
CANADA / JUDGMENT

Long and McQuade Ltd. v. Torres

2010 BCSC 1842

COURT

Supreme Court of British Columbia

DECIDED

24 December 2010

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2010 BCSC 1842 Long and McQuade Ltd. v. Torres

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Long and McQuade Ltd. v. Torres,

2010 BCSC 1842

Date: 20101224

Docket: S105732

Registry: Vancouver

Between:

Long and McQuade Ltd.

Plaintiff

And

Rafael Burgos Torres and Josephine Guevarra-Torres

Defendants

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

(from Chambers)

Counsel for Plaintiff:

M.K. Morrison

Appearing on behalf of Defendants:

J. Guevarra-Torres

(In Person)

Place and Date of Hearing:

Vancouver, B.C.

December 15, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2010

- [1] Applying pursuant to Rule 3-8(7) of the Supreme Court Civil Rules, ss. 68 and 69 of the Personal Property Security Act, R.S.B.C. 1996, c. 359 ("Act"), s. 178(1)(d) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("B.I.A.") and the inherent jurisdiction of the Court, the Plaintiff seeks a determination of "fraud and conversion" against the Defendants relating to a Judgment already obtained in this Action.
- [2] On February 11, 2005, the Defendant, Rafael Borgos Torres, entered into a contract with the Plaintiff whereby the Plaintiff permitted Mr. Torres to purchase musical instruments and make monthly payments against the cost until the cost had been paid in full. That agreement was subject to the right and ability of the Plaintiff to register any purchases under the Act.
- [3] In September 2009, Mr. Torres purchased a guitar ("Guitar") from the Plaintiff for a total purchase price of \$4,088.00. Mr. Torres made a down payment of \$200.00, but made no further payments. On September 29, 2009, the Plaintiff registered a security instrument against the Guitar in the Personal Property Security Registry under registration no. 200365F.
- [4] On November 12, 2009, Mr. Torres filed an assignment in bankruptcy. The Guitar was not listed as an asset in the Statement of Affairs of Mr. Torres. In a December 17, 2009 letter to the Plaintiff, the Trustee in Bankruptcy of Mr. Torres stated that the security of the Plaintiff was valid against the Trustee so that the Trustee was releasing its interest against the Guitar.
- [5] On July 14, 2010, the Plaintiff obtained an order pursuant to s. 69(4) of the B.I.A. lifting the stay of proceedings to permit this Action to be commenced. The relief sought by the Plaintiff included the following: "A judgment for fraudulent conversion against both Defendants in the amount of \$3,888.00."
- [6] On October 19, 2010, the Plaintiff was granted Judgment against the Defendants and each of them for \$3,888.00 and for interest under the Court Order Interest Act of \$12.27.

- [7] It is alleged that the Guitar was sold by the Defendant, Josephine Guevarra-Torres, to a musician based in Winnipeg, that the identity of the purchaser and the address or contact information of the purchaser is unknown to the Plaintiff, and that, at the time the Guitar was sold, the loan of Mr. Torres to the Plaintiff was in default so that the Plaintiff had the right to seize the Guitar. It is also alleged that neither Defendant "notified the Plaintiff of the unlawful conveyance and conversion of the Plaintiff's security outside the Province of British Columbia".
- [8] The Plaintiff submits that the defendants "jointly and severally, and knowingly and wilfully, fraudulently converted and misappropriated the Plaintiff's security by allegedly selling it without notice to the Plaintiff, into a jurisdiction where the asset could not be recovered, and to a person unknown to the Plaintiff". It is submitted on behalf of the Plaintiff:

Due to the fraudulent action of the Defendants, Rafael Borgos Torres and Josephine Guevarra-Torres, in converting the Plaintiff's security, thereby dispossessing it of same, the Plaintiff has suffered loss and expense; specifically loss in amount of \$3,888.00, together with interest calculated thereon pursuant to the Court Order Interest Act from the 29th day of September, 2009.

- [9] Mr. Torres has an explanation for what occurred. In his February 4, 2010 letter to the Trustee in Bankruptcy, Mr. Torres states in part:

The said guitar was purchased without the knowledge of my wife Josephine. My wife and I were not speaking at the time. We were struggling financially and as a result, our marriage was unstable and in a dilemma.

When my wife found out about the guitar she was so distressed and very upset. We were at a friend's house and my wife and I were introduced to a musician by the name of Rene Garola who was in Vancouver on vacation. He lives in Winnipeg, Manitoba with his wife and two children. During our conversation with Rene, we found out that he collects guitars as a hobby.

Without my knowledge my wife contacted Rene in the early part of November 2009. I later found out that she sold the guitar to Rene for \$2,500 and she was paid cash. The money was used to pay off a few of our credit cards that have been in arrears.

The above incident was an indication that we were at the end of our financial devastation. We realized that our income could no longer accommodate our debt load.

CREDIT APPLICATION AND AGREEMENT

- [10] In his application for credit with the Plaintiff, Mr. Torres agreed to repay any sums owing by him by minimum monthly payments with interest. The following were set out as events of default which would cause the entire indebtedness owing to become immediately due and payable: (a) a failure to pay the minimum monthly payment by the due date set out in the Disclosure Statement; (b) becoming bankrupt or insolvent; (c) becoming a Judgment debtor; (d) breaching any term or condition of the Credit Agreement or the Security Agreement; (e)

any misrepresentation of any information in the Credit Application; or (f) moving and failing to advise the Plaintiff immediately in writing.

APPLICABLE PROVISIONS OF THE SECURITY AGREEMENT

[11] Under the Security Agreement which was registered under the Act, Mr. Torres covenanted to "notify ... promptly of any loss of the Collateral". The Events of Default were set out under paragraph 5 of the Security Agreement:

- (a) the non-payment when due, whether by acceleration or otherwise, of any principal or interest forming part of Indebtedness as required herein or the failure of Debtor to observe or perform any obligation, provision or condition contained in this Security Agreement or any other agreement between Debtor and Creditor;
- (b) the bankruptcy or insolvency of Debtor, the filing against Debtor of a petition in Bankruptcy; the making of an assignment for the benefit of creditors by Debtor, the appointment of a receiver for Debtor or for any assets of Debtor or the institution of any one type of insolvency proceeding under Bankruptcy Act or otherwise against Debtor;
- (c) if any encumbrance affecting Collateral becomes enforceable against Collateral;
- (d) if any execution or other process of any court becomes enforceable against Debtor or if a distress or analogous process is levied upon the Collateral.

[12] Paragraph 8 of the Security Agreement which dealt with "Miscellaneous" matters, stated in part:

The Security Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.

APPLICABLE PROVISIONS OF THE PERSONAL PROPERTY SECURITY ACT:

[13] The applicable provisions of the Act are ss. 28(1), 68(1) and 69:

28 (1) Subject to this Act, if collateral is dealt with or otherwise gives rise to proceeds, the security interest

- (a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing, and
- (b) extends to the proceeds,

but if the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

68 (1) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

(2) All rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests must be exercised or discharged in good faith and in a commercially reasonable manner.

(3) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

69 (1) In this section, "secured party" includes a receiver.

(2) A person to whom a duty or obligation is owed under this Act has a cause of action against any person who, without reasonable excuse, fails to discharge the duty or perform the obligation.

(3) Subject to subsection (5) in an action under subsection (2), the plaintiff is entitled to recover damages from the defendant for losses that are reasonably foreseeable as being liable to result from the failure to discharge the duty or perform the obligation.

APPLICABLE PROVISIONS OF THE B.I.A.:

[14] The applicable provision of the B.I.A. is s. 178(1)(d), which states:

178. (1) An order of discharge does not release the bankrupt from ...

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

DISCUSSION AND CASE AUTHORITIES

[15] The words "while acting in a fiduciary capacity" refer to the whole of the clause and not only to the words "misappropriation or defalcation". Accordingly, for a creditor to bring the claim within s. 178(1)(d), it is necessary to prove that the bankrupt was acting in a fiduciary capacity: *Re Brant* (1984), 52 C.B.R. (n.s.) 317 (Ont. S.C.). For s. 178(1)(d) to be applicable here, three elements must be established: (a) the Guitar taken to create the debt must have belonged to the Plaintiff; (b) the taking must involve a wrongful use of the Guitar; and (c) Mr. Torres must have received the Guitar as a fiduciary.

[16] While I can conclude that the Guitar was originally owned by the Plaintiff, I cannot conclude that the taking of the Guitar was wrongful or that Mr. Torres was acting in a fiduciary capacity when he purchased and then received the Guitar. The sale was merely a transaction between vendor and purchaser. The debt itself did not arise out of fraud, embezzlement, misappropriation or defalcation. Rather, the debt arose out of a commercial arrangement between the Plaintiff and Mr. Torres.

- [17] On the assumption that I am incorrect and that Mr. Torres was in the position of being a fiduciary, in order for a breach of fiduciary duty by a bankrupt to constitute "misappropriation or defalcation" there must be an improper dealing with the property entrusted to the fiduciary and some element of moral turpitude - dishonesty, wrongdoing or misconduct: *Re Di Paola* (2006), 24 C.B.R. (5th) 30 (Ont. S.C.J.); *aff'd* (2007), 217 O.A.C. 95 (Ont. C.A.).
- [18] I can find no element of moral turpitude. Title to the Guitar passed to Mr. Torres. Accordingly, he was in a position to sell the Guitar. A sale of the Guitar was not an event of default under the Credit Agreement, under the Security Agreement, or under the Act so as to require the entire indebtedness to be due and owing. In fact, paragraph 8 of the Security Agreement appears to contemplate that the Security Agreement will be binding on the successors and assigns of Mr. Torres.
- [19] Regarding a claim for fraud, the pleading must state how the fraud has been effected. If it is not pleaded specifically, the judgment obtained will not be sufficient to permit the creditor to take proceedings after the discharge on the ground that the claim arises out of fraud committed by the bankrupt while acting in a fiduciary capacity: *Boychuk v. LaMarsh* (1992), 18 C.B.R. (3d) 18 (Sask. Q.B.); and *Canada Deposit Insurance Corp. v. Prisco* (1994), 29 C.B.R. (3d) 157 (Alta. Q.B.).
- [20] Embezzlement involves fraudulent appropriation of property or money entrusted to the bankrupt by another. The following elements must be proven for embezzlement to apply: (a) money taken by the debtor to create the debt must have belonged to someone other than the debtor; (b) the taking must involve a wrongful use of the money; and (c) the debtor must have received the money as a fiduciary.
- [21] Misappropriation must be construed in its ordinary sense to include some element of wrongdoing, improper conduct or improper accounting: *Valastiak v. Valastiak* (2010), 63 C.B.R. (5th) 188 (B.C.C.A.). The following elements must be proven for misappropriation to apply: (a) the money or object taken by the debtor to create the debt must have belonged to someone other than the debtor; (b) the taking must involve a wrongful use of the money or the object; and (c) the debtor must have received the money or object as a fiduciary.
- [22] Defalcation involves the failure of a bankrupt to meet an obligation or the failure to properly account for funds held in a fiduciary capacity: *Smith v. Henderson* (1992), 10 C.B.R. (3d) 153 (B.C.C.A.); and *Turner v. Midland Doherty Ltd.* (1992), 13 C.B.R. (3d) 16 (B.C.S.C.). For defalcation to apply, the following elements must be proven: (a) the money taken by the debtor to create the debt must have belonged to someone other than the debtor; (b) the taking must involve a wrongful use of the money; and (c) the debtor must have received the money as a fiduciary.

- [23] None of fraud, embezzlement, misappropriation or defalcation apply. First, Mr. Torres was not acting in a fiduciary capacity. Second, the receipt of the Guitar did not involve a wrongful use or receipt of the Guitar.
- [24] A transfer by way of a fraudulent conveyance to avoid payment of a debt or liability does not come within s. 178(1)(d) of the B.I.A. because the transaction occurs after the transaction occurs after the creation of the debt and is designed to avoid payment of the debt or liability: *Re Kramer* (1975), 20 C.B.R. (n.s.) 97 (Sask. Q.B.). Accordingly, even if I could conclude that the transfer of the Guitar was a fraudulent conveyance or fraudulent preference, I could not conclude that this was a transaction caught by s. 178(1)(d) of the B.I.A.
- [25] Even assuming that it was not necessary for Mr. Torres to be acting in a fiduciary capacity, "conversion" is not one of the matters which is set out under s. 178(1)(d) of the B.I.A. The legislation is very specific. The absence of the word "conversion" precludes reliance on s. 178(1)(d) to support the application of the Plaintiff that there be a determination that the judgment be based on "fraud and conversion".
- [26] The application of the Plaintiff is dismissed. Mr. Torres is entitled to his costs. Those costs will be payable to his Trustee. In order to avoid the necessity of those costs being assessed before the Registrar, I assess the costs inclusive of fees, disbursements and government taxes at \$625.00. That amount is payable forthwith.

___ "Burnyeat J." ___

The Honourable Mr. Justice Burnyeat

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