SUPREME COURT OF YUKON

Citation: *Golden Hill* v. *Ross Mining Limited and Norman Ross* , 2009 YKSC 80

Date: 20091216
S.C. No. 09-A0087
09-A0014
Registry: Whitehorse

Between: S.C. No. 09-A0014

NORMAN ROSS

Plaintiff

And

ROSS MINING LIMITED, MACKENZIE PETROLEUMS LTD. and GOLDEN HILL VENTURES LIMITED PARTNERSHIPS

Defendants

AND

Between: S.C. No. 09-A0087

GOLDEN HILL VENTURES LIMITED PARTNERSHIP

Plaintiff

And

ROSS MINING LIMITED and NORMAN ROSS

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Stephanie Schorr	Counsel for Golden Hill Ventures Limited Partnership
Murray Leitch	Counsel for Norman Ross
Jocelyn Barrett	Counsel for MacKenzie Petroleums Ltd.

REASONS FOR JUDGMENT

INTRODUCTION

[1] Golden Hill Ventures Limited Partnership (GHV) has filed a Petition seeking judgment on claims of lien against Ross Mining Ltd. Norman Ross has previously obtained a court order placing the mining property owned by Ross Mining Ltd. in receivership in order that it may be sold to permit Norman Ross to recover the unpaid purchase price owed to him by Ross Mining Ltd. Norman Ross applies under Rule 18(6) to dismiss the Petition on the ground that it is bound to fail or that the pleadings fail to disclose a triable issue. Counsel for Norman Ross submits that the claims of lien are in fact a loan that cannot be the subject of a claim of lien and that the claim of lien has been filed out of time.

BACKGROUND

[2] The order placing Ross Mining Ltd. in receivership is found in *Ross* v. *Ross Mining Limited*, 2009 YKSC 55. The undisputed facts in that case are that Ross was the founder and original operator of the placer gold mining operation recently carried on by Ross Mining Ltd. Ross and his wife sold their shares to Ross Mining Ltd. and Ross entered into a loan agreement for $7 million of the purchase price to be paid by Ross Mining Ltd. Ross Mining Ltd. defaulted in a payment on the loan agreement. On July 29, 2009, this Court ordered that the mining property of Ross Mining Ltd. be placed in receivership for the purpose of selling the property.

The Petition

[3] The pleadings state that GHV entered into a Consolidated Loan Agreement (CLA) to provide loans to Ross Mining Ltd. for the working capital to operate the mining property. It is not disputed that GHV and Ross Mining Ltd. are controlled by Jon

Rudolph. The CLA provided that the financial records of GHV were deemed to be conclusive evidence of the indebtedness between the parties. The pleadings go on to state that during the period of November 1, 2005, and August 26, 2009, GHV provided work/service, equipment/equipment repairs, fuel, and supplies/materials to Ross Mining Ltd. to be used in and in respect of the mining or working of the Mining Claims.

[4] The pleadings further claimed that the sum of $6,790,456.29 was due and owing to GHV as of August 26, 2009.

[5] The first claim of lien was filed on August 27, 2009, claiming the amount of $4,713,543. An amended claim of lien was filed on October 21, 2009, increasing the amount claimed to $6,790,456.29.

[6] It is agreed by the parties, for the purposes of this application, that the last day of work or service performed was July 15, 2009. The significance of this fact is that the amended *Miners Lien Act*, R.S.Y. 2002, c. 151, requires a claim of lien to be filed before the expiration of 45 days from the last day on which the work or service was performed. The amended claim of lien was clearly filed outside the 45-day period.

The Applicable Law

[7] There is no dispute that the applicable law is found in *Skybridge Investments Ltd.* v. *Metro Motors Ltd.*, 2006 BCCA 500, at paras. 10 to 13 as follows:

> 10 A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.
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> 11 If <u>insufficient</u> material facts have been pleaded to support every element of a cause of action, then beyond a doubt that

> cause of action is bound to fail and a defendant bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a *bona fide* triable issue.
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> 12 If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
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> 13 On appeal, as on the application in chambers, the question addressed in a Rule 18(6) application of whether there is a *bona fide* issue to be tried must be decided assuming that the uncontested material facts as pleaded by the plaintiff are true: *Van Den Akker v. Naudi***,** [1997] B.C.J. No. 1649, 1997 CarswellBC 1470 (WeC) (C.A.).

[8] The point that must be emphasized is that sufficient material facts must be pleaded to support the cause of action. Failure to do so may result in dismissal of the claim or, where appropriate, an order to amend the pleadings under Rule 18(2)(e). Under a Rule 18(6) application, the question is whether the facts pleaded are sufficient to support a cause of action, not whether there is evidence to support the claim. There is no determination of any contested evidence on an application for summary judgment. If the parties wish to have a determination of contested factual issues, the appropriate procedure is a Summary Trial under Rule 19 or a hearing.

Decision on Rule 18(6)

[9] Counsel for the applicant submits that GHV is bound by the CLA with the result that the parole evidence rule prohibits the introduction of extrinsic evidence to vary the

written contract. He relies upon the case of *The Toronto-Dominion Bank* v. *Peat Marwick Thorne Inc.*, [1998] O.J. No. 2637, at the trial level, and in the Ontario Court of Appeal, [1999] O.J. No. 3290, to support that proposition.

[10] Counsel for the applicant also relies upon the decision in *Pitt* v. *Holt*, 2007 BCSC 1556, being a case where that rule of law was applied in the context of a Rule 18(6) application. The facts in *Pitt* v. *Holt* are that Mr. Pitt and Ms. Holt were in a common-law relationship when they purchased their matrimonial home. Mr. Pitt's grandparents provided a down payment of $25,000. Ms. Holt's father co-signed the mortgage and was a registered owner of one third of the property, with Mr. Pitt and Ms. Holt each holding one third of the property. Mr. Pitt and Ms. Holt entered into a separation agreement whereby Mr. Pitt received the sum of $27,629 in exchange for transferring his interest in the property to Ms. Holt and her father. Following the separation agreement, Mr. Pitt commenced a court action seeking an equal division of the matrimonial home relying upon several legal claims that Ms. Holt's father was not entitled to a one third interest in the matrimonial home. The trial judge dismissed that part of Mr. Pitt's claim pursuant to Rule 18(6) on the basis that Mr. Pitt could not claim through oral testimony that the purchase agreement was other than what it stated. Or, put another way, the trial judge found that it was settled law that a party cannot contradict through oral evidence the terms of a written document, relying upon *The Toronto-Dominion Bank* v. *Peat Marwick Thorne Inc*. decision above.

[11] In my view, the facts in *Pitt* v. *Holt* are distinguishable from the facts in the case at bar. The agreement that Mr. Pitt was attempting to resile from was an agreement between Mr. Pitt and Ms. Holt being the same parties to the court action. However, in

the case at bar, Mr. Ross is not a party to the agreement that he now seeks to enforce in his application to strike the GHV pleadings. The submission of counsel for GHV is that the CLA is a valid agreement for the purpose of establishing the outstanding amount of money claimed pursuant to the claim of liens. Counsel submits that the CLA does not prohibit or affect the agreement to provide work and services which are the subject of the claim of lien. This question can only be resolved by assessing the evidence and it is not plain and obvious that the parole evidence rule should be applied or that its application would result in the conclusion that the GHV pleadings are bound to fail.

[12] Despite the procedure followed in *Pitt* v. *Holt*, it is not appropriate to be assessing the evidence that may or may not support the claim of lien. That can only be considered pursuant to a Rule 19 summary trial or a full hearing on the Petition.

[13] It is my view that on the face of the pleadings filed there is no basis upon which the pleadings should be struck on the ground that the claim is bound to fail. The pleadings show a cause of action, and could certainly be amended if necessary to clarify the point that the CLA is a separate agreement from a claim upon which the lien is based, that being the provision of work and services. In other words, it is perfectly reasonable on these pleadings that the CLA and the claim of lien as pleaded provide sufficient material facts to support a cause of action. It is not appropriate under Rule 18(6) to weigh the evidence to make a determination on the merits. It is not, in my view, a case that is bound to fail on the pleadings.

[14] There may be some confusion on the part of counsel who made submissions based on the evidence following the procedure in *Pitt* v. *Holt.* However, *Pitt* v. *Holt* also

involved the application under British Columbia Rule 19(24) which is our Rule 20(26). British Columbia Rule 19(24) applications are also confined to analysis of the pleadings except where the application is based on abuse of process under Rule 19(24)(d) which permits evidence to be adduced. The applicant in the case at bar did not proceed under Rule 20(26)(d) and therefore no evidence is permitted to be adduced to strike out the GHV pleadings.

[15] That being said, it is quite clear that there is no basis in law to support the amended claim of lien because it has been filed outside the 45-day period. As a result only the claim of lien in the amount of $4,713,543 will be allowed to proceed. The amended claim of lien is struck as it is bound to fail.

[16] I wish to make it clear that there may be many issues raised in the trial or hearing of the petition on the merits. However the petition as pleaded discloses a sufficient cause of action to proceed for the claim of lien in the amount of $4,713,543. There will be no order as to costs as both parties have had some success on the application.

VEALE J.