

CANADA / JUDGMENT

Piscine Energetics Inc. v. Choi

2011 BCSC 71

COURT

Supreme Court of British Columbia

DECIDED

24 January 2011

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2011 BCSC 71 Piscine Energetics Inc. v. Choi IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Piscine Energetics Inc. v. Choi, 2011 BCSC 71 Date: 20110124 Docket: S083147 Registry: Vancouver Between: Piscine Energetics Inc. Plaintiff And: William Bung-Bu Choi Defendant (Plaintiff by Counterclaim) And: Piscine Energetics Inc., 0723622 B.C. Ltd., Nuri D. Fisher, Robert Fisher and Jacob Gechman Defendants by Counterclaim Before: The Honourable Mr. Justice Willcock Reasons for Judgment In Chambers Counsel for the Plaintiff and Defendants by Counterclaim Piscine Energetics Inc., Robert Fisher and Jacob Gechman: T.J. Delaney Counsel for the Defendant (Plaintiff by Counterclaim): A.G. Sandilands Counsel for the Defendants by Counterclaim 0723622 B.C. Ltd. and Nuri D.Fisher: K.E. Siddall Place and Date of Trial/Hearing: Vancouver, B.C. December 2, 2010 Place and Date of Judgment: Vancouver, B.C. January 24, 2011

Background

Piscine's Judgment against Choi

- [1] On June 22, 2010, I gave judgment on a summary trial in this action in reasons that are reported at 2010 BCSC 874. The plaintiff Piscine Energetics Inc. ("Piscine"), sought and obtained judgment against the defendant ("Choi") on a promissory note in the amount of \$243,387.52 plus interest of \$42.36 per diem from May 1, 2008, to judgment. The interest on the judgment was calculated at the rate set out in the promissory note. Piscine also obtained an order for the payment out of funds garnished into court in May 2008, together with interest accumulated on that sum, on account of the judgment.
- [2] Choi's defence, that he signed the note as an accommodation maker and was released from any claim or obligation under the note because Piscine had reached an agreement with the principal debtor to forebear from demanding payment, was dismissed. Choi's Judgment for Indemnity from the Numbered Company

- [3] Choi sought and obtained an order for indemnity from 0723622 B.C. Ltd. (the "Numbered Company") for his liability to pay the debt on the note to Piscine. He also obtained judgment against the Numbered Company for \$155,718.49, the amount garnished into court on May 5, 2008, plus interest at a rate not specified in the reasons for judgment. Choi's Judgment for Contribution and Indemnity from Nuri Fisher
- [4] Choi obtained an order for indemnity from Nuri Fisher for payments on the judgment in excess of Choi's proportionate share of the amount owed to Piscine at the date of garnishment, which share amounted to \$121,693.76. He also obtained judgment against Nuri Fisher in the amount of \$34,024.73 plus interest, at a rate not specified in the judgment, from the date of the garnishment to judgment. Dismissal of some Third Party Claims
- [5] Choi consented to the dismissal of his third party claim against Robert Fisher and Jacob Gechman. The Issue
- [6] The parties now seek clarification of the order made in relation to interest on the respective claims. They seek to correct the entered order in order to account for matters that were not, but ought to have been, adjudicated upon and they have made submissions with respect to the costs of the third party proceedings. Analysis and Judgment The Entered Order
- [7] An Order was approved as to form by the parties and entered on October 7, 2010. That order provides: THIS COURT ORDERS that:
1. The plaintiff, Piscine Energetics Inc., recover judgment from the defendant, William Byung-Bu Choi, with interest to the date of judgment, June 22, 2010, in the amount of \$268,795.84.
 2. The funds paid into Court pursuant to a pre-judgment garnishing Order dated May 5, 2008, be paid out to the solicitors for the plaintiff, Lindsay Kenney LLP, forthwith. THIS COURT DECLARES that:
 3. The defendant by Counterclaim, 0723622 B.C. Ltd., shall indemnify the defendant, William Byung-Bu Choi, from and against his liability to pay the aforesaid judgment to the plaintiff, Piscine Energetics Inc.
 4. The defendant, William Byung-Bu Choi, is entitled to contribution from the defendant by counterclaim, Nuri D. Fisher, for all payments on the judgment in excess of the sum of \$121,693.76. THIS COURT ORDERS that:
 5. The defendant, William Byung-Bu Choi recover judgment against the defendant by counterclaim, Nuri D. Fisher, in the amount of \$34,024.73 with interest from May 5, 2008 to the date of judgment in the sum of \$3,530.36, totaling \$37,555.09, provided that any sums paid by Nuri D. Fisher shall be credited against the defendant's judgment against 0723622 B.C. Ltd.
 6. The defendant, William Byung-Bu Choi, recover judgment from the defendant by counterclaim, 0723622 B.C. Ltd., in the amount of \$155,718.49.

7. The counterclaim by the defendant, William Byung-Bu Choi, against the defendants by counterclaim, Piscine Energetics Inc., Robert Fisher and Jacob Gechman, be dismissed.
8. The defendant, William Byung-Bu Choi, be obliged to pay costs to the plaintiff, Piscine Energetics Inc. at Scale B.
9. The defendant and the defendants by counterclaim have leave to speak to costs.
- [8] Paragraph 1 of the entered order calculates the amount owed to Piscine on the promissory note to the date of judgment, June 22, 2010, inclusive of interest at the rate described in the note, HSBC prime plus 1.6%.
- [9] Paragraph 4 describes Choi's claim to contribution from Nuri Fisher as a claim for any amounts paid to Piscine in excess of \$121,693.76. Choi's proportionate share of the indebtedness to Piscine on May 5, 2008 (\$243,387.520), which figure includes interest at the rate described in the note.
- [10] Paragraph 5 describes Choi's claim to judgment against Nuri Fisher in the amount of \$34,024.73. That amount is the difference between Choi's share of the liability to the Numbered Company on the note as of the date of garnishment and the larger amount actually garnished. The judgment provided that in addition Choi would be entitled to interest on that sum from the date of garnishment. Paragraph 5 calculates interest from the date of garnishment on the sum of \$34,024.73 at the interest rate set out in the promissory note.
- [11] Paragraph 6 of the order describes Choi's judgment against the numbered company for the sum of \$155,718.49, that portion of the debt paid by way of the garnishment in May 2008. It is silent with respect to interest on that sum but should not be.
- [12] The parties agree that the order, as drafted and entered, is inconsistent and unclear. They say that the order should treat interest on the claims in a consistent fashion and that it does not do so. I agree with the submission and will clarify the reasons for judgment in this case with a view toward the entry of an amended order that appropriately addresses the provisions that should be made with respect to interest. Interest on Piscine's Claim
- [13] First, the plaintiff is entitled to recover judgment against Choi with interest at the contractual rate as set out in the current order. Notwithstanding the garnishment, funds were not paid to Piscine prior to the judgment and Piscine is entitled to judgment in the principal amount of the loan together with the contractual rate of interest until judgment. Interest on the Judgments against the Numbered Company and Nuri Fisher
- [14] Claims for contribution and indemnity for amounts garnished or paid to Piscine to discharge that debt should attract interest at the pre-judgment interest rates set out in the Court Order Interest Act, R.S.B.C. 1996, c.79, from the date the cause of action for contribution or indemnity arose to the date of judgment.

- [15] Paragraph 5 of the order should provide that Choi will have judgment against Nuri Fisher in the amount of \$34,024.73 with interest from May 5, 2008, to the date of judgment at court order rates. The judgment enables Choi to recover from his co-surety the amount expended to satisfy the co-surety's debt. Interest on that claim does not run at contractual rates.
- [16] Similarly, paragraph 6 of the order should provide that Choi shall have judgment against the numbered company in the amount of \$155,718.49, the amount garnished on May 5, 2008, plus interest at court order rates on that sum from the date of garnishment to judgment.
- [17] The fact that the interest continues to run on the Numbered Company's debt to Piscine, with respect to which Choi and Nuri Fisher acted as co-sureties, will be reflected in their continuing right to seek indemnity from the Numbered Company for amounts actually paid in satisfaction of that debt and to seek indemnity from each other if and when they are called upon to pay that debt. Further Amendment of the Order
- [18] The parties have agreed that paragraph 5 of the order should be amended to provide that any amount paid to Choi by Nuri Fisher, including interest payments, shall be credited against Choi's judgment against the Numbered Company. Counsel have indicated that they will agree upon appropriate wording. They have leave to make application to the court, if necessary, if they are unable to agree upon the appropriate form of order. Costs
- [19] The parties agree that Piscine is entitled to costs against Choi at Scale B. They have made submissions with respect to Choi's entitlement to costs in relation to his counterclaim.
- [20] Choi abandoned his claim against Robert Fisher and Jacob Gechman at the hearing of the motion. Choi has succeeded in recovering an order for indemnity and judgment against the Numbered Company and an order for contribution from Nuri Fisher, and, for that reason, is entitled to costs of the counterclaim. Counsel for the Numbered Company and Nuri Fisher say, however, that Choi should not recover his full costs in relation to that claim. Counsel submit that considerable time and effort was spent by Nuri Fisher responding to the abandoned claim that he was party to a conspiracy with Robert Fisher and Jacob Gechman. Nuri Fisher says that he did not deny his obligation to contribute to Choi to the extent that he was in co-surety and that he relied entirely upon the Numbered Company and Choi to address the question whether all three parties (the numbered company, Choi, and Nuri Fisher) were co-sureties or whether the Numbered Company was the principal debtor and Choi and Nuri Fisher co-sureties.
- [21] The Numbered Company and Nuri Fisher say, relying upon *Canaccord Capital Corporation v. 884003 Alberta Inc.*, 2004 BCSC 1025, and the cases cited in that decision, particularly *Haida Inn Partnership v. Touche Ross & Co.* (1991), 48 C.P.C. (2d) 61 (B.C.S.C.), that, having made allegations of a conspiracy against the defendants by counterclaim and withdrawn them only at the date of application, Choi pursued a claim that ought not to have been pursued or ought to have been abandoned earlier and that the award for costs should be reduced to reflect that fact.

- [22] The Numbered Company and Nuri Fisher say that the claim could have been more efficiently resolved if the allegation of conspiracy had not been made. I accept that submission and regard their counsel's proposal that Choi should be entitled to 75% of his costs as against the defendants by counterclaim as a reasonable outcome. Choi is awarded 75% of his costs of the counterclaim, those costs to be calculated at Scale B.
- [23] Mr. Siddall, for the defendants to the counterclaim, also suggests that costs of the counterclaim should be apportioned between the two defendants to the counterclaim. The defendants to the counterclaim are jointly and severally liable for costs payable to Choi. Mr. Siddall acted for both. As Nuri Fisher has argued, he had no dispute with the Numbered Company. There was no active lis between them. In the circumstances I make no order with respect to their entitlement to contribution or indemnity from each other. "Willcock J."

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