

CANADA / JUDGMENT

1171746 B.C. Ltd. v. 5930 Condor Limited Partnership

2020 BCSC 1747

COURT

Supreme Court of British Columbia

DECIDED

17 November 2020

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2020 BCSC 1747 1171746 B.C. Ltd. v. 5930 Condor Limited Partnership IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: 1171746 B.C. Ltd. v. 5930 Condor Limited Partnership, 2020 BCSC 1747 Date: 20201117 Docket: S207211 Registry: Vancouver Between: 1171746 B.C. Ltd. Plaintiff And 5930 Condor Limited Partnership 5930 Condor Property Inc. Total Properties Holding 1 Inc. Alexander Barbachkov Clearlake Holdings Inc. Defendants Before: Master Taylor Reasons for Judgment Counsel for the Plaintiff: L. Y. Babbitt Counsel for the Defendants: M.S. Oulton R. Androsoff Place and Date of Hearing: Vancouver, B.C. October 28, 2020 Place and Date of Judgment: Vancouver, B.C. November 17, 2020

- [1] The defendants seek an order to require the plaintiff to post security for costs within 21 days, and that the action be stayed until such time as the ordered amount for security for costs be paid. Background facts.
- [2] The plaintiff filed a notice of civil claim on July 21, 2020, in which the plaintiff alleges that the general partner of a limited partnership engaged in misconduct entitling the plaintiff to seek dissolution of the partnership and distribute its assets. The alleged misconduct includes breaches of its fiduciary duties and duty of good faith owed to the plaintiff and the other limited partners. The plaintiff also alleges that it loaned funds to the partnership, totaling \$585,000, and that the loan agreement does not reflect the true agreement, which is alleged to be a loan between the plaintiff, the general partner, and Mr. Barbachkov.
- [3] As set out in the notice of civil claim, the purpose of the partnership was to hold, manage, develop, operate, and sell real property, especially the lands and premises located at 5930 Condor Place, West Vancouver, B.C. (the "Condor Property").
- [4] The partnership agreement sets out a formula for the distribution of funds upon dissolution of the partnership, which is to occur when the Condor Property is sold. The Condor Property has now been sold; therefore, the distribution provisions of the partnership agreement have been triggered.

- [5] As alleged in the notice of civil claim, the plaintiff says it advanced \$585,000 to the general partner to be used for the benefit of the partnership to finance the further development of the Condor Property and is entitled to repayment of its investment in priority to the return of capital to the partners. According to the plaintiff, this is also in addition to the initial \$300,000 which the plaintiff invested into the partnership. Thus, the plaintiff maintains the partnership currently holds the plaintiff's financial assets in the amount of \$885,000.00
- [6] The defendants take issue with this and say that the plaintiff is only entitled to 13.04% of the net proceeds of the sale of the Condor Property, which would entitle the plaintiff to a minimum of \$89,830.00. Notwithstanding, the plaintiff maintains that sum would be sufficient to cover the defendants' costs if the plaintiff was unsuccessful in its action against the defendants, and therefore an order for security for costs would be unnecessary.
- Discussion and Analysis
- [7] This application is made pursuant to s. 236 of the Business Corporations Act, S.B.C. 2002, c. 57 [Act] where the statute provides: 236 If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given
- [8] The power to make an order under s. 236 of the Act is discretionary. In *Kropp v. Swaneseet Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A.) at para. 17, Justice Finch set forth the principles that ought to guide the exercise of that discretion: 1.The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances; 2.The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security; 3.The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other; 4.The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious; 5.The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal; 6.Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and 7.The lateness of the application for security is a circumstance which can properly be taken into account.
- [9] Both parties agree with the test to be applied in applications such as the one at bar. The test is set out in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] CarswellBC 2111 (S.C.) at para. 14. That test is as follows: 1.Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails? 2.If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs? 3.Is the court satisfied that the defendants have an arguable defence to present? 4.Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's

case from being heard? The Plaintiff's Ability to Pay

- [10] The plaintiff was incorporated on July 12, 2018. It thus appears that the plaintiff was incorporated only for the purpose of becoming a partner in the limited partnership.
- [11] The directors of the plaintiff company are Andrei Glouchak, Svetlana Glouchak, and Nadejda Glouchak. None of the directors have filed an affidavit as to the value of the plaintiff corporation or whether or not it has any exigible assets in British Columbia. Andrei and Svetlana Glouchak own real property in White Rock, B.C. The assessed value of the property as of July 1, 2020, is \$1,050,000.00. A mortgage registered against the property secures a running account or a line of credit up to \$835,000.00, but it is unknown as to how much credit is left in the account, or if it has all been drawn down. Nothing else is known about the valuation of the company or the means of the directors. Do the defendants have an arguable case against the plaintiff?
- [12] The defendants have pleaded arguable defences to the plaintiff's claims of breach of the partnership agreement, breach of fiduciary duty and a duty of good faith owed to the plaintiff. The defendants say there is support for their defence when they point to evidence that Mr. Glouchak was prepared to inject further funds into the partnership, which they say would be unlikely in the face of an allegation of breach of fiduciary duty. Would an order for security of costs hinder a meritorious Claim?
- [13] In exercising its discretion to order security for costs, the court must consider the interests of justice between the parties and balance those interests to try to insure that the substance of their dispute ends up properly litigated.
- [14] To show that an order for security would stifle the action, the plaintiff must show that it has insufficient assets and no means of raising money for security.
- [15] Given the lack of evidence regarding the financial affairs of the plaintiff, the plaintiff has failed to account for its financial security or its ability to satisfy the defendants' bill of costs in the event the plaintiff is unsuccessful at trial, but for the plaintiff's position that the partnership holds many of the plaintiff's financial assets to which the plaintiff may be entitled. Were an order to go for the deposit of funds for security for costs, would that in and of itself result in stifling the plaintiff's claim? I think not.
- [16] The defendants have provided a draft bill of costs to the court to substantiate the claim of the defendants that an order for security for costs should total \$75,000.00.
- [17] I have reviewed the draft bill of costs and have found a number of matters which appear to be premature at best and somewhat excessive as well. For instance, in the matter so far, no examinations for discovery have yet been scheduled, nor has a trial date been set. No lists of documents have been exchanged. And, at this early date, the defendants have calculated the cost of an expert witness to be in the range of \$20,000.00, and estimate the trial of the action will last 15 days. Decision

- [18] Given the complete discretion the court has in applications such as the one at bar, I have determined that it is somewhat premature to make a full order for security for costs at this time. The defendants may, however, renew their application after lists of documents have been exchanged and examinations for discovery have been completed. In the meantime, I order that the plaintiff post security of \$20,000.00 within 21 days of the date of this order which should be sufficient to cover the costs of the defendants while completing the steps in the litigation as set out above. Once the examinations for discovery have been completed, the merits of the cases of the parties should be more evident.
- [19] The \$20,000.00 posted as security is to be deposited into the trust account of the plaintiff's solicitors, and those solicitors will provide a letter to the solicitors for the defendants confirming the deposit of the funds in trust for the benefit of the defendants in the event the defendants are successful at trial. In the event the required funds are not deposited within 21 days, the action will be stayed until the security is posted.
- [20] Costs of this application will be costs in the cause. "Master Taylor"

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