

SUPREME COURT OF YUKON

Citation: *Gwich'in Development Corporation v.
Alliance Sonic Drilling Inc. et al.*,
2008 YKSC 93

Date: 20081202
S.C. No. 08-A0091
Registry: Whitehorse

Between:

GWICH'IN DEVELOPMENT CORPORATION

Plaintiff

And

**ALLIANCE SONIC DRILLING INC. and
KENNETH G.P. ROBERTS**

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Tara V. Marchuk
Kenneth G.P. Roberts

Counsel for the plaintiff
Representing himself and
Alliance Sonic Drilling Inc.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for judgment by way of Summary Trial by Gwich'in Development Corporation (the "GDC") for damages for breach of a Purchase Agreement dated March 4, 2008. The GDC has filed six affidavits in support of its application. The defendants have filed no affidavits.

[2] The first date for the Summary Trial application was set for November 14, 2008, in a mandatory case management meeting held on October 28, 2008. Dates for filing affidavits were also set. On November 14, 2008, Mr. Roberts appeared seeking an

adjournment on the ground that he wanted to retain counsel. Upon being satisfied that there was some possibility of retaining counsel, I granted an adjournment to December 1, 2008, on the condition that Mr. Roberts deliver certain equipment owned by GDC and located in the Yukon to a neutral party pending the application for Summary Trial.

[3] An application for contempt of court has been filed arising out of the alleged failure to deliver the equipment as ordered. The contempt of court application has been adjourned to December 15, 2008, pending production of certain transcripts and e-mails. What follows is my ruling on the application for judgment by way of Summary Trial. Mr. Roberts did not retain counsel.

THE FACTS

[4] The facts are as follows.

[5] GDC is a development corporation registered in the Northwest Territories. It is owned 100% by the Gwich'in Tribal Council and was created shortly after the Gwich'in Comprehensive Land Claim Agreement was signed in 1992 for the purpose of economic development.

[6] The defendant Alliance Sonic Drilling Inc. ("ASD") is a company incorporated in the Yukon by Mr. Roberts for the purpose of operating a diamond drilling business.

[7] GDC and ASD, the latter operated by Mr. Roberts, wished to enter a partnership or joint venture in the diamond drilling business with a major diamond drilling company. Neither a joint venture nor a partnership was ever concluded. However, GDC agreed to advance ASD funds for the purchase of diamond drilling equipment on the agreement that all advances were loans that had to be paid back by ASD with interest.

[8] Between February 1 and August 31, 2007, GDC advanced ASD the sum of \$457,878.78 for equipment purchases and payroll. GDC made numerous demands for payment and Mr. Roberts on behalf of ASD made numerous promises to pay the outstanding debt between April and December 2007. No payments were ever made and on December 6, 2007, demand was made for payment in full of the \$457,878.78.

[9] At this point, the GDC was not prepared to consider any further partnership or joint venture relationship until the outstanding loan was settled.

[10] On March 4, 2008, a Purchase Agreement was signed between GDC and ASD whereby ASD transferred a defined list of assets valued at \$450,000 to GDC for the purchase price of \$450,000 to be paid by way of repayment of the money loaned by GDC to ASD. The purchase of the assets was on an "as is" basis without any warranties as to the condition or state of repair of the assets. ASD signed a Bill of Sale transferring the assets free and clear of encumbrances and giving physical possession on March 4, 2008.

[11] The GDC did not demand immediate delivery of the assets purchased as the parties were still interested in pursuing a joint venture agreement with Sheetah Nabors LP ("Sheetah") wherein Sheetah would own 45%, the GDC 45% and Mr. Roberts 10%. The joint venture did not proceed primarily as Mr. Roberts failed to perform sufficiently in a field trial.

[12] The GDC demanded the delivery of the assets purchased but ASD and Mr. Roberts did not deliver them or provide their location to the GDC.

[13] Ultimately the GDC learned of the location of some of the assets it purchased in the Hay River area of the Northwest Territories. A number of assets were recovered by

the GDC and stored in Hay River. Those assets have an apparent market value of \$5,000 but an asset value of \$117,495.22 according to the Purchase Agreement.

[14] The GDC is seeking an order of specific performance of a list of assets that were not delivered or recovered in Hay River. The assets are listed in detail in paragraph 9 of the Statement of Claim. In the event that the remaining assets are not delivered, the GDC is claiming damages for \$332,504.78, representing the purchase price assigned to the assets, plus pre-judgment interest at 4.75% pursuant to the *Judicature Act* and post-judgment interest and court costs.

ANALYSIS

[15] I am satisfied that this is an appropriate case for Summary Trial particularly as the parties were in agreement to this procedure.

[16] At the outset, I was concerned about a clause in the Purchase Agreement whereby the parties agreed to irrevocably attorn the jurisdiction of the courts in the Northwest Territories and apply the laws of the Northwest Territories. The law in question is ss. 58 and 59 of the *Sale of Goods Act*, R.S.N.W.T. 1988, c. S-2 and there is no difficulty in applying that law. I am also satisfied that after reading *Fairfield v. Low*, [1990] 71 O.R.(2d) 599, this court has jurisdiction to hear this matter as certain assets are in the Yukon and Mr. Roberts agrees that the Yukon is the convenient jurisdiction. Further, there is no competing court action filed in the Northwest Territories, nor any party who wishes to litigate this case there.

[17] Mr. Roberts presents three arguments. Firstly, he says, without providing any evidence, that the value of the assets obtained by the GDC in Hay River have a value

greater than the \$117,495.22 being the assigned value by the GDC and ASD under the Purchase Agreement.

[18] I pointed out the allocation of \$117,495.22 to the assets that were recovered near Hay River is a substantially greater value than their present market value, whether Mr. Roberts agrees with it or not. Mr. Roberts conceded that the allocation of \$117,495.22 to the assets obtained by GDC in Hay River is favourable to his case. I find as a fact that the allocation of \$117,495.22 to these assets is fair and reasonable. This amount will be treated as assets received under the Purchase Agreement on an "as is" basis.

[19] In a variation of his first submission, Mr. Roberts alleged that the GDC recovered more assets in Hay River than it is disclosing. I have rejected this submission as there is no evidence to support it.

[20] Secondly, Mr. Roberts submitted that the assets in the Purchase Agreement were subject to some undisclosed verbal arrangement. He did not present any evidence to explain this submission and I find no basis on which the Purchase Agreement should not be accepted as the agreement between the GDC and the ASD.

[21] Part of this submission by Mr. Roberts was that the assets were somehow tied up with the proposed but unrealized joint venture with Sheetah. That proposed joint venture did not materialize and I do not find any evidence to support the argument that the assets in the Purchase Agreement have somehow been transferred to a new entity.

[22] Thirdly, Mr. Roberts denies that he had any personal liability in this matter and I find that it is indeed the case. The Purchase Agreement was entered into in the name of Alliance Sonic Drilling Inc. and there is no basis on which liability can be applied against

Mr. Roberts personally. I also find that it was not unreasonable to include him as a defendant based on the fact that he appeared to be acting personally in the discussions about a joint venture which was never realized.

DISPOSITION

[23] I am going to decide the claim of specific performance in these reasons and adjourn the application for damages to December 15, 2008, following Mr. Roberts filing an affidavit on the damages issue no later than 4 p.m. on December 5, 2008.

[24] Section 59 of the *Sale of Goods Act* provides:

Specific performance

59. (1) In an action for breach of contract to deliver specific or ascertained goods, on the application of the plaintiff the court may if it thinks fit in its judgment or decree direct that the contract shall be performed specifically without giving the defendant the option of retaining the goods on payment of damages.

Judgment or decree

(2) A judgment or decree referred to in subsection (1) may be unconditional or on terms and conditions as to damages, payment of the price and otherwise that the court considers just.

Application by plaintiff

(3) An application by the plaintiff under subsection (1) may be made at any time before judgment or decree.

[25] I find that Alliance Sonic Drilling Inc. has breached its contractual obligation to deliver the drilling equipment specified in the list of assets set out in the Purchase Agreement of March 4, 2008. The GDC has recovered assets valued at \$117,495.22 but the remaining assets remain undelivered. I therefore order Alliance Sonic Drilling Inc. to specifically perform the Purchase Agreement by delivering the balance of the assets in

the agreement, and specifically enumerated in paragraph 9 of the Statement of Claim no later than December 12, 2008 at 5 p.m. to the GDC at 23 Lorne Road, Whitehorse, Yukon. The order taken out by the GDC should specify the equipment set out in paragraph 9 of the Statement of Claim. Should ASD not comply with this order for specific performance, damages will be assessed on December 15, 2008. The GDC shall have its costs in this application on Scale B from ASD. The application for judgment against the defendant Kenneth G.P. Roberts is dismissed.

Veale J.