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CANADA / JUDGMENT

## Silverado Industries Inc. v. Dycar Pharmaceuticals Ltd.

2018 BCSC 2368

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COURT

Supreme Court of British Columbia

DECIDED

14 December 2018

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2018 BCSC 2368 Silverado Industries Inc. v. Dycar Pharmaceuticals Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Silverado Industries Inc. v. Dycar Pharmaceuticals Ltd.,

2018 BCSC 2368

Date: 20181214

Docket: S28733

Registry: Cranbrook

Between:

Silverado Industries Inc.

Plaintiff

And

Dycar Pharmaceuticals Ltd.

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A.P. Prior

Counsel for the Defendant:

S.D. Dvorak

Place and Date of Trial/Hearing:

Kelowna, B.C.

December 14, 2018

Place and Date of Judgment:

Kelowna, B.C.

December 14, 2018

[1] THE COURT: This is an application for a stay pending appeal of the order of Master Muir made on December 7, 2018.

## Background

[2] The plaintiff, Silverado Industries Inc., ("Silverado"), is a general contractor engaged in the business of civil construction and construction management. It sues the defendant, Dycar Pharmaceuticals Ltd., ("Dycar"), the registered owner of the property in Cranbrook ("Property"), with whom it contracted on April 24, 2018, to construct a large cannabis facility that had been licensed by Health Canada (the "Construction Contract"). Silverado claims it is owed \$2,169,840.99 by Dycar in unpaid invoices ("Invoices").

[3] As it happens, Silverado is one of Dycar's shareholders. In separate Supreme Court proceedings, some of Dycar's shareholders including Silverado, who holds approximately 6.86 percent of Dycar's outstanding shares, seek to force Dycar's directors to call a general meeting with the intent, Dycar says, of forcing a change of Dycar's board of directors and thereby take over the company. It is apparent, therefore, that something more than a straightforward general contractor/owner dispute is at play and the stakes are high.

[4] The Construction Contract between Silverado and Dycar provided that:

- a) Silverado would invoice Dycar on a monthly basis for work performed; and
- b) Dycar would pay Silverado no later than 30 days after submission of an invoice.

[5] The Invoices are:

- a) an October 12, 2018 invoice for work performed in September 2018 for \$1,817,728.35 ("September Invoice") that was delivered to Dycar on October 15, 2018. Under the terms of the Construction Contract, the September Invoice was payable by Dycar on or before November 15, 2018;

- b) an October 17, 2018 invoice for work performed in October 2018 to that date for \$732,125.72 ("October Invoice") that was delivered to Dycar the same day. Under the terms of the Construction Contract, the October Invoice was payable by Dycar on or before November 17, 2018.
- [6] On October 23, 2018, Silverado filed and registered a builder's lien against the property ("CBL"), for the amounts of the Invoices plus holdback of \$450,303.29. The total CBL was \$2,619,840.99. Dycar was unaware that the CBL had been registered.
- [7] At the same time, Silverado was pressuring Dycar to pay the September Invoice. Dycar expedited its review of the September Invoice and delivered a cheque to Silverado on October 24, 2018, in the full amount.
- [8] Dycar's further review of the September Invoice disclosed a number of concerns including that materials Silverado had invoiced for but that had not been provided to or installed on the Property. It suspected Silverado was overcharging. At the same time, Dycar was made aware of the CBL and that some of its dissident shareholders, including Silverado, were making moves to replace its board and take over the company.
- [9] Dycar's response was to issue an immediate stop payment of the cheque in payment of the September Invoice. It also engaged a quantities surveyor to investigate the matter of the September Invoice. Silverado filed this action on November 22, 2018.
- [10] On November 23, 2018, Silverado obtained a garnishing order before judgment and served it on Dycar's bank, the Bank of Montreal in 100 Mile House, BC. Although the precise amount is unclear, that garnishing order apparently attached approximately \$2 million ("Garnished Funds").
- [11] The Garnished Funds have been paid into court by the Bank of Montreal. Their exact whereabouts is unclear but they are in the system somewhere. Dycar did not become aware of the garnishing order until November 30, 2018.
- [12] On December 3, 2018, Dycar applied and was granted short leave to file an application to set aside the garnishing order. That application was heard by Master Muir on December 5, 2018, who issued oral reasons on December 7, 2018 (2018 BCSC 2227), setting aside the garnishing order and ordering the Garnished Funds be paid out to Dycar's counsel in trust.
- [13] Silverado appeals Master Muir's order and applies for a stay pending appeal. The transcript of Master Muir's reasons were not available for yesterday's hearing but the parties agreed to proceed without it late yesterday. After submissions were completed, Silverado's counsel received the transcript and arranged for it to be emailed to me and I have reviewed it.

## Stay Applications Generally

- [14] It is trite law that an order is presumed to be correct and a successful party is entitled to the fruits of the order subject to the court's discretion to stay the order if satisfied that it is in the interests of justice to do so (*Gill v. Darbar*, 2003 BCCA 3 at para. 7).
- [15] The court's power to grant a stay is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation or to prevent irreparable damage or where there are other special circumstances (*Continental Steel Ltd. v. CTL Steel Ltd.*, 2015 BCCA 501 at para. 37).
- [16] Silverado's stay application is brought under Rule 23-6(11) of the Supreme Court Rules. That rule states that an appeal of an order is not a stay of proceeding unless ordered by the court. The burden is on the applicant to show that a stay should be granted.
- [17] The test for granting a stay is well known. It is essentially the same as the test for granting an injunction. It requires the applicant to show:
- a) that there is some merit to the appeal in the sense that there is a serious question to be tried. In other words, the applicant must show it has an arguable case;
  - b) that the applicant would suffer irreparable harm if the stay was not granted; and
  - c) that the balance of convenience favours the stay being granted.
- (*H.E. Administrative Services Ltd. v. Perrick*, 2010 BCCA 576 at para. 18 and *BC Milk (Marketing Board) v. Grisnich*, [1996] B.C.J. No. 1904 (B.C.C.A.).
- [18] I will deal with each of these criteria in turn.
- [19] Where the order appealed from is an interlocutory discretionary order, such as is the case here, there is a substantial burden on the applicant for a stay to show that the court below based its decision on a wrong principle or did not act judicially. Courts will not likely interfere with an exercise of judicial discretion (*Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holding Ltd.*, 2011 BCCA 523 at para. 12 and *Vancouver (City) v. Zhang*, 2007 BCCA 280 para. 11).
- [20] The standard of review on an appeal from a master's purely interlocutory order is that the master must be shown to have been clearly wrong: (*Abermin Corp. v. Granges Exploration Ltd.*, 1990 BCJ No. 1060; *Lee v. Narang*, 2018 BCSC 1645 at paras. 18 to 20; *Abid v. Khan*, 2018 BCSC 1292 at paras. 17 to 27; and *Wright v. Sun Life Assurance Company of Canada*, 2014 BCCA 309 at para. 35.
- [21] On a question of pure law, the standard of review is correctness even if the matter involves an interlocutory issue (*Northland Properties Ltd. v. Equitable Trust*, 1992 BCJ No. 1639 and *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2018 BCSC 1390).

- [22] Dycar argues that Silverado's application should be dismissed on this ground alone because its appeal is doomed to fail. The order involved the exercise of Master Muir's discretion. Accordingly, the appeal court will only interfere if Master Muir's decision is shown to be clearly wrong and Silverado cannot show that.
- [23] Master Muir cited four separate reasons for setting aside the garnishing order:
- a) Silverado failed to make full and frank disclosure of all material facts in its garnishment material, the most egregious being that it stated that all just discounts had been made when they had not. On this point, Master Muir stated the following at paragraph 13 of her reasons:
- [13] While there may be a valid commercial reason for charging for equipment not delivered to the site or to the owner in an invoice, that does not mean that it is proper to include those amounts for the purposes of the garnishing order. I am of the view that while commercial practice may dictate that those items be invoiced, when a line is drawn at a certain point in time and the owner does not have what it has been invoiced for, it is not appropriate to swear that all just discounts have been made.
- b) Silverado's notice of civil claim on its face does not disclose a cause of action against Dycar because it sued claiming monies were due and owing when they were not or, alternatively, the material filed in support of the garnishing order was confusing or misleading. On this point, Master Muir stated at paragraphs 15 to 17 of her reasons:
- [15] Payment for the October 15, 2018 invoice was not due until November 15 and, hence, could not found a breach of contract as at November 2, 2018.
- [16] Silverado argues that the 30-day time period was waived by the issuance of the cheque by Dycar in October, but even if that was the case, it is not made clear in the notice of civil claim or in the affidavit in support of the garnishing order, both of which say that the amounts were due and owing in accordance with the terms of the contract.
- [17] Further, the breach alleged also relies on the October 17, 2018 invoice, which Mr. Thielen swears was issued in accordance with the contract. That is contrary to the assertion in the notice of civil claim that Silverado was to invoice on a monthly basis. As I said earlier, Mr. Thielen notes in a later affidavit that in a construction meeting, it was agreed that invoices would be issued every two weeks, but that does not answer how an invoice could legitimately be issued two days after another invoice had been delivered.
- c) Silverado named BMO, Bank of Montreal, as the garnishee when no such legal entity exists. Its correct name is Bank of Montreal. Although Master Muir didn't specifically state that this was a specific reason for setting aside the garnishing order, she stated at paragraph 22 of her reasons:
- [22] For all these reasons, I conclude that the garnishing order must be set aside. . . .

All these reasons that she was referring to included naming the Bank of Montreal incorrectly.

- d) Silverado's CBL provided sufficient security for its claims and there was no real evidence that any judgment obtained by Silverado would go unsatisfied. In other words, Master Muir determined that there was "more than adequate" equity in the properties sufficient to satisfy Silverado's Invoices, if proven, and that it did not require the garnished funds as additional security. She found the garnishing order was unnecessary. Additionally, she found that the garnishing order was causing financial hardship to Dycar.
- [24] On the evidence before her, Master Muir exercised her discretion that the garnishing order should be set aside and that it was just to do so. She correctly stated that prejudgment garnishing orders are an extraordinary remedy that require strict compliance with the statutory requirements. She found at paragraph 21 that:
- [21] . . . Each of the defects in the materials set out above are sufficient by themselves and certainly in concert to invalidate the garnishing order without more.
- [25] For Silverado to be successful on appeal, it will need to show that she was clearly wrong on all of the grounds she found sufficient to set aside the garnishing order.
- [26] Given the discretionary nature of Master Muir's order and given the standard of review being the determination of whether she was clearly wrong, Silverado has not persuaded me that it may have an arguable case on appeal despite the threshold at this level being so low (RJR-McDonald Inc. v. Canada (Attorney General), [1994] 1 SCR 311).
- [27] In sum, I agree with Mr. Dvorak that Silverado's appeal is bound to fail. Although this finding is sufficient to dispose of the stay application, in the event I am wrong, I will address the issues of irreparable harm and balance of convenience.

### Irreparable Harm

- [28] The irreparable harm Silverado alleges is that if the stay is not granted the Garnished Funds will be paid out to Dycar and there is a risk that it will have no remedy if it is ultimately successful. Although it has a CBL filed against the Property, it says that it is concerned that there may not be sufficient equity in the Property to satisfy any judgment it obtains.
- [29] It points to paragraph 31 of Ms. Wannop's affidavit number 2 filed December 3, 2018 that reads, in part:
31. . . . Dycar has raised more than \$10M in equity financing since March 2015. Since acquiring the lands, Dycar has invested more than \$10 M on the Project, including the construction of a state of the art cannabis production facility that is now 85% complete.

- [30] It argues that a specialized facility that is 85 percent complete may not be worth the amount to cover the first mortgage of approximately \$2.1 million on the Property. Further, it argues that Dycar has produced no evidence of its financial wherewithal in the form of financial statements and has not produced any evidence that the first mortgage is in good standing. Accordingly, Silverado asserts that Master Muir should not have taken this to mean that there was sufficient equity in the Property to satisfy the CBL.
- [31] Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured usually because one party cannot collect damages from the other.
- [32] Examples of the former include instances where one party will be put out of business by the court's decision. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages although it is a relevant consideration.
- [33] In my view, Silverado overstates the harm it says it will suffer if the Garnished Funds are paid back to Dycar. In my view, the harm will not be irreparable. Silverado still has its civil claim against Dycar. It still has its CBL. It has not lost its legal rights to pursue those remedies.
- [34] While it may be true that having the cash amount of the September Invoice and the October Invoice in court is more convenient to Silverado than it is relying on its CBL as security, I am not persuaded that it will suffer irreparable harm by the Garnished Funds being paid out of court. To the contrary, Dycar will be able to use the Garnished Funds to continue to operate, raise funds, and complete the project thus providing Silverado with even more security under its CBL.
- [35] The onus is on Silverado to demonstrate irreparable harm and I am not persuaded that it has met that burden.

### Balance of Convenience

- [36] The third test to be applied is a determination of which of Silverado or Dycar will suffer the greater harm in the granting or refusal of the stay of Master Muir's order pending new appeal.
- [37] Silverado asserts that it will suffer the greater harm because if the stay is not granted it will render its appeal of Master Muir's order moot because the Garnished Funds will be gone. It says that any judgment it may obtain against Dycar will be hollow.
- [38] Against that, the evidence is that if the stay is granted and the Garnished Funds remain tied up, Dycar will be unable to meet its payroll and other financial obligations and will likely have to either shut down or take steps towards insolvency protection which will not benefit anyone, let alone Silverado.

- [39] Prejudgment garnishing orders are extraordinary remedies that are issued to secure funds until the final disposition of the matter. The idea is to ensure that a plaintiff who wins its case will have the ability to realize on the judgment.
- [40] Here, there is a clear dispute between the parties on the validity of Silverado's claims. If it succeeds, it has security in the form of its builder's lien filed against the Property. The evidence is that there is plenty of equity in the Property to satisfy any judgment Silverado may obtain.
- [41] The suggestion that the Garnished Funds will disappear and not be used in the ordinary course of Dycar's business is without foundation. As previously mentioned, I am satisfied that Dycar will continue to operate with the Garnished Funds being returned to it and may not continue to operate if the stay is granted.
- [42] Despite Silverado's point that there is no evidence about what Dycar's payroll or other obligations are, again, I agree with Dycar's submissions that the balance of convenience favours no stay of the order.
- [43] I do not accept that the evidence shows that any judgment Silverado obtains will be hollow. Indeed, the evidence before me suggests the contrary. The ultimate question is whether the interests of justice favour the granting of a stay. In my view, the answer is no.
- [44] So in the result, Silverado's application for a stay of Master Muir's order is dismissed with costs.

"G.P. Weatherill, J"

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