

Court of King's Bench of Alberta

Citation: New Star Energy Ltd v Lam, 2024 ABKB 167

Date: 20240321
Docket: 2301 14989
Registry: Calgary

Between:

New Star Energy Ltd.

Applicant

- and -

Shing Tak (Michael) Lam and Weija Wang

Respondents

**Decision of the
Honourable Mr. Justice O.P. Malik**

[1] The issue I must decide is whether I have the power to set aside a Consent Judgment on the basis that it is procedurally flawed such that it should be considered a nullity.

I. Parties, Background and Argument

[2] On December 13, 2021, an Applications Judge (“AJ”) endorsed a Consent Judgment that had been approved by the parties via the desk application process. The operative terms of the Consent Judgment provide that:

1. The Plaintiff, Shing Tak (Michael) Lam is awarded judgment against the Defendant, New Star Energy Ltd. as follows:
 - (a) \$1,500,000.00 as damages for wrongful dismissal;
 - (b) \$500,000.00 as general damages for damage to reputation; and
 - (c) \$75,000.00 as reimbursement for legal expenses.
2. The Plaintiff Meija Wang is awarded judgment against the Defendant New Star Energy Ltd. as follows:
 - (a) \$250,000.00 as general damages for damage to reputation.

[3] Counsel for Mr. Lam and Ms. Wang signed the Consent Judgment on their behalf while Mr. John Zhao, Interim Chief Executive Officer, signed on behalf of New Star Energy Ltd.

[4] The parties have drawn my attention to two noteworthy procedural issues.

II. The First Issue: Failure to Follow Procedure

[5] The Consent Judgment was submitted via the Court's e-mail filing system. The e-mail request which accompanied the submission states: "no action number exists for this matter. This is an originating document". When the Consent Judgment was returned to the parties with the AJ's endorsement, it had been assigned Court File No. 2101-15856. The Consent Judgment is the only document filed under this Court File No.

[6] The Applicant contends that the Consent Judgment does not constitute a proceeding before the Court pursuant to section 8 of the *Judicature Act*, RSA 2000, c J-2 ("*Judicature Act*"). It references r. 3.1 and argues that the "Rules are explicit in stating that a proceeding, whether applications or actions, may only be taken in accordance with the Rules" which, as provided for in r. 3.2(1), require that an action be commenced by filing a statement of claim (r. 3.2(1)(a)); an originating application (r. 3.2(1)(b)); or a notice of appeal, reference or other procedure or method specifically authorized or permitted by an enactment (r. 3.2(1)(c)). The Applicant argues that as the Consent Judgment is the only document ever filed in Court File No. 2101-15856, proceedings were never effectively commenced in accordance with the Rules.

[7] Further, the Applicant says I may set the Consent Judgment aside pursuant to r. 1.4(2)(b) on the basis that the process followed regarding its endorsement was contrary to law (r. 1.4(2)(b)(i)) or was exercised for an improper purpose (r. 1.4(2)(b)(iii)). Alternatively, the Applicant suggests I could declare the Consent Judgment a nullity and set it aside pursuant to my broad powers under section 8 of the *Judicature Act*, RSA 2000 c J-2 which allows me to "grant any appropriate remedy that is appropriate in the discrete circumstances of a case": *Pyrrha Designs Inc v Plum and Posey Inc*, 2016 ABCA 12 at para 8.

[8] The Respondents acknowledge that proceedings were not commenced pursuant to r. 3.2(1) but point out that the AJ would have known from the e-mail request that there was no subsisting action number and argue that in endorsing the Consent Judgment, the AJ waived the applicable procedural requirements (such as those found in r. 6.3). The Respondents further point out that when the application was made in December 2021, pandemic restrictions, which required parties to submit a Consent Judgment via the e-filing process, precluded counsel from attending in person and making the usual oral submissions in support of the application. Finally, the Respondents say that the time allowed for setting aside the Consent Judgment pursuant to r. 1.5(1) has long since passed.

III. The Second Issue: Mr. Zhao Is Not a Lawyer

[9] Mr. Zhao is not a lawyer by profession nor is he a member of the Law Society of Alberta.

[10] The Applicant says Mr. Zhao does not possess the capacity to practice law, which, pursuant to section 106(1)(d) of the *Legal Profession Act*, RSA 2000 c L-8 (the "*LPA*"), does not permit him to "settle or negotiate in any way for the settlement of any claim for loss or damage founded

in tort”. This would apply to the damages awarded to Mr. Lam and Ms. Wang for damage to their reputations. In any event, the Applicant argues that Mr. Zhao’s signing of the Consent Judgment does not fall into the exception created by section 106(j) of the *LPA*, which allows corporate officers and employees to prepare a document for the use of the corporation, partnership or unincorporated body or to which it is a party.

[11] The Respondents’ view is that, as the CEO of New Star Energy Ltd., Mr. Zhao was a person with real and ostensible authority, that Mr. Zhao did not hold himself out to be a practising lawyer, and that his role was limited to simply signing the Consent Judgment which he was authorized to do as evidenced by an Affidavit of Corporate Signing Authority which accompanied the Consent Judgment when it was submitted. The Respondents say that if the clerks or the AJ had any issue with Mr. Zhao’s approval, they could have raised objections and rejected the Consent Judgment on that ground.

IV. Is a Procedurally Flawed Order a Nullity?

[12] The Respondents’ position is that irrespective of how the first two issues affect the validity of the Consent Judgment, I do not have the general power under section 8 of the *Judicature Act* to set aside an order that has been granted by a court.

[13] This issue was addressed in *Mazepa v Embree*, 2014 ABCA 438 where the Alberta Court of Appeal had to decide whether an order which granted relief that had not been raised in the pleadings was void. The Court concluded at paragraph 9 that “procedural requirements... generally do not have any effect on the court’s jurisdiction”, should be considered “irregularities rather than jurisdictional in nature”, and do not “render the order a “nullity”. At paragraph 10 the Court noted:

In any event, there is an overriding principle that the orders of a superior court of record are never nullities. They perhaps should not have been granted, they may be based on procedural irregularities, and they may be undermined by reviewable error. They are, nevertheless, valid orders of the court until they are set aside. As the Court noted in *Virani v Virani*, 2006 BCCA 63 at para. 37, 52 BCLR (4th) 112:

It is convenient to note at this point that the notice of motion of the appellant seeking to have the order of the court declared a “nullity” was misconceived. An order of a court of superior jurisdiction is never a “nullity”, no matter how wrong it may be.

[14] The Court went on to cite similar authorities, including *Preston v Preston*, 2014 ABCA 247 where the Alberta Court of Appeal stated at paragraph 2 that: “an order of a superior court is never a nullity. If it is to be set aside or varied, proper legal processes must be followed”.

[15] The rationale for the rule was explained in *Lofthaug v Canadian Immigration Specialists Ltd.*, 2011 ABQB 609 at para 37, where this Court cited the following passage from *Bank of Montreal v Ostapowich (Trustee of)* (1996), 144 Sask R 207 (CA) at paragraphs 11 and 12:

The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final

determination by the Court of the rights and obligations of the parties. A consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment...

...

No matter from what perspective one views the application by the bank it is in substance an attack on a valid subsisting judgment of the Court and thus the appellant is correct such judgment can only be attacked in one of the three aforementioned ways:

1. By an application to the Court to vary its judgment;
2. By appeal;
3. By a separate action to set aside the judgment on the basis it was obtained by fraud. See: *R. v. Wilson*, [1984] 1 W.W.R. 481.

[16] At paragraphs 41 and 42 of *Lofthaug*, this Court went on to note consent judgments should not be set aside lightly and then, only on proof of fraud or deceit: referencing *DPL v PAE* (1984), 60 AR 87 (CA) at para 41; and *Neis v Yancey*, 1999 ABCA 272, 250 AR 19 at para 42. See also *Alberta (Maintenance and Recovery, Director) v DL*, 1984 ABCA 5 at para 4.

V. Decision

[17] The parties do not disagree that proceedings before a court must comply with the procedures set out in the Rules. It is not disputed that when the Consent Judgment was submitted to the AJ, it did not comply with the requirements of r. 3.2(1). However, the AJ would have been aware that no action number had been assigned and that the Consent Judgment was the only document in the court file. The AJ could have rejected the Consent Judgment pending clarification regarding procedural requirements but declined to do so. As held in *Ostapowich*, the function of the AJ was not to simply rubber stamp the proposed form of Consent Judgment but to make a judicial determination regarding the parties' substantive rights. Whatever procedural flaws underlay the Consent Judgment when it was submitted for the AJ's endorsement were obviated by the AJ's determination that the Consent Judgment should be granted. The AJ's determination, which crystallized the parties' substantive rights vis-à-vis each other, resulted in a binding judicial decision which I find I do not have the general power to set aside pursuant to section 8 of the *Judicature Act*.

[18] Given that the Applicant has not sought to set aside the Consent Judgment pursuant to r. 1.5 and has not formally appealed the Consent Judgment (both remedies would now appear to be out of time), I do not see what further jurisdiction I may exercise in respect of this application.

[19] I understand that the Applicant has commenced a separate action wherein it alleges the agreement that is the subject of the Consent Judgment was part of a fraudulent scheme entered into among Mr. Zhao, Mr. Lam, and Ms. Wang. That action is not the subject of my decision, but I simply raise it to note there is a venue where the parties' entitlement to the monies that are the

subject of the Consent Judgment ultimately will be decided. Should the parties find it useful to meet with me to devise a procedural order to move that matter along, I would be happy to do so.

VI. Disposition

[20] The monies that are the subject of the Consent Judgment have been paid into Court where they shall remain pending further Court order.

[21] The Respondents are presumptively entitled to their costs. If the parties cannot agree on costs, they shall provide their submissions within 30 days.

Heard on March 14, 2024

Dated at the City of Calgary, Alberta on March 21, 2024.

O.P. Malik
J.C.K.B.A.

Appearances:

Lillian Pan K.C. and Brenden Roberts
for the Applicant, New Star Energy Ltd.

Kenneth P. Reh
for the Respondents, Shing Tak (Michael) Lam and Weija Wang