
CANADA / JUDGMENT

Buhecha v. Impact Imaging Ltd.

2019 BCSC 663

COURT

Supreme Court of British Columbia

DECIDED

29 April 2019

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2019 BCSC 663 Buhecha v. Impact Imaging Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buhecha v. Impact Imaging Ltd.,

2019 BCSC 663

Date: 20190429

Docket: S199891

Registry: New Westminster

Between:

Nikhil Buhecha

Plaintiff

And

Impact Imaging Ltd. and Rajinder Bhatti

Defendants

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiff:

S. Lavrisa

Counsel for the Defendants:

A. Dosanjh

V. Broughton

Place and Date of Hearing:

New Westminster, B.C.

April 2, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 29, 2019

- [1] The plaintiff is a pharmacist, and was principal of The Chemist Holdings Ltd. ("The Chemist"), a now-dissolved British Columbia corporation and one of several companies through which he owned pharmacies in British Columbia. The plaintiff is suing the defendants on a debt alleged to be owed by the defendants to The Chemist, with the plaintiff purporting to be the assignee of the rights of The Chemist under a loan agreement.
- [2] The defendants now move to strike the Notice of Civil Claim ["NCC"] under Rule 9-5 of the Supreme Court Civil Rules, and to dismiss the plaintiff's action under Rule 9-6, principally on the basis of deficiencies in the assignment.
- [3] The NCC, filed March 2, 2018, alleges an agreement made in December 2013 under which The Chemist lent \$250,000 to the defendants - Impact Imaging Ltd. ("Impact") and its principal, Rajinder Bhatti - and, as security and in consideration for the loan, The Chemist was to receive 30% of the issued and outstanding shares in Impact. It is alleged that various payments toward the principal amount of the loan were made by the defendants over approximately a two-year period following the fifth and final instalment of the loan, but that \$135,000 remains due and owing; and, that the shares in Impact were never issued. It is alleged that The Chemist has assigned its cause of action to the plaintiff. The plaintiff claims judgment for the outstanding amount of the debt, an accounting of the value of the shares, and judgment for the value of the shares.
- [4] A BC Registry Services Company Summary in evidence confirms that The Chemist was dissolved for failure to file, October 31, 2017.
- [5] The plaintiff made efforts to serve Ms. Bhatti personally beginning on March 9, 2018. When those efforts were unsuccessful, the plaintiff attempted to serve Impact by way of registered mail on April 30, 2018, but sent the NCC to a previous registered and records office address. Counsel for the defendants learned of this attempt and contacted counsel for the plaintiff, offering to accept service; service was effected on May 2, 2018.

- [6] It is common ground that service of the NCC on that date, with its allegation of an assignment of the cause of action, constituted the first notice to the defendants of the assignment. This is confirmed by way of particulars of the claim delivered by counsel for the plaintiffs. On June 18, 2018, counsel for the defendants demanded particulars of the date and terms of the assignment, and whether it was in writing. The plaintiff's Response to Demand for Particulars dated June 27, 2018, disclosed the following:
1. The date of the assignment is February 27, 2015.
 2. The assignment was an absolute assignment of the loan from The Chemist Holdings Ltd. to Nikhil Buhecha in return for a set off of an equivalent amount of debt owed by The Chemist Holdings Ltd. to corporations controlled by Nikhil Buhecha.
 3. The assignment is in writing.
- [7] By way of a further letter from counsel dated June 28, 2018, the defendants sought further particulars of the alleged assignment, including whether and when express notice was given. The plaintiff responded with a further formal Response to Demand for Particulars, dated July 9, 2018:
1. Express notice of the assignment was given in writing within the Notice of Civil Claim. The Notice of Civil Claim was delivered on May 2, 2018.
- ...
- [8] Counsel for the defendants asked counsel for the plaintiff by way of letters dated June 7, and June 18, 2018, and by email dated June 19, 2018, to take steps to add The Chemist as a party to the action. By way of email dated June 21, 2018, counsel for the plaintiff declined to do so as the pleadings "refer to a legal assignment not an equitable one". Counsel for the plaintiff confirmed at the commencement of the hearing of this application that the plaintiff is not relying on an equitable assignment.
- [9] In an affidavit filed January 24, 2019, in response to this application, a Ms. Sandhu, holder of a power of attorney for the plaintiff, states on the basis of information from the plaintiff, and belief, that either of the defendants or both of them made payments to the plaintiff, or to both The Chemist and the plaintiff, towards repayment of the loan commencing in April 2015 and ending March 22, 2016, totalling \$115,000.
- [10] To that affidavit of Ms. Sandhu is appended the written assignment agreement between The Chemist as assignor and the plaintiff as assignee, dated February 27, 2015. After setting out the amounts of the loan made by The Chemist, the recitals to the assignment state:
- B. The Assignee controls the Assignor and a group of companies affiliated with the Assignor including, without limitation, Renuka Holdings Ltd. ("Renuka"), Abbott Renuka Pharmacy Ltd., and New Era Pharmacy Ltd. (the "Affiliates").

C. The Assignee has agreed to cause Renuka to sell (the "Sale") all of its right title and interest in and to all the issued and outstanding shares of the Assignor (the "Assignor Shares") to Mehdi Mirzaei ("Mehdi") on or about February 27, 2015.

D. The Assignor is indebted to the Affiliates in excess of the Loan amount (the "Affiliate Debt") which Renuka and Mehdi agreed is not to be included in the assets of the Assignor after the Sale.

E. The Assignor has agreed to assign the Loan and all rights related thereto, to the Assignee provide the Assignee causes the Affiliates to set off an equivalent amount against the Affiliate Debt (the "Set Off Amount"), which the Assignee has agreed to do on the terms and conditions set out herein.

The assignment then includes the following term:

5. For greater clarity, and without limiting the generality hereof the Assignor hereby assigns, grants, transfers and sets over absolutely and unconditionally to the Assignee:
 - (a) any civil remedies connected to the Loan along with any proceeds derived therefrom.

[Emphasis added.]

[11] In addition, it must be noted that in her affidavit dated November 22, 2018, the defendant Ms. Bhatti denies any indebtedness to The Chemist or to Mr. Buhecha. Whether this denial is based on The Chemist never having advanced monies, or a defence of payment of accord and satisfaction, or some other legal basis for maintaining that the loan has been extinguished, is not clear. The defendants' Response to Notice of Civil Claim pleads under "Part 3: Legal Basis" that the loan is denied, but under "Part 1, Division 2 - Defendants' Version of Facts", there are no facts pleaded that contradict the factual allegations in the NCC.

[12] On this application, the defendants advance four grounds for striking the NCC and/or dismissing the action: the assignment not having been absolute and thus discloses no cause of action; the lack of prior written notice of the assignment; a limitations issue arising out of notice only having been given through service of the pleadings; and indications of abuse of process. I deal with each separately.

[13] The first three of these four grounds advanced by the defendants on the present application relate to the sufficiency of the assignment, in respect of compliance with the requirements of s. 36 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA]:

36(1) An absolute assignment, in writing signed by the assignor, not purporting to be by way of charge only, of a debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, is and is deemed to have been effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been enacted, to pass and transfer the legal right to the debt or chose in action from the date of the notice, and all legal and other remedies for the debt or chose in action, and

the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.

[14] First, the defendants say that the assignment was not absolute but was partial only. They submit that although the NCC includes in its prayer for relief judgment for the value of the shares, the assignment, as described in the particulars, was for the debt only, and the NCC does not describe the "Loan" as including the shares. The same is true of the assignment form itself. However, the assignment form describes in its recitals an agreement between The Chemist and the plaintiff to include in the assignment "all rights related" to the Loan, and the form purports to assign "any civil remedies connected to the Loan." Those phrases in both the recitals and the term of the assignment previously mentioned, are broad enough to encompass an assignment of rights respecting the shares, in the context of the allegations pleaded. It is evident that the purported assignment was absolute.

[15] The other objections related to the assignment that the defendants raise are more substantial.

[16] Section 36 of the LEA provides that for an assignment to be effectual in law, there must have been express written notice. There is strong precedent in this court and others for strict application of the notice requirement: see *Lee v. K-Leigh Holdings Ltd.*, [1997] B.C.J. No. 2808 (S.C.) (QL); *DiGuilo v. Boland*, [1958] O.R. 384 (C.A.) [DiGuilo], leave to appeal ref'd [1961] S.C.C.A. No. 1; *Griffiths v. Kenny*, [1917] 1 W.W.R. 800 (B.C.S.C.); *United Metal Fabrications Ltd. v. Voth Bros. Const. (1974) Ltd.*, [1987] B.C.J. No. 1916 (S.C.) (QL) [United Metal]; and *588839 B.C. Ltd. v. D H Ventures Ltd.*, 2002 BCSC 1063 (CanLII). The point was stated most emphatically by Southin J., as she then was, in *United Metal*:

I take it to be clear law that before the enactment in 1879 of what is now s. 32 of the Law and Equity Act, (see Statutes of British Columbia, 1879, c. 12, s. 6), an assignee had to sue in the name of his assignor although he might also be a Plaintiff. The reason was that legal title to the debt could not pass without the assent of the debtor.

Thus, an action at law by the assignee of a chose in action to recover upon that chose in his name alone was bound to fail for want of parties. The express notice provided for in s. 32 perfects the legal title. It must be given before the action is brought (see *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.*, [1964] 1 All E.R. 216 at 235, letter C, Roskill J., as he then was) and must be accurate in every particular. (See *W.F. Harrison & Co., Ltd. v. Burke and Another*, [1956] 2 All E.R. 169 (C.A.).

[17] In the present case, no such notice was given prior to the NCC being filed. The assignment was therefore, at the point in time when the action was initiated, of no effect in law, and the plaintiff did not possess a cause of action. Under that line of authority, the action was a nullity. The authorities cited do not preclude an assignor claiming as an equitable assignee; but a suit on an equitable assignment must be brought in the name of the assignor, in recognition that the assignee holds no legal claim: *Dell v. Saunders* (1914), 17 D.L.R. 279 (B.C.C.A.); *The United States Fidelity & Guarantee Co. v. Deisler* (1917), 59 S.C.R. 676, 49

D.L.R. 688; *Brown v. British Columbia Electric Railway Co.*, [1925] 3 D.L.R. 734 (B.C.C.A.).

- [18] The plaintiff Mr. Buhecha, relies on two decisions of this Court in which service of initiating pleadings with no prior notice was held to meet the notice requirement in s. 36. The first of these was *O.T.S. Overseas Transport Systems Inc. v. Neto Investments Ltd.* (1991), 59 B.C.L.R. (2d) 35 [O.T.S.], in which Wetmore J. determined that strict application of the requirement for prior written notice went beyond the remedial purpose of the legislation. Addressing the argument that in the absence of notice there was no cause of action when the action was commenced, he said:

In my view, this is to ignore the purpose of s. 32 [now s. 36] and the remedial purpose of the Law and Equity Act and its predecessor, the Judicature Act. The purpose was to remedy and expedite the fusion of law and equity; at the same time protecting those principles of equity which remedied the failings of the common law. The purpose, as I mentioned earlier in these reasons, was not to defeat just claims.

If in fact the defendant had discharged the debt before notice, or if a priority or set off was impaired through acts done in good faith by the debtor, other equitable considerations would intervene. That, however, is not the case at Bar.

In my view, the proper interpretation is that the pleadings themselves can constitute express notice of the right to make claim. At that point the defendant debtor has not been jeopardized in denial of the debt or other defence such as set off or defence of satisfaction of the debt before receiving that notice.

- [19] In *CIBC v. Dunne*, 2003 BCSC 1594, Allan J. held that at least for the purposes of the application before her - like the present case, an application to strike the pleadings - O.T.S. was determinative; however, she held that the defendant could still pursue a defence based on notice.
- [20] In *Link v. Texas Oil & Gas Inc.*, 2007 BCSC 1205, Neilson J., as she then was, relying on O.T.S., held that in the absence of prejudice to a debtor arising out of lack of prior notice, the notice requirement had been met by the pleadings.
- [21] Justice Wetmore's explication in O.T.S. of s. 36's purpose - that it exists simply to protect debtors who without notice of the assignment might mistakenly pay the assignor - was also cited in *Pro-Mor Mortgage Services Ltd. v. Smith*, 2010 BCSC 782; *Rakhra v. Jhutti*, 2012 BCSC 882; *FortisBC Energy Inc. v. Surrey (City)*, 2013 BCSC 2382. (See also *First City Trust Company v. The Bridges Café Ltd.*, 1993 CanLII 1987 (B.C.S.C)).
- [22] The defendants urge me to disregard O.T.S. Counsel for the defendants submits that the full historical context of s. 36, as outlined, for example, by Newbury J.A. in *Brio Beverages (B.C.) Inc. v. Koala Beverages Limited*, [1999] 6 W.W.R. 219 (B.C.C.A.), and by Morden J.A. in *DiGuilo*, reveals that Wetmore J.'s conclusion as to the purpose of the legislation was incorrect, and militates against a flexible approach to the statutory requirements for validating an assignment. They further submit that as O.T.S. did not consider *United Metal*,

it can and should be disregarded, having violated the rule of stare decisis.

- [23] I do not read O.T.S. however as creating a blanket rule that an allegation of an assignment in the pleadings will serve as notice in all cases. At most, it seems to stand for the proposition that equitable considerations in a particular case might justify loosening the strict requirements of the statute. A flexible approach to s. 36 was endorsed by Gaul J. in *Mega Building Systems Inc. v. Ledcor Construction Limited*, 2010 BCSC 2027. That manner of applying the legislation is now too well-entrenched to disregard.
- [24] Under this flexible approach, do the circumstances of the present case favour loosening the strict requirements of the legislation? This question brings us to the third and fourth grounds of the defendants' application.
- [25] The limitations issue, as stated above, arises out of the notice only having been given through service of the pleadings. Affidavit evidence filed by the plaintiff evidencing the loan states that the loan monies were first advanced by way of an instalment payment made January 9, 2014, and the defendants made their last payment towards the outstanding principal indebtedness on March 22, 2016. The defendants submit on the basis of this evidence that the two-year limitation period for suing on the debt would have begun to run no later than the date of that last payment - as it constituted an acknowledgment of the cause of action - and that the limitation period therefore expired no later than March 22, 2018 - about six weeks before the NCC was served. The defendants say that even if service of the NCC cured the defect in the plaintiff's cause of action at the time the action was commenced, that service cannot have retroactive effect; the assignment did not become effective at law until it was served on May 2, 2018, and therefore no effective action, recognized by law, was commenced before the limitation period expired.
- [26] This analysis of the interplay between the limitation period for the action on the loan, and the assignment, presumes that the loan was a demand loan, so that the limitation period would have run from the point in time when monies were first advanced, with subsequent payments serving as acknowledgments of the cause of action that extended the limitation period. (See *Grimsley v. Roe*, 2018 BCSC 985 at para. 61). However, the NCC makes no allegation as to the term of the loan. Furthermore, the plaintiff's affidavit materials set out a volume of correspondence between the plaintiff and the defendant Ms. Bhatti, and a number of draft written loan agreements, which may evidence negotiation away from the initial proposal of a demand loan, to a loan with a fixed due date: May 27, 2017 on one draft; February 1, 2018 on another. If this was in fact a term loan, the limitations defence now asserted by the defendants might not apply.
- [27] This limitation period argument was not set out in the defendants' Notice of Application. Counsel for the plaintiff agreed, in the course of submissions, that it was open to the defendants to attempt to establish a limitations defence as a basis for striking the claim under Rule 9-5. However, counsel made no argument as to how the nature of the loan could affect calculation of the limitation period. Instead, the plaintiff's submissions on this point

were confined to arguing, on the basis of an affidavit of attempted service, that good faith efforts were made to effect service on the defendant Ms. Bhatti prior to March 22, 2018, the date the defendants contend the limitation period expired. I am not persuaded that the efforts made could overcome the limitations defence being advanced; there is no evidence of the defendant Ms. Bhatti having evaded service, and the plaintiff chose to attempt to serve Ms. Bhatti first, when service easily could have been effected upon Impact directly following the filing of the NCC.

- [28] Be that as it may, I do not find there is sufficient evidence of the terms of the loan to characterize the loan and determine when the limitation period for an action on the loan agreement commenced. The limitations defence the defendants advance is not a basis for striking the NCC at this time; however, it may be a defence the defendants are entitled to pursue if the action proceeds.
- [29] This brings me to the final ground asserted by the defendants, the abuse of process argument. The defendants say there are a number of "red flag" indications of questionable conduct on the part of Mr. Buhecha and The Chemist, such that there is a real basis for concern with this action not having been brought by The Chemist. The defendants have produced evidence of the following facts:
1. On May 5, 2015, just over two months after the assignment was made, foreclosure proceedings were brought against The Chemist and other pharmacies owned by the plaintiff Mr. Buhecha, with Order Nisi being granted June 11, 2015;
 2. In June 2015, Pharmacare revoked the Pharmacare licenses of some or all of the plaintiff's pharmacies;
 3. On August 25, 2015, the Bank of Montreal was granted an order appointing a Receiver over the assets, properties, and undertakings of The Chemist, Abbott Renuka Pharmacy Ltd. (which is named as an affiliated company in the form of assignment), and The Chemist #9 Pharmacy Ltd. (presumed to be an affiliated company);
 4. On October 19, 2015, the College of Pharmacists issued a professional discipline citation against the plaintiff, which was resolved in July 2016 by way of an order under which the plaintiff's registration as a pharmacist was suspended for three years, and the plaintiff was placed under a 5-year prohibition on being an owner or director of a British Columbia pharmacy;
 5. On April 5, 2017, the plaintiff was charged under a Grand Jury Indictment issued out of the U.S. District Court for the Eastern District of Missouri, with conspiracy, smuggling, and mail fraud, in relation to shipments of illegal prescription drugs made between 2009 and 2013. The plaintiff pleaded guilty on April 4, 2018 and was sentenced to 36 months' imprisonment;

6. A court order made July 19, 2017, discharged the receiver appointed over the assets of The Chemist and others. The Receiver's notice of application seeking discharge indicated that net receipts of only approximately \$1.8 Million had been recovered against judgments in the amount of more than \$10.0 Million (including judgment against The Chemist for \$10,303,664.00).
- [30] The defendants say that these circumstances - unrefuted by the plaintiff - support an inference that The Chemist was in significant financial difficulty at the time the assignment was made, and that the assignment was made to frustrate creditors and subvert the pending receivership; they submit that without the assignor being a party to these proceedings, the assignment might be subject to attack by the receiver. As noted above, the defendants asked the plaintiff to add The Chemist as a plaintiff, but the plaintiff declined to do so. They submit that the plaintiff's failure to respond substantively to this position should lead to this action being treated as an abuse of process; and that, having failed to add the assignor as a party when requested, the plaintiff should not now be given additional opportunity to do so.
- [31] The circumstances outlined above do raise significant concerns as to the legitimacy of the assignment, that can be addressed only through The Chemist participating in the proceedings. However, I find the evidence is not conclusive enough to lead to the action being dismissed as an abuse of process. Further, I do not infer an abuse from the plaintiff's failure to add The Chemist as a plaintiff. As I previously stated, enforcement of an equitable assignment by an assignee must be done in the name of the assignor (see Dell), however, the plaintiff has consistently maintained that the assignment was a legal one and entitled the plaintiff to bring the action in his own name, and proper, prior written notice under the LEA could have been given to the defendants at any time prior to service of the NCC. For those same reasons, I find the plaintiff's failure to add The Chemist up to the present point in time should not bar the plaintiff from now seeking to do so.
- [32] I do not find it appropriate, in the circumstances, to allow the service of the NCC to meet the written notice requirement in s. 36 of the LEA. I reach this conclusion primarily because of the concerns as to the legitimacy of the assignment, and the strict requirements of the statute. These considerations weigh in favour of the assignment being found invalid as a legal assignment under the LEA.
- [33] However, there is still a substantive question as to the defendants' indebtedness, and I find it is in the interest of justice to allow the plaintiff the opportunity to recast its claim as being brought under an equitable assignment. As The Chemist has been dissolved, the plaintiff must also be given enough time to gazette notice of a restoration application, and then to make the necessary applications to the Court and to the Registrar of Companies.
- [34] I therefore order as follows:
1. The plaintiff is at liberty to:
 - i. Seek restoration of The Chemist Holdings Ltd.; and, if restoration is allowed,

ii. Apply to this Court to

- (a) add The Chemist Holdings Ltd. as a plaintiff; and,
 - (b) amend the NCC to plead that the assignment referred to in paragraph 13 of the NCC is an equitable assignment, and that The Chemist Holdings Ltd. claims as assignor and Nikhil Buhecha as assignee;
2. If an application for restoration of The Chemist Holdings Ltd. is not made and an application by the plaintiff to this Court to add The Chemist Holdings Ltd. and amend the NCC is not filed within four months of the date of these Reasons, such time period being subject to variance on further order of the Court, the defendants may re-apply for the action to be dismissed, in accordance with these reasons.
- [35] If the plaintiff pursues this course and brings an application to add The Chemist as a party, the defendants will be at liberty to raise their potential limitations defence in their Application Response; however, this grant of liberty will not fetter the ability of the application judge to allow the application, while preserving the defendants' right to plead a limitations defence and have that defence determined as a triable issue.
- [36] The defendants have been substantially successful on this application, and shall have their costs of this application in any event of the cause, payable forthwith.

"A. Saunders J."

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