

SUPREME COURT OF YUKON

Citation: *Dul v. Gatenby*, 2019 YKSC 18

Date: 20190404
S.C. No. 17-A0031
Registry: Whitehorse

BETWEEN

Jerry Allen Dul

Plaintiff

and

Lyle Gatenby (Gatenby Enterprises)

Defendant

Before Madam Justice S. Cooper

Appearances:
Jerry Allen Dul
Lisle Gatenby

Appearing on his own behalf
Appearing on his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a case about breach of contract. The plaintiff (hereinafter referred to as “Dul”) and the defendant (hereinafter referred to as “Gatenby”) entered into an oral agreement whereby Dul was permitted to work some gold mining claims owned by Gatenby. Dul alleges that Gatenby terminated their agreement unlawfully when he leased the claims to a third party. Gatenby states that Dul was in default of their agreement by not paying royalties on the gold he recovered and therefore, Gatenby was entitled to terminate the agreement.

BACKGROUND

[2] Gatenby was the owner of mining claims in the Yukon.

[3] In the summer of 2016, the parties reached an agreement whereby Dul would work three claims that Gatenby owned. The agreement was never reduced to writing.

[4] Dul had some equipment shipped to the site and started working on the claims.

[5] He worked the claims throughout the summer and early fall of 2016 and recovered some gold. Gatenby returned south for the winter in September 2016. Dul shut down work on the mining claims during the winter months.

[6] When Dul returned to the claims in May 2017, he was told by Gatenby that the agreement was over and that the claims had been leased to someone else. The reason given for the termination of the agreement was that Dul had not paid the royalties he had agreed to pay. Within days of being notified that the agreement was terminated, Dul provided Gatenby with partial payment of the royalties owed.

EVIDENCE

[7] Each of the parties in this matter were self-represented. I heard from each of them. No other witnesses were called.

Dul's Evidence

[8] Dul testified that based on the oral agreement he had with Gatenby he entered into other agreements, including lease to purchase agreements for equipment. He testified that much of the early work was preparatory work, such as moving equipment on to the site and putting in a road. The inference is that there is little profit early on in the enterprise.

[9] Dul testified that he understood that royalties of 10% on the amount of gold recovered would be paid to Gatenby. He testified that Gatenby told him that the payment of royalties could wait until the spring of 2017.

[10] Dul testified that he tried to contact Gatenby by telephone a number of times during the winter of 2016 - 2017. The parties had not exchanged contact information. Dul obtained a phone number for Gatenby from a third party, only to later discover that it was the wrong number.

[11] Dul testified that he did not pay any royalties until after he was told that Gatenby was terminating the agreement, at which point Dul paid him \$1,000.

Gatenby's evidence:

[12] Gatenby testified that royalties of 10% were to be paid by December 31, 2016. He testified that this is the industry standard and is well known to those involved in the mining industry. Gatenby denies having told Dul that the payment of royalties could wait until the spring of 2017.

[13] Gatenby testified that he intended to write up an agreement for the parties to sign, based on standard agreements of this type that he has previously entered into. He provided such an agreement to the Court as evidence.

[14] Gatenby testified that by the spring of 2017 he had become aware that Dul was in financial difficulty and was not paying his bills. On May 11, 2017, he entered into an agreement with a third party to work the claims. On May 14, 2017, he received \$1,000 from Dul as partial payment of the amount owing for royalties.

[15] Although Gatenby is owed further royalties (this is not in dispute as Dul acknowledged that the \$1,000 payment was only a partial payment of royalties owing), he has not filed a counter-claim seeking payment of the royalties owing.

ISSUES

The issues in this case are:

1. was Dul in breach of the agreement by failing to pay royalties by December 31st;
2. if Dul was not in breach of the agreement, did Gatenby terminate the agreement without cause;
3. if Gatenby terminated the agreement without cause, what damages, if any, is Dul entitled to.

ANALYSIS

Issue 1: Was Dul in breach of the agreement by failing to pay royalties by December 31st?

[16] The court has conflicting evidence as to what the agreement was regarding the payment of royalties.

[17] On the one hand, Dul testifies to a casual agreement and states that Gatenby told him the payments could wait until the following spring. On the other hand, Gatenby testified that the agreement was that the royalties would be paid no later than December 31st. Although he did not testify the parties having specifically discussed this, he states that the December 31st payment date is the industry standard and is well known.

[18] Gatenby also provided a standard written lease that he said he uses for such agreements. In fact, one of the agreements provided appears to be the actual agreement he entered into on May 11, 2017, after having terminated the agreement with Dul, in relation to the claims which are the subject of this litigation.

[19] The following terms in the standard written agreements are relevant:

4. Work Requirements:

The lessee,

...

n. will deliver to the lessor an annual report by December 31st of that year outlining production, exploration, or any applicable information pertaining to the property. Also included in the report will be a map showing stripping, mining, tailings and settling ponds.

5. Royalty

- a. A 10% gross royalty of all gold produced on the property is to be paid to the lessor.
- b. The royalty is to be paid to the lessor, or a representative, at the discretion of the lessor and with written notice to the lessee, in raw form consisting of a representative selection of various gold sizes or property produced bars or a net smelter return percentage.
- c. The royalty is to be paid every month at the property to the lessor or the lessor's representative, or, upon written notice to the lessee, to some other location.

6. Termination

- a. This agreement is considered no longer in effect at the election of the lessor if the lessee defaults on any of the terms of this agreement.
- b. The lessor will give the lessee written notice of default and the lessee will have 14 days to correct this default in which case there will be not [sic] termination.

...

[20] I set out portions of what has been submitted as a standard contract only to assist determining what the agreement was between the parties in this matter, noting again that these parties did not have a written agreement.

[21] On the issue of what the agreement was regarding the payment of royalties, I prefer the evidence of Dul over that of Gatenby. I do so for the following reasons.

[22] Gatenby did not provide any evidence as to the parties having discussed the timing of royalty payments; simply that a December 31st payment deadline was the industry standard and that Dul ought to have known this. While this might reflect an expectation on Gatenby's part, it does not reflect an agreement between the parties.

[23] The "standard" written agreement that has been provided and relied upon as being reflective of the agreement between the parties, does not support the position taken by Gatenby.

[24] As can be seen, the standard written agreement does not have a provision requiring royalty payments be paid by December 31st of each year. The December 31st reporting requirements provided for in clause 4(n) do not refer to the payment of royalties.

[25] Payment of royalties is provided for in clause 5, which provides that the royalty be paid monthly, and be paid "at the property", which I infer to be the site of the mining claim. If the terms of the standard agreement were the terms that Gatenby intended to govern his agreement with Dul, then royalties would have been payable prior to December 31st. This is not the position that Gatenby has taken.

[26] Further, if Gatenby's position is accepted that there was an agreement that royalty payments would be made no later than December 31st, then it is not clear how Dul was expected to comply, given that Gatenby had left the jurisdiction without leaving any contact information. Gatenby's own actions in leaving the jurisdiction without providing contact information and not following up on the payments at any time are

inconsistent with the assertion that he was expecting to receive royalty payments by December 31st.

[27] It is clear that the agreement between the parties was somewhat casual. I find that it is more likely that Dul was told that royalty payments could “wait until spring”.

[28] I am unable to conclude from the evidence that there was any agreement as to the frequency or method of payment of royalty payments.

[29] Without such a finding, I am unable to conclude that Dul was in breach of the agreement when he failed to pay royalty payments by December 31st.

Issue 2: if Dul was not in breach of the agreement, did Gatenby terminate the agreement without cause?

[30] It is clear from Gatenby’s evidence that he was aware that Dul was experiencing financial difficulties and he was concerned that royalties would not be paid. I find that this was the reason he terminated the agreement and re-leased the mining claims.

[31] While Gatenby’s concern may be understandable, his actions were in breach of the agreement.

Issue 3: if Gatenby terminated the agreement without cause, what damages, if any, is Dul entitled to.

[32] Damages for breach of contract may be awarded various ways.

[33] Expectation damages are essentially compensatory in that they put the plaintiff in the position he would have been in had the contract been completed. Sometimes these damages are readily calculable; for example, if a purchaser breaches a purchase agreement, the damages are the loss of profits from the sale.

[34] In other cases, however, damages for loss of profit are not easily calculable. This is such a case. The agreement was early into its term so there is no pattern of earning from which damages can be extrapolated. Further, there are too many variables, such as variations in amount of gold found at different areas and fluctuations in the price of gold over the term of the agreement.

[35] In such cases, the court might award reliance damages. Where the plaintiff has changed his position because of reliance on the contract, the object is to put the plaintiff in the same position he was in prior to the contract.

[36] The difference between the types of damages was set out in *PreMD Inc. v Ogilvy Renault LLP*, 2013 ONCA 412, (“*PreMD*”):

[65] ...The ordinary measure of damages for breach of contract is expectation damages. The court tries to put the injured party in the position it would have been in had the contract been performed.

[66] In some breach of contract cases, an injured person cannot prove expectation damages or loss of profits, or the contract has been unprofitable. In those cases, an injured party may elect to claim reliance damages. In awarding reliance damages, the court recognizes that the injured party has changed its position in reliance on the contract. The court tries to put the injured party in the position it would have been in had it not entered into the contract at all. Thus, reliance damages amount to wasted expenditures – expenses that the injured party incurred in reliance on the contract but would not have incurred had it known that the contract would be or had been breached: see generally, John McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at pp. 832-37; *Chitty on Contracts*, Vol. 1 (United Kingdom: Thomson Reuters, 2012), at paras. 26-019 to 26-031.

[37] Reliance damages are the appropriate approach in this matter. Based on the supporting materials filed by the plaintiff it is clear that he is seeking reliance damages.

[38] The Statement of Claim itemizes damages as follows:

Fuel:	\$4,702.38
Water pump:	\$8,347.50
Water hose:	\$4,500.00
Conveyor:	\$37,007.50
Labour & equipment:	\$100,800.00
Lost wages:	<u>\$24,000.00</u>
TOTAL	<u>\$179,357.38</u>

[39] Documentation that was filed during the trial supports the following expenses:

Equipment purchased		
Conveyer	purchase price	\$28,532.50
	freight:	\$8,475.00
	Sub-total:	\$37,007.50
Bilge pump kit:		\$481.50
Receipts from Napa:		\$402.57
Fuel:		<u>\$4,499.55</u>
TOTAL		<u>\$42,391.12</u>

[40] The onus is on the plaintiff to establish damages. Damages do not flow automatically upon a finding of liability; they must be proven. There cannot be an award for damages that were claimed but not proven at trial. There was no evidence to support the claim for damages in relation to the water pump, water hose, or "labour and equipment".

[41] There was evidence at trial that some of the equipment had been repossessed. Dul would not be entitled to judgment in relation to repossessed equipment, as he did not suffer the loss of the full purchase price. Further, there was no evidence as to the losses in relation to the repossessed equipment.

[42] The evidence given at trial by Dul was that the claims were worked for 24 days by two men. The claim for “lost wages” in the amount of \$24,000 are reasonable.

[43] I find that Dul is entitled to the following damages:

Bilge pump kit:	\$481.50
Napa:	\$402.57
Fuel:	\$4,499.55
Conveyor:	\$28,532.50
Conveyor (freight):	\$8,475.00
Lost wages:	<u>\$24,000.00</u>
TOTAL	<u>\$66,391.12</u>

Setoffs

[44] Against this I must setoff money that Dul did earn from the claims. The evidence on this point was not clear.

[45] Gatenby stated that he is owed \$3,575 in royalties. With the \$1,000 royalty payment made, this would total \$4,575 owing in royalties on \$45,750 earned.

[46] Dul stated that he made approximately \$32,000 total, from both virgin ground and tailings. He also stated that he mined 14 oz. of gold from virgin ground and that gold was worth \$3,400 per two oz., which means he earned \$23,800 from virgin ground.

[47] Considering the evidence of both Gatenby and Dul, I find that the amount earned is closer to high end of the range. I set this amount at \$45,750.

[48] Also offset against the reliance damages must be the royalty money that was owing but not paid, even though this amount was not the basis of a counter-claim. To do otherwise would result in a windfall to the plaintiff. The total amount of royalties owing is \$4,575, less \$1,000 for that already paid, leaving an amount of \$3,575 outstanding.

[49] Finally, Dul testified that the conveyor could be of use to him once the necessary approvals are in place for him to work his own leases.

[50] As stated in *PreMD*:

[67] A plaintiff's claim for reliance damages is limited in two important ways. First, it is entitled to recover only those expenses that were truly wasted – that would not have been incurred but for the contract. This is the essence of reliance damages.

[51] It is arguable that the conveyor expenses would have been incurred by the plaintiff in any event in relation to his own leases. However, there was no evidence as to when work on these leases might commence, if ever.

[52] The agreement between the plaintiff and the defendant was for a term of five years. The conveyor was purchased for the purpose of mining these particular leases. The fact remains that the plaintiff would not have purchased the conveyor when he did but for the agreement between the parties. It is somewhat speculative as to what use, if any, and when, the conveyor might be of use to the plaintiff.

Damages	\$66,391.12
Less money earned	(\$45,570)
Less outstanding royalties	<u>(\$3,575)</u>
Damages award	<u>\$17,246.12</u>

CONCLUSION

[53] The defendant is found liable for breach of contract.

[54] The plaintiff is entitled to damages to put him in the same position he would have been had the contract not been entered into.

[55] The plaintiff has failed to prove the full damages claimed. He is entitled to damages in the amount of \$17,246.12.

[56] There will be no order as to costs.

COOPER J.