IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Success Group Holdings Ltd. v. Fraser Valley (Regional District),* 2023 BCSC 243

Date: 20230217
Docket: S227325
Registry: Vancouver

Between:

SUCCESS GROUP HOLDINGS LTD.

Plaintiff

And

FRASER VALLEY REGIONAL DISTRICT

Defendant

Before: Master Hughes

Reasons for Judgment

In Chambers

Representative of Success Group Holdings Ltd.:	E. Miao and W. Li
Counsel for Fraser Valley Regional District:	J.W. Locke
Place and Date of Hearing:	Vancouver, B.C. January 18, 2023
Place and Date of Judgment:	Vancouver, B.C. February 17, 2023

2023 BCSC 243 (CanLII)

2023 BCSC 243 (CanLII)

Introduction

[1] The defendant applies for an order that the self-represented corporate plaintiff post $40,000 as security for costs in this proceeding, pursuant to s. 236 of the *Business Corporations Act,* SBC 2002, c. 57. The plaintiff is opposed to posting security in any amount.

[2] The plaintiff was represented at the hearing of this application by Ms. E. Miao. Her relationship to the plaintiff company was somewhat unclear, although an Eva Miao has sworn an affidavit in this action in which she is described as Assistant Manager at Success Group Holdings Ltd. Ms. Miao was accompanied by Wei (William) Li, a director of the plaintiff, who indicated that Ms. Miao would be speaking on his behalf.

Background

[3] In this action, which was commenced on September 8, 2022, the plaintiff claims against the defendant in negligence, breach of a common law duty of procedural fairness, misfeasance in public office, and trespass for damages it claims arise as a result of bylaw enforcement actions taken by the defendant at a property in Boston Bar (the “Property”) which was owned by the plaintiff. The Property is located in the geographic jurisdiction of the defendant regional district, and the defendant has construction regulation jurisdiction over the Property.

[4] The defendant alleges that the plaintiff planned to convert the Property, on which stands an old church building, into an indoor marijuana grow operation. Work on the construction and conversion had allegedly commenced when a building official employed by the defendant inspected the Property. Following that inspection, “Stop Work” and “Do Not Occupy” orders (the “Orders”) were issued.

[5] The plaintiff claims that the posting of the Orders effectively gave notice to local criminals that it was open season for vandalism, looting and theft of equipment and personal property. The plaintiff seeks damages for:

a) Loss of profits from the sale of the Property in the range of $120,000;

b) Theft of equipment from the Property in the range of $150,000;

c) Loss of rental income in the range of $96,200;

d) Property damage and personal property loss at the Property; and

e) General, special, punitive and aggravated damages.

[6] In its response to civil claim filed September 28, 2022, the defendant has denied all claims and has raised defences including:

a) The denial of a private law duty of care;

b) The doctrine of collateral attack; and

c) The Regional District's statutory and bylaw authorities to regulate construction, to enter properties to conduct inspections and to enforce its bylaws.

[7] The defendant claims it has raised strong defences to what it says is a novel claim of a private law duty of care arising from the economic consequences of the exercise of the Regional District's statutory authority to regulate construction.

Test

[8] Section 236 of the *Business Corporations Act* provides that:

> 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.

[9] The purpose of security for costs is to protect the defendant from the likelihood that, in the event of its success, it will be unable to recover its costs from the plaintiff (*Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, 1993 CanLII 1669 (BCCA) at para. 15).

2023 BCSC 243 (CanLII)

[10] While the courts are generally cautious in granting security for costs in relation to an impecunious natural person, the same cannot be said against corporate plaintiffs:

> For good reason, individual and corporate plaintiffs have always been treated differently. Absent special circumstances, corporate shareholders are entitled to avail themselves of the protection of a limited liability company to avoid personal exposure for costs: ***P.G. Restaurant Ltd. v. Northern Interior Regional Health Board et al.***, 2006 BCSC 1680. An order for security for costs prevents the principals of a corporate plaintiff from hiding behind the corporate veil and, as noted by McGarry V.C. in ***Pearson***, protects "the community against litigious abuses by artificial persons manipulated by natural persons.
>
> *Bronson v. Hewitt,* 2007 BCSC 1751 at para. 41, cited with approval in *Ocean Pastures Corp. v. Old Masset Economic Development Corp.,* 2016 BCCA 12 at para. 21.

[11] There is a two-stage legal test on an application for security for costs. The onus is initially on the applicant, at the first stage, to satisfy the court that there is a *prima facie* case that the respondent would be unable to pay the applicant's costs if the respondent's claim fails (*Integrated Contractors Ltd. v. Leduc Developments Ltd.*, 2009 BCSC 965, para. 11).

[12] If this threshold test is met, the onus then shifts to the respondent to show that it has sufficient exigible assets to satisfy an award of costs, or that there is no arguable defence to its claims (*Integrated Contractors,* paras. 12-13).

[13] If the respondent is unable to satisfy the court on either of these two points, the court may then exercise its discretion to make an order that the respondent post security for costs, taking into consideration the following legal principles set out by the BC Court of Appeal in *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.,* 1997 CanLII 4037 at para. 17:

a) The court has complete discretion whether to order security, and will act in light of all the relevant circumstances;

2023 BCSC 243 (CanLII)

b) The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not, without more, sufficient reason for not ordering security;

c) The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;

d) The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;

e) The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;

f) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and

g) The lateness of the application for security is a circumstance which can properly be taken into account.

Analysis

[14] In the case at bar, the defendant provided an affidavit of a paralegal who conducted a number of searches regarding the plaintiff corporation. Those searches reveal that:

a) The plaintiff no longer owns the subject Property, having transferred ownership on May 13, 2022;

b) The plaintiff had no registered interest in any real property in British Columbia as at September 28, 2022; and

c) The plaintiff has no registered security interest in any personal property in British Columbia as of September 28, 2022.

2023 BCSC 243 (CanLII)

[15] The plaintiff submits that it is not impecunious, and that its shareholders are willing and able to inject funds into the corporation if its claim is unsuccessful. The difficulty with this argument is that no affidavit evidence was provided to support this assertion. There is no evidence as to the plaintiff's financial resources including any other assets that it may own that would not appear in either a land title search or a search of the Personal Property Registry. In oral submissions, the plaintiff advised that it has funds from sale of the subject Property, but again, there is no evidence before the court in this regard. There is also no evidence as to the identity of its shareholders or their financial means. Curiously, while arguing that it has the ability to pay any award of costs that the court might ultimately make, the plaintiff also argues that posting security for costs at this stage would pose a hardship that would impair the plaintiff's ability to retain counsel and obtain expert evidence, and would potentially cause it to abandon this case. In essence, the plaintiff has taken contradictory positions as to whether it is impecunious or not at different points in its Application Response and during oral submissions.

[16] Accordingly, based on the evidence provided by the defendant, I am satisfied that the defendant has made out a *prima facie* case that the plaintiff would be unable to pay the defendant's costs if its claim fails.

[17] The burden then shifts to the plaintiff to show that it has sufficient exigible assets to satisfy an award of costs, or that there is no arguable defence to its claims. Given the above-noted lack of evidence provided by the plaintiff as to its financial resources, the plaintiff has failed to show that it could satisfy an award of costs.

[18] As to the existence of an arguable defence, the notice of civil claim includes a number of claims as set out above, and there are therefore a number of defences in the response to civil claim.

[19] First and foremost of the defences is that of collateral attack: the defendant pleads that the plaintiff's claims regarding lack of procedural fairness in the building official's determination relate to a public law duty of care, and the appropriate remedy is therefore a judicial review under the *Judicial Review Procedure Act*,

2023 BCSC 243 (CanLII)

RSBC 1996, c. 241. In answer to the trespass claim, the defendant relies on its statutory authority to regulate construction, which includes the right to enter property to determine compliance with building bylaws. Each of these are arguable defences.

[20] In oral submissions, much time was spent on whether there was an arguable defence to the plaintiff's allegation of a breach of a private law duty of care. The plaintiff relies on *Nelson (City) v. Marchi,* 2021 SCC 41, for the proposition that core policy immunity does not apply to the exercise of discretion by a government employee who is far-removed from democratically accountable officials or who is charged with implementation, and that liability may be found under private law negligence principles (*Marchi,* para. 62). The defendant relies on *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 which, at paras. 197-200, sets out the test for determining whether there is a duty of care based on the *Anns/Cooper* analysis. The defendant says that the plaintiff is alleging a novel duty of care, based on the analysis set out in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General),* 2015 BCCA 163, as reviewed in *Waterway Houseboats*.

[21] The plaintiff's submissions focused primarily on the merits of its claim regarding the alleged breach of a private law duty of care. While there may be merit to that claim, the court's task on this application is not to decide which side will prevail, but simply to determine whether there is an arguable defence. In my view, there are three arguable defences to this particular claim: first, that core policy immunity applies and therefore there is no private law duty of care; second, if there is a private law duty of care, the actions of the defendant's employee did not breach that duty of care; and third, even if the defendant breached its duty of care, there was no causation between that breach and the losses alleged.

[22] As I have determined that there are one or more arguable defences to the claims, the court's discretion is engaged, having regard to the principles set out in *Kropp.*

[23] The plaintiff's arguments with respect to the application of those principles to the case at bar are essentially twofold:

2023 BCSC 243 (CanLII)

a) It is too early in this litigation for the court to order security for costs; and

b) Such an order is inappropriate as it would unduly stifle the plaintiff's ability to pursue what it says is a meritorious case against a government entity with unlimited resources.

[24] With respect to the timing argument, the plaintiff relies on *Ballantyne v. General Motors LLC,* 2018 BCSC 1886. *Ballantyne* involved a motor vehicle accident, and was in the relatively early stages when the application for security for costs was brought against the individual plaintiff. Although lists of documents had been exchanged, document discovery was not complete, and no examinations for discovery had yet been conducted. Having found that the plaintiff would be unable to satisfy a costs award, the court then turned to whether there were special circumstances justifying an order for security. The defendant argued that one factor constituting special circumstances was the weakness of the plaintiff's claim. It is in this context that the court opined that "it would be an injustice to deprive the plaintiff of his right to advance his claim when there is a significant document discovery still to take place, when no examinations for discovery have been held, and when there has not yet been the opportunity to meaningfully consult with experts for a fulsome record" (*Ballantyne,* para. 42).

[25] Although there are some parallels, *Ballantyne* can be distinguished in that the test on an application for security for costs payable by a natural person is different than that on an application under s. 236 of the *Business Corporations Act*. The rationale for the distinction was explained by Justice Goepel in *Bronson v. Hewitt,* quoted in para. 10 above. In the case at bar, unlike *Ballantyne*, I am not considering the merits of the plaintiff's claim. As noted in *Kropp* at para. 17*,* "the court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious." Neither success or failure of the plaintiff's claim appears obvious at this stage.

[26] In *Grant v. Henderson*, 2003 BCSC 1473, the court addressed the timing of an application for security for costs against three corporate plaintiffs. The plaintiffs'

2023 BCSC 243 (CanLII)

argument in that case was that the application was brought too late, only five months prior to trial, although examinations for discovery had not been completed and expert reports had not been exchanged. The court said:

> **10** These Plaintiffs further assert that this application, filed in July 2003, was not brought promptly and that they were prejudiced by relying on the absence of any demand for security to spend money on the action. The principals of Vana and Rocky Mountain depose that their companies have budgeted a sum of money to prepare for and conduct the litigation and would suffer prejudice if the court now ordered any security for costs. It is settled law that if a plaintiff is lulled into the false belief that it may proceed with its action without being called upon to advance more security, and acts on that belief, a subsequent application for security will not succeed: Ruko of Canada Ltd. v. CIBC, [1991] B.C.J. No. 3157, 49 C.P.C. (2d) 105 (S.C.).
>
> **11** One of the principals of Punto deposes that if he is required to pay security for costs, he may not be able to continue with the lawsuit. He says that his company has no assets because of the conduct of the defendants. He believes that if this application had been brought promptly, he would have planned for that contingency.
>
> (emphasis added)

Applying the *Kropp* principles, the court found, at para. 19, that "the application brought against Vana and Punto was not brought in a timely fashion; the financial circumstances of Vana and Punto must have been known to the defendants for some time."

[27] I accept *Grant* as authority for the proposition that applications for security for costs should not be brought at a late stage in litigation. Bringing an application at an earlier stage, as here, allows the plaintiff time to properly arrange its finances to accommodate such an order.

[28] The last argument relates to access to justice. The plaintiff alleges repeatedly, both in written and oral submissions, that the defendant is using this application as an oppressive tactic or a "dirty trick" to deter litigation of a meritorious claim. It alleges that there is no risk to the defendant if security is not posted, as it is a government entity with vast resources, and a lack of security will not hinder the defendant's ability to engage in litigation. No authority was provided to suggest that a different legal test is applicable if the defendant is a government entity. Many of

2023 BCSC 243 (CanLII)

the reported cases are in the context of applications by large corporate defendants, also having vast resources. Accordingly, my analysis is based on the principles in *Kropp.*

[29] The third *Kropp* principle, being that of balancing interests, was addressed by the court in *Apex Mountain Resort Ltd. v. British Columbia,* [1998] B.C.J. No. 1918. Justice Bauman (as he then was) said:

> **30** … The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906). (emphasis added)

[30] The authorities cited by the plaintiff in support of its argument regarding oppressive conduct in the litigation all involve alleged improprieties in addition to seeking security for costs (*Protea Consultax Inc. v. Air Canada,* 2018 BCSC 995, *Split Vision Eyewear Inc. v. The Economical Insurance Group,* 2010 BCSC 396, *Number 216 Holdings Ltd. v. ING Insurance Co. of Canada*, [2013] BCJ No. 8, 201.)

[31] The plaintiff both denies that it is impecunious, and also alleges that the defendant is the cause of its impecuniosity. Specifically, it alleges that the theft from and damage to its Property were a direct result of the Orders issued by the defendant. This argument is somewhat disingenuous, as the Orders would not have stopped the plaintiff from removing chattels or securing the Property. The plaintiff also says that it sold the Property below market value as a result of the Orders, but there is no evidence provided to support this allegation.

2023 BCSC 243 (CanLII)

[32] After considering the authorities provided, I am not satisfied that an order for security for costs would cause undue hardship to the extent of stifling a legitimate claim. As indicated previously, the plaintiff provided no evidence whatsoever as to its financial circumstances. I conclude that the plaintiff has not discharged the burden of proving that it would not be able to pursue its claim if ordered to post security.

2023 BCSC 243 (CanLII)

Amount of Security

[33] The amount of security to be posted is discretionary based on the facts of the case, but should be more than nominal. The court will often consider a draft bill of costs as a guideline. The court can order any amount that it considers appropriate. (*Ocean Pastures,* para. 29).

[34] The defendant seeks security in the amount of $40,000, and has provided a draft bill of costs assuming 10 days of trial and two days of examinations for discovery. The draft bill of costs totals $41,740.60, inclusive of disbursements and taxes. The disbursements include $10,000 for a damages expert, but with no supporting evidence. No allowance is made for any interlocutory applications.

[35] I have determined that $30,000 is an appropriate amount of security in this case. To give the plaintiff an opportunity to raise those funds, the payment will be made in two instalments.

Conclusion

[36] Success Group Holdings Ltd. is ordered to post security for costs in the amount of $30,000. Of this sum, $10,000 is to be paid into court within 30 days from the date of this order.

[37] The plaintiff’s action shall be stayed until the first $10,000 security is posted.

[38] If the $10,000 security is not posted within 30 days, the defendant, Fraser Valley Regional District, shall be at liberty to apply for an order dismissing the action.

[39] The remaining $20,000 must be paid into court prior to a Notice of Trial being filed by the plaintiff.

[40] Costs of this application will be costs in the cause.

"Master Hughes"

2023 BCSC 243 (CanLII)