

CANADA / JUDGMENT

Knox v. Silver Pacific Investments Inc.

2016 BCSC 1280

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1280 Knox v. Silver Pacific Investments Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Knox v. Silver Pacific Investments Inc.,

2016 BCSC 1280

Date: 20160711

Docket: S157993

Registry: Vancouver

Between:

Robert Knox

Plaintiff

And

Silver Pacific Investments Inc.

Defendant

Before: The Honourable Mr. Justice S. Kelleher

On appeal from: An order of the Supreme Court of British Columbia, dated December 18, 2015 (Knox v. Silver Pacific Investments Inc., 2015 BCSC 2537, Vancouver Registry, Docket No. S157993).

Reasons for Judgment

Counsel for the Plaintiff:

Jack M. Webster, Q.C.

Nazeer Mitha

Counsel for the Defendant:

Robert D. Holmes, Q.C.

Maris Holmes, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

April 29, 2016

Place and Date of Judgment:

Vancouver, B.C.

July 11, 2016

- [1] This is an appeal by the defendant from a decision of a Master dated December 18, 2015: *Knox v. Silver Pacific Investments Inc.*, 2015 BCSC 2537.
- [2] The plaintiff had obtained a garnishing order before judgment. The order was served on Toronto-Dominion Bank and, in due course, \$215,265 was paid into court.
- [3] After communications between counsel, the garnishing order was set aside by consent.
- [4] The issue before the master was costs. The defendant, Silver Pacific Investments Inc. ("SPI"), sought special costs payable by Mr. Knox and/or counsel for Mr. Knox or, in the alternative, the defendant sought ordinary costs against Mr. Knox and/or his counsel.
- [5] Master Harper made a decision to:
- (a) award ordinary costs to the defendant for the preparation of the motion to set aside the garnishing order;
 - (b) award ordinary costs to the defendant for the short leave application and attendance; these two awards were made with the consent of the plaintiff.
 - (c) award ordinary costs to the plaintiff for the one and one half day hearing seeking costs against the plaintiff and counsel; and
 - (d) fix the ordinary costs to the defendant and plaintiff as the same lump sum amount and ordered them to be set off.
- [6] The defendant appealed.

Standard of Review

- [7] In *Abermin Corp. v. Granges Exploration Ltd.*, (1990), 45 B.C.L.R (2d) 188 (BCSC), the standard of review was addressed by this Court:

An appeal from a master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the master raises questions which are vital to the final issue in the case, or results in one of those final orders which a master is permitted to make, a rehearing is the appropriate form of appeal .

(at 193)

- [8] This was recently discussed in *Sorila v. Chan*, 2016 BCCA 108, where Groberman J.A. noted the statement in *Abermin* but added this:
- [20] The standard of review on an appeal from a master is a nuanced question, requiring an analysis of the importance of the master's ruling to the final disposition of the case. That analysis depends very much on the circumstances of an individual case: see *Kalafchi v. Yao*, 2015 BCCA 524, particularly at para. 16.
- [21] The correct standard of review from the order of a master will often be closely tied to the substantive issues on the appeal. It is therefore appropriate that it be decided by the judge hearing the appeal, as part of the appeal proceedings.
- [9] Here, the ruling concerns an issue of costs in respect of the garnishing order. The validity of the garnishing order is related, indirectly, to at least one substantive issue in this case. But here, the only issue before the Master was costs. The garnishing order was set aside by consent.
- [10] In *Moody Estate*, 2008 BCSC 786, Justice Johnston considered the standard of review to be applied to a decision from a Master on costs:
- [36] While the matter of costs is not one of the enumerated examples set out in *Abermin* as matters upon which an appeal must meet the "clearly wrong" standard, it does not fall within any of the three criteria upon which an appeal can be found to lead to a rehearing. Costs are not vital to the final issue in the case, and while it might be argued that costs on a petition are final, they are sufficiently discretionary in their origin that in my view, in order to succeed, the appellant here must show that the Master was clearly wrong in ordering costs on an indemnification basis.
- [11] The Court of Appeal in *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309, also notes the discretionary nature of a Master's order for costs.
- [12] I agree with Johnston J. that the "clearly wrong" test is the appropriate standard of review.

Grounds of Appeal

- [13] The grounds of appeal were stated as follows:

1. The learned Master erred in fact, law and in principle in failing to exercise her judicial discretion to award special costs against the Plaintiff Robert Knox and the Plaintiff's Solicitors Harris LLP and Ms. Diane Rideout or alternatively party/party costs of the application, particularly given that, including as set out in the facts and points of law noted in the Notice of Application of the Defendant dated October 9, 2015 and the affidavit materials filed and delivered in relation to the application, in the circumstances:
 - a. There was no right on the part of the Plaintiff Robert Knox and his Solicitors, on a without notice basis or otherwise, to seek or obtain a Garnishing Order Before Judgment in the circumstances and they ought not have done so;
 - b. The Plaintiff Robert Knox and his Solicitors failed in their obligations under and in relation to the Court Order Enforcement Act and the B.C. Supreme Court Civil Rules in making the without notice application and in obtaining and serving the Garnishing Order Before Judgment and the application materials, including their obligations to:
 - i. Make full and true disclosure of all material facts;
 - ii. Not falsely state any material fact; and
 - iii. Promptly serve the Garnishing Order Before Judgment and application materials;
 - c. The acts and omissions of the Plaintiff Robert Knox and his Solicitors were an abuse of process; and
 - d. The acts and omissions of the Plaintiff Robert Knox and his Solicitors deserved reprimand and rebuke by an award of special costs.
2. Such further and other grounds including those noted after receiving the transcript of Reasons for Judgment of the learned Master, as counsel may advise.

The Master's Decision

[14] The background facts are summarized by the Master at paragraphs 9-13 of her decision:

9. The underlying litigation is a wrongful dismissal action. Mr. Knox was employed by SPI as vice-president finance. SPI provided Mr. Knox with a letter dated August 27, 2015, which, at least on the face of it, changed dramatically the terms of his employment. Mr. Knox alleges that he has been dismissed. The current status of Mr. Knox's employment is at issue, and will be an issue at trial. I make no finding as to whether his employment has or has not been terminated.
10. In his notice of civil claim filed September 28, 2015, Mr. Knox alleges that, in addition to being entitled to damages for wrongful dismissal, he is entitled to certain sums payable as bonuses.

11. Mr. Knox calculated the sums he claims were owing as bonuses, and applied for and obtained a prejudgment garnishing order dated September 29, 2015. His affidavit was sworn September 28, 2015. The amount of the garnishing order was \$215,265. The garnishing order and supporting materials were served on SPI, but not until about two weeks after the garnishing order was obtained.
12. Communications ensued between counsel for both parties, as a result of which Mr. Knox agreed to an order setting aside the garnishing order. That order was granted at the beginning of the hearing before me on October 16, 2015. The only issue that proceeded was the application for special costs.
13. SPI's position is that Mr. Knox failed to make full and frank disclosure in his affidavit in support of the garnishing order. The claim against counsel for Mr. Knox was that she knew or ought to have known that the foundation justifying a garnishing order did not exist, and that she should be held accountable for that error by an award of special costs going against her.

[15] The Master stated the principle that special costs are awarded to punish reprehensible conduct: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.).

[16] The Master described the garnishing order procedure. The Court Order Enforcement Act, R.S.B.C. 1996, c. 78, s. 3(2) provides that a garnishing order attaches "all debts due from the garnishee to the defendant".

[17] The Master stated that s. 7 of the Act requires an affidavit with the following elements:

I am the above named plaintiff.

This action is pending, and was commenced on [month, day, year]

The nature of the cause of action for which this action is brought is

In respect of the cause of action the defendant is justly indebted to the plaintiff for \$....., after making all just discounts, and it is now justly due and owing.

That to the best of my information and belief [name, address and description of the garnishee], the garnishee, is indebted, under obligation or liable to the defendant and that the garnishee is in the jurisdiction of this court, and the indebtedness, obligation or liability of the garnishee is not for salary or wages.

[18] Mr. Knox's affidavit stated the following:

1. I am the above-named Plaintiff.
2. This action is pending, and was commenced on September 28, 2015.

3. The nature of the cause of action for which this action is brought is for indebtedness arising from a breach of contract by the Defendant, Silver Pacific Investments Inc., for commission and bonus. Attached hereto and marked as Exhibit "A" to this Affidavit is a true copy of the Notice of Civil Claim which particularizes the indebtedness.
 4. In respect of the cause of action the Defendant is justly indebted to the plaintiff for \$215,000 after making all just discounts and it is now justly due and owing.
 5. To the best of my information and belief, the Toronto-Dominion Bank, 700 West Georgia Street, Vancouver, British Columbia V7Y 1A2, Chartered Bank, the garnishee, is indebted, under obligation or liable to the Defendant and that the garnishee is in the jurisdiction of this court, and the indebtedness, obligation or liability of the garnishee is not for salary or wages.
- [19] The Master then referred to the Court of Appeal's decision in *Politeknik Metal San ve Tic A.S. v. AAE Holdings Ltd.*, 2015 BCCA 318, which set out the following:
- [23] As a result of the unique and extraordinary nature of garnishing orders, the law has developed the requirement that there must be meticulous or strict compliance with the statutory prerequisites for the issuance of a garnishing order. This requirement does not equate to perfect compliance, and defects in the materials for a garnishing order will not be fatal as long as there is no confusion or uncertainty as to the basis upon which the order was issued: see *Golder Associates Ltd. V. North Coast Wind Energy Corp.*, 2010 BCCA 263 at para. 24.
- [20] The Master referred to several flaws in the obtaining of the garnishing order.
- [21] First, the affidavit was sworn before the action was commenced. This was described by the Master as an error "of some concern" but she found it did not "in and of itself amount to conduct that should result in an order for special costs" (at para. 20).
- [22] Second, the defendant had provided a lender with a general security agreement which charged, among other things, its accounts with the Toronto Dominion Bank. As such, these funds are not available to be attached. The Master stated that the plaintiff conceded this was the case but the issue had not occurred to him. The Master stated that when he was reminded of this the plaintiff moved "reasonably quickly to set aside the garnishing order" (at para. 23).
- [23] Third, there was, in fact, no debt owing. No bonus would be payable until, at the earliest, the defendant's fiscal year-end, September 30, 2015. The plaintiff admitted this was an error in judgment on his part, but said he did not intend to mislead the court. The Master concluded that this error was "not sufficient to justify special costs".
- [24] Fourth, s. 9(2) of the Court Order Enforcement Act requires that a garnishing order be served on the defendant "at once". Due to an error in the plaintiff's counsel's office, it was not served until about two weeks later.

- [25] The Master reasoned that if the garnishing order had been served on the defendant "at once", SPI might have been able to contact the bank and prevent it from acting on the garnishing order. She went on to say that this was speculation on her part, because there was no evidence to that effect.
- [26] The Master concluded that, in the result, nothing turned on the failure to serve the garnishing order at once.
- [27] SPI argued that the garnishing order embarrassed the company and cost inconvenience and expense. The Master responded to this argument:
- [27] I accept that the garnishing order caused disruption to SPI's business. I cannot assess whether it sustained any financial loss because that evidence is not before the court. The garnishing order procedure inevitably causes disruption, and again, the plaintiff moved reasonably quickly to come to an agreement to set aside the garnishing order.
- [28] The Master stated there was only one case where special costs were awarded in connection with a garnishing order: *Clark v. Third Storey Holdings Ltd.*, 2003 BCSC 1358. She found the circumstances were distinguishable.
- [29] The Master decided in all circumstances to decline to exercise her discretion to award special costs against the plaintiff.
- [30] She then turned to the application for special costs against Mr. Knox's counsel. The Master stated the court's policy toward special costs against a lawyer. Such an award should be made very rarely and only when serious misconduct has been shown. She quoted the relevant paras. from *Pierce v. Baynham*, 2015 BCCA 188 as follows:

[41] In *Young v. Young*, [1993] 4 S.C.R. 3, McLachlin J., as she then was, stated:

... courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in the situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

In a similar vein, Chief Justice McEachern in *Hannigan v. Ikon Office Solutions Inc.* (1998), 61 B.C.L.R. (3d) 270 (C.A.) stated:

... an award against a solicitor should only be made in very special circumstances, and should not be made on the basis of mistake, error in judgment or even negligence.

[31] The Master stated at para. 34:

Perhaps counsel for Mr. Knox ought to have put her mind to the effect of the GSA. The fact that she did not does not amount to reprehensible conduct. Further, Mr. Knox's counsel may be precluded by solicitor/client privilege from responding to the allegations made against her.

[32] The Master distinguished *Nazmdeh v. Ursel*, 2010 BCCA 131.

- [33] In that case, plaintiff's counsel was ordered to pay the costs of two applications by the defendant. The case was decided under what is now R. 14-1(33), where there is no requirement of a finding of reprehensible conduct.
- [34] The Master was mistaken in stating that the court in Nazmdeh ordered special costs against the lawyer rather than party and party costs. However, nothing turns on this. The Master correctly noted that Nazmedeh sets out that R. 14-1(33) does not require a finding of reprehensible conduct.
- [35] An award for costs against a lawyer is discretionary. Nazmdeh states that "mere delay and mere neglect may, in some circumstances, be sufficient for such an order against a lawyer". Be that as it may, this decision does not dictate a formulistic approach to awarding costs against a lawyer. It does not stand for the proposition that costs must always be awarded against a neglectful lawyer.
- [36] The Master awarded the defendant ordinary cost for preparing the application to set aside the garnishing order and attending in chambers as well as preparing for and attending at the short leave application.

Analysis

- [37] In *Stancroft Trust Ltd. v. Can-Asia Capital Co.*, [1991] B.C.J. No. 931, Bouck J. gave examples of situations where a court has held that a judge or judicial officer has wrongly exercised her or his discretion:
- (a) Where the judge exercised his discretion under a mistake of law ...
 - (b) Where the judge disregarded principle ...
 - (c) Where the judge was under a misapprehension as to the facts or took into account irrelevant matters ...
 - (d) Where the order of the judge would result in an injustice
- [38] SPI argued that the Master erred by not addressing the issue put before her: whether the plaintiff had any claim to a garnishing order. In my view, the Master addressed that. It was conceded that any bonus was not due and owing until after the fiscal year-end. The plaintiff conceded in hindsight that there was, in fact, no bonus owing to him. It was unnecessary to further consider this issue.
- [39] SPI alleges that the Master failed to distinguish the four distinct orders that the defendant sought: first, that Knox pay SPI's costs as special costs; second, in the alternative, that Mr. Knox pay party and party costs; third, an order that Harris LLP and Mr. Knox's solicitor pay SPI's costs as special costs; and fourth, in the alternative, that Harris LLP and the solicitor pay party and party costs.

[40] There is some merit to this criticism of the decision. It was not until the afternoon of the first day of the hearing that Knox conceded party and party costs should be paid. The Master did not address whether party and party costs should be awarded against counsel personally.

[41] Having said that, I fail to see how anything turns on this. She awarded party and party costs against the plaintiff as a result of the defendant having attended both the short leave application and the appearance to obtain a consent order. She then concluded that the plaintiff should have his costs for the costs hearing. That is because she concluded the hearing was almost entirely taken up with the claim for special costs.

[42] The Master stated this at para. 41 of her decision:

It is unfortunate that the situation between these parties has gotten to this level. In my view, SPI overreacted to the garnishing order. Its response was out of proportion to the injury claimed. Whatever harm was done to SPI as a result of the garnishing order, it was minimal and quickly rectified.

[43] I respectfully disagree that SPI overreacted; SPI saw the garnishing order as flawed. In SPI's view, it should never have been issued. When it was issued, and served on the bank, SPI was not informed of this for a period of some two weeks.

[44] But nothing turns on whether SPI overreacted or, for that matter, underreacted. The issue is the conduct of the plaintiff, not the reaction of the defendant.

[45] Much of the defendant's argument in this appeal concerned the fact that the garnishing order should not have been obtained. For example, the defendant argued:

The Master erred by not addressing the issue put before her - did Knox have any claim for bonuses on which a Garnishing Order could have been sought?

[46] As the plaintiff argues, however, this is an argument with which the court will deal in due course. (It is, in fact, the subject of a summary trial application made by the defendant, which, at the time of the hearing of the appeal, had not been scheduled.) There is no requirement in the Court Order Enforcement Act that the plaintiff demonstrate it will be successful on each issue following trial.

[47] The defendant also argues that the plaintiff failed to depose that he believes the allegations in the Notice of Civil Claim are true. It should be recalled that the plaintiff attached the Notice of Civil Claim and deposed that the Notice of Civil Claim particularizes the indebtedness. The Master felt this was adequate relying on *Hans v. Dynegent Technologies Inc.*, 2008 BCSC 494.

[48] The defendant complains that in stating this, the Master took a "formalistic approach". This point has little force. The validity of the garnishing order was not in dispute in the proceedings before her.

- [49] Even if she had taken a different view and not followed *Hans v. Dynegent*, that would have had no effect on the outcome. This was a dispute about costs, not about the validity of the garnishing order. It had already been set aside, by consent.
- [50] The defendant argues that the plaintiffs and his solicitors failed to disclose that the funds sought to be garnished were the subject of a general security agreement and a charge in favour of the defendant's banker, PNC Bank Canada Branch; they were assigned to that banker and not available for garnishment.
- [51] The plaintiff has deposed that he was aware that there was a form of general security agreement but he did not understand that this precluded garnishment. He was not cross-examined on his affidavit.
- [52] The defendant argues that the bonus plan was discretionary. That discretion had not been exercised. Therefore, the defendant says, there is no debt owing.
- [53] This is an argument that may well have merit. The fact that the defendant takes issue with the plaintiff's claim does not disentitle a plaintiff from seeking a prejudgment garnishing order. But, as I have said about other arguments, this argument is a reason to set aside the garnishing order. The garnishing order has been set aside by consent.
- [54] The question is whether the Master's discretion should have been exercised in favour of ordering special costs. In my view, the Master's decision does not fit any of the examples in *Stancroft Trust Ltd.* where there has been a wrongful exercise of, or failure to, exercise discretion.
- [55] The question before me is not whether I would have ordered special costs. But I am quite unable to say that the Master, in exercising her discretion to refuse to award special costs, was clearly wrong.

Costs Against Legal Counsel

- [56] As the Master pointed out, an award of special costs against a solicitor should only be made in very special circumstances. Such an award should not be made on the basis of mistake, error in judgment or even negligence: *Hannigan v. Ikon Office Solutions Inc.* (1998), 61 B.C.L.R. (3d) 270 (CA); *Nazmdeh* at para. 102.
- [57] In the present case, the defendant also sought costs on a party and party basis against the solicitor. Such an award of costs is governed by R. 14-1(33):
- (33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

- (a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;
- (b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
- (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
- (d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

[58] The lawyer was instructed that the defendant owed the plaintiff a sum certain.

[59] I am not prepared to find or to take judicial notice of the fact that a lawyer for a plaintiff in a wrongful dismissal action would reasonably know the rule that funds subject to a general security agreement are not available for a garnishing order. I am not able to say that the lawyer knew that there was a general security agreement in favour of PNC.

[60] I am prepared to find that there was a failure to comply with the Supreme Court Civil Rules, B.C. Reg. 168/2009 requiring prompt service of a garnishing order. That, arguably, caused costs to be incurred without reasonable cause. In other words, the lawyer may have "caused costs to be wasted through delay, neglect or some other fault", giving rise to the prospect of an award for costs against legal counsel. However, the language of R. 14-1(33) is permissive, not mandatory. The Master had discretion to make an award against the solicitor and declined to do so. Perhaps I may have done otherwise, but the Master was not clearly wrong.

[61] Moreover, adding the solicitor as a party who is responsible for costs (not special costs) would not change anything. There cannot be more than one award of ordinary costs. There were ordinary costs ordered against the client which were off-set by the order of costs against the plaintiff in respect of the costs application.

[62] For that reason, even if the Master had found liability for the solicitor under Rule 14-1(33), it would make no difference to the outcome. She had already awarded costs in favour of the plaintiff.

[63] I am satisfied that for these reasons the appeal must be dismissed.

"The Honourable Mr. Justice S.F. Kelleher"

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