

CANADA / JUDGMENT

Waterton Global Resource Management, Inc. v. Bockhold

2022 BCSC 499

COURT

Supreme Court of British Columbia

DECIDED

28 March 2022

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2022 BCSC 499 Waterton Global Resource Management, Inc. v. Bockhold

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waterton Global Resource Management, Inc. v. Bockhold,

2022 BCSC 499

Date: 20220328

Docket: 1812835

Registry: Vancouver

Between:

Waterton Global Resource Management, Inc. and

Waterton Global Value, L.P.

Plaintiffs

And:

Murray Bockhold, Ian Dawson and

G.R. Dawson Holdings Limited

Defendants

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Plaintiffs:

C.P. Dennis, Q.C.

R. Power

Counsel for the Defendants:

W. Zhang

Place and Date of Hearing:

Vancouver, B.C.

February 11 and 22, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 28, 2022

Introduction

- [1] The plaintiffs Waterton Global Resource Management, Inc. and Waterton Global Value, L.P. (collectively "Waterton") are in the business of providing debt financing to public companies. The Defendant G.R. Dawson Holdings Ltd. is a British Columbia corporation. The Defendant Ian Dawson is a businessperson residing in Vancouver, British Columbia, and is a director of G.R. Dawson Holdings Ltd. In these reasons I will refer to the Mr. Dawson and his holding company collectively as the "Dawson defendants". The defendant Murray Bockhold is an investment advisor providing services through Bockhold Investment Management Group. The Dawson defendants are Mr. Bockhold's clients. Mr. Bockhold operates and maintains a website through Bockhold Investment Management Group, which he uses to promote his investment advisory services ("the website").
- [2] On November 30, 2018, the plaintiffs filed a notice of civil claim against the defendants alleging defamation and injurious falsehood as a result of statements published on the website and press releases issued by Mr. Bockhold.
- [3] In this application, the Dawson defendants seek dismissal of the claims against them pursuant to s. 4 of the Protection of Public Participation Act, SBC 2019, c.3 (the "PPPA"); or alternatively, Rule 9-6 of the Supreme Court Civil Rules.

Background

- [4] I will relate only as much of the background as is necessary to decide this application.

- [5] The action at the centre of this application is part of a longstanding commercial dispute between the parties. The defendants were shareholders in Gryphon Gold Corporation ("Gryphon"), which owns Borealis Gold Mine, a gold and silver mine in Nevada (the "Borealis mine"). Waterton was a secured lender to Gryphon and had loaned money to Gryphon several times in 2012 and 2013.
- [6] In July 2013, Gryphon filed for bankruptcy in Nevada. Waterton asserted a claim of \$13.8 million USD. In November 2015, the United States Bankruptcy Court dismissed the Gryphon bankruptcy. Shortly after the dismissal, Waterton foreclosed on its collateral security, being Gryphon's interest in the Borealis mine, to obtain a 100% ownership interest in the Borealis Mining Company.
- [7] Throughout the Gryphon bankruptcy, the defendants have alleged that Waterton deliberately caused the Borealis mine to underperform in order to prevent Gryphon from having a successful reorganization and to ensure that the Gryphon bankruptcy proceeding would be dismissed.
- [8] Since about 2013, the defendants have brought three lawsuits against Waterton in Nevada, all of which stem from the Gryphon bankruptcy ("the litigation"). All of the defendants' lawsuits have been dismissed, the last in October 2019.
- [9] Since 2018, Mr. Bockhold has been publishing statements about the litigation and Waterton on his website, including repeating allegations the defendants made in the unsuccessful litigation. These allegations include that Waterton's business strategy is a "death-spiral loan" model, that Waterton purposely misled the Nevada bankruptcy court and that Waterton uses "underhanded tactics to siphon value from the companies they promise to serve". Mr. Bockhold also issued some press releases making similar allegations against Waterton.
- [10] In their civil suit, Waterton alleges that while Mr. Bockhold actually made/published the allegedly false and misleading statements, the Dawson defendants assisted him by providing him financial support and encouragement. In their amended notice of civil claim filed December 20, 2019, the plaintiffs particularise their claims against the defendants as follows:
- (a) The defendants (including the Dawson Defendants) participated in the publication of the Alleged Defamatory Words and caused, procured, authorized, concurred in, and/or approved publication of the defamatory expression; and
 - (b) Each defendant (including each of the Dawson Defendants) created or assisted in creating the content of the Alleged Defamatory Words and further, or in the alternative:
 - (i) approved, authorized, incited or encouraged publication of the aforesaid defamatory expression;

- (ii) participated in causing the dissemination of the aforesaid defamatory expression by third parties by posting on the Internet and/or by email and/or by facilitating republication; and
- (iii) communicated to third parties their agreement with the content of the defamatory expression.

Issues

[11] The issues to be decided on this application are:

- i. Whether the claims against the Dawson defendants should be dismissed pursuant to s. 4 of the PPPA; or alternatively
- ii. Whether the claims against the Dawson defendants should be dismissed pursuant to Rule 9-6.

[12] I will consider the issues in turn.

Issue 1: Whether the claims against the Dawson defendants should be dismissed pursuant to s. 4 of the PPPA

[13] The PPPA was enacted in British Columbia on March 25, 2019. The purpose of the PPPA is to enhance public participation by protecting expression on matters of public interest from defamation litigation which is brought to stop people from talking. Lawsuits brought to silence or punish one's critics have come to be known as Strategic Lawsuits against Public Participation (SLAPP).

[14] Under s. 4 of the Act, defendants in defamation proceedings may at an early stage apply to have the claim against them dismissed. Dismissal applications have come to be known as Anti-SLAPP applications. Section 4 reads as follows:

4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
- (b) the expression relates to a matter of public interest.

(2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that

(a) there are grounds to believe that

(i) the proceeding has substantial merit, and

(ii) the applicant has no valid defence in the proceeding, and

(a) the harm likely to have been or to be suffered by the respondent as result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[Emphasis added.]

- [15] As can be seen from s. 4, there are two parts to a dismissal action under the PPPA. In the first part, the onus is on the applicant to prove on a balance of probabilities that (1) the expression was made by them; and (2) it relates to a matter of public interest. Only if the applicant is able to satisfy the court of both branches of s. 4(1) does the onus move to the respondent to prove the second part, the three branches of s. 4(2).
- [16] Waterton submits that the Dawson defendants fail immediately under s. 4(1)(a) as they deny making the impugned statements.
- [17] The Dawson defendants argue that "expression" is defined broadly in the PPPA as "any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity [their emphasis]. Further, relying on the Supreme Court of Canada's decision in 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 ("Pointes") they argue that the word "expression" should be interpreted expansively. The Dawson defendants do not however say what expression they made to satisfy s. 4(1)(a).
- [18] Although initially all of the defendants were applying to have the claims against them dismissed, this is now just an application to dismiss the claims against the Dawson defendants; Mr. Bockhold is not seeking dismissal of the claims against him. The Dawson defendants' application is premised on their assertion that Mr. Bockhold alone is responsible for the alleged defamatory statements.
- [19] I conclude that the word "made" in s. 4(1)(a) necessarily involves the applicant taking some positive action, whether verbal or non-verbal, to cause or create the expression in issue. The problem for the Dawson defendants is that they deny having anything to do with the expressions in issue. In fact, Mr. Dawson says that he expressed disapproval when he became aware of the statements. There is no evidence before me that supports the argument that the Dawson defendants made the alleged defamatory statements, even under a generous interpretation of the word "expression".
- [20] I find that the Dawson defendants have failed to satisfy their burden under s. 4(1)(a). Accordingly, their application to dismiss under the PPPA is dismissed.
- [21] Turning now to consider whether the claims should be dismissed under Rule 9-6.

Issue 2: Whether the claims against the Dawson defendants should be dismissed pursuant to Rule 9-6

- [22] Rule 9-6, the summary judgment rule, is employed to prevent claims or defences that have no chance of success from proceeding to trial. It reads in relevant part as follows:

- (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
- (5) On hearing an application under subrule (2) or (4), the court,
 - (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

.

and

- (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[23] The onus is on the party seeking the summary dismissal to prove that there is no genuine issue for trial. If the defendant is able to meet this high bar, the burden shifts to the plaintiff to refute or counter the defendant's evidence: *Canada v. Lameman*, 2008 SCC 14 at paras.10 and 11.

[24] The Dawson defendants argue that if this court finds that the Dawson defendants made no expression, including no non-verbal communication (supporting Mr. Bockhold) and no private communication (encouraging Mr. Bockhold), then there is no factual foundation for the Dawson defendants to be named in this action and the claim must be dismissed pursuant to Rule 9-6. A business relationship with a co-defendant is not enough to ground a claim as joint tortfeasors.

[25] Waterton responds that the Dawson defendants fail to meet their onus for two reasons: first, that this application is premature as the discovery process is incomplete; and second, that even on the existing evidence, Waterton's claim against the Dawson defendants presents a fair issue to be tried.

[26] With respect to the first argument that the application to dismiss is premature, once the defendants filed this dismissal application on March 6, 2020, as per s. 5 of PPPA, all steps in the litigation stopped, meaning that Waterton was precluded from taking steps in the discovery process.

[27] In making this argument, Waterton relies on the decision of *Veritas Geophysical (Nigeria) Limited v. Energulf Resources Ltd.*, 2010 BCSC 1253, which involved a summary judgment application that turned on the threshold question of whether Veritas had a partnership or joint venture relationship with the Government of Nigeria. Harris, J., as he then was, concluded that it was premature to proceed with the application until discovery was complete, stating:

- [31] In summary, I have concluded that it is premature to proceed on the basis that the relationship between Veritas and the Government of Nigeria could not be described as a partnership or a joint venture. I have not, as I shall briefly explain, reached this conclusion because I am satisfied that Energulf has raised a triable issue on this point. Rather, I have concluded that this issue should not be resolved on the current record in the absence of discovery on the threshold question of the existence of a partnership or a joint venture.
- .
- [33] To succeed on an application for summary judgment an applicant must demonstrate, by evidence, that there is no bona fide triable issue standing in the way of judgment: *Ewachniuk v. Abraxis Holdings Inc.*, 2003 BCCA 611 at para. 3. The purpose of Rule 18 is to dispose of claims or defences that have no chance of success. On a Rule 18 application, both parties must bring their cases forward; they cannot simply rely on pleadings or speculation.
- [34] There are, however, circumstances in which an application for summary judgment pursuant to Rule 18 may be premature. Where, for example, a party has not had an opportunity to develop evidence through the discovery process on issues raised by the pleadings, it may not be appropriate to grant summary judgment: *Phillips Paul v. Malak Holdings Ltd.*, 2002 BCSC 1191.
- .
- [41] Veritas has provided affidavit evidence in which it avers that its relationship with the Government of Nigeria is not a partnership or a joint venture. Such a statement is, of course, not binding on me. There has, however, been no discovery of documents on the threshold question of whether the relationship between the parties should properly be characterised as a partnership or joint venture. There has also been no cross examination on the affidavits.
- [42] Although I have concluded that, standing alone, the provision for payment is neutral with respect to the legal relationship between the parties, it is possible that when the relationship and the agreement are analysed in the context of the surrounding circumstances a partnership or a joint venture might be found to exist. There is nothing to suggest that the pleading of a partnership or a joint venture is in any way improper. It is in the nature of the case that the evidence that would prove or disprove the existence of a partnership or a joint venture is necessarily in the possession of Veritas and not Energulf. In the circumstances, given that discovery on this issue has been denied, Energulf could not be expected to have brought forward on this application all of the evidence that may ground the existence of a partnership or a joint venture. Although I am not persuaded, on the evidence that has being brought forward, that a triable issue of partnership or joint venture has been established, it is premature to conclude that discovery might not disclose such an issue. For this reason, I cannot give effect to the application for summary judgment.

[Emphasis added.]

- [28] In *Xiao v. Fan*, 2020 BCSC 69, Crerar, J. held that in order to resist summary judgment based on incomplete disclosure, the respondent must demonstrate a reasonable prospect that further discovery will reveal the existence of a triable issue (para. 49).
- [29] Waterton submits that Mr. Dawson's examination for discovery made clear that there is material disclosure that has not been produced, including communications between the Dawson defendants and Mr. Bockhold during the relevant period, documents relating to the Nevada lawsuits, and reports/documents which are referenced in the defendants' amended response to civil claim as the basis for the alleged defamatory statements.
- [30] Waterton says that the significance of the non-disclosure is not only the absence of the documents and whatever annotations or commentary the defendants may have made on them, but also the associated correspondence among the defendants, which could shed light on the Dawson defendants' participation and encouragement. Waterton stresses that, as in *Veritas*, the evidence that has yet to be disclosed would prove or disprove the Dawson defendants' involvement in the publication of the alleged defamatory statements.
- [31] I agree. The defendants brought their PPPA application on the heels of Waterton's disclosure request. Through the operation of s. 5 of PPPA, that disclosure request remains unanswered. This is similar to the situation in *Veritas* in that:
- i. the relationship of the defendants and communication between them is key; and
 - ii. Waterton is unable to put their best case forward on this application as the evidence as to that relationship is in the possession of the defendants and disclosure is incomplete.
- [32] I am satisfied that there is a reasonable likelihood that the outstanding disclosure (in particular, the communication between the Dawson defendants and Mr. Bockhold) will reveal the true relationship between the parties and the Dawson defendants' role in the publication of the alleged defamatory statements. Accordingly, there exists a reasonable doubt about whether a triable issue may yet emerge through disclosure. As such, I find that this application to dismiss is premature.
- [33] Given my finding, there is no need to consider Waterton's alternative argument.

Conclusion

- [34] The Dawson defendants' applications under s. 4 of the PPPA and Rule 9-6 are dismissed.
- [35] Costs to Waterton in any event of the cause.

"The Honourable Madam Justice Murray"

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