

CANADA / JUDGMENT

Rubin v. Metrakos

2002 BCSC 1787

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC1787

Citation: Rubin et al v. Metrakos

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2002 BCSC 1787Docket: 02 4038
Registry: Victoria
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: EMILY RUBIN, ALSO KNOWN AS EMILY YUNGKANS AND
3041880 NOVA SCOTIA LTD.
PLAINTIFFSAND: GEORGE JAMES METRAKOS ALSO KNOWN AS JAMES METRAKOS
ALSO KNOWN AS ANTHONY RYAN ALSO KNOWN AS
JOSEPH THOMAS GERALD CORWAY ALSO KNOWN AS JOHN LAWSON
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE R. D. WILSON

Counsel for the Plaintiffs:

R.T.C. Johnston, Q.C.

Counsel for the Defendant:

J. M. Hutchison, Q.C.

Date and Place of Hearing/Trial:

December 3, 2002

Victoria, BC

I.

- [1] The plaintiffs commenced this proceeding on 3 September 2002. The plaintiffs say that the defendant was employed by the corporate plaintiff from 26 December 2001 through 9 July 2002.
- [2] The plaintiffs say, among other things, that during the period of his employment, the defendant misappropriated corporate funds and borrowed money from the plaintiffs, without repaying the same.
- [3] On 4 September 2002, and 19 September 2002, on the application of the plaintiffs, without notice to the defendant, garnishing orders before judgment were made, attaching certain funds. And too, on 4 September 2002, the plaintiffs obtained injunctive relief against the defendant, in the form of a "Mareva Injunction".
- [4] On 22 October 2002, the defendant filed a statement of defence and counterclaim. Among other things, the defendant counterclaims for unpaid salary, overtime, employment benefits, and for contract severance pay. On 4 November 2002, on the application of the defendant, without notice to the plaintiffs, a garnishing order before judgment was made attaching certain funds.
- [5] By a motion dated 29 October 2002, the defendant moved for orders setting aside the garnishing orders before judgment of 4 September and 19 September 2002; and the order of 4 September 2002 granting the injunctive relief.
- [6] By a motion dated 13 November 2002, the plaintiffs moved for an order setting aside the garnishing order before judgment of 4 November 2002.
- [7] The motions were heard together.

II.

- [8] The plaintiffs' version of events is as follows.
- [9] The plaintiff Rubin is a principal in the corporate defendant ("the company"). The company owns and operates an inn.
- [10] On 26 December 2001, Ms. Rubin caused the company to employ Mr. Metrakos as comptroller and manager of the inn. Pursuant to that employment, the company issued to Mr. Metrakos a credit card, for purchases relating to the operation and management of the inn.

- [11] By mid-March 2002, Ms. Rubin and Mr. Metrakos developed an intimate relationship. At the time, Ms. Rubin was involved in a dispute with her estranged husband, a resident of the State of California, one of the United States of America. At the suggestion of Mr. Metrakos, precipitated by concerns over conduct of Ms. Rubin's estranged husband, Ms. Rubin moved into Mr. Metrakos' residence.
- [12] While the inn was under the operation of Ms. Rubin and her estranged husband, all financial transactions and business operations were exclusively under the control of her estranged husband. When Mr. Metrakos was employed, the management of the inn's business was entrusted exclusively to Mr. Metrakos. As well, Ms. Rubin relied upon Mr. Metrakos' advice in responding to the various demands and threats by her estranged husband. Ms. Rubin described the circumstances at paragraph 24 of an affidavit sworn 3 September 2002, in these words:

While the Defendant was employed as a comptroller, he had complete control of the finances. He intentionally kept me out of the loop, and because of the representations he had made to me concerning his abilities and experience, and because our relationship became intimate, I did precisely what he told me. I would often sign documents that he had prepared or that he had had his lawyer prepare. I would, if he asked write letters -- that he dictated -- without understanding what was being said.

- [13] Ms. Rubin owned an investment certificate which had been funded by the sale of real property in the State of California. Mr. Metrakos counselled her to liquidate that investment to preserve it from attack by her estranged husband.
- [14] Mr. Metrakos had introduced Ms. Rubin, and the company, to his, Mr. Metrakos', solicitor. Through that solicitor's offices, the investment certificate was liquidated; and from the proceeds, \$275,000 was paid to Mr. Metrakos and \$219,353.10 paid to the company.
- [15] Mr. Metrakos told Ms. Rubin that the \$275,000 had been sent to a secure account in Switzerland to protect it from Ms. Rubin's estranged husband.
- [16] In June 2002, it was brought to Ms. Rubin's attention that questionable expenditures were being made on the company's credit card in Mr. Metrakos' possession.
- [17] In early July, Ms. Rubin learned that Mr. Metrakos had incurred expenses on the company's credit card of approximately \$120,000. The questionable expenditures included payments to Mr. Metrakos' former employer in Nanaimo; golf clubs to a golf club store, men's clothing, a piano and drums for friends of Mr. Metrakos, and liquor. Additionally, Ms. Rubin learned that the company's funds to the extent of \$27,500 had been paid to Mr. Metrakos' solicitor, for professional services supposedly rendered to Mr. Metrakos.
- [18] Ms. Rubin says that there are promissory notes in favour of Mr. Metrakos with, what appear to be, her signature as maker. She says, in effect, those notes are not her documents.

- [19] The company says that there is no evidence that Mr. Metrakos ever placed any money into the company.
- [20] Upon learning of this information, Ms. Rubin consulted a solicitor and eventually arranged for police assistance to remove some of her possessions from Mr. Metrakos' residence. On 9 July 2002, Ms. Rubin did attend at Mr. Metrakos' residence, with police officers, to obtain that property. Among other things, she demanded from Mr. Metrakos the company's credit card and keys to the inn. She says that at the time, Mr. Metrakos told her that he would sue for "constructive dismissal".
- [21] In their statement of claim, the plaintiffs plead, among other things, that the defendant misappropriated funds by the wrongful use of the company's credit card. It is further alleged that the defendant holds the sum of \$275,000 on trust for the company; or, he has had and received that sum to the use of the company; or, he has breached his fiduciary duty and his contract of employment with the company.
- [22] Finally, the plaintiffs allege that the company made a loan to the defendant of \$15,129 which was not repaid; and that Ms. Rubin made a loan to Mr. Metrakos of \$10,338.48 which has not been repaid.

III.

- [23] The defendant's version of events is as follows.
- [24] The terms of Mr. Metrakos' employment with the company are defined in a written agreement effective 26 December 2001. Among its other provisions, the term of employment was fixed by that agreement at two years.
- [25] As well, the agreement deals with the company's right to terminate Mr. Metrakos' employment. Among others, one of the provisions, as alleged in paragraph 18(ii) of the counterclaim is:

Without cause, upon payment of an amount equal to \$18,000 or the balance of salary and benefits that may accrue to the defendant under the remaining balance of the term of the agreement, whichever was lesser; ...

- [26] Mr. Metrakos says that Ms. Rubin is an accomplished legal secretary in the State of California. She was alert to all financial dealings in the inn and regularly received, and perused, all bank statements and credit card statements of the company.
- [27] Ms. Rubin had full knowledge and granted approval of Mr. Metrakos' use of the credit card when each individual transaction occurred. The use of the credit card by Mr. Metrakos was, on each occasion, the subject of consent, direction and acquiescence of the plaintiffs.
- [28] It was at the suggestion of Ms. Rubin that she move in to Mr. Metrakos' residence. She was involved in litigation with her estranged husband and was endeavouring to protect her assets from him. As well, the inn was insolvent, or on the brink of insolvency. To enable the

company to meet financial obligations, Mr. Metrakos made a loan of \$25,000 in mid-May 2002. To secure repayment of that loan, the company made a promissory note in Mr. Metrakos' favour, payable on demand. Mr. Metrakos advanced the sum of \$25,000 to the company in anticipation of the liquidation of the investment held by Ms. Rubin.

- [29] As well, a further \$250,000 was advanced to keep the company operating in June 2002. This money was provided by cash transfers, the source of which was Mr. Metrakos' father in the United States of America. The cash transactions occurred between Mr. Metrakos' father, and a friend of Mr. Metrakos, his former employer, in Seattle, Washington, on two occasions. The cash so received was handed to Ms. Rubin.
- [30] The liquidation of the investment was at the insistence of Ms. Rubin to preserve it from attack by her estranged husband. Ms. Rubin told Mr. Metrakos that she had deposited the money in a separate account out of the country.
- [31] Mr. Metrakos does not hold a valid Canadian passport. He refused an offer of employment in Hong Kong, from his former employer, for reasons of health. He has been a resident in British Columbia for 12 years; he has businesses in Calgary and has no intention of leaving British Columbia, other than to administer those businesses. He says that the attachment orders and injunction are prohibiting him from carrying on his ordinary business dealings.
- [32] As at 7 October 2002, the garnishing orders of 4 September and 19 September 2002 had not been served upon Mr. Metrakos. He says that he was present at his residence, save for brief absences, throughout that period. And as well, his solicitor's business card was posted on the door.
- [33] Mr. Metrakos says that he has never received formal notice of termination from the company. In his counterclaim, he seeks, among other things, judgment for accumulated salary, overtime and benefits. Alternatively, he alleges a constructive dismissal and seeks judgment for the liquidated damages contracted for, plus loss of vacation pay, continued payment of benefits, loss of reputation and legal expenses provided for in the employment agreement.

IV.

- [34] Mr. Metrakos seeks an order setting aside the garnishing orders on four grounds. First, he contends, the plaintiffs have not complied with the service provisions of s. 9(2) of the Court Order Enforcement Act. That subsection provides as follows:

9(2) A copy of the garnishing order must be served at once, or within a time allowed by the judge or registrar by memorandum endorsed on the order, on the defendant, judgment debtor or person liable to satisfy the judgment or order.

- [35] A process server attempted service on Mr. Metrakos, at his residential address, on nine occasions between 4 September and 14 September 2002, both dates inclusive. The attempts were unsuccessful.

- [36] An order for substituted service of the material was obtained from this court on 16 October 2002 and service was effected on Mr. Metrakos on 28 October 2002.
- [37] I am satisfied that the plaintiffs endeavoured to comply with the statute. And, on the information available to the plaintiffs, compliance was frustrated, in part at least, by Mr. Metrakos. This is not a ground for setting aside the orders.
- [38] Second, Mr. Metrakos contends the plaintiffs' claims are not claims for a liquidated amount.
- [39] "A valid liquidated claim has been held to mean evidence of a claim which, 'if ultimately accepted at trial, will establish that the sum or at least some part of it is due to the defendant'" (*Eaglecrest Explorations Ltd. v. Consolidated Madison Holdings Ltd.* (1995), 14 B.C.L.R. (3d) 336 (S.C.)).[1]
- [40] The question to be answered on the claim on the credit card use is one of liability. The amount is not what the parties are quarrelling about. If Mr. Metrakos is found to have made unauthorized use of the company's credit card, then the quantum will be the amount of the unauthorized expenditure. There is nothing which must be assessed by the court.
- [41] Similarly, the plaintiffs say Mr. Metrakos has taken \$275,000 without authority. The issue on this topic is, as well, one of liability. If the promissory notes are valid, then there is no amount owing by Mr. Metrakos to the plaintiffs, or either of them. If the promissory notes are not valid, then the sum of \$275,000 is owing. There is no amount to be assessed by the court.
- [42] Finally, the plaintiffs allege loans to Mr. Metrakos in sums certain. Mr. Metrakos does not quarrel with the amounts involved; he says that no such loans were ever made. Again, the question is whether or not the amount is owing or not owing. Either the loan was made, or it was not. There is no assessment to be done by the court.
- [43] In result, the plaintiffs' claims are claims or demands justly due and owing.[2]
- [44] Third, Mr. Metrakos contends that the orders are fatally flawed because the affidavits in support thereof did not "make all just discounts". That is to say, Ms. Rubin did not disclose, among other things, the claim by Mr. Metrakos against the company for liquidated damages for "constructive dismissal".
- [45] The governing principle on this issue, I take from *Ridgeway-Pacific Construction Limited v. United Contractors Ltd.*[3]:

Nor do I think it tenable for the plaintiff (respondent) to advance the argument that it is possible in respect of a portion only of the transactions between the parties to say that in respect of that isolated portion effect has been given to "all just discounts" and thereby obtain a garnishing order, when in respect of other transactions between the parties it is clear that, as here, the defendant (appellant) has or will have the right to recover from the plaintiff (respondent) a debt or liquidated demand in money. If such a right exists, provision must be made for it in the affidavit by way of "just discount".

- [46] In *Ridgeway-Pacific*, a garnishing order was set aside because "all" discounts were not disclosed. At page 288, the court said: "... the deponent who made the affidavit in support of the garnishing order was incorrect when he said all just discounts had been made."
- [47] In *Chan v. Chen* a similar error resulted in a reduction, by this court, of the fund attached. However, in *Ridgeway-Pacific* and in *Pe Ben Industries Company Ltd. v. Chinook Construction & Engineering Ltd.*,^[4] the Court of Appeal ruled that such an error constituted grounds for setting aside the garnishing order in its entirety. I am bound by the Court of Appeal rulings.
- [48] I do not address the defendant's fourth ground, that it is just in all the circumstances that the orders be set aside.

V.

- [49] The plaintiffs' application to set aside the garnishing order issued at the instance of the defendant, has three grounds.
- [50] First, the plaintiffs say the defendant's claim is not for a liquidated sum.
- [51] The defendant's counterclaim is, among other things, for "salary, overtime charges and benefit payments". Presumably, the salary claim is calculated on the monthly salary defined in the employment agreement between the parties; or, alternatively, on the annual salary so defined, divided by 12.
- [52] There is no information, however, on the basis for the calculation of the overtime charges and benefit claims. The defendant has not provided sufficient information to conclude that these latter claims are ascertainable, without judicial assessment. If part of the claim is not liquidated, then the whole order falls.^[5]
- [53] Furthermore, in the defendant's agent's affidavit in support of the garnishing order, she did not disclose the claim by the company for judgment in a sum in excess of \$390,000. She did not make "all just discounts". For this reason, as well, the garnishing order must be set aside.^[6]

VI.

- [54] Finally, the defendant contends that the interim injunction must be set aside for the following reasons.
- [55] First, the plaintiffs did not exercise that high level of candour and diligence, in disclosing all material facts and presenting relevant authorities on the application for the injunction.
- [56] Second, the serious challenges made by the defendant to the case made by the plaintiffs, negates the propriety of interim injunctive relief.

- [57] Third, there is no real evidence the defendant is about to remove his assets from the jurisdiction, or is otherwise dissipating or disposing of his assets, for the purpose of avoiding the possibility of judgment. This is said to be an essential requirement for the issuance of a Mareva injunction in Canadian law.
- [58] Fourth, the interim injunction is overbroad in that it interferes not only with the defendant's normal business arrangements, but with his living arrangements as well.
- [59] I am not persuaded that this interim injunction must be set aside.
- [60] The plaintiffs have satisfied me that there is a fair question to be tried as to the existence of the rights they allege and the breaches thereof by the defendant.
- [61] I am also satisfied that the balance of convenience favours the granting of this interim injunction.
- [62] The plaintiffs are anxious that they not become the next Ms. Goncalves[7] in the annals of British Columbia law. For the purposes of this interim application, and on the affidavit material filed on that application, I find the plaintiffs' version of events to be more in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in all of the circumstances, than is the version of the defendant.[8]
- [63] Current British Columbia law does not require, as a condition precedent to the issuance of a Mareva injunction, that an applicant demonstrate the defendant is moving assets, to avoid the possibility of a judgment. The current governing principle, as defined by Newbury, J.A., in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*[9]:
- ... I would be reluctant to adopt a hard and fast rule, ... that a Mareva injunction may never be made or continued unless there is a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business; or where it would materially and adversely affect an innocent third party. ... The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.
- [64] It appears the defendant's assets are out of the jurisdiction. According to his material, the marshalling of funds is accomplished by his father in the United States of America. Cash transfers to the defendant are organized

through friends, when the defendant is not able, for transport into Canada. When the defendant has reimbursed the company for personal expenditures, those reimbursements are done in cash, without receipts.

VII.

- [65] In summary:

1. The application of the defendant for the setting aside of the garnishing orders is allowed. The garnishing orders before judgment made 4 September 2002 and 19 September 2002 are set aside;
2. the application of the plaintiffs is allowed. The garnishing order before judgment made 4 November 2002 is set aside; and
3. the defendant's application for an order setting aside the interim injunction granted 4 September 2002, is dismissed.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson

- [1] Chan v. Chen, [1997] B.C.J. No. 34 (B.C.S.C.) at paragraph 28.
- [2] Agnes & Jennie Mining Company Ltd. v. Zen et al (1982), 36 B.C.L.R. 308 (B.C.S.C.) at page 315.
- [3] [1976] 1 W.W.R. 285 (B.C.C.A.), at page 287 - 288.
- [4] [1977] 3 W.W.R. 481 (B.C.C.A.).
- [5] Pacific Blasting, Demolition & Shoring Ltd. v. Skeena Cellulose Inc. (1992), 68 B.C.L.R. (2d) 101 (B.C.S.C. Master).
- [6] Ridgeway Pacific at footnote 3.
- [7] See Goncalves v. Guerra (1992), 67 B.C.L.R. (2d) 241 (B.C.C.A.). An interim injunction was refused. Mr. Guerra removed to Portugal with his lottery winnings; one-half of which were eventually found to be the property of Ms. Goncalves.
- [8] See: Faryna v. Chorny, [1951] 4 W.W.R. (N.S.) 171 (B.C.C.A.) at page 174.
- [9] (1999), 59 B.C.L.R. (3d) 196 (B.C.C.A.), at page 207 - 208, paragraph 20, approving Mooney v. Orr (1994), 100 B.C.L.R. (2d) 335 (B.C.S.C.).

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