

CANADA / JUDGMENT

Avina v. Sea Senior (Ship)

2016 BCSC 749

COURT

Supreme Court of British Columbia

DECIDED

27 April 2016

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2016 BCSC 749 Avina v. Sea Senior (Ship)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Avina v. Sea Senior (Ship),

2016 BCSC 749

Date: 20160427

Docket: S151490

Registry: Vancouver

Admiralty Action In Rem Against

The Ship "Sea Senior" being a 2007 34 Foot Mainship Trawler

Bearing License No. BC651912 and Hull Number MPTGM216K607

and In Personam

Between:

Oscar Avina

Plaintiff

And

The Owners and All Others Interested in the Ship "Sea Senior"

being a 2007 34 Foot Mainship Trawler bearing Licence No. BC651912

and Hull Number MPTGM216K607, Lenic M. Rodriguez and

Sea-Chariot Holdings Inc.

Defendants

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Plaintiff:

D.S. Jarrett

Counsel for the Defendants:

M.J. McCubbin

Place and Date of Hearing:

Vancouver, B.C.

March 8-9, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 27, 2016

1. INTRODUCTION

- [1] In January or February 2012, the plaintiff Oscar Avina ("Avina") and the defendant Lenic M. Rodriguez ("Rodriguez") entered into an agreement to purchase the ship Sea Senior (formerly the Seanior Moment) (the "Vessel") through a company that Rodriguez would incorporate, the defendant Sea-Chariot Holdings Inc. ("Sea-Chariot").
- [2] Rodriguez incorporated Sea-Chariot on March 9, 2012. He was at all times its sole director.
- [3] The Vessel was purchased in March 2012 for \$225,500 and registered in Sea-Chariot's name. The Vessel continues to be Sea-Chariot's only asset.
- [4] Differences arose between the parties leading Avina to commence this action by filing a notice of civil claim on February 23, 2015 which seeks, among other things, damages and an order for sale of the Vessel.
- [5] The Vessel was arrested pursuant to an arrest warrant issued by this Court on February 25, 2015. The Vessel remains under arrest, and the defendants have not posted bail or provided security for its release.

2. ISSUES RAISED ON TWO APPLICATIONS

- [6] Now before me are two applications. The first is an application filed by Avina on October 30, 2015 seeking an order pursuant to Rule 13-5(1) of the Supreme Court Civil Rules for sale of the Vessel and for the proceeds to be held in trust by Avina's solicitors pending further order of this Court or the written agreement of counsel for the parties. That application is opposed by the defendants.
- [7] The second application is one filed by the defendants on November 18, 2015. It seeks an order that the arrest warrant for the Vessel be set aside. It also seeks a declaration that Avina is in default of his payment obligations under a security agreement pursuant to s. 56(2) of the Personal Property Security Act, R.S.B.C. 1996, c. 359 [PPSA], that Sea-Chariot or Rodriguez was within its rights when it seized the Vessel following the default, and that Sea-Chariot has the right to dispose of the Vessel in order to recoup the debt, pursuant to s. 59(2) of the PPSA, and is relieved of its obligation to give notice under that section.
- [8] Avina submits there is no basis to set aside the arrest warrant. With respect to the PPSA, Avina denies that there was a conditional sales agreement and denies ever being served with notice under the PPSA.
- [9] The parties rely on a number of affidavits and exhibits thereto, including:

Affidavit to Lead Warrant of Neela Wickberg made on February 23, 2015;

Affidavit # 2 of Neela Wickberg made on November 16, 2015;

Affidavit # 1 of James (Jim) Connolly sworn on October 30, 2015;

Affidavit # 1 of Oscar Avina made on October 28, 2015;

Affidavit # 2 of Oscar Avina made on November 25, 2015;

Affidavit # 1 of Lenic Rodriguez made on November 17, 2015;

Affidavit # 1 of George Schinas made on November 23, 2015;

Affidavit # 1 of Alana McMullen made on November 17, 2015;

Affidavit # 2 of Alana McMullen made on November 26, 2015;

Affidavit # 3 of Alana McMullen made on November 27, 2015;

Affidavit # 5 of Alana McMullen made on February 17, 2016; and

Affidavit # 1 of Palma D'Andrea made on February 17, 2016;

3. BACKGROUND FACTS

- [10] As set out above, in January or February 2012, Avina and Rodriguez agreed to purchase the Vessel. The parties now differ on the precise terms of their agreement.

- [11] According to Avina, the parties agreed as follows:

- (a) Rodriguez would incorporate a company (Sea-Chariot) to purchase the Vessel and to hold legal title to it;
- (b) Any money or other consideration that Avina provided to Rodriguez would be used to purchase the Vessel;
- (c) Avina would own 49% of the shares of the company and would have 50% ownership interest in the Vessel;
- (d) The Vessel would be moored in Vancouver, British Columbia;
- (e) Rodriguez and Avina would be entitled to equal access to and use of the Vessel; and
- (f) Avina would pay for expenses and necessities for the Vessel, including but not limited to amounts for surveys, moorage, repairs and insurance, with Rodriguez reimbursing Avina 50% of such expenses and necessities.

[12] According to Rodriguez, he provided the majority of the funds to purchase the Vessel, \$203,201. He says the terms of the agreement were:

- (a) Rodriguez would provide funds to purchase the Vessel;
- (b) Rodriguez would incorporate a company (Sea-Chariot) to own the Vessel;
- (c) In order to provide security for Rodriguez as the primary source of funds used to purchase the Vessel, Rodriguez would be the majority shareholder in the company, holding 51% of the shares and Avina holding 49% of the shares;
- (d) Avina would purchase shares from the company for a price equivalent to 49% of the Vessel's purchase price, less the deposit paid by Avina. To facilitate this purchase, Avina would make monthly payments of \$2,000, including 5% annual interest;
- (e) Upon having paid for his shares, Avina would be issued 49 shares, representing a 49% ownership stake in the company;
- (f) Avina would provide Rodriguez with 50,000 shares in Aurcana Corporation as collateral for Avina's outstanding debt;
- (g) Avina and Rodriguez would share the expenses associated with operating the Vessel on a 49/51 basis;
- (h) Each party would enjoy equal use of the Vessel so long as Avina remained current with his obligations regarding his debt to the company;
- (i) The parties would re-evaluate their agreement each year.

[13] The defendants deny that there was ever any agreement that Avina would own 50% of the Vessel.

- [14] The defendants maintain that their agreement constituted a conditional sales agreement. Avina denies this.
- [15] The parties also disagree on the total amount that Avina has paid in relation to the Vessel.
- [16] According to Avina, he has paid \$129,450 between March 2012 and July 2014, as follows. He provided the original deposit of \$11,450 for the purchase of the Vessel to Freedom Yachts, and he made a payment of \$10,000 to Rodriguez on March 23, 2012. He also endorsed 50,000 shares he held in Aurcana Corporation to Rodriguez, which Avina says were valued at the time at approximately \$50,000. Avina says he made payments totalling \$48,000 to Rodriguez by way of monthly cheques for \$2,000 per month from April 16, 2012 to about March 20, 2014. He says he made payments totalling \$10,000 to Rodriguez by way of three cheques between April 15, 2014 and July 7, 2014 for taxes on the sale of the Vessel.
- [17] In addition, Avina says that he paid a total of \$24,500 for mooring charges for the Vessel in Vancouver between March 2012 and July 2014 and also paid for surveys, repairs, maintenance and insurance for the Vessel. He says that, in breach of their agreement, the defendants have only reimbursed him \$8,925.55 for these charges.
- [18] According to the defendants, Avina is in default of his debt. They acknowledge that Avina paid the \$11,450 deposit, gave a \$10,000 cheque to Rodriguez, and made 24 monthly payments of \$2,000, all of which totals \$69,450. From that amount, they say approximately \$9,000 should be deducted to account for interest.
- [19] The defendants say that six of Avina's cheques were not honoured, and that he has never provided payment for June 2012, and that he ceased making payments as of March 20, 2014. They say Avina was four months in default when they made a demand for payment on August 13, 2014.
- [20] The most significant dispute between the parties is with regard to the Aurcana shares and whether they constituted collateral for the loan, or whether they were payment toward the debt. Avina says they were payment, worth approximately \$50,000. The defendants say they were simply collateral for the loan. Rodriguez returned the shares to Avina in May 2014, at which time they were cashed in for only \$4,187.50.
- [21] Sometime between May and September 2014, Rodriguez moved the Vessel from its moorage at 1000 Beach Marina in Vancouver, to its current location at the marina on Bowen Island. On September 10, 2014 Rodriguez told Avina that he was no longer entitled to use the Vessel and that any attempt to use it would be considered trespassing.
- [22] According to Avina, since the fall of 2013, the defendants have been unwilling or unable to make necessary payments relating to the Vessel and the Vessel is not being properly maintained. Avina says the Vessel is deteriorating and therefore needs to be sold.

4. THE ARREST WARRANT

[23] In connection with the current action commenced by Avina, Neela Wickberg swore an Affidavit to Lead Warrant on February 23, 2015 in support of a without notice application for a warrant for the arrest of the Vessel. The affidavit, which described the subject Vessel Sea Senor as bearing license No. BC651912 and Hull Number MPTGM216K607, attested to the fact that Avina's action was, among other things:

...a claim with respect to title, possession or ownership of a ship or any part interest therein pursuant to the Federal Courts Act, section 22(2)(a), a claim relating to any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship pursuant to the Federal Courts Act, section 22(2)(b) and a claim in respect of goods, materials or services supplied to the Defendant ship for its operation or maintenance pursuant to the Federal Courts Act, section 22(2)(m) on the basis of which basis the Plaintiff invokes the in rem jurisdiction of this court.

[24] The arrest warrant was issued by this Court on February 25, 2015, and the Vessel was arrested the same day at Union Steamship Marina, Bowen Island, British Columbia. The Vessel remains under arrest at that location. The defendants have not posted bail or provided security for its release.

[25] The defendants now apply for an order setting aside the arrest warrant "for want of jurisdiction", on the basis that:

- a. There is no basis in law for an exercise of maritime law jurisdiction as the matter is a shareholder's dispute; and
- b. further, and in the alternative, the agreement between the parties is, in substance, a secured transaction and the debtor has exercised its right of voluntary foreclosure.

[26] The warrant was issued pursuant Rule 21-1 of the Supreme Court Civil Rules. Rule 21-1(1) stipulates that the rule applies if an action may be brought in rem against a ship or other property. The in rem jurisdiction of this Court is explained in Rule 21-1(2):

21-1(2) Except to the extent that jurisdiction has been otherwise specially assigned, an action may be brought in rem against a ship or other property that may be brought in rem in the Federal Court of Canada in all cases in which a claim for relief is made under or by virtue of Canadian maritime law or any other law of Canada relating to navigation and shipping.

[27] It appears from that rule that the action must be one that could have been brought in rem in the Federal Court of Canada and must be a claim for relief under or by virtue of Canadian maritime law or any other law of Canada relating to navigation and shipping.

[28] The Affidavit to Lead Warrant referred to ss. 22(2)(a), (b) and (m) of the Federal Courts Act, R.S.C. 1985, c. F-7. Sections 22(1), 22(2)(a), (b) and (m), and 22(3)(a) of that Act provide:

22 (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

- (a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;
- (b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;

...

- (m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

...

(3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies

- (a) in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;

[29] In *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752, McIntyre J. set out three factors for determining jurisdiction at p. 766:

The question of the Federal Court's jurisdiction arises in this case in the context of Miida's claim against ITO, a claim involving the negligence of a stevedore-terminal operator in the post-discharge storage of the consignee's goods. The general extent of the jurisdiction of the Federal Court has been the subject of much judicial consideration in recent years. In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, and in *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, the essential requirements to support a finding of jurisdiction in the Federal Court were established. They are:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the Constitution Act, 1867.

[30] He went on to say at p. 774:

In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the Constitution Act, 1867. It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence.

[31] Of the three factors set out in ITO, the parties are in agreement that the first and the third are present in this case. The defendants submit, however, that factor 2 is absent, because in this case the parties to the dispute are both resident in British Columbia, the contract was formed in British Columbia, the vessel is in British Columbia, and there is nothing to take this case out of the confines of purely provincial law relating to property and civil rights. In particular, the defendants submit that the present dispute is not rooted in maritime law because:

- a. There is no dispute or claim to ownership, title, or possession of the Vessel: that ownership is vested exclusively in Sea-Chariot.
- b. There is no question arising between co-owners of a ship with respect to possession of a ship: Sea-Chariot is the only owner of the Vessel.

[32] In *Sargeant v. Al-Saleh*, 2014 FCA 302, the Federal Court of Appeal held at para. 92 that a claim is indisputably rooted in Canadian maritime law if it falls within one of the heads found in s. 22(2) of the Federal Courts Act:

[92] There can be no doubt whatsoever that once a claim is held to fall within one of the heads found in subsection 22(2) of the Act, there is necessarily substantive maritime law to support the claim (*Siemens Canada Ltd. v. J.D. Irving Ltd.*, 2012 FCA 225, [2012] F.C.J. No. 1120 at para. 35; *Skaarup Shipping Corporation v. Hawker Industries Limited* [1980] 2 F.C. 746 (F.C.A.) at para. 7). In other words, if it is determined that a claim falls under any of the heads described in subsection 22(2), it cannot, in my respectful view, be argued that such a claim is not one that is rooted in Canadian maritime law or any other law of Canada relating to navigation and shipping.

[33] The defendants submit that legal title to the Vessel is held by Sea-Chariot, and therefore, the present claim cannot be a claim with respect to ownership or a dispute between co-owners of the Vessel under ss. 22(2)(a) or (b) of the Federal Courts Act. I do not agree. In Avina's notice of civil claim the relief sought includes:

A declaration that the Plaintiff has a 50% beneficial and legal ownership and interest in the Vessel;

[34] It is not for me, on this application, to determine the validity of the plaintiff's claim. That is a matter to be determined at trial. I am satisfied, however, that the claim is a claim "with respect to title, possession or ownership of a ship or any part interest therein" within the meaning of s. 22(2)(a) of the Federal Courts Act. Pursuant to *Sargeant v. Al-Saleh*, it is therefore rooted in Canadian maritime law.

[35] The application to set aside the arrest warrant for want of jurisdiction is dismissed.

5. THE APPLICATION UNDER THE PPSA

[36] The defendants seek a declaration that Avina is in default of his payment obligations under a security agreement pursuant to s. 56(2) of the PPSA, that Sea-Chariot or Rodriguez was within its rights when it seized the Vessel following the default, and that Sea-Chariot has the right to dispose of the Vessel in order to recoup the debt, pursuant to s. 59(2) of the PPSA.

[37] Avina disputes the allegation that the transaction was tantamount to a conditional sale, as there was no agreement that the Vessel would be collateral for the loan.

[38] Moreover, he disputes that the defendants have given proper notice under the PPSA. Section 72(1)(a) of the PPSA provides:

72 (1) A copy of a financing statement referred to in section 43 (15), a copy of a verification statement referred to in section 43 (15), a notice under this Act, a copy of a notice of seizure referred to in section 58 (2) (e) (ii) or a demand under this Act, other than a demand under section 18, may be given to

(a) an individual, by leaving it with the individual or by sending it by registered mail addressed to

(i) the individual by name at the individual's residence, or

(ii) if the individual is the sole proprietor of a business, the name of the individual at the address of the business,

[39] Avina says that he was never personally served, nor was notice sent to him by registered mail.

[40] In the present case, there are critical facts in dispute that would need to be resolved in order to determine the PPSA issues. In particular, were the 50,000 Aurcana Shares given in part payment or as collateral? This issue requires a credibility assessment which cannot properly be accomplished based simply on the affidavit evidence before me.

[41] Section 70 of the PPSA provides that on an application under the Act, the Court may direct an action to be brought or an issue to be tried. I direct that if the defendants wish to pursue the issues raised on this application under the PPSA, they can only do so at trial.

6. AVINA'S APPLICATION FOR SALE

[42] Avina has applied under Rule 13-5(1) for an order for the sale of the Vessel and for the proceeds to be held in trust by Avina's solicitors pending further order of this Court or the written agreement of counsel for the parties. An order for sale is also one of the items of relief sought by Avina in his notice of civil claim. The issue before me now is whether to make an order for sale at this time rather than determining the issue at trial.

[43] Pursuant to Rule 21-1(16), possession and responsibility for arrested property continues in the person or persons who were in possession immediately before the arrest. Avina submits that since the time of the arrest, the defendants have allowed the Vessel to deteriorate, and a court ordered sale is required now to halt the diminution of its value.

[44] Rule 13-5(1) provides:

13-5 (1) If in a proceeding it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[45] In *Franklin Lumber Ltd. v. The Essington II, (Ship)*, 2005 FC 95, at para. 53 the Court suggested consideration of the following factors on an application for sale before trial:

1. The value of the vessel compared with the amount of the claim;
2. Whether there is an arguable defence;
3. Can the owner carry on: is it reasonable to assume that there must be a sale of the vessel at some point;
4. Whether there will be any diminution in the value of the vessel or of the sale price by the delay, including the cost of keeping a man or a crew aboard the vessel the cost of maintaining the vessel and the cost of insuring the vessel;
5. Whether the vessel will depreciate by further delay;
6. Whether there is any good reason for a sale before trial.

[46] The plaintiff relies on Affidavit #1 of Avina, where at paragraph 27 he deposes that he viewed the Vessel on September 25, 2015 and saw that it was untidy, dirty, and moldy, there were dents and scratches on the hull, the dinghy was partially deflated, and there was maritime growth below the waterline. Exhibits "Y" and "Z" to that affidavit are photographs. The plaintiff also relies on Affidavit #1 of J. Connolly, who made similar observations at paragraphs 3 and 4, with photographs at Exhibits "A" and "B".

[47] The defendants rely on Affidavit #1 of Rodriguez, who deposed at paragraph 33 that there is no serious deterioration and the issues raised by the plaintiff are largely cosmetic. The defendants also rely on Affidavit #1 of George Shinas, who deposed that the issues raised in the affidavit of Mr. Connolly are minor, and could be remedied at a modest cost.

- [48] In *Moody Estate*, 2008 BCSC 786, the Court set out at paras. 18 to 27 that the exercise of the broad discretion under the Rule requires that a sale be either necessary or expedient (at para. 27). At para. 20, the Court said that "What is expedient has been determined, in a matrimonial property context to be 'advantageous to both parties.'"
- [49] In this case, there has been no appraisal of the Vessel. Although an appraisal may not be an absolute requirement on an application for sale, the lack of an appraisal makes it more difficult for Avina, as the applicant, to establish that the value of his claim is close to the value of the Vessel, and to establish that there has been serious deterioration and diminution of value since the Vessel was arrested.
- [50] I am inclined to accept the defendants' submission that the condition of the Vessel is not seriously deteriorating and that the deficiencies noted by Avina and Connolly are minor and merely cosmetic.
- [51] I also accept the defendants' submission that the dollar value of Avina's claim is modest compared to the value of the Vessel. The defendants submit that the most reasonable estimate of Avina's claim is around \$70,000, whereas the value of the Vessel may be as much as \$213,000.
- [52] It appears that the defendants have an arguable defence to Avina's claim, although the relative strength of the two positions can only be determined following a trial.
- [53] In all the circumstances, I am not satisfied that an order for sale of the Vessel is necessary or expedient at this time.
- [54] The application for an order for sale under Rule 13-5(1) is dismissed.
7. COSTS
- [55] As both parties brought applications, and as both were unsuccessful, neither party shall have an order for costs in their favour.

The Honourable Mr. Justice W.F. Ehrcke

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