

SUPREME COURT OF YUKON

Citation: *Murphy v Old Crow Development Corporation*,
2021 YKSC 52

Date: 20211001
S.C. No. 21-A0023
Registry: Whitehorse

BETWEEN

STEVEN MURPHY

PLAINTIFF

AND

OLD CROW DEVELOPMENT CORPORATION

DEFENDANT

Before Justice G.M. Mulligan

Counsel for the plaintiff

Gary W. Whittle

Counsel for the defendant

Morgan Burris

Counsel for dänä näye Ventures

James Tucker,
by agent Stephanie Dragoman

REASONS FOR DECISION

INTRODUCTION

[1] The parties to this proceeding are Steven Murphy (“Murphy”) and Old Crow Development Corporation (“OCDC”). At issue is the plaintiff’s request for summary judgment on a Promissory Note for \$300,000 made to Murphy by OCDC and Wandering Star Winter Road Transport Inc. (“Winter Road”) jointly and severally. Mr. Murphy has not claimed against the co-maker Winter Road, instead pursues OCDC severally. I pause here to note that Winter Road is a company owned and directed by Murphy.

[2] The terms of the note, its execution and demand for payment are not in dispute.

[3] OCDC's defence can be summarized by referring to para. 1 of its outline:

The defendant, Old Crow Development Corporation ("Old Crow Development") opposes the plaintiff's application for summary judgment because the question of whether Old Crow Development is liable to Mr. Murphy on the promissory note is a *bona fide* triable issue.

[4] In addition to its defence, OCDC seeks the following additional relief:

1. an order that this proceeding be consolidated with S.C. No. 21-A0049, and that plaintiffs Steven Murphy and Wandering Star Winter Road Transport Inc. file an amended statement of claim;
2. leave to file the proposed counterclaim of the defendant and an extension of the time prescribed by rule 21(3) and 21(8) of the Rules of Court to serve the counterclaim on the plaintiff and defendants by counterclaim;
3. an order for the immediate appointment of a receiver over the property of Wandering Star Joint Venture, a joint venture between Wandering Star Winter Road Transportation Inc. and Old Crow Development Corporation, on terms to be agreed upon by counsel or upon further direction of the Court;
4. an order that the property of the Wandering Star Joint Venture be preserved pending the receivership of the Wandering Star Joint Venture;
5. costs; ...

BACKGROUND

[5] Both parties filed affidavits. Mr. Murphy's first affidavit makes reference to the Promissory Note, the demand and the non-payment. Geordan Clark, general manager of OCDC, swore an affidavit for the defendant. OCDC was formed in 2017 to promote and facilitate economic development within the Village of Old Crow. Mr. Murphy's

second affidavit responds to Mr. Clark's affidavit and speaks to his hiring of an expert on the Joint Venture financial history.

[6] In 2019, Winter Road and OCDC entered into a joint venture agreement for the purpose of moving cargo to Old Crow using equipment on winter roads. The joint venture was entitled Wandering Star Joint Venture Agreement ("Joint Venture")

[7] Murphy deposited \$300,000 secured by the Promissory Note into the Joint Venture bank account. It is not necessary for the purposes of this hearing to review in detail all of the financial transactions referred to in Mr. Clark's affidavit.

[8] Loads were transported in the winter of 2020-2021. But activity ceased in 2021 and has not resumed.

[9] Mr. Clark's affidavit deposes that the Joint Venture purchased a substantial amount of equipment from the funds advanced by Murphy together with funds procured and deposited into the Joint Venture bank account by OCDC. Mr. Murphy or his company Winter Road presently has care and control of this equipment.

[10] Mr. Clark deposes that this equipment has a value of not less than \$750,000. Mr. Clark deposes that the Joint Venture made several payments to Murphy and his company in the months that followed.

[11] These may have been reimbursements to Murphy for his expenses. Mr. Murphy has undertaken a forensic audit in support of his position that no payments were received on the note.

Counterclaim

[12] In addition to its defence of the summary judgment claim OCDC proposes a counterclaim against Murphy and Winter Road. Relief sought is set out in the defendant's outline at paras. 40 and 41:

40. By way of counterclaim, Old Crow Development is seeking the following relief against Mr. Murphy and Winter Road Inc. in respect of these same issues:
 - (a) general and special damages for the conversion of the Venture's equipment and cash;
 - (b) an order that a receiver be appointed over the property of the Venture;
 - (c) judgment against Winter Road Inc. for its share of liability to Old Crow Development for Old Crow Development's excess contributions to the Venture, and the balance of the Venture's debts; and
 - (d) an order that Winter Road Inc. contribute to and indemnify Old Crow Development for one half of any judgment obtained by Steven Murphy on the Promissory Note pursuant to the *Contributory Negligence Act*, R.S.Y. 2002, c. 42.
41. In addition, Old Crow Development's proposed counterclaim includes claims against Mr. Murphy, Winter Road Inc. and Wandering Star Aviation Inc. for repayment of the Short Term Loans.

Action S.C. No. 21-A0049

[13] Concurrent with this action, Winter Road issued a statement of claim against OCDC for breach of contract and other relief. In furtherance of the Joint Venture, Winter Road provided equipment and supplies, gaining a 49% interest in the Joint Venture. OCDC was required to contribute cash, gaining it a 51% interest in the Joint Venture.

[14] OCDC seeks to consolidate this action with S.C. No. 21-A0023.

Appointment of a Receiver

[15] OCDC seeks the appointment of a receiver over the property of the Joint Venture. Murphy has deposited funds in trust with his counsel as an alternative to the appointment of a receiver. A creditor, *dänä näye Ventures*, has an interest in this aspect of these proceedings and supports the defendant's application for a receiver.

ANALYSIS

The Note

[16] In considering this matter, I have directed my mind to the *Rules of Court* of the Supreme Court of Yukon. Rule 1(6) provides:

The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of

(a) the dollar amount involved in the proceeding,

(b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and

(c) the complexity of the proceeding.

[17] The purpose of the rule was succinctly stated by Seaton J.A. in *Memphis Rogues Ltd v Skalbania*, [1982] BCJ No 855 (BCCA):

... The purpose of the Rule is to reject, promptly and inexpensively, claims and defences that are bound to fail at trial. ...

[18] In *Hugues v Sharp*, [1969] BCJ No 430 (BCCA), Tysoe J.A. provided further guidance at para. 9:

A litigant must be allowed his day in Court, and must not be deprived of a trial in the ordinary way unless it is manifestly clear that he is without a defence that deserves to be tried. It is not the function of a Judge who hears an application under O. 14 to try disputed issues of fact or law. His duty and power are limited to determining whether, on the relevant facts and applicable law, there is a *bona fide* triable issue.

[19] Clearly this Court has discretion in applications such as this, as McLachlin Co.

Ct. J. (as she then was), stated in *Butkovsky v Jalbuena*, [1982] BCJ No 178 (BC Co Ct)

at para. 8:

I therefore proceed on the basis that this Court possesses a discretion as to whether to grant the summary judgment on the promissory note. The question then is whether in the circumstances of the case before me the goal of doing justice between the parties is best served by granting such judgment. One must start from the fact that the defendants, with knowledge of the obligation they were incurring, promised to pay to the plaintiff the principal amount of the loan together with the stipulated interest on November 5, 1981. The next question is whether there are "exceptional circumstances" which would justify departure from the usual rule that bills of exchange are to be treated as cash made out? ... [emphasis added]

[20] On the facts before her, it was found that there were no exceptional circumstances enabling a departure from the normal rule.

[21] Some 32 years later, in *Hryniak v Mauldin*, 2014 SCC 7, Chief Justice

McLachlin's court had an opportunity to provide guidance on summary judgment motions. As Karakatsanis J. noted for the Court at para. 60:

The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and

therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

Position of the plaintiff

[22] The plaintiff's position is clear. OCDC signed a promissory note for \$300,000 and after demand it has not been paid.

Position of the defendant

[23] The defendant's position is that the Court's discretion ought not to be exercised to grant summary judgment. There are *bona fide* triable issues and there is a claim for equitable set-off. The defendant relies on *Simon v Poirier*, 2020 YKSC 47. In that decision, Campbell J. summarized five principles applying to set off at para. 137, quoting from *Holt v Telford*, [1987] 2 SCR 193:

1. The party relying on a set-off must show equitable ground for being protected from his adversary's demands;
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim;
4. The plaintiff's claim and the cross-claim need not arise out of the same-contract; and
5. Unliquidated claims are on the same footing as liquidated claims. [citations omitted]

[24] The defendant's position in raising the issue of set-off is captured in para. 39(d) of its outline:

Mr. Murphy or Winter Road Inc. or both of them, have possession and control of the Venture's equipment, which as

a value of not less than \$750,000. Until Mr. Murphy and Winter Road Inc. allow the Venture's equipment to be sold to pay off the Venture's debts, the Venture's debt to Mr. Murphy on the Promissory note is set off in full.

Counterclaim

[25] OCDC seeks leave to file the proposed counterclaim and seeks an extension of the time prescribed to serve it.

[26] In *Raven v A&W Ranching Ltd.* [2014] BCSC 1359, Donegan J. stated at para. 39:

Practically speaking, an extension of time for filing a counterclaim is usually granted where no limitation problem has arisen because the alternative is for the defendant to commence a separate action and apply to have actions consolidated or heard at the same time: [citation omitted]

[27] The plaintiff opposes the counterclaim request.

[28] The defendant sets out that there has been no extraordinary delay and there are no limitation periods at risk. Its position is summarized at para. 51 of its outline:

The claims in the proposed counterclaim relate directly to the Venture and the financial obligations of the plaintiff and the proposed defendants by counterclaim. These claims should be heard together with the plaintiff's claim for the same reasons that this action should be consolidated with the Winter Road Action.

[29] I am satisfied that leave be granted to issue a counterclaim to be followed by prompt service in accordance with the *Rules of Court*.

Consolidation

[30] The defendant OCDC seeks to consolidate this action with action S.C. No. 21-A0049. It is the defendant in both actions. Mr. Murphy is the plaintiff in this action. Winter Road is the plaintiff in the second action. Murphy is the sole director of Winter

Road. The claim relates to the Joint Venture between Winter Road and OCDC. As previously noted, Steven Murphy loaned \$300,000 by way of promissory note and both OCDC and Winter Road executed the note. The relief sought includes rescission and damages.

[31] Rule 5(8) provides that proceedings may be consolidated at any time by court order. The plaintiffs do not consent to consolidation.

[32] In *Bene (Oval) Development Ltd v 1148538 BC Ltd, 2021 BCSC 1161*, Master Cameron provided a helpful list of factors to consider before exercising this discretionary relief:

13 In considering these questions, rooted in the authorities referred to by all counsel, the court may consider the pleadings and additional factors beyond the pleadings. Those factors include:

- Will the order sought create a saving in pre-trial procedures?
- Will there be a real reduction in the number of trial days taken up by the trials being heard at the same time?
- What is the potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may only have a marginal interest?
- And will there be a real savings in experts' time and witness fees?

14 The court has also recognized the following additional factors that will guide the exercise of the court's discretion:

- a) whether one proceeding is at a more advanced stage than the other.
- b) whether having the trials heard together will result in a delay of the trial of one of the proceedings and the prejudice of that delay outweighing the potential benefits of them being heard together.

c) whether there is a risk of inconsistent findings on identical issues.

d) whether one party may be deprived of their right to a jury trial.

[33] After considering these factors as they relate to these actions I am satisfied that an order for consolidation should be issued. Both actions are at preliminary stages.

Summary Judgment Application

[34] In my view there are exceptional circumstances here. To grant judgment on the Promissory Note would amount to a partial summary judgment in the face of a counterclaim, which raises the issue of set off. It would not be in the interests of justice to have duplicate proceedings.

[35] Furthermore, the consolidated action deals with Winter Road as plaintiff and OCDC as defendant. Winter Road or Mr. Murphy has care and control of the equipment purchased for the Joint Venture. Winter Road signed the same Promissory Note to Murphy.

[36] The Joint Venture has equipment assets but also liabilities to OCDC and others. In turn OCDC has a liability to Murphy, the Promissory Note. Put simply, these actions require the full machinery of a trial.

[37] After considering the issues, it is in the interests of justice that the plaintiff's claim, OCDC's defence and counterclaim and Winter Road's claim be tried together.

[38] Steven Murphy's application for summary judgment is dismissed. I decline to order amended statements of claim not yet sought by the plaintiff.

Appointment of a Receiver

[39] As part of its submissions OCDC seeks the appointment of a receiver over the property of the Joint Venture, as well as a preservation order.

[40] The plaintiff opposes this relief sought and points out the fact that it has deposited \$521,800 into its lawyer's mixed trust account.

The assets

[41] It is clear from the affidavits filed that the Joint Venture has almost no cash. It does have equipment that was acquired from several sources. Mr. Clark deposes that the Joint Venture purchased over \$700,000 worth of equipment. As he states in his affidavit at para. 40:

Pursuant to the terms of the Wandering Star Joint Venture Agreement, Winter Road Inc. contributed equipment with an agreed value of \$521,800 to the Joint Venture. Following the execution of the Wandering Star Joint Venture Agreement, the Joint Venture acquired additional equipment. For example:

- (a) on or about January 14, 2019, the Joint Venture brought two sets of trailers that Mr. Murphy ordered from Tait's Trailer Rentals for \$62,910;
- (b) on or about January 22, 2020, the Joint Venture reimbursed Mr. Murphy for \$39,000 that he spent to purchase a track system for a custom hauling trailer; and
- (c) on or about February 28, 2020, the Joint Venture purchased a snow cat from D'Aoust Environmental for about \$110,295.

[42] As to location and current value, Mr. Clark further states at para. 42:

I do not know the exact present value of the equipment owned by the Joint Venture because at all material times Mr. Murphy has maintained and continues to maintain control and possession of the Joint Venture's equipment.

[43] On behalf of OCDC, Mr. Clark sent a demand letter to Mr. Murphy and his company Winter Road in July 2021. The letter, filed as Exhibit “J” requested that:

Wondering Star Winter Road Transport Inc. prepare and deliver an itemized accounting of the Venture’s equipment, including the location, condition and expected current market value of each equipment item, by or before July 30, 2021.

[44] Neither Mr. Murphy or his company has responded to this demand.

[45] Mr. Murphy has not filed an affidavit in response to the issue of equipment location or value.

[46] I pause to note that the Supreme Court of Canada clarified that contracting parties must deal with each other in good faith. In *Bhasin v Hrynew*, 2014 SCC 71, Cromwell J. stated at para. 33:

In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

[47] It is not disputed that OCDC has a 51% share in the Joint Venture while Winter Road has a 49% interest.

[48] Mr. Clark’s demand letter further sets out that the liabilities of the Joint Venture exceed \$1,000,000, include a loan of \$200,000 from dänä näye Ventures and Mr. Murphy’s \$300,000 Promissory Note.

Analysis

[49] The *Judicature Act*, RSY 2002, c. 128, provides:

26 (1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and that order may be made either unconditionally or on any terms and conditions the Court thinks just.

[50] The *Rules of Court* provide:

56(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

Position of the defendant

[51] The defendant has made arrangements for a receiver in the event a receiver is ordered. The defendant submits that a receiver is appropriate in the circumstances of this case and asks the court to consider the factors set out in *Maple Trade Finance Inc v CY Oriental Holdings Ltd*, 2009 BCSC 1527 at para. 25:

...

- a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
- b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- c) the nature of the property;
- d) the apprehended or actual waste of the debtor's assets;

- e) the preservation and protection of the property pending judicial resolution;
- f) the balance of convenience to the parties;
- g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
- h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
- i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
- j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
- k) the effect of the order upon the parties;
- l) the conduct of the parties;
- m) the length of time that a receiver may be in place;
- n) the cost to the parties;
- o) the likelihood of maximizing return to the parties;
- p) the goal of facilitating the duties of the receiver.

Position of the plaintiff

[52] The plaintiff submits that this is not an appropriate case to appoint a receiver and the defendant has not met its onus to seek such relief.

[53] The plaintiff has deposited funds into his lawyer's mixed trust account. As the plaintiff's outline states at paras. 103 and 112:

103. Indeed, the respondent has deposited into trust the sum of \$518,405.00, being the minimum sum demanded by the applicant; and, has caused to be engaged certified professional accountants to conduct a review and analysis of the sources and uses of the

funds held in the bank account(s) of Wandering Star Joint Venture, *i.e.*, evidence as to the allegations made in the Statement of Defence and proposed counterclaim.

...

112. The remedy sought is, essentially, a Mareva injunction and the applicant has not met the test therefor.

[54] In furtherance of its position, counsel for the plaintiff, in oral argument, and in writing, gave the following undertaking:

“Gary W. Whittle, doing business as Whittle & Company, Lawyers, having the amount of \$518,405.00, in his pooled trust account, and having been instructed to deposit said \$518,405.00 into a separate interest-bearing trust account of the Royal Bank of Canada, in the name of Whittle & Company, Lawyers, at its branch, located in the City of Whitehorse, in the Yukon Territory, hereby undertakes to disperse these funds, including any interest accrued thereupon, only in accordance with an Order of the Supreme Court of the Yukon Territory.”

[55] In reply, the defendant noted that the funds as originally requested in trust were not earmarked. As an alternative, the defendant submitted that the funds, if specified, would stand in lieu of a receivership.

[56] Counsel for the plaintiff further argued that a receivership appointment would only benefit purchasers in a “fire” sale of this equipment.

[57] There is merit in this submission given that both parties might lose in such a sale. I am satisfied that the money placed in trust supported by the undertaking by counsel does justice to both parties until the underlying issues are resolved by settlement or trial. I remind myself that both parties have an investment in this equipment. Mr. Murphy is a creditor and his company contributed some of the equipment. OCDC contributed

cash to the Joint Venture. But to give meaning to the undertaking it is important that OCDC has a list of equipment as well as its current location and I so order.

[58] It is ordered that the plaintiff furnish a list of the Joint Venture equipment and its location within 10 days of these Reasons for Decision. It is further ordered that OCDC have an opportunity to view and photograph the equipment on 10 days written notice.

[59] The parties may contact the trial coordinator to arrange a case management conference before a justice of the Supreme Court of Yukon.

Costs

[60] The parties are encouraged to reach an agreement on costs. If no agreement is reached, I will receive written costs submissions from the defendant, OCDC, within 20 days of these Reasons for Decision. The plaintiff, Steven Murphy, will have 10 days to respond. Submissions are not to exceed five pages plus a Bill of Costs. The defendant will then have five days for a brief reply not exceeding three pages, in care of the Registry.

MULLIGAN J.