

CANADA / JUDGMENT

More Core Diamond Drilling Services Ltd. v. 973613 Alberta Ltd.

2020 BCSC 1760

COURT

Supreme Court of British Columbia

DECIDED

9 October 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

More Core Diamond Drilling Services Ltd. v. 973613 Alberta Ltd.,

2020 BCSC 1760

Date: 20201009

Docket: S170014

Registry: Vancouver

Between:

More Core Diamond Drilling Services Ltd.

Plaintiff

And

973613 Alberta Ltd.

Defendant

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing by teleconference:

M.E. Young

Appearing on behalf of the Defendant by teleconference:

J. Hynes

Place and Date of Hearing:

Vancouver, B.C.

October 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 9, 2020

- [1] THE COURT: These are my reasons for judgment on the application. As these reasons were delivered orally they have been edited for publication.

Introduction

- [2] This action was commenced on January 3, 2017 against the defendant seeking liquidated damages in the form of debt in the amount of \$124,488 owing under a lease agreement entered into between the parties on January 22, 2014.
- [3] In the agreement, the plaintiff, More Core Diamond Drilling Services Ltd., agreed to lease a mobile drill camp comprised of five drill camp units to the defendant, 973613 Alberta Ltd., and the defendant agreed to pay the plaintiff a total sum of \$151,200 in monthly instalments of \$3,150 for a term of 48 months. The lease contains a provision which I find is a liquidated damages provision. It provides that on the defendant's default of payment under the lease, the total amount due and owing on the lease from the date of default to the end of the 48-month term of the lease would immediately become due and payable to the plaintiff. Following the execution of the lease, the defendant made eight payments to the plaintiff up to August 2014, but failed to make any payments thereafter.
- [4] By letter dated July 21, 2015, the plaintiff exercised its right to demand the accelerated balance under the liquidated damages clause and provided written demand to the defendant to pay the accelerated balance in the amount of the debt of \$124,488.
- [5] On November 6, 2018, the plaintiff filed a notice of application seeking summary judgment pursuant to Rule 9-6(2) of the Supreme Court Civil Rules for the debt of \$124,488 or, in the alternative, judgment on summary trial pursuant to Rule 9-7 against the defendant for the debt plus interest. That is the application before me today.

Positions of the parties

- [6] The plaintiff submits that the matter is suitable for summary judgment as there is no genuine issue of material fact that requires a trial for determination. Liability is not an issue and the only defence advanced by the defendant is bound to fail.
- [7] In its response to civil claim, the defendant admits that it was in default under the lease, that upon default the accelerated balance became immediately due and owing to the plaintiff, and that it was and remains indebted to the plaintiff for the debt in the amount of \$124,488. The only defence advanced by the defendant in these proceedings is based on the defence set out in the response to civil claim which is that the plaintiff failed to mitigate its damages.
- [8] The plaintiff submits that there is no duty to mitigate in circumstances where, as in this case, the parties set out liquidated damages in a contract and the amount can be ascertained without further investigation by the court. The amount of the debt is easily ascertained as the defendant admits that the amount owed is \$124,488.
- [9] In the alternative, if there was a duty to mitigate, the plaintiff submits that the defendant has not met its burden of establishing that the plaintiff failed to mitigate its losses. The defendant has not filed a response to the plaintiff's application or any affidavit evidence in support of its position that the plaintiff failed to mitigate its damages. The plaintiff further submits that it acted reasonably in mitigating its losses if required to do so.
- [10] The plaintiff further submits that under Rule 9-6(b), the court must treat the plaintiff's application as uncontested on the basis that the defendant failed to file a response to the application and has failed to file any affidavit evidence in support of its position that the case is not suitable for summary judgment. In the further alternative, the plaintiff submits that this is a suitable case for a determination by way of summary trial under Supreme Court Civil Rule 9-7.
- [11] On the whole of the evidence, it says it is possible to find the facts necessary to decide the issues of fact and law at issue in this action. It further submits there is no reason why it would be unjust to decide this case by way of summary trial.

Background

- [12] The plaintiff is a geologic and geotechnical exploration drilling company. Among its inventory, the plaintiff owns mobile drill camps designed to house and accommodate the plaintiff's employees in remote worksites. The plaintiff is not regularly engaged in the business of leasing goods.
- [13] The defendant is a company incorporated under the laws of the Province of Alberta. Under the lease, the defendant agreed to lease a camp to the defendant and the defendant agreed to pay the plaintiff a total sum of \$151,200 in monthly instalments, as stated above. Clause 18 of the lease contains a provision for liquidated damages which provides in the event the defendant's default on their payment under the lease, the total amount would become due

and owing on the lease from the date of default to the end of the 48-month term of the lease and would become immediately due and payable without demand.

- [14] Under the lease, the parties further agreed that the defendant would pay all amounts due and owing under the lease without any setoff or reduction whatsoever and the defendant's obligation to pay the plaintiff would be absolute and unconditional under all circumstances.
- [15] Also agreed, upon default by the defendant, was that certain remedies would become available to the plaintiff including, but without limitation, the right to sue the defendant to recover the accelerated balance under the liquidated damages clause. All remedies available to the plaintiff under the lease were cumulative and not alternative nor exclusive of one another, and the exercise of one or more remedies would not operate to prevent the plaintiff from exercising other remedies.
- [16] As well, if the plaintiff elected not to enforce any of its remedies under the lease, such election would not affect the plaintiff's rights and the defendant's obligations under the lease. The defendant's obligations under the lease would only be satisfied when the plaintiff received in cash all amounts due and owing under the lease including, without limitation, the accelerated balance due under the liquidated damages clause.
- [17] Following the execution of the lease, the defendant retained agents to transport the camp from the defendant's property located in Stewart, British Columbia. In or about February 2014, the defendant's agents transported two of the camp units from the plaintiff's property. Three of those camp units remained in the plaintiff's possession.
- [18] Since having the two camp units transported, the defendant subsequently abandoned them. On the evidence before me, the two camp units remain in the defendant's agent's possession.
- [19] The defendant made eight payments to the plaintiff up to August 2014, but failed to make any payments thereafter. The parties agree that by virtue of the liquidated damages clause under the lease, the defendant became indebted to the plaintiff in the amount of \$124,488. By letter dated July 21, 2015, the plaintiff exercised its right to demand the accelerated balance and provided written notice to the defendant of its default and demanded immediate payment.
- [20] The plaintiff commenced this claim on January 3, 2017. On September 21, 2017, the defendant filed its response to civil claim in which it admitted that it defaulted on the obligations under the lease, that as a result of that default, the amount of \$124,488 became immediately due and owing, and it was and remains indebted to the plaintiff.
- [21] In the defendant's response to civil claim, it argues that the claim was barred by s. 24 of the Limitation Act. On January 29, 2017, the defendant filed a notice of application seeking an order for summary judgment dismissing the action on those grounds.

- [22] In his reasons for judgment pronounced February 16, 2018, Justice Sewell found that the defendant acknowledged its liability under the lease in January and February 2015 emails for the purposes of the Limitation Act, thereby extinguishing it as a defence.
- [23] In the defendant's response, it also argues that the plaintiff had a duty to take reasonable steps to mitigate its damages by attempting to sell or re-lease the camp under the lease. This contradicts the terms of the lease where the parties agreed that the plaintiff was not required to mitigate its damages upon the defendant's default of payment under the lease. Specifically, under the terms of the lease, the parties agreed that the defendant's obligation to pay the plaintiff would be absolute and unconditional under all circumstances. There was also the accelerated liquidated damages clause which resulted in the amount becoming owing.

Issues

[24] The following issues are before me in this application for summary judgment or, alternatively, summary trial:

- a) Is the matter suitable for summary judgment?
- b) If not, is the matter suitable for summary trial?
- c) Has the defendant demonstrated that the plaintiff failed to mitigate its damages?

Is the matter suitable for summary judgment?

[25] On suitability for summary judgment, I refer to Rule 9-6 of the Rules which governs the procedure for summary judgment. That rule provides that:

On hearing an application under subrule (2) or (4) [of 9-6], the court,

- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
- (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
- (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
- (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

- [26] The purpose of summary judgment is to promptly and inexpensively weed out and prevent meritless claims or defences from proceeding to trial. To succeed on a summary judgment application, the party seeking summary judgment must show that there is no genuine issue of material fact that requires a trial for determination: see *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14 at paras. 10-11.
- [27] On a summary judgment application brought against the defendant, the essential question is whether a defendant is bound to lose. If the court is satisfied that the defendant is bound to lose, it must grant the plaintiff's application for summary judgment: see *North Vancouver (District) v. Babyeats Ltd.*, 2014 BCSC 890 at paras. 44, 46, and 47.
- [28] The plaintiff submits that the evidence clearly demonstrates that it is entitled to summary judgment. The defendant has admitted liability for the debt under the liquidated damages clause. Furthermore, the only defence advanced by the defendant is not supported by evidence on the record. Under the terms of the lease, the plaintiff was not required to mitigate its damages upon the defendant's default of payment. The defendant's bare assertions that the plaintiff was required to mitigate its damages and that it failed to do so are insufficient in law to establish that the case is not suitable for summary judgment.

Should the Court hear submissions from the defendant?

- [29] Under Rule 9-6(3)(b), a defendant resisting summary judgment may not resist on the mere allegations or denials in the pleading, but must set out in affidavit material or other evidence specific facts showing there is a genuine issue for trial: *North Vancouver (District)* at paras. 49 and 55.
- [30] The defendant was served with the plaintiff's application materials on November 6, 2018. The defendant had over 22 months to file a response to the application and affidavit supporting its position that the case is not suitable for summary judgment. Despite multiple requests by the plaintiff to provide a response, as shown to me in the record, the defendant failed to respond to the application and, as a result, the plaintiff submits that the court ought to treat the application as uncontested.
- [31] The specific wording in Rule 9-6(3)(b) requires evidence as part of any response to an application for summary judgment. This Court has found it has no discretion to hear a respondent in the absence of sworn evidence to support its position. As such, the plaintiff submits, a defendant's failure to file a response to an application for summary judgment deprives the defendant of the right to have their submissions considered and the court should treat the summary judgment application as uncontested: *North Vancouver (District)* at paras. 49, 54, 56, 58, and 76.

- [32] In the North Vancouver (District) decision, the Court was faced with a similar issue to the case before me in the context of a Rule 9-6 summary judgment application. In that case, the defendant failed to file an application response or any affidavit, despite the summary judgment application being adjourned three times at the request of the defendant, and despite a court order establishing deadlines for the defendant to file the materials. Justice Sharma noted at para. 55:
- [55] The purpose of a summary judgment is to efficiently weed out those claims that have no merit with minimal cost to litigants and minimal use of court resources. One way Rule 9-6 works towards that goal is to make it difficult for a party to drag out a meritless proceeding for the sake of delay.
- [33] I agree with the plaintiff that the case before the Court in North Vancouver (District) is similar to the case at bar. In North Vancouver (District), the defendants admitted the essential elements of the plaintiff's claim. A contract existed and the defendants breached it. The defendants alleged a number of facts they submitted made the case unsuitable for summary trial.
- [34] Rule 9-6(3) is clear that in responding to an application for summary judgment, the respondent cannot rest on the mere allegations or denials in the pleadings: see North Vancouver (District), again at paras, 49, 54, 56, and 58.
- [35] Ultimately, the Court in North Vancouver (District) concluded that it would be an error of law to permit the defendant to contest the application. Justice Sharma further held that even if she had the discretion, she would not exercise it in favour of the defendant, given the significant and persistent failure to comply with the rules and with court orders.
- [36] The plaintiff submits that the facts in the North Vancouver (District) case are apposite to the case at bar. I agree. The defendant has failed to file a response to the application and affidavit supporting its position and it is an error of law to allow the defendant to contest the application. The defendant has had numerous opportunities to provide responsive material by way of adjournments based on its submission it was preparing that material. Even if I have the discretion to hear the defendant, I decline to exercise it due to the defendant's significant and persistent failure to follow the Rules and court orders pertaining to this application.
- [37] I therefore do not, in the circumstances, permit the defendant to contest the Rule 9-6 application.

Conclusion on the application for summary judgment

- [38] I agree that the matter is suitable for summary judgment. Liability is not an issue and the only live defence advanced by the defendant, namely that the plaintiff failed to mitigate its damages, is not properly before the court as it has not been presented in a response to the application nor is it supported by evidence before me.

- [39] The terms of the lease are clear that the liquidated damages clause does not require the plaintiff to mitigate its damages. Furthermore, the evidence of the plaintiff's attempts to recover the camp units does not show a failure to mitigate damages.
- [40] The defendant is unable on the facts and evidence before me to meet its burden to prove failure to mitigate.
- [41] Accordingly, as there is no genuine issue for trial with respect to the plaintiff's claim against the defendant, pursuant to Rule 9-6(5), I grant judgment in favour of the plaintiff as sought.
- [42] As the plaintiff has been successful in its first argument, I need not address its alternative positions.

Costs

- [43] On the issue of costs, I heard submissions from both parties. The plaintiff submits that it is entitled to special costs against the defendant and against the defendant's representative, Mr. Hynes, who is a non-party to the action, and they seek that order to be joint and several. They seek this due to Mr. Hynes', as they characterize it, reprehensible conduct throughout the course of the litigation. Mr. Hynes is a principal and director of the defendant.
- [44] It is well-established law in British Columbia that costs, including special costs, may be awarded against a non-party, including a representative of a corporate party. *Westsea Construction v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, sets out the principles regarding special costs as follows:

73 I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and

- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.
- [45] In the decision of *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242, the court established "reprehensible" as the single standard for the award of special costs. In recognition of the broad meaning of the word "reprehensible", the court explained that in order for an award of special costs to be justified, something more is required, such as improper conduct of the proceedings. Conduct can include conduct that is scandalous, outrageous, or constitutes misbehaviour, but it also includes milder forms of misconduct. It means simply deserving of reproof or rebuke: see *Garcia* at paras. 17 and 23.
- [46] I permitted Mr. Hynes to make submissions on costs. He submits that when he took over representation from legal counsel in May of 2019, he was at a disadvantage.
- [47] In *Allart v. Allart Estate*, 2016 BCSC 768, the court confirmed that the fact that a party is unrepresented is not itself a basis for declining special costs. A litigant must still comply with the rules and procedures of the court and a failure to do so is not excused by one's self-represented status.
- [48] I appreciate that at the beginning of this action, the plaintiff did not appear to provide disclosure as quickly as it should have. However, Mr. Hynes, on behalf of the defendant, has continuously and reprehensibly failed to follow Rules of Court and court orders, unnecessarily delaying the proceedings and causing the plaintiff to incur extraordinary legal fees. Even today before me, he raised objections to the appropriateness of proceeding by way of summary trial because he may be able to find more evidence in the future.
- [49] As such, the plaintiff submits that the costs of these proceedings should be awarded against both the defendant and Mr. Hynes, jointly and severally, as special costs.
- [50] The conduct warranting rebuke includes the following:
- a) Mr. Hynes has been obstructionist and non-cooperative, resulting in the plaintiff incurring extraordinary costs, as I noted. In the first two years, the defendant was represented by counsel. At that time, the plaintiff set down this application and the defendant requested an adjournment. This adjournment was likely warranted given the timing of the notice. The plaintiff agreed. The plaintiff reset the application for March 12, 2019. The day before that date, the defendant notified the plaintiff of its self-represented status. At the hearing on March 12, 2019, the defendant sought an adjournment without notice or materials or application to find new counsel. The defendant received that adjournment on conditions. Those conditions were that he provide counsel for the plaintiff with information about new counsel obtained by a certain date. When that date arrived, Mr. Hynes informed the plaintiff that the company was self-representing through him.

- b) Despite his prior representation that he was actively seeking out new legal counsel, Mr. Hynes now says his company has no income or assets and that is why it is actually self-represented.
 - c) The defendant requested further extensions to conduct examinations for discovery and obtained an appraisal of the property, but now says it has no ability to pay for these.
 - d) The plaintiff set down a case planning conference. At the case planning conference, the defendant requested further time to obtain appraisals and conduct an examination for discovery. The court made orders at that case planning conference to keep the defendant to timelines to obtain the appraisal and conduct the examination for discovery. He did not comply with those orders.
 - e) There are numerous examples of Mr. Hynes failing to respond to communications with plaintiff's counsel or only responding in a very short time before a court date.
 - f) When confronted with court dates, Mr. Hynes, on behalf of the defendant, repeatedly makes adjournment applications without notice or application.
 - g) He has alleged he did not receive many of the communications, which has been disproven on the evidence before.
 - h) For today's hearing, the plaintiff prepared materials to respond to an anticipated adjournment application and reasonably so, in my opinion. After the date was set, Mr. Hynes communicated to plaintiff's counsel that he had a prior engagement.
 - i) The most recent reason for an adjournment of this hearing was that the defendant insisted that he required four hours for hearing of the matter because his submissions would be about two hours. The adjournment was granted for those very reasons so that he could be fully heard before the court. The defendant failed to file responsive materials. I permitted the defendant to make submissions pending my decision on the Rule 9 6(3)(b) issue and My. Hynes' submissions today before me, including on costs, were less than 30 minutes in total.
- [51] I am satisfied that there are exceptional circumstances in this case that exist to award special costs against Mr. Hynes and the defendants jointly and severally.
- [52] In Gichuru, the Court of Appeal confirmed the usual rule that special costs will be awarded for the whole proceeding and I do not see a reason to depart from that rule in the case before me.
- [53] Therefore, I make the following orders:
- a) The defendant shall pay to the plaintiff the sum of \$124,488, together with prejudgment interest from and after July 21, 2015, to the date of judgment under the Court Order Interest Act.

- b) The defendant and Mr. Hynes shall pay to the plaintiff special costs in the action, jointly and severally.
- c) Endorsement of this order by the defendant and Mr. Hynes shall be dispensed with.

[54] Is there anything arising from my reasons?

[55] MS. YOUNG: My Lady, Megan Young. I do have some -- some concerns about the assessment of special costs. I wonder if it might be the most -- I wonder if -- if we should not come before you again to assess those as well? I suspect the parties are going to have some disagreement as to the appropriateness of costs.

[56] THE COURT: Well, it might be more expedient than the registrar, but that is normally the registrar's purview and exceptional for me to conduct the assessment.

[Submissions]

[57] THE COURT: I am prepared to proceed with the assessment of the costs in these circumstances, yes.

[58] MS. YOUNG: Thank you, My Lady. May I add that to the order?

[59] THE COURT: Yes, we can add that to the order. I do have a form of order in front of me, but perhaps you can revise it and send it through for vetting.

[60] MS. YOUNG: Yes, My Lady.

[61] THE COURT: All right.

"Wilkinson J."

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