

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Graham v. Galaxie Signs Ltd.*,
2010 BCSC 1655

Date: 20101124
Docket: S074997
Registry: Vancouver

Between:

John Graham

Plaintiff/Respondent

And:

Galaxie Signs Ltd.

Defendant/Applicant

Before: The Honourable Mr. Justice Groves

Reasons for Judgment

Counsel for the Plaintiff:

B.J. Lotzkar

Counsel for the Defendant:

L.A.L. Morris
S. Kent

Place and Date of Hearing:

Vancouver, B.C.
October 1, 2010

Place and Date of Judgment:

Vancouver, B.C.
November 24, 2010

Introduction

[1] By way of notice of application dated the 28th of September 2010, the defendant in this action seeks an order that the trial of this matter be re-opened.

[2] This litigation has been before me on numerous occasions including for trial in October 2009 and continuing on February 15, 2010. As a result of the trial of the matter, written reasons were granted on the 30th of April 2010. At that time I made some findings of fact about the plaintiff's ability to mitigate his damages. I had previously dismissed the defendant's defense of failure to mitigate by Rule 18A application.

[3] The defendant seeks to re-open the issue of mitigation. The defendant alleges that new evidence has been uncovered that suggests that the plaintiff was less than forthcoming both at discovery and at trial about efforts he made to earn income during the relevant period of notice. Specifically the defendant wishes to question the plaintiff about work that the plaintiff did through Dickson's Signs Ltd. for a company called "Cap-It" in Campbell River, B.C.

[4] Before the court in support of this application is Affidavit No. 4 of John LeComte, a principal of the defendant, Galaxie Signs Ltd. Attached to Mr. LeComte's affidavit are a number of documents that were discovered after the judgment was granted. These documents purport to suggest that this plaintiff worked through the auspices of Dickson's Signs Ltd. in arranging a sign project for Cap-It (the "Cap-It sign") and that he should have been or was paid for these services. These documents and assertions appear to be inconsistent with both the discovery evidence and the evidence at trial of the plaintiff in regards to his mitigation efforts during the notice period.

[5] The plaintiff has replied in his own affidavit. The plaintiff's reply is, *inter alia*, that he received no remuneration of any kind for the assistance he provided to either Dickson's Signs Ltd. or Cap-It for the Cap-It sign, which he admits to arranging. He states that he assisted Cap-It on a not-for-pay basis as a favour to them in order to maintain their goodwill in the event that he resumed work in the sign business and

thus kept them as a client. He further submits that he assisted Dickson's Signs Ltd. for no remuneration in an effort to show them that he could generate business for them should they decide to offer him a salaried position. The plaintiff submits that neither of these gestures worked out to his advantage.

[6] In *Zhu v. Li*, 2007 BCSC 1467, 2007 CarswellBC 2367 [*Zhu*], leave to appeal to British Columbia Court of Appeal dismissed, 2008 BCCA 239, 2008 CarswellBC 1153, this court stated at para. 20 that the following principles apply to an application to re-open a trial to adduce fresh evidence:

1. Prior to the entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and abuse of the court's process.
3. The onus is on the applicant to show first that a miscarriage of justice would probably occur if the trial is not re-opened and second that the new evidence would probably change the result.
4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.

[7] In regards to the test set out in the *Zhu* case, it is of note here that the formal order has not yet been entered.

[8] Additionally, the evidence appears credible. There are before me emails as well as numerous documents that appear to be authored by the plaintiff during the notice period and related to the construction of the Cap-It sign. All of these documents suggest that the plaintiff was working on the Cap-It sign. Additionally, the affidavit of the plaintiff does not dispute the documentary evidence provided in the affidavit of John LeComte but states in his defence that he did not receive remuneration for the work that the documents confirm he did.

[9] I find that the proposed fresh evidence is credible and tends to show that a miscarriage of justice would probably occur if the trial is not re-opened to deal with the issues raised by this evidence.

[10] As suggested by *Zhu*, the defendant is obligated to exercise due diligence prior to trial to ensure that all issues are before the court and that all defences are raised so as to avoid unnecessary re-openings of trial. With that said, I find that this defendant was diligent in their actions prior to trial in trying to uncover possible avenues of mitigation of this plaintiff. In fact, the defendant has been so diligent that it has, in the past, received criticism from the court for some of their “diligence”. That, coupled with what appears to be a *prima facie* denial at trial and at discovery by this plaintiff of work that the documents support he did, leads me to conclude that this defendant has exercised due diligence prior to and at trial in attempting to get all evidence in the area of mitigation before the court.

[11] I direct that the trial of this matter be re-opened. I further direct that the plaintiff be required to attend a further examination for discovery on the issue of mitigation during the relevant notice period as it relates to his relationships with Cap-It and Dickson’s Signs Ltd. Additionally I direct that the defendant be permitted to call additional witnesses at trial on the issue of mitigation during the notice period as it relates to Cap-It and Dickson’s Signs Ltd.

[12] The defendant shall have their costs of this application on Scale B, in any event of the cause.

“The Honourable Mr. Justice Groves”