
CANADA / JUDGMENT

Doerksen v. Marnor Holdings Ltd.

2018 BCSC 2359

COURT

Supreme Court of British Columbia

DECIDED

19 June 2018

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2018 BCSC 2359 Doerksen v. Marnor Holdings Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doerksen v. Marnor Holdings Ltd.,

2018 BCSC 2359

Date: 20180619

Docket: S28691

Registry: Chilliwack

Between:

Rudi Doerksen and Adalwolf Transportation Inc.

also known as Adalwolf Trking Ltd.

Plaintiffs

And

Marnor Holdings Ltd.

also known as MHL Logistics & Freight Transport

Defendant

Before: The Honourable Mr. Justice Riley

Oral Ruling Re Application Seeking Damages for Wrongful Retention of Property

In Chambers

Counsel for the Plaintiff:

R.J. Cuddeford

Counsel for the Defendant:

R. Vickers

Place and Date of Hearing:

Chilliwack, B.C.

June 18, 2018

Place and Date of Ruling:

Chilliwack, B.C.

June 19, 2018

Introduction

- [1] THE COURT: This is a ruling on a chambers application in connection with a civil claim. The plaintiffs, Mr. Doerksen and a company under his control, seek damages from the defendant, Marnor Holdings Ltd., in connection with Marnor's alleged wrongful retention of two vehicles, a 2001 International and a 2006 Peterbilt. Marnor has filed a counterclaim in respect of alleged outstanding debts owed by Mr. Doerksen.
- [2] The matter coming before me today is an application by Marnor for:
- 1) dismissal of Mr. Doerksen's claim for failure to comply with the Rules;
 - 2) dismissal of Mr. Doerksen's claim for want of prosecution; and
 - 3) summary judgment in respect of Mr. Doerksen's claim against Marnor.
- [3] At the outset of the application counsel for Marnor advised that he was abandoning the request for dismissal based on non-compliance and want of prosecution, points 1 and 2, but he would be pursuing the request for summary judgment, point 3.

Summary of Allegations in the Pleadings

- [4] At this point a brief explanation of the allegations set out in the pleadings is necessary. Mr. Doerksen alleges in his notice of claim that:
- a) he is a truck driver and owner of several vehicles, a 2001 International and a 2006 Peterbilt;
 - b) he entered into a contract with Marnor in which Marnor would have use of the two trucks in its business, and Mr. Doerksen would drive them and be paid 85% of the associated revenue;
 - c) at a certain point he demanded return of the trucks. Marnor refused to do so and wrongfully retained them. As a result he, Mr. Doerksen, has suffered damages.

- [5] In its response to civil claim Marnor denies all of this. Marnor specifically denies that it had an employment contract with Mr. Doerksen and denies that Mr. Doerksen is the legal owner of the vehicles. Marnor alleges that it is owed debts by Mr. Doerksen and by Mr. Highfield. Marnor alleges that Mr. Doerksen agreed to sign over one of the vehicles, the 2001 International, as collateral on the debt owed by Mr. Highfield. Marnor has filed a counterclaim alleging that Mr. Doerksen owes Marnor a debt.

Affidavit Evidence

- [6] In support of the application, counsel for the defendant filed an affidavit sworn by Mr. Nicholson, the president, director and principal owner of Marnor. The affidavit is sparse but does contain some averments which are germane to the allegations made in Mr. Doerksen's notice of civil claim. Specifically Mr. Nicholson's affidavit alleges that Mr. Doerksen is indebted to Marnor in the amount of some \$5,000, and that Mr. Doerksen has refused to pay the debt.
- [7] Mr. Nicholson's affidavit also includes averments about the two vehicles referred to in Mr. Doerksen's notice of civil claim. With respect to the 2006 Peterbilt, Mr. Nicholson avers that Marnor has never had possession of it. With respect to the 2001 International, Mr. Nicholson avers that Mr. Doerksen basically signed the vehicle over to Marnor as collateral on a debt owed by Mr. Highfield.
- [8] Attached to Mr. Nicholson's affidavit are:
- 1) a document setting out the particulars of Mr. Highfield's debt totalling some \$38,000 Canadian and \$7,000 US;
 - 2) a document signed by Mr. Doerksen stating that Mr. Doerksen agreed to sign over his 2001 International tractor to Marnor as collateral on Mr. Highfield's debt; and
 - 3) a copy of a motor vehicle transfer form with respect to the 2001 International filled in by Mr. Doerksen as the seller with the purchaser information left blank.
- [9] In response to the application counsel for the plaintiffs filed an affidavit from Mr. Doerksen. However, Mr. Doerksen's affidavit basically addressed the procedural history of his claim and the efforts to negotiate or resolve it. Thus, the affidavit furnishes some explanation for the delays in prosecuting the case, but is silent with respect to the merits of the case and contains no evidence to support the allegations in Mr. Doerksen's notice of civil claim.

The Positions of The Parties

- [10] Counsel for Marnor argued that because Marnor has filed affidavit evidence to support his position while Mr. Doerksen's affidavit evidence is largely silent on the merits of the claims, Marnor is bound to succeed on the summary judgment application. In taking this position counsel for Marnor fairly acknowledged in argument that Mr. Doerksen's counsel appeared to have overlooked the summary judgment aspect of the application, as a result of which Mr.

Doerksen quite simply presented no admissible evidence to support his claim or to refute the averments in Mr. Nicholson's affidavit.

- [11] In opposing the application for summary judgment, counsel for Mr. Doerksen made what I perceive to be three discrete arguments.
- [12] First, counsel argued that Marnor's application should fail because there were gaps or deficiencies in Marnor's application evidence with respect to the nature of the alleged debt, the validity or enforceability of that debt and its relationship to the relief claimed in Mr. Doerksen's notice of civil claim.
- [13] Second, in a somewhat related point counsel argued that since this case involved both the claim by Mr. Doerksen and a counterclaim by Marnor, it is impossible on the basis of the affidavit evidence before me to discern the relationship between the two. Counsel argued that it would not be appropriate to grant summary judgment dismissing Mr. Doerksen's claim while allowing Marnor's debt claim to proceed. There is an issue of setoff as between the two claims, and it would not be appropriate to hamstring the trial judge by dismissing Mr. Doerksen's claim while allowing Marnor's claim to proceed to trial.
- [14] Third, in the course of his submissions, Mr. Doerksen's counsel fairly acknowledged that in responding to Marnor's originally three-pronged application, the summary trial component of the application was "lost in the shuffle" and not properly addressed by way of affidavit evidence setting out an explicit evidentiary basis to support Mr. Doerksen's claim. Counsel submitted that the court may grant remedies other than dismissal of the claim, including ordering that discoveries take place or ordering an early trial date.

Analysis

- [15] Marnor's application for summary judgment is governed by Rule 9-6 of the Supreme Court Civil Rules. The purpose of 9-6 is to weed out cases that stand no chance of success because they have no factual merit. In *Canada (Attorney General) v. Lameman*, [2008] 1 SCR 372, 2008 SCC 14, the court stated at paras. 10 and 11:
- [10] This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
- [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital*

Corp., 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: 1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 1995 CanLII 1686 (ON CA), 21 O.R. (3d) 547 (C.A.); Tucson Properties Ltd. v. Sentry Resources Ltd. (1982), 1982 CanLII 1218 (AB QB), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: Murphy Oil Co. v. Predator Corp. (2004), 365 A.R. 326, 2004 ABQB 688 (CanLII), at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69 (CanLII). Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: Transamerica Life Insurance Co. Of Canada v. Canada Life Assurance Co. (1996), 1996 CanLII 7979 (ON SC), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; Goudie v. Ottawa (City), [2003] 1 S.C.R. 141, 2003 SCC 14 (CanLII), at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: Guarantee Co. of North America, at para. 30.

[16] In the case at bar I have the unopposed averments in Mr. Nicholson's affidavit. The affidavit, though sparse, does provide direct, admissible, unchallenged evidence that:

- 1) Mr. Doerksen owed a debt to Marnor;
- 2) Mr. Doerksen agreed to sign over his 2001 International truck as collateral on a debt owed by Mr. Highfield; and
- 3) Marnor has never had possession of Mr. Doerksen's other vehicle, the 2016 Peterbilt.

[17] The problem I am faced with on this application is that while each side is expected to "put its best foot forward" by presenting evidence that demonstrates the existence or non-existence of triable issues, Mr. Doerksen does not appear to have done so. Mr. Doerksen filed an affidavit, but that affidavit quite simply overlooks the merits of his claim and overlooks the allegations of fact set out in Mr. Nicholson's affidavit, which allegations give substance to the position advanced by Marnor. There may well be another side to the story, but on the material placed before me I have no admissible evidence to explain Mr. Doerksen's side of the story.

[18] Rule 9-6(5) sets out the powers of the court on an application for summary judgment. In addition to the authority to dismiss the claim outright, the court has the authority to make any other order that the court considers will further the object of the Rules. In this particular case I consider the following order to be appropriate in furthering the object of the Rules:

- 1) the defendant's application to dismiss the plaintiff's claim for failure to comply with the Rules and for want of prosecution is dismissed as abandoned.
- 2) with respect to the defendant's application for summary judgment:

- a) on or before 16 July, 2018, the plaintiff shall serve on the defendant one or more affidavits setting out facts capable of supporting the claims made in the notice of civil claim, failing which those claims will be dismissed;
- b) upon receipt of the plaintiff's affidavit evidence as referred to in term 2(a) above, the defendant will be at liberty to renew its application for summary judgment; and
- c) the defendant will be entitled to costs for the hearing of the application for summary judgment which took place on 18 June, 2018, in any event of the cause.

[19] So that is my ruling.

[20] Now, I will say this finally. With respect to the costs element, Mr. Cuddeford urged me yesterday not to address the costs issue in my ruling and to hear further submissions on it. However, having heard the submissions of both parties, it seems to me that the only just outcome, given the status of the pleadings and the material that was presented on the application, is that the defendant should have the costs in connection with yesterday's hearing, which would not have been necessary and would have proceeded in the manner that it did had the plaintiff presented evidence that would allow the court to properly assess the claims made in the notice of civil claim.

[21] So in the circumstances I have concluded that appropriate for the defendant to have its costs in connection with yesterday's hearing.

[22] MR. CUDDEFORD: Yes, My Lord, and, in fact, costs in the cause in any event, that is to say not payable forthwith?

[23] THE COURT: That is right. That was intentional on my part to specify that the costs would be costs in any event of the cause. Costs in any event of the cause, but I have not made any requirement that they be payable forthwith.

[24] MR. CUDDEFORD: Thank you for that clarification, My Lord.

[25] MR. VICKERS: My Lord, if I may speak to the costs issue briefly in regards to the forthwith and potentially the court fixing an amount to avoid these parties going to the registrar to set this matter.

[SUBMISSIONS ON COSTS]

[26] THE COURT: In light of that, then, I have considered the submissions of both parties on the question of whether the costs should be payable forthwith or whether the costs should be specified in a particular amount. Beyond saying that it is costs for a full day of court, I think it is not necessary to add anything to my previous ruling in terms of costs.

[27] I would say that in terms of fixing the amount, I have been shown no reason to believe that that would be necessary or that there would be any disagreement as to the appropriate amount as specified under the Rules and following the procedures that would normally flow.

- [28] In terms of whether the costs should be payable forthwith or there should be no specification as to that and they would presumably be dealt with at the end of the case, as would all the other costs, I have considered that. It does not seem to me that that issue has any real bearing on what transpired yesterday. I have not been given any information about any prejudice that would require payment of these costs forthwith to avoid hamstringing one of the parties or to remedy some situation about some expenditures that will be incurred as a result of what happened yesterday that will present an insurmountable hurdle to the defendant going forward.
- [29] So I have considered the submissions that have been made by Mr. Vickers today, and I appreciate his view that in the end yesterday's hearing ended up exactly where he suggested that it might. I do not know that Mr. Cuddeford saw the case the same way when we started the submissions yesterday afternoon, and his position in terms of an adjournment was not necessarily as clear cut as Mr. Vickers might have thought it would be. In the end thing the appropriate remedy is to simply ensure that the defendant has its costs for yesterday's hearing, which took place as a result of argument over an application where there was a lack of evidence by the plaintiff and that has really hamstrung the defendant in getting to the outcome that they wanted to pursue in the application in the first place.
- [30] That is why I made the order of costs at this point, but I have nothing more to say about it. So that is my ruling. Thank you very much.

"Riley J."

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