
CANADA / JUDGMENT

Hamilton v. Mainland Machinery Ltd.

2016 BCSC 141

COURT

Supreme Court of British Columbia

DECIDED

29 January 2016

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2016 BCSC 141 Hamilton v. Mainland Machinery Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hamilton v. Mainland Machinery Ltd.,

2016 BCSC 141

Date: 20160129

Docket: S146175

Registry: Vancouver

Between:

Lawrence Hamilton

Plaintiff

And

Mainland Machinery Ltd., and Paragon Partners Inc.

Defendants

Before: Master MacNaughton

Reasons for Judgment

Appearing on his own behalf:

Lawrence Hamilton

Counsel for the Defendants, Application Respondents:

Geoffrey Dabbs

Counsel for the Proposed Added Defendant Boale, Wood & Company Ltd.:

Peter Roberts

Place and Date of Hearing:

Vancouver, B.C.

December 10, 2015

Place and Date of Judgment:

Vancouver, B.C.

January 29, 2016

The applications

- [1] The plaintiff, Lawrence Hamilton, seeks orders that:
- (a) this file be transferred to the Kelowna Registry for all purposes;
 - (b) Enviro-Klean Remediation Group ("Enviro Remediation") be added as a plaintiff to this action; and
 - (c) Boale, Wood & Company ("Boale") be added as a defendant to this action.
- [2] The defendants Mainland Machinery Ltd. ("Mainland") and Paragon Partners Inc. ("Paragon") oppose all the orders sought and Boale opposes being added as a defendant.

The background facts

- [3] These background facts are taken from the parties' affidavits, the attached exhibits, and the pleadings, which formed part of the materials before me.
- [4] Mr. Hamilton is an inventor who, in 2002, invented or modified what he describes as a new and patentable version of a thermal desorber machine called the KM-4. The KM-4 cleans soil that has been contaminated with hydrocarbons. The KM-4 weighs about 30,000 kilograms and is about 16 meters long, 2.5 meters wide and 4 meters high.
- [5] In his affidavit, Mr. Hamilton says that he financed, built, serviced, and sold several KM-4s in Canada, Spain and South Korea. He completed the last machine in 2006 and Mr. Hamilton says that it has been described as the best machine of its kind in the world.
- [6] As a result of health issues in 2005 and 2006, Mr. Hamilton and Enviro Remediation ceased manufacturing the KM-4. He says that Enviro Remediation then had an outstanding \$500,000 loan to either Hilton Industrial or Edward Hilton (I will refer to the lender as "Hilton") which was secured by the last completed KM-4. Mr. Hamilton estimates the KM-4 had a value of about \$3.5 million.

- [7] In 2007, when the loan had been paid down to about \$400,000, Hilton placed a lien on the KM-4 and may have seized it and placed it in storage. What happened is not entirely clear on the materials but nothing turns on it for the purposes of this decision. Enviro Remediation then laid off staff and ceased operations.
- [8] Mr. Hamilton continued to actively seek buyers for the KM-4 and, in 2009, he sold it to an off-shore remediation company for whom he facilitated financing through Business Development Canada.
- [9] Because the KM-4 had been in storage, it required servicing and the purchaser requested some customization. Hilton refused to allow it to be moved to Kelowna for that purpose and Mr. Hamilton made arrangements to have it serviced at an indoor facility owned by Mainland in Abbotsford. The KM-4 was moved there in May of 2010. Mr. Hamilton says that he and Mainland agreed that the goal of their relationship was to complete the sale, demonstrate the machine, and sell others to Mr. Hamilton's contacts (the "Service Agreement").
- [10] Mr. Hamilton expressed his dissatisfaction with the fact that Mainland serviced the KM-4 in an outdoor facility where it was exposed to the effects of weather. He also expressed dissatisfaction with the quality and pace of Mainland's work. Within a few months, Mainland advised the purchaser that the KM-4 was serviced and fully operational including the installation of an oil recovery attachment which had been requested by the purchaser.
- [11] In November 2010, Mr. Hamilton ran out of money and, at some point, Mainland stopped working on the KM-4. He says that Mainland introduced him to the defendant Paragon which agreed to find additional financing of up to \$2 million to complete the sale, do the demonstrations, and sell other machines.
- [12] In early 2011, there is some dispute about the date, Enviro-Klean Technologies, Inc. ("Enviro Technologies"), Enviro Remediation, and Enviro-Klean Oil Recovery System, Inc., companies in which Mr. Hamilton was a shareholder, director and officer, entered into a management contract with Paragon. I will refer to this group of companies as the Enviro-Klean Group in this decision. Pursuant to the management contract, Paragon was to provide all senior management functions to the Enviro-Klean Group. I will refer to this agreement as the "Management Contract". The Management Contract was signed by Mr. Hamilton on behalf of the Enviro-Klean Group and by Dwight Martin on behalf of Paragon. Mr. Martin was designated at Paragon's primary representative to carry out the duties prescribed in the Management Contract.
- [13] Mr. Hamilton says that, when the Management Contract was executed, Mainland and Paragon did not disclose to him that Mr. Martin was no longer licensed to practice as a Chartered Accountant.

- [14] Pursuant to the Management Contract, Paragon says that it found four investors who were prepared to lend \$490,000 to the Enviro-Klean Group. In March and April 2011, Paragon caused Enviro Remediation and Enviro Technologies to enter into four agreements for financing that was to be provided by Andrew Palaniak, 574651 B.C. Ltd., 0852963 B.C. Ltd., and TLC Holdings Inc. ("TLC" and, collectively, the "Secured Creditors")
- [15] The terms under which the financing was to be advanced were incorporated into Term Sheets. Three of the Term Sheets were signed on behalf of Enviro Remediation and Enviro Technologies by Mr. Martin, as CEO, and one was signed by Evan Baergen, as president.
- [16] Pursuant to the Term Sheets, Enviro Remediation provided the Secured Creditors with promissory notes and Enviro Remediation and Enviro Technologies executed general security agreements ("GSAs"). The promissory notes and GSAs were executed by Mr. Martin.
- [17] Mr. Hamilton disputes that Paragon had the necessary legal authority to enter into the various agreements with the Secured Creditors. However, no steps were taken by Mr. Hamilton on the Enviro-Klean Group to raise that issue or to question the validity of the various documents signed by Paragon.
- [18] On October 20, 2011, TLC made demand on Enviro Remediation and Enviro Technologies for the monies it had advanced and gave notice that, if payment was not made, it intended to enforce its GSAs.
- [19] In response, Enviro Remediation and Enviro Technologies said that they were unable to meet their debt obligations until the KM-4 was sold. They did not question the enforceability of the GSAs. Their counsel indicated that a sale was pending which would result in sufficient funds to pay the debt in full. They sought additional time for the sale to complete.
- [20] On November 4, 2011, under the terms of the GSAs, TLC appointed Boale as a receiver of Enviro Remediation and Enviro Technologies.
- [21] Despite immediately threatening legal action about the appointment of Boale, Mr. Hamilton, who was then represented by counsel, did not commence any proceedings.
- [22] On April 4, 2012, Mr. Hamilton's counsel proposed that Mr. Hamilton take possession of the KM-4 in order to put it in working order to complete a sale. Counsel threatened that, if Paragon did not agree to his proposal, Mr. Hamilton would commence legal proceedings to discharge Boale and for other relief. Paragon did not agree and no action was commenced.
- [23] On June 20, 2012, Mr. Hamilton's counsel requested an update on the status of the sale of the KM-4 and an update was provided.
- [24] Mr. Hamilton underwent a liver transplant in October 2012 and, after recovering, in mid-2013, he learned that the receiver had still not realized on the KM-4. In November 2013, Mr. Hamilton had a second major surgery relating to his liver transplant and, after recovering, he filed this notice of civil claim in August of 2014.

- [25] In an affidavit filed by Evan Baergen, an officer and director of Paragon, he says that Paragon remains a creditor of the Enviro Group under the Management Contract and has taken an assignment of Hilton's security and its claim against Enviro Remediation.
- [26] While realizing on the assets of Enviro Remediation and Enviro Technologies, Boale assigned certain of their assets to Paragon including: the right, title and interest in the company names and the name Enviro-Klean; any intellectual property owned by them including the right to pursue any claim to any intellectual property purported to be owned by Mr. Hamilton related to the companies' products; the right, title and interest of Enviro Remediation and Enviro Technologies in respect of a claim against Mr. Hamilton and/or his wife in respect of money wrongfully withdrawn from Enviro Remediation's bank accounts between October and November 2011; and the right, title and interest of Enviro Remediation and Enviro Technologies arising from or related to contracts between them, Mainland, and Paragon including the claims which are the subject matter of this action.
- [27] Enviro Remediation is now out of receivership and Mr. Hamilton has taken steps to have it corporately restored.

The pleadings to date

- [28] In his notice of civil claim, as against Mainland, Mr. Hamilton alleges that Mainland breached its contract to prepare the KM-4 for sale. In particular, he alleges that Mainland failed to: control costs; keep the project on schedule; and provide quality fabrication work.
- [29] As against Paragon, Mr. Hamilton alleges that Paragon breached the management agreement by failing to provide: financing services for the KM-4; management services to implement and accomplish Enviro Remediation's goals; and to demonstrate the KM-4 to potential customers.
- [30] In response to the allegations against it, Mainland acknowledges entering into an agreement with Enviro Remediation and Enviro Technologies to assist in the further development and fabrication of the KM-4. It pleads that Enviro Remediation and Enviro Technologies failed to pay it for services under the agreement. Mainland denies entering into any agreement with Mr. Hamilton.
- [31] In response to the allegations against it, Paragon alleges that the Enviro-Klean Group failed to pay it for the management services it provided under the Management Agreement. Paragon denies entering into an agreement with Mr. Hamilton.
- [32] As a result of Mainland's and Paragon's defences, Mr. Hamilton realized that he may not be the proper plaintiff in this action and he seeks to add Enviro Remediation, a party to the Service Agreement and one of the parties to the Management Contract, as a plaintiff.

The legal framework for an application to add parties

[33] Rule 6-2(7)(b) and (c) of the Supreme Court Civil Rules B.C. Reg. 168/2009, set out the discretion to, and legal test for, adding or substituting a party to a proceeding. The Rule provides:

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
 - (b) order that a person be added or substituted as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
 - (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relation to or connected with
 - (i) any relief claimed in the proceeding, or
 - (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[34] The same Rule applies whether the party sought to be added is a plaintiff or a defendant.

[35] Mr. Hamilton's notice of application does not specify whether he is relying on Rule 6-7(b) or (c).

Rule 6-7(b)

[36] An application under Rule 6-7(b) is intended only to remedy defects in the proceeding as it stood prior to the application to add parties. As the Court of Appeal explained in *Letvad v. Fenwick*, 2000 BCCA 630, when dealing with an application to add parties under the applicable predecessor Rule:

the plaintiff must establish either that the persons sought to be added "ought to have been joined as a party" or that their "participation in the proceeding is necessary" in order to permit the issues between the existing parties to be effectually adjudicated. [para. 17]

Rule 6-7(c)

[37] Because an application to add a party under Rule 6-7(c) requires the court to exercise its discretion, the application must be supported by facts which establish the possible existence of a question or issue, the resolution of which would be just and convenient to determine as between the existing parties to an action and the person sought to be joined. There must be some evidence indicating a cause of action between the existing parties and the proposed

added parties: *Robson Bulldozing Ltd. v. Royal Bank of Canada* (1985), 62 B.C.L.R. 267 (S.C.) at para. 7.

- [38] An applicant must establish two requirements to succeed in adding a new party under Rule 6-7(c). First, there must be a question or issue between the plaintiff and the proposed added party that relates to the relief, remedy, or subject matter of the proceeding. The threshold on the question is not onerous. The issue is not whether the cause of action may be proven, but that it exists. In *MacMillan Bloedel Ltd. v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.), the Court said:

the question or issue is a real one in the sense that it is not entirely frivolous and would result in [the court] wasting judicial time.

- [39] The threshold question may be met solely on the basis of the proposed amendments to the claim or by affidavit. Any such affidavit is examined only to the extent necessary to determine whether there exists the required issue between the parties: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, at para. 45.
- [40] If the first requirement is met, the court must then determine, exercising its discretion, whether it would be just and convenient to decide the issue between the parties in this proceeding.

Mr. Hamilton's application to add Enviro Remediation as a plaintiff

- [41] Mr. Hamilton has prepared an amended notice of civil claim ("ANCC") which sets out, in much greater detail, the chronology of Enviro Remediation's relationship with the defendants. In Part 3, the Amended Legal Basis, and under a heading entitled "Breach of Fiduciary Duty", Mr. Hamilton adds claims that Mainland and Paragon fraudulently misrepresented themselves or alternatively negligently represented their relationship with the plaintiffs.
- [42] I accept that, on the pleadings as originally filed, Enviro Remediation ought to have been joined as a party as it was the signatory to the Service Agreement, and one of the signatories to the Management Contract, both of which are the subject of this lawsuit. To the extent that the facts pled support such pleadings, Enviro Remediation is an appropriate party. As a result, absent the issue discussed below, Mr. Hamilton's application would succeed under Rule 6-7(b).
- [43] Based on the ANCC, and Mr. Hamilton's affidavit, I also accept that there may exist between Enviro Remediation and the defendants a question or issue relating to or connected to the relief claimed in Mr. Hamilton's proceeding or the subject matter of the proceeding. As a result, absent the issue discussed below, Mr. Hamilton would meet the first stage of the inquiry under Rule 6-7(c).

- [44] However, there is an unusual twist in this case. Enviro Remediation's right to sue the defendants was a corporate right or asset which vested in Boale and was subsequently conveyed by it to Paragon in exchange for a forgiveness of part of Enviro Remediation's debt arising from the Management Contract. As a result, Enviro Remediation does not have the right to sue either Mainland or Paragon. This is, in my view, a complete answer to the amendment sought. It cannot therefore be either just or convenient to add Enviro Remediation as a party under Rule 7-2(c).

Mr. Hamilton's application to add Boale as a defendant

- [45] As it relates to adding Boale as a defendant, I have concluded that Mr. Hamilton cannot succeed under Rule 6-7(b) as the materials filed do not support that Boale ought to have been a party to the proceeding as originally commenced or that their participation in the proceeding is necessary to permit the issues between the existing parties to be effectually adjudicated.
- [46] Boale was not a party to either the Service Agreement or the Management Agreement and cannot be said to have been involved in the alleged breaches thereof. Boale was also not a party to any misrepresentations alleged against Mainland or Paragon. It cannot have been a party to any alleged breach of fiduciary duty.
- [47] I have also concluded that Mr. Hamilton's application cannot succeed under Rule 6-7(c).
- [48] In reviewing the ANCC, and Mr. Hamilton's affidavit in support, I am not satisfied that, as pled, Mr. Hamilton has established that a cause of action exists against Boale. Further, the remedy or relief Mr. Hamilton seeks as against Boale has no relationship to the relief or remedy sought as against Paragon or Mainland. Therefore, it is not necessary for me to consider the justice and convenience part of the analysis.
- [49] The ANCC does not make clear whether Mr. Hamilton seeks to add Boale in its capacity as a receiver or in its personal capacity. In either event, the ANCC does not plead any material facts to support such claims.
- [50] In this regard, there are a number of flaws in the pleading. First, there is no claim available to Mr. Hamilton personally against Boale. He was not a party to the GSAs between Enviro Remediation and Enviro Technologies and TLC, nor was he a party to the arrangements between TLC and Boale. Second, Boale's authority was pursuant to the GSAs which Paragon, on behalf of Enviro Remediation and Enviro Technologies granted to TLC, but Mr. Hamilton does not seek to add TLC as a party or to dispute the enforceability of the GSAs. The ANCC makes no claim against TLC. Third, Mr. Hamilton does not seek to add Enviro Technologies as a plaintiff.
- [51] In addition, the ANCC, and Mr. Hamilton's affidavit, do not assert: that TLC never advanced funds to Enviro Remediation; that the GSAs were not granted or were otherwise invalid; or that Enviro Remediation had not defaulted in its repayment obligations.

- [52] Paragraphs 149-151 of the ANCC set out the facts regarding the appointment of Boale and the reasons for it. Paragraphs 153, 154, 158, 159 and 162-165 refer to Boale's activities under the receivership. They do not suggest any wrongdoing or breach of any professional duty on the part of Boale.
- [53] A receiver appointed under an instrument such as the GSA is the agent of the secured creditor who appointed it and its primary duties are to that security holder. A receiver may also be an agent of the debtor and owe a duty to the debtor and to others to account for its actions, to act honestly and in good faith, and to deal with the property in its possession or control in a commercially reasonable manner. In this case, if any duty was owed by Boale to a debtor, it was owed to Enviro Remediation. However, the ANCC does not include any allegations of breaches by Boale in its conduct of the receivership. The ANCC pleads no material facts that Boale failed to account to Enviro Remediation or to act honestly or in good faith.
- [54] The legal basis for the claims in the ANCC are breach of contract, misrepresentation, and/or breach of fiduciary duty, but those claims are against the defendants Mainland and Paragon not against Boale.
- [55] The only relief sought which involves Boale is:
- An order to rescind the receivership actions against Enviro-Klean Remediation Group Inc. and Enviro-Klean Technologies Inc.
- [56] The receivership has concluded and all of the assets of Enviro Remediation have been disposed of by Boale. An order to "rescind the receivership actions" would have to name those affected by a rescission including the purchasers of any Enviro Remediation assets from Boale.
- [57] As a result, there is no factual or legal basis on which it would be appropriate to add Boale as a party under Rule 6-7(c) and Mr. Hamilton's application is dismissed at the first stage of the analysis discussed above.

Mr. Hamilton's application to transfer this proceeding to Kelowna

- [58] Rule 23-1(13) grants discretion to the court to order a proceeding to be transferred from one registry to another for any or all purposes.
- [59] Applications to transfer proceedings are most commonly brought by a defendant to a proceeding and thus decisions under the Rule have considered the right of a plaintiff to select the jurisdiction of their choice and the substantial burden on a defendant to overcome that choice.
- [60] Neither Mr. Hamilton nor the defendants were able to direct me to any cases in which a plaintiff sought to transfer proceedings he had commenced from his jurisdiction of first choice to another.

- [61] In my view, this application should be considered on the same basis as a similar application by a defendant would be with the exception there should be no presumption that the plaintiff's initial selection of venue, as *dominus litus*, should be given some preference. As a result, I will consider whether the interests of justice or the preponderance of convenience favour a transfer.
- [62] In this case, Mr. Hamilton commenced this proceeding when he lived, temporarily, in the Lower Mainland. He now resides in Kelowna. I accept that it will be more convenient for Mr. Hamilton if the matter is transferred to Kelowna.
- [63] Read generously, Mr. Hamilton suggests that, his liver transplant, and his need for daily anti-rejection drugs may make it difficult for him to travel long distances. He does not say that unless this proceeding is transferred, his medical condition is such that he cannot participate in it. He attended in Vancouver to argue this application. However, I accept that it would be more convenient to Mr. Hamilton to have this action transferred to Kelowna.
- [64] On the other hand, both of the defendants, and their counsel of choice, are from the Lower Mainland. Mainland is located in Abbotsford, Paragon is located in Delta and the defendants' counsel maintains his office in Vancouver. The agreements which are the subject matter of this dispute were executed here and the work performed here. Presumably, the defendants' witnesses reside at or near their place of employment.
- [65] Mr. Hamilton is an in-person litigant who, due to his financial situation, has been granted a waiver of fees. He does not have to pay counsel to travel to Vancouver. The defendants would have to pay their counsel and witnesses to travel to Kelowna if the matter were to be transferred.
- [66] Pursuant to Rule 7-2(11), Mr. Hamilton is entitled to be examined for discovery in Kelowna where he resides. Even if the matter were transferred, absent agreement, representatives of the defendants are entitled to be examined within 30 kilometres of the registry that is nearest to the place where the person to be examined resides.
- [67] Mr. Hamilton will continue to have access to the Kelowna Courthouse Library for the purposes of legal research regardless of whether the matter is transferred. Taking all of these factors into account, I conclude that neither the interests of justice nor the balance of convenience weighs in favour of a transfer of this proceeding.
- [68] Recognizing that Mr. Hamilton's health challenges may change, he may, if necessary, apply to have other steps in this proceeding, including the trial, held in Kelowna.

Conclusion

- [69] Mr. Hamilton's applications to add Enviro Remediation as a plaintiff and Boale as a defendant are dismissed. His application to transfer this proceeding to Kelowna has also been dismissed.

- [70] In dismissing these applications, I am not deciding that Mr. Hamilton or Enviro Remediation has no legal recourse. In fact, counsel for Mainland and Paragon candidly acknowledged that there may be a cause of action. It may be that what Mr. Hamilton, or Enviro Remediation, really seeks to do is unwind the receivership and sue for damages. Such an action is legally complex and has not been pled in the existing pleadings. Mr. Hamilton would benefit from legal advice.
- [71] Finally, the parties did not make submissions on costs. Both respondents sought costs in there filed responses. The respondents have been entirely successful. Costs would usually follow this result. If the parties are unable to agree on such an order, they may schedule submissions through Supreme Court Scheduling.

"Master MacNaughton"

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