

SUPREME COURT OF YUKON

Citation: *G&B Fuels Inc. v. Jer-Cal Holdings Ltd.*,
2020 YKSC 27

Date: 20200714
S.C. No.: 19-A0068
Registry: Whitehorse

BETWEEN:

G&B FUELS INC.

PETITIONER

AND

JER-CAL HOLDINGS LTD., PETRO-CANADA INC.,
YESTERDAY MECHANICAL LTD. GUS POIRIER CONSTRUCTION LTD. AND
DRAGON CONSTRUCTION LTD.

RESPONDENTS

Before Madam Justice S.M. Duncan

Appearances:

Daniel R. Bennett (by telephone) and

Rowan MacPhail

Anais Durante (by telephone)

Counsel for the Petitioner

Appearing on behalf of Jer-Cal Holdings Ltd.

REASONS FOR JUDGMENT

[1] DUNCAN J. (Oral): This is an application by the petitioner, G&B Fuels, for an order absolute of foreclosure on the right of redemption of two mortgaged properties belonging to the respondent, Jer-Cal Holdings, specifically, Lots 16 and 17, Block 2, Plan 22463, Watson Lake, on which Jer-Cal operates a gas station, convenience store, and hotel.

[2] This matter is intertwined with the family law proceeding between the sole director and shareholder of Jer-Cal Holdings Ltd., Mr. Mark Durante, and his ex-wife, Ms. Anais Durante, the manager and operator of the Jer-Cal Holdings properties.

[3] The primary issue is whether Ms. Durante had the authority to bind Jer-Cal Holdings in the proceedings that have given rise to these foreclosure proceedings.

[4] Although Ms. Durante and her lawyer, Mr. Nicholas Davies, were the only contacts of G&B Fuels throughout their dealings with Jer-Cal, which commenced in 2015, Ms. Durante's argument of the absence of authorization to represent Jer-Cal Holdings was raised for the first time as her ground for opposing this application which is currently before the Court.

[5] I will first review the background to this application, assess the validity of the grounds for the application, and then address the argument of Ms. Durante, before setting out my conclusion.

[6] I would first note that there are other respondents to this application, all of whom have registered interests on the properties. None of them has responded to this application or the previous one on October 31, 2019, when the order nisi was granted, although all of them were duly served.

[7] I also note that Ms. Durante is self-represented in these proceedings, although from reviewing the material which contains some legal analysis and references to case law, she has had some legal assistance. Ms. Durante did confirm this in her submissions orally.

[8] G&B Fuels is a supplier and distributor of fuel for independent gas stations in Alberta, British Columbia, Saskatchewan, and the Yukon. The company is extra-territorially registered in the Yukon. Greg Keffer is the authorized representatives of G&B Fuels in this application.

[9] Jer-Cal Holdings is a B.C. incorporated company, extra-territorially registered in the Yukon. It holds the two properties at issue in this application on which the gas station, restaurant, and motel operate. Mr. Mark Durante is the sole shareholder and director and Ms. Anais Durante is his ex-wife. They separated in 2012.

[10] The order of Justice Gower made in August, 2013 in the family law proceeding, declared that Ms. Durante was entitled to participate in the management of the three businesses owned by Jer-Cal equally with Mr. Durante. In fact, Ms. Durante has become the sole operator and manager of these businesses.

[11] G&B Fuels began to supply fuel to Jer-Cal in May of 2015. Ms. Durante ordered the fuel, signed for the deliveries, and agreed to pay for the fuel.

[12] Overdue accounts for the fuel began to accumulate on or about August, 2017. Jer-Cal stopped paying the invoices altogether. The outstanding principal amount at that time was \$242,260.92.

[13] As a result of this, G&B Fuels started an action in the Supreme Court of Yukon against Jer-Cal in November, 2017 for recovery of the unpaid debt.

[14] Jer-Cal defended the action through a lawyer, Mr. Nicholas Davies, who was also Ms. Durante's lawyer in the family law proceeding against Mr. Durante. Although at one point, Mr. Davies did provide a notice of withdrawal as counsel representing Jer-Cal, he later served a notice of appointment as counsel for Jer-Cal before the minutes of settlement in the debt action were signed.

[15] The debt proceeding was settled in October, 2018. The minutes of settlement provided that Jer-Cal would make regular monthly payments to G&B Fuels, secured by a mortgage on the two properties.

[16] The minutes of settlement also contained provisions to ensure that Ms. Durante received authorization to bind Jer-Cal to the agreement related to the mortgage and the payments. These were: first, for Ms. Durante to seek authorization in writing from Mr. Durante, and if that were not forthcoming, then to seek authorization from the accountant of Jer-Cal.

[17] This process was followed and in March, 2019, the accountant of Jer-Cal provided authorization to Ms. Durante to act on behalf of Jer-Cal with respect to the minutes of settlement and the mortgage. Although it was signed three days later than the requested date, it was accepted and acted upon by Ms. Durante and her lawyer.

[18] Post-dated cheques for the payment of the debt, as required by the minutes of settlement and the mortgage, were provided and signed by Ms. Durante.

[19] The first two cheques were rejected due to insufficient funds. The mortgage was in default. It was not cured after notice was given to Mr. Davies. The foreclosure proceedings were started in July of 2019 and Mr. Davies provided notice of them to Mr. James Vilvang, the lawyer for Mr. Durante in the family law proceedings.

[20] In October, 2019, G&B Fuels applied for an order nisi in the foreclosure proceedings on notice to Jer-Cal, Mr. Davies, and Mr. Vilvang. Ms. Durante responded to this application, on behalf of Jer-Cal, filing an appearance, response, and affidavit. She consented to the order nisi on the condition that the redemption period be extended to six months. She further advised of her intention to bring an application in the family law proceedings for an order to access one of Jer-Cal's bank accounts that held U.S. funds, presumably to assist in paying the outstanding debt.

[21] The order nisi was granted on October 31, 2019, with a six-month redemption period, as sought by Ms. Durante, ending April 30, 2020.

[22] The order in the family law proceeding granting access to the U.S. dollar account of Jer-Cal by Ms. Durante was issued on January 7, 2020. However, to date, no payments have been made on the amount owing under the mortgage. The total as of April 30, 2020, is \$264,873.27.

[23] G&B Fuels therefore brings this application under Rule 57 and para. 6 of the order nisi for an order absolute, that is, a final order of foreclosure.

[24] Although G&B Fuels did provide law for the test for extension of the redemption period, I find there is no need to address this, as Ms. Durante of Jer-Cal is not making this argument.

[25] Ms. Durante's only argument to support her opposition to this application is that she was never properly authorized to act on behalf of Jer-Cal. Therefore, she says the minutes of settlement, the mortgage, and the order on consent reflecting these are invalid and G&B Fuels is prevented from obtaining a final order. As previously noted, this is the first time this argument has been raised by Ms. Durante. She did consent to the order nisi on one condition, which was granted, that is, a six-month redemption period, and she did not appeal the order.

[26] Ms. Durante's argument is that:

- i) Mr. Mark Durante was the sole director and shareholder of Jer-Cal, and still is, and he did not approve the minutes of settlement, the mortgage, or the consent order;
- ii) Mr. Davies was not authorized to represent Jer-Cal in the foreclosure proceedings;

- iii) the onus is on G&B Fuels to satisfy the Court that it entered into the settlement without knowledge that Jer-Cal had not authorized it or that Mr. Davies had the right to represent Jer-Cal in negotiations and in court.

[27] Ms. Durante says that G&B Fuels cannot meet this onus. In fact, she says they and their lawyers knew that Mr. Davies had no authority to file the appearance, statement of defence, and notice of appointment of lawyer in the action and that she had no authority to negotiate the minutes, mortgage, and consent order on behalf of Jer-Cal.

[28] Ms. Durante also relies on s.14(c) of the minutes of settlement, which provides that if no authority from Mr. Durante or the accountant is forthcoming, Ms. Durante will make an application in the family law proceeding for an order authorizing execution and delivery of the settlement documents, and that all of this should have been raised with the Court before the consent order was entered.

[29] I understand that Ms. Durante's position in this matter appears to be compromised by her disputes with her ex-husband over the family assets, of which Jer-Cal is one. However, on review of all the materials, case law, and submissions in this matter, I do not accept Ms. Durante's argument that G&B Fuels cannot rely on her representations on behalf of Jer-Cal thereby making the mortgage, minutes of settlement, and consent order invalid.

[30] I agree with Ms. Durante in one respect, though. This issue of whether Ms. Durante could represent and bind Jer-Cal was recognized by Mr. Davies, Ms. Lang, and G&B Fuels at the time the minutes of settlement and the consent order were entered into. However, the provisions in the 2013 order of Mr. Justice Gower and the

minutes of settlement address this issue specifically. G&B Fuels is also entitled to rely on the past actions of Ms. Durante (since 2015) and the fact that she did not raise this issue until now, the last stage of the foreclosure proceeding.

[31] More specifically:

- i. the 2013 order provides that Ms. Durante has an equal right to participate in the management of Jer-Cal;
- ii. Ms. Durante was the sole contact with G&B Fuels in ordering, receiving, and delivery of fuel, as well as making payments;
- iii. Ms. Durante responded to the debt action on behalf of Jer-Cal, represented by Mr. Davies;
- iv. Mr. Davies was candid that he would not represent Jer-Cal if the matter proceeded to litigation and clearly stated that he would represent Jer-Cal and Ms. Durante in the negotiation of a resolution, which he did;
- v. the minutes of settlement were signed by Ms. Durante, but only paras. 12 to 17 applied to her because she had not at that point received formal authorization from Mr. Durante or the accountant to bind Jer-Cal. This shows everyone's awareness of the issue now being raised by Ms. Durante and also shows their agreement on how to manage that issue;
- vi. Ms. Durante, through her counsel, Mr. Davies, followed the steps set out in the minutes of settlement to obtain authorization — namely, she obtained it from the accountant of Jer-Cal after receiving no response from Mr. Durante — so it was not necessary for Ms. Durante herself to make application in the family law proceeding;

- vii. the consent order converting the minutes of settlement into a court order was signed by Ms. Durante but not until January 16, 2020, well after authorization and approval of her to act on behalf of Jer-Cal was received;
- viii. Ms. Durante responded to the application for order nisi in October of 2019, did not raise the authorization issue then and consented to the order, except for the length of redemption period. Her request to extend it to six months was ultimately granted;
- ix. Ms. Durante did not raise the authorization issue as a ground for invalidating the settlement until this application for final order was brought, although she had multiple previous opportunities to do so, including appealing the order nisi.

[32] I find that Ms. Durante was authorized to act on behalf of Jer-Cal throughout.

[33] I also find that, if necessary, that the so-called "indoor management rule" developed at common law applies in this situation. As noted by counsel for G&B Fuels, it provides that third parties are entitled to assume that corporate agents with whom they interact have the authority to bind the corporations they represent. The intention of this rule is to ensure "that parties dealing with a corporation are entitled to assume that a corporation's internal policies have been followed" to ensure protection of innocent third parties (see *Accra Wood Products Ltd. (Bankruptcy of)*, 2014 BCSC 1259, at para. 18).

[34] I appreciate that Ms. Durante has provided a number of cases in support of her argument. One she relies on heavily is from 1914 of the Alberta Court of Appeal, while others are from 1874, 1923, 1931, 1955, and 1980. The most recent cases that she provides are dated 1992. While older cases may set out principles that may have some

relevance today, I find that the cases she has provided are distinguishable and I am not persuaded by them.

[35] Finally, as counsel for G&B Fuels has pointed out, if I accept Ms. Durante's argument that she is not authorized to represent Jer-Cal, then she has no standing in this matter, as she is not a party to the action. She did request to be added as a party but this request was denied by G&B Fuels, and she did not bring a court application to be added.

[36] It would be for Jer-Cal to respond with this objection that Ms. Durante is now raising. No one from Jer-Cal has responded to this application. Mr. Durante and Jer-Cal's office in Whitehorse were duly served.

[37] Although it is not in evidence, Ms. Durante did say in submissions in answer to one of my questions that Mr. Durante is aware of this application and believes the foreclosure should proceed. As I said at the outset, it does appear that this matter is tied in with the family law dispute and I have some sympathy with Ms. Durante as the operation of these businesses has been her livelihood for some years. However, as Ms. Durante herself noted, Mr. Keffer of G&B Fuels has been more than patient in achieving some resolution of this fairly significant debt owed to his company from Jer-Cal.

[38] I accept that Jer-Cal is bound by the minutes of settlement, the mortgage, all confirmed by the court order.

[39] As an aside, Ms. Durante did make some submissions that her lawyer had given her bad advice and that she relied on to her detriment. If she continues to believe that this is the case, then she does have other avenues to pursue with respect to that.

[40] The order will go generally as drafted. However, a few changes are needed.

[41] One of the first changes is in the preamble. On hearing, it should be Daniel Bennett instead of Meagan Lang.

[42] Paragraphs 1, 2, 3, and 4 can stay as drafted.

[DISCUSSIONS]

[43] In paras. 5 and 6, before 12 noon on July 31 will be set as the time and date.

[DISCUSSIONS]

[44] Costs are to be awarded to the petitioner according to the Yukon Supreme Court Tariff, Category B.

[45] Mr. Bennett will redraft and file the order. The requirement for signatures and approval is waived.

[46] Last, the words "and upon being reserved to this date" will be added, so it is clear when it was heard and when it was reserved to.

DUNCAN J.