IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Campbell v. Jackman,*
2023 BCSC 1517

Date: 20230830
Docket: 222474 and 222475
Registry: Victoria

Between:

Gordon James Campbell

Plaintiff

And:

Craig Jackman

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(Hearing proceeded via MS Teams)

Counsel for the Plaintiff:	P. Sorensen
Counsel for the Defendant:	P. Waller
Place and Date of Hearing:	Victoria, B.C. June 8, 2023
Place and Date of Judgment:	Victoria, B.C. August 30, 2023

Introduction

[1] The parties had a business arrangement. The plaintiff claims they were in a partnership. The defendant does not agree. Unfortunately, the arrangement was oral. The nature and details of the arrangement are in dispute.

[2] The plaintiff commenced two actions back-to-back in the Supreme Court of British Columbia, Victoria Registry, on the same day. In Action No. 222474 he advances claims for fraud and misappropriation of funds while acting in a fiduciary capacity and for obtaining property under false pretenses and/or by fraudulent misrepresentation. In Action No. 222475 he seeks repayment of a loan allegedly made by him to the defendant during their business relationship.

[3] The defendant has filed a counterclaim in Action No. 222475 seeking payment by the plaintiff for management work provided by the defendant.

[4] The parties have filed cross applications in both actions. In Action No. 222474 the plaintiff seeks an order that the counterclaim filed by the defendant be tried separately or consolidated in Action No. 222474.

[5] The defendant applies for an order that Action No. 222474 and 222475 be consolidated, or in the alternative, that they be tried at the same time or on the same day.

[6] In Action No. 222475, the plaintiff seeks summary judgment against the defendant for breach of contract for $52,100.83. The defendant opposes the summary judgment application on the grounds that the plaintiff is seeking to litigate in slices as the issues involved in both actions are related, intertwined and involve the same business relationship.

[7] The plaintiff agrees that if the summary judgment application is unsuccessful the plaintiff will consent to consolidation of the two actions.

Background

[8] The plaintiff, Mr. Campbell, has been in the construction industry for over 40 years. He runs a sole proprietorship doing business in the Victoria, British Columbia area under the name GJC Construction Services ("GJC Construction"). In 2019 he was in his mid-sixties and was looking to retire. In the fall of 2019, he and Mr. Jackman met when they were both working on the same construction project. Mr. Jackman was a site supervisor for another construction company on that project.

[9] They became acquainted and decided that Mr. Jackman would join GJC Construction and over time integrate himself into the business with the intention that he would eventually take over GJC Construction (the "Agreement").

[10] The defendant alleges he entered the arrangement largely based on the plaintiff's financial representations respecting GJC Construction. He states the Agreement included these terms:

a) The defendant's employees would become employees of GJC Construction;

b) The defendant would manage existing GJC Construction projects;

c) The defendant would be compensated by the plaintiff for that management work according to industry standards (the "Jackman Compensation");

d) The defendant would develop his own work and would manage those projects separately from the GJC Construction projects and would receive the financial benefits derived from his own projects.

[11] The defendant alleges that through his efforts GJC Construction was very busy for the next year and the plaintiff and GJC Construction earned significant profits. He alleges that despite repeated requests that he be paid the Jackman Compensation, the plaintiff gave excuses for not paying him, often telling him he did not have enough money.

[12] The plaintiff states they ran GJC Construction together for almost a year, the relationship became strained and eventually it became clear that the defendant would not be taking over GJC Construction. The defendant alleges the reason for the breakdown of their working relationship was the plaintiff did not provide GJC Construction's financial information and the Jackman Compensation.

[13] Mr. Jackman informed the plaintiff he intended to set up his own competing construction business and in early October 2020 he did so, operating as a sole proprietorship called True North Carpenters ("TNC").

[14] The defendant alleges that the plaintiff, in the fall of 2020, in an effort to entice him to consider once again purchasing GJC Construction, offered to lend money to him to assist with the initial costs associated with the start-up of TNC (the "Bridge Loan"). The defendant states it was agreed those funds would be paid back pursuant to an agreed payment schedule, not on demand, and would incur interest at the Bank of Canada prime rate plus 2 percent. The defendant states it was agreed he would make the loan payments provided the parties continued to negotiate the Jackman Compensation.

[15] The plaintiff agrees he made the Bridge Loan and that in October and November 2020 he advanced $61,270 to the defendant. He states the defendant was to make monthly payments and pay interest at 7 percent. However, he alleges:

> Mr. Jackman's payments towards the loan were inconsistent and sporadic, never in the same amount, and never in regular intervals. Mr. Jackman has paid back only $9,169.17, leaving $52,100.83 owing to Mr. Campbell plus accrued interest.

[16] He states Mr. Jackman has not made a payment towards the Bridge Loan since September 15, 2021.

[17] In December 2020 in a phone call between the parties relating to the possible purchase of GJC Construction, the Jackman Compensation and the Bridge Loan, the defendant states he advised the plaintiff he would not purchase GJC Construction and asked for the Jackman Compensation to be paid. He alleges the

plaintiff stated he would not pay the compensation and he responded he would make no further loan payments.

Law and Analysis

Summary Judgment Application

[18] The plaintiff seeks summary judgment pursuant to Rule 9-6 for breach of contract for $52,100.83 with prejudgment interest calculated at 7 percent per annum, or alternatively, 5 percent per annum pursuant to the *Canada Interest Act*, R.S.C. 1985, c. I-15 or alternatively, at the Bank of Canada prime rate of 2 percent with post-judgment interest accumulating pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, thereafter.

Position of the Plaintiff

[19] The plaintiff relies in part on admissions by the defendant that the loan existed, was to bear interest and that he ceased making payments on the loan (although the defendant made some payments after he said he would not). He submits he has made out a *prima facie* case for judgment. The plaintiff submits the only genuine issue is whether the defendant can avoid judgment due to an alleged set-off.

Position of the Defendant

[20] The defendant submits given the two actions involve the same parties and the same business relationship and that the loan is completely intertwined with the business relationship referred to in Action No. 222474, the legal test for summary judgment is not satisfied.

Discussion

[21] Rule 9-6 states that in an application for summary judgment the power of the Court is that:

> (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…

[22] In *Armex Mining Corp. v. Huakan International Mining Inc*., 2018 BCSC 1418, Justice Burke summarized the application of Rule 9-6 as articulated by the Court of Appeal:

> [6] This Court succinctly explained how Rule 9-6(5)(a) should be applied in *Watson Island Development Corp. v. Prince Rupert (City)*, 2015 BCSC 1474. At paras. 21-26, the Court stated:
>
> > [21] The City applies under Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Rule 9-6(5)(a) permits a court to dismiss a claim if it is satisfied that there is no genuine issue for trial. Summary judgment may be granted on all or part of a claim. The onus is on the applicant to prove beyond a reasonable doubt that there is no triable issue: *Metro-Can Construction (HS) Ltd. v. Noel Developments Ltd.* (1996), 26 B.C.L.R. (3d) 26 at para. 4; *Wong v. Wilson*, 2013 BCSC 1465 at para. 40. Another way of stating the test is whether the plaintiff is "bound to lose": *Pitt v. Holt*, 2007 BCSC 1555 at para. 10.
> >
> > [22] The application under Rule 9-6 is based on the premise that the claim is factually without merit. It raises an issue of fact only or, at best, a question of mixed fact and law, unless the court determines under subrule (5)(c) that "the only genuine issue is an issue of law", in which case the court "may determine the question and pronounce judgment accordingly": *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at para. 9.
> >
> > [23] On an application under Rule 9-6 the court is not to weigh the evidence. If the evidence needs to be weighed and assessed, then the test of "plain and obvious" or "beyond a doubt" has not been satisfied and the application is to be dismissed: *Skybridge Investments Ltd. v. Metro Motors Ltd*, 2006 BCCA 500 at paras. 8-12; *International Taoist Church of Canada* at para. 14.
> >
> > [24] An application to dismiss a claim that is bound to be unsuccessful weeds out unmeritorious claims and saves the heavy price of time and cost borne by the parties and the justice system: *4 Corners Properties Ltd. v. Boffo Developments (Smithe) Ltd.*, 2013 BCSC 1926 at para. 20.
> >
> > [25] Caution must be exercised in granting summary judgment on only a portion of a claim so as to guard against litigating in slices: *Westsea Construction Ltd v. 0759553 BC Ltd.*, 2012 BCSC 564 at para. 49. Judgment on only a portion of the claim risks multiple appeals being heard within the same action, findings being made in the absence of a full factual context, and inconsistent findings being

> made after further evidence has been adduced: *Century Services Inc. v. LeRoy*, 2014 BCSC 702 at para. 89, var'd on other grounds 2015 BCCA 120.
>
> [26] On the other hand, the resolution of an important part of the claim against a party may significantly impact the balance of the claim and provide for a timelier and cost effective approach: *Hryniak v. Mauldin*, 2014 SCC 7 at para. 60.
>
> …
>
> [Emphasis in original.]
>
> [7] The Court of Appeal has confirmed that, while evidence may be considered in a Rule 9-6(5)(a) application, it must be undisputed evidence: *Oh v. Coquitlam (City)*, 2018 BCCA 129 at para. 6. The Court should not weigh the evidence, but may draw inferences of fact from the undisputed evidence, as long as those inferences are strongly supported by the facts: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at paras. 37-38.

[23] As indicated, the agreements of the parties regarding their business arrangement and the loan are oral. The loan arises in the context of their overall business plans. According to the defendant, it was understood that the loan and his payments on it were to continue while the parties actively engaged in resolving their business relationship and the Jackman Compensation. That is, it was to assist him in getting his business started while they did so but was always tied to resolution of the compensation owed to him.

[24] The plaintiff submits the defendant's response to civil claim in the "loan action" is evasive and fails to specifically respond to the facts of a claim as required by Rule 3-7(15). He alleges as well that the counterclaim is evasive. He submits there is no genuine issue for trial as it relates to the loan.

[25] The plaintiff relies on *McLean* where the Court of Appeal stated:

> [36] In my respectful view, the judge erred in principle in saying the rule was not available when there are disputed facts in the pleadings and in declining to consider the evidence on the Rule 9-6 application. In *Lameman*, the Supreme Court of Canada explained the importance of the summary judgment rule. This Rule has advantages to the administration of justice that are different from those provided by a summary trial such as we have long had in British Columbia. The court said:
>
> > 10 This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the

> civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
>
> 11 For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"…

[26] He states a bald assertion in the defendant's affidavit should not defeat a summary judgment application. In *Balfour v. StormCloud Network (Canada) Incorporated*, 2015 BCSC 1232, aff'd 2016 BCCA 438, Justice Betton discussed what defines a bald assertion:

> [38] The respondents argue that since the parties have provided conflicting sworn evidence, this is a factual dispute that would require a trial to allow for the assessment of credibility. As noted above, this court's role on a summary judgment application is determining whether there is a triable issue, not weighing conflicting evidence: International Taoist Church of Canada at para. 14.
>
> [39] However, the petitioner characterizes the respondents' evidence as "bald assertions" that are not sufficient to defeat its application. That phrase has been used in some decisions to describe assertions which are not corroborated in any way, and such assertions will not usually be sufficient to prevent summary judgment, especially when there is no evidence that corroborating facts might arise later in the proceedings. This was discussed in *Southeast Toyota Distributors Inc. v. Branch*, 1997 CanLII 2089 (BC SC), [1997] B.C.J. No. 1426 (S.C.), aff'd (1998) 1998 CanLII 4338 (BC CA), 47 B.C.L.R. (3d) 1 (C.A.) where Hood J. said at para. 62:
>
> > [62] Bald assertions in a given case may not be enough to resist the order nisi, and to justify the transfer of the proceedings to the trial list. This will depend to some extent on the state of the defendant's evidence or case at the time of the application. If he has basically presented his case, then assertion would probably not be enough. On the other hand if the evidence or facts upon which the defendant relies are not within his knowledge or control, and there is a real possibility of a factual base being developed as the trial proceeds, then assertion may be enough. Each case of course will stand alone on its particular circumstances. See *Memphis Rogues*.
>
> [40] Indeed, there is nothing presented in the evidence that corroborates the assertion of a collateral contract. The respondents point to some e-mail

> communication, but, in my view, those emails of a very general nature. There is certainly no specific reference to the petitioner undertaking to attempt to get $300,000 to the respondents, and any inference of such an undertaking would be a strained one.
>
> [41] In short, there is nothing in the limited communications between the parties that supports the respondents' proposition. In the circumstances the evidence of a collateral contract consists of only bald assertions.

[27] Mr. Jackman in his affidavit describes the loan arrangement:

> 15. In about fall 2020, Campbell, in an effort to entice me to once again consider purchasing GJC, offered to lend me monies to be used to assist with the initial costs associated with the startup of TNC (the "Bridge Loan"). Of course, by that time Campbell owed me significant sums pursuant to the Jackman Compensation. We discussed this in great detail and eventually agreed that we would continue negotiating the Jackman Compensation and in the interim ask me to make payments of the Bridge Loan to help him conceal this arrangement from his wife and help with cashflow problems he was experiencing, but ultimately he would pay me the difference between the Jackman Compensation and any outstanding amount pursuant to the Bridge Loan (the "Campbell Debt").
>
> 16. Therefore, we agreed that the Bridge Loan would be paid back pursuant to an agreed to payment schedule and would incur an interest rate of the Bank of Canada Prime Rate plus 2% (the "Loan Payments"). We further agreed that I would make the Loan Payments only while active negotiations regarding the exact amount of the Jackman Compensation were occurring and until we agreed on an amount, at which time there would be a reconciliation to determine the Campbell Debt.

[28] The plaintiff submits this explanation is nonsensical given the defendant alleges the plaintiff owes him substantial funds yet a loan from the plaintiff was arranged under which he was to make payments including interest. He notes despite Mr. Jackman in the phone call saying he would make no further payments, six months after he paid $500 towards the loan and nine months after he paid $1,000 towards the loan. He states Mr. Jackman does not even offer a bald assertion as to why "any of this makes any sense".

[29] Mr. Jackman does dispute the sum of $9,270 he received from the plaintiff on October 13, 2020 as not being part of the loan, but rather being a repayment of expenses. Hence, he disputes the sum claimed.

[30] The plaintiff concedes that the loan arrangement was “loose” and that he has not included in his affidavit material all details relating to the loan.

[31] I am not satisfied that the defendant is simply making bald assertions. He has pled the facts he alleges and explained them in his affidavit material. While the arrangement he refers to may lack logic and clarity, that does not make his position one of bald assertions. The parties differ on their understanding of the arrangements both regarding the partnership and the loan. The differences are significant. Facts may arise at trial generally that will corroborate one or the other’s evidence. Issues of credibility may arise as well.

[32] It is not possible to find that the loan terms are undisputed. There are issues regarding the advance of $9,270 being reimbursement for expenses incurred and not part of the loan, the interest rate agreed to is unclear, the repayment arrangements are unclear and the relationship of the Jackman Compensation and the loan are disputed.

[33] The plaintiff is asking the Court to weigh conflicting evidence in part because it seems to lack logic and not make sense. On a summary judgment application, the Court does not weigh and assess the evidence. In addition, granting judgment would amount to litigating in slices given the interrelated circumstances of the parties’ business relationship.

[34] The application for summary judgment is dismissed.

Application to Consolidate

[35] Rule 22-5(8) states:

> (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time of on the same day.

[36] In *Nijjar v. Nijjar*, 2022 BCSC 327, Justice Kirchner set out the applicable principles for an application to consolidate:

> [9] The legal principles that apply to an application to have multiple actions tried together was set out by Master Kirkpatrick (as she then was) in *Merritt v. Imasco Enterprises Inc.*, [1992] B.C.J. No. 160 (S.C.) and Master Keighley in *Funk v. Harder*, 2015 BCSC 2152. The principles from both cases were summarized by Master Taylor in *Grewal v. Grewal*, 2017 BCSC 291 [*Grewal*, 2017] as follows:
>
> > …
> >
> > [15] The law to be applied on applications of this nature is well known and is ably set out by Master Keighley in *Funk v. Harder*, 2015 BCSC 2152, starting at para. 16 where he quotes from the decision of Master Kirkpatrick, as she then was, from *Merritt v. Imasco Enterprises Inc*. [1992] B.C.J. No. 160 (S.C.):
> >
> > > I accept that the foundation of an application under R. 5(8) is indeed disclosed by the pleadings. The examination of the pleadings will answer the first question to be addressed: do common claims, disputes and relationships exist between the parties? But the next question which one must ask is: are they "so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense"? *Webster v. Webster* (1979), 12 B.C.L.R. 172 (C.A.). That second question cannot, in my respectful view, be determined solely by reference to the pleadings. Reference must also be made to matters disclosed outside the pleadings:
> > >
> > > (1) will the order sought create a saving in pre-trial procedures (in particular, pre-trial conferences)?
> > >
> > > (2) will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
> > >
> > > (3) what is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest? and
> > >
> > > (4) will there be a real saving in experts' time and witness fees?
> > >
> > > This is in no way intended to be an exhaustive list. It merely sets out some of the factors which, it seems to me, ought to be weighed before making an order under R. 5(8).
> >
> > [17] In the case of *Shah v. Bakken*, [1996] B.C.J. No. 2836 (BCSC), Master Joyce, as he then was, added two further factors for consideration:

> 15. Other factors which in my view can be added to the foregoing list are:
>
> (5) Is one of the actions at a more advanced stage than the other? see: *Forestral Automation Ltd. v. RMS Industrial Controls Inc. et al*. (No. 2), unreported, March 6, 1978, No. C765633/76, Vancouver (B.C.S.C.).
>
> (6) Will the order result a delay of the trial of one of the actions, and, if so, does any prejudice which a party may suffer as a result of that delay outweigh the potential benefits which a combined trial might otherwise have?
>
> [18] And finally, in the case of *Murray v. Morgan*, [1999] B.C.J. No. 2871, Master McCallum paraphrased Master Kirkpatrick's analysis in *Merritt* as: "Will the order make sense in the circumstances".
>
> [10] The analysis requires some balancing of the factors, namely whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the parties opposing the order*: Liu v. Tsai*, 2017 BCSC 221 at para. 4*; Simmonds v. Victoria (City*), 2016 BCSC 951 at para. 25.
>
> [11] An order under Rule 22-5(8) is discretionary: *The Owners of Strata Plan BCS 2854 v. Travelers Guarantee,* 2013 BCSC 2428; *Shah v. Bakken*, 1996 CanLII 2522; [1996] B.C.J. No. 2836 at para. 12 (SC). Like all matters of discretion, however, it must be exercised judicially in accordance with established legal principles.

[37] The actions sought to be combined involve the same parties and were filed on the same day one after the other. The issues in each action are intertwined and arise from the business dealings of the parties over about a one-year period. Action No. 222475 is silent on the business dealings of the parties and frames the claim as an independent loan. It appears the filing of the two actions was an attempt to separate the loan from the business dealings of the parties to resolve it summarily. That summary relief could have been sought within one action if in fact it was found to be an independent loan.

[38] In any event, the plaintiff’s position at the hearing of these applications was that if his summary judgment application was dismissed, he would consent to consolidation of the two proceedings.

[39] Consolidation of the two actions is appropriate because the matters are intertwined and concern the same parties and their business relationship. Duplication of all pre-trial procedures can be avoided. The actions are both at identical early stages in the litigation process, and consolidation will not delay the trial given the plaintiff has set Action No. 222474 for nine days beginning October 1, 2024, which is agreed to be sufficient time to address all the issues between the parties. No prejudice arising from consolidation has been shown other than the plaintiff's desire to recover the funds he loaned.

[40] Action No. 222474 and 222475 are ordered to be consolidated for all purposes.

Costs

[41] The defendant sought special costs apparently on the basis that the plaintiff filed two separate actions. That in itself is not reprehensible, improper or exceptional: *Westsea Construction Ltd. v. 0759553 B.C. Ltd*., 2013 BCSC 1352. Special costs are not warranted.

[42] The defendant is entitled to his costs at Scale B.

"The Honourable Mr. Justice Punnett"