

SUPREME COURT OF YUKON

Citation: 365334 *Alberta Limited v. Pishon Gold Resources Inc.*, 2019 YKSC 5

Date: 20190201
S.C. No. 17-A0102
Registry: Whitehorse

BETWEEN

365334 ALBERTA LIMITED operating as A1 CATS

PETITIONER

AND

**PISHON GOLD RESOURCES INC. and
ALMIN LIAO**

RESPONDENTS

Before Mr. Justice P. Kane

Appearances:
Mark Wallace
Almin Liao

Counsel for the petitioner
Self-representing the respondents

COST DECISION

INTRODUCTION

[1] The respondents following this one day trial seek costs at tariff Scale C level against the petitioner in the amount of \$24,651.39, inclusive of disbursements and taxes. That claim for costs exceeds the quantum of relief obtained by the respondents in their counterclaim.

[2] The petitioner claimed no costs. It submits in reply to the respondents' costs claim that there should be no award of costs to any party, beyond \$500 costs to it for this cost application.

RELIEF SOUGHT IN PROCEEDING

[3] The petitioner in this proceeding sought:

- a. to enforce a claim of miners lien pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151 against the respondents' 43 placer claims for \$50,509, plus interest at 24% per annum;
- b. an order that the placer claims be sold to satisfy its liens at any time after three months from the date of judgment herein; and
- c. joint and several judgment against the respondents for the liability claimed, including 24% per annum interest thereon from September 15, 2017.

[4] The respondents by counterclaim sought \$112,270 damages against the petitioner as follows:

- a. \$22,052 for the cost of their repairs to the equipment rented from the petitioner;
- b. \$35,218 for wages and subsistence for the loss of six days of gold mining production during the rental term when the equipment rented was inoperable; and
- c. \$55,000 for the respondents' loss due to their inability to conduct its gold mine operation because the equipment rented from the petitioner was inoperable for 18 of the 30-day rental term.

OUTCOME OF PROCEEDING

[5] The respondents were found liable to the petitioner for:

- a. \$34,650 including GST, being the unpaid rental cost for 30 days;

- b. \$2,698 for the cost of repairs including taxes, being \$37,348 in total, versus the \$50,509 claimed by the petitioner; and
- c. less the \$16,842 they recovered by the respondents by counterclaim, resulting in \$20,506 net judgment to the petitioner.

[6] The respondents' \$112,270 counterclaim was denied other than their recovery of judgment in the amount of \$16,842.

[7] The Court:

- a. granted the petitioner judgment against the respondents, jointly and severally, in the amount of \$20,506, plus pre and post judgment interest;
- b. declared the petitioner was entitled to enforce a claim of miners lien pursuant against the 43 placer claims in the amount of \$20,506, plus prejudgment and post judgment interest; and
- c. ordered that the placer claims be sold to satisfy the \$20,506 lien amount if not paid within 90 days.

ANALYSIS

[8] The issues required the court to interpret the rental contract and make numerous finds of fact on the evidence presented.

[9] This complexity of this proceeding was low and should have been resolved without the need of a trial.

[10] Neither party otherwise took unnecessary steps nor delayed or extended the proceeding intentionally or by mistake.

[11] The hearing was a bit longer as the respondents for unknown reasons chose to be self-represented however the duration of the hearing was short.

[12] The Court made a number of legal and factual determinations which resulted in the petitioner and the respondents only recovering a portion of their claims.

[13] As to the level of success, the amount of the petitioner's judgment exceeded that obtained by the respondents. The petitioner also obtained the additional remedies associated with that judgment for debt owing but was unsuccessful as to several items claimed.

[14] As to the claim presented by the petitioner, the Court:

- a. it preferred and accepted the respondents' evidence as to the state of disrepair of the rented equipment at the start of the lease;
- b. determined the petitioner misrepresented the equipment's operational fitness and state of repair at the commencement of the rental;
- c. implied a term into the rental contract that the equipment would be repaired and operationally fit to perform its designed functions at the commencement of the rental term and concluded that the petitioner breached that term in failing to ensure such state of repair and maintenance at the start of the rental;
- d. determined that the petitioner and the respondents knew or ought to have known that the deteriorated conditions of the elements noted would or could result in inoperable periods during the rental term and despite that knowledge elected to proceed with the rental rather than returning the equipment;
- e. the petitioner was entitled to the \$2,030 labour and fuel costs to retake possession of the equipment;

- f. the petitioner was not entitled to \$2,200 for two additional days of rental fee rent charged after the rental term;
- g. the petitioner's claim of \$200 for a pickup with the fuel tank was denied;
- h. the petitioner's claim for the new idler pin and repair to the idler in the amount of \$9,295, \$400 to repair the ripper tip, \$243 for the melted fuel oil tank and \$220 for sub-contractor costs were denied;
- i. the petitioner's \$400 battery related claim was granted; and
- j. held that the petitioner was entitled to \$2,030 for labour and fuel costs in retaking possession of the equipment.

[15] As to the claims presented by the respondents, the Court held that:

- a. the deteriorated equipment elements identified by the respondents existed at the commencement of the rental term;
- b. the respondents failed to provide evidence of or prove their combined damage claim of \$90,218 for lost wages, subsistence and production time during periods when the tractor was inoperable, despite filing six affidavits;
- c. the respondents were entitled to credits for certain repair costs totaling \$16,842 against their unpaid rental cost;
- d. the respondents were not entitled to an abatement of rent during the 30-day rental period;
- e. rejected the respondents' claims of \$692 and \$3,520 for labour and material costs resulting from breaks in hydraulic hoses on two occasions was rejected; and

- f. determined that the respondents were not entitled to an abatement of rent during the 30-day rental term

[16] With respect to costs the respondents do not submit the applicant acted unreasonably or deserves punishment which might otherwise warrant an award of costs against it.

[17] No offers of settlement were disclosed.

CONCLUSION

[18] Success as indicated was divided with each party achieving some success but unsuccessful as to other material elements and amounts claimed.

[19] The level of divided success between the parties supports a conclusion that each party should be responsible for their costs and there be no cost award: *Supeene v. Supeene*, 2011 YKSC 3, paras. 30 to 34 and *Government of Yukon v. McBee, Yukon Human Rights Commission and Yukon Human Rights Board of Adjudication*, 2009 YKSC 73, para. 68.

[20] Neither the petitioner nor the respondents are entitled to costs of the proceeding, other than a \$500 cost award to the petitioner pursuant to Rule 60(14)(a) as to this cost argument which the respondents are jointly and severally responsible for.

[21] In the alternative:

- a. Scale C tariff as claimed is not applicable. The interests and issues were limited to the parties. The complexity level was low;
- b. the units claimed by the respondents exceed the low level of complexity and include time expended outside the litigation in issue; and

- c. the time claimed by the respondents exceeds what was reasonably required.

KANE J.