
CANADA / JUDGMENT

Low v. Baja Mining Corp.

2012 BCSC 1380

COURT

Supreme Court of British Columbia

DECIDED

19 September 2012

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2012 BCSC 1380 Low v. Baja Mining Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Low v. Baja Mining Corp.,

2012 BCSC 1380

Date: 20120919

Docket: S123822

Registry: Vancouver

Between:

Kendra Low

Plaintiff

And

Baja Mining Corp.

Defendant

Before: Master Muir

Reasons for Judgment

Counsel for Plaintiff:

R. J. Kaardal

G. Allen

Counsel for Defendant:

M. J. Weiler

Place and Date of Hearing:

Vancouver, B.C.

August 2, 2012

Place and Date of Judgment:

Vancouver, B.C.

September 19, 2012

[1] This is an application by the defendant for orders that:

- a) The Garnishing Order Before Judgment filed June 27, 2012 ordering the Bank of Nova Scotia to pay \$391,320.70 into court be set aside, and
- b) The sum of \$391,320.70 being held by the Bank of Nova Scotia pursuant to the Garnishing Order be released to the defendant.

FACTS

- [2] The plaintiff was hired by the defendant as Office Manager and Assistant to the Vice President - Operations in 2004. In 2006 she was appointed as the defendant's Corporate Secretary. She claims considerable responsibility in that position.
- [3] In 2008 the plaintiff was appointed as the Vice President - Administration, in addition to her role as Corporate Secretary. She claims that her tasks did not change significantly with the addition of this title and that the majority of her employment tasks were pursuant to her position as Corporate Secretary.
- [4] In 2010, the plaintiff and defendant entered into an employment contract, which confirmed her employment as Corporate Secretary and Vice President - Administration with no fixed term. The contract provides:

Baja can terminate the Employment Contract without cause at any time, upon which Baja will pay to the Plaintiff the following termination benefits:

- (i) Payment of an amount equal to 12 months salary plus one month's additional salary for each year of the Plaintiff's service (to a maximum of 18 months), at the Plaintiff's annual salary in effect immediately prior to the time of termination (the "Salary Entitlement"), including amounts that the Plaintiff would have received as a participant in the Annual Incentive Compensation Program (the "Bonus Entitlement");
- (ii) Payment of any unpaid salary earned up to and including the date of termination;
- (iii) Payment of any unpaid vacation pay earned up to and including the date of termination (the "Vacation Pay Entitlement"); and

(iv) At the Plaintiff's option, either six months of continued benefit coverage following the date of termination or payment of a lump sum equal to the estimated net cost to Baja of maintaining the Plaintiff's benefits for a six month period following termination.

[5] Those amounts are payable within five days of the plaintiff's termination without cause.

[6] On May 7, 2012, the Board of Directors of the defendant met and dismissed the plaintiff from her employment as Corporate Secretary.

[7] All of the above facts are found in the plaintiff's Notice of Civil Claim.

[8] Paragraph 17 of the Notice of Civil Claim of the plaintiff alleges:

17. The Plaintiff's dismissal as Corporate Secretary constituted a summary termination of the Plaintiff's employment with Baja, without just cause or reasonable notice, which amounted to an arbitrary and wilful breach and repudiation of the Employment Contract, and a wrongful dismissal of the Plaintiff.

[9] She pleads in the alternative that if she was not expressly terminated that her dismissal as Corporate Secretary constituted a constructive dismissal and that was a breach and repudiation of the employment contract.

[10] The plaintiff attaches a copy of the Notice of Civil Claim and the Employment Contract to the affidavit in support of the Garnishing Order Before Judgment.

[11] In her affidavit in support of the Garnishing Order Before Judgment, the plaintiff says:

5. In this action, I allege that I was terminated without cause by the Defendant on May 7, 2012. As set out at paragraph 7(e) of the Notice of Civil Claim in this matter, upon termination without cause, the Defendant was obligated to pay me the following amounts pursuant to s. 5.5 of the Employment Contract:

[12] She then sets out the contractual entitlement and quantifies her salary, bonus, back pay and vacation pay, totalling \$390,598.10.

THE APPLICANT'S POSITION

[13] The defendant says that on an application for a garnishing order before judgment there must be full and frank disclosure of all material facts and that where a party fails to do so the garnishing order may be set aside. Counsel referred me to McKnight v. Hutchison, 2009 BCSC 343, Evans v. Umbrella Capital LLC, 2004 BCCA 149, and Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar, 2001 BCCA 204.

[14] The defendant says that Ms. Low failed to disclose certain material facts in her affidavit in support of the garnishing order before judgment and in her Notice of Civil Claim.

[15] In particular, the defendant says that the plaintiff failed to disclose the following facts:

a) She had not been dismissed as Vice President - Administration;

- b) On May 8, 2012, the day after she had been terminated as Corporate Secretary, the plaintiff sent an email to the defendant saying that she was taking a personal day; and
 - c) The Employment Contract required that the company had to terminate both the Employment Contract and her employment without cause in order to trigger the liquidated amount payable under the contract.
- [16] The defendant says that these facts, if disclosed, would have led the Registrar to conclude that this was not a debt or liquidated claim and that there was therefore not full and frank disclosure.
- [17] The defendant argues that the termination of the plaintiff's employment as Corporate Secretary was not a termination of her entire employment, nor was it a termination of the Employment Agreement. They argue at best it was a constructive dismissal and perhaps not that, as not all 'transfers' involving a loss of prestige and a change of position will entitle the employee to treat the contract as terminated: *Cayen v. Woodward's Stores Ltd.*, [1993] B.C.J. No. 83 (B.C.C.A.); *Lesiuk v. British Columbia Forest Products Ltd.*, [1986] B.C.J. No. 1241 (B.C.C.A.).
- [18] If the plaintiff's claim was properly for wrongful dismissal, the defendant says that there is only an entitlement to damages in lieu of reasonable notice and that there is a requirement to mitigate. As a result the claim is for un-liquidated damages and cannot support a garnishing order before judgment: *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846.
- [19] Therefore the defendant says the conditions required to make the debt or liquidated claim currently payable have not been fulfilled and the garnishing order should be set aside: *Groenheyde v. Pringle*, [1995] B.C.J. No. 369.
- [20] Further, the defendant says the plaintiff failed to disclose that the defendant had paid her vacation pay of \$22,000 less the statutory deduction for income tax on May 31, 2012. It is alleged that this is a misrepresentation of a material fact and a failure to disclose all just discounts and that the garnishing order should be set aside.
- [21] In addition, it is alleged that there was a failure to effect service upon the garnishee, the Bank of Nova Scotia. The branch in question is the bank's Business Service Centre. Inquiries were made of the bank as to the physical address of the Business Service Centre and the bank provided a post office box address, saying that was the only address for the Business Service Centre. The branch was served by mail to the address given. After the fact it was learned that there is a physical address of the Business Service Centre to which the documents could have been delivered.
- [22] The garnishing order was also served on the extra-provincially registered bank by serving its attorney as shown in the corporate register per s. 9 of the Business Corporations Act.
- [23] S. 462 of the Bank Act, S.C. 1991, c. 46, provides:

462. (1) Subject to subsections (3) and (4), the following documents are binding on property belonging to a person and in the possession of a bank, or on money owing to a person by reason of a deposit account in a bank, only if the document or a notice of it is served at the branch of the bank that has possession of the property or that is the branch of account in respect of the deposit account, as the case may be:

- (a) a writ or process originating a legal proceeding or issued in or pursuant to a legal proceeding;
- (b) an order or injunction made by a court;

...

[24] The defendant argues that it is therefore mandatory for a garnishing order before judgment to be served on the branch affected by the order.

[25] Counsel for the bank did not take any position regarding service, admitting that the bank had effectively been served. He did caution that he would not want this court to condone service in the manner used here, as in other circumstances documents might not promptly come to the attention of the proper branch.

THE RESPONDENT'S POSITION

[26] The plaintiff says that although the Court Order Enforcement Act requirements must be observed, the court will not impose a standard of technical perfection as long as the true message is imparted and there is no confusion or uncertainty created: *Thomson Canada Ltd. v. Monday Publications Ltd.*, [1997] B.C.J. No. 460.

[27] The plaintiff submits that her claim is clear. She says her job and the Employment Contract were terminated without cause, entitling her to the liquidated amount per the Employment Contract.

[28] She says she does not seek damages in lieu of reasonable notice. That is borne out by the Notice of Civil Claim, s. 17, quoted above. She does, however plead in the alternative, that she was constructively dismissed.

[29] The plaintiff submits that on an application for a garnishing order before judgment one does not inquire into the merits of a claim. The only issue is whether the claim advanced is for a liquidated sum. That there may well be defences to the claim is irrelevant. She references *Hans v. Dynegent Technologies Inc.*, 2008 BCSC 494.

[30] Further, Master Scarth in *Dynegent*, *supra*, concluded that severance provisions in an employment contract were a liquidated sum.

- [31] As to the vacation pay, which is apparently admitted to having been paid in the amount of \$22,000.00 less statutory deductions, the plaintiff says, first, this has not been pleaded and second, it is most appropriately dealt with under s. 5(2) of the Court Order Enforcement Act, allowing the court to release part of the garnishment.
- [32] Further, she submits that if the amount attached by a garnishing order is not correct, the appropriate remedy is to amend the garnishing order: *Mutual of Omaha Insurance Co. v. Gestion Professional Consultants (Autorema) Inc.*, [1990] B.C.J. No. 1807; *Chan v. Chen*, 1997 CanLII 2023 (B.C.S.C.).
- [33] The plaintiff says that service was made on the address for the branch that the garnishee provided. In the circumstances, the plaintiff submits that the Bank Act section was complied with.
- [34] Even if proper service was not made, the plaintiff says that the defendant cannot use this alleged default as a defence to the garnishing order. The plaintiff relies on *Hope v Hope* (1854), 4 De G.M. & G. 328, 43 E.R. 534 at p. 539:
- The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.
- [35] Further, the plaintiff says that the provision of the Bank Act requiring service on a branch is to protect the bank: *Bank of Nova Scotia v. Mitchell*, [1981] B.C.J. No. 654; [1981] 5 W.W.R. 149 30 B.C.L.R. 213. As the bank has acknowledged receipt of the garnishing order, there can be no issue as to service.
- [36] As a final point, the plaintiff says that even if the affidavit in support of the garnishing order is defective, the garnishing order is rendered voidable, not void and the court has a residual discretion to order the funds to be paid into court: *Nguyen v. McElwain*, [1993] B.C.J. No. 2600.
- [37] The court must be satisfied, in accordance with s. 5(2) of the Court Order Enforcement Act, that it is "just in all the circumstances" to release all or part of the garnishment.
- [38] The plaintiff submits that she has a strong claim on the merits and that while the defendant company does appear to have some financial difficulties, in the circumstances that it is in the process of constructing a mine in Mexico at an estimated total cost of \$1.3 billion, the amount that is the subject of this order will not have a significant impact on it.

ANALYSIS

- [39] Beginning with the issue of service on the bank, given that the bank was served at the address it provided for the branch in question and that it has acknowledged and does not dispute service of the garnishing order, I am satisfied that proper service was effected in the unusual circumstances of this case.
- [40] As to the question of material non-disclosure, as Master Scarth noted in *Dynegent*, *supra*:
- [12] The defendant submits that the affidavit filed in support of the application for the garnishing orders is deficient in that it does not set out the severance provision in full. In *Hamelin v. Seven Mile High Group Inc.* (1991), 36 C.C.E.L. 45 (B.C.S.C.), on which the defendant relies, the affidavit was considered deficient because it failed to allege or particularize the factual basis for the occurrence of a precondition to the debt. I am satisfied that the affidavit here, by attaching the statement of claim, adequately sets out both the allegations of fact forming the basis for the entitlement to the severance payment, i.e. the plaintiff's termination by the defendant without cause, and the formula for calculation of the payment.
- [41] I am satisfied that the affidavit of Ms. Low, attaching as it does both the Notice of Civil Claim and the Employment Contract, discloses all required material facts.
- [42] It is clear from the Notice of Civil Claim that the plaintiff is alleging that her position as Corporate Secretary was her primary position with the defendant and that her termination as Corporate Secretary was a termination without cause of her employment and the Employment Contract and that the liquidated damage provisions of the contract were thereby triggered.
- [43] While the plaintiff does have alternative pleadings in constructive dismissal and wrongful dismissal that does not preclude her obtaining a garnishing order before judgment. As Master Scarth noted in *Dynegent*, *supra*:
- [9] In *Drayton v. W.C.W. Western Canada Water Enterprises Ltd.* (1989), 63 D.L.R. (4th) 71, 28 C.C.E.L. 134 (B.C.S.C.), Donald J. (as he then was) explained the distinction between an action for damages for wrongful dismissal and an action on a severance provision. In the former, a pre-judgment garnishing order is not appropriate because the claim is not a liquidated demand. The amount of the claim cannot be readily ascertained at the outset. Mitigation must be taken into account and the quantification of the damages is more than a "mere matter of arithmetic". The latter, however, relies on a contractual provision for payment upon termination and can be the subject of pre-judgment garnishment.
- [10] The defendant submits, relying on *Stovicek Estate v. Napier International Technologies Inc.*, [1995] B.C.J. No. 1761 (S.C.) (Q.L.) that, at this early stage, the court cannot make a finding as to whether the severance provision applies or whether the claim is one for damages for wrongful dismissal. While this may be so, it does not follow that the garnishing orders must be set aside. On this application, "it is not necessary to determine whether or not the plaintiff will succeed in his claim for a liquidated amount, but only that the claim made the

plaintiff in his pleadings is a liquidated claim and not for unliquidated damages": *Byrne v. Vranckaert* (1990), 32 C.C.E.L. 58 (B.C.S.C. Master). What is required from the plaintiff is a "succinct and informative statement" as to the nature of the cause of action to enable the court to determine whether it is one to which the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 applies: *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560 (B.C.S.C.).

- [11] The court in *Stovicek* concluded that the circumstances of the case presented a difficulty in assessing the cause of action. In contrast, here it is clear from the affidavit that the plaintiff relies on the severance provision in the contract which "guarantees" a payment in the event of termination and sets out how the amount of the payment is to be calculated. That calculation is a "mere matter of arithmetic". It is fair to conclude that the claim is for liquidated damages. While there are alternative claims for damages for breach of contract and wrongful dismissal, neither of which would support a pre-judgment garnishing order, the inclusion of those claims does not preclude a garnishing order being properly issued on the claim in debt: *First Avenue Research Corp. v. Donar Chemicals Ltd.* (1987), 11 B.C.L.R. (2d) 136 (S.C.).
- [44] That the plaintiff took a personal day following notice of her termination is at best a fact in support of the defence argument, not a fact that would overcome the pleading of termination.
- [45] Accordingly, the defendant's application to have the garnishing order set aside on this basis is dismissed.
- [46] With respect to the failure to disclose that the vacation pay amount claimed had been paid, I am satisfied that this was an error and that there was no intention to mislead. The first draft of the plaintiff's affidavit in support was done before the vacation pay was received and the fact was not noted when the affidavit was sworn.
- [47] The amount of the vacation pay is small in relation to the liquidated sum claimed. In *Chan v. Chen*, *supra*, paras. 32 - 33, Madam Justice Sinclair Prowse held that where there was, "evidence which, if accepted at trial, will at the very least reduce the monies owing to the plaintiff" the amount due on the garnishing order should be reduced by the amount claimed.
- [48] I am satisfied, in accordance with s. 5(2) of the Court Order Enforcement Act, that it is "just in all the circumstances" to release part of the garnishment. The amount of the garnishing order will be reduced by the \$22,000 paid.
- [49] As to the balance of the garnishing order I conclude that there is no basis for overturning the order.

CONCLUSION

- [50] The application to set aside the garnishing order is dismissed. The amount of the garnishing order is reduced by \$22,000 to \$369,320.70.

[51] Costs to the applicant in the cause.

"Master Muir"

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Prepared on 25 October 2026 · Esheria