Citation: *Cunning* v. *City of Whitehorse*, 2008 YKSM 3 Date: 20081002
Docket: 08-S0012
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Faulkner

Patricia Cunning

Plaintiff

v.

City of Whitehorse

Defendant

Appearances:
Richard Buchan Counsel for the Plaintiff
Andre Roothman Counsel for the Defendant

REASONS FOR DECISION

[1] This action traces its origins to the 1940s and 1950s when the federal government developed an area of housing known as “Camp Takhini” for the purpose of housing military personnel.

[2] Eventually, the area was annexed to the City of Whitehorse. Later still, the real estate in the area was sold off in bulk to private investors, who resold the houses to members of the public.

[3] At some point, it became clear that the provisions for water and sewer supply to many of the houses in Takhini were substandard and would need to be replaced. The current owners of the properties in question appear to be destined to bear this expense. Some 74 of them have commenced an action in the Supreme Court of Yukon, claiming damages from the City of Whitehorse for

negligence and breach of statutory duty in the City's handling of the regulatory and zoning aspects of the chain of transactions leading to the eventual purchase of the properties by the plaintiffs. The Writ of Summons and Statement of Claim, though filed, have not been served on the City.

[4] Meanwhile, Ms. Patricia Cunning, one of the 74 plaintiffs in the Supreme Court action, has sued the City in the Small Claims Court. The allegations of fact, and the relief claimed, are, to all intents and purposes, identical to those contained in the Supreme Court action, except that the damage claim in the Small Claims Court action is limited to $25,000 – which is the limit of the Court's monetary jurisdiction.

[5] The City of Whitehorse has moved to have this Court either dismiss or stay Ms. Cunning's Small Claims Court action on two grounds.

[6] First, the City submits that the Court has no jurisdiction to award much of the relief sought. The Claim is for damages, a declaration and an injunction. The award of a declaration or an injunction is, the City says, beyond the jurisdiction of the Small Claims Court.

[7] Second, the City objects to being sued in parallel actions in two different courts. The City says that it is unfair and contrary to the proper and efficient administration of justice for it to have to defend itself in two actions based on the same subject matter. The City argues that the plaintiff must elect to proceed in one court or the other.

[8] I will address each of these issues in turn.

Does the Small Claims Court have the jurisdiction to grant declaratory or injunctive relief?

[9] The Small Claims Court is a statutory court and, in consequence, has only the powers expressly given to it by statute, subject to the implied power to control its own process. In the case of the Small Claims Court of Yukon, the powers of the Court are set out in s. 2 of the *Small Claims Court Act*, R.S.Y. 2002 c. 204, amended S.Y. 2005 c. 14. Section 2 ("Jurisdiction") provides:

> 2(1) Subject to subsection (2), the Small Claims Court
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> > (a) has jurisdiction in any action for the payment of money if the amount claimed does not exceed $25,000 exclusive of interest and costs;
> >
> > (b) has jurisdiction in any action for the recovery of possession of personal property if the value of the property does not exceed $25,000;
> >
> > (c) shall perform any function assigned to it by or under any other Act; and
> >
> > (d) The Commissioner in Executive Council may by Order increase the monetary jurisdiction of the Small Claims Court under paragraphs 2(1)(a) and 2(1)(b).
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> (2) The Small Claims Court does not have jurisdiction in
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> > (a) any action for the recovery of land or in which an interest in land comes in question;
> >
> > (b) any action against the personal representatives of a deceased person or in which the validity of a devise, bequest, or limitation under a will or settlement is disputed; or
> >
> > (c) any action for libel or slander.

[10] It will be at once obvious that the Court has no power to grant equitable relief. Assuming, without deciding, that subsection 2(1)(c) could confer such a

power, no other statute has done so. Decisions from other courts also support the City's contention that this court cannot grant injunctive or declaratory relief. (see for e.g. *Icecorp International Cargo Express Corp. v. Nicolaus* 2007 BCCA 97, *Hellman v. Crane Canada Co.* 2007 BCPC 133)

[11] Faced with this seemingly insuperable obstacle, the plaintiff abandoned her claim for a declaration and an injunction, but insisted that the claim for damages could proceed despite the existence of the action in the Supreme Court.

Given the suit filed in Supreme Court, can the plaintiff proceed on this parallel action?

[12] This brings us to the City's second objection – that the plaintiff is suing it in parallel actions in two different courts. As noted, the City takes the position that it is unfair and contrary to the proper and efficient administration of justice for it to have to defend itself in two actions based on the same subject matter. The City says that the plaintiff must elect to proceed in one court or the other.

[13] The plaintiff, however, refuses to elect. According to Mr. Buchan, the plaintiff wishes to proceed with her Small Claims Court action, but maintain her action in Supreme Court "in order to preserve her rights". When pressed, Mr. Buchan said that if he pursued the Small Claims action, and, hopefully, obtained a judgment in Ms. Cunning's favour, he might then continue the Supreme Court action in an attempt to obtain the declaration and/or injunction.

[14] This is clearly wrong. The plaintiff cannot divide her claim in this way. Section 4 ("Division of action") of the *Small Claims Court Regulations* provides that:

> 4. A cause of action shall not be divided into two or more actions for the purpose of bringing it within the court's jurisdiction.

[15] It is beyond question that the plaintiff is attempting to divide her claim. In addition to what Mr. Buchan submitted in argument, Paragraph 4 of Ms. Cunnings "Amended Claim" in this Court states:

> The Plaintiff claims against the Defendant for damages she sustained arising from the Defendant's negligence and breaches of statutory duty with respect to the development of Takhini North. To bring the Plaintiff's claim within the monetary jurisdiction of this Honourable Court, *and without prejudice to any related claim that the Plaintiff may bring in another forum*, she limits the amount of her claim in this action to $25,000.00. (emphasis added)

[16] Quite apart from s. 4 of the *Regulations*, it is clearly an abuse to seek to sue a defendant in one court, see how it goes, and then proceed with essentially the same suit in another court. The prejudice to the defendant in defending multiple suits in regard to the same delict is obvious. The harm to the administration of justice from multiple proceedings is obvious. The risk of inconsistent verdicts is obvious.

[17] These concerns are the reasons for the development of the law relating to *forum conveniens.* Even where no *forum conveniens* issue arises, and two courts have clear concurrent jurisdiction over a matter, the law is clear that you can not maintain concurrent suits in both courts where the parties, the object and the cause are the same in both cases: *Rocois Construction Inc. v. Quebec Ready Mix Inc.,* [1990] 2. S.C.R. 440; *ABM Amro Bank of Canada v. Wackett*, (1997), 161 N.S.R. (2d) 48 (C.A.).

[18] Now it could be argued that since the plaintiff has abandoned her claims for a declaration or injunction in this Court, that the objects of the two suits are not the same. Even if this is so, it remains clear that it would be an abuse of the court's process to conduct parallel suits in regard to the same cause of action. In

my view, the Court has, of necessity, the inherent jurisdiction to control its own process.

[19] Additionally, s. 1(2) of the *Small Claims Court Regulations* provides that reference may be had to the *Supreme Court Rules* in matters not otherwise provided for. No provision is made regarding abuse of process so reference may, therefore, be made to subrule 20(26(a) of the *Supreme Court Rules (Yukon)* which provides that the court may strike out any pleading that is an abuse of the courts process.

[20] I find that at the least, Ms. Cunning must elect which court she will proceed in, and that her action in this Court ought to be stayed unless and until her action in the Supreme Court is discontinued.

[21] It remains to be considered whether or not the Small Claims Court would, in any event, be the appropriate forum for the determination of the issues between the parties. There would be a considerable advantage to conducting the proceeding in the Supreme Court, in that it would resolve in one action, rather than 74, the issues between the Takhini residents and the City of Whitehorse. As well, the plaintiffs would have resort to the more thorough discovery, admissions and interlocutory processes of the Supreme Court. While it is true that the plaintiffs would face exposure to the possibility of having to pay substantial costs should their suit be unsuccessful, this would be offset by the fact that these costs, and the costs of counsel, would be shared amongst a large number of people.

[22] The disadvantages of proceeding in the Small Claims Court could be offset to some extent by the provisions of s. 10.1(3) of the *Act* and s. 36 of the *Regulations*. Section 10.1(3) of the *Act* allows for a joinder of claims, and reads:

> …

> 10.1 (3) If more than one claimant has filed a notice of claim against the same defendant or defendants with respect to the same event, or if one claimant has filed notices of claim against more than one defendant with respect to the same event, the judge may
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> (a) hear at one time evidence that relates to all the claims;
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> (b) apply that evidence to all the claims; and
>
> (c) make a decision in each of the claims;
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> even though the total monetary outcome of all the claims, not including interest and expenses, is likely to exceed $25,000.

[23] However, I note that none of the other 73 plaintiffs has commenced a claim in this Court, so the prospect of multiple proceedings remains very much alive.

[24] As well, s. 36 of the *Regulations* provides that the Small Claims Court can order discoveries when necessary:

> 36.(1) Except as this section provides, no discovery is permitted.
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> (2) The court may on motion, where the court is satisfied that special circumstances of the case make it necessary in the interests of justice, order discovery between the parties on such terms, including terms as to costs, as are just.
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> (3) Where discovery is to take the form of the examination of a party, the court may give directions as to
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> (a) the scope of the examination,
>
> (b) whether the examination is to be by written questions and answers or by oral examination, and
>
> (c) if it is to be by oral examination, before whom it is to be conducted or recorded.
>
> …

[25] While s. 36 could be helpful in allowing some of the evidence to be sorted out before trial, the *Small Claims Court Regulations* do not provide for other

significant procedures available in the Supreme Court to address discovery or other interlocutory and pre-trial matters.

[26] In the result, I would be very much inclined to transfer Ms. Cunning's action to the Supreme Court. However, the *Small Claims Court Act* further provides in s. 10.1(1) and (2) that:

> 10.1(1) If satisfied that the monetary outcome of a claim, not including interest and expenses, may exceed $25,000, a judge shall transfer the claim to the Supreme Court
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> (a) on application at any time; or
>
> (b) on the judge's own motion at trial.
>
> (2) Despite subsection (1), a claim *must not* be transferred to the Supreme Court if the claimant chooses to abandon the amount over $25,000 so that the claim may be heard in the Small Claims Court. (emphasis added)

[27] The British Columbia Court of Appeal in *Shaughnessy v. Roth* 2006 BCCA 547 considered an identical provision to s. 10.1; there found in s. 7.1 of the *Small Claims Rules* (B.C. Reg. 261/93; enacted pursuant to The *Small Claims Act*, R.S.B.C. 1996 c.430). The Court held that ss. (2) provides the only statutory basis for transferring a claim to the Supreme Court and, consequently, a judge of the Small Claims Court had acted without jurisdiction in transferring a claim on the basis that there were concurrent, related proceedings in the Supreme Court. While it was assumed that the Small Claims Court has inherent jurisdiction to control its proceedings, there is "… no room for its exercise in the context of the transfer of claims to the Supreme Court" (para. 46).

[28] The Court held that the intent of the *Small Claims Act* and the *Rules* is to provide claimants with the opportunity to proceed in the forum of their choice and, provided that a claimant is prepared to abandon any claim in excess of the Small Claims Court's jurisdiction, their choice to proceed in that court should be respected.

[29] In the result, Ms. Cunning's claim in the Small Claims Court is stayed until such time as she provides proof of the discontinuance of her Supreme Court action relating to the same matter. Should she elect to discontinue the Supreme Court action, the Small Claims Court action may proceed. If the plaintiff so elects, the decision of this court will finally determine the dispute between the parties. The plaintiff will not retain the right to sue for additional relief in the Supreme Court.

Faulkner T.C.J.