

CANADA / JUDGMENT

Thandi Group Holdings Inc. v. Labonte

2009 BCSC 295

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 295 Thandi Group Holdings Inc. v. Labonte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thandi Group Holdings Inc. v. Labonte,

2009 BCSC 295

Date: 20090310

Docket: S087393

Registry: Vancouver

Between:

Thandi Group Holdings Inc. and Thandi Enterprises 1985 Ltd. and River Studios Inc.

Plaintiffs

And

Dale Matheson Carr-Hilton Labonte and James F. Carr-Hilton and Alvin F. Dale and Reginald J. Labonte and Robert Matheson and John Doe

Defendants

Before: The Honourable Mr. Justice Nathan H. Smith

Reasons for Judgment

(In Chambers)

The plaintiff's representative, Avtar Thandi appearing in person

Counsel for the defendants

Emily Stock

Date and Place of Hearing:

February 13, 2009

Vancouver, B.C.

- [1] The defendants apply for an order that the three plaintiff companies (the "Plaintiffs") post security for costs.
- [2] The Plaintiffs allege that the defendant accountants provided negligent financial and business advice. They also allege the defendants failed to file tax returns and failed to co-operate with the Plaintiffs subsequent accountant. On the first issue, the defendants deny the allegations of negligent advice and say that the applicable limitation period has expired. They also say the Plaintiffs did not provide the necessary information to prepare the tax returns and deny that they failed to co-operate with the Plaintiffs' new accountant.
- [3] The defendants' application for security for costs is brought under s. 236 of the Business Corporations Act, S.B.C. 2002, c. 57, which reads:

If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

- [4] On an application of this kind, the defendants must first establish a prima facie case that the corporate plaintiff will be unable to pay costs. If the defendant is able to do that, the corporate plaintiffs must respond with evidence that it will be able to pay costs (usually evidence showing that it has exigible assets) or that there is no arguable defence or that an order for security for costs will stifle the action. See *Kropp v. Swaneset Bay Golf Club Ltd.* (1997), 29 B.C.L.R. (3d) 252 of paras. 17-2290 B.C.A.C. 170 (C.A.); and *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 at para. 16, 25 B.C.A.C. 95, (C.A.).
- [5] One of the Plaintiffs in this case, Thandi Group Holdings Ltd., is among the parties liable on a judgment for more than \$500,000 given in one of three related actions that went to trial in 2005. Thandi Group Holdings Ltd. and/or its principals were the owners of land in Burnaby, B.C. (the "Burnaby property") on which a large volume of waste material accumulated. They were found liable for nuisance created by the presence of the material on that property and for encroachment of that material onto neighboring properties.
- [6] Part of the Plaintiffs' claim in this action appears to be an allegation that the defendants advised them to enter into the business venture that ultimately exposed them to liability in that earlier litigation. The Plaintiffs have also brought action against their former lawyers. Mr. Thandi, the personal representative of the Plaintiffs, says the Plaintiffs are in the process of negotiating a settlement of the outstanding judgment debt.

- [7] Thandi Group Holdings Ltd. is also a plaintiff in an action against approximately 40 companies that allegedly dumped waste on the Burnaby property. Mr. Thandi says settlements have been reached with many of the defendants in that action and claims against the others are proceeding.
- [8] Two of the plaintiffs in this action -- Thandi Group Holdings Ltd. and River Studios Ltd. -- are plaintiffs in yet another action with more than 60 defendants. That action alleges further environmental damage to the Burnaby property arising out of its subsequent use by the film industry. Mr. Thandi also says he is in the process of negotiating settlements in that action.
- [9] Mr. Thandi says his affidavit:

We have spent millions in clean up fees and hundreds of thousands of dollars in legal and professional fees and us putting security for costs will definitely stall us in resolving these major environmental contamination issues. We have more than enough equity in Thandi Enterprises property and there is settlement funds constantly being deposited in Thandi group.

- [10] The "Thandi Enterprises property" referred to is a three-acre farm property in Richmond, B.C. (the "Richmond property") owned by the Plaintiffs Thandi Enterprises Ltd. That appears to be the only significant asset now owned by any of the Plaintiffs. The Richmond property is in the Agriculture Land Reserve and has an assessed value of \$95,000.
- [11] Mr. Thandi says in a second affidavit that the current appraisal is a reduced value assigned to the Richmond property because it is an active farm. He attaches to his affidavit a letter from the assessment authority indicating the assessed value would be \$931,000 if it was not "on farm." He also attaches a letter from a realtor indicating that development properties in the area sold last year for approximately \$1 million an acre. However, the realtor has apparently not considered the market value of the Richmond property as agricultural land and there is no evidence of any efforts to have the land removed from the Agricultural Land Reserve or whether any such efforts would be likely to succeed.
- [12] There is also a certificate of pending litigation ("CPL") that has been registered against the Richmond property since 2005. That relates to a matrimonial action in which Mr. Thandi's mother alleges the Richmond property is a family asset or is subject to a trust in her favour. Mr. Thandi's affidavit attaches a letter from his mother in which she states she put the CPL on the Richmond property because of the "foul conduct and misrepresentation and advice of our previous lawyer and accountant." I am not sure what that means, but one could infer that the CPL was filed for tactical reasons to frustrate any attempt at execution against the Richmond property. In that regard, I note that the CPL was filed the day after the court gave judgment in the earlier litigation.
- [13] None of the Plaintiffs have produced current financial statements in response to this application. The defendants prepared financial statements for two of the plaintiff companies, but the most recent ones were for the years ended May 31, 2004 and are therefore of no assistance in determining the current financial position.

[14] On the evidence before me, the defendants have clearly established a prima facie case for security for costs. Two of the three plaintiff companies have no apparent assets and one is already facing a large judgment debt. The third company has an asset of uncertain value. The Plaintiffs have failed to show sufficient exigible assets or any other source of funds to pay costs. Although Mr. Thandi asserts that the Plaintiffs will have resources from settlement of other actions, that is not supported by any current financial statements or by documentation of the alleged settlements. I am also satisfied that there is an arguable defence to the claim.

[15] The question then becomes whether the order will create undue hardship such that it would prevent the claim from being heard. In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266, B.C.J. No. 2160 (S.C.), this court said at paragraph 21:

In exercising its discretion to order security for costs, the court must consider the interests of justice between the parties and balance those interests to try to insure that the substance of their dispute ends up properly litigated. As such, once a prima facie case is made out by the defendants, the court must consider whether an undue hardship would be visited upon the plaintiff if an award for security for costs was made. In other words, would the ordering of security for costs prevent justice from being done.

[16] The Plaintiffs do not say that posting security will make pursuing the litigation more difficult and a mere assertion to that effect would not be sufficient in any case. They must establish that they cannot even raise or borrow money to post security and there is no such evidence: see *Vetshopaustralia Pty. Ltd. v. Pivotal Partners Inc.*, 2007 BCSC 1519 at paragraph 49.

[17] I therefore conclude that the corporate Plaintiffs are required to post security for costs. In determining the amount that must be posted, the authorities make clear that the Court has discretion to order any amount up to the full amount claimed. In *Apex Mountain Resort Ltd. v. British Columbia*, 1998 CarswellBC 1758 (S.C.), Bauman J. said:

It is clear that in setting quantum I am not engaged, necessarily, in a "dollar-for-dollar" exercise, with a projected final Bill of Costs dictating the amount. At the least, at this stage, there should be an arbitrary discount for the possibility of settlement: *Fat Mel's. supra* at 237-238

[18] The defendants have presented a draft bill of costs indicating that the costs payable in this matter may ultimately be in the range of \$80,000. This assumes the matter goes to trial, although it appears there are at least some issues that may be capable of resolution on a Rule 18A. It also estimates costs for experts which may or may not turn out to be accurate.

[19] In setting the amount of security, I may also consider, without commenting on the merits of the claim, the fact that the Plaintiffs allege their current poor financial position to have been caused by the alleged wrongful conduct of the defendants that gave rise to this action. *Apex Mountain Resort, supra*.

[20] Taking all of those matters into account, I conclude that security for costs in the amount of \$25,000 is appropriate in this case and I direct that amount be posted within 90 days of the date of these reasons, with the action stayed until it is posted. If the Plaintiffs fail to post security within 90 days, the defendants will be at liberty to apply for dismissal of this action. The defendants will also have costs of this application.

Nathan H. Smith J.

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