

CANADA / JUDGMENT

Springhill Enterprises Ltd. v. Uzelac et al

2002 BCSC 1883

COURT

Supreme Court of British Columbia

DECIDED

13 June 2002

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2002 BCSC 1883 Springhill Enterprises Ltd. v. Uzelac et al

Citation:

Springhill Enterprises Ltd. v. Uzelac et alSpS

Date: 20020613

2002 BSC 1883

Docket:

S023018

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

Master Patterson

June 13, 2002

BETWEEN:

springhill enterprises ltd.

dba chEck station

plaintiff

AND:

milan uzelac and milan uzelac

law offices, personal law corporation

defendants

Counsel for the Plaintiffs

J.C. MacInnis

Counsel for the Defendants

M. Huculac

- [1] THE COURT: This is an application pursuant to Rule 18 for summary judgment.
- [2] Rule 18(1) provides that, in an action in which an appearance has been entered, the plaintiff, on the ground that there is no defence to the whole or part of the claim or no defence except as to amount, may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of it and stating that there is no known fact which would constitute a defence to the claim. Rule 18(2) provides that the court may enter judgment and impose certain terms, including a stay if appropriate. The case law makes it abundantly clear that the defendant should not be deprived of his day in court if he can raise a bona fide triable issue.
- [3] This action arises out of an extraordinary set of circumstances. The claim is against a lawyer and his personal law corporation for the sum of \$91,901.14, being the balance owing to the plaintiff after a partial payment by the defendant Uzelac.
- [4] On May 4 and May 6, 2002, the defendant law corporation issued two solicitor's trust cheques in the amounts of \$71,500 and \$50,000, respectively. On May 4th, which is a Saturday, the defendant Uzelac contacted the plaintiff, which is in the business of cashing third party cheques for a commission, to enquire about cashing the first of these cheques. The defendant Uzelac had acted as solicitor for the plaintiff company and it was partly on that basis that the plaintiff company agreed to cash the cheque. On that Saturday, the defendant Uzelac obtained CDN\$20,000 in cash from the plaintiff. The defendant was told that any further amount that might be due or payable would have to wait until Monday. On Monday, May 6th, the defendant Uzelac obtained additional funds from the plaintiff in the amount of US\$30,000 and CDN\$50,000.
- [5] The trust account cheques issued by the defendant law corporation were not honoured by the Royal Bank, upon whom those cheques were drawn. The defendant Uzelac was notified by the Royal Bank on May 7th that funds deposited to his account had not cleared, he did not notify the plaintiff. On May 10th, the plaintiff's bank notified the plaintiff that the Royal Bank had refused to clear the trust cheques. On May 10th, the defendant Uzelac caused to be delivered to the plaintiff the sum of \$22,598.96 from his own funds.
- [6] The plaintiff's claim is, first, against the defendant company, pursuant to the Bills of Exchange Act as the drawer of the cheques. The Bills of Exchange Act provides that a cheque is a bill of exchange; and secondly, in s. 94 as follows:

94.(1) A bill is dishonoured by non-payment when

- (a) it is duly presented for payment and payment is refused or cannot be obtained; or
 - (b) presentment is excused and the bill is overdue and unpaid.
- (2) Subject to this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer, acceptor and endorsers accrues to the holder.

In this case, of course, the cheque was dishonoured when it was presented for payment, and it would follow from s. 94 that there is a right of recourse against the drawer of the cheque.

[7] The amended Statement of Defence filed today contains a bare denial of the facts and a denial that the company was the drawer of the cheque. It sets out no defence to the Bills of Exchange Act claim. It sets out lengthy reasons why the defendant company may have a claim against the Royal Bank of Canada, and I gather a third party notice has been issued. It sets out no facts which would support any other type of a defence, and it sets out no counterclaim against the plaintiff.

[8] In a decision referred to by counsel, *Butkovsky v. Jalbuena* (1982), 132 D.L.R. (3d) 177, Her Honour Judge McLachlin, as she then was in the county court, made this finding:

Having reviewed the Canadian authorities to which I was referred, I think that the highest the defendants' position can be put is that, in an action between the original parties to the bill of exchange, the court has a discretion as to whether to award judgment notwithstanding the filing of a counterclaim, as well as on the further question of whether to order that execution of judgment on the bill be stayed.

As noted, there is no counterclaim in this particular circumstance.

[9] In my view, there is no bona fide defence advanced by the defendant company to the claim against it as drawer of the cheques. The defendant company may have a valid claim against others, but that is no reason at this time to deny judgment to the plaintiff in the amount claimed.

[10] The plaintiff's claim against the personal defendant is based on the fact that the plaintiff was a client of the defendant Uzelac, that the defendant Uzelac alleges that he tendered the cheques to obtain cash for another client. The cheques delivered were clearly trust cheques drawn on a solicitor's trust account. The second cheque was presented by the defendant personally on Monday, May 6th.

[11] The Professional Conduct Handbook provides this as to trust cheques:

Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque:

- (a) will be paid, and
- (b) is capable of being certified if presented for that purpose.

- [12] Counsel acting for the personal defendant raises two questions, and says that in this particular case there were unusual and unforeseen circumstances, and that the cheques, when drawn, would have been capable of certification.
- [13] It appears that no difficulty was raised with the defendant withdrawing funds from his trust account on Monday, May 6th, because on that date he apparently withdrew some of the money. However, while the circumstances are certainly unusual, to say the least, there are a number of factors that have to be considered. On Friday, May 3rd, Mr. Uzelac was informed a sum in excess of \$5.3 million was deposited to his trust account. Mr. Uzelac attended personally at the Royal Bank to verify the deposit. Mr. Uzelac apparently attended again at the Royal Bank on the same day with a cheque for \$5.1 million to transfer the bulk of the funds into an interest-bearing account.
- [14] On Monday, May 6th, Mr. Uzelac obtained bank drafts for virtually the full amount of the \$5.3 million. On Saturday, Mr. Uzelac obtained \$20,000 cash from the plaintiff. On Monday, Mr. Uzelac personally attended at the plaintiff's premises to pick up \$30,000 cash, U.S. funds, and another \$50,000 cash in Canadian funds. On Tuesday, May 7th, Mr. Uzelac was told by the Royal Bank the deposit to his account hadn't cleared and he was asked to return the bank drafts.
- [15] The leading case on the question of solicitor's undertakings is that of Mr. Justice Coleridge in *Re Hilliard* (1845), 2 Dow & L. 919, and a portion of the judgment in that case is as follows:

It seems to me that the Court does not interfere merely with a view of enforcing contracts on which actions might be brought in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. The Court acts on the same principle, whether the undertaking be to appear, to accept declaration, or other proceedings in the course of the cause, or to pay the debt and costs. It does not interfere so much as between party and party to settle disputed rights; as criminally to punish by attachment, misconduct, or disobedience in its officers. In this view, the objection relied on does not apply. I have no desire to narrow the jurisdiction of the Court as to these undertakings on any such ground as the present; they are very often most beneficially made for both parties in a cause, and there would be great injustice in letting the attorney loose from them, after the party has foregone the advantage or paid the price which was the consideration; while there is no hardship on the attorney in enforcing them; he is never compelled to enter into them; if he does, he should secure himself by his arrangement with his client, and he must be taken to know the legal consequences of his own act.

- [16] The amended Statement of Defence, insofar as the claim against the personal defendant on his undertaking again contains a bare denial, raises no facts that would discharge the onus on the defendant to justify his action, as is suggested in s. 8 of the Professional Conduct Handbook.

- [17] The whole set of circumstances raises a number of questions which the defendant should have considered and has not satisfactorily explained. That includes obtaining cash from the plaintiff for a client on short notice, the failure of Mr. Uzelac to notify the plaintiff of the dishonour of the deposit, the repayment from personal funds of a portion of the money taken.
- [18] In my view, the defendant Uzelac has not raised a triable issue on the question of the undertaking. The fact that he may have a claim over against the Royal Bank is not a defence. There is no counterclaim. There is no reason to delay judgment in this instance either. Consequently, there will be judgment against the defendant Uzelac personally.
- [19] In summary, the plaintiff is entitled to judgment against both defendants for the amount claimed, plus interest and costs. I'm prepared to consider the question now of whether or not there should be a stay, and if so, for how long. Mr. Uzelac first.

(SUBMISSIONS BY COUNSEL)

- [20] THE COURT: All right, thank you. Well, what I'm going to do, counsel, is to stay execution. I will stay execution on the judgment until the end of next week, until 4:00 p.m., June 21, 2002. That may give your client time to sort something out. But longer than that, I won't do at this time.
- [21] There will be liberty to apply. You can apply to extend the stay, if you choose to do so. But if you do, there will probably be a requirement for security.
- [22] I'll return these various binders and some loose material. Thank you.

"Master A. Patterson"

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Prepared on 29 October 2026 · Esheria