

CANADA / JUDGMENT

Steveston Seafood Auction Inc. v. Bahi

2013 BCSC 1072

COURT

Supreme Court of British Columbia

DECIDED

12 June 2013

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2013 BCSC 1072 Steveston Seafood Auction Inc. v. Bahi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Steveston Seafood Auction Inc. v. Bahi,

2013 BCSC 1072

Date: 20130612

Docket: S117510

Registry: Vancouver

Between:

Steveston Seafood Auction Inc.

Plaintiff

And

Rugbeer Bahi and D & H Group LLP, a Limited Liability Partnership

Defendants

Before: The Honourable Mr. Justice Abrioux

Oral Reasons for Judgment

Counsel for the Plaintiff:

No Appearance

Counsel for the Defendant D & H Group LLP:

M.J. Hewitt

Counsel for the Proposed Third Parties Knott, Small and Medanic:

D. Jones

Place and Date of Hearing:

Vancouver, B.C.

June 5, 2013

Place and Date of Judgment:

Vancouver, B.C.

June 12, 2013

I: INTRODUCTION

- [1] The defendant D & H Group LLP ("D&H") seeks an order pursuant to Rule 3-5(4)(a) of the Supreme Court Civil Rules that the defendant Rugbeer Bahi, as well as Renae Knott, Harold Small and Dennis Medanic, be added as third parties in the action and that the proposed third party notice attached to the notice of application dated September 26, 2012, be filed.
- [2] The plaintiff takes no position on this application, which is opposed by the proposed third parties.
- [3] For the reasons that follow I conclude leave should be granted to D&H to add the proposed third parties and file the third party notice.

II: BACKGROUND

- [4] D&H is a firm of chartered accountants that performed annual reviews of the plaintiff's financial statements.
- [5] In its notice of civil claim filed November 7, 2011, the plaintiff alleges that Bahi was its bookkeeper and that, between February 2005 and July 2010, he misappropriated monies from the plaintiff in the amount of approximately \$860,000.
- [6] The plaintiff alleges that D&H is liable for its losses in that when performing their review engagement it failed to discover Bahi's misappropriation of funds.
- [7] In its response to civil claim filed December 12, 2011 (the "response"), D&H denies liability to the plaintiff and pleads that any loss suffered by it is attributable to the acts or omissions of others.
- [8] In January 2012, counsel for D&H wrote to Knott, Small and Medanic and advised them it was considering third party claims against them. It invited them to advise if they perceived any prejudice resulting from a delay in making these claims. No response was received to that correspondence.

- [9] On May 22, 2012, an order was made that Bahi be served substitutionally. He was served with the plaintiff's pleadings on May 25, 2012. He has been served with notice of this application but did not attend the hearing on June 5, 2013.
- [10] On May 30, 2012, counsel for D&H wrote to Bahi and stated it was considering a third party claim against him. He was invited to advise if he perceived any prejudice resulting from a delay in making this claim. No response was received to that correspondence.
- [11] In paragraph 20 of the response, D&H alleges that it received substantial direction and instruction from Bahi on behalf of the plaintiff and from "other of its executives and employees or agents in their capacity as representatives of the Plaintiff company".
- [12] Knott, Small and Medanic were, at all material times, three of the Plaintiff's 20 directors. Medanic was also a member of the Executive Committee.
- [13] In its proposed third party notice, D&H intends to plead that Knott, Small and Medanic were responsible for the plaintiff's financial affairs and they made representations to D&H with respect to financial, accounting and bookkeeping information that was necessary for D&H to perform its services. D&H alleges that the proposed third parties knew or ought to have known that it would rely on those representations in performing accounting services for the plaintiff. Allegations as to specific representations are set out in paragraph 12 of the proposed third party notice.
- [14] In addition, D&H alleges that Knott and Small were "tasked with reviewing the company's bank reconciliations, prepared by Mr. Bahi each month, and failed to perform those tasks properly or at all." It is also alleged that Medanic was responsible for managing the plaintiff's day-to-day operations, including staff supervision and overseeing financial transactions and that he and Small received delivery of bank statements, which contained information that the plaintiff alleges ought to have disclosed Bahi's alleged fraud.
- [15] At paragraphs 13 to 15 of the proposed third party notice, D&H alleges that the proposed third parties owed a duty of care to the plaintiff and D&H to properly supervise Bahi and the financial affairs of the plaintiff. They say the third parties also had a duty to ensure the accuracy and completeness of the information provided to D&H.
- [16] It also alleges that the third parties failed to identify or disclose facts related to whether Bahi had misappropriated funds. Furthermore they were negligent or reckless, or in Bahi's case, willfully failed to identify and disclose the facts required by D&H such that Bahi's alleged misappropriation of funds would be uncovered.
- [17] Knott, Small and Medanic swore and filed affidavits in opposition to D&H's application. They dispute certain of the allegations made against them by D&H and assert that any action they took with respect to representation letters, financial statements, banking records, etc., occurred in their capacity as directors of the plaintiff.

[18] In response, D&H filed an affidavit of one of its principals Mike Nakanishi. He describes the purpose of a limited review engagement and attaches as exhibits various representation letters on the plaintiff's letterhead signed by one or more of the proposed third parties.

III: THE APPLICABLE PRINCIPLES

[19] These can be summarized as follows:

- (a) The test on this application is the same as under Rule 9 - 5. The proposed third party must establish beyond doubt that the pleadings discloses no cause of action. The court is permitted to reject proposed claims only if the action is "bound to lose" or there is no bona fide triable issue.

Drummond v. Moore, 2012 BCSC 496 at para. 25.

- (b) In exercising its discretion as to whether leave ought to be granted, the court can consider factors such as prejudice to the parties, the expiration of a limitation period, the merits of the proposed claim, any delay in the proceedings and the timeliness of the application.

Clayton Systems 2001 Ltd. v. Quizno's Canada Corporation, 2003 BCSC 1573 at para. 9.

- (c) The court is required to assume that all pleaded facts are true.

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 980.

Dhillon v. Coape and Hockaday, 2004 BCSC 1208 at paras. 17-18.

- (d) An important consideration is whether it is "just and convenient" in all the circumstances of the case to grant leave to file the third party notice.

Symes v. Knooihuizen, 1998 B.C.J. No. 611 at paras. 38-39.

Clayton Systems 2001 Ltd. at para. 9.

- (e) A third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defense.

Adams v. Thompson et al. (1987), 15 B.C.L.R. (2d) 51 at para. 20.

Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc., 2012 BCCA 22 at para. 1.

IV: THE PARTIES' POSITIONS

[20] D&H submits that the proposed third party notice alleges breaches of duties owed to both the plaintiff and D&H. It says that the third party claims are within the permissible scope of third party pleadings as summarized in Laidar Holdings Ltd. at para. 16:

- [16] Considering only the pleadings, the Court found that McNaughton was distinguishable from Adams: it could not be said that the allegations against the third party "all necessarily related to acts committed as agents for the plaintiff." In McLachlin J.A.'s words:

On the contrary, the scope of the retainer between the plaintiff and the accountants appears to be in dispute. In these circumstances, amendments alleging that the accountants owed an independent duty to the defendants of which they were in breach, disclosed a "possible" third party claim against the accountants and should be permitted. [At 27.]

In the result, the law firm's amended third party notice as against the accountants was permitted to stand.

- [21] Knott, Small and Medanic's position is that the relief sought by D&H as set out in the proposed third party notice is for contribution and indemnity. This remedy is not available where the claim is for fault partially attributable to the plaintiff. In addition, D&H incorporates by reference the allegations in its response to civil claim in the third party notice.
- [22] Simply put, the proposed third parties submit that all the allegations in the third party notice vis-à-vis Knott, Small and Medanic, necessarily relate to the actions they took in their capacity as directors, employees or agents of the plaintiff. As such, they all relate back to the plaintiff and cannot be the subject of third party proceedings.

V: DISCUSSION

- [23] This application is to be decided on the basis of the pleadings which must be considered to be true. That being the case, I have not considered the affidavits of Knott, Small, Medanic or Mr. Nakanishi.
- [24] This application is brought at an early stage in the litigation. It should be kept in mind that the plaintiff has taken no substantive steps except issuing the notice of civil claim.
- [25] When I apply the legal principles to the pleadings, in particular the allegations in paragraphs 9 to 15 of the proposed third party notice, it cannot be said, in my view, that the claim is "bound to lose" or that there is no triable issue.
- [26] Following production of documents and examinations for discovery, it may be that the third parties consider it appropriate to attempt to have the third party proceedings against them dismissed pursuant to the summary trial provisions of the Supreme Court Civil Rules on the basis that the entirety of their actions can be related back to the plaintiff.
- [27] As matters now stand, however, there are allegations in the third party notice that raise an independent duty not "belonging to the plaintiff."

[28] Starting at para. 17 of Laidar Holdings Ltd., reference is made to Quintette Coal Ltd. v. Bow Valley Resource Services Ltd. (1986), 19 C.L.R. 153 (B.C.S.C.), a decision of Chief Justice McEachern. Newbury J. A. noted at para. 18:

Upon examination of these cases, and the decision of McLachlin J. (as she then was) in Westcoast Transmission Co. Ltd. v. Interprovincial Steel and Pipe Corp. (1985) 60 B.C.L.R. 368 (B.C.S.C.), the Chief Justice was not persuaded that they stood for the sweeping argument made on behalf of the third party. He noted that the defendant was relying not only on an alleged breach of contract on the part of Kilborn but "rather its conduct as an actor in this particular construction neighbourhood when Kilborn knew there were other legal neighbours who might be injured by its lack of care, if any." (At 169.)

[29] In my view, this comment also applies in this case. D&H seeks to show that the conduct of the proposed third parties breached their duty of care to other "legal neighbors", that is, D&H. It should be permitted to attempt to do so.

VI: CONCLUSION

[30] The application is allowed. Bahi, Knott, Small and Medanic are added as third parties and D&H is granted leave to file the third party notice in the form attached to the notice of application.

[31] Cost of the application will be in the cause.

"Abrioux J."

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