SUPREME COURT OF YUKON

Citation: *Nelson Drywall Interiors Alberta Inc. v Dowland Contracting Ltd.*, 2016 YKSC 25

Date: 20160614
S.C. No. 12-A0055
Registry: Whitehorse

Between:

NELSON DRYWALL INTERIORS ALBERTA INC.

Plaintiff

And

DOWLAND CONTRACTING LTD. and YUKON HOSPITAL CORPORATION

Defendants

Before Mr. Justice L. F. Gower

Appearances:

Mark E. Wallace	Counsel for the Plaintiff
James R. Tucker	Counsel for the Defendant Yukon Hospital Corporation

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff, Nelson Drywall Interiors Alberta Inc. ("Nelson") for an order requiring the defendant, Dowland Contracting Ltd. ("Dowland") to serve Nelson with its affidavit of documents within seven days of the said order, failing which Nelson would be at liberty to: (1) apply to strike out Dowland's statement of defence and counterclaim; and (2) apply for default judgment against Dowland.

[2] Nelson is an alleged creditor of Dowland in relation to the construction of two hospitals in Watson Lake and Dawson City, Yukon, which were substantially completed

in 2013. The defendant, Yukon Hospital Corporation ("YHC"), is the owner of the two hospitals and the lands on which they are situated. In May 2012, Nelson filed builders liens against the subject lands for unpaid invoices relating to work and supplies it furnished to Dowland for these construction projects.[1] In November 2012, YHC obtained an order authorizing it to pay into court the amount of $1,015,923.12 as security for the amount of the liens in exchange for having the liens vacated from the certificates of title for the lands.[2]

[3] As Dowland is now an adjudged bankrupt, the issue is whether Nelson is prevented from pursuing the Dowland action by virtue of s. 69.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "*BIA*") and/or the receivership order related to the bankruptcy proceedings. Nelson argues that it is not prevented from doing so because:

1) it is a "secured creditor" for the portion of its claim relating to the builders liens; or
2) alternatively, the funds held in trust do not form part of Dowland's estate.

ANALYSIS

1. The Secured Creditor Issue

[4] Section 2 of the *BIA* defines a secured creditor as:

> In this Act... secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor…

[1] Nelson in turn failed to pay two subcontractors, Bragg Holdings Ltd. and Superior Plus LP. Accordingly, when Nelson filed its builders lien for $1,015,923.12, it included the face value of the debts owed to Bragg and Superior.

[2] In 2014, Bragg and Superior each obtained default judgments against Nelson for the amount of their respective claims and obtained court orders to pay those claims from the lien funds paid into court by YHC. After those amounts were paid, $791,752.42 remains in court as security for the Nelson lien.

[5] Section 69.3 of the *BIA* prevents creditors commencing or continuing any action against the debtor unless the creditor is a secured creditor. Subsection (1) provides:

> 69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[6] Subsections 69.3(2) and (2.1) allow secured creditors to realize on their security:

> (2) Subject to sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:
>
> > (a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and
> >
> > (b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

> *Exception*
>
> (2.1) No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

[7] The receivership order related to the bankruptcy proceedings was granted May 6, 2013 by Rooke, A.C.J. of the Court of Queen's Bench of Alberta. I am informed by YHC's counsel that this order is effective nationwide. Paragraphs 8 and 9 of that order generally provide for a stay of creditors' proceedings against Dowland:

> NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY
>
> 8. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statue or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8.
>
> NO EXERCISE OF RIGHTS OR REMEDIES
>
> 9. All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the enviroment, (iii) prevent the filing of any registration to preserve or perfect a security

> interest, or (iv) prevent the registration of a claim for lien.

[8] The flaw in Nelson's argument is that the definition of secured creditor under the *BIA* requires that Nelson hold a lien on or against "the property of the debtor", i.e. Dowland, which is not the case here. Rather, Nelson's liens have been filed against the property owner, YHC. Therefore, Nelson is not a secured creditor in the context of Dowland's bankruptcy, and is prohibited from proceeding further against Dowland by both s. 69.3(1) of the *BIA* and paras. 8 and 9 of the receivership order. Indeed, as I interpret s. 69.3(1), I do not have jurisdiction to consider relief which authorizes Nelson to continue to prosecute its claim against Dowland. Further, Nelson's counsel candidly was unable to suggest any argument which would allow me to do so. Consequently, I must dismiss the application to require Dowland to provide an affidavit of documents in the within action.

2. The Funds in Court are not the Property of Dowland

[9] Nelson's argument here is that the funds paid into court by YHC to have the builders liens vacated from the respective certificates of title do not form part of Dowland's estate and therefore there should be no stay of proceedings on its action against Dowland.

[10] I confess that I do not understand this argument.

[11] There is apparently no dispute between the parties that the money in court is not the property of the bankrupt Dowland. Indeed, they also agree that one of the leading cases in this area is *Cutting Edge Foods Inc. (Re)*, 2008 ABQB 340, where Topolniski J., in summarizing the law of builders liens in the context of bankruptcy proceedings, made the following statement:

> [213] There is a significant body of law addressing builders' liens and trust property in the context of bankruptcy proceedings. The principles most relevant to the present application can be summarized as follows:
>
> …
>
> 3. Money paid into court by the owner to remove builders' liens is not the property of the debtor/bankrupt.
>
> …

[12] This principle was also affirmed by the Saskatchewan Court of Appeal in *D & K Horizontal Drilling (1998) Ltd. (Trustee of) v. Alliance Pipeline Ltd.*, 2002 SKCA 145. There, the Court upheld the decision of the Saskatchewan Court of Queen's Bench that monies paid into court were not the property of the bankrupt, D & K Horizontal Drilling. D & K had entered into a pipeline construction contract with the project owner, Alliance. The lien claimants were contractors engaged by D & K to perform work on the project. Alliance paid funds into court to vacate the liens. The central issue was whether those funds, upon being paid into court, became the property of D & K, and therefore divisible among its creditors in accordance with the *BIA*. The Court of Appeal concluded:

> 22 The money in Court is there because of Alliance's obligation and liability to the lien claimants under the *BLA*. The lien claimants who supplied material and services to the improvements had both a right to sue Alliance Pipeline Ltd. and force the sale of this land. The money paid into Court stands in substitution for the land and for the *in personam* rights that exist against Alliance Pipeline Ltd. Given the provisions of the Alliance Pipeline Ltd. contract with D & K, its obligation to make further payments to D & K ceased when it failed to remedy the default: see paras. 5.4 and 5.5 of the contract.

> 23 For these reasons we affirm Barclay J.'s conclusion that the money in Court, to the extent of the lien claim, is not the property of the bankrupt. (my emphasis)

[13] Finally, I am unable to see how the proposition that the funds in court are not part of Dowland's estate in any way assists Nelson in establishing it as a secured creditor. Any doubt in this regard would seem to be put to rest by the following statements of Topolniski J. in *Cutting Edge Foods*, cited above:

> [225] The lien claimants here are not secured creditors within the meaning of the *BIA* and calling them so in the Proposal does not make them so. Section 2 of the *BIA* defines "secured creditor" as meaning:
>
> > ... a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable ...
>
> [226] Clearly, the lien claimants are creditors of the debtor, but the security which they hold is not against the property of the debtor but rather is against the property of the owner for whom the debtor did work or supplied materials.

In other words, while the lien claimants in that case, like Nelson in the case at bar, might have been considered to be creditors whose debts were secured against the property of the owner, their debts were not secured against the property of the debtor, which is required by s. 2 of the *BIA*. Accordingly, this argument must also fail.

CONCLUSION

[14] Nelson's application is dismissed. Neither party sought costs either in their written material or at the hearing. If they are unable to resolve that issue within 30 days, I will remain seized for the purpose of hearing further submissions on the point.

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GOWER J.