

CANADA / JUDGMENT

Scala Development Consultant Ltd. v. Anderson

2020 BCSC 2184

COURT

Supreme Court of British Columbia

DECIDED

30 October 2020

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2020 BCSC 2184 Scala Development Consultant Ltd. v. Anderson IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Scala Development Consultant Ltd. v. Anderson, 2020 BCSC 2184 Date: 20201030 Docket: S203411 Registry: Victoria Between: Scala Development Consultant Ltd. and Aristides Cota Plaintiffs And Jerry Anderson Defendant Before: The Honourable Madam Justice Francis Oral Reasons for Judgment In Chambers Counsel for Plaintiffs: N.M. Vaartnou Place and Date of Trial/Hearing: Victoria, B.C. October 30, 2020 Place and Date of Judgment: Victoria, B.C. October 30, 2020

- [1] THE COURT: This application is brought by the plaintiffs, Scala Development Consultant Ltd. ("Scala") and Mr. Cota, for a preservation order under Rule 10-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] Scala and Mr. Cota went into business with Mr. Anderson for the purposes of the development of a property in Cowichan Bay (the "Sutherland Property"). At a certain point that relationship appears to have broken down, and some of Scala's invoices were not paid by Mr. Anderson.
- [3] When representatives of Scala followed up with Mr. Anderson about the unpaid invoices, he presented them with an invoice for the storage of their equipment on the Sutherland Property. That equipment had been stored on the property for some time, and it had been the understanding of the plaintiffs that they would not be charged for storage, since the equipment was situated on property they were in the process of developing.
- [4] Mr. Anderson's invoice was dated July 13, 2020, in the amount of \$41,850. Since that invoice was rendered, Mr. Anderson has taken the position that he will not return the equipment to the plaintiffs until they pay that invoice.
- [5] The plaintiffs commenced a claim against Mr. Anderson for damages in respect of three disputes involving the Sutherland Property. The only one relevant to this application is a claim for damages related to Mr. Anderson's wrongful seizure of Scala's equipment and supplies that were located on the Sutherland property.

- [6] The test for a preservation order broadly speaking is:
- (a) whether there is a claim on the evidence and not just the pleadings to a proprietary interest in the property;
 - (b) whether there is some evidence to render reasonable the belief of the plaintiff that the property is threatened with disposition or transfer outside the jurisdiction;
 - (c) whether there is a substantial question to be decided as to the plaintiffs' entitlement to the property (this is a lower threshold than the strong prima facie case called for in a Mareva application); and finally
 - (d) whether the balance of convenience favours the granting of the order: *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420.
- [7] Turning to the first branch of the test, I am satisfied that the plaintiffs have a proprietary interest in the equipment. There is nothing in the evidence to suggest that anyone contests ownership. The issue here appears to be whether Mr. Anderson is entitled to charge rent for the equipment being situated on his property over the relevant period of time. Mr. Anderson has said that he will return the equipment when rent is paid. As such, the plaintiffs' proprietary interest does not appear to be controversial.
- [8] With respect to the second branch of the test, Mr. Makaroff on behalf of Scala has deposed that he is concerned that Mr. Anderson may sell the equipment. He has deposed that the equipment has a value of approximately \$250,000 and that Mr. Anderson could sell it, even though it is second-hand equipment, either through a private sale or through an equipment seller, Great West Equipment, in Nanaimo. The equipment has been seized. Mr. Anderson has not advised the plaintiffs where it is. I find that in these circumstances Mr. Makaroff's concern that Mr. Anderson may sell the equipment is a reasonable concern.
- [9] The third branch of the test is whether there is a substantial question to be decided as to the plaintiffs' entitlement to the property. On the particular facts of this case, the analysis under this factor is a bit duplicative of the first factor, but there is no question here that the plaintiffs own the equipment, and that there is a substantial question to be tried about whether the equipment should be returned.
- [10] Finally, the fourth and final consideration is the balance of convenience. Counsel for the plaintiffs has pointed out that a preservation order in this case is the best way to preserve the status quo until the case can be determined. I agree. Clearly the plaintiffs will suffer if the equipment is sold, for a number of reasons. They need the equipment to do work on other sites, and in fact they are presently renting equipment so they can do work on other projects.
- [11] Further, the equipment's value is higher to Scala than its actual value. The equipment is all second hand equipment. If Scala were to go out and purchase the same equipment, they would have to purchase new equipment at a higher cost.

- [12] Finally, and perhaps most importantly, there is no harm to Mr. Anderson in the court granting the preservation order. He is presently holding on to the equipment. Ordering him not to sell it pending the outcome of this dispute does not cause any prejudice whatsoever to him.
- [13] Consequently, I am prepared to make the order on the terms sought at Schedule A to the notice of application. The defendant, Mr. Jerry Anderson, is restrained from disposing of any construction equipment and supplies owned by Scala Development Consultant Ltd., including, but not limited to, the equipment and supplies described at Exhibit A to the affidavit of Mr. Doug Makaroff sworn October 13, 2020, that are in Mr. Anderson's possession, pending resolution of this action, further order of the court, or consent of the parties.
- [14] The defendant has leave to apply to set aside this order on three days' notice. And the defendant must be served with a copy of the order.
- [15] MR. VAARTNOU: Of course.
- [16] THE COURT: Anything further?
- [17] MR. VAARTNOU: No, My Lady. Thank you.
- [18] THE COURT: Thank you. "Madam Justice Francis "

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