

CANADA / JUDGMENT

Nisa Holdings Inc. v. LMG Mgmt. Ltd.

2020 BCSC 11

COURT

Supreme Court of British Columbia

DECIDED

8 January 2020

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2020 BCSC 11 Nisa Holdings Inc. v. LMG Mgmt. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nisa Holdings Inc. v. LMG Mgmt. Ltd.,

2020 BCSC 11

Date: 20200108

Docket: S220606

Registry: New Westminster

Between:

Nisa Holdings Inc.

Plaintiff

And

LMG Mgmt. Ltd.

and West Coast Sign Service Ltd.

Defendants

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:

H. Cheung

Counsel for the Defendants:

E. Reimer

Place and Date of Hearing:

New Westminster, B.C.

December 5, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 8, 2020

- [1] This is an application to have funds thought to be attached by two garnishment orders before judgment released to the defendants LMG Mgmt. Ltd. ("Lucid") and West Coast Sign Service Ltd. ("West Coast"). The application was originally brought on an urgent basis. The garnishment orders were obtained by the plaintiff Nisa Holdings Inc. ("Nisa") and served on the garnishee Bank of Nova Scotia (the "Bank").
- [2] The two issues argued are whether:
- a) Nisa made "all just discounts" in the affidavits filed in support of the garnishment orders, as required by s. 3(2)(d) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78; and
 - b) the garnishment orders are "just in all the circumstances" within the meaning of s. 5(2) of the Court Order Enforcement Act.

Preliminary issue

- [3] During the hearing of the application, it was not clear whether funds had actually been garnished, and whether the defendants' accounts had been frozen such that a line of credit was not available to them.
- [4] The two garnishment orders were issued on November 1 and 25, 2019, and subsequently served on the Bank. Counsel for Nisa advised it had not received a response from the Bank with respect to the November 1, 2019 garnishment order. Apparently unknown to counsel at the time of the hearing, a letter of dispute had been filed by the Bank on November 26, 2019 with respect to the November 1, 2019 garnishment order. In the letter, the Bank advised there were no attachable accounts at the location where the garnishment order was served.
- [5] On November 28, 2019, after the second garnishment order was served, the Bank sent an email to counsel for the defendants, advising:

We are required by law to send these funds to the courts immediately. Those business accounts will be frozen until the courts provide us confirmation the holds can be released .

- [6] As of December 1, 2019, Mr. Will Dimzon, the financial controller of the defendants, was able to determine that despite the above email, no funds had yet been garnished from the defendants' accounts at the Bank and that Lucid's accounts had not yet been frozen, but that West Coast's accounts had been frozen.
- [7] On December 2, 2019, the Bank advised Mr. Dimzon that the West Coast account would be unfrozen at the end of the business day on December 2, 2019 and that any available funds in the accounts would be combined and sent to the Supreme Court pursuant to the garnishing order. However, to counsel's knowledge, no funds had been paid into court.
- [8] At the request of the court, over the lunch break during the application, counsel for the parties contacted the Bank. Counsel for the defendants subsequently received an email that the accounts had been unfrozen and the funds had been garnished about 1.5 hours earlier. Twenty minutes later, counsel for the defendants received a phone call from the Bank who advised that it had decided to reject the garnishment order because it had been served on the branch and not the private banking floor. As a result, no accounts were frozen, and no funds were garnished. Counsel for Nisa expected the Bank to file a notice of dispute. Since the hearing of the application, the Bank has filed a letter of dispute with respect to the November 25, 2019 garnishment order. The letter again advises that there were no attachable accounts at the location where the garnishment order was served.
- [9] Of importance to the defendants, as a result of the garnishment orders being rejected, funds which were needed for payroll and other pressing debts were now available. Both counsel then advised this matter was no longer urgent and there was a discussion whether some issues were now moot. Counsel still requested a ruling on the issues. Ultimately, I have decided that the issue raised by the letters of dispute between the Bank and Nisa is different than the issues raised between the defendants and Nisa, and that the application is not moot. I therefore proceed with these reasons.

Background

- [10] The defendants are related companies. Mr. Dimzon swore affidavits in support of the defendants' application. The defendants are signage and project management firms.
- [11] Mr. Darren Penner is the principal of Nisa. Mr. Penner was a former owner of the defendant businesses, and after selling his interest, entered into a contract with the defendants to provide sales consulting services.
- [12] The contract between Nisa and the defendants is dated January 1, 2019. Compensation is determined according to a formula, and is generally commission based. The contract also provides that in addition to compensation, Nisa will be reimbursed for reasonable and authorized business expenses incurred as a result of work done on behalf of the defendants. Nisa is eligible for a cell phone service package valued at \$100 per month and is also reimbursed for out-of-country roaming charges.

- [13] The contract was terminated by the defendants effective August 29, 2019.
- [14] In the notice of civil claim, Nisa alleges that it invoiced the defendants for payment of commissions and that three invoices in the total amount of \$72,757.01 remain outstanding. Nisa also claims for other commissions for which the defendants have not yet provided sufficient information so that the plaintiff can determine the amount owing. Further, Nisa seeks damages for alleged wrongful termination of the contract without the required notice. Nisa seeks judgment for \$72,757.01, an accounting of the further commissions due and owing, and damages for breach of contract.
- [15] Although a response to civil claim has not yet been filed, in the application materials, the defendants allege Nisa knew or ought to have known that amounts exceeding the cell phone package allowance were to be paid by Nisa, and that there are amounts owing to them by Nisa for cell phone overages. The defendants claim a set-off for these overages, which set-off is provided for in the contract, and argue this was not taken into account as a "just discount" when Mr. Penner swore his affidavits in support of the garnishing orders before judgment.
- [16] I note here that the defendants' application materials also alleged that the \$72,757.01 alleged to be owing cannot be reconciled with the defendants' accounting records. However, that allegation was abandoned at the hearing.

Were "all just discounts" taken into account?

Law

- [17] Section 3(2) of the Court Order Enforcement Act sets out the requirements for an affidavit filed in support of a garnishment order before judgment. In this case, the requirements in issue are those set out in s. 3(2)(d) (iv) and (v), which are:
- (iv) the actual amount of the debt, claim or demand, and
 - (v) that it is justly due and owing, after making all just discounts,...
- [18] A garnishment order before judgment is an extraordinary remedy and there must be strict but not perfect observance of the legislation: *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263 [*Golder Associates*] at paras. 9 and 24.
- [19] A garnishment order before judgment must be in respect of a debt or liquidated claim: *Pe Ben Industries Company Ltd. v. Chinook Construction & Engineering Ltd.*, [1977] 3 W.W.R. 481 (B.C.C.A.) at 485-487.
- [20] A liquidated claim is a claim for "a specific sum which has either been ascertained or is capable of being ascertained as a matter of mere calculation": *Golder Associates* at para. 51.
- [21] A plaintiff must account for all just discounts. However, an unliquidated claim by a defendant by way of set-off or counterclaim is not a "just discount" within the legislation. A plaintiff does not have to make allowance for such an unliquidated claim in its affidavit in

support of a garnishing order. Otherwise, a garnishment order could easily be defeated by the plea of a counter-claim or set-off for some unliquidated amount: *Design Sportswear Ltd. v. Goodmark Apparel Inc.*, 1994 CanLII 3026 (B.C.S.C.) at page 6; and *Alpine Electric Ltd. v. 398717 British Columbia Ltd.*, 1993 CanLII 1701 (B.C.S.C.) at page 7.

- [22] Because garnishment orders before judgment are usually made ex parte, full and frank disclosure of matters which are relevant and material to the prescribed content of the affidavit filed in support must be made: *Environmental Packaging Technologies, Ltd., v. Rudjuk*, 2012 BCCA 342 at para. 51.
- [23] If a defendant provides evidence which, if accepted, would establish that there is a set-off for a debt or liquidated amount, and the plaintiff's affidavit in support of the garnishing order has not made an allowance for it, the garnishing order may be set aside: *Ridgeway-Pacific Construction Limited v. United Contractors Ltd.* (1975), [1976] 1 W.W.R. 285 at 288 (B.C.C.A.).

Positions of parties

- [24] The defendants argue that the affidavits filed in support of the garnishment orders before judgment do not take into account "all just discounts" because Mr. Penner did not take into account or mention the amount of the cell phone overage.
- [25] In his two affidavits sworn in support of the ex parte garnishing orders, Mr. Penner states:
- The actual amount of the debt, claim or demand in the cause of action is \$72,757.01 after making all just discounts, and it is now justly due and owing.
- [26] Nisa argues that the cell phone overages are not a liquidated amount and that they do not need to be taken into account in the affidavit.
- [27] The parties referred me to an exchange of emails between Mr. Penner and the general manager of the defendants, Ms. Gwendolyn Reischman:

July 19, 2019 email Mr. Penner to Ms. Reischman

Hi Gwendolyn, sorry I didn't see that you required a response. I am being more aware on the data usage and it will be reduced.

August 28, 2019 email Ms. Reischman to Mr. Penner

Hi Darren, unfortunately the usage is not lower but higher, we have agreed to cover \$250/month (business use) from May to August but that is all. Total excess over \$250/month is \$1719.17 which will be deducted from your next commission payment.

[Excel table setting out in detail overage charges per month from May to August 2019, less \$250 per month credit.]

September 3, 2019 email Mr. Penner to Ms. Reischman

Good morning Gwendolyn, Will, regarding the Bell account, I finally figured out what was happening with regards to the overages. Apparently all the kids in the neighbourhood here in Summerland were logging into my wireless router and watching cartoons. Anyway, I spoke to the Bell agent last week they are going to look into the charges and they will be decreased significantly. Under the business contract they are supposed to notify us when the current bundles are getting close to the limit and recommend that we be placed into a higher tier for that particular devise [sic]. They will be recalculating the overages based on the best tier value and will be providing a credit.

September 3, 2019 email Ms. Reischman to Mr. Penner

Hi Darren, we are also in conversation with our corporate contact, Eric, just an FYI Dzu is no longer associated with our account.

[28] Mr. Penner states in an affidavit filed on this application that:

I have claimed in this action for the payment of the amount of \$72,757.01 representing the amount of commissions booked and approved by the Defendants. .

The amounts of the invoices are net of any deductions that could be made by the Plaintiff.

[29] Mr. Penner then states that when he was involved in the management of the defendants, it was usual for employees to contact Bell to reduce any cell phone overages. When his overages were brought to his attention, he explained to Ms. Reischman and Mr. Dimzon the process to contact Bell. He refers to the email exchange and states:

At a later date, I was informed by the Defendants that they no longer wished to pursue this matter with Bell as it was too time consuming.

I was not able to follow up with Bell after September 3, 2019 as I was told that Bell was instructed not to deal with me.

In these circumstances, it was not possible for me to determine what amounts, if any, was legitimately able to be deducted from the commission calculations in regards to telephone expenses.

[30] Mr. Dimzon states that as a good faith gesture, the defendants had agreed to increase the \$100 per month cell phone package to \$250 per month for the months of May to August 2019, but advised Nisa it would be responsible for paying whatever amounts exceeded what was permitted under the package. Such overages would be deducted from Nisa's compensation. Contrary to what Mr. Penner stated in his September 3, 2019 email, Bell has not provided a credit to compensate for all of Nisa's cell phone package overages.

[31] Counsel for the defendants argue that it is not Mr. Penner's prerogative to tell the defendants to negotiate for a discount with Bell.

Analysis

- [32] In my view, the cell phone overage is a liquidated amount. The amount claimed by the defendants as a set-off to any commissions, was set out in detail in the Excel spreadsheet embedded in the email exchange between the parties. The claim to August was \$1719.17. The materials do not disclose whether the September overage amount was forwarded to Nisa, but using another updated Excel spreadsheet in the materials, and a \$250 monthly allowance, the amount in issue to September 2019 is easily calculable.
- [33] Nisa's position that the defendants could have attempted to negotiate a lesser amount with Bell; or if it had been permitted to do so, that Nisa could have negotiated a lesser amount, does not make this an unliquidated claim. To use the test in *Golder Associates*, the amount claimed by the defendants is easily calculable as a specific sum. This cell phone overage is not akin to an unliquidated claim such as general damages which are assessed by the court. I do not accept Nisa's position that the possibility of negotiation on a third party charge makes a liquidated claim unliquidated.
- [34] The emails show that Mr. Penner knew there was a claim by the defendants for the cell phone overage prior to him swearing his affidavits in support of the garnishing orders. He did not mention this claim in his affidavits. I find that he did not make all just discounts. As a result, the ex parte garnishing orders before judgment are set aside.
- [35] As a result of the above finding, it is not necessary to address the second issue, which is whether the garnishing orders before judgment were "just in all the circumstances".
- [36] The garnishment orders before judgment dated November 1, 2019 and November 25, 2019 are set aside.

"Norell J."

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