

Case Name:

Fraser v. Holman Exhibits Ltd.

Between

**Scott Fraser, Plaintiff, and
Holman Exhibits Limited, Wendy Cudney, Dirk Trefzger
and Andrew McKay, Defendants**

[2008] O.J. No. 3188

68 C.C.E.L. (3d) 96

2008 CarswellOnt 4815

168 A.C.W.S. (3d) 965

Court File No.: 07-CV-341664PD3

Ontario Superior Court of Justice

R.S. Echlin J.

Heard: July 15, 2008.

Judgment: August 1, 2008.

(30 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- Availability -- Debt or liquidated demand -- Applications by plaintiff seeking (a) immediate payments of certain commissions and (b) production of all solicitor-client files between the defendant employer and its solicitors prior to his dismissal dismissed with costs -- The plaintiff failed to establish there was no genuine issue for trial regarding the employer's claim for set-off -- As for the production application, there was no compelling fairness or public policy reason given by counsel to support a finding of waiver of privilege -- The defendant was awarded \$11,500 in costs.

Employment law -- Wrongful dismissal -- Civil procedure -- Applications by plaintiff seeking (a) immediate payments of certain commissions and (b) production of all solicitor-client files between the defendant employer and its solicitors prior to his dismissal dismissed with costs -- The plaintiff failed to establish there was no genuine issue for trial regarding the employer's claim for set-off --

As for the production application, there was no compelling fairness or public policy reason given by counsel to support a finding of waiver of privilege -- The defendant was awarded \$11,500 in costs.

Application by plaintiff seeking immediate payments of certain commissions and for production of all solicitor-client files between the defendant company and all of its solicitors prior to his dismissal. In the underlying action, the plaintiff sought damages for wrongful dismissal and outstanding commissions. The defendant claimed set-off on the grounds that the plaintiff had secretly introduced its largest client to a competitor, and other alleged breaches of fiduciary duty, etc. The defendants' counsel indicated they intended to combine the two actions.

HELD: Application dismissed with costs. Application for production of the files also dismissed with costs. The plaintiff failed to establish there was no genuine issue for trial. The plaintiff was seeking summary judgment relating to work performed for Home Depot in the face of serious and substantial evidence by Holman that while performing those services he received secret commissions, created self-admitted false documentation, failed to disclose to his employer that he directed work to others, violated his exclusivity commitment, and arranged for his wife to render billings in connection with such work. There was both direct and circumstantial evidence raising genuine issues for trial regarding the commission claims. There was an inextricable intertwining of the factual matrix between the claims upon which summary judgment was sought and those relating to the set-off. The defence of set-off was not so weak as to refuse to justify postponing payments to the plaintiff. It would be wholly inequitable and unreasonable in the circumstances to permit the plaintiff to receive judgment for a portion of his claims when there remained genuine issues required to be determined by the trial judge. As for the production application, there was no compelling fairness or public policy reason given by counsel to support a finding of waiver of privilege. The plaintiff was awarded \$11,500 in costs.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 20.04

Counsel:

Theodore P. Charney and Rachel Hepburn Craig, counsel for the Plaintiff, Scott Fraser.

Lorne Honickman, counsel for the Defendants, Holman Exhibits Limited, Wendy Cudney and Dick Trefzger.

REASONS FOR DECISION

R.S. ECHLIN J.:--

1. **INTRODUCTION:**

1 Leonardo da Vinci (1452-1519), the legendary Italian scientist, mathematician, inventor, painter, sculptor, and writer has observed that, "patience serves as a protection against wrongs as clothes do against cold."

2. **FACTUAL BACKGROUND:**

2 Holman Exhibits Limited is an established designer and producer of corporate exhibits, theme interiors, and retailer environments and has been in existence since 1965. At present, it employs approximately 60 employees.

3 On January 25, 2002, Scott Fraser signed an employment agreement with Holman containing confidentiality and non-disclosure provisions and contracted to act *exclusively* as a full time sales executive.

4 In the sister action to this, [*Holman v. Fraser, Fraser, Froio, 694679 Ontario, and Digital (06-CV-321779PD)*] Holman has alleged (and I make no findings in this regard) that in 2006, it became aware that Fraser had secretly introduced Home Depot, Holman's largest single client, to Vito Froio and his company, 694679 Ontario. Holman further alleged that Digital Integration and 6946679 entered into a contract with Fraser's wife, Tanya; that she sent a \$25,000.00 invoice on October 10, 2006 to 694679 for consulting related to Home Depot; and that Fraser and Froio paid \$1,000.00 in cash to the supervisor of all Home Depot installations for confidential information relating to Home Depot projects. Counsel have indicated that they intend to move to combine these two actions.

5 On November 7, 2006, Holman dismissed Fraser and immediately sued him for damages arising from his actions while a Holman employee.

6 Over eleven months later, Fraser commenced this action against Holman and others for wrongful dismissal and outstanding commissions in this action.

3. **ISSUES:**

7 Fraser has brought a Rule 20 motion seeking immediate payment of certain commissions and further seeks production of *all* solicitor-client files between Holman and *all* of its solicitors prior to his dismissal.

4. **ANALYSIS AND LAW:**

a) **The Rule 20 Application:**

Rule 20.04 of the *Rules of Civil Procedure* provides:

- (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
- (2) The court shall grant judgment if,
 - (a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; or
 - (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
- (3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.
- (4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

8 The oft-quoted and cogent comment of Osborne J.A. of the Ontario Court of Appeal in *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.) clearly outlines the rationale and considerations involved:

The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial: See *Pizza Pizza v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.), *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.). The motions judge hearing a motion for summary judgment is required to take a hard look at the evidence in determining whether there is, or is not, a genuine issue for trial. The onus of establishing that there is no triable issue is on the moving party. However, a respondent on a motion for summary judgment must lead trump or risk losing: See Rule 20.04(1). Generally, if there is an issue of credibility which is material, a trial will be required: see: *Ungerman, supra.* (at p. 557).

9 The seminal and definitive statement of the appropriate test to be applied is found in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

10 Rule 20 was not designed to deny parties their day in court or to provide a procedural or tactical advantage to one party or the other. Rather, the rule is applicable only in those instances where a full trial, complete with a full and fair opportunity to lead and test evidence, attendant with all applicable procedural safeguards, is patently and clearly unnecessary and not deserving of the use of the precious and scarce resource of court time and facilities.

11 In this case, Fraser is asking this Court to grant him summary judgment against Holman relating to work performed for Home Depot in the face of serious and substantial evidence by Holman that while performing those services Fraser received secret commissions, created self-admitted false documentation, failed to disclose to his employer that he directed work to others, violated his exclusivity commitment, and arranged for his wife to render billings in connection with such work. Holman has claimed a set-off against Fraser for such actions.

12 With respect to the Fraser claims for commissions, it is clear that there is both direct and circumstantial evidence (admitted by Fraser) that raise genuine issues for trial regarding the commission claims. These relate to whether certain jobs had been cancelled (and therefore no commissions would be owing); the applicable rate of exchange for U.S. accounts; when and whether those accounts had been paid by the clients; and the timing of such accounts, amongst other issues. In addition, there exists serious evidence regarding Holman's claims for set-off against Fraser. This is contained in documentation in the court record, admissions of Fraser, and evidence from others. These issues extend well beyond mere issues of credibility.

13 The leading authority for assessing the principles of set-off is *Holt v. Telford*, [1987] 2 S.C.R. 193 at para. 33 where the five essential elements are outlined:

- (i) The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
- (ii) The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
- (iii) A cross-claim must be so clearly connected with the demand of the

plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim.

- (iv) The plaintiff's claim and cross-claim need not arise out of the same contract.
- (v) Unliquidated claims are on the same footing as liquidated claims.

14 An analysis of the set-off claims in this case leads me to believe that Holman's claims are closely bound to Fraser's commission claims. They involve his very actions with and relating to Holman's largest client, and the customer who paid for work performed, upon which commission claims are founded, Home Depot. There is an inextricable intertwining of the factual matrix between the claims upon which summary judgment is sought and those relating to the set-off. In the words of the Ontario Court of Appeal in *Siemens Electric v. Unident Ltd.*, [1999] O.J. No. 575 (C.A.) at para. 3: "the set-off claimed flows from the same relationship as the claim itself."

15 In my view, (without making any factual findings whatsoever) the defence of set-off is not so weak as to refuse to justify postponing payments to Fraser.

16 Sharpe J. (as he then was) in *C & A Steel (1983) Ltd. v. TESC Contracting Co.* (1998), 39 O.R. (3d) 155 (Gen. Div.) at para. 8 has observed that it is important to consider whether "... it would be inequitable if one were called upon to satisfy the claims of the other before the claims of the other were satisfied."

17 The serious claims made by way of set-off involve mutual facts which are clearly in dispute, both on the record and which were conceded by both counsel in argument. The issues in question extend far beyond the simple issue of credibility. They involve such matters as the extent and value of Holman's claims, the issues of progress invoices (which bear upon commission entitlement), Home Depot policies regarding making displays and installing them, the capability of Holman to do the work, and the billing procedures and the timing of entitlement to commission, in addition to others previously referenced.

18 This case involves exceptional circumstances, not ordinarily found in such cases. The intricacy of the evidence required and the interrelationship of the claim for commission, brought nearly a year after dismissal and the claims by Holman, are reciprocally connected, correlative, and entirely mutual. From a trial management standpoint, it would make absolutely no sense to try the issues separately. The facts required to determine Fraser's claims relate in many ways to those required to determine Holman's claims.

19 It would be wholly inequitable and unreasonable in these circumstances to permit Fraser to receive judgment for a portion of his claims when there remain genuine issues required to be determined by the trial judge. It cannot be said that Holman's position is a sham or has no substance. In my view, the set-off claims intertwined with Fraser's claims, raise triable issues and have substance, without in any way suggesting a determination of such issues.

20 Fraser has failed to establish that there is no genuine issue for trial. This is not the type of case that should be weeded out at the pre-trial stage without a full and proper trial. I am not satisfied that a trial in this matter is unnecessary. I am further satisfied that Holman's set-off claims are ones which show a real chance of success and cannot be dismissed out of hand.

21 I therefore dismiss Fraser's Rule 20 application with costs.

22 In the alternative, if it were to be determined that the Plaintiff is entitled to summary judgment, I would have no hesitation in finding it appropriate to grant a stay of execution of that judgment pursuant to rule 20.08 pending determination of the Holman claims.

b) Should the Solicitor-Client Files in Question be Produced?

23 Fraser has asked for an order requiring Holman to produce the *complete* files of *all* of its solicitors up to November 7, 2006, the date of his dismissal. The Plaintiff asserted that Holman waived privilege over the files of their solicitors by virtue of the following paragraph from Wendy Cudney's affidavit sworn May 9, 2008:

24. To date, we cannot know with any degree of certainty exactly how much of the Home Depot business was diverted away from Holman Exhibits due to Mr. Fraser's conduct. *After consulting with counsel*, we learned that Mr. Fraser was in breach of his employment contract, he was in breach of his fiduciary duty to the company, that he has committed the torts of conspiring with others to harm Holman Exhibits, and he interfered with Holman Exhibits' contractual relationship and engaged in fraud. [emphasis added].

24 Solicitor-client privilege has a long history in the common law and has been referenced by the Supreme Court of Canada as a principle of fundamental importance to the administration of justice:

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends on the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented. (*R. v. McClure*, [2001] 1 S.C.R. 445 at para. 29 *per* Major J. in speaking for the Court).

25 There is no doubt that Holman consulted counsel before dismissing Fraser. The question for determination is whether it later waived the privilege by this single reference in Ms. Cudney's affidavit.

26 Blair J.A. has observed, in *Davies v. American Home Assurance Co.* (2002), 60 O.R. (3d) 512

(C.A.) at para. 31:

A legal opinion from a lawyer to his or her client is the quintessential example of a communication between a solicitor and client for the purpose of obtaining legal advice, and falls squarely into this category, in my opinion. It is immune from attack in the absence of an express or implied consent or waiver.

27 Holman has not explicitly waived the privilege. Can it be seen to have done so by implication? Was the disclosure inadvertent? The advice given was not referenced in detail. The full extent of the disclosure is as set out above. The communications have not entered the "public realm" in any fashion. I find that the mere reference to "after consulting with counsel" is insufficient to establish a waiver of solicitor-client privilege in this instance. There was no compelling fairness or public policy reason given by counsel to support a finding of a waiver of privilege.

28 I therefore dismiss Fraser's application for production of the complete files of all of its solicitors up to November 7, 2006 with costs.

5. **COSTS:**

29 Counsel jointly submitted that \$10,000.00 for the Rule 20 motion and \$1,500.00 for the production of solicitor-client files motion are appropriate in the circumstances. I have carefully considered these submissions in light of the considerations outlined in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) and am of the view that these amounts are reasonable and within the contemplation of the parties.

6. **ORDER:**

30 The Plaintiff's two applications are hereby dismissed with costs. Costs are fixed in the sum of \$11,500.00 and shall be payable by Fraser to Holman by 12:00 noon, Wednesday, October 1, 2008.

R.S. ECHLIN J.

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