

CANADA / JUDGMENT

Yu v. TNG Packaging Limited

2022 BCSC 574

COURT

Supreme Court of British Columbia

DECIDED

8 April 2022

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2022 BCSC 574 Yu v. TNG Packaging Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yu v. TNG Packaging Limited,

2022 BCSC 574

Date: 20220408

Docket: S1811559

Registry: Vancouver

Between:

Junjie Yu also known as Jun Jie Yu also known

as Jun Jie (Jack) Yu

Plaintiff

And

TNG Packaging Limited, Guang Tian also known as

Tim Tian and Yan Ping Ma

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

In Chambers

Counsel for Plaintiff:

D. Way

(Appearing as agent for D. Chen)

Appearing as Representative for the Defendants:

Si Yu Tian

Place and Date of Hearing:

Vancouver, B.C.

February 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2022

- [1] These applications are brought in Action S181159 (the "Yu Action"). I note that the Yu Action has been consolidated with Action S189475 (the "TNG Action").
- [2] The plaintiff Mr. Yu brings an application to withdraw certain deemed admissions, in response to a notice to admit filed in 2019.
- [3] The defendants, who I will refer to collectively as "TNG" for simplicity in these reasons, bring two applications. The first application is to have the notice of civil claim ("NOCC") in the Yu Action struck pursuant to Rule 9-5(1). The second application is to have the NOCC in the Yu Action dismissed for want of prosecution pursuant to Rule 22-7.
- [4] These applications are brought in the context of an exceeding complex series of interlocutory applications. To understand the positions taken by the parties on these applications, the entire chronology going back to 2017 must be reviewed.
- [5] Chronology of the two actions:
- a) February 2, 2017 - Mr. Yu files a petition seeking various oppression remedies against TNG, Mr. Tian and Ms. Ma relating to the operation of TNG.
 - b) April 3, 2017 - a response to the petition is filed.
 - c) August 21, 2018 - the petition is ordered to be converted to an action (the Yu Action).
 - d) August 30, 2018 - TNG and Mr. Tian file the TNG Action against Mr. Yu seeking declarations that Mr. Yu is in breach of a share transfer agreement and in breach of his fiduciary duties, and that the Yu Action is an abuse of process, and various orders restraining Mr. Yu from using TNG information or competing with TNG and claiming damages against Mr. Yu.
 - e) September 24, 2018 - Mr. Yu files a response to the TNG Action.

- f) October 26, 2018 - the NOCC is filed in the Yu Action.
- g) November 26, 2018 - the first response to the Yu Action is filed.
- h) December 31, 2018 - Mr. Yu files a notice of intention to act in person. Mr. Yu is not proficient in English, and relies on his friends to translate documents for him.
- i) January 14, 2019 - Mr. Yu receives a notice to admit from the defendants by email. Mr. Yu was in China at the time, and was not returning to Canada until March 17, 2019. Mr. Yu told Mr. Tian that he could not properly prepare a reply until he was back in Canada, several months later. The parties exchanged emails disputing both the request for an extension and the date the notice to admit had been received.
- j) March 26, 2019 - Mr. Yu serves a reply to the notice to admit on the defendants.
- k) April 15, 2019 - the defendants serve a notice to set aside the reply to the notice to admit, with a hearing date of May 1, 2019.
- l) April 17, 2019 - Mr. Yu advises the defendants that he was not available to have the matter heard on May 1, 2019.
- m) April 25, 2019 - TNG's application to set aside the reply to the notice to admit is reset for a hearing on April 30, 2019, by consent.
- n) April 30, 2019 - the parties appear before Master Taylor. Mr. Yu's translator left before the end of the hearing. Ms. Tian, on behalf of the defendants, advised the court the matter could be reset to May 2, 2019. Ms. Tian then went to the registry and reset the matter for hearing on May 1, 2019. The requisition is purportedly made by consent, although Mr. Yu disputes that he consented to the date of May 1, 2019.
- o) April 30, 2019 - at 4:27 pm, Ms. Tian advises Mr. Yu that the hearing had been reset to May 1, 2019. At 10:31pm, Mr. Yu repeats his advice to Ms. Tian that he is not available on May 1, 2019 and asks Ms. Tian to reset the application to a day he is available.
- p) May 1, 2019 - the defendants in the Yu Action appear before Justice Iyer. Mr. Yu is not in attendance. Ms. Tian advises the court that Mr. Yu consented to the May 1 date, and did not object to the date when she sent the requisition to him. These statements were both false.

Justice Iyer strikes Mr. Yu's reply to the notice to admit as an abuse of process, and gives Mr. Yu leave to file a new reply within two weeks. Justice Iyer orders Mr. Yu to produce a list of documents within 14 days.

- q) May 14, 2019 - Mr. Yu delivers a new unfiled reply to the notice to admit to the defendants. Mr. Yu did not understand the reply was also required to be filed.
- r) May 28, 2019 - an amended NOCC is filed in the TNG Action.

- s) June 12, 2019 - the parties appear back before Justice Iyer. Mr. Yu explains that he did not consent to the earlier hearing date, and attempts to address the May 1 order. There was insufficient time to hear the application, and Mr. Yu failed to properly file the materials needed for his application. Justice Iyer declined to hear the application, but left it open to be brought on again with a properly filed application record. Justice Iyer advised Mr. Yu that he was required to file his amended reply with the court.
- t) June 12, 2019 - an amended response is filed in the TNG Action.
- u) June 13, 2019 - Mr. Yu files the new reply to the notice to admit.
- v) July 4, 2019 - the defendants file an application to strike the new reply.
- w) July 17, 2019 - Master Elwood strikes Mr. Yu's new reply to the notice to admit as an abuse of process.
- x) August 16, 2019 - Mr. Yu retains counsel.
- y) September 9, 2019 - a case planning conference is held before Justice Choi in which she orders that a one-day hearing be set to hear Mr. Yu's application to consolidate the Yu Action and the TNG Action, and ordering a further case planning conference to be set in January 2020.
- z) Early 2000 - Mr. Yu obtains a one-day hearing date in April 2020.
- aa) March 18, 2020 - COVID 19 restrictions were announced, adjourning all civil hearings, including conferences and chambers hearings. The April hearing date obtained by Mr. Yu was adjourned as a result.
- bb) July 2020 - The BC Supreme Court registries re-open for regular filings.
- cc) August 7, 2020 - Mr. Yu files an application to withdraw the deemed admissions to the notice to admit dated January 9, 2019, and permitting him to file a new reply to the notice to admit. Mr. Yu also sought to have the Yu Action and the TNG Action consolidated.
- dd) August 21, 2020 - Justice Myers orders that the Yu Action and the TNG Action be consolidated for hearing, adjourns Mr. Yu's application to withdraw the deemed admissions so that the transcript of the hearing before Justice Iyer can be obtained. The court also orders that arguments be filed in advance of the hearing.
- ee) July 2, 2021 - an amended NOCC is filed in the Yu Action.
- ff) July 19, 2021 - an amended response to civil claim is filed in the Yu Action.
- gg) November 26, 2021 - Master Cameron orders that Mr. Yu's application to withdraw the deemed admissions and the defendants' application to strike the NOCC in the Yu Action be reset for a one-day hearing on February 11, 2022.
- hh) January 12, 2022 - TNG files an application to dismiss the Yu Action for want of prosecution.

Deemed admissions

- [6] In support of his application, Mr. Yu has provided an affidavit setting out the responses he would like to be able to make to the notice to admit. He argued that he was acting without counsel and did not understand the requirements when he filed the first and second replies. He also argued that the application before Justice Iyer was set without his consent on a day he could not attend. The court was misled as to his consent to the date of hearing. If he had been present, he would have been able to explain his position, and understand the court's reasoning.
- [7] I agree that Ms. Tian was not truthful with the court when she set the original date for May 1, 2019, nor when she advised the court that Mr. Yu consented to the date for hearing. I am satisfied that Mr. Yu was prejudiced as a result.
- [8] Mr. Yu attempted to return to Justice Iyer in June 2019 to have her address the issues. That application did not proceed. Justice Myer requested the transcript of the hearings before Justice Iyer before the application to withdraw the deemed admissions could be heard. I have now had the benefit of reading these transcripts. I am satisfied that Justice Iyer treated Mr. Yu's application as a nullity because the record was not properly filed, and allowed him to refile the application. Before that happened, TNG brought an application before Master Elwood to strike the second reply to the notice to admit. Master Elwood struck the reply because it was substantively similar to the reply which was the subject of Justice Iyer's order dated May 1, 2019.
- [9] Mr. Yu was not represented by counsel in the summer of 2019 and did not have good comprehension of the English language. TNG took an extremely aggressive approach to the Rules. These factors resulted in a failure of Mr. Yu to strictly comply with Rules, and orders being made against him as a result.
- [10] Mr. Yu now has counsel. He has properly filed an application to withdraw the deemed admissions which flowed from the orders striking his original replies to the notice to admit.
- [11] The test for withdrawing deemed admissions is set out in *Hamilton v. Ahmed*, 1999 CanLII 7029 (BCSC):
- [10] In considering what principles a court should apply when faced with an application to withdraw a deemed admission, I have considered following cases, which I list in chronological order: *Abacus Cities Ltd. v. Port Moody* (1981) 1981 CanLII 402 (BC CA), 26 BCLR 381 (BCCA); *Norlympia Seafoods Ltd. et al. v. Dale & Company Ltd.* (1982) 1982 CanLII 491 (BC CA), 41 BCLR 145 (BCCA); *La v. Le* (1993) 1993 CanLII 1186 (BC CA), 78 BCLR (2d) 322 (BCCA); *Chavez v. Sundance Cruises Corp.* (1993) 1993 CanLII 2432 (BC CA), 77 BCLR (2d) 328 (BCCA); *Bank of Montreal v. Quality Feeds Alberta* (1994) 49 CPC (3d) 8 (BCCA), Affg (1995) 49 CPC (3) 4 (BCSC); *Can-Am Produce & Trading Ltd. v. Moradin* (unreported) September 7, 1995, Vancouver Registry No. CA019606 (BCCA).

- [11] There is no conflict between these decisions and I derive the following principles from them:
1. That the test is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.
 2. That in applying that test, all the circumstances should be taken into account including the following:
 3. That the admission has been made inadvertently, hastily, or without knowledge of the facts.
 4. That the fact admitted was not within the knowledge of the party making the admission.
 5. That the fact admitted is not true.
 6. That the fact admitted is one of mixed fact and law.
 7. That the withdrawal of the admission would not prejudice a party.
 8. That there has been no delay in applying to withdraw the admission.
- [12] I agree with Mr. Yu that the facts in contention in the notice to admit pertain to triable issues, and I am persuaded that it would not be in the interests of justice overall for the issues to be determined on the basis of deemed admissions. Rather, the parties should have the ability to call evidence and the court should be given the opportunity to determine the facts.
- [13] I do not agree that Mr. Yu appreciated the nature of the notice to admit when it was served on him, or understood his obligations in replying to the notice to admit. All litigants are required to take steps to meet the requirements of the Rules, including having proper translations prepared if they are not proficient in English, and obtaining advice if they do not understand the Rules. In the case before me, Mr. Yu has now obtained proper advice, and has prepared an affidavit setting out responses which do comply with the requirements of Rule 7-7, should he be permitted to file a new reply.
- [14] Should Mr. Yu have obtained this advice earlier? The answer is obviously yes. His failure to properly respond to the requirements of Rule 7-7 resulted in numerous court appearances, and the striking out of his replies. However, as he has now persisted in his application to withdraw the deemed admissions, has obtained counsel, and has presented responses which would comply with the Rules, I do not agree that it is in the interests of justice that the deemed admissions should stand.

- [15] I have reviewed the schedule attached to the submissions filed on behalf of Mr. Yu, dated August 7, 2020. This schedule sets out Mr. Yu's position in relation to all 77 paragraphs of the notice to admit, including which paragraphs he admits, which facts are not within his knowledge, which paragraphs are mixed fact and law, and which facts are not true. I am not prepared to summarize or set out the extensive set of responses. However, I agree that the positions are proper, and can be properly drafted into a reply to the notice to admit.
- [16] While this litigation has been dragging on for some time, I am not satisfied that there is any prejudice to TNG if Mr. Yu is permitted to file a reply. If TNG had simply given Mr. Yu time to return to Canada to properly address the initial notice to admit, the parties may not have wasted years on the convoluted myriad of applications which have sprung forth from Mr. Yu's initial rushed reply. Mr. Yu has been trying to get this application dealt with for years, and while it has taken a long time, and has been delayed due to COVID, I do not agree that there has been an inexcusable delay. I find both parties have contributed to the state of this case, and both need to focus on getting this matter set for trial.
- [17] Paragraphs 1 and 2 of Mr. Yu's application dated August 20, 2020 are allowed.

Application to Strike

- [18] TNG seeks to strike out either the entirety of the Yu Action, or a substantial number of paragraphs of the Yu Action, pursuant to Rule 9-5(1).
- [19] A plaintiff is required to set out material facts in the NOCC. A plaintiff is not required to set out the evidence in support of the allegations of material facts.
- [20] TNG's submissions generally confuse allegations of material facts with evidence. The complaints raised may be summarized as follows:
- a) Claims against Ms. Ma. The NOCC alleges that Ms. Ma is a director, and acquiesced in board decisions, as directed by her husband. This is a proper pleading. Nothing more is required. Mr. Yu complains about actions taken by the board. Ms. Ma is or was a director at the relevant times, and Mr. Yu is entitled to pursue her for any improper acts she acquiesced in.
 - b) Claims against TNG. TNG is a proper party to an oppression claim. The NOCC seeks relief against the company, based on the oppressive acts of the directors. Nothing more is required.
 - c) Claims against Mr. Tian. The NOCC makes numerous allegations of material facts supporting the claim in oppression. None of these are improper. The plaintiff is not required, or indeed permitted, to provide the evidence supporting the allegations in the NOCC itself.
- [21] TNG complains that various paragraphs in the NOCC are contradicted in various affidavits and other filed materials, and argues this is an abuse of process warranting the striking of the claim. I disagree.

- [22] Prior to trial, TNG may demand particulars where appropriate, or may use other discovery processes, such as an examination for discovery of the plaintiff. This is the appropriate way for TNG to explore the evidence behind the allegations, and resolve any inconsistencies which it says arise on the pleadings and other documents filed with the court.
- [23] At trial, TNG will be able to challenge any of the allegations, and attempt to prove that the evidence does not support the allegations. That is the function of the trial process.
- [24] I find this application of TNG is simply an attempt to forestall a determination of the claim on its merits.
- [25] I am not prepared to make the orders sought by TNG on this application. I am not satisfied that TNG has met the test to strike the NOCC as disclosing no cause of action, or as an abuse of the court's process.
- [26] The application of TNG to dismiss all or part of the NOCC in the Yu Action is dismissed.

Application to dismiss for want of prosecution

- [27] TNG applies to strike the Yu Action for want of prosecution. As can be seen in the summary of steps taken in the litigation set out above, this litigation has been active since the petition was filed. The parties have been mired in interlocutory applications since 2019. Both parties have contributed to the barrage of applications and court appearances.
- [28] An order dismissing a claim for want of prosecution is a draconian measure, which is simply not warranted on the facts of this case.
- [29] The application of TNG to dismiss the Yu Action for want of prosecution is dismissed.

Costs

- [30] Costs of all applications are costs in the cause.

"W.A. Baker J."

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