

CANADA / JUDGMENT

Canada v. Bernard

2006 FC 1074

COURT

Federal Court

DECIDED

7 September 2006

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Decision Content

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Docket: T-729-05

Citation: 2006 FC 1074

Ottawa, Ontario, September 7, 2006

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

Her Majesty the Queen

Plaintiff

and

Douglas Bernard

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion by Her Majesty the Queen (Plaintiff) for summary judgment against Douglas Bernard (Defendant) pursuant to Rules 213-219 of the Federal Court Rules, S.O.R./1998-106.

I. Background

[2] On October 22, 1993, Douglas Earl Bernard (Defendant) applied in writing to the Canadian Wheat Board (CWB) for an advance payment under the Prairie Grain Advance Payments Act, R.S.C. 1985, c. P-18, as rep. by Agricultural Marketing Programs Act, 1997, c. 20, s. 46 (PGAPA). In response to this application, on December 1, 1993, the Defendant received a cash advance in the sum of \$50,012.00.

[3] In 1994, after crop failures in 1991, 1992 and 1993 due to frost, rain and a midge infestation respectively, the Defendant ceased farming. Given the crop failures, the Defendant defaulted in repaying his advance payment on August 23, 1994. On that

date, the outstanding balance of the cash advance together with interest was \$50,834.92.

[4] Although in financial hardship, the Defendant did not file for bankruptcy. Instead, he chose to negotiate settlements with most of his creditors. In what concerns his PGAPA advance payment, on September 16, 1998, the Plaintiff and the Defendant entered into a Compromise Settlement Agreement. Under the Compromise Settlement Agreement, the Defendant agreed to pay the Plaintiff \$30,000.00 by an initial payment of \$2,000.00 plus monthly instalments of \$500.00 commencing June 1, 1998 and ending February 1, 2004 at 0 percent interest in lieu of \$69,836.27, the amount including interest owing at that time.

[5] The Defendant made payments totalling \$18,000.00 under the Compromise Settlement Agreement until he lost his job in January 2002. Consequently, on February 1, 2002 the Defendant failed to make the required payment to the Plaintiff as per the Compromise Settlement Agreement and was considered in default.

[6] After defaulting on his repayment obligations on February 1, 2002, the Defendant alleges he contacted Christine Doe of the CWB on several occasions, leaving voice mails, so as to make arrangements for reinitiating payments when his financial situation permitted him to do so. The Defendant claims he received no response from the CWB, leading him to believe that the CWB had accepted his repayment of \$18,000.00 under the Compromise Settlement Agreement as a full settlement of his advance payment debt and had closed his file.

[7] On February 17, 2004, the Plaintiff sent the Defendant a final demand for payment. After no response to the demand was received, the Plaintiff proceeded to file a statement of claim against the Defendant in the Federal Court on April 21, 2005.

[8] The Defendant served a statement of defence on the Plaintiff on June 7, 2005 but did not file a copy with the court. Thus, on January 18, 2006 the Defendant applied to the court for an extension of time to file the Statement of Defence. The extension was granted by Prothonotary Lafrenière on January 20, 2006. The Defendant's statement of defence was filed with the court on January 31, 2006.

II. Analysis

[9] Rule 213 of the Federal Courts Rules provides for the availability of summary judgment to a plaintiff where the defendant has filed a defence.

213. (1) A plaintiff may, after the defendant has filed a defence, or earlier with leave of the Court, and at any time before the time and place for trial are fixed, bring a motion for summary judgment on all or part of the claim set out in the statement of claim.

(2) A defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.

213. (1) Le demandeur peut, après le dépôt de la défense du défendeur — ou avant si la Cour l'autorise — et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire sur tout ou partie de la réclamation contenue dans la déclaration.

(2) Le défendeur peut, après avoir signifié et déposé sa défense et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire rejetant tout ou partie de la réclamation contenue dans la déclaration.

[10] Rule 216 of the Federal Courts Rules provides for the circumstance under which a motion for summary judgment will be successful:

216. (1) Where on a motion for summary judgment the Court is satisfied that there is

no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

(3) Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

216. (1) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est :

a) le montant auquel le requérant a droit, elle peut ordonner l'instruction de la question ou rendre un jugement sommaire assorti d'un renvoi pour détermination du montant conformément à la règle 153;

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

Jugement de la Cour

(3) Lorsque, par suite d'une requête en jugement sommaire, la Cour conclut qu'il existe une véritable question litigieuse à l'égard d'une déclaration ou d'une défense, elle peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question particulière, soit de façon générale, si elle parvient à partir de l'ensemble de la preuve à dégager les faits nécessaires pour trancher les questions de fait et de droit.

[11] In the matter of Granville Shipping Co. v. Pegasus Lines Ltd, [1996] 2 F.C. 853, affirmed by the Federal Court of Appeal in ITV Technologies Inc. v. WIC Television Ltd., 2001 FCA 11, Justice Tremblay-Lamer identifies the general principles pertaining to summary judgment:

I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al);²

2. there is no determinative test (Feoso Oil Ltd. v. Sarla (The))³ but Stone J.A. seems to have adopted the reasons of Henry J. in Pizza Pizza Ltd. v. Gillespie.⁴ It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;

3. each case should be interpreted in reference to its own contextual framework (Blyth⁵ and Feoso);⁶

4. provincial practice rules (especially Rule 20 of the Ontario Rules of Civil Procedure, [R.R.O. 1990, Reg. 194]) can aid in interpretation (Feoso⁷ and Collie);⁸

5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (Patrick);⁹

6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (Pallman¹⁰ and Sears);¹¹

7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (Forde¹² and Sears).¹³ The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (Stokes).¹⁴

[12] In the case at hand, the Plaintiff requests summary judgment for the amount outstanding under the Compromise Settlement Agreement of September 16, 1998, namely the principle amount of \$12,000.00 plus 8 % interest per annum from the date of default.

[13] In his statement of defence, the Defendant admits to receiving the advance payment under the PGAPA, to entering into the Compromise Settlement Agreement and to being in default of the Compromise Settlement Agreement. The Defendant in his statement of defence, does not dispute any aspects of the Plaintiff's claim, nor does he raise any issues of law. In his statement of defence, the Defendant makes the following statements :

By 1998, it was clear that I had no choice but to sell everything and start over in another location ... Through a long process that I personally initiated, I was able to settle with most of the major creditors ... I must add that I was advised to avoid settling with the Canadian Wheat Board but chose to do so, believe it to be the « right thing to do ». It must be understood that at the time of the agreement, I was suffering from severe depression, and no job to go to and really had absolutely no idea of how I was going to be able to pay the 500.00 per month that was expected. With no job and no source of revenue, 500.00 was a huge amount of money to commit to, but I wanted to do my best and believed it was possible

....

From 1998 to January of 2002, I managed to repay 18,000.00 of the originally agreed upon 50, 834.92 which is more than a third repaid.

In January of 2002, the company I was working for laid me off and I was out of a job. Overnight, I was out of a job and had to rely on unemployment insurance to support my family, which was a significant decrease in our family income. As a result, it was impossible to maintain the 500. payments to CWB ... Although I had every intention to reinstate the payments, there was not enough money and I could not.

[14] This being said, the Defendant alleges that after losing his job in January 2002, he contacted Christine Doe of the CWB on numerous occasions, leaving her voice mail messages, so as to make arrangements for reinstating payments under the Compromise Settlement Arrangement once his financial situation permitted him to do so. The Defendant alleges that Ms. Doe never returned his phone calls. The Defendant further contends that the failure to return his phone calls and the fact that he was never contacted as to his failure to meet his payment obligations under the Compromise Settlement Agreement led him to believe that his repayment of \$18,000.00 had been accepted as a full settlement of his advance payment debt and that consequently the CWB had closed his filed.

[15] Whether the Defendant contacted the CWB to make arrangements for repayment of the advance payment loan after his default in February 1, 2002 and received no response does not raise a genuine issue of fact which could permit the Defendant to mount a defence to the Plaintiff's claim for repayment. Unless the Plaintiff annulled the debt, and there is no evidence that this was the case, the advance payment debt remains and the Plaintiff is entitled to be repaid. The

Plaintiff's subjective belief that the CWB had closed his file does not amount to a defence to the claim for repayment, and as such does not raise any genuine issues for trial.

[16] Thus, none of the general principles established by Justice Tremblay-Lamer in *Granville Shipping Co.* would prevent summary judgment from being granted in this case: there are no genuine issues to be tried; the case is so doubtful that it does not deserve to be considered at trial; it would not be unjust to grant summary judgment; and there are no issues of credibility necessitating that cross-examination before a trial judge take place.

III. Monies Owed and Costs Awards

[17] Under the Compromise Settlement Agreement the Plaintiff was to pay the Defendant \$30,000.00 without interest. Before the Defendant's default in February 2002, the Defendant had repaid \$18,000.00. Leaving the amount owing to the Plaintiff at \$12,000.00.

[18] The date of default is February 1, 2002. Consequently pre-judgment interest to be paid on the amount owing between the date of default and the date of judgment is to be calculated at rate of 8.00% per annum, as is indicated at clause 6 of the Settlement Agreement:

In the event of the Producer's default under the terms of this agreement, the Producer shall consent to Her Majesty taking judgment against him in the amount of the balance of the Producer's full indebtedness owing at the date of the breach, including interest at a rate of 8% per annum, to date of judgment, plus costs of the Judgment.

[Plaintiff's Motion Record, Statement of Claim, Schedule B, page 32]

Furthermore in accordance with the Interest Act, R.S.C., c. I-15, s.3, the Defendant shall pay the Plaintiff post-judgment interest at an annual rate of 5.00% per annum from the date of judgment.

[19] Costs and disbursements will also be awarded to the Plaintiff under Rule 400(4) of the Federal Courts Rules, as per Tariff "B" in the amount of \$734.65.

JUDGMENT

THIS COURT ORDERS that:

- The motion for summary judgment is granted in favour of the Plaintiff. The Plaintiff is to recover \$12 000.00 plus 8 % interest per annum from the date of default, together with costs for a fix amount of \$734.65 and with part-judgment interest at an annual rate of 5% as set by the Interest Act, R.S.C., c. I-15, s.3 from the date of judgment. "Simon Noël" Judge FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-729-05 STYLE OF CAUSE: HER MAJESTY THE QUEEN
- v. DOUGLAS BERNARD PLACE OF HEARING: Vancouver, British Columbia DATE OF HEARING: August 31, 2006 REASONS FOR JUDGMENT AND JUDGMENT: Mr. Justice Simon Noël DATED: September 7, 2006 APPEARANCES: Don Klaassen (DOJ Saskatoon) for Applicant Douglas Bernard for Respondent SOLICITORS OF RECORD: John H. Sims, Q.C. for Applicant Deputy Attorney General of Canada Self Represented for Respondent

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