SUPREME COURT OF YUKON

Citation: *Rock Ranger Inc. v 16142 Yukon Inc.*, 2023 YKSC 58

Date: 20231020
S.C. No. 22-A0134
Registry: Whitehorse

BETWEEN:

ROCK RANGER INC., LORENA FUNNELL AND DAMAN WERRUN

PLAINTIFFS

AND

16142 YUKON INC. OPERATING AS CUSTOM CONCRETE/
NORTHERN ENVIRO SERVICES AND KERRY PETERS

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs	David Cumming (by videoconference)
Appearing on his own behalf and on behalf of 16142 Yukon Inc.	Kerry Peters

This decision was delivered in the form of Oral Reasons on October 20, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): There are two applications before me in this matter.

[2] The first is the application of the plaintiffs in action number 22-A0134,

Rock Ranger, Daman Werrun, and Lorena Funnell, for replevin at common law or under

Rule 52(4) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules of Court*") for return of two pieces of equipment currently in possession of the defendant. They are the EL-Jay, 1979, 48-foot portable jaw crusher and a 1987 Pioneer jaw crushing plant with the grizzly and screen portion. The plaintiffs have part of this second piece of equipment but the feeder (i.e. grizzly and screen) portion they say remains in the defendant's yard.

[3] The second application is by the defendant Kerry Peters in action number 22-A0134 for return of business records he says belong to his company, and access to his company's websites and passwords for those websites.

[4] The plaintiffs were granted an order for replevin from this Court on June 26, 2023, for the equipment that I just mentioned. The defendant did not appear for the hearing that day. On July 25th, 2023, the defendant successfully had the June 26th order set aside by virtue of a medical emergency that he claimed, supported by medical evidence, caused him to make a mistake about the hearing date of June 26th.

[5] The plaintiffs' application was re-argued on Tuesday, August 29th, with Mr. Peters present. Materials were filed by him, including his own application that I just noted, and responding affidavits and exhibits were filed by the plaintiffs. Mr. Peters represented himself and the plaintiffs were represented by Mr. David Cumming.

Plaintiffs' application

[6] The plaintiffs seek an order for replevin, which has been codified in the *Rules of Court* in Rule 52(4):

> Where a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the claimant, pending the outcome of the proceeding, either unconditionally or upon terms relating to

> giving security, time, mode of trial or otherwise as it thinks just.

Background

[7] The plaintiffs were employees of the defendant company 16142 Yukon Inc., operating as Custom Concrete/Northern Enviro Services. I will refer to that company as "161". The defendant Kerry Peters is the sole director. Its business is supplying concrete crushing services, general contracting services, and environmental services.

[8] The plaintiffs incorporated 536346 Yukon Inc., operating at that time as Custom Concrete and Crushing, in August 2, 2017. The name of this corporation was amended in June 2022 to become Rock Ranger. Its business is rock and gravel crushing. Until September 2022, it shared a yard with 161.

[9] The plaintiffs were employees of 161 from 2010 to September 2022. They claim their employment was wrongfully terminated in September 2022. Mr. Peters had management responsibilities for 161. The plaintiffs were involved in its operations respectively as the foreman/supervisor and the office manager. Since September 2022, the plaintiffs have been denied access to the 161 yard, which was shared by the two businesses.

[10] What complicates this matter further is that Ms. Funnell and Mr. Werrun are in a common-law relationship and Ms. Funnell is the daughter of Jane Peters, who is Kerry Peters' spouse.

[11] The current legal dispute arises from the breakdown of this business relationship. There are two actions. The first is by Rock Ranger for the return of equipment and resulting damages, and for payment of invoices for work done. The second action is a claim by 161 that Mr. Werrun and Ms. Funnell acted in a conflict of interest, breached

their employment contract, breached their fiduciary obligations, breached trust, and, in the alternative, were unjustly enriched, and diverted funds. The claim requests an order for accounting and tracing of funds and assets, and return of records.

Law

[12] The order sought in the plaintiffs' application in the first action is, in effect, an interim junction pending the outcome of trial. There is currently no case law in the Yukon on the test for replevin. However, legal principles have been set out clearly by the Alberta and Ontario courts, and I will apply that test here.

[13] The test was set out very recently in *Gault v Cowden*, 2023 ABKB 178, a 2023 decision of the Alberta King's Bench, and is described in para. 18 of that decision as follows:

> The traditional test for replevin is contained in *Ryder Truck Rental Ltd. v Walker*, [1960] OWN 70 (HC Master), aff'd [1960] OWN 114 (HC), where the Senior Master wrote:
>
> > The first matter for consideration is the scope of the enquiry under Rules 359-360. Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted. This is consistent with *Gilchrist v. Conger* (1854), 11 U.C.Q.B. 197, where it was held on an application to set aside a *praecipe* order that the question of whether the defendant did in fact either take or detain the goods must be left to be ascertained upon the trial as that involved the merits of the case.

> Therefore, in my opinion the enquiry is limited to determining whether there are substantial grounds for the plaintiff's allegations, which if proved, bring the case within the statute. [emphasis in original]

[14] The Court in *Gault* then goes on to address the substantial grounds test and the judge adopts the principles that are set out and analysed in *Clark Door of Canada Ltd. v Inline Fiberglass Ltd.*, [1996] OJ No 238 (SCJ) decision, a 1996 decision of the Ontario Court. That test is described as follows in the *Clark Door* decision:

> [20] …
>
> > 23 Clearly, the test for whether a replevin order should be made is not going to be exactly the same as the test for any type of injunction. However, the term "substantial grounds" is somewhat vague and it helps, in my opinion, to put it in a contextual framework. As I have said earlier, it is obvious that the substantial grounds test is a lesser standard than the test for summary judgment. Similarly, I consider the Mareva injunction "strong *prima facie* case" requirement to be too high a standard for replevin orders which are much less draconian and far reaching. On the other hand, the "substantial issue" test (not frivolous or vexatious) applied generally in prohibitive injunction cases is, in my view, too low a standard for a replevin order which requires one party to actually deliver up possession of property to the other. It must be remembered that before obtaining a prohibitive injunction, a party must satisfy other requirements not imposed on applicants for replevin (e.g. the requirement of demonstrating irreparable harm which damages cannot remedy). As the replevin order is more in the nature of a mandatory injunction and is a greater interference with responding parties' rights than a prohibitive injunction, a stronger standard is required. Accordingly, I am of the view that the "substantial grounds" test for interim recovery of property requires a high degree of assurance that the plaintiff will be successful at trial.

> 24 Cases in which there is clear documentation supporting the plaintiff are more likely to meet the substantial grounds test. Cases in which straight issues of credibility will determine the action are less likely to meet the test. However, that is not to say that the presence of a credibility issue is fatal to the plaintiff's success or that a solid "paper trail" is unrebuttable by a defendant. Most cases will fall somewhere in the middle with some but not perfect, documentation and some issues of credibility. The case before me falls into that category. [emphasis in original]

Analysis

[15] Here, in my view, the plaintiffs have substantiated their claim to the EL-Jay equipment for the purposes of Rule 52(4) using the test that I just read. Mr. Werrun provided the purchase agreement for the equipment on April 5, 2021, by his company 536346 Yukon Inc., the predecessor to Rock Ranger, on behalf of Dynamic Capital Equipment Finance. He also provided the subsequent lease agreement between 536346 and Dynamic Capital.

[16] The defendant does not dispute these documents. He says that he is not claiming ownership. He is not sure about ownership because he is concerned about whose money was used to make the purchase and lease payments. His allegation that the plaintiffs were diverting funds and had two sets of books means that it is possible that money from his company (161) was used for the purchase. He seeks the transfer of the equipment to a third party pending the resolution of this dispute.

[17] In my view, the purchase and lease agreements provided by the plaintiffs for the 1979 EL-Jay piece of equipment meets the substantial grounds test described in the case law. The defendant has raised his concerns about what monies were used for the purchase and the lease but, at this point, has not provided sufficient evidence to support

his concerns. The affidavit and exhibits he provided do not clearly demonstrate that monies he alleged were diverted by the plaintiffs were used for the purchase and lease of this equipment.

[18] Turning to the second piece of equipment, the grizzly and screen, the plaintiffs provided the purchase and sale agreement of the Pioneer piece of equipment by Rock Ranger at the McDougall Auction on July 14, 2022. The plaintiffs included, as exhibits to their affidavit, photographs of the part of equipment they have in their yard and the other piece of equipment in 161's yard, which is the former shared yard. The grizzly and screen portion in the 161 yard feeds raw material into the jaw crushing portion of the equipment. The equipment in the possession of the plaintiffs is not able to be used without the grizzly and screen portion. Rock Ranger is currently leasing a feeder at the cost of $29,000 a month to enable them to use the part of the equipment that they have.

[19] The defendant also wants this piece of equipment to be provided to a third party pending the outcome of the litigation. He argues that keeping the equipment with a third party will preserve its value. He also said he is not sure whether he has the particular feeder the plaintiffs say he has. He was provided with the serial number of 136 and undertook at the last hearing to look for that serial number on the equipment in his yard and advise the Court accordingly.

[20] By email on September 5, 2023, he said he checked the grizzly and screen at issue and advised that it is home-built and does not have a serial number. He also advised at the hearing that there were several grizzly screens in his yard.

[21] The plaintiffs have made out their case for replevin for this piece of equipment as well. The documentation showing the purchase and sale by the plaintiffs is not disputed.

Although Mr. Peters has said by email that the feeder in his yard does not have a serial number, this information was not provided by way of affidavit and there is no evidence that he checked that particular grizzly and screen, and that there was no grizzly and screen that had the serial number of 136.

[22] On the other hand, the photographs produced by Rock Ranger, along with their affidavit evidence, are sufficient to meet the substantial grounds test.

[23] If it turns out that Mr. Peters does have some claim to the equipment after trial, then his remedy is damages, as proposed by the plaintiff.

[24] So, there will be an order pursuant to Rule 52(4) for replevin for the two pieces of equipment. We will discuss the terms in a minute.

Defendant's application

Background

[25] Turning to the defendant Mr. Peters' application for return of business records, passwords, and website access, I have reviewed all the material filed by Mr. Peters and reviewed his submissions made on August 29, 2023 related to these issues. As well I have reviewed the response of Ms. Funnell and Mr. Werrun, who deny that they have any business records belonging to Mr. Peters nor have they had access to them since September 2022 when they ceased to be employees of 161 and the working relationship broke down.

[26] Ms. Funnell also provided as an exhibit an email from a network administrator confirming the denial of her access to the 161 account and they further deny the use of passwords and access to the websites and to the account.

Analysis

[27] This application by Mr. Peters is premature. He advised the Court that a forensic audit is occurring to trace funds and records. More investigation and evidence is needed for the Court to make a determination on these issues. There is insufficient evidence on this application to support the allegation that Mr. Werrun and Ms. Funnell took business records, used the websites and passwords for the email account of 161 after September 2022. There may be evidence available to support this allegation that is revealed through the course of this legal dispute, but it is not before me now.

Conclusion

[28] The application of Mr. Peters is dismissed without prejudice to his right to re-apply for the order requested under paras. 3, 4, 5, and 6 of his application if he provides further and new evidence in support of those paragraphs of his application.

[29] With respect to the terms of the replevin order, Mr. Cumming, I was going to just follow the original order of June 26 except — so paras. 1, 2(a), and 4(a) put in one paragraph, para. 3, para. 5, para. 6, and I will hear submissions on costs.

[DISCUSSIONS]

[30] The order will go then as the plaintiffs are granted an order for replevin. The defendants 16142 Yukon Inc., operating as Custom Concrete/Northern Enviro Services, and Kerry Peters are directed to immediately return the following equipment to the plaintiffs: the 1979 EL-Jay 48-foot portable jaw crusher, serial number 42F0129, blue in colour. That is defined as “EL-Jay”.

[DISCUSSIONS]

[31] Paragraph 3 would say:

> A civil enforcement agency or the Sheriff's office shall have the authority to search the premises of the respondent 16142 Yukon Inc. located at 118 Wye Drive, Stall 4, Watson Lake, Yukon, Y0A 1C0, to obtain the following: a 1987 Pioneer 30 x 42 jaw crushing plant (grizzly and screen portions) 3/N136, orange in colour.

[32] I assume that is the serial number, right, 136? That was what I noted in my decision and that is defined as the "Pioneer".

[33] The next paragraph:

> If this Court later determines that the plaintiffs were not entitled to possession of the EL-Jay or the Pioneer, the plaintiffs undertake to pay any damages to the defendants resulting from the loss of possession of the EL-Jay and the Pioneer.

[34] And then:

> A civil enforcement agency or the Sheriff's office shall have the authority to enforce this replevin order. The plaintiff shall be entitled to retain possession of the EL-Jay and the Pioneer until further order of the Court.

[35] Costs.

> [DISCUSSIONS]

[36] MR. CUMMING: It is actually Lot 10835 15A/2 997-33 Yukon Mile 636 Alaska Highway, Watson Lake.

[37] THE COURT: That is what will be reflected in the paragraph that talks about the civil enforcement agency and the Sheriff's office having the authority to search the premises. Instead of 118 Wye, it will be the address that Mr. Cumming just provided.

[38] Costs will be awarded for the application of the plaintiffs in the amount of $2,240.

> [DISCUSSIONS]

[39] I will order a transcript of my decision.

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DUNCAN C.J.