Case Name:

Precious Metal Capital Corp. v. Smith

Between
Precious Metal Capital Corp., Plaintiff (Appellant), and Gregory Charles Smith, Taghmen Ventures Limited, NHG Capital Limited, Gregory Jack Peebles, Haviland Management Inc., Haviland International Resources Inc. Limited aka Haviland International Resources Limited, Euro Americas Securities Limited, International Consolidated Minerals Limited, and Platinum Diversified Mining Inc., Platinum Partners Value Arbitrage Fund, L.P., Mark Nordlicht and Ancash Mining Ltd., Defendants (Respondents)
And between
Gregory Charles Smith, Taghmen Ventures Limited, NHG Capital Limited, International Consolidated Minerals Limited, International Consolidated Minerals Inc. (formerly Platinum Diversified Mining Inc.,) and Euro Americas Securities Limited, Plaintiffs by Counterclaim (Respondents), and Precious Metal Capital Corp., Steven Babcock, Gary Sugar, George H. Babcock, Babcock Consulting Limited and Plataperu Resources Inc., Defendants to the Counterclaim (Appellants)

[2012] O.J. No. 2013

2012 ONCA 298

76 E.T.R. (3d) 23

2012 CarswellOnt 5603

Docket: C54301

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg, R.G. Juriansz and P.S. Rouleau JJ.A.

Heard: January 30, 2012.
Judgment: May 8, 2012.

(21 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- No triable issue -- To dismiss action -- Appeal by plaintiff from summary judgment dismissing claim against moving defendants dismissed -- Plaintiff claimed Smith and Peebles breached contractual, fiduciary and confidence duties to acquire mining property on their own behalf -- Ancash defendants were successors in title to property -- No genuine issue for trial was established, as agency relationship asserted by plaintiff did not exist in law or on facts given documentary evidence -- As plaintiff could not establish its claim that Peebles was its agent in acquiring mine, its action against Ancash defendants could not succeed.

Tort law -- Fraud and misrepresentation -- Particular relationships -- Fiduciary relationship -- Appeal by plaintiff from summary judgment dismissing claim against moving defendants dismissed -- Plaintiff claimed Smith and Peebles breached contractual, fiduciary and confidence duties to acquire mining property on their own behalf -- Ancash defendants were successors in title to property -- No genuine issue for trial was established, as agency relationship asserted by plaintiff did not exist in law or on facts given documentary evidence -- As plaintiff could not establish its claim that Peebles was its agent in acquiring mine, its action against Ancash defendants could not succeed.

Appeal by the plaintiff from summary judgment dismissing the action against the Ancash defendants, Platinum Partners Value Arbitrage Fund, Nordlicht, and Ancash Mining. The plaintiff claimed a constructive trust arising from an alleged breach of fiduciary duty and duty of confidence owed in connection with its intended acquisition of a Peruvian mining property. The plaintiff claimed that it retained the defendant, Peebles, as its agent in connection with the acquisition and that it shared confidential information with Peebles and the defendant Smith. The plaintiff claimed that Peebles acquired the mine for his own benefit. The Ancash defendants were indirect purchasers of the mining properties from Peebles and Smith. The Ancash defendants applied for summary judgment to dismiss the action against them on the basis that their position was derivative to the issues raised by the statement of claim against Peebles and Smith. The motion judge granted summary judgment dismissing the claim against the Ancash defendants, finding that there was no genuine issue for trial. He found that the agency relationship asserted by the plaintiff could not exist in law given the strength of the documentary evidence and the evidentiary record as a whole. He concluded that the reasonable inference from the documentation was that the plaintiff knew that its agreement with Peebles did not relate to the mine in question and so no contractual or fiduciary duty was owed by Peebles or Smith regarding the mine at issue. Furthermore, he found that no breach of confidence was established, as any information given by the plaintiff to Peebles regarding the mine was in the public domain and was not misused by Peebles or Smith. As no viable claim against

Peebles or Smith was established, the motions judge found that there was no claim against the Ancash defendants as their successors in title.

HELD: Appeal dismissed. The record enabled the judge to have a full appreciation of the evidence and the issues required to make the findings he did. While the record was voluminous due to the complexity of the transactions, few documents were relevant to the key issue of whether Peebles was retained by the plaintiff as its agent. While there was conflicting evidence from witnesses, most of the points of disagreement were minor and not material. The motion judge avoided making credibility findings and, despite the conflicting evidence, he was able to decide that a trial was not required based on his conclusion that the agency relationship asserted by the plaintiff could not exist in law given the strength of the documentary evidence and the evidentiary record as a whole, which was a determination he was entitled to make.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 20

Appeal From:

On appeal from the judgment of Justice Peter A. Cumming of the Superior Court of Justice dated September 2, 2011, with reasons reported at 2011 ONSC 2962, 72 E.T.R. (3d) 69.

Counsel:

Morris Manning, Q.C. and David Roebuck, for the appellants.

Matthew Milne-Smith, for respondents Platinum Partners Value Arbitrage Fund, L.P., Mark Nordlicht and Ancash Mining Ltd.

The judgment of the Court was delivered by

1 **R.G. JURIANSZ J.A.**:-- This is an appeal from the order of Cumming J. dated September 2, 2011, granting summary judgment to the moving parties, Platinum Partners Value Arbitration Fund L.P., Mark Nordlicht and Ancash Mining Ltd. (known collectively as the "Ancash defendants"). The Ancash defendants were three of 12 defendants in the initial action.

2 The appellant, Precious Metal Capital Corp. (PMCC), is an Ontario company with the object of locating, acquiring and developing precious metal mining opportunities in South America. The success of its action against the Ancash defendants depends on it establishing that the defendant Gregory Jack Peebles breached his fiduciary duty to PMCC and committed a breach of confidence.

PMCC claims relief against the Ancash defendants on the basis of their knowing assistance in Peebles' breach of trust, and for conspiracy and unjust enrichment. Likewise, the success of the Ancash defendants' summary judgment motion depends on them establishing that there is no liability on the part of Peebles.

3 PMCC claims that it retained Peebles, first verbally in early January 2005 and subsequently by written agency agreement dated May 20, 2005, to raise financing for three mining properties: San Luis, Millotingo and Pachapaqui. It claims it shared confidential information about Pachapaqui in the course of retaining him. PMCC asserts that Peebles' retainer as agent and the confidential information he received created a fiduciary relationship that he breached by acquiring Pachapaqui for himself.

4 It is common ground that PMCC engaged Peebles in regard to San Luis and Millotingo. The heart of the dispute is whether he was also engaged in regard Pachapaqui.

5 Peebles and his partner and companies, the defendants Gregory Smith, Haviland Management Inc. and Haviland International Resources Inc., bought Pachapaqui from its owner Plata-Peru, and sold it to the Ancash defendants. Peebles assembled a deal in which International Consolidated Minerals Limited (ICM) would acquire all three properties (Pachapaqui from the Ancash defendants and San Luis and Millotingo from PMCC) in exchange for shares. ICM did not close the deal when it learned that PMCC did not own San Luis and Millotingo. PMCC then commenced this action.

(1) Decision of the motion judge

6 The motion judge began his analysis by observing that PMCC's claim against the Ancash defendants was derivative of its claim against the defendants Peebles, Smith, Haviland Management Inc. and Haviland International Resources Inc. He asked: "[i]s there a genuine issue requiring a trial with respect to whether PMCC retained Haviland [Management Inc.] (*i.e.* Mr. Peebles) to help PMCC purchase Pachapaqui and did Mr. Peebles owe and breach a duty of confidence to PMCC in that regard?" He found that a trial was not required to decide the question and awarded summary judgment to the respondents.

7 The record before the motion judge included the direct evidence of two witnesses, Gary Sugar and Stephen Babcock, that there was an agency relationship between PMCC and Peebles which obligated Peebles to help PMCC acquire Pachapaqui. However, the motion judge found that the agency relationship the two witnesses claimed existed "cannot exist in law on the facts before me, given the strength of the documentary evidence, together with the evidentiary record as a whole, in contradicting Messrs. Sugar and Stephen Babcock".

(2) Test for summary judgment

8 The summary judgment motion below was decided before this court's decision in *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1. In *Combined Air*, this court

articulated the test to be applied on a summary judgment motion under the amended Rule 20. The question whether there is a "genuine issue requiring a trial" must be answered in light of whether a full trial is required for the judge to get a "full appreciation" of the evidence and issues required to make dispositive positive findings. The ultimate question is whether a trial is required in the "interest of justice".

9 The court indicated that the "full appreciation" test would likely be met in cases that are largely driven by documents, in which testimonial evidence and contentious factual issues are limited: *Combined Air*, at para. 52. The test is unlikely to be met in cases in which there are multiple factual issues involving conflicting evidence from a number of witnesses and a voluminous evidentiary record (para. 51).

(3) Discussion

10 This is a case in which there is a voluminous evidentiary record and conflicting evidence from a number of witnesses. Nevertheless, the *Combined Air* formulation of the summary judgment test is met in this case. The record enabled the application judge to have a "full appreciation" of the evidence and issues required to make the findings he did.

11 The voluminous evidentiary record in this case is due to the complexity of the transactions and the relationships among the parties. However, relatively few documents bear on the one issue on which the case turns: whether Peebles was retained by PMCC as its agent to purchase, or finance the purchase of, Pachapaqui on its behalf.

12 In this case there is conflicting evidence from a number of witnesses. However, most of the points of disagreement among the witnesses are minor or are about issues that are not material. The only material conflict relates to the one issue stated above. Gary Sugar and Steven Babcock assert that PMCC retained Peebles as an agent and provided him with confidential information to acquire Pachapaqui on its behalf, while Peebles denies that.

13 The motion judge was well aware that credibility findings should not be made on a summary judgment motion and he studiously avoided doing so. Despite the conflicting affidavit evidence, he was still able decide that a trial was not required to determine whether Peebles was an agent for PMCC in acquiring Pachapaqui, without making findings about the credibility of the witnesses. He did so by concluding that the testimony of Gary Sugar and Steven Babcock would be insufficient in law to establish the plaintiff's claim "given the strength of the documentary evidence, together with the evidentiary record as a whole, in contradicting [them] in their assertion."

14 This was a determination he was entitled to make. If the action had proceeded to trial, PMCC would have borne the burden of proving it retained Peebles as agent to acquire an interest in Pachapaqui and that it provided him with confidential information. The assertions of Gary Sugar and Steven Babcock were the only evidence offered to support these claims. As the motion judge demonstrated in his careful analysis, all of the documentary and other evidence pointed in the

opposite direction. In the face of the facts established by the documentary and other evidence, including the evidence of the actions and communications of Gary Sugar and Steven Babcock themselves, it was open to the motion judge to conclude that the plaintiff could not obtain judgment in its favour at trial. On all the evidence in the record, PMCC simply could not fulfill its burden of proving that it retained Peebles as agent and provided him with confidential information to acquire Pachapaqui on its behalf.

15 I need not repeat the motion judge's careful analysis of the evidence in the record. I would merely highlight a few facts.

16 One, Peebles acquired no confidential information about Pachapaqui from PMCC. Plata-Peru, the former owner of Pachapaqui, disseminated information about the mine to potential investors and buyers. Any information about Pachapaqui that Peebles learned from Steven Babcock or Gary Sugar was not confidential information that belonged to PMCC but information Plata-Peru had disseminated throughout the mining community.

17 Two, as the motion judge said, any aspiration on the part of PMCC to acquire Pachapaqui was "wishful fantasy". PMCC's only assets were in relation to San Luis and Millotingo. As the motion judge found, PMCC misrepresented both to the Peebles group and to ICM, the ultimate purchaser of Pachapaqui, that it owned the San Luis and Millotingo properties. In fact, it held options that had gone into default. PMCC was in no position to acquire Pachapaqui.

18 Three, the agency agreement, which contained an "entire agreement" clause, did not mention Pachapaqui. The evidentiary record enabled the motion judge to find, as he did, that the amount of financing contemplated by the agreement "realistically relates to development of the San Luis and Millotingo properties", that Peebles' entitlement to remuneration was not tied to Pachapaqui, and that the amount of remuneration the agreement provided was inconsistent with the addition of Pachapaqui to the venture.

19 Four, as the motion judge's review of the evidence shows, PMCC was well aware that Peebles was acquiring Pachapaqui on his own account. Steven Babcock was an officer and director of Plata-Peru and was fully apprised of the Peebles group's initiative to purchase Pachapaqui. His actions and communications are not consistent with PMCC being an undisclosed principal behind Peebles' proposal. In fact, had PMCC been an undisclosed principal, Steven Babcock would have been in a conflict of interest.

20 For these reasons, I would conclude that the record enabled the application judge to have a "full appreciation" of the evidence and issues, and that there is no basis for interfering with his decision that a trial is not necessary to conclude that PMCC cannot establish its claim that Peebles was its agent in acquiring Pachapaqui. Without establishing that claim, PMCC's action against the respondents cannot succeed.

(4) Conclusion

21 I would dismiss the appeal and fix the respondents' costs in the amount of $15,000.00 including disbursements and applicable taxes.

R.G. JURIANSZ J.A.
M. ROSENBERG J.A.:-- I agree.
P.S. ROULEAU J.A.:-- I agree.