

CANADA / JUDGMENT

First Majestic Silver Corp. v. Davila

2013 BCSC 1126

COURT

Supreme Court of British Columbia

DECIDED

25 June 2013

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2013 BCSC 1126 First Majestic Silver Corp. v. Davila

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

First Majestic Silver Corp. v. Davila,

2013 BCSC 1126

Date: 20130625

Docket: S078106

Registry: Vancouver

Between:

First Majestic Silver Corp.

First Silver Reserve Inc.

Minera El Pilon, S.A. de C.V.

Plaintiffs

And

Hector Davila Santos

Minerales y Minas Mexicana, S.A. de C.V.

Defendants

Before: The Honourable Mr. Justice Myers

Supplemental Reasons for Judgment

Counsel for the Plaintiffs:

Howard Shapray, Q.C.

Brad Cramer

Francis Lamer

Counsel for the Defendants:

David Church, Q.C.

Martin Bühler

Place of Trial:

Written Submissions Received

Vancouver, B.C.

Place and Date of Judgment:

Vancouver, B.C.

June 25, 2013

- [1] These Reasons deal with various issues that follow from my prior Judgment in this case: 2013 BCSC 717.
- [2] I awarded the plaintiff First Majestic Silver Corp. damages against the defendants for Mr. Davila's breach of fiduciary duty. Mr. Davila, had a counterclaim for amounts owing for the sale of his shares to First Majestic pursuant to a share purchase agreement, for which First Majestic had previously admitted liability. While I did not formally deal with the issue of a set-off for the amount of the counterclaim, it was common ground at trial that this was the way the counterclaim would be disposed of.

I. Interest

- [3] First Majestic signed a promissory note for the amount owing under the share purchase agreement. It provided for interest at 6% compounded annually:

FOR VALUE RECEIVED First Majestic Resource Corp.(the "Debtor") hereby acknowledges itself indebted to and promises to pay to Hector Davila Santos (the "Lender") the principal sum of TWENTY SIX MILLION SIX HUNDRED AND EIGHTY TWO THOUSAND SEVEN HUNDRED AND FIFTY NINE (\$26,682,759) and agrees as follows:

- (i) The Debtor shall pay interest on the said principal sum outstanding from time to time at a rate of 6.0% per cent per annum, compounded annually and calculated daily and all such interest accruing up to and including the First Instalment Date and the Second Instalment Date shall be paid on a quarterly basis commencing as of the date above. Notwithstanding the foregoing, if any principal or interest on the principal sum outstanding is not paid when due, such overdue amount shall continue to bear interest at a rate per annum equal to 6.0%

per annum, compounded annually and calculated daily after as well as before judgment and shall be payable on demand.

- [4] In July 2009, Mr. Davila applied for summary judgment on the unpaid amount of the share purchase price. At the hearing in front of Pitfield J., First Majestic consented to judgment against it in the amount of \$14,881,911.
- [5] The terms of the order provided that a portion of the judgment amount, \$14,258,332 was to be held in trust. A further portion - \$227,427.20 - was released to First Majestic, leaving \$623,579 unsecured.
- [6] Paragraph 3 of the order provided that the amount in trust was held "in partial satisfaction of the Judgment, but subject to the terms set out in this Order" (emphasis added).
- [7] Paragraph 8 of the order provided Mr. Davila the ability to pursue post-judgment interest at a later point in time. It has no substantive effect on the issues.
- [8] Paragraph 10 of the order imposed a stay of execution for the unsecured amount, pending release of the trust funds.
- [9] Mr. Davila argues that he is entitled to receive compound post-judgment interest either at the rate specified in the promissory note or at some other rate set by the Court on both the secured and unsecured amounts of the judgment. First Majestic argues that no post-judgment interest is payable on the amount put into trust, and that the unsecured portion should be non-compounded at the standard Court Order interest rates.

A. Is post-judgment interest payable on the amount in trust?

- [10] The first question is whether post-judgment interest is payable at all on the \$14,258,332 held in trust. Based on the wording of paragraph 3 of the order which I quoted above, I agree with First Majestic that the \$14,258,332 in trust is to be considered as having been paid in partial satisfaction of the judgment. This is enforced by the fact that the Mr. Davila will, in the result, have the benefit of the interest earned in the trust account.
- [11] I conclude that no post-judgment interest is payable.

B. Post-judgment interest on the unsecured portion of the counterclaim

- 1. Should post-judgment interest on the unsecured amount be compounded?

- [12] Post-judgment interest is dealt with in the Court Order Interest Act, R.S.B.C. 1996, c. 79 (the "Act"). Section 7 of the Act provides:

7 (1) In this section, "interest rate" means an annual simple interest rate that is equal to the prime lending rate of the banker to the government.

- (2) A pecuniary judgment bears simple interest from the later of the date the judgment is pronounced or the date money is payable under the judgment.

[13] Under s. 8 of the Act, the Court has the discretion to vary the rate of interest payable under s. 7(1) of the Act or when the interest begins to run under s. 7(2):

If the court of original jurisdiction considers it appropriate, it may, on the application of a person affected by or interested in a judgment, vary the rate of interest applicable under section 7 or set a different date from which interest must be calculated.

[14] In *B.A.J. v. V.L.*, 2012 BCSC 560, Masuhara J. dealt with the interpretation of s. 8 of the Court Order Interest Act. He noted, at para. 13, that because of the word "or", the court can either vary the interest rate or the start date, but not both.

[15] Mr. Davila relies on *Bank of America v. Mutual Trust Co.*, 2002 SCC 43, in which the Supreme Court of Canada recognized the ability of a court to award, in appropriate cases, compound pre and post-judgment interest at common law and equity. The Court further said that the relevant sections of the Ontario Courts of Justice Act R.S.O. 1990, c. 43 continued to allow the court to do so.

[16] Next, Mr. Davila says that *Pacific Playground Holdings Ltd. v. Endeavour Developments Ltd.*, 2002 BCSC 1491, is applicable. In that case, the court applied *Bank of America* to pre-judgment interest. However, as noted, by Prowse J.A. (although not definitely decided by her), in *Misley v. 420746 B.C. Ltd.*, [1997] B.C.J. No. 2831 (C.A.):

18 Neither party provided any authority for the proposition that parties to an agreement are entitled to contract out of the post-judgment interest rate provided for in the Act. The wording and structure of the Act suggests otherwise. Whereas the Act specifically provides that the parties can contract out of the prejudgment rate of interest provided for in Part 1 of the Act, there is no such provision in Part 2 of the Act dealing with post-judgment interest.

[17] *Hallam v. Shen*, 2002 BCSC 1760, was decided two months after *Pacific Playground*. The plaintiff, relying on *Bank of America*, claimed that post-judgment interest should be compounded at the rate provided for by contract rather than that set out in the Court Order Interest Act. Maczko J. rejected that argument, noting the differences between the Ontario and British Columbia statutes. At para. 21, he further noted that s. 7(1) of the Court Order Interest Act defines interest as simple interest and that s. 8 allows the court to vary the rate of interest but not the way it is calculated.

[18] In my view, the statute is clear and *Hallam* is applicable. Post-judgment interest cannot be compounded.

2. The date at which post-judgment interest on the unsecured amount begins to run

[19] The defendants argue that post-judgment interest should run from the date of the Pitfield J. order. First Majestic argues that it should run from the time of the trial judgment. They base their argument, in part, on the proposition that Mr. Davila should not be taken to be a creditor who has been involuntarily deprived of his money because he had agreed to the stay of execution.

[20] In *B.A.J. v. V.L., Masuhara J.* noted, at para. 15, that a stay of execution does not itself stay the accrual of interest unless it is specifically provided for in the stay order. That is not the case here.

[21] Further, and in any event, the fact that Mr. Davila agreed to a stay does not mean he agreed to be, or should be, deprived of interest. The order is neutral in that regard and First Majestic has had the benefit of the use of the money. It should not reap a windfall from that. Therefore, I exercise my discretion under s.8 and conclude that post-judgment interest on the \$623,579 should run at the standard court rate from the time of the order of Pitfield J.

II. The conversion of the judgment from U.S. currency to Canadian

[22] In my Reasons for Judgment I said, at para. 385:

I have assessed the loss in U.S. dollars because that was used by all the experts. Under the Currency Act, R.S.C. 1985, c. C-52, the final judgment must be expressed in Canadian dollars. The parties may make submissions as to the time of conversion and the applicability of the Foreign Money Claims Act, R.S.B.C. 1996, c. 155.

[23] Section 1(1) of the Foreign Money Claims Act provides:

If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

[24] First Majestic says that its loss should be measured in Canadian dollars because it would not be fairly compensated if its loss was measured in U.S. dollars. The defendants say the opposite.

[25] The reasoning in *Han v. Cho*, 2009 BCSC 458, including the likelihood that this Judgment will be enforced in Mexico, is applicable here. I further note that the claim was one by a B.C. company for breach of fiduciary duty owed to it by a former director. The only reason the Judgment was initially expressed in U.S. dollars was that is the currency of mining in Mexico and therefore the experts expressed their opinion in U.S. dollars.

[26] With respect to the time for conversion from U.S. to Canadian dollars, the damages were awarded based on what was, at the time of trial, estimated retrospective lost net revenue, and, primarily, prospective lost net revenue. The starting date for the calculation of damages was not the date of the breach, because I assumed that had the breach of duty not occurred, First Majestic would have taken time to decide on the corporate opportunity and to bring the mine on stream.

[27] Under those circumstances, the most reasonable time to peg the conversion from U.S. dollars to Canadian is the date of the judgment.

III. Should the funds in trust be paid out now?

[28] The defendants have appealed. They have not applied to the Court of Appeal for a stay of execution. The issue here is whether I should order that the funds be paid out to First Majestic, given the provisions of the Pitfield J. order.

[29] While both sides made arguments with respect to the solvency of the other, I do not think that that is a consideration I am entitled to take into account. Rather, the matter is governed by the terms of the order.

[30] I have quoted several provisions of the order above. Two others are germane to this issue:

6. Davila Santos shall not release the Trust Monies or any portion thereof, until the earlier of:
(a) the release of Reasons for Judgment which finally adjudicate on the merits of the Plaintiffs' claims in this action, including any claims for damages ("the Reasons"), in which case the Trust Monies shall be dealt with as set out in this Order;
7. Upon release of the Reasons after the trial of the Plaintiffs' claims as referred to in paragraph 6 herein, any of the parties herein are at liberty to apply to this Court for an order extending the time period for Church & Company to hold the Trust Monies in trust ("the Extension Order"), pending appeal by any party to the Court of Appeal and further order of the Court of Appeal to restrain dealings with the Trust Monies pending any appeal. Nothing in this Order will prevent any party herein from arguing, on any application for the Extension Order, as to how the Trust Monies shall be treated;

[31] The order does not allow the defendants to do anything in this court other than to ask for a postponement of the payment out pending an application to the Court of Appeal. The defendants have not made an application to me to defer the payment out. Rather, their argument against payment is made in the context of First Majestic's application for payment out.

[32] That might be regarded as an inconsequential matter of form, however, there is more. In their argument, the defendants argue that the funds should remain in trust "pending further order of the Court of Appeal on or after June 18, 2013". On June 18, the Court of Appeal heard an application by First Majestic for an expedited hearing of the defendants' appeal and an order requiring the defendants to secure the amount of the judgment pending appeal. First Majestic's counsel advise:

First Majestic's security application was heard by D. Smith J.A. on June 18, 2013 and judgment is reserved. First Majestic sought security for the trial judgment but net of the funds in Church & Company's trust account. Madam Justice Smith was advised that First Majestic is seeking payment out of the funds in Church & Company's trust account in partial payment of the trial judgment and that this matter is before Mr. Justice Myers.

[33] The end result is that the defendants have not made an application to the Court of Appeal with respect to the trust funds. That being the case, there is no reason to defer the payment out, and I so order. Payment is to be made to First Majestic's counsels' firm, in trust.

IV. Costs pursuant to the promissory note

[34] Mr. Davila claims costs pursuant to the promissory note relating to the share purchase. The clause reads:

Failure of the Debtor to pay the Principal Sum and accrued interest as and when due shall constitute an event of "default" under this Note. In the event of default by the Debtor of its obligations under this Note, the Debtor will be required to pay all costs and expenses incurred by the Lender, including, without limitation, legal fees and expenses on a solicitor and own client basis, in pursuing the Lender's remedies against the Debtor for collection of all amounts owing under the Note.

[35] I agree with First Majestic that the "costs and expenses" incurred to obtain judgment on the promissory note was addressed in the order of Pitfield J. which provides:

12. Each party shall bear its own costs with respect to the Defendant's Application under Rule 18A and the Plaintiffs' Application under Rule 18A(8);

[36] After the summary judgment applications, the claim became subsumed by the trial of the plaintiffs' breach of fiduciary claim. All that was left with respect to the counterclaim was to calculate the set-off. Therefore any expenses relating to the counterclaim or other steps relating to the claim under the promissory note are de minimis. The claim for costs and expenses is therefore dismissed.

V. Scale of Costs

[37] One need read no further in my Reasons than the Table of Contents to see that the evidentiary and legal issues (including the assessment of compensation) were of more than ordinary difficulty. What the Reasons will not show is the number of complicated pre-trial and mid-trial motions made or the expert evidence on Mexican law. (The latter was not necessary for me to deal with in the Judgment.)

[38] Costs shall be at scale 3.

"E.M. MYERS J."

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