

CANADA / JUDGMENT

Coast Mountain Aviation Inc. v. Dawn Construction Ltd.

2022 BCSC 760

COURT

Supreme Court of British Columbia

DECIDED

10 May 2022

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2022 BCSC 760 Coast Mountain Aviation Inc. v. Dawn Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Coast Mountain Aviation Inc. v. Dawn Construction Ltd.,

2022 BCSC 760

Date: 20220510

Docket: S194668

Registry: Vancouver

Between:

Coast Mountain Aviation Inc.

Plaintiff

And

Dawn Construction Ltd. and Dawn Diversified Holdings Inc.

Defendants

Before: The Honourable Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:

J. Whyte

Counsel for the Defendants:

No Appearance

Counsel for the Garnishee, BGIS Global Integrated Solutions Canada GP/ BGIS Solutions Globales Integrees Canada S.E.C.:

N. Mann

Counsel for Dawn Construction (2018) Ltd.:

A. Potomak

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 4, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 10, 2022

Introduction

- [1] In this debt recovery action, the applicant seeks a garnishing order absolute against BGIS Global Integrated Solutions Canada GP/ BGIS Solutions Globales Integrees Canada S.E.C. ("BGIS GP") pursuant to s. 11 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 as well as other relief against BGIS GP and BGIS Global Integrated Solutions Canada LP/ BGIS Solutions Globales Integrees Canada S.E.C. ("BGIS LP").
- [2] The plaintiff has sued the defendants, Dawn Construction Ltd. ("DCL") and Dawn Diversified Holdings Ltd. for recovery of a loan made by the plaintiff to the defendants in the amount of \$400,000, plus accumulated interest (the "Loan").
- [3] According to the plaintiff, DCL has accounts receivable from BGIS GP or BGIS LP. On April 29, 2019, the Court issued a garnishing order before judgment (the "BGIS GP Garnishing Order") against BGIS GP. On September 5, 2019, the Court issued a garnishing order before judgment against BGIS LP (the "BGIS LP Garnishing Order") (collectively, the "Garnishing Orders"). Due to a number of complications that have arisen with respect to the Garnishing Orders, neither BGIS GP nor BGIS LP have paid any funds into court pursuant to the Garnishing Orders. However, their counsel advises that BGIS LP is presently holding \$76,334.54 and will pay it out to the appropriate party or into court, depending on the outcome of this application.
- [4] There are two applications before me. In the first, the plaintiff seeks an order that BGIS GP pay into court the amount appearing due from BGIS GP to the defendant plus costs. Alternatively, the plaintiff seeks various other relief to cause either BGIS GP or BGIS LP pay into court the amounts owing by one of them to DCL.

- [5] Meanwhile, Dawn Construction (2018) Ltd. ("Dawn 2018"), a separate legal entity from either of the defendants, has applied for standing in this proceeding and seeks to set aside the Garnishing Orders. Dawn 2018 submits that it has an interest in the funds that are the subject of the Garnishing Orders.

Factual Background

- [6] The outstanding amount of the Loan as at April 10, 2019 was \$426,738.19. The plaintiff commenced this action against DCL and Dawn Diversified Holdings Inc. for recovery of the Loan on April 9, 2019.
- [7] DCL carries on business as a supplier and installer of improvements to commercial premises.
- [8] BGIS LP is a facilities management company that manages the real estate needs of clients in various sectors. One of the services that BGIS LP provides is the management of construction projects. In 2018, BGIS LP acted as authorized agent for Canadian Imperial Bank of Commerce ("CIBC") with respect to the renovation of a CIBC branch in Victoria, B.C. (the "Project"). CIBC hired BGIS LP to act as its agent and manage the Project.
- [9] BGIS GP is a separate legal entity from BGIS LP. BGIS GP is the general partner in a partnership in which BGIS LP is the limited partner. No client or vendor contracts are entered into directly by BGIS GP.
- [10] In 2018, DCL successfully bid to provide construction services on the Project. On or about November 28, 2018, BGIS LP issued a purchase order for the Project to DCL (the "Purchase Order"). No construction contract appears to have been executed between DCL and BGIS LP. DCL commenced performing work on the Project pursuant to the Purchase Order in early 2019. The Project was completed in April 2019.
- [11] In 2018, prior to the Purchase Order issuing to DCL, Dawn Construction (2018) Ltd. ("Dawn 2018") was incorporated. Dawn 2018 has different shareholders than DCL. The plan was for DCL and Dawn 2018 to work together to bid on projects. Dawn 2018 qualified for performance bonds, while DCL did not. As a result, Dawn 2018 bid on projects and, if successful, it engaged DCL to perform the work and supply the materials.
- [12] The Project did not require a performance bond and, therefore, DCL did not require the assistance of Dawn 2018 to bid on the Project.
- [13] According to the evidence of David Senkler, Chief Financial Officer of Dawn 2018, at some unspecified point in time, Dawn 2018 and DCL agreed that Dawn 2018 would assume all of DCL's responsibilities with respect to the Project. Mr. Senkler deposes that although DCL performed all the work on the Project, the labour and material costs for the Project were paid by Dawn 2018. No documentary evidence of this arrangement between the two corporate entities was tendered, and the financial arrangement between DCL and Dawn 2018 as it pertains to the Project remains unclear.

- [14] At some point in 2019, an undated unsigned letter on DCL stationary purportedly from Mr. Senkler, was sent to BGIS LP that stated "Effective December 1, 2018 Dawn Construction Ltd. will do business and be known as Dawn Construction (2018) Ltd." (the "Name Change Letter"). Mr. Senkler deposes that he did not authorize the Name Change Letter, and that it contains an incorrect characterization of the relationship between DCL and Dawn 2018.
- [15] By letter dated August 19, 2019, Dan Johnson, Senior Legal Counsel for BGIS LP, wrote to the parties to clarify the position of BGIS LP with respect to the BGIS GP Garnishing Order (the "Johnson Letter"). He identified two concerns:
- a) The BGIS GP Garnishing Order names the incorrect party in order to be able to garnish funds from BGIS. This is because BGIS GP has no contractual privity with any BGIS customer or vendor.
 - b) BGIS LP entered into a contract with DCL on behalf of, and as legal agent for, CIBC. Any debt owed to DCL is owed by CIBC and not BGIS.
- [16] On September 5, 2019, the plaintiff obtained the BGIS LP Garnishing Order.

Issues

- [17] These applications give rise to the following issues:
- a) Should Dawn 2018 be granted standing in this proceeding to apply for an order to set aside the Garnishing Orders and, if so, should the Garnishing Orders be set aside?
 - b) Should the plaintiff be deprived of the relief it seeks on the basis that CIBC, and not BGIS LP or BGIS GP, is the party to whom DCL provided services on the Project?
 - c) Is the plaintiff entitled to a garnishing order absolute or any of the other relief it is seeking?

Analysis

Issue 1: Standing of Dawn 2018

- [18] Dawn 2018 submits that the plaintiff knew, at the time it filed its notice of application for garnishing orders absolute, that Dawn 2018 claimed an interest in the funds that were the subject of the garnishment and it therefore had a duty to serve Dawn 2018 as an interested party.
- [19] Dawn 2018 relies on R. 8-1(7) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, which requires a party bringing an application to serve the notice of application and supporting materials on any person who may be affected by the order sought.

- [20] The question of standing to apply to set aside a garnishing order was considered by the Court in *Evans v. Silicon Valley IPO Network*, 2003 BCSC 954, appeal dismissed: *Evans v. Umbrella Capital LLC*, 2004 BCCA 149. Justice Hood found that the applicable test was whether the party seeking standing "had a claim against the funds which was at least arguable and not frivolous or vexatious" (para. 51).
- [21] In order to determine whether Dawn 2018 has standing to seek to set aside the Garnishing Orders, I must consider whether it has a claim against the funds that is at least arguable, and not frivolous or vexatious.
- [22] Dawn 2018 submits that its claim to the garnished funds arises from the fact that it performed the Project work and that therefore Dawn 2018, rather than DCL, is entitled to be paid for work done on the Project. However, the evidence submitted by Dawn 2018 does not support this conclusion.
- [23] Mr. Senkler deposed that Dawn 2018 was incorporated with a separate sole director and shareholder for the purposes of working with DCL to allow it to bid on projects that required a performance bond. He further deposed that Dawn 2018 and DCL had agreed between themselves that Dawn 2018 would assume DCL's responsibilities with respect to the Project, notwithstanding the fact that it was DCL, not Dawn 2018, who successfully bid on the Project and ultimately performed the work. Dawn 2018 paid the material and labour costs of the Project on behalf of DCL. On this basis, Dawn 2018 submits that it is entitled to be paid for the Project, not DCL.
- [24] The arrangement between DCL and Dawn 2018 with respect to the Project was not reflected in any assignment agreement approved by BGIS LP. On the contrary, according to the Johnson Letter, BGIS LP received the "Name Change Letter" and, based on that letter, believed that DCL had simply changed its name. Later, following inquiries made by BGIS LP, it became clear that a new entity had been formed, namely Dawn 2018, that had been performing work that DCL had been contracted to perform on the Project. Mr. Johnson expressed BGIS LP's lack of consent to this arrangement and raised his concern that any assignment was pursuant to a scheme to circumvent the Garnishing Orders.
- [25] Therefore, while there may be a financial arrangement in place between DCL and Dawn 2018 with respect to the funding of work on the Project, the purchase order was issued to DCL, the work was performed by DCL, and the entity entitled to be paid for work on the project is DCL. Dawn 2018 has no reasonable claim against BGIS LP or CIBC with respect to the Project because, as the Johnson letter makes clear, from the perspective of BGIS and CIBC, the contract for performance of work under the Project was never validly assigned by DCL to Dawn 2018. The notion of DCL assigning its contract with respect to the Project to Dawn 2018 was raised in conversations between Mr. Senkler and Mr. Johnson only after the BGIS GP Garnishing Order was obtained. The assignment was not agreed to.

[26] It is clear and obvious on the evidence before me that, even if Dawn 2018 had a bona fide basis for being involved in the Project, the only party entitled to get paid for work on the Project was DCL. As Hood J. noted in Evans, the test for standing will be met "unless it is clearly established on the materials before the court that the applicant does not have any real prospect of succeeding on his claim" (para. 52). Based on the material before me, Dawn 2018 does not have any prospect of succeeding in demonstrating an entitlement to the funds that are the subject of the Garnishing Orders. If Dawn 2018 funded DCL's work on the Project, Dawn 2018 may have a claim against DCL. However, it has not submitted any evidence to support its entitlement to be paid by CIBC or BGIS LP for the work DCL was contracted to perform.

[27] As such, I decline to grant standing to Dawn 2018 to apply to set aside the garnishing orders.

Issue 2: Is BGIS LP or CIBC the Appropriate Garnishee?

[28] BGIS LP points out that, at all relevant times, it was acting as authorized agent on behalf of CIBC. It had no contractual privity with DCL or Dawn 2018.

[29] Nevertheless, BGIS LP states that it has decided to withhold payment of monies owing in respect of the Project until it receives clear direction where to direct the funds. At the hearing, counsel for BGIS LP advised that it was holding funds in the amount of \$76,334.54, payable with respect to the Project, pending the outcome of this hearing.

[30] It is not entirely clear on the evidence whether the entity who contracted with DCL for work done on the Project was BGIS LP or CIBC. BGIS LP was clearly acting as an agent for CIBC, however the purchase order was completed by BGIS LP and DCL's accounts receivable are recorded as being from BGIS. That said, given BGIS LP's advice to the Court that it is holding the funds payable to DCL with respect to the Project pending the outcome of the hearing, at this point nothing turns on whether CIBC or BGIS LP was the entity responsible for paying DCL for the work it did on the Project. The funds may have originated with CIBC, but they are presently being held by BGIS LP and they are payable to DCL. Therefore, I do not accede to the submission of BGIS LP that, in the absence of privity of contract between BGIS LP and DCL, no funds may be garnished.

Issue 3: Relief Sought by the Plaintiff

[31] In the face of some of the concerns raised by BGIS LP and Dawn 2018, the plaintiff amended its position somewhat in the course of the hearing and submitted that it would be content to have the \$76,334.54 presently held by BGIS LP paid into court. This would not preclude Dawn 2018, in its capacity as creditor of DCL, from asserting a claim to those funds, and it would relieve BGIS LP from further involvement in the proceeding.

[32] In my view, it is appropriate to grant the plaintiff this alternative relief. BGIS LP shall pay the funds it is currently holding in the amount of \$76,334.54 into court.

Costs

[33] In my view, given the lack of clarity in the relationship between DCL and Dawn 2018, it was appropriate for BGIS LP to hold the \$76,334.54 payable to DCL pending agreement of the parties or court order. Had they taken a neutral position in this application, and simply sought the direction of the Court, they would not be liable for any costs. However, BGIS LP opposed the plaintiff's application. It did not file any evidence in support of its position but it argued that due to the lack of contractual privity between BGIS LP and DCL (or Dawn 2018), no amounts were owing from BGIS LP to them. Having entered the fray, BGIS LP must accept the costs consequences. BGIS LP and Dawn 2018 are responsible for paying the plaintiff's costs of this application.

"Francis J."

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