
CANADA / JUDGMENT

Voce Enterprises Ltd. v. SHE Apparel Inc.

2016 BCSC 1080

COURT

Supreme Court of British Columbia

DECIDED

19 April 2016

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2016 BCSC 1080 Voce Enterprises Ltd. v. SHE Apparel Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Voce Enterprises Ltd. v. SHE Apparel Inc.,

2016 BCSC 1080

Date: 20160419

Docket: S156383

Registry: Vancouver

Between:

Voce Enterprises Ltd.

Plaintiff

And

SHE Apparel Inc., SHE Lingerie Inc.,

Maria Lailina Smith, Jaimey Midtdal

Defendants

Before: The Honourable Madam Justice S. Griffin

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

Heather L. Jones

Owen De Vries

Counsel for Defendants:

David J. Brundige, QC

Place and Date of Hearing:

Vancouver, B.C.

April 19, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 19, 2016

- [1] THE COURT: This is a summary trial application brought by the plaintiff pursuant to R. 9-7 for summary judgment against one defendant, SHE Lingerie Inc. ("Lingerie"), regarding the issue of payment of a dishonoured cheque.
- [2] The evidence on which the application is based is undisputed. In December of 2014, Lingerie provided the plaintiff ("Voce") with a post-dated cheque dated January 21, 2015, to pay an amount of debt owed to Voce by SHE Apparel Inc. ("Apparel"). Later, after the post-dated date of the cheque, so after January 21, 2015, when the plaintiff went to deposit the cheque it was dishonoured.
- [3] On the evidence, there is no dispute about the amount of the cheque, the amount of debt owed by Apparel to the plaintiff, the date the cheque was received by the plaintiff, and the fact it was post-dated and then dishonoured after the post-date.

Background Facts

- [4] By way of background, the plaintiff is a British Columbia company which distributes lingerie, dancewear, swimwear and fashion. It supplied fashion stores of Apparel, an Alberta company. The defendant Ms. Smith was an officer and director of Apparel and the main person with whom the plaintiff had contact during their years of business.
- [5] The defendant Lingerie is a Saskatchewan company incorporated in 2014. The defendant Ms. Smith was also an officer and director of Lingerie. The defendant Ms. Midtdal was an officer and director of Lingerie and not previously involved in the business of Apparel.
- [6] There is no contest on the evidence that Apparel fell behind in the payments of amounts owed to the plaintiff in 2014. Ms. Smith asked for time to repay the debt of Apparel and held out the prospect that it was undergoing a restructuring that would implicitly put it in a better place financially. It appears that the incorporation of Lingerie and the involvement of Ms. Midtdal on the part of Lingerie was part of that restructuring.

- [7] After much correspondence, Lingerie delivered a cheque to the plaintiff by mail received on December 23, 2014, in the amount of half of the debt owed by Apparel to the plaintiff, namely, in the amount of \$62,607.81. It was post-dated to January 21, 2015.
- [8] There were subsequent communications between Ms. Smith and the plaintiff, which are not determinative of the application, as well as communications between Ms. Midtdal and the plaintiff.
- [9] The bottom line is that on April 25, 2015, when the plaintiff attempted to cash the cheque, it was returned as dishonoured.

Legal Principles

- [10] The legal principles regarding a summary trial application are well-established in this province.
- [11] The primary, if not sole, argument of the defendant Lingerie is that the matter is not suitable for disposition pursuant to R. 9-7 because there are other outstanding issues in the litigation as between the plaintiff and the other defendants.
- [12] Rule 9-7(11)(b) provides that:
- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
- ...
- (b) dismiss the summary trial application on the ground that
- (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
- (ii) the summary trial application will not assist the efficient resolution of the proceeding.
- [13] In the case of *Dahl v. Royal Bank*, 2005 BCSC 1263, aff'd 2006 BCCA 369, the leading authorities and typical factors considered in such cases were summarized at paras. 11-12. The factors to consider in deciding whether a summary trial application is suitable can be distilled as follows:
- 1) the amount involved;
 - 2) the complexity of the matter;
 - 3) the cost of a conventional trial in relation to the amount involved;
 - 4) the course of the proceedings;
 - 5) the time required for a summary trial;
 - 6) whether credibility is a crucial factor;

- 7) whether the application will really save time and complexity; and
- 8) whether the application slices the litigation.

Analysis

- [14] Here there is no doubt that all of the factors 1 through 7 mentioned above weigh in favour of the summary trial application: the matter is straightforward; the evidence is not controversial; credibility is not in issue; and as a matter of proportionality, the amount in dispute calls out for efficient court procedures. The real question is whether the application will "slice the litigation".
- [15] The plaintiff, in the notice of civil claim, makes certain other allegations against the other defendants, including claims against Ms. Smith and Ms. Midtdal.
- [16] The defendant Lingerie argues that the claim against Ms. Midtdal will require findings of fact that could touch on the findings of fact this Court needs to make on this hearing and therefore there is the potential for inconsistent findings of fact if the present application is decided.
- [17] I am not persuaded by that argument.
- [18] The notice of civil claim makes certain allegations against the personal defendant Ms. Midtdal which have to do with alleged actions taken by Ms. Midtdal. The present application does not require this Court to make any findings of fact regarding those alleged actions by Ms. Midtdal.
- [19] Furthermore, the findings of fact sought on this application are not contested. Surely if there was a concern about inconsistent findings, the defendants have an obligation to put some evidence forward that challenges the findings of fact and explains how they could be different if there was a single trial of all of the issues against all of the defendants.
- [20] The only issue is one concerning whether there was consideration for the cheque, and that is a combined factual and legal issue.
- [21] The reality is that the evidence with respect to whether there was consideration for the cheque is undisputed on the application.
- [22] I find that the matter is suitable for the summary trial proceeding, and the question of the claim by the plaintiff against Lingerie for the dishonoured cheque is a very discrete, narrow issue which can be decided separately from the other issues in the action without prejudicing the trial judge on the determination of those other issues.
- [23] I return to the issue of whether there was consideration for the cheque provided by Lingerie.

[24] In my view the evidence is overwhelming that the cheque was provided as payment for half of the amount owed to the plaintiff by Apparel and that Lingerie intended for the payment to be used for that purpose.

[25] Furthermore, the cheque was post-dated, and the implicit reason for this was to ask the plaintiff to forbear on taking execution proceedings against Apparel for the outstanding debt.

[26] The plaintiff relies on the Bills of Exchange Act, R.S.C. 1985, c. B-4, in particular s. 57(1), which provides:

Every party whose signature appears on a bill is, in the absence of evidence to the contrary, deemed to have become a party thereto for value.

[27] The parties agree that there is a presumption that a party who signs a cheque has done so for valuable consideration. The onus, therefore, is on the defendant Lingerie to rebut that presumption and prove there was no consideration.

[28] The consideration here, payment for another party's forbearance with respect to another party's debt, is, in law, good consideration. There is old authority for this, including the case of *Glesby v. Mitchell*, [1932] S.C.R. 260, which held at p. 8:

In support of this contention the appellant referred to Byles on Bills, 19th ed., at page 129, where the learned author says:--

A subsisting debt due from a third person is a good consideration for a bill or note, at least if the instrument is payable at a future day, for then it amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker.

This statement of the law is quoted with approval by this court in *Gallagher v. Murphy*, [1929] Can. S.C.R. 288 at 293; [1929] 2 D.L.R. 124 at 127.

[29] The Supreme Court of Canada made much the same point in the case of *J.D.F. Builders Ltd. v. Alberta Pearl (Management) Ltd.*, [1975] 2 S.C.R. 846, citing at p. 11 *Falconbridge, Banking and Bills of Exchange* (7th ed. 1969) at p. 605:

In *Currie v. Misa* (1875), L.R. 10 Ex. 153, the Court of Exchequer Chamber said: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." The second branch of this judicial description of consideration is more important than the first. It does not matter whether the party making the promise receives any apparent benefit; it is sufficient that the promisee undertakes some burden or gives up something which in contemplation of law may be of value, and that the promisor accepts what the promisee undertakes or gives up as the inducement or price for the promise. The consideration must move from the promisee, that is, the promisee must suffer some detriment; but the consideration need not move to the promisor, that is, the apparent benefit, if any, need not be enjoyed by the promisor, and may consist in forbearance or credit given by the promisee

to a third person, as is usually so in the case of a guarantee.

- [30] Thus, it does not matter that the debt that Lingerie was attempting to pay with the cheque was a debt of Apparel.
- [31] The implicit request at the time the cheque was delivered was for the plaintiff to forbear from taking action against Apparel on the debt owed until after the date of the cheque.
- [32] Given that evidence of consideration, I find no contrary evidence which rebuts the presumption under the Bills of Exchange Act that there was consideration for the cheque.
- [33] It being clear that there was consideration for the cheque and that it was dishonoured, judgment must follow for the plaintiff against Lingerie in the amount of \$62,607.81.
- [34] The plaintiff also seeks pre-judgment interest from January 21, 2015 pursuant to the Court Order Interest Act. I heard no contrary argument, and so grant the pre-judgment interest sought and post-judgment interest will also apply under the same Act.
- [35] The plaintiff also seeks costs of this application. Any further submissions on that?
- [36] MS. JONES: No. I mean, we would seek costs in the normal course. My client would like me to ask that they be payable forthwith so that they have an obligation that it be paid immediately?
- [37] THE COURT: Yes.
- [38] MR. BRUNDIGE: The only comment with respect to costs, My Lady, is that my client will require some time to pay the costs.
- [39] THE COURT: I will simply order ordinary costs to the plaintiff payable forthwith. In other words, that the defendant Lingerie is not entitled to wait until the completion of the action to pay the costs. I will let the parties sort that out between them.
- [40] I would be remiss in completing the ruling without making mention of the fact that the plaintiff's application materials and submissions were very thorough and helpful to me and I relied extensively on them in reaching this ruling. Thank you.

"The Honourable Madam Justice S. Griffin"

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