SUPREME COURT OF YUKON

Citation: *Morrison v Liard First Nation Development Corporation*, 2014 YKSC 68

Date: 20141128
S.C. No. 14-A0089
Registry: Whitehorse

Between:

ALEX MORRISON

Respondent/Plaintiff

And

LIARD FIRST NATION DEVELOPMENT CORPORATION

Applicant/Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Jocelyn Barrett — Counsel for the Respondent/Plaintiff
Darcy Lindberg — Counsel for the Applicant/Defendant

RULING ON APPLICATION
(to set aside Writs of Garnishment)

INTRODUCTION

[1] This is an application by the defendant, Liard First Nation Development Corporation ("LFNDC"), to set aside six writs of continuing garnishment issued before judgment. Three of those writs have resulted in a total of $42,659.47 being paid into court. Of that amount, $9,443 was from the defendant's account with the First Nation Bank of Canada ("First Nation Bank"), and $33,216.47 was from the defendant's funds

on deposit with the Canadian Imperial Bank of Commerce ("CIBC") in Watson Lake, Yukon. The defendant claims that the garnishment of these funds is causing it an extreme hardship, by preventing LFNDC from paying its creditors, employees and insurer, and by interfering with its ability to maintain the defendant's apartment building in Watson Lake.

[2] The plaintiff, Alex Morrison, is the former general manager of LFNDC, who claims to have been terminated without cause on January 9, 2014. He is suing the defendant for breach of the employment contract. The bulk of his damages consist of a claimed lump sum payment of $72,000 due under that contract.

[3] One of the defendant's creditors, Environmental Refuelling Systems Inc. ("ERS") also sued the defendant for the non-payment of petroleum fuel delivered between September 28, 2013, and March 20, 2014. On September 19, 2014, ERS obtained a default judgment against the defendant in the sum of $146,858.88, plus $19,674.17 in pre-judgment interest. ERS has filed a writ of seizure and sale against the defendant's apartment building in Watson Lake. It has also provided notice to the parties in this action that it has an interest in the funds garnisheed by the plaintiff, pursuant to s. 37 of the *Garnishee Act*, RSY 2002, c 100 (the "*Act*").

ISSUE

[4] The issue on this application is whether the defendant has satisfied the requirements of s. 5(3) of the *Act*, which generally requires the court to set aside a writ of garnishment issued before judgment, unless the court is satisfied that:

- the plaintiff is making a liquidated claim;
- there are reasonable grounds for believing that any judgment the plaintiff may obtain may not be satisfied if the writ is set aside;

- maintaining the writ will achieve an equitable result, which balances the potential hardship to the defendant and the potential benefit to the plaintiff; and
- the plaintiff has sufficiently demonstrated the merits of his claim.

BACKGROUND

[5] The defendant takes no position with the allegation that the plaintiff commenced his employment as a general manager of LFNDC on November 30, 2005. The defendant admits that it entered into an employment contract with the plaintiff on December 1, 2011, which was to terminate on November 30, 2014 (the "employment contract"), unless the parties agreed to an extension. The defendant further agrees that the employment contract was terminated on January 9, 2014. There is no evidence on this application that the termination was by written notice.

[6] Section 5 of the employment contract states:

> TERMINATION/CHANGE IN CIRCUMSTANCES. The LFNDC may, by written notice to the Contractor terminate this Contract if the Contractor fails to perform, in a substantial way, the Contractor's obligations under this Contract. LFNDC may terminate this Contract, without cause, by providing an immediate lump sum payment of one month's salary for every year worked, which is in keeping with Canadian settlement guidelines. The Contractor may terminate this contract by providing LFNDC with three months written notice.

[7] The plaintiff alleges that he was terminated without cause. In its statement of defence, the defendant says that, after the termination, it discovered facts that would give it cause to terminate the plaintiff and that these facts existed prior to January 9, 2014. Specifically, the defendant says that, contrary to s. 2 of the employment contract, the plaintiff failed to provide high-quality services with due diligence, including (a) failing

to monitor and control LFNDC's corporate budget; and (b) failing to ensure that LFNDC paid all its bills while under his management.

[8] The plaintiff relies on s. 5 of the employment contract, and further pleads that the contract was simply an amendment to the previous terms and conditions of his employment since November 2005. Accordingly, he pleads that he is entitled to one month's salary ($9,000) for each year of work, including the years prior to entering into the employment contract (eight years in total), for a total of $72,000. The defendant pleads that, if the plaintiff is so entitled, then he should only be paid for the two years which he worked under the employment contract, for a total of $18,000.

[9] Finally, the defendant relies upon s. 13 of the employment contract, which states:

> DISPUTE RESOLUTION. Any disputes arising from this Employment Contract will be settlement (as written) as follows:
>
> a) Negotiation between parties
>
> b) Mediation by a Mediator agreed to by both parties
>
> c) Binding Arbitration, as outlined within the laws of the Yukon Territory govern this Employment Contract. (as written)

Based on this provision, the defendant pleads that the plaintiff's legal action is premature, as the parties have not yet engaged in alternative dispute resolution.

[10] The plaintiff commenced this action on October 3, 2014. On October 14, 2014, he obtained five writs of continuing garnishment before judgment, including the writ naming the First Nation Bank as garnishee. On October 17, 2014, he obtained a further writ of continuing garnishment before judgment naming CIBC as garnishee. Also on October 17th, the plaintiff served counsel for LFNDC with the statement of claim. On October 28, 2014, the plaintiff's counsel delivered filed copies of the writs of

garnishment to counsel for LFNDC. On November 7, 2014, the defendant filed its statement of defence.

DEFENDANT'S POSITION

[11] LFNDC employs seven individuals with a collective payroll of approximately $15,000 every two weeks. It also incurs $2,000 per month in operating expenses for its business office.

[12] LFNDC also owns and manages an apartment building in Watson Lake, which is a residence to members of the Liard First Nation. It incurs $7,000 per month in operating costs for the apartment building.

[13] As a result of the garnishment of the two banks, the defendant says that it has been unable to pay its employees for the pay period ending November 7, 2014. It also states that future payroll dates are threatened. In addition, the defendant says that it is unable to pay for heating fuel for the apartment building, creating a risk of damage to the building and an adverse impact on the living conditions of the residents. Finally, the defendant says that it has no funds to pay its insurer, which puts it on the brink of defaulting on the insurance policy covering LFNDC buildings and staff activities.

[14] The defendant submits that pre-judgment garnishment orders are an extraordinary remedy, and should only be granted in particular circumstances where it is necessary to ensure that there are sufficient funds available from the alleged debtor to satisfy the claim, and where it is relatively clear that the debt is provable. In *Directional Mining & Drilling Ltd v City of Whitehorse*, 2010 YKSC 37, Veale J of this Court stated, at para. 6:

> Master Groves, now Groves J., sets out a summary of the extraordinary nature of pre-judgment garnishing orders in

> *Flintstone Concrete v. Peace River et al*., [2003] BCSC 1137, at paragraph 89:
>
> > Pre-judgment garnishing orders are an extraordinary remedy granted by the Court. A pre-judgment garnishing order allows a plaintiff in an action to force the defendant to pay into Court all or a portion of the debt being sought in an action prior to any determination in the action being made. The rationale behind these orders is to prevent the defendant from disposing of, absconding with or in any other manner disavowing themselves of the funds available to satisfy that debt. It is a remedy granted only where particular circumstances are alleged to exist and where it is relatively clear that there is a definitive debt owing to the plaintiff.
>
> That quote was made in the context of the British Columbia *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78.

[15] This theme was echoed earlier by the Supreme Court of British Columbia in *DWD Logging Ltd v Seton Timber Co Ltd*, 1998 CanLII 1486 (BCSC), where the Court stated, at para. 8:

> It is trite to say that garnishment proceedings before judgment is an extraordinary remedy and that it is within the discretion of the Court to set aside such an order where it will work a hardship or injustice. Only in exceptional circumstances should a party be deprived of the use of funds prior to judgment.

[16] In *SEG Engineering Inc v Garden Hill First Nation*, 2010 MBQB 117 (var'd on other grounds, 2010 MBQB 160), a Master of the Court of Queen's Bench of Manitoba held that, providing the defendant has a reasonably strong defence on the merits, the threshold for establishing undue hardship is a relatively modest one. At para. 58, Master Cooper stated:

> 58 Alternatively, I am persuaded in all of the circumstances of the case, that it would be "unjust" not to set aside the garnishing order. I come to both of these conclusions bearing in mind the Court of Appeal's

> comments in *Lechow v A.E.I. Communications (Canada) Ltd.*, [1991] M.J. No. 356 (QL), where Scott C.J.M. observed that the threshold to be crossed by the defendant on the issues of undue hardship or injustice is a "relatively modest one".
>
> > Under the Rule, the onus remains throughout upon the defendant, even after having set forth a defence on the merits under subparagraph (a), to further demonstrate under subparagraph (b) either undue hardship or that the order in the circumstances is unjust.
> >
> > Having said this, I am however of the opinion that the threshold to be crossed by the defendant, once a reasonably strong defence on the merits has been demonstrated, may be a relatively modest one…. (my emphasis)

[17] On this application, the defendant only raises paras. (b), (c) and (d) of s. 5(3) of the *Act* and, of those, it principally relies upon para.(c). These provisions state:

> (3) A writ of garnishment issued under subsection (1) before judgment shall be set aside by the court on application made by the debtor at any time before judgment unless the court is satisfied that
> …
> (b) there are reasonable grounds for believing that, if the judgment is obtained by the creditor, it may not be satisfied if the writ is set aside;
>
> (c) having regard to the potential hardship and inconvenience to the debtor and to the potential benefit to the creditor, the writ will achieve a result that is equitable in the circumstances;
>
> (d) the creditor has demonstrated sufficiently the merits of their claim against the debtor; …

[18] The defendant submits that its claim of undue hardship is plain and obvious. As for the merits of the plaintiff's claim, the defendant submits that its defence that the action is premature has a reasonable prospect of defeating the claim.

PLAINTIFF'S POSITION

[19] The plaintiff submits that the provisions in s. 5(3) and s. 8 of the *Act*, when read together, provide this Court with sufficient reason to dismiss the defendant's application. The relevant paras. in s. 5(3) are set out above. Section 8 of the *Act* states:

> 8(1) For the purposes of subsections 5(3) and 7(3), the merits of a creditor's claim against a debtor are demonstrated sufficiently if
>
> > (a) there appears to be no defence that has a reasonable prospect of defeating the claim, other than a defence that to succeed depends on a finding, favourable to the debtor, on a fact that is in dispute; and
> >
> > (b) one or more affidavits filed on behalf of the creditor set out and verify the facts on which the creditor's claim is based and, if a defence is made, deny the facts on which the defence is based, or set out and verify additional facts that rebut the defence.
>
> (2) In an application to the court under subsection 5(3) or 7(1), it may be presumed in favour of the creditor that, unless the debtor gives evidence to the contrary,
>
> > (a) there are reasonable grounds for believing that, if a judgment is obtained by the creditor, it will not be satisfied if the writ is not issued;
> >
> > (b) having regard to the potential hardship and inconvenience to the debtor and to the potential benefit to the creditor, issuance of the writ will achieve a result that is equitable in the circumstances; and
> >
> > (c) the creditor is likely to recover a judgment in the action for an amount not less than the sum of the amount specified in the application and the proceeds of any previous garnishment in respect of the action.

[20] The plaintiff submits that the pre-judgment writs of garnishment should not be set aside because:

1) the defendant has not rebutted the presumption that if judgment is obtained by the plaintiff, it may not be satisfied if the writs are set aside;

2) the defendant has not rebutted the presumption in favour of the plaintiff that the writs will achieve a result that is equitable in the circumstances; and

3) the plaintiff has sufficiently demonstrated the merits of his claim.

[21] While the plaintiff acknowledges that the remedy of garnishment before judgment is extraordinary, he also submits that pre-judgment garnishment cases are dependent on their own unique circumstances: *Steele v Riverside Forest Products Ltd*, 2005 BCSC 1602, at para. 55. The plaintiff further submits that his position in this case is significantly aided by the presumptions in s. 8(2) of the *Act*.

[22] As for the presumption that the plaintiff's judgment will not be satisfied if the writs are set aside, the plaintiff argues that the defendant has not provided any evidence that it has sufficient assets available to pay any judgment in this matter.

[23] The plaintiff submits that *Directional Mining,* cited above, is distinguishable from the case at bar because the alleged debtor in that case, Castle Rock Enterprises, had displaced the presumptions in ss. 8(2)(a) and (b) of the *Act* by providing significant evidence of its financial solvency. At para. 5, Veale J. made the following findings of fact in that regard:

> [5] I find the following facts for the purpose of this application:
>
> 1. Castle Rock has provided a redacted March 31, 2010 balance sheet indicating assets of approximately $7,000,000 and liabilities of approximately $4,000,000;

> 2. The City agrees that the Castle Rock contract creates a pass through liability for the City if the DMD claim for force account rates is valid;
>
> 3. Castle Rock has professional liability insurance of $2,000,000 for its engineering consultants;
>
> 4. Castle Rock has a labour and material payment bond of $2,000,000, which DMD cannot pursue because of a missed limitation period. The existence of this bond was referred to in the instructions to bidder material;
>
> 5. Castle Rock filed a builder's lien which had to be vacated because the City did not consent to it under s. 369 of the *Municipal Act*, R.S.Y. 2002, c. 154;
>
> 6. There is no evidence of outstanding judgments against Castle Rock or pending litigation or an inability to pay debts generally and carry on business generally;
>
> 7. There is evidence that the approximate $1.1 Million at issue here has reduced the bonding available to Castle Rock for future contracts.

[24] As for the presumption that the pre-judgment garnishment will achieve an equitable result, the plaintiff submits that the defendant has provided no evidence to show that the writs are unnecessary. To the extent that the defendant has presented evidence of alleged hardship, the plaintiff submits that its writs are not the sole cause of that hardship. Rather, the defendant has allowed default judgment to be entered against it by ERS for over $166,000, and ERS is actively pursuing enforcement of its judgment by filing a writ of seizure and sale against the apartment building and by seeking to establish an interest in the funds paid into court pursuant to the pre-judgment garnishments. Thus, the defendant would be expected to suffer hardship from that enforcement in any event.

[25] As for the merits of the plaintiff's claim, counsel argues that LFNDC's defence depends upon findings favourable to it that: (a) the employment contract constituted a

new employment relationship between the parties; and (b) the defendant had cause to terminate the plaintiff. Thus, the plaintiff says that he can justifiably rely upon s. 8(1)(a) of the *Act* to establish that the merits of his claim have been sufficiently demonstrated.

[26] As for the defence of having cause to terminate, the plaintiff has deposed that the annual evaluations by LFNDC were always positive, that he was never informed of any issues with his performance and that he was never disciplined during his eight years of employment there.

ANALYSIS

[27] I am largely in agreement with the submissions of the plaintiff's counsel on this application. I conclude that it should be dismissed, subject to a variation order under s. 54 of the *Act*, which the plaintiff's counsel has invited me to make. I will return to this shortly.

[28] Firstly, the defendant has provided no evidence to rebut the presumption that, if the plaintiff obtains a judgment, it will not be satisfied if the writs are set aside. Indeed, the evidence which the defendant has provided relating to the issue of undue hardship, combined with the concurrent enforcement by ERS of its default judgment, makes it more likely than not that the defendant may be insolvent by the time the plaintiff obtains his judgment, should that happen.

[29] Secondly, I agree that the plaintiff has successfully established there appears to be no defence that has a reasonable prospect of defeating his claim, other than defences that depend upon findings favourable to the defendant on facts that are in dispute.

[30] Thirdly, I disagree with the defendant's submission that it has a reasonable prospect of defeating the claim on the basis that the action is premature. In his affidavit,

the plaintiff has deposed that, following his termination on January 9, 2014, he wrote a letter to the Chief and Council of the Liard First Nation on January 20, 2014, regarding his termination, but received no response. The plaintiff further deposed that on April 7, 2014, he emailed the acting manager for LFNDC regarding his termination, and again received no response. On June 20, 2014, the plaintiff sent a “without prejudice” letter to the defendant, and it was not until July 9, 2014 that counsel for LFNDC replied, stating that they were reviewing the matter. The plaintiff further deposed that despite several additional requests, there was no further response from the defendant. Finally, the plaintiff has deposed that between June 20, 2014 and November 2014, he made numerous attempts to discuss his termination with the defendant, but received no response. Assuming those facts can be established at trial, I expect that the defendant will be unable to establish that the plaintiff ought to have pursued alternative dispute resolution as a condition precedent to commencing his court action. I also note that, to the extent that the dispute resolution provision in the employment contract included a reference to binding arbitration, the defendant has failed to avail itself of the remedy of a stay of the legal proceedings under s. 9 of the *Arbitration Act*, RSY 2008, c 8.

[31] Lastly, and in any event, the parties have been put on notice pursuant to s. 37 of the *Act* that ERS intends to make an application for an order that it has an interest in the funds paid into court pursuant to the pre-judgment garnishments. Thus, even if I were to set aside the writs, s. 37(1) would prevent the funds being paid out of court, until an order is made under that section on the application of ERS.

[32] Despite my conclusion that the writs should not be set aside, the plaintiff’s counsel nevertheless has requested that I consider exercising my discretion to vary the one year terms of the writs pursuant to s. 54 of the *Act*. That section provides:

> 54(1) Subject only to subsection 12(2), the court has a discretion to order that, to achieve a result that is just in all the circumstances,
>
> (a) a writ of garnishment be varied;
>
> (b) a writ of garnishment be set aside; or
>
> (c) terms and conditions be imposed with respect to a writ of garnishment.
>
> (2) The generality of subsection (1) is not limited by any other provision of this Act that authorizes the court to order that a writ of garnishment be varied or set aside.

Section 12(2) is not applicable on these facts.

[33] The implicit suggestion by the plaintiff's counsel here is that, should I order that the terms of the respective writs terminate as of the date of this order, then they will no longer be writs of "continuing" garnishment. Accordingly, should the defendant be able to obtain further financing or receive funds from other sources, the writs will no longer impede the defendant's access to such funds. I am persuaded that such an order is appropriate in the circumstances.

CONCLUSION

[34] The defendant's application to set aside the writs of continuing garnishment issued before judgment is dismissed. However, the terms of each such writ will terminate as of the date these reasons are issued. Pursuant to Rule 60(12)(b), the plaintiff is entitled to his costs for this application as costs in the cause.

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GOWER J.