

CANADA / JUDGMENT

Rufus Enterprises Ltd. v. Mikelson et al.

2006 BCSC 1815

COURT

Supreme Court of British Columbia

DECIDED

7 December 2006

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2006 BCSC 1815 Rufus Enterprises Ltd. v. Mikelson et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rufus Enterprises Ltd. v. Mikelson et al.,

2006 BCSC 1815

Date: 20061207

Docket: S062903

Registry: Vancouver

Between:

Rufus Enterprises Ltd.

Plaintiff

And

Arnold Mikelson, Catrina Mikelson and

Alexandria Enterprises Ltd.

Defendants

And

Gregory Rodgerson, also known as

Gregory Rodgers

Defendant by Counterclaim

Before: Master Taylor

Reasons for Judgment

Counsel for the Plaintiff and Defendant

by Counterclaim:

S.D. Vanderfluit

Counsel for the Defendants:

J.A. MacLean

Date and Place of Hearing:

November 23, 2006

Vancouver, B.C.

- [1] This is an application by the defendants to set aside a garnishing order before judgment granted to the plaintiff on May 5, 2006 as against the defendant, Alexandria Enterprises Ltd. and for an order that the sum of \$16,418.93 paid into Court by the garnishee be paid out to the defendant, Alexandria Enterprises Ltd. and for costs of the application to be paid to the defendants in any event of the cause.
- [2] The defendant, Alexandria Enterprises Ltd. submits that since the claim is primarily for one of conversion, the claim is for damages and not a liquidated amount; therefore a garnishing order cannot issue as damages would have to be assessed.
- [3] The plaintiff, rather than denying the claim is in conversion, asserts that it's in fact in conversion; however suggests that because the value of the goods converted is known, that causes the amount to be liquidated and therefore a garnishing order before judgment can issue.
- [4] In reply, the defendant argues that whilst the value of the materials at the time they were purchased was known, that cannot be said for the date of the conversion because the date of the conversion was not known and therefore the value of the goods is also not known.

FACTS

- [5] In support of the garnishing order before judgment and before the action was commenced, Greg Rodgerson, a director of the plaintiff Rufus Enterprises Ltd., swore an affidavit on May 4, 2006 in which he says the following at paragraphs 2, 3 and 4:
 - 2. The Intended Plaintiff wishes to commence an action against the above-named Intended Defendants for, among other things, the non-payment of a loan and the conversion by the Intended Defendants of property owned by the Intended Plaintiff.

3. The nature of the cause of action is more particularized in the Writ of Summons with attached Statement of Claim to be filed in this proceeding, a copy of which is marked as Exhibit "A" and attached to this Affidavit.
4. In respect of the cause of action the Intended Defendant, Alexandria Enterprises Ltd., is justly indebted to the Intended Plaintiff for \$19,074.11, after making all just discounts, and it is now justly due and owing.
- [6] Paragraphs 16 to 23 of the undated, unsigned and unfiled statement of claim are as follows:
 16. The Company is and was at all material times the owner of and in possession or entitled to immediate possession of construction and building supplies, including but not limited to drywall, steel studs, adhesives, ready-mix, moulding, and similar products and materials (the "Goods").
 17. The Company purchased the Goods from more than one third party, for a total of \$19,074.11, including social services tax and goods and services tax.
 18. In or about January 2005, Mr. Mikelson has converted the Goods to his own use and then gave possession of the goods to Alexandria.
 19. Mr. Mikelson is the sole or majority shareholder of Alexandria, a company incorporated pursuant to the laws of British Columbia with a registered office located at Bldg #5, 21183 - 88th Avenue, Langley, British Columbia, V1M 2G5.
 20. After taking possession of the Goods, Alexandria sold or gave the Goods to Applecross Projects Ltd. ("Applecross").
 21. The Company has made demand on Mr. Mikelson and Alexandria for payment of the cost of the Goods.
 22. Despite demand, Mr. Mikelson and Alexandria have refused or neglected to pay the Company for the cost of the Goods, or any part thereof.
 23. The Company says that Mr. Mikelson and Alexandria are jointly and severally liable for the total cost of the Goods, being \$19,074.11
- [7] On October 16, 2006 Mr. Rodgerson swore another affidavit wherein he declares himself to be the president of Rufus Enterprises Ltd. Paragraphs 4 to 7 of Mr. Rodgerson's affidavit sworn October 16, 2006 are set out below:
 4. In or about the winter of 2004 and 2005, one or both of the Defendants entered into an agreement with Applecross Projects Ltd. ("Applecross") to perform work on a project under development by Applecross at the University of British Columbia (the "Applecross Project"). Mr. Mikelson led me to believe that the Applecross Project involved a contract between the Company and Applecross. At no time did Mr. Mikelson tell me that Applecross had contracted with Mr. Mikelson or Alexandria Enterprises Ltd. ("Alexandria"), or both of them.

5. At the time, I was unaware that Mr. Mikelson had been ordering materials through the Company for use by himself or Alexandria, or both of them, on the Applecross Project. The Company never approved or authorized Mr. Mikelson to purchase materials for the Applecross Project on behalf or for use by himself or Alexandria, or both of them, with funds provided by the Company.
6. I am advised by Shelley Moore, an employee of the Company, and believe it to be true, that in or about January 2005, the Company began to receive invoices from suppliers of materials purchased by the Defendants for work done by the Defendants on a project under development by Applecross Projects Ltd. (the "Applecross Project"). Ms. Moore advises me, and I believe it to be true, that on or about February 7, 2005 she asked Mr. Mikelson about these bills and Mr. Mikelson told her that Applecross would send a cheque to the Company for the materials used on the Applecross Project, but Mr. Mikelson did not disclose to Ms. Moore that it was Mr. Mikelson or Alexandria, or both, that were the parties to the contract with Applecross and not the Company.
7. The total amount paid by the Company for materials used by the Defendants on the Applecross Project, including G.S.T., was \$19,074.11.
- [8] The garnishing order before judgment sought to attach the sum of \$19,074.11 plus attachment costs of \$595.50 for a total of \$19,669.61. The garnishee, Toronto Dominion Bank paid the sum of \$16,418.93 into court on May 26, 2006.
- [9] Aside from arguing that the said sum is damages which have to be assessed rather than a liquidated amount, the defendant/applicant herein has also urged me to set aside the garnishing order because "it is just in all the circumstances to do so" pursuant to s. 5(2) of the Court Order Enforcement Act, R.S.B.C. 1996, c.78.
- [10] The defendant/applicant, says there are specific reasons for finding it just in all of the circumstances to set aside the garnishing order specifically, they are:
 - (a) there is nothing in the evidence to suggest a risk of flight by the corporate defendant;
 - (b) the plaintiff's claim against the corporate defendant is inextricably interwoven with the plaintiff's claim against the individual defendant and therefore the affidavit filed in support of the garnishing order material mis-states the nature of the plaintiff's claim against the individual defendant;
 - (c) a strong defence and counter-claim have been filed by the defendants; and
 - (d) issuance of the garnishing order was not preceded by any written demand for payment from either the plaintiff or its solicitor.
- [11] The plaintiff's statement of claim pled that the defendant, Arnold Mikelson, was an employee of Rufus Enterprises Ltd. This is set out in paragraph 7 of the statement of claim.

- [12] The statement of defence and counter-claim of the defendants was filed on June 8, 2006. In the counter-claim Mr. Mikelson pleads that he and Mr. Rodgerson are 50% partners in the company and that the agreement between them allowed Mr. Mikelson to do what he did.
- [13] In particular, the statement of defence pleads that the principals, Mr. Mikelson and Mr. Rodgerson, agreed that they would jointly manage the company; that Mr. Mikelson would be considered the beneficial owner of 50% of the shares of the company; that all of the company's after-tax profits would be divided evenly between the two principals; and that each of the principals would be entitled to take draws either as salary or loans out of the company's surplus cash flow and any such payments would be treated as an advance on the principal share of any distributable profits for that year; and each of the principals were entitled to direct some or all of their draws to their respective spouses for the purposes of minimizing personal income tax.
- [14] On October 19, 2006 the plaintiff filed an amended statement of claim which pled in the alternative that Mr. Mikelson was a partner of the company. Further extended pleadings were added to the amended statement of claim which were pled in the alternative but which essentially joined issue with the pleadings of the defendant Mikelson and the company Alexandria in relation to the issues of entitlement to funds by way of draws or otherwise from the company.
- [15] The defendant/applicant submits that the defence pleads an express agreement between the partners to charge construction expenses to the company. Notwithstanding a plea in the alternative, the amended statement of claim joins issue with this assertion.
- [16] Section 5(2) of the Court Order Enforcement Act provides as follows:
- (2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment and if he or she does and a judgment has been entered, he or she must set the amounts and terms of payment of the judgment by instalments.
- [17] The only constraint on a registrar or judge's discretion is that he or she must consider it just in all of the circumstances.
- [18] Having considered the allegations subsequently pled in the alternative and the statement of defence filed in these proceedings I am of the view that there are issues of fact and credibility yet to be determined, and, accordingly, a garnishing order before judgment is not appropriate or just in the circumstances. Accordingly, the garnishing order should be set aside and the full amount currently paid into court be returned to the defendant Alexandria Enterprises Ltd.
- [19] Costs of the application will be costs in the cause.

"Master G.C. Taylor"

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