

CANADA / JUDGMENT

381713 B.C. Ltd. v. Command Construction Ltd.

2011 BCSC 1234

COURT

Supreme Court of British Columbia

DECIDED

15 September 2011

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2011 BCSC 1234 381713 B.C. Ltd. v. Command Construction Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: 381713 B.C. Ltd. v. Command Construction Ltd., 2011 BCSC 1234 Date: 20110915 Docket: 91065 Registry: Kelowna Between: 381713 B.C. Ltd. doing business as Kelowna Marina Appellant And Command Construction Ltd. Respondent Before: The Honourable Mr. Justice Rogers On appeal from: Provincial Court of British Columbia, March 30, 2011 (Kelowna Docket 81017) Reasons for Judgment Counsel for the Appellant: D.E. Spelliscy Appearing as Agent for the Respondent: L. Cookson Appearing for North Central Bailiffs Ltd.: D. McPhail Place and Date of Hearing: Kelowna, B.C. September 8, 2011 Place and Date of Judgment: Kelowna, B.C. September 15, 2011

Introduction

- [1] This is an appeal of a Provincial Court order. The contest is between a judgment creditor who wants a boat and trailer to be sold in part satisfaction of the judgment debt and a third party numbered company who asserts it owns the boat and trailer and wants them released into its possession. The Facts
- [2] In June 2010, Command Construction Ltd. obtained Provincial Court default judgment against Stewart Smith and Belco Holdings Inc. The judgment was for approximately \$10,000. Neither Mr. Smith nor Belco paid the judgment. Command began execution proceedings against them. Command caused Mr. McPhail, a court appointed bailiff, to seek out exigible assets belonging to Mr. Smith and Belco. In December 2010, Mr. McPhail attended at a certain piece of property near Kelowna and there found a 2008 boat trailer. Belco was the registered owner of that trailer. The trailer was not empty. On the trailer's bunks rested a 2008 Larson, model Senza 206, pleasure boat. Mr. McPhail reasoned that if Belco owned the trailer then Belco probably also owned the boat that was on the trailer. Mr. McPhail seized the boat and the trailer and carted them off to his storage yard, intending to advertise them for sale in due course.

- [3] Shortly after the boat and trailer were seized, Ms. Sandra Smith approached Mr. McPhail with a story that the boat and trailer belonged to 381713 B.C. Ltd. She asserted that she was the sole shareholder, officer, director and guiding mind of 381713. She also asserted that 381713 operated under the business name of Kelowna Marina. Mr. McPhail was skeptical of Ms. Smith's claims. He asked for proof that the boat and trailer were the property of 381713. Ms. Smith produced some documents, but they did not satisfy Mr. McPhail. He suggested to Ms. Smith that she make an application to the Provincial Court seeking an order that the boat and trailer be released to 381713. Ms. Smith made that application. Ms. Smith's application was heard and decided by the Honorable Judge Hogan on March 30, 2011. It is from that decision that 381713 takes this appeal. The Proceedings and Decision Below
- [4] Ms. Smith appeared for 381713, Ms. Cookson appeared for Command, and Mr. McPhail appeared in his capacity as the court appointed bailiff. The learned application judge received an affidavit, some documents, and viva voce evidence from Ms. Smith and Mr. McPhail.
- [5] Ms. Smith testified that 381713 operates under the business name Kelowna Marina. She said that in 2008 Kelowna Marina bought ten boats and ten trailers from the Rayburn Marine boat dealership in Kelowna. She produced a bill of sale showing that Rayburn had sold the particular boat in question to Kelowna Marina, and the particular trailer in question to Kelowna Marine. Ms. Smith did not produce evidence that 381713 paid for the boat and trailer. Ms. Smith put into evidence a pleasure craft license issued by Transport Canada for the boat. The license holder was shown as Kelowna Marine. She produced an unregistered transfer of the trailer in issue between Belco and Kelowna Marina. Finally, Ms. Smith produced blank and undated voided cheques on which were printed the words "381713 BC Ltd. (D.B.A. Kelowna Marina)".
- [6] Mr. McPhail testified that after hearing from Ms. Smith, he spoke to a representative of Rayburn Marine. That representative told him that Kelowna Marine was synonymous with Mr. Stewart Smith. Mr. McPhail also testified that according to motor vehicle registry searches he conducted, the trailer he seized was originally registered to Rayburn and was then transferred to Belco. He said that the trailer remains registered to Belco.
- [7] The parties made submissions after the evidence was in. Ms. Smith repeated her assertion that 381713 operated as Kelowna Marina and that it owned the boat and trailer. Ms. Cookson and Mr. McPhail pointed out that 381713's name did not appear anywhere on any of the documents relating to ownership of the boat. They also emphasized the fact that at all material times the trailer was registered to Belco. They noted that Belco shared the same address as Mr. Stewart Smith. Finally, they argued that if 381713 operating as Kelowna Marina actually owned the boat, it would surely have more documents than the few at hand to prove that ownership.

- [8] The learned application judge dismissed Ms. Smith's application. He correctly found that 381713 bore the onus of showing on the balance of probabilities that 381713 owned the boat and trailer. He noted that no document relating to ownership of either the boat or the trailer actually names 381713. The learned application judge noted that the trailer was, in fact, registered in the name of Belco. The only documents connecting 381713 to Kelowna Marina were the unused cheques. The judge concluded that Ms. Smith had not discharged the applicant's burden of proof and dismissed the application.
- [9] Ms. Smith appealed that decision. Grounds of Appeal
- [10] Ms. Smith asserts that the learned application judge erred in law and fact by not finding that the boat and trailer were the property of 381713. New Evidence
- [11] Ahead of the appeal hearing, the parties agreed that they would adduce new evidence. They agreed that the new evidence would be documentary and that it would be put forward by affidavit.
- [12] The new evidence tendered by Mr. McPhail comprised motor vehicle registration documents confirming that Belco is the registered owner of the trailer. He also tendered documents showing that at various times in the past Belco has owned other boat trailers, and in the distance past (i.e. the 1990s) Belco financed a third party's acquisition of several boats and other recreational equipment.
- [13] The new evidence adduced by Ms. Smith comprised numerous documents confirming that at all times relevant to this matter 381713 operated a business in Kelowna under the name Kelowna Marina. The documents also show that 381713 had an insurable interest in the boat that Mr. McPhail seized. Standard of Review
- [14] The introduction of new evidence on appeal somewhat alters the standard of review. The question becomes less whether the trial judge misapprehended the evidence, and more whether the trial judge would likely have come to a different conclusion had he or she known of the new evidence. That is the test that I will employ in this appeal. Discussion
- [15] The learned application judge concluded that Ms. Smith had not put forward enough evidence to establish that 381713 actually operated Kelowna Marine. The learned application judge also had some reservations as to whether 381713 or Kelowna Marine actually owned the boat in question.
- [16] I do not fault the learned application judge for the conclusion he reached in the absence of this new and convincing evidence - it was a conclusion that he could have reasonably reached on the strength of the evidence that was before him. In my view, though, the new evidence on appeal would, had it been shown to the learned application judge, likely have been sufficient to convince him that 381713 operated Kelowna Marine and that 381713 owned the boat that Mr. McPhail seized.

- [17] Oftentimes when an appeal court reaches the conclusion I have reached here, it refers the case back to the original court for rehearing. A rehearing is usually appropriate in such cases because the new evidence may well bear upon some aspect of the trial, such as credibility, that a trial judge is uniquely able to assess. A rehearing in this case would not, I think, well serve the parties or the administration of civil justice. That is because the new evidence comprises an overwhelming case for 381713. That company's claim to the boat no longer requires viva voce evidence from Ms. Smith - the new evidence fully perfects its claim to ownership of the boat. A rehearing would do nothing more than further delay this matter.
- [18] The new evidence does not bear on the trailer. I see no reason to disturb the learned application judge's conclusion that the trailer is the property of Belco.

Conclusion

- [19] 381713 is entitled to an order for possession of the boat in issue in this proceeding. The boat is the property of Belco and the bailiff may sell the trailer at his convenience.
- [20] Having elected to park its boat on someone else's trailer, 381713 cannot be heard to complain that the boat is still on that trailer. It will be for 381713 to arrange to retrieve the boat from Mr. McPhail's storage facility. The cost of retrieval will be on 381713's account. Mr. McPhail will take reasonable steps to accommodate that retrieval.
- [21] According to Mr. McPhail's submissions at the appeal hearing, storage fees accrue on the physical footprint of the trailer. The trailer remains under seizure, and storage fees are therefore attributable and chargeable to the trailer. No storage fees may be levied on the boat.
- [22] 381713 is entitled to its costs of the appeal against Command. "P.J. Rogers J." The Honourable Mr. Justice Rogers

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