

CANADA / JUDGMENT

311165 BC Ltd. v. Derewenko

2015 BCSC 1594

COURT

Supreme Court of British Columbia

DECIDED

4 September 2015

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2015 BCSC 1594 311165 BC Ltd. v. Derewenko IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: 311165 BC Ltd. v. Derewenko, 2015 BCSC 1594 Date: 20150904 Docket: 13874 Registry:

Salmon Arm Between: 311165 BC Ltd. Plaintiff/Appellant And Michael Derewenko Defendant/

Respondent Before: The Honourable Madam Justice Hyslop On appeal from: An order of a Master of the Supreme Court of British Columbia, dated June 25, 2015 (311165 BC Ltd. v. Derewenko,

Salmon Arm Registry 13874) Reasons for Judgment Stephen Ambrose, Officer of the Plaintiff/

Appellant appeared on his own behalf. Counsel for the Defendant/Respondent: D. Zachernuk

Place and Date of Trial: Salmon Arm, B.C. July 16, 2015 Place and Date of Judgment: Salmon Arm, B.C. September 4, 2015

[1] The appellant, 311165 BC Ltd., appeals an order of a master, who, on June 25, 2015, refused the appellant leave to file a further amended notice of civil claim. Costs were awarded to the respondent in the cause.

[2] On August 19, 2011, the appellant issued a notice of civil claim naming Michael Derewenko as defendant. In the notice of civil claim, amongst other claims, the appellant sought judgment against the respondent in the amount of over \$270,000.00. As it was entitled to do, the plaintiff amended its notice of civil claim on April 30, 2015, without leave. DECISION OF THE MASTER

[3] The master refused to permit the amendment sought by the appellant. In doing so, he stated: THE COURT: Mr. Derewenko. So I read this over and, first of all, your pleadings, to use a technical term, are what we call prolix. Pleadings are supposed to plead facts, not evidence. I understand that you're frustrated in -- in a technical sense as opposed -- and -- and an emotional sense probably, but in a technical sense in that 311 is unable to successfully execute a judgment for substantially over one and a half thou -- \$150,000 that was awarded two and a half years ago against General Cedar Products. I understand that. But your pleadings are inappropriately drafted and they plead facts as well as evidence and they plead argument and they do all manner of things that are inappropriate. In addition, you started this lawsuit August 18, 2011. But I am not prepared to grant the application that you're seeking. The amended documents do not comply in any way, shape, or form, with the rules of pleading. I think that the best thing that should happen here -- my refusal to allow

this amendment doesn't affect your claim at this point. The claim remains alive, but it seems to me that Justice Dley is the one who should continue to deal with this matter because he will be able to properly decide on the issue of -- of res judicata or issue estoppel and whether you should have brought both actions along at the same time. You see there's -- there's authority that says that you're to bring all your claims at once and -- and you're not to choose to establish a judgment against General Cedar, and then when you can't collect from them, then proceed to try to pierce the corporate veil.

BACKGROUND

- [4] The appellant sold to General Cedar Products Ltd. ("General Cedar") cedar blocks which General Cedar resold to third parties. General Cedar did not pay the appellant for all of the cedar blocks. In Action No. 13417, Salmon Arm registry, the appellant obtained a judgment against General Cedar for \$192,263.13. Apparently, the amount is now \$271,812.76, which includes interest and costs. The basis of the appellant's claim against the respondent is based on the same facts in Action No. 13417.
- [5] The respondent is now the principal of General Cedar. GROUNDS OF APPEAL
- [6] The appellant's grounds for appeal are stated in the appellant's memorandum of law and argument as follows:
1. the learned Master erred in denying the application for leave to further amend the Notice of Civil Claim by failing to follow the precedent of the British Columbia Court of Appeal in *McNaughton v. Baker* (1988), CanLII 3036 (BC CA);
 2. the learned Master erred in exceeding, or in the alternative, failing to exercise his jurisdiction in the context of an unopposed application for leave to amend, while fashioning an outcome that was neither asked for in a Response filed by the Application Respondent, nor even suggested from the counsel table by the Respondent at the hearing;
 3. the learned Master's manner of dealing with the application, and his comments to the Applicant, give rise to a reasonable apprehension of bias against the Applicant in the Application, and which deprives the learned Master of jurisdiction to issue the Order appealed from, according to the law as stated in *Wewaykum Indian Band v. Canada* 2003 SCC 45 (CanLII).
- [7] The defendant then states that the issues of law are:
- a) what is this Court's stated position on how Rule 1-3(1) is accommodated in the case of lay litigants before the Court and the need for impartiality of judicial officers in such situations;
 - b) if a Respondent to an Application does not file a Response to an Application such as that which is at the center of the Appeal, is Rule 8-1(9) to be said to have the effect of the Application being before the Court as unopposed;

- c) is the jurisdiction of a Master circumscribed by the Rules, that is to say, can he or she proceed to outcomes that do not arise in the procedures laid down in the Rules on an assumption that a Master has an unfettered discretion beyond the Rules;
 - d) is there jurisdiction for a Master to proceed as if making a ruling on a defence application alleging defects in a Notice of Civil Claim on his own motion, without Response, or submissions of any kind by the Respondent alleging a defect;
 - e) is there a reasonable apprehension of bias that arises out of how the Master conducted this particular hearing, and in particular in the context of what the Court may rule in regard to the above issue of lay litigants and Rule 1-3(1).
- [8] At the hearing of the appellant's application to amend its pleadings, the respondent was seeking an adjournment. The adjournment was not considered by the master. I conclude that the master decided that he could rule on the appellant's application without submissions from the respondent.
- [9] The master reviewed the pleadings to date, including the amendments sought. The master concluded that the amendments that had been made and those that were being proposed to be made, did not conform to the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules] as to pleadings.
- [10] The respondent, at this appeal, seeks the appeal be dismissed. The respondent argues that the master made an interlocutory order and this appeal court must not interfere, unless the master was clearly wrong.

ISSUES

- [11] The issues are as follows:
1. What is the proper standard of review on an appeal from the decision of a master?
 2. Did the master err in refusing to allow the amendments sought by the appellant pursuant to Rule 6-1(1) of the Civil Rules?

ANALYSIS

1. What is the proper standard of review on an appeal from the decision of a master?
- [12] In *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd. (c.o.b. Kencore)*, 2011 BCSC 999, Madam Justice Fenlon wrote at para. 7: The standard of review to be applied on an appeal to a judge of this Court from a master's decision has been settled since early 1990:
- 1) Review of a purely interlocutory decision of a master is a true appeal and the master's decision is not to be interfered with unless it is clearly wrong.

- 2) A question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the master; even where an exercise of discretion is involved, the judge appealed to may quite properly substitute his or her own view for that of the master. (*Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188 (S.C.) [Abermin]; *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2d) 124 (S.C.) [Northland].)
- [13] In *Ralph's Auto Supply (B.C.) Ltd.*, the order was a final order. The action was struck and judgment was given to the plaintiff with damages to be assessed. As it was a final order, Fenlon J. found that the standard of review on the appeal in that case was a re-hearing on the merits.
- [14] In this case, the amending of the pleadings is purely interlocutory. There is no question of law, despite the position taken by the appellant in its written memorandum of law and argument under the heading "Issues of Law".
- [15] The master made it clear that in refusing the amendments sought by the appellant, he made no final orders that affected the appellant's action. I agree with this assessment.
2. Did the master err in refusing to allow the amendments sought by the appellant pursuant to Rule 6-1(1) of the Civil Rules?
- [16] The plaintiff sought to amend its pleadings pursuant to Rule 6-1(1) of the Civil Rules:
- (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party
- (a) once without leave of the court, at any time before service of the notice of trial, or
- (b) after the notice of trial is served, only with
- (i) leave of the court, or (ii) written consent of the parties.
- [17] Rule 3-1 restricts a notice of civil claim to the following: (1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1. (2) A notice of civil claim must do the following:
- (a) set out a concise statement of the material facts giving rise to the claim;
- (b) set out the relief sought by the plaintiff against each named defendant;
- (c) set out a concise summary of the legal basis for the relief sought;
- (d) set out the proposed place of trial;
- (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;
- (f) provide the data collection information required in the appendix to the form;

- (g) otherwise comply with Rule 3-7.
- [18] Rule 3-7(1) reads as follows: (1)A pleading must not contain the evidence by which the facts alleged in it are to be proved.
- [19] In this case, the amending of pleadings is an interlocutory order in which the master exercises his discretion.
- [20] In exercising his discretion was, was the master clearly wrong? I find he was not.
- [21] Rule 3-1 of the Civil Rules is mandatory. It sets out what is required in the notice of civil claim. In both subrules (a) and (c), the word "concise" is used. The master found that the pleadings and proposed amendments were prolix.
- [22] In Rule 3-7(1), the pleadings must not contain evidence. The balance of Rule 3-7 relates to a variety of situations and claims. The master found that the proposed amendments did not comply with the Rules in that the pleadings plead evidence. This is a discretion in which the master is entitled to exercise.
- [23] The master was aware that the appellant in some of his amendments was claiming that the proceeds of the sale of the cedar blocks received by General Cedar were actually received by Mr. Derewenko, who converted them to his own use and was unjustly enriched at the expense of the appellant, using the money to pay the mortgage registered against real property owned by Mr. Derewenko. The appellant, under "Legal Basis" in the proposed amended notice of civil claim, states:
15. The Plaintiff says that, in the event it is successful in gaining a declaration of unjust enrichment, and it elects the remedy of declaration of a constructive trust, that trust should commence on the date of the acquisition of the Property by Mr. Derewenko, and that it should declare the percentage of the Plaintiff's equity in the Property to be equal to \$300,000 divided by \$192,263.13, that is to say 64.02%.
- [24] The appellant told the master: STEVE AMBROSE: Okay. Once again. I was only basically looking for leave to file this notice so that I could file a certificate of pending litigation. My concern is that this property will be transferred over. I have nothing to prevent that.
- [25] The appellant relied on McNaughton and Peterson v. 446690 B.C. Ltd., 2014 BCSC 1531.
- [26] In McNaughton, the issue was whether the "chambers judge should consider striking out or refusing to permit a third party claim to be filed or amended." The court considered whether the application for an amendment needed to be supported by some evidence. It concluded evidence to support an amendment was not required. Rather, the pleadings must plead material facts which are assumed to be true and support a cause of action.

- [27] In Peterson, the plaintiff sought leave of the court to amend its notice of civil claim. The defendant opposed it, arguing that the proposed amendment was inconsistent with the pleadings to date and in opposition to Rule 3-7(6) of the Civil Rules. After a review of the case law, leave was granted to the plaintiff to amend.
- [28] This case law does not assist the appellant.
- [29] Having found that master was not clearly wrong, I do not need to address the appellant's ground of appeal of bias.
- [30] The appellant's appeal is dismissed with costs to the respondent. "H.C. Hyslop J." HYSLOP J.
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Prepared on 28 October 2026 · Esheria