CANADA / JUDGMENT

HSL Investments Ltd. v. 1027023 B.C. Ltd.

2017 BCSC 1090

COURT
Supreme Court of British Columbia

DECIDED
29 June 2017

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2017 BCSC 1090 HSL Investments Ltd. v. 1027023 B.C. Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: HSL Investments Ltd. v. 1027023 B.C. Ltd., 2017 BCSC 1090 Date: 20170629 Docket: S108233 Registry: Kelowna Between: HSL Investments Ltd. Plaintiff And 1027023 B.C. Ltd. Defendant Before: The Honourable Mr. Justice Rogers Reasons for Judgment Agent for the Plaintiff: L. Wade Counsel for the Defendant: A. Pabani Place and Date of Hearing: Kelowna, B.C. June 19, 2017 Place and Date of Judgment: Kelowna, B.C. June 29, 2017

Introduction

[1] The defendant seeks an order striking the plaintiff's claim. The defendant's theory is that the plaintiff's behavior in relation to the authors of an expert report in this matter was so egregious as to merit termination of the plaintiff's proceeding. The behavior in issue was the plaintiff's decision to challenge the two experts by way of Small Claims proceedings as opposed to challenging them by way of cross examination in this matter.

[2] For the reasons that follow, I conclude that the application must be dismissed.

Background

[3] The plaintiff sold some property to the defendant. The property comprised realty and various chattels located near or in an airport in Fort St. John, B.C. Among other things, the agreement between the parties required the defendant to retain the plaintiff on a consulting basis for a certain period of time. The plaintiff's claim in this proceeding centers on its allegation that the defendant breached its obligations under the consulting agreement.

[4] The defendant has responded to the suit. The defendant says, among other things, that the physical plant that it purchased was not as represented by the plaintiff and this failing justifies its decision to terminate the plaintiff's position as consultant. In support of this assertion, the defendant retained an engineering firm to provide an expert opinion as to the quality of the physical plant in issue. The firm was SRC Engineering Consultants Ltd. The firm supplied the expert report requested. The report was authored by Mr. Khangura and Mr. Manisali, both professional engineers ("SRC report").

[5] The plaintiff took issue with the quality of the engineering report. The plaintiff's principal Mr. Wade decided to challenge Mr. Khangura's and Mr. Manisali's work. Mr. Wade chose Small Claims Court as the forum in which to prosecute the plaintiff's challenge. HSL Investments Ltd. therefore issued two separate notices of claim out of the Fort St. John registry of the Provincial Court of British Columbia (Small Claims Court). The target of one Small Claims action was Mr. Khangura; the target of the other was Mr. Manisali. In both Small Claims proceedings, the plaintiff asserted that the engineers had committed numerous errors in their work on the SRC report. In each Small Claims proceeding the plaintiff sought special damages for legal fees expended in assessment of the SRC report and punitive damage against SRC and the named individual engineer.

[6] Mr. Wade acknowledged that the plaintiff has had a lawyer from time to time to represent its interests in the present proceeding, but said that he did not seek legal advice ahead of causing the plaintiff to commence the two Small Claims actions. Mr. Wade asserted that he was innocent of the fact that the proper way to challenge an expert's opinion is by way of cross-examination in the proceeding in which the opinion was adduced. The defendant on this application did not challenge that assertion.

[7] The plaintiff filed notices of withdrawal of both Small Claims proceedings very shortly after receiving delivery of the present application. The record of evidence on this matter does not describe the outcome of any argument as to costs in those Small Claims matters. Given that SRC and the engineers filed replies, it is certainly possible that some order might be made in respect of costs in those proceedings. Relief Sought

[8] The defendant seeks an order that the plaintiff's notice of civil claim be "stricken". By that I assume the defendant means "struck", as the Webster's definition of stricken is: 1: having the contents leveled off even with the top <a ~ measure of grain> 2: hit or wounded by or as if by a missile 3: a: afflicted or overwhelmed by or as if by disease, misfortune, or sorrow b: made incapable or unfit : INCAPACITATED

[9] In any event, this application does not engage the court's authority pursuant to Civil Rule 9-5, nor is it founded on an allegation that the plaintiff has failed to comply with a procedural rule. In fact, the defendant does not cite in Part 3 of its application exactly what power or authority the court might have to strike the proceeding. I assume that the defendant would, if prompted, say that the authority to strike under these circumstances flows from the court's inherent jurisdiction to control its process.

[10] As an alternative pleading, the defendant seeks:

2. Such further and other orders and directions as this Court may deem just and appropriate, including a finding of contempt of court,

[11] Again, the defendant does not cite a Rule in support of its plea for a citation of contempt.

[12] The defendant also seeks special costs. Parties' Positions Defendant

[13] The defendant points out that witnesses, including expert witnesses, in civil matters are protected by immunity from claims by unhappy litigants. The defendant says that the Small Claims actions against the engineers and their firm were, therefore, wholly unfounded. The defendant goes on. It argues that because the Small Claims were unsupportable in law, the court should infer that the plaintiff's purpose in launching those suits was to intimidate the experts and to pressure or persuade them to change their opinions or not give their evidence at all. This, the defendant says, amounts to contempt of court. Conduct this egregious must, says the defendant, be punished.

[14] Alternatively, the defendant grounds its application on the proposition that by making use of SRC's expert report to sue SRC and the engineers, the plaintiff failed to preserve the cloak of litigation privilege that ought to have shielded the report from use outside the context of the litigation for which the report was created. Plaintiff

[15] The plaintiff acknowledges that suing the engineers and their firms in Small Claims Court was not appropriate. As noted, Mr. Wade for the plaintiff says that he did what he did without legal advice and not knowing that the proper (and only) forum for challenging an expert opinion is cross-examination in the proceeding in which the opinion was tabled. Acting in ignorance of the proper procedure and protocol, the plaintiff argues that it is innocent of wilful contempt.

[16] The plaintiff says that it filed its notices of withdrawal of the Small Claims matters as soon as it received the present application and as soon as it realized, a realization reached upon reading the application, that the Small Claims suits were improper. The plaintiff argues that had the defendant simply sent it a letter outlining the same arguments it would have immediately terminated the Small Claims proceedings. So, the plaintiff submits, this application was and is unnecessary - a tempest in a teapot, to quote Mr. Wade. Discussion

[17] I will address the question of contempt before moving on to whether the proceeding should be struck. It is trite law that an essential element of contempt of court is that the alleged contemnor be shown to have acted wilfully. In this case, the alleged contemptuous act is the intimidation of witnesses. The defendant says that intimidation must have been the plaintiff's motive in launching the Small Claims proceedings and invites the court to make that finding of fact.

[18] The difficulty with the defendant's argument is that it flies in the face of Mr. Wade's uncontradicted evidence that he had no idea that it was wrong to test the engineer's opinions in a separate forum. Given that evidence, I cannot find that Mr. Wade wilfully tried to subvert justice by a deliberate attempt to intimidate the witnesses.

[19] I cannot, therefore, find that the plaintiff is guilty of contempt.

[20] The central question on this application is whether the plaintiff's misguided Small Claims proceedings against the engineers were so egregious that only by termination of this action can the plaintiff be properly punished? The jurisprudence concerning striking pleadings

and dismissing actions for failure to comply with the Civil Rules is rife with judicial caution to the effect that such remedies should be levied only when the prejudice caused by the transgression is so great as to affect the fairness of the proceeding. Further, a general sentiment found in that jurisprudence is that the court is unwilling to prevent a party from having its day in court and so these fatal orders should be made only as a last resort.

[21] Here we do not have a breach of the Civil Rules of Court, but I see no reason why the principles governing the remedy for a Rule breach should not apply to this matter. The issue is whether the plaintiff's error so prejudiced the fairness of this action that the only appropriate remedy is to prevent it from proceeding through to trial. I note that the engineers have not adduced evidence that owing to intimidation stemming from the Small Claims suits they now refuse to assist the court with their expert opinions. Even if the engineers had said something to that effect, there was no evidence that the defendant could not obtain other expert evidence to replace SRC's report.

[22] This analysis applies equally to the defendant's complaint that the plaintiff breached the implied undertaking of confidentiality that cloaked the SRC report.

[23] I am not, therefore, convinced by the evidence on this application that the fairness of the proceeding has been severely compromised by the plaintiff's actions. It follows that the defendant's application to strike the proceeding must be dismissed.

Conclusion

[24] The application is dismissed. Costs

[25] Special costs are not appropriate here. I have come to that conclusion for essentially the same reasons that I dismissed the contempt application. The plaintiff's error was basically innocent of nefarious intent - it was not the kind of behavior that merits repudiation or punishment by way of special costs.

[26] Although the plaintiff has defeated this application, I would not reward its success with costs. Instead, the defendant shall have its costs of the application in the cause. "Rogers J."

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