IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *True Colors Painting Ltd. v. 0846747 BC Ltd.,* 2015 BCSC 278

Date: 20150225
Docket: S130950
Registry: Vancouver

Between:

True Colors Painting Ltd. and Lorne Fisher

Plaintiffs

And

0846747 BC Ltd. dba G&D Linemarking and Glenn Ross

Defendants

- and -

Docket: S95643
Registry: Kelowna

Between:

0846747 B.C. Ltd. dba G&D Linemarking

Plaintiff

And

True Colors Painting Ltd. and Lorne Fisher

Defendants

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for True Colors Painting Ltd. and Lorne Fisher: T.J. Delaney

No appearance for Glenn Ross and 0846747 BC Ltd.

Place and Date of Trial/Hearing: Vancouver, B.C. January 26-29, 2015

Place and Date of Judgment: Vancouver, B.C. February 25, 2015

Preliminary Matters

[1] By court order of July 8, 2013, True Colors Painting Ltd. and Lorne Fisher v. 0846747 BC Ltd. and Glenn Ross, Vancouver Registry No. S130950 (the "Vancouver action") was ordered to be tried at the same time as 0846747 B.C. Ltd. dba G&D Linemarking v. True Colors Painting Ltd. and Lorne Fisher, Kelowna Registry No. S95643 (the "Kelowna action"). It was also ordered that examinations for discovery in both actions be admissible in both actions and that evidence in one action be admissible in the other. The Vancouver action was stayed pending payment by the plaintiffs of the defendants' costs to the date of service of the discontinuance of the plaintiffs' counterclaim in the Kelowna action. Counsel for the plaintiffs assured this Court that these costs had been paid.

[2] A trial management conference was held for both actions on December 2, 2014. The defendant, Glenn Ross ("Ross") attended via satellite telephone on his own behalf and on behalf of 0846747 BC Ltd. (the "numbered company"). His solicitor had ceased to act by order on October 15, 2014. The defendants did not file a trial brief for the trial management conference or subsequently. Ross informed the presiding Master that he would be attending the trial which was agreed would proceed on January 26, 2015 for 10 days. He did not request an adjournment.

[3] Nobody appeared on behalf of Ross or the numbered company at the start of trial on January 26, 2015. The court waited until 11:45 a.m. for an appearance whilst court schedulers and plaintiffs' counsel attempted to contact Ross. No telephone number had been provided by Ross but Supreme Court Scheduling contacted Ross through email. Court administration requested to know if Ross planned to attend and advised Ross that the trial would proceed in his absence. Ross replied on January 27, advising Supreme Court scheduling that he was on his sailboat in Panama and was cruising to Columbia. He gave no explanation for his absence from trial except to say that he was short on cash to pay for entry into Panama from whence he had expected to travel to Vancouver. He did not ask for an adjournment of trial.

[4] Based upon the non-appearance at trial of the plaintiffs in the Kelowna action, that action was dismissed. The Vancouver action proceeded. Nobody appeared on behalf of the defendants throughout the four days of trial and no further information was received from the defendants.

[5] It should be noted that the plaintiff in the Kelowna action was 0846747 B.C. Ltd.; but, in the Vancouver action, the periods were deleted from "B.C. Ltd." in naming the defendant. It was not in issue that these are the same company. It is assumed that the correct name is 0846747 B.C. Ltd. Reference will be made herein to 0846747 B.C. Ltd or to the numbered company.

Facts

[6] The plaintiff, Lorne Fisher ("Fisher"), is the President and owner of the plaintiff company, True Colors Painting Ltd. ("True Colors"). True Colors had been in the business of roadway line painting since 1996, mainly in the lower mainland of British Columbia, and had numerous large institutional and other clients. Fisher was diagnosed with Hepatitis C in 2000 and increasingly had difficulty managing the disease and its medications. He turned to medicinal marihuana and obtained authorizations to possess dried marihuana from April 2011 to April 4, 2012 and from June 28, 2012 to June 28, 2013.

[7] In October 2011, Fisher felt that his disease had started to take a toll on his business and he started to look for a partner to relieve him of some of the work fatigue. He approached Ross who operated G&D Linemarking ("G&D") out of Kelowna. Ross expressed interest by email in February 2012 and information was exchanged. Fisher told Ross that he had an illness that "slow[ed] [him] down quite a bit" and the two planned to meet.

[8] Fisher met with Ross and his wife in early March 2012. Ross asked Fisher why he wanted to get out of the business. Fisher testified that he told Ross that he had Hepatitis C, that his health had "gone to crap", and that he used medicinal marihuana. This was significant in an industry where the standard expressly forbid smoking marihuana on the job, according to Fisher. Ross told Fisher that he was not

interested in a partnership but in an asset purchase. An agreement in principal was reached on March 8, 2012 wherein G&D, through the numbered company, would purchase certain assets and attached liabilities of True Colors for $300,000 payable over three years and would assume the lease on the warehouse used by True Colors in Langley, British Columbia. G&D would employ Fisher as a manager and as a labourer for up to three years and there was to be a profit sharing arrangement for up to three years. G&D tendered $10,000 towards a $25,000 down payment on the purchase price. The agreement in principal was to be reduced to contract by lawyers for G&D before the end of March.

[9] Fisher received a draft asset purchase agreement on March 31. He testified at first that he did not review it prior to Monday April 2 when Ross and his wife attended at True Colors Langley warehouse. But, he also said that he "skimmed" the document on the weekend. Fisher said that Ross told Fisher that Fisher had to sign on that day because Ross had to go out of town. Fisher said that he read the first few pages and "went straight to the money part to make sure that what they had discussed was there". He then said: "Glenn, you're not trying to fuck me are you?" Glenn replied: "No way, I wouldn't do that". Fisher testified that there was no urgency to signing the agreement. Everything looked good. He was "happy in the moment" because the financials looked good. He said that he did not read clause 1.3.5 before he signed the agreement in the presence of his secretary as witness. Fisher accepted a $15,000 cheque for the balance of the down payment that was payable.

[10] About a week later, Fisher had read through the contract and requested a change so that the management fee would be payable over 10 months rather than 12 months. This was agreed and written by hand into the contract. There were no other changes sought.

[11] The asset purchase agreement dated April 2, 2012 was between True Colors, the 'seller', and 0846747 B.C. Ltd., the 'purchaser' (referred to as "G&D"), and Fisher, the 'indemnitor'. The purchaser was defined as doing business as G&D Linemarking. The asset purchase agreement provided for the sale of certain

contracts, specified equipment, the name 'True Colors', and customer lists. The purchase price was $325,000 subject to adjustments set out in Schedule 1.3, with deposit paid of $25,000 and the balance payable "by way of 12 equal quarterly payments" to be paid over three years from the closing date with the first payment due on July 12, 2012. Pursuant to clause 1.3.1, True Colors was to receive a consulting fee for the first year in the amount of $50,000, payable in equal quarterly installments commencing on July 2, 2012. Pursuant to clause 1.3.2, Fisher was to be "employed… as the manager" in respect of the Langley business for three years for an "annual salary" of $50,000, with the employment to be renewable annually at the option of G&D. Pursuant to clause 1.3.3, Fisher was also to be employed as a labourer at the hourly rate of $25, the employment to be renewable annually at G&D's option for a period of up to three years. Pursuant to clause 1.3.4 and provided that Fisher remained employed as a manager, he was to receive 25% of "the pre-tax income earned by the Purchaser from the contracts and new business generated out of the Purchaser's Langley, BC location". The asset purchase agreement also included a non-competition clause 6.1 wherein Fisher agreed not to compete with G&D for a period of three years.

[12] Clause 1.3.5 of the asset purchase agreement said:

> 1.3.5 **Employment Termination.** In the event that the Indemnitor quits or resigns from his employment under Article 1.3.2 of this agreement or his employment is terminated by the Purchaser for cause, the Purchaser's obligations to the Seller and/or the Indemnitor under Articles 1.1.3, 1.3.1, 1.3.2, 1.3.3 and 1.3.4 shall expire.

[13] The contract created between the parties was not only an asset sale of the business assets of True Colors, but was also an employment contract for managerial, consulting, and labour services of Fisher to ensure the business viability of G&D in the lower mainland of British Columbia. The contractual relationship was intended to be one of mutual cooperation for at least three years.

[14] All parties affirmed the asset purchase agreement in pleadings.

[15] G&D took over the leased warehouse premises formerly used by True Colors and all of the equipment pursuant to the asset purchase agreement. Fisher started working for G&D immediately, working in the lower mainland as normal, while Ross worked in the interior of British Columbia. G&D secured a contract for work for the municipality of Chilliwack, an important job with significant up front financial investment. Ross emailed Fisher about this job on May 19, 2012, advising of certain policies that must be followed and warning that Chilliwack's traffic technician and others might also show up unannounced to inspect the work and crew. The email stated that there was to be no drugs and "anyone who is not clear of head on the job is to be dismissed immediately."

[16] On June 3 or 4, Fisher received a telephone call from Ross while Fisher was on crew on the Chilliwack job. Fisher testified that Ross was irate and screaming that an employee of Fisher's had been caught smoking marihuana on the jobsite by someone from Chilliwack. He berated Fisher about 'what part of this did he not understand' and told Fisher that he was holding Fisher personally responsible and would put a note on his file. Ross then hung up. Fisher immediately contacted the other crew working on the Chilliwack job and asked with his crew to determine that nobody had been smoking marihuana on the job. Fisher was upset because he had never been spoken to like that before and had never experienced anyone smoking marihuana on the jobsite.

[17] Ross emailed Fisher on the morning of June 5. He reiterated that nobody was to work for G&D under the influence of drugs and that he had warned Fisher that he could expect unannounced visits from Chilliwack personnel, particularly the traffic technician. He continued:

> Either you didn't believe me, or you ignored me. Or do you have some other excuse as to why an employee of G & D Linemarking working under your supervision was caught smoking pot on the job? …
>
> You are not to contact anyone at the City of Chilliwack trying to find out who ratted out the staff, enough damage has been done. Your staff on the job has been caught smoking pot.

> … SEND THAT PERSON HOME. If the same person shows up a second time and you even SUSPECT that he or she is under the influence, FIRE that person right then and there. …
>
> This issue is serious and egregious enough that I am issuing a warning to you Lorne, and it is going into your employment file. I expect you to manage the staff there in Langley in a manner that is consistent with company policy.

Ross said that if the same person showed up a second time under the influence of drugs, he should be fired immediately. He gave a warning to Fisher and told him that this was going into his employment file.

[18] Fisher replied by email that he would not tolerate being hung up on again and said that the person caught smoking on the jobsite should be fired. He reviewed each of the crew on the site as to whether he was known to smoke marihuana. He isolated one crew member, "Jay", and reported to Ross that he knew "Jay" to smoke "pot", but said that he had never seen or caught him smoking on the jobsite. He told Ross that he did not tolerate drug use. He queried the reliability of the report that a member of the crew had been smoking marihuana.

[19] The implication from Ross' email of June 5 is that someone from the City of Chilliwack had caught someone on Fisher's crew smoking marihuana on the job. The traffic technician for the City of Chilliwack testified. She had secured and was responsible for the line marking contract with G&D. She sometimes inspected the worksites and would have been informed immediately about any report of crew smoking marihuana. There was none. Further, the traffic technician said that she never had a conversation with anyone from G&D about smoking marihuana on the jobsite.

[20] On the evidence as presented, it cannot be concluded that an employee on Fisher's crew had been smoking marihuana on the Chilliwack jobsite. Certainly, Fisher was not smoking on the jobsite and there had never been a suggestion that he had.

[21] Matters remained as such until June 14. Fisher received a telephone call from Ross while Fisher was on his way to work at the Langley warehouse. Ross told

Fisher that, due to the incident in Chilliwack, he had decided to implement a random drug testing programme. Fisher responded that he would most certainly fail because of his medicinal marihuana use that he had already told Ross about. Ross said that anyone who failed the test would be fired, "no ifs or buts". Fisher said that this put him in a precarious situation because of his medicinal licence. Fisher testified that Ross replied that he did not care; anyone who failed the test would be fired, and hung up.

[22] Fisher arrived at the warehouse. Within minutes, an email arrived at 8:24 a.m. from Ross that said:

> Further to our telephone conversation of minutes ago, your admission to the use of drugs is a contravention of stated and documented company policy. Your resignation is hereby accepted. Effective immediately you no longer are employed by 846747 BC Ltd. doing business as G & D Linemarking. Clear your personal things out of the office and turn in your keys to Claudette by noon today.

Based upon the evidence at trial, it cannot be concluded that Fisher voluntarily resigned or initiated steps to resile from his employment situation with G&D.

[23] Fisher attempted to contact Ross immediately by phone but Ross did not respond to calls or messages. Ross directed the cancellation of Fisher's security code "because he [was] no longer employed with G&D" and demanded the return of company credit cards. Fisher complied. Fisher testified that he was in a "massive panic and stress". He still had some equipment on his truck trailer. He drove it to storage and called a lawyer.

[24] Fisher emailed Ross early that evening. He stated that he had never resigned. He reminded Ross that he had been told that Fisher had a licence to smoke marihuana, whether Ross remembered that information or not. He said that he did not want to be fired. He continued: "Obviously this union is over…I will accept a cash buyout". He told Ross that he would get a lawyer.

[25] Fisher emailed Ross again in the early morning hours of the next day, June 15. He stated that he was not and had not resigned. He said that he was willing

to resume all contractual expectations and wanted the original agreement to continue as agreed. He offered to fulfill all his obligations under the contract. Ross did not respond.

[26] Ross commenced the Kelowna action on June 19, 2012. In the Notice of Civil Claim, Ross confirmed the asset purchase agreement and stated that G&D had fulfilled all obligations under the contract to date. The claim stated that Fisher had resigned from his employment on June 15. G&D obtained short leave on June 20 for a hearing on June 22 for an order for the return of equipment sold under the agreement. Before the hearing of the application, Fisher arranged through counsel for the return of all equipment as demanded. When the matter came on for hearing, the court in oral reasons acknowledged that Fisher had undertaken to return all equipment but made the order for the return to preserve the parties' positions and in consideration that True Colors and Fisher had the right to further payment under the contract. The court at paragraph 15 stated that Fisher was entitled to installments of about $300,000. It does not appear to have been suggested that G&D had been relieved of its obligations for payment pursuant to clause 1.3.5 of the agreement by the resignation of Fisher.

[27] G&D never paid any further part of the purchase price for the equipment as required to be first paid on July 12, 2012. True Colors and Fisher did not receive any further payment for the asset purchase or for termination of employment. On discovery as read in at trial, Ross said that G&D had sold all of the assets purchased under the asset purchase agreement to a competitor and had wound down its business. Ross said that G&D received $500,000 for these assets. G&D never did introduce a random drug testing programme. Ross placed "Jay", known to him as a marihuana user from Fisher's email of June 5, as the manager of Langley operations in place of Fisher.

Issues

[28] This case raises the following issues:

(a) Did Fisher quit or resign from his employment as manager or was he terminated for cause so to release G&D from any obligations for payment of the purchase price or other obligations under clause 1.3.5 of the asset purchase agreement? If not, is G&D in breach of the agreement?

(b) If G&D is in breach of the agreement, what damages are payable to True Colors and to Fisher?

(c) Did Ross and/or G&D fabricate an allegation of smoking marihuana on the job and then attempt to induce Fisher to resign from his employment through false threat of random drug testing, so to gain the advantage of the employment termination clause 1.3.5 of the asset purchase agreement and so commit the tort of deceit?

(d) Did Ross induce Fisher to enter into the asset purchase agreement through fraudulent misrepresentation?

(e) Was Fisher wrongfully terminated from his employment so that damages are recoverable?

(f) Are the plaintiffs entitled to punitive damages?

Analysis

(a) Breach of Contract

[29] In order for G&D's obligation to pay the purchase price for the assets, as set out in clause 1.1.3, to have expired pursuant to clause 1.3.5, Fisher must have quit, resigned, or been terminated for cause as manager for the Langley operations. This position as manager was set out in clause 1.3.2. On the facts as found, Fisher did not quit. He did not resign. He was not terminated for cause.

[30] After the events of June 5 and then after the telephone conversation on the morning of June 14, Fisher continued to work for G&D. He performed a project in Penticton between these dates. He showed up at the warehouse as usual for work after the June 14 conversation on his way to work. It was then that he received the email stating that his admission of the use of drugs was in contravention of company policy and his resignation was accepted. Fisher did not quit. Later in the day, he emailed Ross and stated that he "didn't want to be fired". His statement that the "union is over" was in response to G&D's behaviour on June 14 that started with the email and continued to demand return of company credit cards and other facilities and cancellation of security access. Fisher had repeated that he "did not in any way resign" and was willing to fulfill all contractual expectations in the email of June 15.

[31] Neither did Fisher resign. He had a heated argument with Ross over plans to initiate a random drug testing programme. This was at the talking stage only and subsequent conduct by G&D through Ross shows that there was not really an intention to initiate such a programme. Ross appears to have brought this up in an attempt to goad Fisher into resigning, knowing of Fisher's weakness and susceptibility in this regard. However, Fisher did not resign. There was nothing in the conversation on the morning of June 14 that could be interpreted as a resignation. Ross' email stating that Fisher's admission to use of drugs was a contravention of company policy is inaccurate. There was no such company policy banning the use of drugs generally, and specifically there was no company policy banning the use of drugs that were lawful by medical certificate and licence. As stated by Ross in the email of June 5, company policy was that if anyone showed up for work under the influence of drugs, he was to be sent home on the first occasion and fired on the second occasion. If someone was working on the job under the influence of drugs, he was to be immediately fired. Fisher admitted to neither. Ross' statement that "Your resignation is hereby accepted" was really a statement that Fisher was terminated because there was no conduct or words on the part of Fisher that could be taken as a resignation.

[32] Fisher was also not terminated for cause. He was not the subject of the complaint on June 5 that someone had been caught smoking marihuana on the job nor was he alleged to have ever attended for work under the influence of drugs. A random drug testing programme was not at the time and never was instituted. Ross seemed to think that by threatening such a programme, Fisher would quit or resign, but he did not. The fact that Ross manipulated a resignation also demonstrates that there was no justified termination.

[33] From these findings, it is apparent that clause 1.3.5 of the asset purchase agreement was not triggered. G&D's obligation to pay for the assets under clause 1.1.3 did not expire. G&D was obliged to pay the first installment for the assets after deduction of the down payment on or before July 12, 2012.

[34] G&D took immediate steps to reaffirm the contract and to secure their position under the contract by commencing action on June 19 and obtaining an order for the return of all assets on June 22, even though Fisher had already returned most equipment and had undertaken to return the rest. At the time of the court order, the first installment for payment under clause 1.1.3 of the asset purchase agreement was not due and G&D was able to maintain that it was not in default of any of its obligations. It alleged in its Notice of Claim that Fisher had resigned but did not outline the contractual effect of same.

[35] G&D did not pay any part of the purchase price for the assets except for the initial down payment or deposit. It did not pay on July 12, 2012 or on any date thereafter. Yet, it continued to treat the assets as owned and sold them to a third party. This was in breach of the asset purchase agreement. True Colors is entitled to damages for this breach.

[36] In addition, G&D undertook to pay a fee to True Colors for contract consulting. Clause 1.3.1 of the asset purchase agreement provided:

> **Contract Consulting.** In respect of all Contracts and Prospective Clients, and potential contracts and so long as the Indemnitor is employed by the Purchaser as a manager under Article 1.3.2 of this agreement, the Purchaser shall retain the Seller act as the Purchaser's Contract Consultant for a period

> of not more than one year from the date of this agreement to ensure that the Work being performed by the Purchaser pursuant to the Contracts and any potential contracts is acceptable to the party contracting with the Seller or the Purchaser, as the case may be. For serving in this capacity and performing this role of Contract Consultant the Purchaser shall pay the Seller the sum of Fifty Thousand Dollars ($50,000) in equal quarterly instalments commencing July 2, 2012.

[37] G&D did not pay any installments owing to True Colors as contract consultant.

(b) Damages Payable for Breach of Contract

(i) Damages payable to True Colors by 0846747 BC Ltd.

[38] The original purchase price as set out in clause 1.1.3 was $325,000, subject to adjustments as set out in Schedule 1.3 of the asset purchase agreement. A deposit of $25,000 was paid, leaving a balance payable before adjustments of $300,000.

[39] According to Schedule 1.3, the adjustments to purchase price was to include reduction for payment of the deposit, reduction for any outstanding loan or lease payments outstanding as at the date of the agreement, reduction for future vehicle and equipment loan and lease payment obligations in the amount of $68,472.58, and reductions for any taxes, assessments, levies or indebtedness that was payable under any stature to which a lien could attach to the assets purchased. The only adjustment that applies here is the future lien and lease payments that were assumed by G&D in the amount of $68,472.58.

[40] There was an unpaid balance payable to True Colors pursuant to the contract of $231,527.42 for the purchase price of assets that were held and eventually sold by G&D. That amount is awarded to the plaintiff, True Colors, as damages for breach of contract by 0846747 BC Ltd.

[41] In addition to damages payable for the balance of the purchase price, the sum of $50,000 is payable as damages for breach of clause 1.3.1 of the asset purchase agreement.

[42] Total damages payable by 0846747 B.C. Ltd. to True Colors for breach of contract is $281,527.42.

(ii) Damages payable to Fisher by 0846747 BC Ltd.

[43] There remains quantification of damages payable by G&D to Fisher personally for breach of employment contract. There are several elements here: first, damages for breach of the management contract in clause 1.3.2; second, damages for breach of employment as a line painter and other labour work as set out in clause 1.3.3; and third, damages for profit sharing in clause 1.3.4.

[44] Clause 1.3.2 said:

> **Management Contract.** The Indemnitor commits to the Purchaser that he will, if the Purchaser requests, agree to be employed by the Purchaser as the manager for the Purchaser in respect of the Purchaser's business in Langley, BC, which includes the Contracts that are subject to this Agreement and all new business of the Purchaser administered through its Langley, BC, location. The Indemnitor agrees that his employment as manager of the Purchaser's Langley location is renewable annually, at the option of the Purchaser, for three (3) years from the Closing Date. For providing his services as Manager, the Indemnitor agrees that he will be paid an annual salary of Fifty Thousand Dollars ($50,000.00). Payable over ten months being February through November inclusive. (last sentence handwritten)

[45] Fisher sought payment for a period of 21.5 months pursuant to the management contract. However, this employment was renewable annually at the option of G&D. The management relationship only lasted 2½ months. During this time, Fisher earned $12,045.65 in management salary. There is no evidence that G&D would likely have renewed the agreement, except for Fisher's expectation. Under the circumstances between Ross and Fisher, it cannot be concluded that the relationship probably would have lasted longer than the one year. Also, Ross' evidence upon discovery that was read in at trial established that G&D was sold as an asset sale to a competitor and the business wound down. In the circumstances, one year is also a reasonable period of notice. Damages are payable under the management contract to Fisher in the amount of $37,954.35.

[46] Clause 1.3.3 said:

> **Offer of Employment.** In addition to his employment as manager of the Purchaser's Langley location and provided he remains so employed, the Purchaser will also employ the Indemnitor as a line painter, truck driver, thermoplastic applicator, snowplow operator, salter and general labourer at an hourly wage rate of twenty five dollars ($25.00). This employment is renewable annually, at the Purchaser's option, for a period of up to 3 years from the Closing date.

Fisher also sought payment for a period of 21.5 months pursuant to this clause and based upon earnings of $13,000 per year for a total of $21,900.

[47] From the pay statement for the period ending on June 24, 2012, which included year to date payments for hand work, driving the truck, removal of old roadway lines, and placement of new lines, Fisher received a total of $4,100. This works out to an average of $1,640 per month. Fisher testified that this was seasonal work so he could have expected to work for eight months of the year. For the same reasons as stated above, it cannot be concluded that G&D would probably have renewed Fisher's employment as labourer after one year. This is also a reasonable period of notice. Damages are payable under the labour employment contract to Fisher in the amount of $9,000.

[48] Finally, there is clause 1.3.4 of the agreement that Fisher would share in 25% of the "pre-tax income earned by [G&D] from the contracts and new business generated out of [G&D's] Langley, BC, location" so long as he remained employed as a manager under clause 1.3.2. The management salary of Fisher was to be expensed against revenues earned in calculating pre-tax income for this purpose.

[49] Fisher argued that the calculation of profit share should be based upon the sale price of the assets, $500,000, minus the purchase price of $325,000, for annual profit in the first year of $175,000. There is no basis in the agreement for such a calculation. There was no evidence of the "pre-tax income" that would have been used to calculate a profit share. In these circumstances, no amount is awarded because this head of damage has not been proven.

[50] Fisher is entitled to damages from 0846747 B.C. Ltd. in the amount of $46,954.35.

(c) Tort of Deceit

[51] The plaintiffs allege in the Notice of Civil Claim that Ross telling Fisher that an employee had been caught smoking marihuana on the job was fabricated by Ross as part of a plan to either invent a false allegation of just cause to dismiss Fisher from his employment or to try to force Fisher into resigning, thus triggering clause 1.3.5 of the asset purchase agreement whereby G&D would be relieved of payment obligations under the asset purchase agreement. In furtherance of this plan, Ross then told Fisher that G&D would be implementing a policy of random drug testing which Fisher was likely to fail, when no such policy was really intended, and then effectively terminating Fisher without notice. The plaintiffs allege that, believing the truth of the statements, they acted to their detriment and lost the balance of the purchase price of the agreement and fees, salaries, wages and the share of profits dues under the agreement. The tort of deceit is specifically alleged.

[52] In *XY, LLC v. Zhu,* 2013 BCCA 352, leave to appeal refused [2013] S.C.C.A. No. 376 (*XY*), Newbury J.A. for the Court attempted to consolidate the jurisprudence and academic discussion about the elements required to prove the tort of deceit. Although there are variations in combination of the elements of the tort, the statement from the trial judge of the elements of the tort seemed to have been accepted when Newbury J.A. said at para. 19:

> [19] The trial judge analyzed the evidence with respect to the elements of the tort of deceit beginning at para. 237 of his reasons. Relying on *Han v. Cho* 2009 BCSC 458 and *Le Soleil Hospitality Inc. v. Louie* 2010 BCSC 1183, he stated:
>
> > The tort of deceit, also known as civil fraud, is concerned with the intentional inducement of another person to rely upon a representation that the representor knows to be untrue. The elements that make up this tort are:
> >
> > (1) a false representation of fact by the defendant;
> >
> > (2) made with knowledge of its falsity or recklessly, ie. not caring whether it is true or not;
> >
> > (3) made with the intention that the plaintiff would act on it;

> (4) with the intention that the plaintiff would act on it; and
>
> (5) the plaintiff suffered damages. [At para. 237; emphasis added.]

[53] The first focus in *XY* was on the issue of whether the plaintiffs had suffered damages, particularly upon the causation element which asked whether the plaintiffs had altered their position in reliance upon the false statements. While this was variously considered by different authors as described in the judgment at paras. 23-25 to be a variation of the fourth and fifth elements or an extension of elements to include alteration of position and damage, the question essentially is whether the plaintiff acted in reliance upon the false representation to its detriment (*XY* at para. 39). The plaintiff must have been induced by the representation to alter his position, which means to change his material or temporal interests or situation (*XY* at para. 25).

[54] The important aspect of reliance in *XY* was the conclusion that carrying on under the contract on the basis of false representations constituted reliance for the purposes of deceit (*XY* at paras. 39-41). This was not the classic situation in the tort of deceit where the party was induced to enter into a contract as the result of the false representation. In *XY*, the plaintiff had already entered into a contract with JingJing Genetic Inc. ("JingJing") and the deceit occurred in the performance of that contract. This was also the situation in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company Ltd.*, 2009 BCCA 307, where the plaintiff made payments under a contract on the strength of false invoices. In *XY*, the plaintiff had entered into a licensing agreement wherein JingJing agreed to pay royalties based upon sales. JingJing falsified records and underreported sales. The plaintiff's continuation under the contract until it discovered the fraud constituted an act of reliance within the law of deceit (*XY* at paras. 39-41).

[55] The issue of reliance was also in question in *Roy v. Kretschmer*, 2014 BCCA 429 (*Roy*) because the false representation occurred during performance of the contract. In *Roy*, a real estate developer sold a lot to the plaintiffs without informing them of a registered certificate of pending litigation on the property. He then lied and

told the plaintiffs that they could not build on the property until a subdivision plan was approved, when the real cause of the delay was the pending litigation. Chiasson J.A. applied *XY* as follows at para. 61:

> [61] Although detriment was not addressed specifically in this appeal, it might be characterized as an aspect of reliance. In *XY, LLC v. Zhu*, 2013 BCCA 352, this Court considered whether carrying on under a contract until the discovery of fraud may constitute reliance and concluded that acceptance of payments under the contract on the basis of false reports was reliance for the purposes of the tort of deceit (at paras. 39 and 41). The Court also referred to *Firbank's Executors v. Humphreys* (1886), 18 Q.B.D. 54 (C.A.), as an example of reliance through forbearance. In the present case, the respondents accepted the continuing representations of Mr. Kretschmer that there were problems with subdivision approval and did not seek to exercise their legal rights.

The Court concluded at para. 62 that the plaintiffs were entitled to be put in the position that they would have been in had there been no deceit.

[56] An important result from *XY* for consideration here is that the personal defendants were held personally liable for their tortious conduct and were not shielded by having committed such conduct in the course of their employment. After a thorough review of the case authorities at paras. 58-72, Newbury J.A. concluded at para. 73:

> [73] …it appears to be the law in Canada that as long as tortious conduct on the part of an employee or agent of a corporation (or any other employer) is properly pleaded and proven as an "independent" tort by the employee or agent, the wrongdoer can be held personally liable notwithstanding that he or she may have been acting in the best interests of (and at the behest of) the employer or principal. I see no reason in principle or policy why such liability should be restricted to cases involving physical damage (as *Said v. Butt* may have suggested in 1920), or to claims in negligence (as referred to in *London Drugs, Hildebrand* and *Neilson.*) Certainly the Ontario Court of Appeal did not so restrict it in *ADGA.* (See also *Hogarth v. Rocky Mountain Slate Inc.* 2013 ABCA 57 at para. 103; *Schembri v. Way* 2012 ONCA 620 at para. 30; *Correia v. Canac Kitchens*, 2008 ONCA 506 at paras. 86-8; and *Unisys Canada Inc. v. York Three Associates Inc.* (2001) 150 O.A.C. 49 (Ont. C.A.) at para. 11.)

The claim of deceit was available to the plaintiff against the personal defendants notwithstanding that they were employees acting in the course of their duties.

[57] Here, Ross falsely represented that there had been a complaint from the City of Chilliwack concerning a crew member of Fisher's smoking marihuana on the job. He then also falsely represented that G&D was about to implement random drug testing and that anyone who failed the test would be fired. He then falsely represented that Fisher had resigned as manager as a result of this information or that he had been terminated for cause. Ross clearly knew that this information was false but made the continuing representations with the expectation that Fisher would act, so to trigger the non-payment of purchase price clause 1.3.5. Fisher's actions in accepting that he was no longer manager of the Langley operations and in returning equipment in furtherance of the asset purchase agreement was in reliance upon these false representations. Fisher relied on this state of affairs when he gave in his credit cards and no longer showed up for work and when he returned the equipment in reliance on the contract.

[58] Both G&D and Ross are jointly liable for this deceit (*XY* at para. 42). As in *Roy,* both True Colors and Fisher are entitled to be put in the same position that they would have been in had the deceit not occurred. This is the same measure of damages as for breach of contract above. Therefore, True Colors is entitled to damages in the amount of $281,527.42 jointly from both 0846747 B.C. Ltd. and Glenn Ross for the tort of deceit. However, this amount is only recoverable once, either from G&D or from Ross. Fisher is entitled to damages in the amount of $46,954.35 jointly from both 0846747 B.C. Ltd. and Glenn Ross. This amount is also only recoverable once, either from G&D or from Ross.

(d) Fraudulent Misrepresentation

[59] The plaintiffs' action for fraudulent misrepresentation is alleged in paragraph 12 of the Notice of Civil Claim. It alleges that, prior to entering into the asset purchase agreement, Ross, on his own behalf and on behalf of G&D, made assurances to Fisher that the agreement was fair and equitable, that Ross would not do anything or engage in any conduct that would harm Fisher's interests, and that the defendant would not deprive the plaintiffs of the benefit of the agreement. In

evidence, the basis for this allegation was the exchange between Ross and Fisher on April 2, 2012 as described above at paragraph 9.

[60] In my view, the colloquial exchange between Fisher and Ross on April 2 was not sufficient to establish the representation as alleged. It could be assumed as a matter of contractual principle that True Colors and Fisher could expect that the contract would be performed honestly and reasonably (*Bhasin v. Hrynew,* 2014 SCC 71). The appropriate contractual regard that G&D should have for True Colors' and Fisher's interests was not extended by the slang remarks between them and added nothing beyond contractual duties, the breach of which has already been dealt with above.

(e) Wrongful Termination of Employment

[61] The matter of the wrongful termination of Fisher's employment relationship has been dealt with as breach of contract and need not be re-addressed here.

(f) Punitive Damages

[62] The plaintiffs have claimed punitive damages for the deliberate deceit and breach of contract and for the manner of Fisher's dismissal from employment.

[63] As stated in *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502 at para. 268, punitive damages are restricted to advertent wrongful acts that are deserving of punishment on their own. Punitive damages must be a rational response to the misconduct at issue and proportionate to the defendant's blameworthiness, the plaintiff's vulnerability, the harm caused, and the need for deterrence.

[64] In this case, G&D through Ross falsely set up the employment termination clause so to avoid payment of the purchase price under the asset purchase agreement. However, the defendant also sued under the agreement and secured the return of the equipment that it had not paid for and then promptly sold it at a profit and wrongfully never paid the purchase price. The plaintiff was known to be vulnerable as Fisher had entered into the agreement without legal advice and True

Colors was essentially selling its business. In all of these circumstances, an award of punitive damages to True Colors in the amount of $20,000 against the numbered company is appropriate.

Conclusion

[65] The plaintiff, True Colors, is entitled to damages against both defendants in the amount of $281,527.42. True Colors is also entitled to punitive damages against 0846747 B.C. Ltd. in the amount of $20,000. The plaintiff, Fisher, is entitled to damages as against both defendants in the amount of $46,954.35.

[66] The plaintiffs are entitled to costs throughout on the Scale B.

"Dillon J."

The Honourable Madam Justice Dillon