COURT OF APPEAL FOR YUKON TERRITORY

Citation: *Ross v. Golden Hill Ventures Limited Partnership*, 2010 YKCA 4

Date: 20100712
Docket: 09-YU649

Between:

Norman Ross

Appellant
(Plaintiff)

And

Golden Hill Ventures Limited Partnership

Respondent
(Defendant)

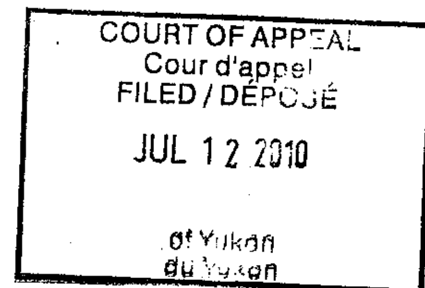
Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

On appeal from: Supreme Court of Yukon, December 12, 2009
(*Golden Hill v. Ross Mining Limited and Norman Ross*, 2009 YKSC 80,
Whitehorse Docket Nos. 09-A0087 and 09-A0014)

Counsel for the Appellant:	M. Leitch
Counsel for the Respondent:	S. Schorr
Place and Date of Hearing:	Whitehorse, Yukon May 20, 2010
Place and Date of Judgment:	Vancouver, British Columbia July 12, 2010

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett



Reasons for judgment of the Honourable Madam Justice Garson:

Introduction

[1] The appellant, Norman Ross, appeals from the judgment of a chambers judge (indexed as 2009 YKSC 80) dismissing, in part, his application pursuant to R. 18(6) (the summary judgment rule) to strike out the petition of Golden Hill Ventures Limited Partnership ("GHVLP"). GHVLP claims a lien pursuant to the *Miners Lien Act*, R.S.Y. 2002, c. 151 (as amended), against the appellant's estate and interests in a mine.

[2] The original amount claimed under the lien filed on August 27, 2009, was $4,713,543. An amended claim of lien was filed on October 21, 2009, increasing the amount claimed to $6,790,456.29. The chambers judge struck out the amended claim of lien because it was filed outside the statutory 45-day period, measured from the last day of work. The chambers judge held that "[a]s a result, only the claim of lien in the amount of $4,713,543 will be allowed to proceed", at para. 15. No appeal is taken by the respondent, GHVLP, from the order striking out the amended claim of lien.

[3] Rule 18(6) of the Supreme Court of Yukon *Rules of Court* provides as follows:

> In an action in which an appearance has been entered, the defendant may, on the ground there is no merit in the whole or part of the claim, apply to the court for judgment on an affidavit setting out the facts verifying the defendant's contention that there is no merit in the whole or part of the claim and stating that the deponent knows of no facts which would substantiate the whole or part of the claim. [Emphasis added.]

[4] The judge found that there was no dispute between the parties concerning the appropriate test on an application under R. 18(6). That test is set out in *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, at paras. 10–13 as follows:

> [10] A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to

succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.

[11] If *insufficient* material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a *bona fide* triable issue.

[12] If *sufficient* material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law. <u>If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.</u>

[13] On appeal, as on the application in chambers, the question addressed in a Rule 18(6) application of whether there is a *bona fide* issue to be tried must be decided assuming that the uncontested material facts as pleaded by the plaintiff are true: *Van Den Akker v. Naudi*, [1997] B.C.J. No. 1649 (Q.L.), 1997 CarswellBC 1470 (WeC) (C.A.).

[Italic emphasis in original; underline emphasis is added. BC R. 18(6) under consideration in *Skybridge* is in identical language to R. 18(6) of the Yukon Rules.]

[5] The chambers judge held, correctly, at para. 8:

> The point that must be emphasized is that sufficient material facts must be <u>pleaded</u> to support the cause of action. Failure to do so may result in dismissal of the claim or, where appropriate, an order to amend the pleadings under Rule 18(2)(e). Under a Rule 18(6) application, the question is whether the facts pleaded are sufficient to support a cause of action, not whether there is evidence to support the claim. There is no determination of any contested evidence on an application for summary judgment. If the parties wish to have a determination of contested factual issues, the appropriate procedure is a Summary Trial under Rule 19 or a hearing. [Emphasis in original.]

Issues on Appeal and Position of the Parties

[6] The appellant raises two issues on appeal. First, he says that on the admissible evidence before the chambers judge, it was plain and obvious the lien claim must fail because the amounts owed to GHVLP were owed in respect to a loan, not for work and services. Second, he says it was plain and obvious the claim

must fail because the petition was filed in support of the struck amended claim, not the original claim, and therefore the petition should also be struck out.

[7] The respondent acknowledges that there is a debtor relationship between GHVLP and Ross Mining Ltd., but GHVLP contends there is a separate agreement, partly oral and partly in writing, whereby GHVLP agreed to provide work and services to Ross Mining. GHVLP says pursuant to that separate agreement, it did provide lienable services.

[8] With respect to the validity of the petition, GHVLP says on its face the petition was filed in support of the original lien.

[9] Before turning to an analysis of these issues, I will describe the factual background to this dispute.

Factual Background

[10] Norman Ross and his spouse were the owners of all the shares in two companies that operated a mine. On November 1, 2005, Norman Ross and his spouse sold all the shares in Ross Mining Ltd. and two numbered companies to 38890 Yukon Inc., a company controlled by John Rudolph. John Rudolph was also the sole principal and controlling mind of Golden Hill Ventures Ltd., the general partner of the respondent, GHVLP. Mr. Rudolph amalgamated the three corporations, which became Ross Mining Ltd.

[11] In order to acquire the mine from Norman Ross, Ross Mining Ltd. financed approximately $7,000,000 as vendor take-back financing. Of that amount, about $3.4 million is outstanding. Ross Mining Ltd. defaulted on the loan and a receiver was appointed in order to sell the mine. Norman Ross is the secured creditor and he claims to have priority over any another claims against the mine.

[12] The reasons for judgment granting the order placing Ross Mining Ltd. in receivership are indexed as *Ross v. Ross Mining Limited*, 2009 YKSC 55.

[13] GHVLP loaned Ross Mining Ltd. $14,850,000 on November 28, 2005. On November 2, 2006, GHVLP and Ross Mining Ltd. entered into a set-off agreement whereby work performed by GHVLP on the mine would be set off from the amount Ross Mining Ltd. owed to GHVLP. As at August 26, 2009, GHVLP claims that Ross Mining Ltd. owes it $6,790,456 for work and services it performed at the mine. Thus, GHVLP says its claim is secured and ranks in priority, by virtue of the *Miners Lien Act*, ahead of the security held by Norman Ross.

Analysis

[14] In the case of *Esteban Management Corp. v. Edelweiss Holdings Corp.* (1990), 43 B.C.L.R. (2d) 335 at 339, 39 C.P.C. (2d) 44 (S.C.), cited in *Skybridge*, it was held that "neither a judge in chambers nor a master is to determine any issue of fact or law on an application for summary judgment; his or her function is limited to a determination as to whether a bona fide triable issue arises on the material before him in the context of the applicable law" (emphasis added).

[15] The chambers judge held that Norman Ross' contention that the claim for a lien was actually a debt claim could not be determined pursuant to R. 18(6) because there was conflicting evidence on the point.

[16] Mr. Leitch has mounted a vigorous and compelling argument that all the money owed by Ross Mining Ltd. to GHVLP is in nature of a loan. In order to find in his favour, the chambers judge would have been required to assess the evidence. Admittedly, the conflicting evidence is all from the petitioner, so it is not conflicting evidence in the sense that a judge must weigh the credibility of one party against another. Nevertheless, the inconsistencies in the evidence require a judge to assess the evidence in order to determine whether the claimant can discharge the burden of proof. Here, the appellant points to terms of the inter-company agreements and also parts of the financial statement reflecting these inter-corporate accounts that would seem to support his assertion that the relationship between the parties is solely that of lender and borrower. However, GHVLP asserts that there is a separate contractual arrangement in which, quite apart from the loan agreements,

there is an agreement by Ross Mining Ltd. to provide work and services to GHVLP. The respondent refers to this agreement at paras. 13 and 14 of the petition. This agreement is also referred to at paras. 5–8 of Randolph's affidavit of December 1, 2009, filed in the R. 18(6) application.

[17] In my view, the chambers judge did not err in deciding that this question was not one that could be resolved on a R. 18(6) application. Rule 18(6) ought to be narrowly construed. A claim or petition may only be struck out where there are no material facts pleaded on which the claim could succeed. Here, the pleadings do disclose sufficient material facts (albeit pleaded in a somewhat confusing and inconsistent manner) from which a separate contractual claim for work and services could be made out. The appellant has tendered evidence on the application that may well succeed at trial in persuading a judge that the whole claim is a debt claim and not one for work and services, and cannot succeed as a mining claim. That question, however, must be determined by a trial judge and not under R. 18(6), because a determination of the nature of the claim involves the weighing and assessment of evidence.

[18] The second question is whether the petition should be struck out. The appellant says that the petition was filed in support of an amended claim of lien that has itself been struck out. He says the original lien could not be revived when the amended lien was struck out.

[19] The appellant argues that the chambers judge did not address the argument that late registration of the amended claim by GHVLP did not simply result in reducing GHVLP's lien claim down to the amount contained in the original claim. Rather, the appellant says that by virtue of s. 7 of the *Miners Lien Act*, the underlying lien "ceased to exist" and, further, that the petition or proceeding commenced by GHVLP and the certificate of pending litigation issued pursuant to it were in respect to the amended claim. Consequently, the requirements of s. 8 of the *Miners Lien Act* were not met and the underlying lien ceased to exist.

[20] Section 7 of the *Miners Lien Act*, R.S.Y. 2002, c. 151, provides:

> Every lien that has not been duly deposited under this Act shall cease to exist on the expiration of the time previously limited for the registration thereof.

[21] Section 8 provides:

> Every lien that has been duly deposited under this Act shall cease to exist on the expiration of 60 days after deposit unless proceedings are commenced to realize the claim and a certificate granted by the Supreme Court is duly filed in the office of the mining recorder.

[22] The original affidavit verifying the claim of lien for $4,713,543 was sworn on August 27, 2009. On the same day, it was entered and registered in the office of the Mining Commissioner at Dawson City. On October 21, 2009 (within the 60 days stipulated by s. 8), a petition was filed at the Supreme Court of Yukon. It claimed $6,790,456.29.

[23] At para. 2 of the petition, the respondent claims:

> a Declaration that it has a Claim of Lien pursuant to the *Miner's Lien Act*, R.S.Y. 2002, c. 141, as amended against the estates or interests of the Defendants in the mine, mining claims, or mineral claims registered in the Dawson Mining Recorder's office under the *Quartz Mining Act*, S.Y. 2003, c. 14 as described in the Plaintiff's Claim of Lien registered on or about August 27, 2009 (PD83195) and attached hereto as Schedule "A", together with all appurtenances thereto, the minerals or ores produced therefrom, the land occupied thereby or enjoyed therewith, and the chattels, equipment, and machinery in, or used in connection with, the said mine, or mining claims, or mineral claims (collectively referred to as the "Mining Claims")

[24] At para. 17, the petition pleaded:

> The Plaintiff filed its Claim of Lien in accordance with the provisions of the *Miner's Lien Act* on August 27, 2009.

[25] At para. 18, the petition pleaded:

> The Plaintiff intends to file an Amended Claim of Lien pursuant to Rule 24 of the Rules of Court to reflect the sum of $6,790,456.29 owed by the Defendants with respect to work, service and materials used in or in respect of the mining or working of the Mining Claims for the period from November 1, 2005 to August 26, 2009.

[26] Schedule A to the petition was the original claim of lien.

[27] On the same day, October 21, 2009, a certificate of pending litigation was endorsed by the court. It referred to an attached Claim Status Report dated June 16, 2009, the same one that had been attached to the original lien.

[28] Also on October 21, the petitioner filed in the office of the Mining Commissioner at Dawson City the amended claim of lien. It purported to be amended pursuant to R. 24(1) of the Yukon *Rules of Court*.

[29] In my view, this second ground of appeal cannot be sustained. The appellant contends that once an amended lien was filed, it subsumed the original claim. No authority was provided to support this proposition other than *Southridge Construction Group Inc. v. 667293 Ontario Ltd.* (1992), 2 C.L.R. (2d) 177 (Ont. C.J.). That case turned on the fact that when the amended claim was filed, the claimant specifically released the original claim. It is therefore clearly distinguishable.

[30] The appellant also argued that the petition was filed pursuant to the amended claim. I agree the petition is not a picture of clarity, but it specifically references and attaches the original mining lien claim. In my view, the petition is a proceeding commenced to realize the claim as required by s. 8. I would not sustain this second ground of appeal.

[31] Accordingly, I would dismiss this appeal.

N. Garson, J.A.
The Honourable Madam Justice Garson

I agree:

M. Saunders, J.A.
The Honourable Madam Justice Saunders

I agree:

"E. Bennett JA" per [illegible] J.A.
The Honourable Madam Justice Bennett