywhere in the Lower Mainland of British Columbia during the Term and for the period of three years commencing on the day following the last day of the Term; and
- (b) except in the performance of his duties hereunder:

- (i) the Employee shall not solicit, at any time during the Term or at any time thereafter during the period of three years commencing on the day following the last day of the Term, any business from any person, firm, corporation or other entity who was at the date of this Agreement or at any other time during the Term a customer or client of the Business
- [9] I note that while "Term" is capitalized in the above provisions, it is not a defined term in the Contract.
- [10] Mr. Jahromi started work for Progressive on or about December 19, 2016. According to Mr. Arora, while at Progressive, Mr. Jahromi was given access to a computer normally used by an office administrator who was away on vacation. Mr. Arora says that this computer gave Mr. Jahromi access to extensive information relating to Progressive's business, including customer lists, sales orders, product pricing, suppliers and vendors, product specifications and company financial statements, among other key information.
- [11] Adam Mitchell, a sales representative with Progressive, deposed that he was responsible for training Mr. Jahromi beginning on December 19, 2016. He says that while Mr. Jahromi was at Progressive, he used the office administrator's computer each day he was working.
- [12] For his part, Mr. Jahromi deposes that during his employment with Progressive, he shadowed a customer service representative and was not provided with his own account. He further deposes that at no point was he provided with, or did he obtain, information about Progressives' customer lists, individual customer's purchasing history, product pricing, discount policies, cost of products or suppliers.
- [13] On December 28, 2016, Mr. Jahromi failed to show up for work. On December 29, 2016, Mr. Jahromi advised Progressive's general manager by email that he had been in a car accident and needed to "clear things up with ICBC ASAP".
- [14] On December 30, 2016, Mr. Jahromi emailed the general manager again and said that he had come to the realization that he was not receiving a livable wage and required a minimum salary of \$50,000. That request was denied and Mr. Jahromi's employment ended.
- [15] Mr. Arora deposes that about a week after the termination of Mr. Jahromi's employment, "Trojan Horse" malware was discovered on the computer Mr. Jahromi was using, despite the fact that the computer had been completely wiped and reformatted about four weeks before Mr. Jahromi started. According to Mr. Arora, the "Trojan Horse" is an application that allows hackers to remotely access the computer system.
- [16] Mr. Jahromi's version of events is that Progressive represented to him that the job he was offered would allow him to use the skills he developed in his diploma program and was a stepping-stone to a job as an engineer. He says that when he began work at Progressive, it became apparent that those representations were false.

- [17] On December 23, 2016, while employed at Progressive, he was offered employment with another company. He says that on December 29, 2016, he "was in a motor vehicle accident and was unable to attend work at Progressive".
- [18] Mr. Jahromi goes on to state that on December 30, 2016, he emailed Progressive's general manager requesting to come in and speak to her about his concerns with the representations that had been made and to negotiate a higher salary. He acknowledges that his salary request was denied and that his employment ended.
- [19] It is worth noting that the "motor vehicle accident" reported by Mr. Jahromi involved him backing into his father's car, which resulted in minimal damage and was not reported to ICBC. Mr. Jahromi admitted as much when he was cross-examined on his affidavit.
- [20] On January 6, 2017, Progressive received an email from a Mo Foroughi, who is Mr. Jahromi's father, inquiring about becoming a vendor of Progressive's products. It is common ground that Mo Foroughi is the defendant Mo Foroughi Jahromi. Mr. Foroughi was provided with a distributor application form that he completed and returned. On that form, he identified Target Tech as the proposed distributor. As noted above, Target Tech was incorporated on January 18, 2017.
- [21] On February 15, 2017, Mr. Jahromi, purportedly on behalf of Target Tech, contacted Summit Automations Company Ltd. ("Summit"), a main supplier of Progressive, expressing interest in selling Summit's linear actuators. One of the questions Mr. Jahromi asked in his email was whether Summit currently had a distributor in BC and Canada.
- [22] On February 18, 2017, Alfred Que, Summit's marketing manager, responded by email to Mr. Jahromi and advised him that Summit's distributor in BC is Progressive. Mr. Que asked whether Target Tech would want to cooperate with Progressive. Later the same day, Mr. Jahromi emailed back saying "I've seen your website. You are very organized and professional and for that reason we would like to deal with you directly".
- [23] At some point, Progressive discovered a website purportedly operated by Target Tech advertising linear actuators and related equipment for sale. Mr. Arora appends to his first affidavit screen shots from the website taken February 24, 2017, although he acknowledges that the website was not fully functional at that time.
- [24] On February 27, 2017, Progressive's counsel wrote to Mr. Jahromi personally and to Target Tech demanding that they cease using confidential information obtained from Progressive and cease competing with Progressive. The only response received was an email from Mr. Foroughi on February 28, 2017 stating:

On behalf of Target Tech Solutions Inc. we categorically deny all allegations which are solely based on false assumptions. We are not in possession of any Progressive Automation's confidential information.

- [25] Progressive filed a notice of civil claim on March 7, 2017, and filed the within application the same day.
- [26] On April 21, 2017, an interim order was issued by consent on essentially the same terms being sought in this application (the "Consent Order").
- [27] On February 16, 2018, Mr. Jahromi applied to vacate the Consent Order and to strike Progressive's claim. That application was dismissed by Madam Justice Forth.
- [28] The Consent Order does not have an end date and thus continues in force. While it is not entirely clear from the record, my understanding is that the Consent Order was intended to remain in force until Progressive's application could be argued on the merits. For various reasons, including a serious injury suffered by Mr. Jahromi's former counsel, the application was not heard until May 16, 2018.

Legal Framework

- [29] The well-established test for granting an injunction emanates from the leading Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 348-349:
1. Whether there is a serious issue to be tried;
 2. Whether irreparable harm would result if an injunction is not granted; and
 3. Whether the balance of convenience favours granting the order.
- [30] In BC, reference is also often made to the decision in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 345; *aff'd* (1991), 53 B.C.L.R. (2d) 189 (S.C.C.) in which a two-part test was set out: is there a fair question to be tried and does the balance of convenience favour the granting of the injunction? In my view, there is no practical difference between the two tests in that under the *Wale* test, the issue of irreparable harm is subsumed into the discussion of balance of convenience: *Coburn v. Nagra*, 2001 BCCA 607 at para. 7; and *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 37.
- [31] In considering whether there is a serious issue to be tried, the court generally does not engage in an extensive review of the merits. There are however exceptions to this principle, including where a plaintiff seeks injunctive relief to enforce a restrictive covenant so as to inhibit the ability of a person to earn a livelihood. In those cases, a more detailed consideration of the merits is warranted. A party seeking to enforce such a restriction must show a strong *prima facie* case: *Phoenix Restorations Ltd. v. Brownlee*, 2010 BCSC 1749 [Phoenix Restorations] at para. 24.
- [32] Where the injunction is sought to enforce post-employment restraint of trade, the party seeking to uphold the restraint must prove the following:

- a) The restraint protects a legitimate proprietary interest of the employer;
- b) The restraint is reasonable between the parties in terms of :
 - i) Temporal length;
 - ii) Spatial area covered;
 - iii) Nature of activities prohibited; and
 - iv) Overall fairness;
- c) The terms of the restraint are clear, certain and not vague; and
- d) The restraint is reasonable in terms of the public interest with the onus on the party seeking to strike out the restraint.

(Aurum Ceramic Dental Laboratories Ltd. v. Hwang, [1998] B.C.J. No. 190 (S.C.) [Aurum] at para. 11; Phoenix Restorations at para. 33).

The Parties' Positions

- [33] As indicated at the outset, the parties have agreed to an order restraining all of the defendants from using any confidential information obtained by Mr. Jahromi from Progressive. Accordingly, the issues to be decided are whether Mr. Jahromi should be restrained from competing with Progressive and from soliciting or accepting any business from a customer or client of Progressive.
- [34] Progressive submits that it has a strong case in that immediately after Mr. Jahromi's employment terminated, he began attempts to compete with Progressive through Target Tech, despite the clear terms of the Contract that prohibited such activity. It submits that the harm it will suffer if Mr. Jahromi is not held to the terms of the Contract is self-evident. Allowing Mr. Jahromi to compete with Progressive and/or solicit business from its clients would harm Progressive's business interests. Progressive submits that damages would not be a suitable remedy because that would require the defendants to maintain records of their sales, and they cannot be trusted to do so. Finally, Progressive submits that the balance of convenience favours granting the injunction in that the harm to its interests is real whereas Mr. Jahromi has not established that he would suffer any harm if the order is granted.
- [35] Mr. Jahromi submits that because Progressive is seeking to enforce a restrictive covenant, it must show a strong prima facie case. He submits on this point that Progressive cannot rely on the Contract because Progressive repudiated the Contract and he accepted the repudiation. He submits further that the provisions restraining Mr. Jahromi are unenforceable in that they are ambiguous, unreasonable and contrary to public policy.

- [36] Mr. Jahromi denies that he or Target Tech has competed with Progressive or has used any confidential information obtained from Target Tech. He submits that Progressive has not established that it would suffer irreparable harm if the injunction is not granted and that the balance of convenience favours permitting Mr. Jahromi to pursue his lawful business interests.

Analysis

- [37] In his application response, Mr. Jahromi submits that the Contract is unenforceable because: i) he was coerced into signing it; ii) he relied on misrepresentations made by Progressive in signing the Contract and iii) Progressive repudiated the Contract, which repudiation he accepted.
- [38] Mr. Jahromi did not adduce any evidence to support the allegation that he was somehow coerced into signing the contract and, with respect to the alleged misrepresentations, he only advances a vague allegation that certain representations turned out to be "incorrect". Neither of these allegations amounts to a defence to Progressive's claims.
- [39] With respect to the allegation of repudiation, it is clear on the evidence that it was Mr. Jahromi who indicated an intention not to be bound by the Contract when he failed to report to work and demanded an increase in salary.
- [40] At the hearing of the application, Mr. Jahromi argued further that the Contract is invalid because the termination provision, which provides for two weeks' notice, does not comply with the Employment Standards Act, R.S.B.C. 1996, c. 113 [ESA]. Section 63 of the ESA sets out statutory minimum periods of notice which, depending on the length of service, may exceed the two week period provided for in the Contract.
- [41] This issue was not raised by Mr. Jahromi in his response to civil claim nor in his application response and, as such, he is precluded from raising it at the hearing of the application. In any event, the issue is academic because Mr. Jahromi's employment with Progressive only lasted about 11 days.
- [42] The real issue under the first prong of the injunction test is whether Progressive has established a strong prima facie case that the non-solicitation and non-compete clauses are reasonable within the meaning set out in *Aurum and Phoenix Restorations*.
- [43] I am satisfied that Progressive has a legitimate proprietary interest that it is seeking to protect. Progressive has been in business for ten years and over that time has developed a well-established presence in the electronic equipment market.
- [44] I am not satisfied however that the restraint provisions are reasonable in their temporal length, geographical application and scope of prohibited activities.

- [45] In terms of the time period, both the non-solicitation and non-compete restraints purport to apply for three years. Progressive justifies the three year period on the basis that it takes two and a half years to take a product from the idea stage to production and then marketing. However, the evidence is unclear about how involved Progressive is in actually producing or manufacturing linear actuators. Mr. Arora describes Progressive's business as selling actuators and related equipment. Moreover, the principal triggering event for this litigation was the fact that Mr. Jahromi contacted Summit, which Mr. Arora describes as a major supplier to Progressive.
- [46] Further, Progressive seeks to restrain Mr. Jahromi for a period of three years, notwithstanding that his employment lasted less than two weeks. In the circumstances, I find the three-year period to be excessive and beyond what is necessary or reasonable to protect Progressive's proprietary interests.
- [47] In terms of the scope of activities Progressive seeks to restrain, the terms of the non-compete clause are vague in the sense that the clause refers to "manufacturing or selling Company's products in the Lower Mainland of British Columbia". The specific products in issue are not clearly defined nor is the geographic scope. The description "lower mainland", while often used, is not a term of art and may mean different things to different people. As found by Mr. Justice Voith in *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 at para. 55: "Any ambiguity in the language of a restrictive covenant will render the term prima facie unenforceable".
- [48] The non-solicitation clause purports to restrain Mr. Jahromi from soliciting business from anyone who was a customer of Progressive at the time the Contract was signed or at any time during the term of the Contract. In *Phoenix Restorations*, Mr. Justice Goepel declined to enforce a similar restraint on the basis that it was overly broad in that it was not limited to customers that the employee had dealt with (at para. 40). Justice Goepel held that such a blanket prohibition was broader than what was necessary to protect the employer's interest. I find the clause in issue here to be similarly over broad.
- [49] For these reasons, I find that Progressive has failed to establish a strong prima facie case that the non-solicitation and non-compete provisions of the Contract will be enforced.
- [50] While that is sufficient to dispose of Progressive's application, I also find that, in any event, Progressive has not established irreparable harm. In the approximately four months from when Mr. Jahromi's employment ended to the date of the Consent Order on April 21, 2017, there is no evidence of any interference by Mr. Jahromi or Target Tech with Progressive's business. While Mr. Jahromi attempted to establish a supply arrangement with Summit, that did not come to fruition. Progressive discovered a website in Target Tech's name, but on Mr. Arora's own evidence, that website was not fully functional and the evidence does not establish that Target Tech was selling any of Progressive's products. Moreover, Progressive's primary concern about protecting its confidential business information is addressed by way of the defendants' consent to an order restraining the use of any such information. Finally,

Progressive has not established that damages would not be an adequate remedy. Its argument that the defendants cannot be trusted to record any sales they might make is, at best, speculative.

Conclusion

- [51] Items 1 (a), (b) and (c) of Progressive's notice of application, seeking to restrain Mr. Jahromi from competing with Progressive or soliciting business from a customer of Progressive are dismissed. By consent, the defendants collectively are restrained from using or disclosing Confidential Information, as that term is defined in the Contract.
- [52] The Consent Order is vacated and replaced with an order on the above terms.
- [53] Mr. Jahromi has largely been successful and in the normal course would be entitled to his costs. However, it was his conduct that created the circumstances leading to this application, including his failure to deal with Progressive in good faith. In the circumstances, I order that the parties bear their own costs.

"Skolrood J."

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Prepared on 26 October 2026 · Esheria