
CANADA / JUDGMENT

Archipelago v. Broadwater

2012 BCSC 1137

COURT

Supreme Court of British Columbia

DECIDED

24 July 2012

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2012 BCSC 1137 Archipelago v. Broadwater

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Archipelago v. Broadwater,

2012 BCSC 1137

Date: 20120724

Docket: S122533

Registry: Vancouver

Between:

Archipelago Ventures Ltd.

Plaintiff

And

The Owners and all Others Interested in the Ship Broadwater Rigger, Broadwater Industries Ltd.
and Broadwater Industries (2011) Ltd.

Defendants

Before: The Honourable Mr. Justice Savage

Oral Reasons for Judgment

Counsel for the Plaintiff:

A.P. Butterfield

Counsel for the Defendants:

D.S. Jarrett

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 24, 2012

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2012

- [1] This is an application for summary judgment. The matter at issue is small, less than \$5000 in both parties submissions. It was agreed that the matter was appropriate for an application for summary judgment despite conflicts in the affidavits. I agree with that position.
- [2] There are two named corporate defendants who I will collectively refer to as Broadwater. In my view the correspondence and other documentary exchanges creating the contract involved both entities. For example, Broadwater Industries Ltd.'s name is on the deposit receipt. However Broadwater Industries (2011) Ltd.'s name is on the invoice. In my view the only proper interpretation is that both of these corporate entities were contracting parties.
- [3] The position of the plaintiff, Archipelago Ventures Ltd. ("Archipelago"), as I understand it, is that there was a contract between it and the defendants, Broadwater, to lift Archipelago's vessel, the Island Bay, onto the North Arm Transportation's barge when that barge came into Skidegate Channel. The contract was to lift the vessel for the agreed rate of \$650/hour, subject to a four hour minimum charge. The lift took less than four hours so the appropriate fee is \$2600. The work was done February 1, 2012.
- [4] The position of Broadwater, on the other hand, is that its charge of \$6783.26 is appropriate, based on its invoice of February 15, 2012. Broadwater says that its position is supported by the documentary and conduct evidence, namely, the fact that the sum of \$7000 was authorized to be charged against Archipelago's credit card in advance of the work.
- [5] Archipelago also relies on the letter that authorized payment of the security deposit. The letter is from Rob Pettigrew to Broadwater, dated January 28, 2012, and says:

Per John Dolmage's conversation yesterday with Doug Mackereth Jr., this is your authorization to charge a \$7,000.00 security deposit to my Visa credit card No. xxxxx, expiry date xxxxx.

I understand that this deposit will be applied to your fee for lifting Island Bay (\$650.00 per hour with a 4 hour minimum charge), with adjustment to follow.

- [6] The letter was addressed to Broadwater in Prince Rupert and copied Captain John Dolmage and Mr. Doug Mackereth Jr. That is because Mr. Pettigrew had no direct dealings with Broadwater. Captain John Dolmage acted for Archipelago in his dealings with Broadwater.

- [7] Following the January 28, 2012 letter, there was email correspondence from Broadwater dated January 30, 2012 to Archipelago saying "I have received your fax and put through the \$7,000.00 charge on your credit card. Thanks."
- [8] There are a couple of things to note with the letter from Archipelago to Broadwater. It refers to "your fee" for the work to be done, namely "lifting Island Bay". In brackets immediately following this reference to "your fee for lifting Island Bay" is the statement "\$650.00 per hour with a 4 hour minimum charge". Following that phrase is the additional phrase "with adjustment to follow".
- [9] Broadwater relies on this correspondence and the fact of payment of the security deposit to argue that the actual fee was to be \$7,000. However the invoice is not in that amount. It was then argued that there was to be the possibility of minor adjustments, and thus the original invoice at \$6783.26 is entirely consistent with that. Archipelago, on the other hand, says that the contract was for an hourly rate and nothing more.
- [10] In my view the correct interpretation of this letter is that the fee is to be \$650/hour with a minimum charge of four hours. There was a requirement that there be a security deposit, but it was anticipated that the time spent could be different than four hours, so there was contemplated the possibility of an "adjustment to follow". An adjustment based on hours would occur if more than four hours were worked.
- [11] Now, there is nothing indicating that Broadwater disagreed with the \$650/hour fee rate. On the contrary, the credit card number was charged the security deposit on January 30, 2012. The work then proceeded after the letter and after charging the security deposit. The actual negotiation of the rates is set out in the affidavit of Captain John Dolmage.
- [12] Captain Dolmage negotiated the contract with Mr. Makereth. His affidavit evidence confirms that fee was to be \$650/hour. He says that was to be the only charge and gives a history of his discussions with Mr. Makereth.
- [13] Broadwater, based on the evidence of Mr. Makereth, says that the hourly lift rate was to be only one part of the charge. Other additional charges are operator time at \$90/hour, room and board for the operator at \$160, half of the cost of a seaplane of \$99, and half the cost of inland air of \$886.93. The invoice submitted charged for 7 hours of lift time.
- [14] In my opinion, the evidence of Captain Dolmage is entirely consistent with the documentary evidence relied upon by Archipelago. In my opinion the evidence of Mr. Makereth is not consistent with the correspondence from Archipelago dated January 28, 2012, or it taking the security deposit upon receipt of that letter.

- [15] First, the correspondence was received and the security deposit taken before the work commenced. If there was disagreement with the \$650 per hour rate, I would have expected there to be correspondence clarifying the matter from Broadwater. There is none. Moreover, there is no documentary evidence that any additional charges would be incurred by Archipelago over and above the hourly rate.
- [16] Broadwater argues that if there was only to be an hourly rate charged, this is inconsistent with the amount of the security deposit charged. An explanation for this is provided in the affidavit of Captain Dolmage. The security charged was to secure payment of possible charges if the task proved more difficult than anticipated. The area where the work occurred is an area subject to fierce weather and seas, however, none of that materialized.
- [17] Moreover, the hours charged on the invoice for lift time is inconsistent with the evidence of Ray Lagace. Mr. Lagace in his affidavit testified that conditions were ideal and the lifting time took no longer than 1.5 hours. As such, the amount charged in the invoice for the lift alone is greater than that allowed. Mr. Mackareth's affidavit confirms that the lift time was far less than four hours, even allowing for some preparation time. The minimum charge is four hours, so the amount of the invoice should have been \$2600 plus taxes at 12% or \$2912.00.
- [18] In the circumstances the defendants overcharged the plaintiff by \$3,871.26.
- [19] The plaintiff will have judgment against the defendants Broadwater Industries Ltd. and Broadwater Industries (2011) Ltd. in the amount of \$3,871.26.
- [20] Costs and the question of what to do with the funds in court may be spoken to.

[Submissions on costs]

- [21] The plaintiff applies for costs pursuant to Rule 15-1(15) following my judgment in its favour in the amount of \$3,871.26. Rule 15-1(15) on its face is subject to Rule 14-1(10). Rule 14-1(10) and the requirement for "sufficient reason" is fully explicated in the decision of our Court of Appeal in *Gradek v. Daimler, DaimlerChrysler*, 2011 BCCA 136.
- [22] This is a modest award. I have heard counsel's arguments about the "in rem" claim, and the claim for consequential damages, which I likened to that of a claim that a kingdom was lost for want of a ferrier's nail. In my opinion there is no appropriate "in rem" claim and the claim for consequential damages is one that would have no chance of success.
- [23] There is, however, a very unusual circumstance here which, because of the location of the small claims registry which has jurisdiction, makes the plaintiff's option to pursue the matter in small claims court a very expensive one. I accept that had the matter been pursued in small claims court, it would involve both parties in very considerable travel expenses, expenses that, certainly with counsel representation, would vastly exceed the amount of the claim. In these unusual circumstances in my view the plaintiff has shown sufficient reason to pursue the matter in Supreme Court.

- [24] On the other hand, it seems to me that the "in rem" issue raised by the plaintiff is not a proper claim and ill advised. Accordingly, this matter took on a prolixity that it would not otherwise have had. A considerable amount of time was spent in respect of such claim in argument before me on both the question of costs and during the plaintiff's and defendants' arguments on the main issue.
- [25] Rule 15-1(15) starts with the preamble "unless the court otherwise orders". In my view that permits the court to invoke the jurisdiction in Rule 14-1(14) and (15) that allows a court to fix the amount of costs including disbursements. As I understood the submissions of both parties, they agreed that the court retains an overriding jurisdiction to fix the amount of costs, even where sufficient reason is found under Rule 15-1(15).
- [26] In the circumstances, I am prepared to award costs, as sufficient reason has been shown, but because of the unnecessary prolixity would limit those costs to the sum of \$1500 inclusive of disbursements.

"The Honourable Mr. Justice Savage"

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