
CANADA / JUDGMENT

Primus Electric Inc. v. Ryken Construction Inc.

2014 BCSC 421

COURT

Supreme Court of British Columbia

DECIDED

13 March 2014

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2014 BCSC 421 Primus Electric Inc. v. Ryken Construction Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Primus Electric Inc. v. Ryken Construction Inc.,

2014 BCSC 421

Date: 20140313

Docket: 1344008

Registry: Prince George

Between:

Primus Electric Inc.

Plaintiff

And

Ryken Construction Inc., Kenneth Trevor James McCoshen,

Joseph Denis Brian Joly and Yvonne Debbie Ryder

Defendants

Before: Master Muir

Reasons for Judgment

Counsel for Plaintiff:

G. Wright

Place and Date of Hearing:

Prince George, B.C.

February 24, 2014

Place and Date of Judgment:

Prince George, B.C.

March 13, 2014

- [1] This was a without notice application for a garnishing order before judgment and default judgment. Both applications had been rejected by the district registrar and were before me by requisition.
- [2] Counsel advised me at the outset that the Defendants had, since application was made, filed a Response to the Notice of Civil Claim. As a result, default judgment cannot go and therefore the application in that regard is moot.
- [3] Counsel urged me, nevertheless, to consider the default judgment matter on its merits along with the garnishing order before judgment matter, alleging that the registry practice was not in keeping with the requirements of the new Supreme Court Civil Rule 3-8(3), the wording of which has changed from the former rule 17(3).
- [4] I advised counsel that I would consider the law regarding the discretion to determine moot cases before giving my decision, as that law was not before me at the hearing of this matter. The general rule is from *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, at p. 353:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

- [5] That rule was considered by our Court of Appeal in *Cowling v. Brown*, 1990 CanLII 777 (BC CA):

Even if a matter is moot within that general description there is a power in the Court to exercise its discretion in favour of hearing and deciding the appeal. The general rule is that if the matter is moot the Court should not deal with it. The exceptions arise in special cases. An example is the case where rights arise and are terminated by the effluxion of time in a brief period, and if the Court does not agree to hear a moot case in those circumstances similar rights in the future will never be adjudicated upon.

[6] In my view that exception arises here because of the change in the wording of the rule and I have decided to exercise my discretion to consider the matter.

[7] The matter comes before me in accordance with BCSC civil rule 3-8(8) following rejection by the district registrar.

[8] For clarity, I will set out the pertinent part of the plaintiff's claim, which is said to be a debt claim:

5. The Plaintiff is a company which supplies and installs all aspects of electrical services for commercial and residential, new and renovation construction.
6. Pursuant to an agreement with the Defendant, Ryken, the Plaintiff provided electrical work and supplies to a new home located at 5936 Bearpaw Crescent, Prince George, BC (hereinafter "the Bearpaw Project").
7. The work done by the Plaintiff on the Bearpaw Project was undertaken between July 15, 2012 and December 7, 2012.
8. Ryken was invoiced for the work and material supplied by the Plaintiff, as follows:

Invoice Date Invoice Amount (Inclusive of HST)

September 24, 2012 \$15,680.00

November 29, 2012 \$ 7,050.40

Total \$22,730.40

[9] Another project is then set out in a similar manner, and the claim continues:

11. Ryken paid the sum of \$3,000.00 with respect to Chief Lake Project but made no other payments on account of any of the invoices referred to herein.
12. All of the Plaintiff's invoices were due upon receipt and were subject to interest on overdue accounts at the rate of 2 per cent per month (24 per cent per annum).
13. Ryken remains indebted to the Plaintiff for the full sum of \$40,187.90 plus accrued interest on overdue accounts.

[10] Judgment is then sought for the amount claimed of \$40,187.90.

- [11] The plaintiff then sought a garnishing order before judgment and a default judgment. Both were rejected by the district registrar on the basis that the pleadings and the affidavit in support of the garnishing order before judgment did not set out sufficient particulars of the agreement to satisfy the district registrar that this was a claim for a liquidated amount.

Liquidated Amount

- [12] The plaintiff submits that the registrar erred in refusing to grant the garnishing order before judgment and the default judgment. In both cases it is said the registrar was wrongly requiring evidence as to the precise calculation of the amount claimed.
- [13] The plaintiff submits that this process of inquiry into the evidentiary basis for the claim is a mistake that originates with *Eades v Kootnikoff* (1995), 13 BCLR (3d) 182. Mr. Justice Shaw in *Eades* considered the decision in *Holden Day Wilson v Ashton*, 1993, 104 D.L.R. (34th) 266 as follows:

9 In *Holden Day Wilson v. Ashton* 1993 CanLII 8513 (ON SC), (1993), 104 D.L.R. (4th) 266, Ontario Court (General Division), Divisional Court, an application for default judgment for the amount of the claim for legal services was refused by the Clerk of the Small Claims Court. The Clerk's decision was upheld by the Divisional Court. The statement of claim set out the following claim:

"The Plaintiff claims:

(a) Payment of \$2,202.20 for legal services provided by the Plaintiff to the Defendant and in respect of accounts rendered by the Plaintiff to the Defendant on May 31, 1990 and August 15, 1990;..."

10 White J. for the Divisional Court cited (at p.271) the following test stated by Ferguson J. in *Cantalia Sod Co. Ltd. v. Patrick Harrison & Co. Ltd.*, 1967 CanLII 210 (ON SC), [1968] 1 O.R. 169 (H.C.J.) at 171:

"The test of a liquidated demand is whether the amount to which the plaintiff is entitled (if he is entitled to anything) can be ascertained from the contract itself or by calculation or fixed by a scale of charges agreed upon by the contract or implied by it."

11 White J., after a thorough review of the jurisprudence, summarized several useful questions to help identify what is a liquidated demand. He said at p.276:

"It would appear that the case law, text book and law dictionary sources indicate that whether a claim can be identified as a 'liquidated demand' will depend on the answers to several questions:

1. Is it ascertainable by calculation or by referring to a fixed scale of charges?
2. Can the calculation be made by reference to the agreement between the parties itself, or, at least, implied by the agreement?
3. Was the price or method of calculation of the price agreed upon by the parties?

4.Has the defendant obliged him/herself to pay a specific sum of money? and

5.Was a reasonable estimated cost established by the parties?"

12 White J. then looked to the statement of claim and held that it did not set out sufficient detail to show that it was for a liquidated demand. He said, at p.277:

"In the case at bar, there is no indication whatsoever in the statement of claim filed by the plaintiff solicitors in the Small Claims Court as to the standard of calculation of the solicitors' accounts. For example, if the method of calculation of the solicitors' accounts was on some agreed hourly rate for the solicitor charged with management of the defendant client's file, and the number of hours were stated in the statement of claim, a calculation formula could be found. The statement of claim does not allege that the solicitor billed on an hourly rate or on some pre-covenanted basis."

[14] Mr. Justice Shaw concluded:

36 Counsel for the appellant submits the practical effect of the decision of the Deputy Registrar and the memoranda of the Registrar is that all claims by lawyers, accountants, engineers or other professionals, and tradespeople such as plumbers, electricians and auto mechanics will, upon default, lead to interlocutory judgments with damages to be assessed rather than final judgments for the amounts claimed. I do not think this is so. Each case will depend upon its own contractual circumstances. If, for example, it is understood between the contracting parties that a set fee will be charged or that the fee will be so much per hour, I can see no reason why, if this information is set out in the statement of claim, there cannot be a final default judgment entered for the amount of the claim. Clearly, care must be taken to disclose sufficient detail in the statement of claim so that the Registrar can make a proper assessment of whether the claim is for a debt or liquidated demand. [Emphasis added.]

[15] The plaintiff relies on what it submits is the trend in the jurisprudence away from the rigid technical approach regarding a liquidated amount, citing *Jefferies v American Cumo Mining Corp.*, [2013] BCJ No. 1372. The point in that case, however, was that the factors referenced in *Eades* and other decisions are not to be formulaically imported into requirements for materials in support of such applications. They are, rather, questions, the answers to which may assist in identifying a liquidated demand.

[16] The plaintiff submits that I should particularly note the discussion regarding debt and liquidated demand by Master Horn in *Hayes, DeBeck, Stewart and Little v. Nikka Developments Limited*, [1996] BCJ No. 2466 (*Stewart v Nikka*), in which Master Horn concluded:

[46] From this I reach the conclusion that neither a registrar nor a judge, to whom an application is made to set aside a garnishing order, must assume that a claim made for services rendered is not a liquidated claim, simply because the deponent does not state upon what basis the fee was calculated. The deponent is only obliged to say that there is an actual amount

due and if he says so, his affidavit is sufficient to justify the issuance of a garnishing order.

[17] Counsel submits that, at least in the case of garnishing orders before judgment, which were before Master Horn in that case, it is sufficient for the plaintiff to say, as he does here, that \$40,187.90 is due and the registrar is bound to issue the garnishing order.

[18] Counsel also pointed me to the decision in *Thom v. Granger*, [1999] BCJ No. 3124 referenced in *Wesbild Holdings Ltd. v. Sports For All Management Ltd.*, [2009] BCJ No. 1627 at para. 10, where the court commends "moving away from technicality" and speaks approvingly of *Stewart v. Nikka*. That was in quite a different context, however, and is of little assistance here.

[19] *Stewart v. Nikka* is a decision of a Master and if it stands for broad principles which, as is submitted by counsel for the plaintiff here, conflict with judicial consideration in other cases, then I am bound to follow judicial pronouncement. I tend to the view, however, that it is a case that turned on its own facts and is not truly capable of generalization in the manner asserted by the plaintiff here.

[20] Further, *Stewart v. Nikka* was considered in *McCullough et al v. Millennium Fin. Group Inc.*, 2003 BCSC 480 by Mr. Justice Hood who noted:

I will only say that in my view, given the Court's experience in many instances when the Deponent swore that a sum was due and owing when in fact the sum was not a liquidated amount, the better practice would be for the affidavit to disclose the true nature of the sum claimed to enable the Court to conclude that it is the proper subject of a Garnishing Order.

[21] Mr. Justice Hood clearly identifies the danger of proceeding as the plaintiff proposes.

Default Judgment

[22] The registrar rejected the claim for a default judgment in the amount of \$40,187.90 for various reasons, including that:

Still not clear that this is a liquidated claim. No connection between the amounts claimed and the terms of the Agreement. The pleadings must set out the method of calculation (amt. per hour, no. of hours spent, amt. per unit, no. of units sold, etc.)

[23] BCSC Civil Rule 3-8(3) provides:

Claim for specified or ascertainable amount

- (3) If the plaintiff's action against a defendant includes a claim for recovery of money in a specified or ascertainable amount, the plaintiff may
- (a) on that claim, obtain judgment in Form 8 against that defendant for an amount not exceeding the total of
 - (i) the amount claimed,
 - (ii) the interest, if any, to which the plaintiff is entitled, and
 - (iii) costs, and
 - (b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).

[24] The wording has changed from that in the former rules of court, where rule 17(3) provided:

Where the plaintiff's claim against a defendant is solely for recovery of a debt or liquidated demand, the plaintiff may enter final judgment in Form 86 against that defendant for a sum not exceeding that claimed, interest if entitled and costs, and may proceed with the action against any other defendant.

[25] The plaintiff argues that the changes to the rules to remove "debt or liquidated demand" and substitute "specified or ascertainable amount" must be given "meaning and function" such that the sum specified in the plaintiff's claim herein would form the basis for a default judgment.

[26] The plaintiff submits that there is nothing in the new rule that requires proof in the application for default judgment of the method of calculation of the amount claimed, provided it is a specified amount.

[27] As noted above, the plaintiff also relies on the decision in *Stewart v. Nikka*. I am satisfied, however, that decision is not applicable to default judgment. Master Horn, in distinguishing *Eades*, noted:

[53] The case is distinguishable. Firstly, the decision was made in the context of a rule which requires the registrar to be satisfied that the claim is for a debt or liquidated demand before entering a final judgment. The Court Order Enforcement Act requires only that the registrar be satisfied that the plaintiff has sworn to the nature of the cause of action and to the actual amount of the debt claim or demand and that it is justly due and owing. The decision of the registrar to issue a garnishing order as a measure of security is in no sense a final judgment. The defendant is always at liberty to show that the claim is not liquidated or is not justly due and owing or to apply for relief under s. 6. The consequences of entering a default judgment are far more serious to a defendant. The two situations are not the same.

- [28] The plaintiff submits that in modern commerce many smaller contracts are entered into without precise written agreements, often with no stated understanding of the price to be charged, and frequently without any record of units of volume or time being set out. He says if the practice of the district registrar is confirmed that such contractors would never be able to obtain a garnishing order before judgment and that offends BCSC Civil Rule 1-3 and its requirement for "just, speedy and inexpensive" resolutions of claims in a manner that is proportionate to the claim advanced. This complaint echo's that dealt with by Mr. Justice Shaw in para. 36 of Eades, quoted above, and my answer is the same.
- [29] In the plaintiff's case, it has pleaded a contract for work and supplies to be provided to certain premises. It says that has been done and invoices sent. The amount allegedly due stems from those invoices. It says that quantification is sufficient to constitute a "specified amount" and hence a default judgment should have been granted by the registrar.
- [30] Taking a step back, there are two types of default judgments at issue here - those which grant judgment for a specified amount under rule 3-8(3) and those for which damages are to be assessed under rule 3-8(5).
- [31] The fact that a claim is made for a certain amount, as it is here, does not preclude the claim being one for damages. That is the danger referred to by Mr. Justice Hood in McCullough noted above.
- [32] The plaintiff here cited a decision of our court of appeal in *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 0078, for the definition of liquidated demand it relied upon. Although that was a case involving a garnishing order before judgment, the definition is also relied upon in default judgment cases. Obviously what constitutes a liquidated demand should be consistent. There the court held:
- [8] The claim must be either a debt or liquidated demand to meet the statutory test. The Chambers judge cited the definition of liquidated demand adopted by Donald J. in *Drayton v. W.C.W. Western Canada Water Enterprises Inc.* (1989) 63 D.L.R.(4th) 71 at 73:

The operative test as to what constitutes a liquidated demand is expressed in *Standard Oil Co. of B.C. Ltd. v. Wood* (1964), 47 W.W.R. 494 at p. 497 (B.C. Co Ct.):

"Debt or Liquidated Demand.' - A liquidated demand in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation, beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages.'" [Emphasis added in original]

- [33] Plaintiffs may well believe they are entitled to claim a certain amount from a defendant for any number of reasons. That claim may still be a claim for damages and not for recovery of a specified or ascertainable amount, as set out in the rules.

- [34] In my view the change in the wording from the old rule 17(3) to the new rule 3-8(3) does not assist the plaintiff here. A default judgment under rule 3-8(3) can only be granted if the pleading or the evidence supports the position that the claim is not for damages.
- [35] In this case there is no basis on which I can conclude that this is not a claim for damages as defined in *Busnex*. There is nothing that sets out the nature of the agreement between the parties as to payment. It is simply stated that it was agreed that the plaintiff would "provide electrical work and supplies". Indeed, from counsel's submission it appears to me that there was no specific agreement as to payment.
- [36] The agreement pleaded here is not sufficient to conclude that a default judgment in a specified amount should issue under rule 3-8(3).

Garnishing Order Before Judgment

- [37] The Court Order Enforcement Act, RSBC 1996, c. 78 sets out the requirements for a garnishing order before judgment in ss. 3(2) as follows:

- (2) A judge or a registrar may, on an application made without notice to any person by
- (a) a plaintiff in an action, or
 - (b) a judgment creditor or person entitled to enforce a judgment or order for the payment of money,

on affidavit by himself or herself or his or her solicitor or some other person aware of the facts, stating,

- (d) if a judgment has not been recovered,
- (i) that an action is pending,
- (ii) the time of its commencement,
- (iii) the nature of the cause of action,
- (iv) the actual amount of the debt, claim or demand, and
- (v) that it is justly due and owing, after making all just discounts,

- [38] The plaintiff's affidavit in support of the garnishing order referenced the pleading which is set out above.
- [39] The plaintiff accepts that a "claim for unliquidated damages could not be the subject matter of a pre-judgment garnishee", referencing *Pe Ben Industries v Chinook*, [1977] 3 W.W.R. 481.
- [40] The plaintiff argues, however, that the court should not be inquiring into how the claim is calculated or the precise nature of the contract. He argues that if the legislature had intended that there be a clear and complete calculation of how the amount of the debt, claim or demand was arrived at, it would have said so.

- [41] The plaintiff submits, based largely on *Stewart v. Nikka*, dealt with above, that all he needs to do is plead an agreement (the "nature of the cause of action") and the amount claimed (the "actual amount of the debt, claim or demand"). He says the statute does not require more and that it is error to require evidence of the precise nature of the contract.
- [42] The argument misses the mark. The point of the analysis is not to determine the precise amount of the claim or what is due under some agreement, the point is to ensure that the "nature of the cause of action" is one that is capable of resulting in a claim that is a liquidated and not an unliquidated amount.
- [43] As noted above, making a claim for a specific amount is not tantamount to making a liquidated claim. Mr. Justice Hood's comments in *McCullough* are apt.
- [44] Similarly to my finding regarding the default judgment, I am unable to conclude on this pleading that the amount claimed is a liquidated amount and as a result, the application for a garnishing order before judgment is dismissed.

"Master Muir"

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