CITATION: The Catalyst Capital Group Inc. v. Moyse et al., 2015 ONSC 2384
DIVISIONAL COURT FILE NO.: 541/14
DATE: 20150414

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE AND WEST FACE CAPITAL INC., Defendants

BEFORE: Harvison Young J.

COUNSEL: *Rocco Di Pucchio and Andrew Winton*, for the Plaintiff

Jeff C. Hopkins and Justin Tetreault, for the Defendant, Brandon Moyse

Jeffrey Mitchell and Andy Pushalik, for the Defendant, West Face Capital Inc.

HEARD at Toronto: In writing, April 10, 2015

ENDORSEMENT

[1] Brandon Moyse and West Face Capital Inc.("West Face") both seek leave to appeal from an interlocutory injunction imposed by Lederer J. dated November 10, 2014. which enjoined Mr. Moyse from working at West Face for approximately six weeks, until December 21, 2014.

[2] The order reads as follows:

1. An interlocutory injunction enjoining the defendant, Brandon Moyse, or anyone acting on his behalf or at his discretion from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of The Catalyst Capital Group Inc.

2. A further interlocutory injunction enjoining the defendant, Brandon Moyes (sic), from engaging in activities competitive to Catalyst in compliance with the non-competition clause of his employment agreement (clause 8) until its expiry six months after his leaving his employment with The Catalyst Capital Group, being December 22, 2014.

3. On the understanding that, as a result of this order, Brandon Moyse will be unable to commence his employment with West Face until December 22, 2014, The Catalyst Capital Group Inc. shall pay Brandon Moyse his West Face Capital Inc. salary until December 21, 2014.

4. The forensic images that were created in compliance with the order of Mr. Justice Firestone shall be reviewed by an independent supervising solicitor identified, pursuant to a protocol to be jointly agreed to by counsel for the parties, or, failing such an agreement by way of further direction of the court.

5. The review of the forensic images by the independent supervising solicitor shall be completed before any examinations-for-discovery are conducted in this action.

[3] There is no issue with respect to the first aspect of the order which simply seeks to enforce the confidentiality clause in the contract of employment. In addition, and as of December 12, 2014, the parties have agreed to a document review protocol pursuant to paragraphs 4 and 5 of the order. Thus, the only issue with respect to which leave is sought is the injunction restraining Mr. Moyse from working for West Face until December 22, 2014 and requiring Catalyst to pay his salary in the meantime.

[4] Mr. Moyse and West Face raise very similar grounds in their applications for leave. They both submit that their applications meet both limbs of the test set out in Rule 62.02(4). I do not agree.

[5] With respect to Rule 62.02(4)(a), I am not satisfied that there are conflicting decisions of another judge or court within the meaning of the Rule.

[6] A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts. In particular, this Court has held that exercising discretion in a way that is different from that of other cases is not a difference in principle, rather, it is merely a difference in the application of discretion and it is not a difference that will create any confusion in the law requiring a resolution by a full panel of the Divisional Court. The applicants in the present case take issue not with the principles applied but with the motion judge's application in the circumstances of the case, and the cases to which they refer do not reveal conflicts with respect to principle.

[7] The applicants' argument on the conflicting decisions issue is essentially an argument that Justice Lederer's decision to grant the injunction was incorrect. The heart of their claims is that he incorrectly applied the principles not that he applied the wrong tests and their arguments reiterate those made before the motions judge for the most part.

[8] In any event, with respect to Rule 62.04(a), I am not satisfied that that it is desirable that leave to appeal be granted. A central term of the order was the enforcement of the 6 month non-competition clause which expired on December 21, 2014. Whether or not this renders the matter moot as the respondent submits, it is a factor I take into account in considering whether it is

desirable that leave be granted, and I am of the view that the applicants have not established that it is desirable that leave be granted

[9] I am not satisfied that the applicants have met the second limb of the test set out in Rule 62.02(4)(a) which requires them to raise serious debate as to the correctness of the decision **and** that the matter involves matters of such public importance that, in the court's opinion, leave to appeal should be granted.

[10] The motions judge carefully and painstakingly applied the three limbs of the test set out in *RJR-Macdonald Inc. v. Canada*, 1194 CarswellQue 120 (S.C.C.) to the circumstances of this case.

[11] After a careful review of the record and authorities before him, the motions judge concluded that he "would not be prepared to find the non-competition clause unreasonable" (Reasons, para. 66) and that he was unprepared to find that the public interest militated against the acceptance of this particular non-competition clause. (Reasons, para. 67). He found that there was a serious issue to be tried on both issues and also found there to be a strong *prima facie* case that Mr. Moyse had breached the confidentiality clause in his contract of employment with Catalyst.

[12] Similarly, he did consider the evidence before him and the considered the issue of irreparable harm. Finally, he considered the balance of convenience question. He found that the balance of convenience favoured issuing the injunction in the circumstances. I note that the applicants submit that the motions judge misapplied the notion of "irreparable harm" in that he noted that complying with the non-competition agreement for the balance of the term would not cause Mr. Moyse irreparable harm. I disagree that this was an error with respect to the "irreparable harm" test. While the use of the term "irreparable harm" may not have been advisable in this context, it is clear that the effect of complying with the competition agreement was being considered in terms of the balance of convenience (and under that heading) and I see no error in this.

[13] In any event, I do not find that the proposed appeal involves matters of such importance that, in my opinion, leave to appeal should be granted. The period covered by the non-competition period has passed. The issues raised here are not issues of principle but a dispute between these individual parties concerning the application of established principles to the facts and circumstances of this case. The central issue was whether an interlocutory injunction should be granted. I note that media interest does not, in my view, satisfy the "importance" limb of the test for leave.

[14] I am not satisfied that there is any reason to doubt the correctness of the motions judge's decision to grant the injunctive relief in the circumstances before him at that time, and I am not satisfied in any event the matter is of such importance that warrants an appeal to this court. The applications are therefore dismissed.

[15] Having reviewed the costs submissions filed by the parties, I conclude that costs are payable by the defendants to the plaintiff in the amount of $5,550.02.

Harvison Young J.

Date: April 14, 2015