See paras. 2, 5, 7, 8, 9, 10c, 11

Case Name:

J. Jenkins & Son Landscaping Contractors Ltd. v. SCS Consulting Group Ltd.

RE: J. Jenkins & Son Landscaping Contractors Limited, Plaintiff, and SCS Consulting Group Ltd. and Blair Seeley, Defendants

[2015] O.J. No. 1484

2015 ONSC 1921

Court File No.: CV-11-441425

Ontario Superior Court of Justice

F.L. Myers J.

Heard: March 20, 2015.
Judgment: March 25, 2015.

(12 paras.)

Counsel:

Shane Murphy, for the Plaintiff.

Ryan Hauk, for the Defendants.

ENDORSEMENT

1 F.L. MYERS J.:-- The plaintiff sues based on allegations that the defendant Seeley told Scott White the plaintiff's confidential information (paragraph 24 of the statement of claim) and the defendant Seeley told competitors (ConDrain) that the relevant construction site could receive fill (paragraph 28 of the statement of claim).

2 The plaintiff has no evidence of the allegation in paragraph 24. It is denied by Mr. Seeley. The plaintiff tries to put Mr. Seeley's credibility in issue by relying on two alleged inconsistencies in his evidence and one inconsistency alleged between the defendants' factum and Mr. Seeley's evidence. I do not see any issue going to credibility.

3 The unit credit price is not unique - not even on the very tender in issue. Mr. Seeley was consistent on confidentiality. He said there was no confidentiality contract but he holds information confidential as agent of the owner and would only disclose it if the owner directed him to do so. Those two positions are not at all in conflict.

4 As to Cornell being a logical supplier to the site, he agreed it was. How his counsel tries to argue the issue does not impact Mr. Seeley's credibility.

5 I have read the full cross-examination and do not see why I would be better to see Mr. Seeley at trial. He was not shaken in his denial. He had no significant inconsistencies and the plaintiff chose not to call Scott White (whom it knows is aligned with the defendants). There is no evidence the other way to support an inference of misuse of the plaintiff's confidential information. Eyewitnesses' demeanour alone is no longer regarded as an acceptable way to assess credibility. Yet seeing his demeanour is the only difference a trial may make.

6 If the plaintiff were to call Mr. White at trial, I would be approving a tactical decision here to hold back trump. That is contrary to the goals of efficient, affordable, and proportionate justice. See *Amos v. Thyussennkrupp*, 2014 ONSC 3910 at paragraphs 42 to 45.

7 Finally Mr. Deliivanov was clear on cross-examination that Scott White did not say that Mr. Seeley had disclosed the plaintiff's unit price to him or that anyone had done so. The plaintiff leaps to that conclusion on its own.

8 As to the allegations in paragraph 28, even if the information set out in that paragraph was confidential, there is once again no evidence that Mr. Seeley disclosed it to ConDrain. Moreover, the fact that the project could receive 160,000 m[superscript 3] of fill was known to ConDrain as it bid on the same contract that the plaintiff ultimately obtained. Mr. DeGasperis plainly denied that Mr. Seeley disclosed the plaintiff's unit price to ConDrain. Price is the real nub of the plaintiff's allegation of confidentiality. Absent any confidentiality term in the plaintiff's contract with the owner, I am not clear that the owner or its agent, the corporate defendant, actually owed a duty of confidence. But Mr. Seeley acknowledged that he did not view it as his place to disclose the price and he did not do so. There may be a custom of the trade, but there is no evidence of a breach by Mr. Seeley.

9 The plaintiff had written and oral discovery and examined Mr. DeGasperis. I already ruled that it could not have an adjournment to fish for more evidence from him. Absent proven facts to support an inference that the defendant and Mr. DeGasperis are not being truthful, the plaintiff is left with its own merest of supposition.

10 I am satisfied that I have sufficient evidence (and the plaintiff has had sufficient opportunities in the four years this case has been underway to obtain evidence) so that I can be confident that I can make the necessary findings of fact and apply the law and that it is fair and just to do so now. Were I not, I would nevertheless be confident to draw inferences and make credibility findings as follows:

a. Scott White's evidence will not help the plaintiff;

b. Mr. Seeley was a fully credible witness; and

c. The plaintiffs allegations are speculative and had more to do with its tactics in its litigation against the owner whom it also accuses of releasing its confidential information to competitors i.e. ConDrain.

11 But given the absence of evidence to support findings of fact that probatively lead to the inferences sought by the plaintiff, there is no serious issue requiring a trial.

12 Unlike *CN v. Holmes*, 2014 ONSC 2914, there are not a huge number of documents or witnesses in this case and a trial is not needed to assess Mr. Seeley's credibility. Action dismissed.

F.L. MYERS J.