

CANADA / JUDGMENT

Rhodes v. All Pro Building Maintenance Ltd.

2012 BCSC 270

COURT

Supreme Court of British Columbia

DECIDED

23 February 2012

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2012 BCSC 270 Rhodes v. All Pro Building Maintenance Ltd. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Rhodes v. All Pro Building Maintenance Ltd., 2012 BCSC 270 Date: 20120223 Docket: S128509 Registry: New Westminster Between: Forsdick Rhodes doing business as Rhodes Standard Building and Marine Maintenance and the said Forsdick Rhodes Plaintiffs And All Pro Building Maintenance Ltd. and Acom Building Maintenance Limited Defendants Before: Master Keighley Reasons for Judgment Counsel for Plaintiffs: D.T Hill Counsel for the Defendants: D. Madani Place and Date of Hearing: New Westminster, B.C. February 3, 2012 Place and Date of Judgment: New Westminster, B.C. February 23, 2012

- [1] The claimants in this action allege breach of contract by the defendants. The terms of the alleged agreement are disputed, but essentially the plaintiffs allege that they entered into an agreement concerning the cleaning of vessels belonging to the B.C. Ferry Authority which, they say, the respondents breached by conferring the benefits of the contract to another entity. The respondents allege, inter alia, that there was no contact, that if there was the claimants breached it by failing to achieve union certification and that the action is, in any event, statute-barred.
- [2] This application is concerned with a Reply filed February 16, 2011, by the claimants. The respondents seek orders that this Reply be struck in its entirety or that, alternatively portions of it be struck as being unnecessary, frivolous, vexatious, embarrassing, an abuse of process or otherwise likely to cause delay in the hearing of this proceeding.
- [3] The application is brought pursuant to Rule 9-5(1) and 9-5(2) of the Supreme Court Civil Rules, which read as follows:
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,

- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - (d) it is otherwise an abuse of the process of the court, and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
- (2) No evidence is admissible on an application under subrule (1) (a).
- [4] Evidence is admissible to determine issues raised by 9-5(1) (b) to (d), but no evidence is advanced by the claimant in support of the pleading on this application. The Law
- [5] In the case of *Dempsey v. Envision Credit Union*, [2006] B.C.J. No. 1073, 2006 BCSC 750, at para. 17, Garson J., summarized the circumstances in which a pleading is liable to be struck as follows:
- (a) the pleadings are unintelligible, confusing and difficult to understand;
 - (b) the pleadings do not establish a cause of action and do not advance a claim known in law;
 - (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time.
- [6] Rule 3-7(1) provides:
- (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
- [7] Rule 3-7 (6) provides:
- (6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
- [8] Rule 3-7(15) provides:
- (15) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party must not do so evasively but must answer the point of substance.
- [9] A pleading may be poorly drafted, but that alone is not a sufficient basis to strike it or portions of it. The court must be satisfied, not only under 9-5(1) but also under the other provisions of the Rule, that it is "plain and obvious" that the impugned pleading offends the subrule in question: 347202 B.C. Ltd. v. Canadian Imperial Bank of Commerce, [1995] B.C.J. No. 449.
- [10] In the case of *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress and Michael Elterman*, [1999] B.C.J. No. 2160, Romilly J. said, with respect to applications under the earlier equivalent of Rule 9-5(1)(b) and (c), as follows:
45. To succeed on an application under Rule 19(24)(b) or (c) it must be established that it is "plain and obvious" that the pleading offends either or both provisions.

46. The authorities provide little guidance as to what constitutes pleadings that are "unnecessary", "scandalous", "frivolous" or "embarrassing". However some principles do emerge.
47. Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (B.C.C.A.). An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons of B.C. v. Cleland* (1968), 66 W.W.R. 499 (B.C.C.A.). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (Q.L.) (B.C.S.C.). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber and Timber Co.* (1920), 28 B.C.R. 39 (C.A.). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd. et al.*, [1992] B.C.J. No. 1567, (6 July 1992), Prince George Registry 20714 (B.C.S.C.). The Reply
- [11] The Reply, in its entirety, reads as follows. I have italicized those portions which the respondent finds objectionable:
1. In reply to Paragraph 9, Acom Building Maintenance Limited (hereinafter referred to as "Acom") was also not a union certified company. Allpro was created by Ko as a union certified company to specifically replace Rhodes as the subcontractor in the Contract between Acom and Rhodes.
 2. In reply to paragraphs 10 - 13, this is not factual and is confirmed by Bill Hulme, the union agent. Rhodes could not have applied for union certification until such time that the B.C. Ferries Contract was awarded to Acom. The B.C. Ferries Contract as [sic] not awarded to Acom until September, 2003. Rhodes could not have applied for union certification in March of 2003.
 3. In reply to paragraph 14, this is not factual. At no time had Rhodes applied for union certification. Rhodes could not have been "disqualified" if he never applied for certification.
 4. In reply to paragraph 15, Ko never gave Rhodes the opportunity to perform the B.C. Ferries Contract, within three months of the awarding of the Contract or at any time. The probationary period is irrelevant [sic] in these circumstances.
 5. In reply to paragraphs 16, and 17 - There is ample evidence that Ko consistently promised the plaintiffs payments in relation to the Agreement and made threats to Rhodes' safety.

6. In reply to paragraph 18, this is not factual as Ko admitted at his Examination for Discovery on February 8, 2011 that Acom did not at any time advise the plaintiffs that Acom was successful in its bid with B.C. Ferries. Specifically, Ko said "I didn't inform him and I didn't have to." Ko admitted to Rhodes that Acom had been the successful bidder for the first time in February of 2004, after initially denying same in December of 2003. In February of 2004, Ko promised to pay Rhodes in full in six months' time as Ko declared that "he had many equipment expenses to deal with" at that time.
7. In reply to paragraph 19, Acom clearly and intentionally bypassed Rhodes and set up All Pro Building Maintenance Ltd. (hereinafter referred to as "Allpro" to perform the duties that Rhodes was to perform pursuant to Acom's Contract with Rhodes.
8. In reply to paragraph 20, there is ample documentary evidence that Allpro is a wholly owned subsidiary of Acom, including written statements by Ko to that effect.
9. In reply to paragraph 23, this is untrue. The plaintiffs did not make demands between February 2004 and approximately September of 2004 on the plaintiffs' reliance on Ko's promise to pay them in six months' time. In the late fall of 2004, Acom made partial payment to Rhodes, i.e. Ko called it a "down payment". From September of 2004 until September of 2005, the plaintiffs made consistent demands for payment. In September of 2005, the plaintiffs ceased making such demands when Ko threatened Rhodes with bodily harm. From September of 2005 to December of 2009, the plaintiffs made demands for payment through an intermediary as Rhodes feared for his safety if he tried to deal with Ko personally.
10. In reply to paragraphs 26 and 27, the Contract between the parties was a management contract, not an employee contract and did not obligate the plaintiffs to "clean the ferries."
11. In reply to paragraph 28, the plaintiffs' pleadings were frustrated and limited by the lack of disclosure by the Defendants. Recent B.C. Ferries disclosure has revealed that the initial three year contract between B.C. Ferries and Acom has been extended to the present time and will extend into the future. But for the breach by the Defendants, the plaintiffs would have enjoyed the benefits of these extensions.
12. In reply to paragraph 29, the document disclosure by B.C. Ferries reveals this to be a false statement. LEGAL BASIS
13. In reply to paragraphs 35 and 36, the limitation period extended by Sections 5(1), (2)(a)(ii), (6)(a), (7)(a), (9) and 6(3)(d) and (e), (4) of the Limitations Act [RSBC 1996] c. 266. The limitation period would start to run in early August of 2004 at the earliest, i.e. six months from early February of 2004, at which time Ko deceived the plaintiffs into believing that he would be making full payment "within six months." In the late fall of 2004, Ko, on behalf of the Defendants, paid Rhodes \$500.00 as a down payment of the debt of the Defendants to Rhodes. This action was commenced on June 22, 2010, well within the six year limitation period. In fact, Ko consistently promised, directly and through an intermediary, that he

would pay the plaintiffs until December of 2009, at which time, he said, for the first time, that he had no intention of paying. All of these promises were an attempt by Ko to deceive the Plaintiffs into believing that Ko intended to pay them. This would render December 2009 as the commencement of the six year limitation period. In any event, the action was commenced within the requisite limitation period.

14. In reply [to paragraph] 37, the Agreement was drafted by Acom and presented to the plaintiffs in the form of an offer. As such, the Agreement would be interpreted contra preferendum. Additionally, the Agreement clearly sets out the responsibilities of each party to the Agreement. At his Examination for Discovery on February 8, 2011, Ko admitted that he understood said responsibilities.
 15. In reply to paragraphs 38 and 39, Acom did not give the plaintiffs an opportunity to form a company with a collective agreement with an established union.
 16. In reply to paragraph 40, this is not factual.
 17. In reply to paragraph 41, this is moot, as Acom did not give the plaintiffs an opportunity to perform the Agreement.
 18. In reply to paragraph 42, Ko, deliberately and with forethought, set up Allpro as a union company to perform the contractual obligations of the plaintiffs to the Agreement. Allpro is a wholly owned subsidiary of Acom with both entities controlled by Ko. Ko diverted funds that were to be paid from B.C. Ferries to Acom pursuant to the B.C. Ferries Contract to Allpro, Ko declared at his Examination for Discovery on February 8, 2011 that Allpro, not Acom, was the real contracting party with B.C. Ferries and that Acom's name on the contract was a mistake. Invoices to B.C. Ferries were delivered as "Acom doing business as Allpro". For all of these reasons and more, Allpro is a proper Defendant in this action.
 19. In reply to paragraph 43, it is clear on the pleaded facts that the breach by Ko on behalf of Acom and Allpro was deliberate and planned and that Ko, on behalf of the Defendants, had no intention of honouring the Agreement. Those facts alone gives rise to a proper claim for aggravated and/or punitive damages.
 20. In reply to paragraph 49, the plaintiffs' claim is in relation to net profits of the B.C. Ferries contracts.
 21. In reply to paragraph 50, the Defendants are not entitled to any offset as claimed as the Agreement was a management contract that did not obligate the plaintiffs to work full time any more than it obligated the Defendants to devote its full time attention to the B.C. Ferries contract.
- [12] I will now deal sequentially with the impugned portions of the Reply. Paragraph 1
- [13] The respondents say that the allegation that Allpro was "created by Ko" is inconsistent with the Amended Notice of Civil Claim (ANCC) which alleges that Ko "assumed ownership of Allpro" and paragraph 7 of the Reply itself, which alleges that the defendant Acom "set up"

Allpro. The italicized portions of this paragraph are certainly confusing and thus embarrassing and perhaps irrelevant. Ko is not a party and the claimants inconsistently allege that Allpro was either "created" or "set up" by Ko or Acom. The italicized portion will be struck. Paragraph 2

- [14] The italicized portion is a pleading of evidence and is struck. Paragraph 3
- [15] The italicized portion is argumentative and irrelevant and is struck. Paragraph 4
- [16] The italicized portion is argumentative and irrelevant and is struck. Paragraph 5
- [17] The words "There is ample evidence that..." are an attempt to plead evidence or advance argument and will be struck. The alleged threat to Rhodes' safety is a repeat of an allegation in the ANCC and is thus unnecessary. That portion, too, will be struck. Paragraph 6
- [18] The italicized portions of this paragraph appear to be allegations based upon what a representative of one of the respondents said at his examination for discovery. It is a pleading of evidence, is unnecessary and irrelevant. It will be struck. Paragraph 7
- [19] This paragraph raises the same issue, in the same confusing manner, as paragraph 1. It too will be struck. Paragraph 8
- [20] The italicized portions represent a pleading of evidence and are struck. Paragraph 9
- [21] The italicized portion is a pleading of evidence and is scandalous as defined by the decision in Citizens. It will be struck. Paragraph 11
- [22] The entire paragraph is either a pleading of evidence or an attempt to raise a new cause of action with respect to the extension of the Acom contract "into the future". In the latter respect, it is scandalous and embarrassing. It will be struck. Paragraph 12
- [23] The italicized portion is a pleading of evidence and will be struck. Paragraph 13
- [24] The italicized portions represent submissions or argument, not facts, and will be struck. Paragraph 14
- [25] The italicized portions represent submissions and evidence respectively and will be struck. Paragraph 15
- [26] The italicized portion does not offend the Rules and will not be struck Paragraph 16
- [27] Although not articulated as such, I regard the impugned words as having the same general effect as a traverse and not, therefore, objectionable. Paragraph 17
- [28] The italicized portion is in the nature of argument and will be struck. Paragraph 18

- [29] The allegations with respect to ownership of Allpro ad further to the confusion created by paragraphs 1 and 7 and will be struck. The allegations with respect to the alleged diversion of funds by Ko are scandalous and an attempt to establish a new cause of action and will be struck. The allegations concerning Ko's examination for discovery represent a pleading of evidence and the allegation with respect to Allpro being a proper party is irrelevant. Both will be struck. Paragraph 19
- [30] The italicized portions are unnecessary and represent argument, respectively. Both will be struck. Costs
- [31] The respondents have enjoyed substantial success on this application and will have their costs in any event of the cause. "Master Keighley"
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