IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kledo Construction Ltd. v. Tallahassee Exploration Inc.,* 2024 BCSC 166

Date: 20240110
Docket: S233559
Registry: Vancouver

Between:

Kledo Construction Ltd.

Plaintiff

And

Tallahassee Exploration Inc.

Defendants

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. Elashry D.F. Hepburn
No other appearances	
Place and Date of Trial/Hearing:	Vancouver, B.C. January 10, 2024
Place and Date of Judgment:	Vancouver, B.C. January 10, 2024

[1] **THE COURT:** The application before the court today is for summary judgment pursuant to R. 9-6 with respect to this contract dispute regarding what was initially a construction contract between the plaintiff and defendant with respect to the defendant's oil and gas works in Alberta, which seems to have evolved into a number of different service contracts including in respect of a road, snow plowing, security services, water-hauling services, equipment rental, road grading, and pad construction.

[2] The matter has some history in that the response was filed with a jurisdictional dispute being raised, notwithstanding express notice by the plaintiff that the expectation was that if that jurisdiction issue was going to be pursued, that it was incumbent upon the defendants to bring an application to that effect. They have not done so.

[3] In addition, there was a *Mareva* injunction that was granted on a without notice basis, then expired under its terms, and was extended with some modification relatively recently, on December 22, 2023.

[4] The evidence before the court is in a number of affidavits sworn by the principal of the plaintiff which also exhibit the contracts and the various invoices which are subject to the dispute.

[5] I am satisfied that notice was given to the defendant of today's application. However, they are not appearing today. There has been no response, or evidence provided by the defendant.

Analysis

[6] The test judgment under R. 9-6 is well known, and has been set out in the notice of application filed by the plaintiff. One of the leading decisions of the Court of Appeal in this respect is the decision of *Balfour v. Tarasenko*, 2016 BCCA 438, where the court set out the purpose of R. 9-6 as follows:

> [41] Rule 9-6 of the Rules governs the procedure for summary judgment. The purpose of summary judgment is, promptly and inexpensively, to weed out and prevent meritless claims or defences from proceeding to trial. To

> succeed on a summary judgment application, the party seeking summary judgment must show there is no genuine issue of material fact that requires a trial for determination: *Canada (Attorney General) v. Lameman*, 2008 SCC 14, paras. 10-11.
>
> [42] On a summary judgment application brought against a defendant, the essential question is whether the defendant is bound to lose. If so, summary judgment should be granted to avoid unnecessary waste of time and expense. Where the defendant relies upon an asserted defence to resist the application, that defence must be *bona fide* in nature. This means that the proposition of law upon which the defendant relies must have a *bona fide* foundation in fact: *North Vancouver (District) v. Babyeats Ltd.*, 2014 BCSC 890, at paras. 44 and 46; *Bank of Montreal v. Yow (1986),* 1986 CanLII 864 *(B*C CA), 16 B.C.L.R. (2d) 249 at 253-255 (C.A.).
>
> [43] Each party must "put its best foot forward" when presenting or resisting a summary judgment application: *Lameman* at para. 11. Accordingly, under Rule 9-6, to the extent reasonably possible, each must provide evidence that the other's claim is factually without merit, in whole or in part. Where the evidence presented conflicts, summary judgment is unlikely because the court's role is not to weigh evidence and make factual determinations. It is to determine whether there is a *bona fide* triable issue. However, uncorroborated "bald assertions" of fact will likely not prevent summary judgment, unless the facts in question are not within the asserting party's knowledge or control and there is a real possibility that they will be discoverable as the trial proceeds: *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at paras. 9, 12-15; *Southeast Toyota Distributors Inc. v. Branch*, 1997 CanLII 2089 (BC SC), [1997] B.C.J. No. 1426 at para. 62 (S.C.), aff'd (1998), 1998 CanLII 4338 (BC CA), 47 B.C.L.R. (3d) 1 (C.A.).

[7] Thus, while the court is not to weigh evidence and make factual determinations on an application for judgment under R. 9-6, there must be some evidence in order for the court to determine whether there are conflicts or issues that raise *bona fide* triable issues. As noted, bald assertions in the response to civil claim are not sufficient on their own to defeat a R. 9-6 application. I am satisfied here that it is appropriate to proceed under R. 9-6 notwithstanding that the response raises such defences.

[8] In particular, the defences raised in the response to civil claim include, but are not limited to, that there were defects in the work that was undertaken, that the amounts paid were an over payment with respect to some of the services or contracts despite that they were fixed-price contracts, or that charges were essentially inappropriate extras or overruns for which that they ought not be liable.

[9] There is no evidence before the court today to establish that those defences are not bound to fail, as argued by the plaintiff, or to answer the plaintiff's evidence on those points.

[10] Turning then to the jurisdictional defence, the contract is before the court today. The contract has the following forum selection clause:

> The purchase order shall be governed by the laws of the Province of Alberta and the federal laws of Canada applicable therein, and the parties hereto irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Alberta.

[11] The plaintiffs here say that given that there is no evidence before the court, the jurisdiction issue is not defensible. In this respect they rely on *Baran v. Pioneer Steel Manufacturers Limited*, 2021 BCSC 491, where a two-step test has been set out for whether or not a forum selection clause should be enforced. In particular, the court there said that the first step, at para. 18, is to determine whether the selection clause is enforceable and that the applicant seeking to enforce the forum selection clause bears the burden of proof at this stage of the test.

[12] Here, the plaintiff argues that given that the defendant is not here, they simply cannot meet that hurdle because they are not meeting the onus upon them.

[13] I do not agree. The court can look at the evidence before it, notwithstanding that one party bears the onus, and can find that that onus has or has not been met without the party who bears it standing in front of the court making that argument. The contract is before me.

[14] On its face, the forum selection clause would likely meet the requirements under the first stage of the test.

[15] However, the second stage of the test is to assess whether or not there are strong reasons not to give effect to what *might* be an enforceable forum selection clause here, even if it is enforceable.

[16] It is the second stage of the test that would require evidence from the defendants on this application to refute the arguments of the plaintiff that there is a reason to not give effect to the clause.

[17] Specifically, the plaintiff's argument is that based on the defendants' failure to take any steps to proceed with an application under R. 21-8 despite (a) that the rules do specifically set out a process for such disputes to be resolved, and, although not a mandatory time requirement, a 30 day period within which they may do so without concern of attorning and (b) that express notice was given to the defendants to bring that application, failing which they would be taking further steps in this litigation.

[18] Given the lack of action by the defendants in response to that notice, I accept the plaintiff's argument that the filing of the jurisdictional response was meant to create a procedural hurdle, and is such was one more of strategy than legal basis, or was done as a means to delay the ultimate judgment in this matter.

[19] As such, I am satisfied that they are bound to fail on the forum selection clause. With respect to the defences, again, as noted by the courts, since there must be some evidence, by not appearing today and failing to provide any evidence to refute the positions of the plaintiff, notwithstanding that there are some arguable defences raised in the notice of civil claim itself as bare assertions, I conclude that there are no *bona fide* triable issues in respect of them.

[20] As such, I make the orders as sought in the notice of application.

"Associate Judge Robertson"