

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Top Down Investments Inc. v. Kranz*,
2023 BCSC 1850

Date: 20231023
Docket: S20996
Registry: Duncan

Between:

Top Down Investments Inc., DU 620 GP Ltd., and Guy Bouchard
Plaintiffs

And

Fred Kranz
Defendant

Before: Master Harper

Reasons for Judgment

Counsel for the Plaintiffs:

D.T. McKenzie
J. Bhupal

Counsel for the Defendant:

K. Smith
C.A. Bush

Place and Dates of Hearing:

Duncan, B.C.
August 14, 2023
Victoria, B.C.
September 20, 2023

Place and Date of Judgment:

Duncan, B.C.
October 23, 2023

Introduction

[1] The defendant, Fred Kranz, seeks orders for the production of documents.

[2] The application arises from claims and counterclaims that relate to matters involving a 126-unit apartment building with a civic address of 620 Dobson Road, Duncan, British Columbia (the “Property” or “620 Dobson”).

[3] Mr. Kranz has owned the Property since 1979. In around June of 2018, there was a fire at the Property which rendered approximately a quarter of the units uninhabitable. Following the fire, Mr. Kranz hired the plaintiff, Guy Bouchard, to oversee the renovations of the Property.

[4] The two plaintiff companies, Top Down Investments Inc. and DU 620 GP Ltd., are controlled by Mr. Bouchard (collectively, the “plaintiffs”). Mr. Bouchard seems to have conducted business variably through these companies as well as in his personal name.

[5] The allegations the parties make against each other are detailed and extensive.

[6] The plaintiffs allege that the parties entered into an agreement, partially oral, partially in writing, and partially made by conduct whereby, among other things:

- a) the plaintiffs or any of them would manage and perform the reconstruction and/or restoration of the Property (the “Work”); and
- b) once the Work was complete, the plaintiffs or any of them would purchase the Property.

(the “Alleged Agreement”).

[7] The plaintiffs’ claim is that the Alleged Agreement was captured, at least in part, by writing on a napkin (the “Napkin”). Mr. Kranz asserts that, although the parties discussed the possibility of the plaintiffs, or one or more of them, purchasing the Property from him, no binding agreement was ever reached.

[8] The plaintiffs allege that, on or about September 23, 2021, Mr. Kranz accused the plaintiffs of improper behaviour and directed the plaintiffs to cease performing the Work. The plaintiffs claim that Mr. Kranz's direction to cease the Work caused the plaintiffs to incur costs, expenses and loss, including the loss of opportunity to purchase the Property. They seek an order for specific performance of the alleged agreement for the purchase and sale of the Property. All allegations are denied by Mr. Kranz.

[9] The plaintiffs plead that they are entitled to \$1,242,608.31 for the Work completed by the plaintiffs or any of them at the time Mr. Kranz directed the plaintiffs to cease performing the Work. Mr. Kranz denies this claim and takes the position that the approximately \$4 million he advanced to Mr. Bouchard, or to the plaintiff companies (the "Advanced Funds") exceeds the value of the Work performed by the plaintiffs. The theory of the counterclaim is that the difference between the \$4 million Advanced Funds and the value of the work done was misappropriated by Mr. Bouchard.

[10] Mr. Kranz argues that documents, financial or otherwise, which would show how the Advanced Funds were received and expended, as well as compensation received by the plaintiffs or any of them from the work done, are relevant.

[11] Mr. Kranz, by way of counterclaim, advances claims for breach of contract, breach of fiduciary duty, negligent misrepresentation, unjust enrichment, conversion, and the tort of unlawful means. Broadly put, Mr. Kranz says that he put Mr. Bouchard in a position of trust, granting him the discretion to act in the interests of Mr. Kranz's business and, thus, Mr. Bouchard owed a duty to act in good faith.

[12] Mr. Kranz also pleads that the plaintiffs, or one or more of them, misdirected some of the Advanced Funds as well as labour and chattels for their own benefit, contrary to the express purpose for which they were advanced. Mr. Kranz claims that the plaintiffs used the funds, labour, and chattels, for, among other things, the development of other properties in which the plaintiffs have an interest in and around the Duncan, BC area and on Vancouver Island generally. Mr. Kranz argues that

documents related to the work and other activities performed by the plaintiffs, including communications with tradespersons and sub-contractors, on the Property and on other such properties which the plaintiffs own or have/had an interest in are relevant and should be disclosed.

The Application

[13] Mr. Kranz says that the plaintiffs' list of documents fails to include documents that could prove or disprove a material fact in the action. These would be documents that are required to be listed in a party's initial list of documents pursuant to Rule 7-1(1) of the *Supreme Court Civil Rules*.

[14] Counsel for Mr. Kranz made a demand for further documents while asserting that Mr. Kranz's position was that many of the requested documents ought to have been listed in the initial list of documents.

[15] The plaintiffs take the position that the document requests are overly broad in relation to the claims pleaded in the notice of civil claim and counterclaim, are insufficiently particularized, and amount to a fishing expedition.

[16] I will address a preliminary evidentiary issue. In general answer to the application, the plaintiffs tendered a legal assistant's affidavit in which she provides hearsay evidence of Claire Gullmes, the Chief Financial Officer of the corporate plaintiff, Top Down Investments Inc. The legal assistant avers that she has been advised by Ms. Gullmes, and verily believes, that Ms. Gullmes has provided counsel for the plaintiffs with any and all communications in her possession relevant to the accounting of the Project (I assume that "Project" in the affidavit means the "Work" or the "Alleged Agreement"), and any and all communications in her possession relating to the Project that she has access to in her role at the plaintiff companies.

[17] This evidence is problematic for a number of reasons. First, law firm staff should not be put in a position of testifying on matters of substance on behalf of the law firm's clients. The employee might not feel comfortable declining their employer's request for them to be a witness for client and might feel pressured to

comply. Affidavits of legal assistants should be avoided unless they deal solely with routine, factual matters. Second, to require a legal assistant to provide evidence on behalf of the firm's clients violates the well-established principle that counsel should not be a witness for their clients. Third, although Rule 22-2(13) provides that an affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if (a) the source of the information and belief is given, and (b) the affidavit is made in respect of an application that does not seek a final order, the court is not bound to accept such hearsay evidence. Ms. Gullmes ought to have provided her own affidavit. Fourth, the hearsay evidence of Ms. Gullmes (even if I were to accept it) is unpersuasive. Ms. Gullmes refers to documents in her "possession" only, not in her possession, power, or control. She does not set out the efforts she made to locate the requested documents. She is an employee of one of the plaintiff companies. She is not the alter ego of the plaintiffs and does not say that she speaks for the plaintiffs. For all of the foregoing reasons, I reject the portions of the affidavit of the legal assistant that purport to tender Ms. Gullmes's evidence.

[18] The application is governed by Rules 7-1(10) and (11):

(10) If a party who has received a list of documents believes that the list omits documents or a class of documents that should have been disclosed under subrule (1) (a) or (9), the party may, by written demand, require the party who prepared the list to

- (a) amend the list of documents,
- (b) serve on the demanding party the amended list of documents, and
- (c) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

(11) If a party who has received a list of documents believes that the list should include documents or classes of documents that

- (a) are within the listing party's possession, power or control,
- (b) relate to any or all matters in question in the action, and
- (c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),

the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to

- (d) amend the list of documents,
- (e) serve on the demanding party the amended list of documents, and
- (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[19] Rule 7-1(11) requires an applicant to demonstrate a connection between the documents sought and the issues in the action beyond a mere possibility. There must be an air of reality between the documents and the issues: *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633 at para. 28.

[20] On an application for additional documents, some evidence of the existence and potential relevance of those additional documents is required: *Przybysz v. Crowe*, 2011 BCSC 731 at para. 32, citing *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166 at para. 8.

[21] The applicant is required to identify, with reasonable specificity, the documents requested: *XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584. The court in *XY, LLC* balances the requirement for reasonable specificity against the impossibility of a requesting party to identify documents they are not aware of because the documents are in the possession of the opposing party and have not been listed. The court in *XY, LLC* at paras. 28 and 29 said (in part):

[28] [...] There will clearly be some limited cases where a party is simply unaware of a document or a class of documents that are relevant and where such documents would, if the party could identify them, be ordered to be produced. In cases of fraud or conspiracy, for example, the very fact that the plaintiff does not know what has occurred may impede its ability to demand production of additional documents and identify such documents with “reasonable specificity”. And yet, it is exactly in such cases that expanded document production may be most important.

[29] Part of this concern is addressed by the words “reasonable specificity”. Since each case is decided on its own facts, “reasonable specificity” should encompass varying levels of “specificity” that depend on the nature of the case.

[22] In the reasons that follow, where I have noted that the demand has been made with reasonable specificity, I have determined that the above-noted passages from *XY, LLC* apply.

[23] In their application response, the plaintiffs have expressed their intention, notwithstanding their opposition to the application, to voluntarily disclose certain documents. The orders for production set out in these reasons will not reference the documents to be voluntarily disclosed. The court assumes that the plaintiffs will follow through on their commitment.

The Requested Documents

[24] In his notice of application, Mr. Kranz seeks the listing and production of the following documents (the application for document item 11 has been adjourned generally):

1. The original Napkin, a photograph of which has already been listed (TDI001691) and all documents in the power, possession, or control of the Plaintiffs which relate or refer to it.

[25] The rationale for this request is that the agreement for the purchase and sale of the Property was written on the Napkin. The Napkin is obviously a relevant document, but Mr. Bouchard says in his affidavit that “neither myself nor any of the Plaintiffs possess or control the original of the [N]apkin referred to in the Notice of Civil Claim”.

[26] The difficulty with the plaintiffs’ position is that the Napkin is an important piece of evidence, someone took a photo of the Napkin, and now no one seems to know where the original Napkin is. There should have been a detailed explanation of the extent and manner in which document discovery was pursued: *Thomas v. Rio Tinto Alcan Inc.*, 2019 BCSC 421, at para. 46. Mr. Bouchard’s explanation about the whereabouts of the Napkin is insufficient. He ought to have explained why the Napkin is no longer in his possession or control and what he did to try to locate the Napkin. I cannot resolve the dispute about whether the plaintiffs have possession or control of the Napkin on the evidence or, more accurately, the lack of evidence, before me.

[27] One option on this request would be to adjourn it pending the examination for discovery of Mr. Bouchard. Depending on his evidence, Mr. Kranz would then be

entitled to come back to chambers to seek production of the Napkin and for documents that reference the alleged contract for the purchase and sale of the Property written on the Napkin. The duty to answer questions on discovery is apparently broader than the duty to disclose documents: *More Marine Ltd.* at para. 7. The evidence Mr. Bouchard gives could be used as a foundation for a further application for the production of the Napkin and documents that reference it. However, I do not think that it is proportional for Mr. Kranz to have to wait for the outcome of the examination for discovery of Mr. Bouchard to obtain an order for the production of these documents. “Depending on the case, proportionality and the existing evidence might support pre-examination document disclosure so that the examination can be conducted in an efficient and effective manner”: *Przybysz* at para. 32.

[28] I do not think postponing an application for these documents would be an efficient use of the parties’ or the court’s time. The Napkin and any documents that refer to the writing on the Napkin are relevant. Mr. Bouchard should know what documents he has in his possession, power, or control that refer to the Napkin. The demand has been made with reasonable specificity.

[29] I therefore make the order sought together with an order that if the plaintiffs’ position is that the Napkin is not within their possession, power, or control, Mr. Bouchard serve an affidavit explaining the efforts he made to locate the Napkin and what happened to the Napkin after the photograph of it was taken. The deadline for service of the affidavit will be 45 days from the release of these reasons.

2. Any and all records of communications involving the plaintiffs or any of them, and any non-party, in whatever form, regarding Mr. Kranz, the 620 Project, and/or the Napkin.

[30] The plaintiffs say this request is overbroad. I agree that the request is very broad, but is it overbroad given the breadth of the allegations made by both sides? The plaintiffs’ claims arise from agreement that they say are partly in writing, partly oral, and partly by conduct. Having made such broad allegations as to how the agreements arose, the plaintiffs are now required to produce documents that pertain

to those agreements, in whatever form the agreements were allegedly made. I do agree that the request lacks reasonable specificity as written. The documents are described with reasonable specificity. However, the order will be narrowed to include a phrase at the end of the order as follows: “that relate to the agreements alleged by the plaintiffs”.

3. All bank statements of the plaintiffs from the period April 2020 - October 2021.

[31] The timeframe of the bank statements requested is relatively short and the effort required to produce the bank statements would therefore not be out of proportion to the amount at issue in the proceeding. Mr. Kranz alleges misdirection of funds. Tracing where the funds advanced by Mr. Kranz went is certainly relevant to the matters at issue in the proceeding. However, requiring the plaintiffs to produce all their bank statements would likely result in irrelevant and private information being disclosed. An appropriate order is narrower in focus than the one proposed by Mr. Kranz. The order will be limited to bank statements that reflect the deposit and withdrawal of funds the plaintiffs, or any of them, received from Mr. Kranz. The bank statements may be redacted accordingly.

4. All tax returns of the individual and corporate plaintiffs for 2020, 2021, and 2022.

[32] The rationale for this request is Mr. Kranz’s allegation that the Advanced Funds exceed any amounts properly incurred by the plaintiffs or for payments to subcontractors or third parties on the Project for which Mr. Kranz is liable. Mr. Kranz seeks evidence as to how much Mr. Bouchard paid himself from the Advanced Funds, how he dealt with the Alleged Agreement for tax purposes (or whether he declared tax at all), and how much each of the corporate plaintiffs received from the Project.

[33] The timeframe for the tax returns requested is narrow, being limited to the three material years.

[34] The plaintiffs say that the income tax returns are irrelevant. However, if the income tax returns are not ordered at this point to be disclosed, Mr. Bouchard could still be asked at his examination for discovery how he dealt with the Advanced Funds in his tax returns. I agree with the plaintiffs' position that whether or not they paid income tax on the Advanced Funds is irrelevant. However, the purpose of disclosure of the tax returns is not to audit the plaintiffs' tax compliance; rather, it is to examine how the plaintiffs accounted for the Advanced Funds received from Mr. Kranz.

[35] I conclude that the tax returns are relevant insofar as the information contained therein relates to the matters at issue. The tax returns will be listed, but may be redacted such that only the information described in paragraph 32 above is revealed.

5. All records evidencing communications between Mr. Bouchard and Kelly Fry in relation to the Property.

[36] Kelly Fry is the individual who introduced Mr. Bouchard to Mr. Kranz and to 620 Dobson. Mr. Kranz says that the communications between Mr. Bouchard and Ms. Fry are relevant to the parties' state of mind at the time periods in question. The plaintiffs say that they have produced all records in this category. In response, Mr. Kranz says that only three communications were produced, and no originating communications from Ms. Fry. Mr. Kranz says there must be more records. I agree that the plaintiffs have not sufficiently explained what steps they took to search for and retrieve these records. The records are described with reasonable specificity.

[37] I will make the order sought. In addition, Mr. Bouchard must include in his affidavit that I referred to in paragraph 29 above evidence of the steps he took to locate and retrieve the records.

6. All records relating to Mr. Bouchard's decision to relocate his family to Duncan, including, without limitation, documents:
 - a. that relate to leases of property in the Duncan, B.C. and/or surrounding area;

- b. that relate to contracts of purchase and sale of property in the Duncan, B.C. and/or surrounding area;
- c. such as social media posts relating to that subject; and
- d. written communications between Mr. Bouchard and any other person(s) on that subject.

[38] The rationale for these records arises from Mr. Kranz's allegation that Mr. Bouchard obtained funds from him by representing to Mr. Kranz that he would be moving his family to Duncan for the sole purpose of being able to work at the Property full-time and, in particular, that he would commit himself fully to the construction and remediation work at 620 Dobson.

[39] The position of the plaintiffs as of the hearing of the application is that if there is a timeframe for production of these records, then there would be no objection. The timeframe is from April 2020 to October 2021. The order will go on that basis.

- 7. Documents evidencing all properties which the plaintiffs or any of them own or have/had an interest in, in and around the Duncan, B.C. area and on Vancouver Island generally.

[40] The rationale for the production of these documents is the allegation in the counterclaim that Mr. Bouchard represented to Mr. Kranz that he would be moving his family to Duncan for the sole purpose of being able to work at the Property full-time and, in particular, that he would commit himself fully to construction and remediation work at 620 Dobson. Mr. Kranz alleges that Mr. Bouchard did not devote himself exclusively to the work at 620 Dobson, but worked on a number of other projects and properties, many of which the plaintiffs had a direct or indirect interest in, contrary to Mr. Bouchard's representations. Mr. Kranz also justifies the documents sought as being relevant to the plaintiffs' claim for specific performance of the alleged contract for the purchase of 620 Dobson.

[41] The plaintiffs say that Mr. Kranz's rationale for the production of these documents is insufficient to tie the documents to the pleadings, the material facts, or matters in question in the action.

[42] The request as framed is overly broad as to timeframe. However, given Mr. Kranz's allegation that Mr. Bouchard did not devote his energies exclusively to 620 Dobson, the request is reasonably specific and the timeframe for the production of the documents in Request #7 will be from April 2020 to October 2021.

8. Documents evidencing all other projects besides 620 Dobson which the plaintiffs or any of them worked on during the period April 2020 to October 2021, including, without limitation, documents evidencing:
 - e. the location and nature of such projects;
 - f. the beneficial owner of such projects;
 - g. financial arrangements for such projects (including without limitation the source of the funding and project capital liquidity for such projects);
 - h. the identity of labour trades used on such projects and time spent by those tradespeople; and
 - i. any written evidence that would tend to show that Mr. Bouchard told either Mr. or Mrs. Kranz about such properties/projects.

[43] The rationale for production of these documents is the same as for Request #7. The documents go to the question of whether time and labour were diverted to other projects in which the plaintiffs had an interest.

9. Documents evidencing all projects underway or contemplated by the plaintiffs or any of them during the period in question [April 2020 to October 2021].

[44] The rationale for production of these documents is the plaintiffs' claim for specific performance. Mr. Kranz argues that the plaintiffs' involvement in projects underway or contemplated during the period in question is evidence that will support or undermine the suggestion that 620 Dobson was unique.

[45] The plaintiffs say this rationale is inadequate. I agree with the plaintiffs. The connection between the request and the rationale is tenuous. This request is denied.

10. Communication with trades, sub-contractors and other providers including in relation to the other properties.

[46] The “other properties” referred to in this request includes, according to Mr. Kranz, three other properties that Mr. Kranz knows of.

[47] The rationale for the request is that the class of documents sought is relevant to Mr. Kranz’s claim that:

- the plaintiffs diverted labour intended for 620 Dobson to other projects;
- the plaintiffs misappropriated or misdirected other assets intended for 620 Dobson to other projects;
- the plaintiffs charged Mr. Kranz higher rates for certain trades while using less expensive equivalents on other projects;
- the plaintiffs provided false information to the payment certifier;
- the plaintiffs encouraged other parties to take action which caused Mr. Kranz economic harm.

[48] Generally, disclosure is necessary to establish what work was requested and performed, when and by whom, and when invoices were rendered and payments were made.

[49] The plaintiffs say that they have already disclosed all relevant communications with their trades, sub-contractors, and other providers related to the Property. I agree with Mr. Kranz’s position that “communications” should not be limited to invoices (which have been produced), but should include correspondence. Request #10 is foundational to Mr. Kranz’s claim that Mr. Bouchard misled the payment certifier.

[50] I also agree with Mr. Kranz that the documents should not be limited to the Property, but also include other properties because of the claim that funds and labour were diverted to other properties and projects in which the plaintiffs had an interest.

[51] The challenge, however, is the scope of the disclosure that will capture relevant documents only. The plaintiffs have agreed to produce some documents in response to Request #10. I have concluded that Request #10 should be dismissed

with liberty to re-apply because the matters covered by Request #10 can be explored at Mr. Bouchard's examination for discovery and, by then, the voluntarily-produced documents will be available to Mr. Kranz for his review. It is possible that evidence will arise from Mr. Bouchard's examination for discovery that will justify a renewal of the application for the documents covered by Request #10.

Conclusion

[52] The orders are made as per the above-noted reasons.

[53] The deadline for delivery of the amended list of documents and copies of the listed documents will be 45 days from the release of these reasons.

Costs

[54] Mr. Kranz has been substantially successful in this application and is entitled to his costs in the cause.

“Master Harper”