IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Schwartz v. Harvard Auto Halifax Inc., 2003 NSSC 1

Date: 20030108
Docket: SH 177588
Registry: Halifax

Between:

Donald Schwartz

Plaintiff

v.

Harvard Auto Halifax Incorporated and
Gary Rubenstein

Defendants

Before: The Honourable Justice Davison

Heard: January 8, 2003, in Halifax, Nova Scotia

Written Decision: January 14, 2003

Counsel: Bruce W. Evans, for the plaintiff
Steven Zatzman, for the defendants

Davison, J.:

[1] The plaintiff made application pursuant to Civil Procedure Rules 18.09 and 18.11 for an order compelling Gary Rubenstein, on behalf of himself, and on behalf of the defendant Harvard Auto Halifax Incorporated, to provide sufficient answers and documents requested on an examination for discovery which took place on July 11 and July 12, 2002.

[2] Civil Procedure Rules 18.09 and 18.11 read as follows:

Scope of examination
18.09.

(1) Unless it is otherwise ordered, a person, being examined upon an examination for discovery, shall answer any question within his knowledge or means of knowledge regarding any matter, not

privileged, that is relevant to the subject matter of the proceeding, even though it is not within the scope of the pleadings.

(2) In order to comply with paragraph (1), the person being examined may be required to inform himself and the examination may be adjourned for that purpose.

(3) When any person examined for discovery omits to answer or answers insufficiently, the court may grant an order requiring him to answer or to answer further and give such other directions as are just.

Production of books, papers or documents

18.11.
Anyone who admits upon an examination for discovery that he has in his custody or power any book, paper document or record relating to the matters in question in the proceeding, not privileged or protected from production, shall produce the same for the inspection of the party examining him upon the direction of the examiner or order of the court within a reasonable time as fixed by the direction or order.

[3] In support of the application, Mr. Bruce W. Evans, counsel for the plaintiff, submitted an affidavit consisting of three paragraphs, and the third paragraph reads as follows:

> "3. That attached as Exhibit "A" is the correspondence between myself and Mr. Steven Zatzman, solicitor for the Defendants, regarding the outstanding undertakings of the Defendants from the Examination for Discovery."

[4] Exhibit "A" is a letter from Mr. Evans to Mr. Steven Zatzman, counsel for the Defendants, dated August 2, 2002 and consists of five pages of single-spaced requests for information. There are 30 paragraphs and the plaintiff seeks detailed information from the defendants.

[5] At the beginning of the hearing I expressed concern that the affidavit presented, insofar as it attempted to bring the applicant within Rule 18.09 and 18.11, was not complete. With respect to information sought pursuant to Rule 18.09, there was no mention in the affidavit that Mr. Gary Rubenstein omitted to answer, or answered insufficiently, the questions put to him at the examination for discovery. There is also nothing in the affidavit which would indicate that Mr. Rubenstein admitted at the examination for discovery that he had certain documents in his power or custody as it relates to Civil Procedure Rule 18.11. Mr. Evans should file an additional affidavit covering these deficiencies if the omissions and admissions of Mr. Rubenstein are true.

[6] It is clear, and I find, that the plaintiff's counsel went to considerable length to obtain a response to his requests and between August 2, 2002 to November 13, 2002, Mr. Evans wrote to counsel for the Defendants eight letters urging a response to the request for information, and, in the course of these letters, made it quite clear that if the responses were not forthcoming application would be made to the court. Mr. Zatzman replied to the letters of plaintiff's counsel but apparently was unable to get some of the information requested by plaintiff's counsel from his clients. On the morning of the hearing, and prior to the hearing commencing, a folder of documents was presented to plaintiff's counsel, but no time was available to ascertain the adequacy of these answers. At the time of the hearing there still remained approximately ten items to which the defendants had not responded.

[7] These events which occurred between the examination for discovery and the hearing have significance for several reasons. It seems that there has been a sense of cooperation between counsel, but the defendants have not responded to all of the requests. Accordingly, if the affidavit I have requested cannot be completed because the facts are not such as to bring the matters within the terms of Civil Procedure Rules 18.09 and 18.11, I am prepared to sign an order amending the interlocutory notice (application inter partes) by adding a request for production and inspection pursuant to Civil Procedure Rule 20.06.

[8] Examination of the statement of claim provides allegations that the plaintiff was hired by the corporate defendant on September 15, 1997. The company is in the business of selling used automobiles and the plaintiff was hired as a business manager whereby he was to be paid 30% of the gross profits of the business office. In December 1999 the plaintiff began developing a form of business which was referred to as "sub prime financing" and it is alleged the corporate defendant agreed to pay the plaintiff 25% of the gross profits on each of these transactions which the plaintiff was able to complete. In the pleadings the plaintiff seeks special damages on the basis the corporate defendant neglected to pay amounts that were owed to him on a regular basis and claims against Mr. Rubenstein special damages for inducing the

corporate defendant to breach the contract. General damages and other remedies are claimed against both defendants.

[9] The plaintiffs employment was terminated on December 17, 2001 and the plaintiff alleges the termination was without just cause. It is also alleged that the dismissal constituted bad faith conduct and unfair dealing. It is also alleged that both defendants unjustly enriched themselves with respect to funds that should have been paid to the plaintiff. It is alleged that the defendant Rubenstein deliberately caused the corporate defendant to breach its contract with the plaintiff and that Rubenstein acted in bad faith "*...for the dominant purpose of depriving the plaintiff of his contractual benefits for the personal benefit of Rubenstein."* It is also alleged that Mr. Rubenstein is liable for inducing the breach of contract.

[10] In *Coughlan et al. v. Westminer Canada Holdings Ltd. et al.*, (1989) 91 N.S.R. (2d) 214 (C.A.), the Nova Scotia Court of Appeal considered the Rules respecting discovery and inspection of documents and the Court stated at page 221:

> "...the courts of this province have consistently decided that provisions respecting oral discovery and the production of documents should be liberally interpreted to grant effect to full disclosure of the facts and issues relevant to the subject matter of the proceedings prior to trial."

[11] With the delivery of a book of documents to plaintiff's counsel the morning of the hearing, there remains only approximately 10 items which the counsel for the defendants object to submit answers. It is clear that counsel for the plaintiff has not had the opportunity to examine the documents delivered, but I advised counsel that I will deal only with the remaining items and if there are answers in the book of documents which are insufficient there will have to be a separate application for those documents. Motions in chambers can not be unduly delayed and it is impractical to permit an application to be carried over into the future with counsel communicating with the court from time to time concerning further objections.

[12] The first items are listed in the letter of plaintiff's counsel on the following terms:

> "2. To provide the percentage of shares held by each of Gary Rubenstein and his wife Jennifer Rubenstein in GLJ Holdings Limited. Please also identify the class of shares held by each of Mr. And Mrs. Rubenstein and if there is more than one class of shares,

indicate the percentage of the total issued shares of that class held by each of Mr. And Mrs. Rubenstein.

3. Advise as to the percentage of voting shares held by each of Mr. And Mrs. Rubenstein.

4. To provide information as to the years from 1997 to 2002 with respect to which Gary Rubenstein received a performance bonus.

5. To produce a copy of the performance bonus agreement or agreements which have been in effect from 1997 to the present.

6. To provide particulars of the years, if any, when that year's performance bonus was reduced by performance in that year or other years."

[13] Counsel for the plaintiff indicate that the share structure of the corporate defendant as it relates to the defendant Rubenstein and his wife reveals the extent of the personal interest that these shareholders may have and the extent of control over the company. Counsel for the defendants say that these items requesting the breakdown of shares have no relevance to this proceeding and should not be disclosed.

[14] There are two defendants to this action and the individual defendant, Gary Rubenstein, is not a party simply because he was an officer in the corporate defendant but allegations are made directly against Mr. Rubenstein. The statement of claim would suggest that the difficulties alleged to have been experienced by the plaintiff relate to conduct which are interrelated between the two defendants. It is alleged that the defendant Rubenstein caused the corporate defendant to breach the contract and that the defendant Rubenstein acted in bad faith and reckless disregard as to whether the corporate defendant breached the contractual obligations to the plaintiff. At issue is whether Mr. Rubenstein had the control of the corporate defendant to the point where he could exercise these acts referred to in the pleadings and have the power to direct the corporate defendant to effect the alleged deficiencies set out in the statement of claim. Obviously, I make no comments and am unable to make comment with respect to the worth of these accusations but it does place the interrelationship between the two defendants in issue and I would direct that the defendants respond to the requests set forth in paragraphs two to six of Mr. Evans letter dated August 2, 2002.

[15] The next item set forth in the letter which plaintiff seeks to have enforced is in paragraph 13 which reads as follows:

> "13. To provide information as to amounts of bonuses received by Harvard Auto from VFC from the beginning of doing business with VFC to 2002 and to provide a sample copy of how the bonus was calculated and documents showing the amounts of bonuses received."

[16] It is my understanding that the objection that is taken by counsel for the defendants, and the only objection at the time of the hearing, was a concern about providing information with respect to amounts of bonuses for the year 2002. I interpret paragraph 13 to request information up to December 31, 2001 and counsel for the plaintiff confirms that is all that is being requested. Accordingly, there does not seem to be any dispute with respect to paragraph 13.

[17] The next paragraph to consider is paragraph 15 which reads as follows:

> "15. To produce a list of all sales of Harvard Auto during the plaintiff's employment identifying the stock number, purchasers name, date of purchase and all other information that would be required to calculate sales commissions and office manager commissions."

[18] It is clear from the arguments of counsel and in particular the comments of counsel for the defendants, that the objection is a practical matter in the sense that all of these documents would be voluminous and require considerable time and expense for the defendants to effect production. Counsel for the plaintiff says that the issues are allegations that the plaintiff has been underpaid by about $100,000.00 and that there is a counterclaim advanced by the defendants that the plaintiff has been overpaid by $26,000.00. It is alleged that the accounting records are not in good order, but the plaintiff is not seeking to have all of these documents produced. A system could be arranged which would permit an inspection of the documents by the plaintiff, or a person on the plaintiff's behalf, with the request that copies of relevant documents be made. This is a common device which can be effected when the mass of the documents render production impractical and expensive.

[19] The other items at issue relate to the allegation of the plaintiff that the defendants failed to deduct income tax from sums owed to the plaintiff and failed to remit those deductions to Revenue Canada.

[20] The relevant paragraphs in the plaintiff's letter are 22, 24 and 25 and the read:

> "22. To inquire as to whether employee deductions were deducted and remitted with respect to the Plaintiff's pay from September 1997 to April 1999 on a regular basis and to provide the dates when employee deductions regarding the Plaintiff were remitted for the period September 1997 to April 1999 and to provide copies of records that provide this information. To provide the same information fro the period April 1999 to the date of termination including all dates when employee deductions on behalf of the Plaintiff were remitted.
>
> 24. To make inquires of Green, Haley Jain, Chartered Accountants and confirm that that firm prepared the 1997, 1998, 1999 and 2000 income tax returns of the Plaintiff and to provide the name of the person providing the information and a copy of any document received from Green Haley Jain providing the information.
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> 25. To make inquiries of Green, Haley Jain and find out who paid for preparation of the Plaintiff's 1997, 1998, 1999 and 2000 income tax returns by Green, Haley Jain and to provide copies of the documents or names of the person(s) providing this information. If Harvard Auto was billed for any or all of the preparations of these returns, to provide copies of the invoices to Harvard Auto. If no one was billed for the preparation of these returns, to inquire a to why no one was billed and identify the source of the information and to provide copies of any documents received that provides this information."

[21] Counsel for the defendants advised that paragraph 22 was answered in the book of documents given to counsel for the plaintiff on the morning of the hearing. Mr. Evans did not have the opportunity of determining whether the reply contained sufficient information but by reason of the response from the defendants it does not appear they object to replying to paragraph 22.

[22] Mr. Evans in his argument alleged the corporate defendant failed to make financial deductions for income tax and failed to send those monies to Revenue Canada. He stated the plaintiff owes Revenue Canada and seeks an accounting of monies which went to Revenue Canada. The statement of claim states the corporate defendant neglected or refused to provide an accounting of amounts "deducted and remitted for Income Tax, Canada Pension Plan Premiums and Employment Insurance Premiums". It is said this was an implied term of the offer to the plaintiff for employment. Yet in the remedy portion of the statement of claim there is no claim for an accounting of monies remitted to Revenue Canada. There is a claim for an accounting of profits from the business office and "sub prime financing" during the period of the plaintiff's employment.

[23] The statement of claim does state that it was a term of this contract to deduct and remit deductions to Revenue Canada and that the plaintiff breached that

part of the contract but in the pleading there is no claim for damages sought for the breach. There is no objection from the defendants to produce the information in paragraph 22 and in fact they have alleged they have produced it. In view of this, if there is a deficiency in the production of the answer to paragraph 22 I would direct there be an adequate response.

[24] The defendants do object to responding to paragraph 24 and 25 stating these inquiries should be made by the plaintiff to the chartered accountants who allegedly prepared the plaintiff's income tax returns for the years 1997, 1998, 1999 and 2000. Mr. Zatzman states the defendants have no objection to the plaintiff contacting the chartered accountants, that the return forms were those of the plaintiff and the accountants should be free to speak to the plaintiff.

[25] In addition to the incomplete state of the pleadings relating to accounting of the income tax of the plaintiff the plaintiff has not proved to me the requests set out in paragraphs 24 and 25 are those to be answered by the defendants. Direct contact with the chartered accountants by counsel for the plaintiff is certainly a less complicated manner of acquiring the information. A complete discussion would avoid any deficiencies in the information. There should be no difficulty in obtaining the information but if there is the accountants could be examined by discovery. There is no need for the defendants to answer paragraphs 24 and 25.

[26] Counsel for the plaintiff seeks costs in the amount of $500.00 from the defendants payable forthwith. Counsel for the defendants indicates that Mr. Rubenstein was unable to reply to the requests because he is a busy person. That is an inadequate reason for the considerable delay in advancing the information requested and the necessity to come to court to get the information. I would award costs of this application in the amount of $500.00 to the plaintiff with the defendants to make payment forthwith.

J.