IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***510267 B.C. et al v. Gilmore et al,***
2005 BCSC 756

Date: 20050516
Docket: S013494
Registry: Vancouver

Between:

510267 B.C. Ltd. and Nor-Van Landscape Design Ltd.

Plaintiffs

And:

Debra Gilmore, Plantscape Design International Inc., Mark Handfield and Tyler Fitzwater

Defendants

And:

Robert George, David Bossons, Arne Olsen and Marita Osswald

Defendants by Counterclaim

Before: The Honourable Madam Justice Gill

Oral Reasons for Judgment

May 16, 2005

Counsel for the Plaintiffs and Defendants by Counterclaim:	A.E. Thiele
Counsel for the Defendant, Debra Gilmore:	T.G. Lewis
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** The only remaining claim in these proceedings is Ms. Gilmore's action for wrongful dismissal. It is agreed that she was constructively dismissed. Counsel have, in fact, reached agreement on all but the following two issues:

(1) What is the appropriate notice?

(2) Are the defendants by counterclaim personally liable?

[2] I will begin by setting out a brief background. I will refer to Ms. Gilmore as the plaintiff.

[3] The plaintiff began working for Nor-Van Landscape Design Ltd. in 1978 and by 1996, managed its operations. The company was in the business of installing and maintaining plants and later flowers, providing services to the commercial sector. Ms. Gilmore testified that it had been her dream to be an owner of the business. That opportunity presented itself in 1996 when a number of individuals, including Ms. Gilmore, purchased the business through the acquisition of shares. Ms. Gilmore and Mr. Olsen, a defendant by counterclaim, each advanced approximately $250,000 and, thus, had the most sizeable investments in the company. The relationship between shareholders is governed by a shareholders agreement dated July 22, 1996, the provisions of which are generally not material to the present action.

[4] Mr. Olsen is a businessman and after the sale of a very successful company in 1988, he continued to be involved in various businesses but generally in the more limited role of investor. That was to be his role in Nor-Van. The plaintiff was to be president of the company.

[5] Ms. Gilmore and Mr. Olsen agree, although perhaps not for the same reasons, that by the spring of 2000 the company was experiencing problems. In

Ms. Gilmore's view, the problem was cash flow. She said the difficulty began immediately after the company's purchase when unexpected legal expenses were incurred in a dispute with the former owner. Mr. Olsen testified that in his view the company was in chaos and it was in the best interests of the company that someone else take over as president and that Ms. Gilmore work in the field. A meeting of shareholders was held on April 19, 2000. It was attended by the plaintiff, the defendants by counterclaim and Ms. O'Brien, an employee of the company. At that meeting Mr. Bossons was appointed secretary/treasurer, a position then held by Ms. Gilmore. Mr. George was appointed managing director. The minutes indicate that those motions were carried unanimously. It was the evidence of Ms. Gilmore that she initially welcomed the assistance of both Mr. Bossons and Mr. George. She said that at the April 19 meeting there were discussions to the effect that Mr. George would work with her and assist her as he could and it was her understanding that he would be there to assist. She agreed that assistance was needed in respect of the financial management of the company. Mr. Bossons was to be involved in that aspect of the business.

[6] Counsel for Ms. Gilmore argued that the events leading up to what culminated in her dismissal began at the meeting of April 19. Mr. Lewis said that Ms. Gilmore did not know that the involvement of Mr. George was "laying the foundation of her own dismissal."

[7] As to what occurred between April 19 and August 3, 2000, there are significant discrepancies between the testimony of Mr. George and Ms. Gilmore. I will refer to the evidence of Ms. Gilmore.

[8] She testified that on April 19, she and Mr. George made arrangements to meet on several occasions over the following weeks. The first meeting, which was to have been held on May 3, had to be cancelled because she was called to a tender walk-through. They did meet at the company's offices as arranged on two other dates in May. These meetings were cordial and their discussions centred on the business of the company. For various reasons their next meeting did not go well, including Mr. George's reaction to having to wait. On July 19, Mr. George came to the offices of Nor-Van without an appointment and told her that he was there to advise her that she was no longer president. She described herself as dumbfounded.

[9] On July 24, she received a fax regarding a shareholders meeting to be held July 26. It was at that meeting that Mr. Olsen requested that she resign as president. She said she would not do so until she had consulted with family members who had provided financial assistance. At the meeting there was also a discussion about acquiring a company called Landscape Design in which Mr. Olsen, Mr. George and Mr. Bossons had an interest. Ms. Gilmore did not wish to acquire that company.

[10] The next meeting was held on July 31. It was the plaintiff's evidence that she told the others that she was neither prepared to resign nor to acquire Land Design. A letter of resignation was presented to her and in her view, she was forced to resign.

[11] She also testified about what occurred on August 3 when she was to travel to Calgary to attend her grandmother's funeral. She stated that she received a telephone call from her father-in-law who told her that the police and a vehicle belonging to a locksmith were at the premises of the company. Mr. George testified that the locksmith was called because when he went to the company's offices, Ms. Gilmore's office door and the accounting office were locked. The police were called because when the offices were opened, the computer used by the company's accountant was not there and he was very concerned. In fact, the computer was at London Drugs for repairs.

[12] Admittedly, at least some of what had been in Ms. Gilmore's office was placed in green garbage bags which, in turn, were stored in a closet. Admittedly, she was thereafter told to use a boardroom as an office, even though it was not set up for that purpose.

[13] I do not intend to refer to evidence of what occurred over the next nine months except to say that in March, 2001, Ms. Gilmore was told in a letter from counsel that she had no authority to speak on behalf of Nor-Van to any creditors of the company regarding its business affairs without the prior consent of Mr. George. She testified that it was therefore impossible to continue and through her counsel she advised the company of her view that she had been dismissed.

[14] Against that background, I turn to the issues raised. As the plaintiff's argument regarding notice relies to some extent on the conduct of the defendant by counterclaim, I will deal first with the issue of personal liability.

[15] Because it is not my view that there is any basis for concluding that any defendant by counterclaim is personally liable, I do not intend to address in any detail what their counsel described as two conflicting lines of authority relating to the liability of directors. For that same reason I do not tend to dwell at length on the pleadings, which in my view are problematic. It is necessary, however, to make some reference to the pleadings.

[16] It is alleged that the defendants by counterclaim acted with "deliberate intent and malice." There is no plea of any tort, although it is argued that torts were committed. There is no plea of defamation, one of the torts alleged. In ***Deildal v Tod Mountain Development Ltd.***, [1997] B.C.J. No. 860 (C.A.), a trial award was set aside because of the absence of a plea of defamation. The absence of a plea is not, as is sometimes described in these rooms, a technicality. Counsel for Ms. Gilmore has suggested that various false statements were made, including that Ms. Gilmore embezzled funds and forged cheques. That should have been pleaded.

[17] In any event, there is not even admissible evidence that such statements were made to anyone. Only Ms. Gilmore testified and although many documents are included in Exhibits 1 and 2 and others were placed into evidence, only authenticity was admitted and thus, many documents were not proven. Mr. Lewis says that it was alleged by one or more of the defendants by counterclaim that a computer was stolen, but it is not clear that anyone actually said that Ms. Gilmore did so.

[18] There is, therefore, not only a deficiency in pleadings, but a deficiency in the evidence and, accordingly, even if there had been a plea of defamation relating to the theft of the computer, theft of funds or forging a cheque, in my view there is no evidence upon which a conclusion in favour of the plaintiff could have been reached. That Mr. Olsen may still question Ms. Gilmore's explanation of draws does not prove a tort.

[19] As to certain other conduct alleged to be tortious, the plaintiff says she was harassed and belittled, but so far as I am aware, there is no tort of harassment or belittling and as stated, no pleading.

[20] It is necessary to address at greater length the plaintiff's argument that the defendants by counterclaim were acting for personal gain and with malice. Although it is my view that the pleadings are deficient, these issues have nevertheless been addressed by both counsel.

[21] I will begin by referring to the evidence of Mr. Olsen. His evidence is of particular importance as it was Mr. Olsen who suggested that Mr. Bossons and Mr. George become involved in this company and that Mr. George should replace Ms. Gilmore as president.

[22] As I have already stated, it was his evidence that by the time of the shareholders meeting in mid-April he had serious concerns about this company. He gave reasons for his concerns and amongst other things, made reference to the following:

- Advice received from the Hong Kong Bank of Canada on June 15, 1998, that it was closing all accounts and credit facilities and that the company should immediately seek “a new relationship with another banking institution”;

- Correspondence from the Royal Bank in December of 1999 expressing concerns that the corporate account had not been operated in a satisfactory manner;

- A demand from the landlord in March, 2000, for $9,000 for back rent; and

- The company’s inability to provide the financial information required by its accountant to produce financial statements.

[23] I should add that Mr. Olsen had provided guarantees in respect of the lease and the line of credit. The line of credit was in the amount of $150,000 and had always been fully drawn down. The items that he described as being of concern would, in my view, have been of concern to anyone in his situation.

[24] Mr. Olsen knew Mr. George and Mr. Bossons. Mr. Bossons had previously worked for a company owned by Mr. Olsen as a financial officer. Mr. George and Mr. Olsen had been involved in a number of businesses and Mr. George’s background included providing consulting services regarding business turnarounds. It was therefore not merely his personal relationship with these individuals that led to Mr. Olsen’s request that they become involved in this company, but also their particular expertise.

[25] Despite Mr. Olsen's evidence about his concerns and Ms. Gilmore's evidence that she initially welcomed the involvement of others, the theory of the plaintiff is that what motivated Mr. Olsen was Ms. Gilmore's resistance to the plan to merge Nor-Van and Land Design and, indeed, that is what motivated everyone. It is argued that the defendants by counterclaim acted as they did hoping that she would quit and sell her shares. However, she did not quit and ultimately proved to be a "tough customer". Seeing that she was not going away, her fellow shareholders "downed tools and let the company drift".

[26] To address this argument I begin by saying that I accept that Mr. Olsen had serious concerns about this company, that he was justified in having those concerns and that it was for that reason that he ultimately suggested to Ms. Gilmore in July, 2000, that someone else take over as president. Obviously, he had a sizeable investment in this company and significant potential liability as a guarantor and his concerns increased after the involvement of Mr. Bossons and Mr. George when additional problems came to light. These included the company's failure to make mandatory payroll remittances and to remit GST. Again, these were concerns that were legitimate. The amounts involved were sizeable and Ms. Gilmore apparently did not appreciate that directors could be personally liable. Accepting that Ms. Gilmore had been attempting to keep the company going, such questions as the magnitude of draws to her and her sister did, in fact, require explanation.

[27] I accept, as argued on behalf of the plaintiff, that the merger of Nor-Van and Land Design was not merely a passing thought in the sense that financial information was obtained and the merger was discussed at a shareholders meeting.

However, the suggestion that Ms. Gilmore's opposition to this merger led to conduct intended to force her out of the company, including as a shareholder, does not make much sense. It seems an extraordinary and a foolish way to set about to achieve that goal, assuming it was the goal. To down tools and let the company drift could not possibly have been in Mr. Olsen's interest given his investment and his personal liability for various debts. As it was, he lost approximately $700,000 on this venture.

[28] The argument that the plaintiff's opposition to a merger with Land Design led to what amounts to retaliatory conduct ignores the plaintiff's own evidence regarding the company's circumstances and her need for assistance. I accept the submission made on the plaintiff's behalf that Mr. George did not become president of the company in a true sense, but that cannot negate the fact that the company was in trouble and that assistance was required. That some of Mr. George's conduct could be described as arrogant or lacking in empathy does not alter those facts either.

[29] In summary, I do not accept that any defendant by counterclaim acted for an improper purpose or was acting maliciously or acted in retaliation to Ms. Gilmore's opposition to a merger with Land Design. I should add that there is virtually no evidence regarding Mr. Bossons and Ms. Oswald except that they were present at certain meetings. In my view, that could not be enough to lead to personal liability no matter what the findings in respect of Mr. Olsen and Mr. George.

[30] I turn now to the second issue, being length of notice. Undoubtedly because personal liability was the focus of these proceedings, there is limited evidence on the issue of the appropriate period of notice.

[31] The plaintiff is now 46. She has only a high school education. Her position when she left the company was president. She has been working as a courier since March, 2002. She did not give evidence about her job search, if any, and I do not know, for example, whether this was the only job she could find. There is also limited evidence about the company itself except what one might assume from looking at its financial statements.

[32] My understanding of the argument that the notice period should be 33 months is that it is based on the decision in ***Deildal.*** I assume the submission is that allegations of misconduct were made against the plaintiff. There is an allegation in paragraph 3 of the defence of the numbered company to the counterclaim that Ms. Gilmore paid herself and family members sums which she and they were not entitled to receive. The defence of Nor-Van to the counterclaim also refers to unauthorized payments and the conversion of cheques. To that extent, there is a basis for arguing that what have come to be known as ***Wallace*** damages should be awarded. The difficulty, however, is that there is virtually no evidence about how such allegations have impacted upon the plaintiff other than Ms. Gilmore's feelings about the situation.

[33] In any event, as the notice period is an issue, it is necessary to do one's best on the limited evidence before the court. Based on Ms. Gilmore's age, length of service, my assumption that she was the president of what could be described as a small company and my assumption that she does not have transferable skills, it is my view that a notice period of 22 months is appropriate.

[34] That deals with the two issues that are outstanding.

(SUBMISSIONS BY COUNSEL RE: COSTS)

[35] THE COURT: Mr. Lewis, I am not prepared to make a ***Sanderson*** order. A company necessarily acts through its employees and it officers and directors and the end result cannot be that wherever a director, officer or employee is somehow involved in the dismissal, which necessarily they must be, there is a basis for ordering that the unsuccessful company pay the costs of successful defendants who are in the action because personal liability is alleged. That is simply not sufficient. It would be entirely inappropriate. I am not prepared to make any other order than what would be the usual order in favour of successful parties. Indeed, the successful parties are seeking only ordinary costs on scale 3.

[36] MR. THIELE: That's correct, My Lady.

[37] THE COURT: So that will be the end result here. Thank you very much.

"K. M. Gill, J."
The Honourable Madam Justice K.M. Gill

These Oral Reasons for Judgment were released from the Vancouver Registry on May 16, 2005.