
CANADA / JUDGMENT

Hall Enterprises Inc. v. Tyam Construction Ltd.

2010 BCSC 921

COURT

Supreme Court of British Columbia

DECIDED

30 June 2010

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2010 BCSC 921 Hall Enterprises Inc. v. Tyam Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hall Enterprises Inc. v. Tyam Construction Ltd.,

2010 BCSC 921

Date: 20100630

Docket: S104242

Registry: Vancouver

Between:

Hall Enterprises Inc

Plaintiff

And

Tyam Construction Ltd.

and

Cambie St. Constructors Inc.

Defendants

Before: Master Taylor

Reasons for Judgment

Counsel for Plaintiff:

J. L. Oliver and

J. R. Goheen

Counsel for Defendants:

D.W. Lahay

Place and Date of Hearing:

Vancouver, B.C.

June 25, 2010

Place and Date of Judgment:

Vancouver, B.C.

June 30, 2010

- [1] The defendants seek to set aside three garnishing orders before judgment all issued on the 16th of June, 2010. The defendants' challenge to the garnishing orders is founded on the following grounds:
- (a) the garnished amounts are not for a debt or a liquidated sum;
 - (b) the affidavits filed in support of the garnishing orders are defective, in that they:
 - (i) failed to set out the proper calculations for the garnished amount;
 - (ii) were misleading and failed to make all just discounts;
 - (c) the garnishing orders create a hardship for the defendant; and
 - (d) the garnishing orders are unnecessary.
- [2] The plaintiff is seeking payment of the sum of \$926,695.43 by way of Writ and Statement of Claim issued June 15, 2010.
- [3] On June 16, 2010 the plaintiff obtained 3 garnishing orders before judgment against the City of Langley, the Bank of Montreal, and Her Majesty the Queen in Right of British Columbia as represented by the Minister of Transportation and Infrastructure. As of the date of hearing, the sum of \$763,177.28 was paid into court by the City of Langley, although the defendants maintain that sums totalling \$1,724,177.20 have been "secured". The defendants calculate that this sum is \$797,481.77 more than that claimed by the plaintiff.

Factual Background

- [4] The plaintiff provides consulting services on construction and engineering projects, though its principal, Dennis Hall.

- [5] The defendants, Tyam Construction Ltd ("Tyam") and Cambie St. Constructors Inc. ("CSC") were engaged in the provision of construction and infrastructure development services on various projects relating to the construction of the Richmond-Airport-Vancouver Line (the "RAV Line") project. CSC is a wholly owned subsidiary of Tyam.
- [6] In or about late 2004, a proposal by SNC Lavalin ("SNC") to construct a rapid transit system between the City of Richmond, the Vancouver Airport and downtown Vancouver was accepted by Translink through its subsidiary, RAV Project Management Ltd ("RAVCo").
- [7] In late 2004, Mr. Hall was approached by a number of individuals at SNC, who indicated that SNC required a contractor for the relocation of utilities that would be disrupted by the underground construction of the RAV Line (the "Utilities Contract"). Discussions and negotiations with SNC ensued, and by mid-2005, the parties were discussing the preliminary pricing for a contract between SNC and Tyam. The Utilities Contract was ultimately finalized in the Spring of 2006.
- [8] SNC also required a contractor to excavate and build the RAV Line tunnel along Cambie Street in Vancouver. This contract has been referred to as the Cut and Cover Contract. In the Spring of 2005, SNC was involved in negotiations with another construction company for the Cut and Cover Contract, however, in early 2006 Mr. Hall was again approached by SNC and asked if he could provide a construction team to take over the Cut and Cover Contract. Mr. Hall discussed this possibility with his son, Bryan Hall, and Jason York. Within a few days, the defendant, CSC took over the Cut and Cover Contract with SNC. The plaintiff has referred to the Cut and Cover Contract and the Utilities Contract collectively in its pleadings as the "RAV Contracts").
- [9] Work commenced pursuant to the RAV Contracts in or about March 1, 2006.
- [10] As consideration for the services being provided by the plaintiff through its employee, Mr. Hall, to the defendants in obtaining the RAV Contracts, the plaintiff and the defendants entered into a Project Management and Consulting Agreement (the "Consulting Agreement").
- [11] The Consulting Agreement dated as of the 1st day of March, 2006, provided for a Base Fee of \$185,000 per annum until the RAV Contracts were completed, after which the plaintiff was to be paid \$125,000 per annum for a further ten years from the completion date (the "Adjusted Base Fee"). In addition, the plaintiff was entitled to receive a Performance Incentive Fee equal to:
- (a) 30% of the fixed contract fee of \$3.5 million payable to CSC pursuant to the Cut and Cover Contract; and
 - (b) 30% of any incentive fee payable to CSC pursuant to the Cut and Cover Contract,

plus applicable GST. The Performance Incentive Fee was to be payable to the plaintiff in instalments as and when the fixed fee payments and incentive fee payments were paid to CSC in accordance with the terms and provisions of the Cut and Cover Contract.

- [12] The plaintiff, by virtue of the affidavit of Dennis Hall, maintains that work over and above what was required in the Cut and Cover Contract was added on a number of occasions, as were the fees payable to CSC for that additional work. According to Mr. Hall, he represented CSC in negotiations with SNC for the additional contracts in relation to the Cut and Cover Contract.
- [13] The additional contracts relating to the development of the RAV Line that were added to the Cut and Cover work as per Mr. Hall's affidavit were:
- (a) the excavation of station sites for the RAV Line (the "Station Excavation Contract");
 - (b) the construction of stations for the RAV Line (the "station Construction Contract");
 - (c) additional work that was performed between December 2008 and June 2009 (the "Odds and Sods Contract");
 - (d) additional work that was done at the Vancouver International Airport (the "YVR Contract"); and
 - (e) additional work that was done at the project maintenance yard (the "OMC Contract").
- [14] The plaintiff also maintains that in addition to the additional contracts, Mr. Hall was also instrumental in obtaining the agreement of SNC such that at the conclusion of the RAV Project, CSC could sell all of the salvage rebar, scrap and other excess materials, and that CSC would share the sale proceeds equally with SNC. This is referred to as the "CSC Salvage". The plaintiff refers to all of the contracts set out in sub-paragraphs (a) to (e) above, plus the CSC Salvage collectively as the "Additional RAV Contracts".
- [15] Of importance to this portion of the plaintiff's case, Mr. Hall says that he later came to an agreement with Bryan Hall and Jason York, two directors of the defendants, that the plaintiff would be entitled to remuneration in relation to those Additional Contracts on essentially the same terms contained in the Consulting Agreement for the Cut and Cover Contract Incentive Fee. In other words, the plaintiff maintains it would be entitled to receive 30% of the fees or sale proceeds obtained by the defendants under the Additional RAV Contracts.
- [16] The defendants maintain that the Additional RAV Contracts were not specifically covered by the Consulting Agreement of March, 2006, but rather the plaintiff submitted invoices for these additional amounts and that Tyam accepted these invoices and "agreed, expressly or impliedly, to the payment terms set out in the invoices" as is claimed in the statement of claim.

- [17] The defendants say that the course of conduct upon which the plaintiff relies was established by Dennis and Bryan Hall, in that Dennis Hall on behalf of the plaintiff submitted invoices to his son, Bryan Hall, for approval and were then paid by Tyam's controller, who was the wife of Dennis Hall. The defendants also suggest that neither Mr. Barker nor Mr. Jordan, also directors of Tyam, were informed of the nature of the additional invoices being paid, nor did they approve of payment of them.
- [18] Thus, the defendants say that the additional amounts claimed by the plaintiff were not part of a contract between the parties and therefore should not form part of the garnished amounts.
- [19] As well, the defendants say that Mr. Hall submitted invoices for expenses which far exceeded what was contemplated by the Consulting Agreement and claim a set-off against the plaintiff for a substantial amount of what is claimed by the plaintiff against the defendants.
- [20] Accordingly, there are some important triable issues as between the parties. The neat question, therefore, is whether or not a triable issue is such that at this stage of the proceedings, the court is entitled to look at the issues to determine whether or not a garnishing order should be set aside in whole or in part.

Discussion

- [21] There are a number of principles that are essential to the determination of whether or not a garnishing order before judgment should be set aside. Garnishing orders before judgment are unique and extraordinary remedies and, therefore, require meticulous observance of the rules set out in the Court Order Enforcement Act: *Knowles v. Peter* (1954), 12 W.W.R. 560 (B.C.S.C.). Accordingly, failure to observe the rules will result in the garnishing order being set aside, however the courts must not prevent access to the remedy through an overly technical approach to garnishing orders: *Golder Associates Ltd. v. North Coast Wind Energy Corp.* 2010 BCCA 263
- [22] As well, a plaintiff seeking to rely on a garnishing order is required to make full and frank disclosure to the court: *Steele v. Riverside Forest Products Ltd.* 2005 BCSC 1602. Further, where a plaintiff has knowledge of amounts due to the defendant by set-off either by debt or liquidated amount, they are to be applied as just discounts in the affidavit in support of the garnishing order: *Helicraft Enterprises Ltd. v. Quasar Helicopters Ltd.* [1986] B.C.J. No 2863. Failure to do so may result in setting aside the garnishing order.
- [23] I am satisfied that the claims made by the plaintiff are liquidated claims as required by case law. The mere fact that a simple arithmetic calculation has to be made to determine the amount owing does not make it something other than a liquidated amount: *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.* 1999 BCCA 78.

[24] I have also determined that I cannot impute knowledge of any set-offs to the plaintiff by virtue of privileged communications between the parties which I deal with later in these reasons. Accordingly, I find that the plaintiffs did make all just discounts before seeking a garnishing order before judgment.

[25] The provisions of the Court Order Enforcement Act which pertain to this application are subsections (1) and (2) of Section 5.

5(1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment,

(2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment....

[26] In considering whether or not to set aside a garnishing order under s. 5(1) of the Court Order Enforcement Act, the court may consider some or all of the following in determining what is just in all the circumstances under s. 5(2):

- (a) whether the garnishment order results in an abuse of process;
- (b) whether there is undue hardship caused by the garnishment order;
- (c) the relative merits of the plaintiff's claim and any set-offs; and,
- (d) whether the garnishing order is necessary.

[27] In my view, the most important of the above considerations in the case at bar is related to the relative merits of the respective claims of the parties as I set out below. I have determined that there is insufficient evidence before me for consideration of whether or not the garnishing orders are an abuse of process, whether they are necessary or whether there is undue hardship caused by the orders.

[28] As Master Patterson stated at paragraph 12 in *Elkhorn Roadbuilding Ltd. v. Dorman Timber Ltd.* 2005 BCSC 1568:

In *Min-En Laboratories Ltd. v. Westley Mines Ltd and Ventures West Minerals Ltd.* (1983) 57 B.C.L.R. 259 (C.A.) Seaton J.A. gave judgment for the Court and held that one of the factors to consider in setting aside a pre-judgment garnishing order was the merits of the plaintiff's claim. Seaton J.A. continued to emphasize that the test was what was "just in all the circumstances."

[29] In fact, Seaton J.A. went further in his assessment of what a chambers judge or master could do in such an application when he said at paragraph 5:

...I think it is open to a chambers judge to consider whether the plaintiff's case is a strong one, or a weak one, or something in between; whether the defences raised are strong, or weak, or something in between; and whether the plaintiff's case or the defendant's case is in part weak or strong or something else. I would not require the chambers judge to blind himself to those considerations.

- [30] In order to make any determination as to the strengths or weaknesses in the cases of the parties, reference has to be made to the affidavits submitted on behalf of the parties to the proceedings.
- [31] The plaintiff makes a strong case for striking or expunging certain of the paragraphs in the affidavits of Robert Barker and Scott Ashton filed in these proceedings in support of the defendants' applications. Three reasons have been given for striking or expunging the said affidavits:
- (a) double hearsay;
 - (b) inadmissible opinion, adjectival descriptions or argument; and
 - (c) without prejudice discussions to effectuate the settlement of the dispute.
- [32] I have taken all of these submissions into account. In fact, during this part of the submissions on behalf of the plaintiff, counsel for the defendant made some concessions regarding some of the paragraphs in Mr. Barker's affidavit such that it was agreed that portions of paragraphs 5 & 12 and all of paragraph 25 should be expunged. At the same time, counsel for the plaintiff and I discussed deleting certain words or phrases that are most likely hearsay which I have done in considering the affidavit of Mr. Barker. I have not included in my deliberations paragraphs 27 to 33 of Mr. Barker's affidavit as I determine that those paragraphs relate to privileged communications between the parties.
- [33] The plaintiff also objects to paragraphs 21 - 24 in Mr. Ashton's affidavit, claiming they are conclusions and allegations more appropriate in a Statement of Claim. The other objection is that these objected-to paragraphs do not provide any admissible evidence that a court could possibly use to come to a finding of fact.
- [34] In order to make a determination regarding paragraphs 21 - 24 in Mr. Ashton's affidavit, I think it important to include those paragraphs here together with a few others, commencing with paragraph 1:
1. I am the Vice President, Finance, for the group of companies ("Tyam Group") owned by and/or related to the defendant Tyam Construction Ltd. ("Tyam"), and the defendant Cambie St. Constructors Inc. ("CSC") and as such have personal knowledge of the facts and matters herein deposed to save and except where the same are stated to be based on information and belief and where so stated I verily believe the same to be true.
 2. I have worked for the Tyam Group since 2006. I was initially hired as Project Cost Accountant for CSC; in March 2008 I became Controller for CSC and in September 2008, Controller/Vice President, Finance of the Tyam Group....
 21. Attached as Exhibit "A" to this affidavit, is a spreadsheet showing the overpayments made by Tyam to the plaintiff, as well as the summary of the expenses that the plaintiff forwarded to Tyam to pay or which were charged to a Tyam MasterCard credit card in Dennis Hall's name.

22. Tyam says that the total overpayments, unauthorized expenses, and personal expenses charged to Tyam's MasterCard total \$552,847.86 and are comprised as follows:
- (a) \$323,262.47 (\$307,773.78 plus \$15,388.69 GST) representing the difference between the amount paid to the plaintiff and the amount owed to the plaintiff;
 - (b) \$123,223.52 (\$117,355.73 plus \$5,867.79 GST) representing
 - (i) the extra vehicle operating and maintenance charges paid to the plaintiff or charged to Tyam by the plaintiff over and above \$1,500 per month paid by Tyam,
 - (ii) 70% of the Dennis Hall and Judy Hall cell phone expenses charged to Tyam, and
 - (iii) \$15,000 owed to Tyam by the plaintiff, which represents the loss sustained by Tyam re-selling a Ford Expedition, which loss was incurred because Tyam bought out the lease of a Ford Expedition at the request of the plaintiff for the use of Dennis Hall, however the plaintiff then decided to lease a vehicle instead, thereby requiring Tyam to re-sell such vehicle at a loss; and
 - (c) \$106,461.87 for personal charges charged to Tyam's MasterCard in Dennis Hall's name.
23. Between 2006 and the end of 2009, the plaintiff and/or Dennis Hall actually charged \$158,510.09 to Tyam's MasterCard and such amounts were automatically paid by Tyam's accounting department. In January 2010, Bryan Hall reviewed the MasterCard summaries for each of the items charged and of the \$158,510.09, identified \$106,461.87 as being personal expenses that should be charged back to the plaintiff and/or Dennis Hall.
24. Such expenses were not authorized by any oral or written agreement, nor did the plaintiff ever submit any expense reports or explanations for such amounts. Tyam, through its counsel has demanded that the plaintiff and/or Dennis Hall repay the \$552,847.86 to Tyam and that the plaintiff has so far refused or neglected to repay this amount.
- [35] I agree that the last sentence in paragraph 24 is inappropriate for an affidavit in these circumstances and agree that it should be expunged.
- [36] It must be remembered that the action was only commenced 10 days prior to the hearing into the defendants' motions and part of that time was taken up by seeking short leave for the hearing and preparation of affidavits for the hearing. Thus, the defendants haven't yet had time to prepare and file a Statement of Defence in the proceedings, nor were they yet required to do so by the Rules of Court by the time this matter was heard.
- [37] It would therefore seem appropriate for the Controller and Vice President of Finance for the defendant group of companies to set out in his affidavit what will be an issue at trial by way of set-off against the plaintiff's claims. Additionally, his evidence regarding the sums owed will likely be admissible resulting from the "business records" provisions of the Evidence Act.

- [38] While the decision in Elkhorn Roadbuilding Ltd. v Dorman Timber Ltd (supra). has been cited for the proposition that a garnishing order can be set aside if the defendant can establish that a plaintiff would be unable to recover the full amount of the judgment, I decline to do so here as I am not satisfied that the defendants have made out that case.
- [39] Applying the considerations set out by Seaton J.A. in Min-En Laboratories Ltd., I determine that it would not be just in all the circumstances to allow the sum of \$926,695.43 to be garnished from third parties who owe money to the defendants. Further, I determine from the evidence before me that each party has an equal chance of success in relation to its claims for money owed or for set-off.
- [40] Accordingly, I order that the sum of \$400,000.00 be left in court and the balance be paid out to the defendants.
- [41] Each party will bear its own costs for this application.

Master G. Taylor

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Prepared on 29 October 2026 · Esheria