
CANADA / JUDGMENT

310047 B.C. Ltd. v. Thermo Tech Technologies Inc.

2012 BCSC 1473

COURT

Supreme Court of British Columbia

DECIDED

4 October 2012

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2012 BCSC 1473 310047 B.C. Ltd. v. Thermo Tech Technologies Inc

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

310047 B.C. Ltd. v. Thermo Tech Technologies Inc.,

2012 BCSC 1473

Date: 201210204

Docket: S84025

Registry: New Westminster

Between:

310047 B.C. Ltd.

Plaintiff

And

Thermo Tech Technologies Inc., and American Water Services Canada Corp.

Defendants

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Batkin

Counsel for the Defendants:

D.L. Kiselbach

Place and Date of Chambers Summary Trial:

Vancouver, B.C.

July 3 and 4, 2012

Place and Date of Judgment:

New Westminster, B.C.

October 4, 2012

Introduction

- [1] The plaintiff is a law office management corporation and seeks payment of an amount which it says is owing to it by virtue of an agreement entered into between the Vancouver law firm of Clark Wilson, the defendant Thermo Tech Technologies Inc. ("Thermo Tech"), and the defendant American Water Services Canada Corp. ("AWS"). Clark Wilson has assigned any amount owing to it under that agreement to the plaintiff.
- [2] AWS denies that it is obligated to pay the plaintiff and says that if such an agreement existed it has been terminated.

Background

- [3] Clark Wilson represented Thermo Tech in respect of complex civil litigation. By August 2002, Thermo Tech owed \$105,173.48 to Clark Wilson in respect of accounts rendered for legal services. One aspect of the litigation was that a party was seeking to enforce a security and applied for the appointment of a receiver over the property of Thermo Tech. Among its properties, Thermo Tech owned a building in Hamilton, Ontario, which was being leased by AWS.
- [4] In August 2002, Clark Wilson ceased taking any further steps in the litigation until its outstanding accounts were paid. On September 6, 2002, the president of AWS, David Clancy, its business development officer, Tim Payne, and a partner of Clark Wilson met to negotiate an agreement that would result in the payment by AWS of Clark Wilson's outstanding accounts to Thermo Tech and its future accounts to Thermo Tech. No solicitor-client relationship existed between AWS and Clark Wilson. In return for that agreement, Clark Wilson was prepared to agree to keep AWS apprised of the status of the litigation and AWS was to continue to utilize Thermo Tech's building. The plaintiff says that if Thermo Tech was not successful in the litigation, then there was some risk that AWS' occupancy of Thermo Tech's building in Hamilton was at risk.

- [5] Following the meeting on September 6, David Clancy and the in-house counsel of AWS, Moira Wallace, prepared a draft written document and sent it to Clark Wilson. Clark Wilson proposed changes to that document which were accepted by AWS and incorporated into a revised document.
- [6] The resulting document was in the form of a letter dated September 23, 2002, from AWS to Douglas W. Lahay at Clark Wilson and Mohammad Hassouneh at Thermo Tech. It read as follows:

Dear Mr. Hahay (sic)

Thank you for your letter of September 10, 2002, in which you outline your firm's position with respect to payment of the outstanding account owing by Thermo Tech and future legal services to be provided with respect to the litigation. Although we have not as of yet made the requested payment of \$50,000, we are agreeable to your request for payment on the following conditions:

1. Provided all the parties, including Clark, Wilson, Thermo Tech and AWS Canada, are agreeable to the conditions of payment contained herein, AWS Canada shall make payment of \$50,000 on or before September 20, 2002, to be applied to the outstanding legal fees of \$105,173.48 owed by Thermo Tech to Clark, Wilson (the "Outstanding Legal Fees");
2. Payment of the Outstanding Legal Fees shall be made to Frank Zechner, Ontario legal counsel to Thermo Tech, who is acting as a trustee or escrow agent with respect to any funds payable to Therm Tech. Upon receipt of funds from AWS Canada in respect of the Outstanding Legal Fees, Mr. Zechner shall issue funds from his trust account to Clark, Wilson, which shall be applied by Clark, Wilson to the account of Thermo Tech for the Outstanding Legal Fees;
3. Payment of any and all funds hereunder to be applied to the Outstanding Legal Fees and any fees incurred by Clark, Wilson from the date of this letter agreement (the "Future Legal Fees") shall be deemed to be "Advanced Rent" as defined and paid under the Lease Agreement between Thermo Tech, Hamilton Bio Conversion Inc. and AWS Canada. AWS Canada shall make payment for Future Legal Fees within 14 days of receipt of invoice from Clark, Wilson;
4. Commencing January 1, 2003, AWS Canada shall issue monthly payments of \$10,000 in accordance with paragraph 2 above, which shall be applied by Clark, Wilson to the account of Thermo Tech for the Outstanding Legal Fees. Provided that AWS Canada continues to participate in the Litigation process and subject to paragraph 6 below, monthly payments of \$10,000 shall continue to be made by AWS Canada in respect of the Outstanding Legal Fees, until the outstanding receivable of \$55,173.48 (after the September 29, 2002 payment of the \$50,000) has been paid in full;

5. All parties acknowledge and agree that notwithstanding AWS Canada's agreement to pay the Outstanding Legal Fees and the Future Legal Fees (collectively, the "Legal Fees"), AWS Canada shall not be deemed to be the client of Clark, Wilson nor a party to the litigation between Thermo Tech and Milverton Capital (the "Litigation"). In consideration of AWS Canada's payment of the Legal Fees, Thermo Tech hereby expressly consents to and authorizes Clark, Wilson to release to AWS Canada any and all information in respect of the Litigation that may affect or impact the lease arrangements between AWS Canada and Thermo Tech. Clark, Wilson hereby acknowledges and agrees that it shall not require any further consent or authorization of Thermo Tech to release information to AWS Canada and shall abide by the terms hereof and Thermo Tech hereby expressly waives its right to further notice or confirmation regarding the release of such information;
6. Notwithstanding that AWS Canada is not the client of Clark, Wilson, all parties acknowledge and agree that as consideration for AWS Canada's payment of the Future Legal Fees, (deleted portion) Clark, Wilson shall keep AWS Canada fully apprised of the status of the litigation. In the event AWS Canada determines, in its sole discretion, that the merits of the Litigation or the efforts expended in pursuing the Litigation are not financially viable, it shall have the right to immediately withdraw from the Litigation process with no further obligation to either Clark, Wilson or Thermo Tech.
7. The parties agree to determine the approach to be taken with regard to the Litigation and to execute a definitive agreement among all of the parties, as to the intended legal proceedings, timing of the actions and steps to be taken by Clark, Wilson. Such definitive agreement shall be executed on or before October 31, 2002 and may be amended from time to time, based on the advancement and progress of the Litigation.

If you are in agreement with the foregoing, please so indicate by signing this letter agreement in the space provided below, which shall constitute our agreement with respect to the matters set forth herein.

We look forward to working with Clark, Wilson and Thermo Tech.

Sincerely,

AMERICAN WATER SERVICES CANADA CORP.

David Clancy

President

[7] In these reasons I will refer to this document as the "Letter Agreement."

- [8] Although he did not sign the Letter Agreement, in his examination for discovery, David Clancy admitted that the Letter Agreement contained all of the terms of an agreement between AWS, Thermo Tech and Clark Wilson. Mr. Clancy, as President of AWS, had the authority to bind AWS to contracts up to \$1,000,000. It appears that AWS intended to be bound by the terms of the Letter Agreement.
- [9] The Letter Agreement was signed by Clark Wilson. An identical letter, except for the deletions, dated September 24, 2002, was signed by Thermo Tech.
- [10] In accordance with the terms of the Letter Agreement, AWS paid the initial amount of \$50,000 and two subsequent payments of \$20,000, for a total of \$90,000, to the escrow agent, Frank Zechner. These amounts were then paid by Zechner, on behalf of his client, Thermo Tech, to Clark Wilson.
- [11] In reliance on the Letter Agreement, Clark Wilson says that it proceeded further with the litigation on behalf of Thermo Tech and periodically reported to AWS on the status of the litigation. Clark Wilson rendered additional accounts in relation to the litigation totalling \$567,000. Of those, AWS has paid seven accounts totalling \$376,000 to the escrow agent. The total amount claimed by the plaintiff before interest is \$199,931. The plaintiff also claims interest at the rate of 14% per annum on the basis that this rate of interest is specified on the face of each account that it rendered. When interest is applied, the total amount claimed by the plaintiff is \$448,085.26.
- [12] At some point in time, AWS and Thermo Tech entered into an agreement whereby AWS committed to the payment of (US)\$1,000,000 as advance rent to Thermo Tech, which amount would be used by Thermo Tech to pay the accounts of Clark Wilson (the "AWS-Thermo Tech Agreement").
- [13] At a meeting on May 5, 2003, AWS advised Thermo Tech for the first time that it was close to reaching the \$1,000,000 limit under the AWS-Thermo Tech Agreement.
- [14] On September 3, 2003, Clark Wilson says that it was notified by AWS for the first time that it would no longer remit funds for the payment of Clark Wilson's accounts.
- [15] The issues in this case are as follows:
1. Whether the letter of September 23, 2002, created a binding obligation on the part of AWS to pay legal fees to Clark Wilson.
 2. If the letter of September 23, 2002, created such an obligation, did AWS terminate its obligation and, if so, when?
 3. If the letter of September 23, 2002, created such an obligation, was AWS obligated to pay interest at the rate of 14% per annum on amounts that it did not pay?
- [16] The defendants say that these issues are not suitable for determination under Rule 9-7 of the Supreme Court Rules because of the conflicts in the affidavit evidence regarding these

issues.

[17] The important issues in respect of which there is conflicting evidence in the affidavits are:

1. Whether or not AWS entered into a binding agreement with Clark Wilson to pay its legal fees. While it appears that AWS entered into an agreement to pay amounts to Thermo Tech as advance rent and Thermo Tech agreed to apply those amount to the fees that it owed to Clark Wilson, the evidence is not clear as to whether AWS agreed with Clark Wilson to pay its legal fees such that Clark Wilson has a cause of action directly against AWS rather than against Thermo Tech.
2. If there was an agreement between AWS and Clark Wilson whereby AWS agreed to pay the legal fees of Clark Wilson, did AWS provide notice to Clark Wilson on May 5, 2003, that it would not be making any further payments under the agreement and thus terminate the agreement. Not only must it be determined whether notice was required to terminate the Letter Agreement, but there is conflicting evidence as to whether and when such notice was given.

[18] The matter is further complicated by the allegation in the pleadings of the plaintiff that by virtue of the Letter Agreement, AWS guaranteed the payment of legal fees by Thermo Tech to Clark Wilson. There is conflicting evidence as to whether or not the parties considered that letter to have created a guarantee. If it was a guarantee, then the obligations of AWS would be different than if it was primarily obligated to pay the legal fees of Thermo Tech.

[19] In determining whether these issues are suitable for determination under Rule 9-7 I have considered the principles enunciated in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) (C.A.).

[20] The amount involved in this case is significant, namely about \$450,000. The matter is complex, involving allegations of a guarantee or a direct obligation by a third party to pay the legal fees of another party as well as the implications of a specified interest rate on a legal account. The matter does not appear to be urgent and relates to accounts rendered by Clark Wilson in 2002 and 2003. There is no evidence that the delay occasioned by a conventional trial will prejudice the plaintiff. Further, in my view, findings of credibility are necessary in order to resolve the important issues in this case and such findings cannot be made based only on the affidavit evidence filed.

[21] The application by the plaintiff is dismissed. This matter should be set for a conventional trial.

[22] Costs shall be in the cause.

"Bowden J."

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Prepared on 28 October 2026 · Esheria