

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Summit Leasing Corporation v. Rutledge*,
2024 BCSC 1989

Date: 20241030
Docket: S235189
Registry: Vancouver

Between:

Summit Leasing Corporation

Plaintiff

And

Donald Graham Rutledge and Leslie Anne Rutledge

Defendants

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Plaintiff:

D. Frenette

Counsel for the Defendant D.G. Rutledge
and L.A. Rutledge:

J. Shields

Place and Date of Hearing:

Vancouver, B.C.
August 20, 2024

Place and Date of Judgment:

Vancouver, B.C.
October 30, 2024

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Introduction

[1] The plaintiff (“Summit”) applies, by notice of application filed November 29, 2023, for orders for document production from the defendant Donald Rutledge and his spouse, Leslie Rutledge, in furtherance of an examination in aid of execution, pursuant to Rule 13-4(11) of the *Supreme Court Civil Rules* [*Rules*]. Summit also seeks an order pursuant to Rule 13-4(5) compelling Leslie Rutledge to attend an examination in aid of execution.

[2] As the application respondents share the same surname, I will follow counsel’s lead and refer to them as “Donald” and “Leslie”, with no disrespect intended.

Background

[3] This action arises out of a loan in the amount of \$250,000 USD from Summit to Donald. A loan agreement dated September 29, 2021, provided that the loan principal would be advanced in two tranches as follows:

- a) \$150,000 USD upon the signing of a promissory note; and
- b) \$100,000 USD upon the issuance of shares of Aquagold International Inc.

The loan principal was to be repaid on or before December 31, 2021.

[4] As security for the loan, Leslie and her company executed a collateral security agreement dated September 29, 2021, in which she pledged various chattels as security for the loan.

[5] As instructed by Donald, Summit paid the loan principal, in the two tranches, to Leslie by way of wire transfer to her Bank of Montreal account. No part of the loan has been repaid.

[6] Summit commenced this action against both Donald and Leslie on July 20, 2023, and filed a summary trial application on the same day. No response to civil claim was ever filed.

[7] This action was discontinued as against Leslie on August 29, 2023.

[8] On September 21, 2023, Justice Sharma granted judgment against Donald and ordered that he pay the plaintiff the Canadian equivalent of \$250,000 USD, contractual interest of 30 percent per annum, compounded monthly, from December 31, 2021, and all legal fees and recovery costs of Summit.

[9] Roughly \$10,000 has been recovered to date, and the debt owing is now approaching, if not exceeding, \$500,000 USD.

Timeline of this application

[10] As noted at the outset, this application was filed on November 29, 2023. It was initially set for hearing in regular chambers on December 14, 2023 and was adjourned several times, initially at the behest of the respondents as they were self-represented and seeking counsel. It was eventually set for a full day on August 20, 2024, to be heard together with a second application filed by Summit on May 24, 2024. On the day of the hearing there was insufficient time to hear the second application and it was adjourned generally.

[11] Despite filing this application for the purpose of obtaining documents in advance of the examination in aid of execution, the plaintiff conducted an examination of Donald on December 11, 2023, prior to the initial hearing date set for this application.

[12] The Rutledges' application response was filed on February 12, 2024, after they retained new counsel. In that application response, the respondents submit that there is insufficient evidence to ground most of the orders sought. In particular, they reference the fact that no transcript of the examination in aid of execution of Donald was provided.

[13] In response to this complaint, the applicant has provided a reply affidavit from Summit's director Allan MacKenzie on February 20, 2024, attaching amongst other things the transcript from the December 11, 2023 examination of Donald.

[14] The respondents now complain that this is impermissible case-splitting, as they are unable to provide further responding material without leave of the court. It is notable that they have not sought such leave, despite having had months to do so, but instead have made the tactical decision to object to the admissibility of the transcript.

[15] Case-splitting has been described as a failure to adduce essential evidence in the first instance, followed by an attempt to “patch-up” the case under the guise of reply evidence: *Slaughter v. Ximen Mining Corp.*, 2018 BCSC 573 at para. 56; *Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd.*, 2009 BCSC 938 at para. 67, aff’d 2011 BCCA 473. *Slaughter* and *Lost Lake* are distinguishable, however, in that the offending affidavits contained evidence that was available and could have been provided at the outset. In the case at bar, Donald’s examination in aid of execution did not occur until after this application was filed, and therefore the transcript could not have been provided as part of the supporting affidavit evidence. Although not truly in the nature of reply, the transcript is new evidence that was not previously available. The prejudice to the application respondents could have been easily remedied by permitting them to adduce further evidence in response, which they have not sought to do. The consequence of that strategic decision falls on them.

Document production from Donald

[16] Rule 13-4(2) provides for a wide-ranging examination of a judgment debtor with respect to their finances and means of satisfying the judgment:

Examination of judgment debtor

(2) If a judgment creditor is entitled to issue execution on or otherwise enforce an order of the court, the judgment creditor may examine the judgment debtor for discovery as to

- (a) any matter pertinent to the enforcement of the order,
- (b) the reason for nonpayment or nonperformance of the order,
- (c) the income and property of the judgment debtor,
- (d) the debts owed to and by the judgment debtor,
- (e) the disposal the judgment debtor has made of any property either before or after the making of the order,

(f) the means the judgment debtor has, had or may have of satisfying the order, and

(g) whether the judgment debtor intends to obey the order or has any reason for not doing so.

[17] With respect to production of documents, Rule 13-4(11) provides:

(11) Unless the court otherwise orders, the person to be examined for discovery under this rule must produce for inspection on the examination all documents in the person's possession or control, not privileged, relating to the matters referred to in subrule (2).

[18] A judgment creditor is entitled to production of documents pursuant to Rule 13-4(11) ahead of the examination in aid of execution: *Bagash and Ansari v. Burns*, 2005 BCSC 213 at para. 6, *Resolution and Collection Corp. v. Nishiyama*, 2017 BCSC 2085 at para. 37.

[19] The judgment debtor has identified certain concerns with some of the documents sought in the notice of application, being that some of the requests:

- a) are too broad and do not identify the requested documents with sufficient specificity;
- b) ask for information rather than documents, which is not what Rule 13-4(11) provides;
- c) relate to publicly available documents that the plaintiff could obtain elsewhere;
- d) seek corporate records without any notice to the corporations or efforts to obtain the records from those corporations directly;
- e) seek documents that are irrelevant; and
- f) seek documents that are not in Donald's possession and may not exist.

[20] In response to some of these complaints, the plaintiff invites the court to pare down the list of documents to be ordered. Frankly, that is the responsibility of

counsel and it should not fall to the court to winnow out the chaff. The result of the plaintiff's approach is that this application took an inordinate amount of court time, and resulted in a reserve decision so that the court could closely review the requests and engage in the winnowing exercise.

[21] I agree that some of the requests are too broad, and I have narrowed the orders that I will make. I am also limiting the order to production of documents rather than information. Any explanation required as to the details disclosed in the documents is more properly the subject of a further examination.

[22] With respect to publicly available documents, there is no requirement that a judgment creditor must exhaust other avenues to obtain documents that are in the judgment debtor's possession or control. Court documents and demands received by the judgment debtor from other creditors are producible: *Bagash*, para. 7.

[23] The corporate records sought are in relation to corporations of which Donald has admitted under oath to being a shareholder, director and/or officer. For some of the companies he is the sole shareholder. The documents sought are those that a BC company is required to keep pursuant to s. 42 of the *Business Corporations Act* [BCA]. The notice of application seeks the full gamut of those documents listed in s. 42 of the *BCA*, without regard to relevance or whether they actually exist. It also disregards the fact that some of the corporate entities are not BC corporations, and may be subject to different record-keeping requirements in their jurisdictions.

[24] With respect to documents that may not be in Donald's possession or control, the plaintiff says that they would be satisfied with an affidavit to that effect from Donald.

[25] I make the following orders with respect to the judgment debtor Donald Rutledge:

[26] Pursuant to Rule 13-4(11), within 30 days of the date of this order, Donald Rutledge shall produce to the plaintiff any and all of the following documents which are in his possession or control:

- a) Documentation regarding any and all income received by him for the period January 1, 2021 to date which was not reported on Donald's income tax returns;
- b) Copies of all statements for all bank, investment, trust or credit accounts, whether in or outside of Canada, held in Donald's name either solely or jointly with another account-holder for the period January 1, 2021 to date;
- c) Any trust indenture, bare trust agreement, or other instrument or written agreement according to the terms of which any other party is named trustee for Donald or otherwise holds property or an interest in such property on his behalf;
- d) All pleadings and other documents filed with the United States District Court Southern District of Florida as set out in paragraph 1(f) of the plaintiff's notice of application filed November 29, 2023;
- e) For each of Aqua Gold International Inc., Arctic Enterprises Inc., Formula Financial LLC, Golden Eye Resources LLC and Pony Mountain Gold Corp., copies of:
 - i. The company's minute book;
 - ii. The certificate of incorporation, conversion, amalgamation or continuation, as the case may be; any certificate of change of name and any certificate of restoration applicable to the company;
 - iii. The central securities register for the company;
 - iv. The register of directors for the company;
 - v. Each of the audited financial statements (or unaudited, if the company has not produced audited financial statements) of the company and its subsidiaries from January 1, 2021 to present, whether or not

consolidated with the financial statements of the company, including the auditor's reports; and

- vi. All tax returns filed by the company in any jurisdiction for the 2021 and 2022 tax years.

[27] I am not ordering production of the remaining documents listed in Schedule A to the notice of application as there is insufficient evidence as to the relevance of such documents. The relevance of the documents I have ordered should be obvious. The plaintiff may make further enquiries of Donald at another examination and has liberty to reapply with respect to the remaining documents upon providing further and better evidence as to their relevance.

[28] Any documents already produced by Donald need not be produced again.

[29] In the event that any of the above-listed documents do not exist or are not in Donald's possession or control, he shall provide an affidavit within 30 days of this order setting out, for each category of document listed, whether the documents:

- a) have been produced,
- b) do not exist, or
- c) are not in his possession or control,

and his efforts to obtain such documents, if any.

Examination of Leslie

[30] Rule 13-4(5) provides:

Examination of person other than judgment debtor

(5) On being satisfied that any other person may have knowledge of the matters set out in subrule (2), the court may order that other person to be examined for discovery concerning the person's knowledge.

[31] This court has found spouses to be compellable under this rule and its predecessor Rule 42A(4): *Dezcam Industries Ltd. v. Kwak*, [1982] 38 B.C.L.R. 121

(S.C.); *Advance Magazine Publishers Inc. v. Fleming*, 2002 BCSC 995 [*Advance Magazine*]; *Columbus Networks Corporation v. Collins*, 2016 BCSC 201.

[32] To be compellable, the court must be satisfied that the person may have knowledge of the matters set out in subrule (2). With respect to a spouse, this is a fairly low bar. Most people will have at least some knowledge of their spouse's financial circumstances, including income, assets and debts.

[33] In the case at bar, I am satisfied that Leslie is a person who may have knowledge of the matters set out in subrule (2) in relation to her spouse Donald. It is undisputed that Leslie was involved in the underlying transaction. The principal loan funds were advanced to Leslie's accounts, at Donald's direction. Leslie pledged security for the loan and executed a collateral security agreement. Leslie has sworn an affidavit in this action in which she deposed that she "facilitated the transfer of the loan of \$250,000 USD. Donald Graham Rutledge did not have a USD account therefore, to avoid exchange fees my account was used." This facilitating of the transfer of funds on behalf of her spouse is sufficient to establish that she is a person who may have knowledge of Donald's affairs. How much knowledge she has will be revealed at the examination.

[34] Leslie's obligation to answer questions under examination is limited to those matters set out in subrule (2). She is not required to answer questions about her personal financial circumstances, as that would be an unreasonable intrusion into her personal matters.

[35] Accordingly, I am ordering that Leslie shall attend for an examination in aid of execution in this matter. As was ordered in *Advance Magazine*, the examination is limited to her knowledge concerning Donald's ability to satisfy the judgment, the questions being confined to and by those matters set out in Rule 13-4(2) as they relate to Donald.

Document production from Leslie

[36] Rule 13-4(11), regarding production of documents, is not limited to a judgment debtor. Any person who is to be examined in aid of execution may be compelled to produce documents pursuant to that Rule.

[37] Summit is frank in that it seeks document production from Leslie as it believes that Donald may not be forthcoming in producing the requested documents that are in his possession or control. Many of the documents sought are duplicates of those sought from Donald. In this respect, the plaintiff is going too far. There is no reason to order both Donald and Leslie to produce the same documents. Leslie is not a judgment debtor and ought not be put to any greater burden than is necessary.

[38] Until Donald has had an opportunity to produce the documents that I have ordered or an affidavit as set out in para. 29 herein, the application for production of documents by Leslie is premature. Paragraph 2 of the Notice of Application is dismissed, with liberty to reapply after Donald has complied with this order or after 30 days, whichever is sooner.

Costs

[39] As success has been somewhat mixed, each party shall bear their own costs of this application.

“Associate Judge Hughes”