

CANADA / JUDGMENT

Hepworth v. Otso Gold Corp.

2020 BCSC 1086

COURT

Supreme Court of British Columbia

DECIDED

3 July 2020

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2020 BCSC 1086 Hepworth v. Otso Gold Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hepworth v. Otso Gold Corp. ,

2020 BCSC 1086

Date: 20200703

Docket: S204346

Registry: Vancouver

Between:

Michael Hepworth, Basil Botha, Greg Duras

and Tom Klaimanee

Plaintiffs

And

Otso Gold Corp.

Defendant

Before: Master Cameron

Oral Reasons for Judgment

Counsel for Plaintiffs:

N. Chang

Counsel for Defendant:

J. Buysen

Place and Date of Hearing:

Vancouver, B.C.

July 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 3, 2020

- [1] This is an application brought by the defendant to set aside a garnishing order before judgment filed May 1, 2020. The amount paid into court pursuant to the order is the sum of \$269,413.
- [2] The pertinent background facts and circumstances are as follows:
- [3] On April 28, 2020, the plaintiffs filed a notice of civil claim identifying the defendant as a company that the plaintiffs were employed with as senior officers and directors until July 2, 2019.
- [4] The plaintiff, Michael Hepworth was the president, chief executive officer, and a director. The plaintiff, Basil Botha was the executive chairman and a director. The plaintiff, Greg Duras was the chief financial officer and the plaintiff, Tom Klaimanee was the corporate secretary.
- [5] The plaintiffs provided management services to the company and were entitled to compensation for those services pursuant to written consulting agreements they entered into with the company.
- [6] In 2019, the company restructured its board and management, and as part of that restructuring, the plaintiffs agreed to resign their senior management roles with the company and be replaced by two entities named Lionsbridge and Westech.
- [7] Paragraph 8 of the notice of civil claim asserts that at the time the agreement was made, the company had not fully compensated the plaintiffs for their services. The agreement contained the following term with respect to compensation owed by the company to the plaintiffs for their management salaries:

7.8 Notwithstanding any other provision of this agreement, the amount payable pursuant to clause 7.1(a) above shall be accrued but not paid until the total available funds of Nordic [that is the defendant] is at least U.S. one million dollars. On the date total available funds to Nordic reaches at least U.S. one million dollars (the "release date"), all accrued amounts will be paid Lionsbridge and Westech will continue to be paid without accrual as per clause 7.1(a). In addition, on the release date, any and all accrued management salaries of approximately \$269,333 as of the date of this agreement owing to Michael Hepworth, Basil Botha, Greg Duras and Tom

Klaimanee shall be paid in full.

- [8] The notice of civil claim alleges that the precondition for payment of these funds to Messrs. Hepworth, Botha, Duras and Klaimanee came to pass, and in breach of the agreement, the defendant failed to pay the amounts owing.
- [9] The notice of civil claim claims judgment for debt in the amount of \$269,333. Alternative claims are made for damages for breach of contract, a declaration that the company has been unjustly enriched by the plaintiffs, and an order that the defendant pay \$269,333 to the plaintiffs on a quantum meruit basis.
- [10] It is pled the agreement, specifically the accrued salary term, is an acknowledgement by the company of the debt owed to the plaintiffs. It is also alleged that the agreement was a valid contract made between the defendant, Lionsbridge and Westech and was approved by the company shareholders at a shareholder meeting. The plaintiffs resigned from their positions with the defendant company consistent with the agreement.
- [11] Based on this legal foundation, the plaintiffs applied for a prejudgment garnishing order. Supporting the order sought was the affidavit of Mr. Botha, filed May 1, 2020. In that affidavit Mr. Botha affirms:
 - [1] I am one of the plaintiffs herein and as such have personal knowledge of the facts deposed to in this, my affidavit.
 - [2] This action is pending. The notice of civil claim was electronically filed on April 28, 2020, and is attached as Exhibit A to this, my affidavit. The notice of civil claim describes our claims in more detail.
 - [3] The nature of the cause of action for which this action is brought is in breach of contract. Put another way, as a result of its breach of contract, the defendant owes a debt to the plaintiffs as described below.
 - [4] In respect of the cause of action, the defendant is justly indebted to the plaintiffs jointly for a debt owing of \$269,333 after making all just discounts and it is now justly due and owing.
 - [5] To the best of my information and belief, the Bank of Montreal at 595 Burrard Street, Vancouver, BC, V7X 1L7, the garnishee is indebted under obligation or liable to the defendant, and the garnishee is in the jurisdiction of this court, and the indebtedness obligation or liability of the garnishee is not for salary or wages.
- [12] The defendant submitted that the garnishing order was flawed and challenged it principally due to what were submitted to be material nondisclosure of essential facts.
- [13] The challenges are premised upon the legal requirements that have been often articulated and most recently stated and confirmed in *Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd.*, 2015 BCCA 318. At para. 33 and 34, the court notes:

- [33] Thus, the plaintiff in this case was required to make full and frank disclosure of all material facts related to the cause of action asserted against the defendants. A material fact is one that may have affected the outcome of the application: see *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at para. 33. Here, the notice of civil claim attached to the supporting affidavit effectively stated that both the Parent and the Subsidiary had entered into the agreements with the plaintiff for the anodizing line and the waste water treatment plant. It defined the two defendants as "Apex" and then stated that Apex had entered into the agreements with the plaintiff. This was misleading because only the Parent entered into the agreements with the plaintiff. The affidavit failed to disclose this material fact. To the extent the plaintiff intended to rely on its "arguable case" that the plaintiff and the Subsidiary agreed on all essential terms of the contract for the anodizing line orally and/or by way of emails, the affidavit failed to disclose the material fact that the formal agreement was amended to remove all references to the Subsidiary in order to ensure that it could not be considered to be a party to the agreement.
- [34] The principal cause of action relied on in the notice of civil claim attached to the supporting affidavit was breach of contract. The Subsidiary could not be liable for breach of contract if it was not a party to the contract. If all the material facts had been disclosed in the affidavit, the registrar may well not have issued the garnishing order on the basis that the facts did not support a claim against the Subsidiary.
- [14] Counsel for the defendant submitted that there were essential material facts that were not brought to the attention of the registrar that may well have had a bearing upon whether or not the registrar would or should issue the garnishing order.
- [15] The management services provided by the plaintiffs to the defendant company were provided pursuant to consulting agreements they entered into on January 23, 2019, with an effective date of August 1, 2018.
- [16] It was common ground that any amounts due and owing to the plaintiffs resulted from their provision of services to the defendant under the consulting agreements that was confirmed by the subsequent services agreement that provided for a change in control of the senior management of the defendant company and, with that, the resignations of the plaintiffs as its senior officers.
- [17] What was material to know and would have been a consideration for the registrar if it had been drawn to his or her attention is that the consulting agreements in each case but for one are personal to the plaintiff; that is, Mr. Botha, Mr. Duras and Mr. Klaimanee all were signatories to the agreement each of them entered into with the company.

- [18] In the case of the plaintiff Michael Hepworth, the agreement was between a company that Mr. Hepworth controlled known as Results Exchange Inc. In his consulting agreement, there is no mention of him as the consultant, rather it is Results Exchange Inc. that would perform or be responsible for the carrying out of the services and be compensated for those services albeit through its principal, Mr. Hepworth.
- [19] Counsel for the defendant submits that this is a crucial feature to the underlying factual and legal matrix in support of the claim; that is, it was important and necessary for the registrar to know that Mr. Hepworth himself was not a party to the consulting agreement, but rather his closely held company was. It follows that the company would be a necessary and proper party to advance a claim for breach of this consulting agreement on behalf of Mr. Hepworth. The company is not named in the action. That is a matter the registrar did not have the opportunity to consider in issuing the garnishing order.
- [20] Other information that the defendant says ought to have been provided in carrying out the obligation to make full and frank disclosure in support of the garnishing order concerns the amount of the claim itself. The affidavit of Mr. Botha that attaches the notice of civil claim was all that was provided in support of the garnishing order. No other documentation in support of the claim was provided, although there was a written reconciliation or table prepared by the plaintiffs and shared with the new management taking over the company that calculated and specified what they alleged they were collectively entitled to pursuant to the terms of the consulting agreement. The amounts that are claimed are for accrued salaries and for termination notice, amounting to \$269,332.60, which corresponds with the amount claimed in the notice of civil claim.
- [21] The reconciliation document, sets out various amounts alleged to be due based on the plaintiffs' performance of the agreement, and it is noteworthy that it also includes an amount for a person who is not a plaintiff in the action. A person by the name of Dace is said to be owed \$4,520. That sum is included within the \$269,333 claimed in the garnishing order. Again, this fact or circumstance, if it had been brought to the attention of the registrar, may have caused the registrar to make further inquiries or require further information before issuing a garnishing order for the full amount claimed.
- [22] In my view, it is a significant omission that the consulting agreements were not attached as evidence in support of the garnishing order. That is so because the consulting agreements set out with specificity those amounts due and payable to the plaintiffs based on services they provided and expenses they incurred for the benefit of the company.
- [23] In this case it is clear that the plaintiffs resigned and the consulting agreements provided a resignation would not trigger certain additional termination payments. However, it is clear from the reconciliation prepared by the plaintiffs that those termination payments are included in the claim for which the garnishing order was issued.

- [24] That is not to say whether or not those amounts are due to the plaintiffs, but only one more material fact that was not disclosed in support of the garnishing order.
- [25] Counsel for the defendant also relied upon the plaintiffs' failure to disclose in support of the garnishing order the terms of the consulting agreements that provide for the laws of Ontario to apply and for the courts of Ontario to have exclusive jurisdiction over matters relating to the agreement.
- [26] Counsel submitted that under Ontario law there is no right to prejudgment garnishment. Plaintiffs' counsel did not challenge that assertion, and as I understand it, that is a correct statement of the law. Again, this is information that should have been available to the registrar to ensure that a prejudgment garnishing order was properly issued in this case. Even if there was an argument to support the action being brought in British Columbia, which was not addressed by plaintiff's counsel on this application, nonetheless this was a material fact or circumstance that was required to be disclosed on the application for the garnishing Order based upon the law I have already referenced.
- [27] Counsel for the plaintiffs was correct in submitting that the courts do not require perfection, but the law is clear that there must be meticulous or strict compliance with the statutory prerequisites for the issuance of a garnishing order. Where that compliance is not made out, unless it can be concluded that all of the omissions are not material, the court must set aside the garnishing order.
- [28] In conclusion, the failure on the part of the plaintiffs to make full and frank disclosure of all of the underlying material facts and circumstances respecting their claims as I have outlined them require that the garnishing order be set aside with costs to the defendant.

"Master Cameron"

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