

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stromsten v. Horvatincic*,
2023 BCSC 2338

Date: 20230907
Docket: 57003
Registry: Vernon

Between:

Matt Stromsten

Plaintiff/
Defendant by Counterclaim

And

Mary Horvatincic

Defendant/
Plaintiff by Counterclaim

And

BlueSky Organics Corporation

Defendant by Counterclaim

And

Mayan Standard Enterprises Corporation

Defendant by Counterclaim

Before: The Honourable Justice G.P. Weatherill

Oral Reasons for Judgment

Counsel for the Plaintiff:

J.W.T. Robinson

Appearing for the Defendant:

M. Horvatincic

Place and Date of Trial/Hearing:

Kelowna, B.C.
September 7, 2023

Place and Date of Judgment:

Kelowna, B.C.
September 7, 2023

[1] **THE COURT:** I'm going to give you my decision now. The plaintiff applies to set aside an *ex parte* injunction order granted on April 26, 2021, by Justice Forth ("Injunction"). The underlying dispute between the parties is a domestic relationship gone sour. The parties were the two major and co-founding shareholders of a company known as BlueSky Organics Corporation ("BlueSky"). In short, this is a shareholder dispute with each party seeking control of the company, BlueSky.

[2] In the late months of 2020, the defendant initiated a family law claim out of the Vancouver Registry and on February 18, 2021, obtained an *ex parte* restraining order/protection order that among other things prevented the plaintiff, her ex-romantic partner and co-shareholder, from attending at BlueSky's business premises and from attending her personal residence. The protection order also contained a police enforcement clause.

[3] On March 1, 2021, the plaintiff filed this claim by filing a notice of civil claim seeking various relief including shareholder oppression remedies and damages for wrongfully dismissing him from his employment with BlueSky.

[4] The defendant was duly served and filed a response and counterclaim on April 14, 2021. Two days later, April 16, 2021, the defendant filed an application seeking an *ex parte* injunction together with supporting affidavits. The *ex parte* hearing was heard by Justice Forth on April 26th, 2021. A transcript of that hearing is in evidence before me. The matter lasted 20 minutes.

[5] Justice Forth made it clear to the defendant's counsel that she had not had a chance to read the affidavit material in advance of the hearing. Justice Forth was clearly concerned about why the application was being made without notice. She made it clear that she was relying entirely on counsel's submissions in considering whether to grant the injunction.

[6] After 20 minutes and after hearing the defendant's counsel, Justice Forth granted the Injunction that had far-reaching effects on the plaintiff and the plaintiff's

ability to prosecute this action including obtaining documents, communicating with BlueSky's employees, customers, and the like.

[7] Briefly, the Injunction reads, and I'll paraphrase, that the plaintiff was enjoined from directly or indirectly communicating with or contacting BlueSky's employees or former employees, customers, prospective customers, leads, shareholders, investors, creditors, and contractors. The Injunction removed him as an authorized signing authority for BlueSky. He was enjoined from accessing or transacting with any BlueSky bank accounts. He was required to direct all business communications pertaining to BlueSky to the defendant or her counsel. He was enjoined from accessing e-mail accounts or e-mails from his directors, officers, consultant, or employees.

[8] The Injunction further enjoined him from accessing any e-mails received by him since February 16, 2021, dealing with BlueSky's business, its officers or employees and to forthwith notify BlueSky of the existence of any such e-mails. He was enjoined from taking steps to interfere with the defendant's role as the day-to-day operator and manager of BlueSky pending resolution of the underlying action. He was enjoined from making representations regarding any person or entity regarding the sale of BlueSky or an investment into BlueSky.

[9] He was further enjoined from dealing with any of his shares to third parties without written consent of the defendant or a court order. He was required to disclose within 24 hours the names and contact information of all persons and entities to which he had communicated to any extent BlueSky's intellectual property or trade secrets, along with all copies of all digital or written communications relating to that. He was required to preserve all his e-mails since February 16, 2021, at non-BlueSky e-mail accounts related to the business of BlueSky or its directors, officers, employees.

[10] He was also required within 24 hours to deliver copies of all e-mails and other documents sent or received by him personally pertaining to BlueSky, its operations or intellectual property. The order declared the defendant to be BlueSky's sole

operator to the plaintiff's exclusion, and the plaintiff was ordered to pay costs in any event of the costs.

[11] For reasons that are unclear or unknown, the Injunction is silent on the defendant giving an undertaking as to costs, which is a requirement of such orders.

[12] Since the Injunction was granted, it is apparent that the plaintiff's counsel has taken a number of significant steps to attempt to gather evidence that he considers important to the plaintiff's case. He has largely been unsuccessful in doing so because of the terms of the Injunction.

[13] The plaintiff maintains that Justice Forth was misled both during submissions and in the affidavit material filed in support of the application. He asserts that the misrepresentations and nondisclosure of relevant facts were so significant that the Injunction should be set aside. The defendant disagrees and says that there were no misrepresentations made to Justice Forth nor was she misled.

[14] The law is very clear on the principles involved in seeking and setting aside *ex parte* orders. I refer to the legal basis set out in the plaintiff's notice of application with which I agree.

[15] *Pierce v. Jivraj*, 2013 BCSC 1850, summarizes the relevant principles required on an *ex parte* application at para. 37:

- [37] . . . 1) the applicant must make full and frank disclosure of all material facts;
- 2) a material fact is one that may affect the outcome of the application;
 - 3) It is for the court to determine if the fact is material, not the applicant or his legal advisors;
 - 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
 - 5) the extent of the inquiries required depend on the circumstances of the particular case;
 - 6) If material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;

- 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
- 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the *ex parte* hearing;
- 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside;
- 10) not every omission necessarily results in the order being set aside.

[16] Additionally, the applicant of an *ex parte* application is obliged to detail all important aspects of the evidence while avoiding opinion and criticism:

Northwestpharmacy.com Inc. v. Yates, 2018 BCSC 41 at para. 17.

[17] The question before the court on an application to set aside the *ex parte* order is whether there was material nondisclosure. If there is material nondisclosure, the court may set aside the *ex parte* order. If not, the court is to proceed to a hearing *de novo* on the merits of the injunction application.

[18] In the latter case, the court may take nondisclosure into consideration when considering whether or not to maintain the *ex parte* order. But the ultimate question is whether it is just or convenient that the injunction be maintained:

Northwestpharmacy.com Inc. at paras. 15–19.

[19] The reason why fair and frank disclosure is required in an *ex parte* application of any kind is because there are always two sides to every case. The counsel or party making submissions during an *ex parte* application is required to explain to the court the other side of the story to the best of his or her ability, that is, to disclose what the other party might say if that other party was there to take a position.

[20] This is because injunctions are by their nature, equitable. The foundation of an *ex parte* order such as the Injunction here is that the application is grounded on fairness. The ultimate question is whether, given all the relevant circumstances, it is just or convenient that the injunction ought to be granted.

[21] During his submissions, Mr. Robinson took me through the transcript of the injunction hearing before Justice Forth in some detail. It is clear from the transcript that Justice Forth had some major concerns. One was that if the order was granted, the plaintiff (whom she was told was receiving a salary from BlueSky), would be able to continue receiving a salary so he could pay his living expenses if the order was granted. That presumably was because the order would effectively prevent him from having anything further to do with the company.

[22] Justice Forth was assured by defendant's counsel that not only was the plaintiff being paid a salary to date, but that he would continue to be paid a salary if the injunction was granted. From the materials before me, I am satisfied that that particular representation to Justice Forth was misleading at best and downright false at worst.

[23] The evidence satisfies me that, in fact, the plaintiff had not been paid a salary for months prior to the application, probably from either July or August of 2020. And instead of paying him a salary, the defendant arranged to have any salary that was owing to him by BlueSky used to pay down disputed debts and loans that the defendant says existed and that the plaintiff denies existed and/or applied to his shareholder loan account.

[24] I am also satisfied that had Justice Forth been aware of the true state of affairs, she would likely not have granted the Injunction, at least in the sweeping terms that she did.

[25] I am amply persuaded by Mr. Robinson's submissions that there were a number of other misrepresentations made by defendant's counsel to the Court that were not supported by any admissible evidence. Examples are that the plaintiff was simply helping himself to money from the corporate bank account to pay for his personal credit card when, in fact, that credit card was used to a large extent to cover corporate expenses and which had been authorized by BlueSky and, indeed, by the defendant.

[26] For substantially the reasons articulated by Mr. Robinson, I am persuaded that the defendant's use of the court system in order to seek and obtain Injunction *ex parte* was aggressive and was made solely in order to obtain an upper hand in what should have been a relatively routine shareholder dispute case.

[27] Having heard the defendant's submission as well, I am persuaded not to set aside the entire order. I think the order went far too far. So, I am going to set aside the Injunction save for the following paragraphs which will remain:

- a) Paragraph 2 will remain, that is, that the plaintiff will be removed as an authorized signing officer of BlueSky.
- b) Paragraph 3 will remain, that is, that the plaintiff is enjoined from transacting with any BlueSky bank accounts. He is not enjoined from accessing BlueSky's bank accounts.

The rest of the Injunction is set aside.

[28] Mr. Robinson seeks an order for special costs. I am not persuaded, at least at this juncture, that special costs ought to be ordered. I am going to leave the issue of special costs to be determined by the trial judge who will have had the benefit of fulsome evidence and fulsome arguments. However, I am going to order that the defendant pay the plaintiff Scale B costs of this application.

[29] Anything arising, Mr. Robinson?

[30] CNSL J. ROBINSON: Just perhaps a clarification. The plaintiff is enjoined from transacting with BlueSky bank accounts but is not enjoined from accessing. I take that to mean accessing information about –

[31] THE COURT: Yes. He can access it, but he can't start using it to withdraw moneys or deposit moneys.

[32] CNSL J. ROBINSON: I just want to make sure I have language that the bank looks at it and will acknowledge that he's entitled to information about the account.

And so it might best, at least from my client's point of view, to have a third order to the effect that, you know, for clarity, the plaintiff is entitled to full information about all of BlueSky's bank accounts and financial records. So that way, if he ever goes to his bank and the bank says, well, he can't transact, I'm concerned.

[33] THE COURT: Any objection to that? That makes sense. I want him to have access to these records. He's entitled to them. He's a shareholder. I gather he's still the director, isn't he? Now that I have made my order, he's back on as a director.

[34] M. HORVATINCIC: He was a director, but he didn't have signing authority.

[35] THE COURT: I don't want him to have signing authority, but I want him to have access. So, Mr. Robinson, you can draft the order to that effect.

[36] CNSL J. ROBINSON: So I will draft the order with a supplementary clarifying term about him positively having access to the bank accounts and such.

[37] THE COURT: That's fair.

[38] CNSL J. ROBINSON: Thank you.

[39] THE COURT: That works. Now, in terms of getting this order drafted and entered, Mr. Robinson, you can draft it and send it to Ms. Horvatincic. Do we need an order dispensing the need to have him sign it?

[40] CNSL J. ROBINSON: I will ask for that order because in the past, we've had to rely on the rule where if they don't sign it in so many days, you can have it submitted automatically.

[41] THE COURT: I'm going to make that order. I want her to have a copy of the draft and the entry order. It will be vetted by the Court, Ms. Horvatincic.

[42] CNSL J. ROBINSON: And I will seek comments before I submit to the Court, notwithstanding that a court order may be entered [indiscernible].

[43] THE COURT: All right. Anything else?

[44] CNSL J. ROBINSON: Not from me, Justice.

[45] THE COURT: Nothing? I would urge the parties as well to arrange for examinations for discovery and trial dates so we can get this matter moving. Okay. Thank you.

[46] THE CLERK: All rise. This Court is adjourned for the day.

“G.P. Weatherill J.”