COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Sturzenegger v. K. Peters Industries Northern Ltd.,***
2005 YKCA 8

Date: 20050916
Docket: 04-YU-518

Between:

Peter Sturzenegger,
doing business as Zurich Trucking

Respondent
(Plaintiff)

And

K. Peters Industries Northern Ltd. and
Kerry Peters doing business as KPI Northern

Appellants
(Defendants)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Oral Reasons for Judgment

A. Roothman — Counsel for the Appellant

K.D. Parkkari — Counsel for the Respondent

Place and Date: Vancouver, British Columbia
September 15, 16 2005

[1] **NEWBURY J.A.**: The defendants appeal an order of Mr. Justice Gower of the Supreme Court of the Yukon Territory, ordering them to pay $38,764.19 to the plaintiff Mr. Sturzenegger. The trial lasted four days and the defendants were not represented by counsel. The trial judge's reasons for judgment are indexed as 2003 YKSC 72 and I will not review them at length. It will be sufficient to note that the claim arose out of trucking services provided to the defendants, over about 14 months ending in November 2001, by a Mr. Gordon Holland, who was found to have been the agent of the plaintiff. The question of agency was contested at the trial and again on appeal, but I do not find any error in the trial judge's reasoning or in his appreciation of the evidence that would allow us to interfere with that finding.

[2] On the merits of the claim, the trial judge had before him a multitude of documentary evidence adduced by the plaintiff, including various invoices, payment or bank records and accounts. Prior to trial, at least two orders had been made directing Mr. Peters to respond to requests for discovery of documents, the most recent of which had been made on October 21, 2003, about two months prior to trial. Yet early on in the trial the defendants sought cross-examine Mr. Holland on a document Mr. Peters had not produced before trial. The trial judge held a *voir dire* and for Reasons dated December 11, 2003 held that Mr. Peters had not provided an adequate explanation for his failure to produce the document earlier and was therefore not permitted to adduce it into evidence or cross-examine on it.

[3] Before us, Mr. Roothman has applied on behalf of the appellants for the introduction of fresh evidence consisting of documents also not produced at trial which are said to show that in fact Mr. Holland "double-billed" some items included in the $38,764 judgment, both in his own name and in the name of Zurich Trucking.

Mr. Peters alleges that he paid such items to Mr. Holland personally and that indeed his fresh evidence shows there were improprieties in Mr. Holland's accounting to his principal, Mr. Sturzenegger. With respect to the requirement of due diligence, we are told that these documents, which may or may not be the same documents, sought to be adduced at trial were not available until just before trial because they had been seized by the R.C.M.P. from the office of the defendants' bookkeeper. No mention had been made of the seizure until trial.

[4] Counsel are aware of the criteria for the introduction of further evidence in this court: see ***R. v. Palmer*** [1980] 1 S.C.R. 759 at 775. Mr. Parkkari relies on the due diligence criterion and on the requirement that the evidence be "credible in the sense that it is reasonably capable of belief", to argue against our admitting this evidence. He says the proffered evidence lacks credibility, given the adverse credibility findings made by the trial judge in respect of Mr. Peters. More specifically, Mr. Parkkari contends that on the face of the proffered evidence, the documents in question did not, it seems, exist until nine months after the R.C.M.P. seizures. Moreover, no cheques or other evidence of payment of the double-billed amounts are in evidence. On the other hand, Mr. Parkkari candidly acknowledged that he cannot say with certainty that the fresh evidence would have not have changed the outcome of the trial.

[5] Mr. Roothman has said all that could be said for the defendants. However, having reviewed the new evidence proffered in this court, I am not minded to grant the application. Here we have a litigant who has been found to lack credibility, and was ordered months prior to trial to, in effect, get his documents in order. He did not do so, and now he seeks a re-trial with the attendant delay and expense for both

parties. On balance, I am not persuaded that the documents are credible, or that the plaintiff should be put through another trial, at this point, to test them. I agree there is the possibility of a different outcome, but that factor is in my view outweighed by the lack of due diligence shown here and the dubious reliability of the fresh evidence. I would dismiss the application to adduce fresh evidence, although I would not order special costs against the defendants in respect of this application.

[6] This leaves the other grounds of appeal advanced by the defendants - that the trial judge erred in finding that $1,965.30 paid to the plaintiff had not been accepted in full settlement of what was owed; and in finding there were no improprieties in Mr. Holland's accounting to the defendant and indirectly to Mr. Sturzenegger. In my view, no error was shown on these issues which would justify interference by this court.

[7] In these circumstances, I would dismiss the appeal.

[8] **FINCH C.J.B.C.:** I agree.

[9] **KIRKPATRICK J.A.** I agree.

"The Honourable Madam Justice Newbury"

Correction: 28 October 2005

> The heading at the top of the front page should read: "COURT OF APPEAL FOR THE YUKON TERRITORY".
>
> The date at the bottom of the front page should read: "September 15, 16 2005".