SUPREME COURT OF YUKON

Citation: *Duke Ventures Ltd v Seafoot*, 2015 YKSC 14

Date: 20150326
S.C. No. 14-A0153
Registry: Whitehorse

Between:

DUKE VENTURES LTD.

Plaintiff

And

CLAYTON SEAFOOT

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Romeo Leduc — Appearing on his own behalf
Darcy Lindberg — Counsel for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral) On September 26, 2014, the plaintiff (defendant by counterclaim), Duke Ventures Ltd. ("Duke"), a company owned by Romeo Leduc, and the defendant (plaintiff by counterclaim), Clayton Seafoot, entered into a written agreement ("the agreement") for the sale of several pieces of timber harvesting equipment and the right to harvest an estimated volume of 800 to 900 cords of standing timber on a woodlot subject to a permit in Duke's name ("the assets"). The agreement actually specified Mr. Leduc personally as the seller and Mr. Seafoot as the purchaser, although the parties appear to have agreed that the plaintiff (defendant by counterclaim) is properly named as

Duke Ventures Ltd. Mr. Seafoot was to pay $58,000 plus GST for the equipment and $20 per cord for the standing timber he removed from the woodlot. Mr. Seafoot paid a $10,000 deposit upon the signing of the agreement, and the balance was to be paid over time, according to the terms of the agreement.

[2] Over the following months, there were various additional verbal agreements between the parties, the most significant one being on November 7, 2014, when Mr. Seafoot agreed to pay Mr. Leduc $10,150 for a new engine, which Mr. Leduc had purchased for one of the harvesting machines.

[3] Mr. Seafoot made a total of $17,700 in additional payments to Mr. Leduc from October 2014 to January 2, 2015.

[4] On January 14, 2015, Mr. Leduc delivered to Mr. Seafoot a demand letter from Mr. Leduc's lawyer claiming that Mr. Seafoot was behind in his payments under the agreement in the sum of $19,723.38. The letter demanded that Mr. Seafoot pay this sum within five days or Mr. Leduc and/or Duke would commence legal proceedings. In the interim, Mr. Leduc demanded that Mr. Seafoot not haul any further firewood away from the woodlot.

[5] Mr. Seafoot understood that the demand letter prohibited him from continuing to harvest timber under the agreement. He also understood that Mr. Leduc was prohibiting him from entering onto the woodlot. Before he shut down his operation, Mr. Seafoot took steps to ensure that Mr. Leduc would not be able to access the equipment, such as removing fuel from all of the equipment, locking them up and retaining the keys.

[6] Mr. Leduc has since admitted that he took possession of the “skidder” on January 20, 2015 and the “Ford LT8000” truck on February 25, 2015. He did so on his own and without the benefit of any court order.

[7] On February 6, 2015, Duke commenced this action by filing a statement of claim, which asserted that Mr. Seafoot owed it $27,177.05 under the agreement. In the alternative, Duke seeks termination of the agreement and a return of the assets.

[8] On March 10, 2015, Mr. Seafoot filed an amended statement of defence and counterclaim. In the counterclaim, Mr. Seafoot seeks: (1) an order that Duke cease any harvesting operations on the woodlot; (2) a declaration that Duke caused the parties to breach the agreement; (3) an order for specific performance of the agreement; and (4) in the alternative, damages for breach of contract or unlawful inducement of breach of contract.

[9] The application presently before me is made by Duke for the return of the assets, as well as a declaration that Duke has lawful and exclusive possession of them. In his response to the application, Mr. Seafoot seeks: (1) a declaration that he owns the equipment; (2) an order that Mr. Leduc give up possession of the equipment to him; (3) an order that Mr. Seafoot be authorized to enter upon the land where the equipment is located to regain possession of them; and (4) an order that Duke refrain from harvesting the remaining standing timber on the woodlot until the resolution of the issues in the litigation.

[10] It appears from the pleadings and the evidence thus far that the equipment is still located on the woodlot, where Mr. Leduc is known to reside from time to time in a mobile trailer.

[11] The first issue in this application is whether the property in the equipment passed to Mr. Seafoot when the agreement was made. If it did, then Duke has no right to repossess the equipment and his (extra-judicial) repossession of the skidder and the Ford truck would be unlawful.

[12] Section 19(1)(a) of the *Sale of Goods Act*, R.S.Y. 2002, c. 198 ("the *Act*") states:

> 19(1) Unless a different intention appears the following are rules for determining the intention of the parties as to the time at which the property in the goods is to pass to the buyer
>
> (a) if there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed;
>
> …

[13] I conclude that the agreement is an unconditional contract for the sale of specific goods in a deliverable state. Accordingly, the property in the equipment passed to Mr. Seafoot when the contract was made. Duke did not reserve the "right of disposal" of the property in the equipment pending the satisfaction of certain conditions, as contemplated in s. 20(1) of the *Act*. If Duke feels that Mr. Seafoot has failed to pay for the equipment pursuant to the terms of the agreement, then its remedy is to pursue a judgment for the price of the equipment under s. 46(1) of the *Act*. It is not entitled to repossess the equipment: see *Anderson's Engineering Ltd*. *(Re)*, 2001 BCSC 1476, at paras. 41 through 48. Further, Mr. Seafoot never intended to give up possession of the equipment when he felt compelled to leave the woodlot. In my view, the steps that he took to secure the equipment were sufficient to constitute constructive possession by him since leaving the woodlot.

[14] Accordingly, I make an interim declaratory order that the property in the equipment passed to Mr. Seafoot when the agreement was made and that he continues to own the equipment today. The list of the equipment specifically includes:

- 1989 Ford LT8000 Truck (VIN# 1FDXR82A0KVA26799);
- 1979 Grapple Skidder (Serial # 640 G 312707T);
- Risely Model Rollie II Single Grip Harvester (Serial # PB1091191RFMD);
- 1999 Model 723 Timber King Fellerbuncher (Serial # ZA1080398);
- 3216-2V Block Engine;
- 26 foot Cube Van Shop Trailer, including tools and spare parts;
- 1994 F250 Truck; and
- 1983 Chevrolet 700 Dump Truck

[15] I further order, on an interim basis, that Duke and/or Mr. Leduc give up possession of the equipment to Mr. Seafoot and that Mr. Seafoot is authorized to enter upon the woodlot to take whatever further steps he deems necessary to secure his possession of the equipment.

[16] The second issue on this application is whether there should be an interim order preserving the remaining standing timber on the woodlot for Mr. Seafoot's benefit, pending a trial of this action. This would incidentally also require an order, referred to as an interim injunction, prohibiting Duke and/or Mr. Leduc from harvesting timber pending the final resolution of this matter.

[17] The preservation order is generally justified by Rule 52(1) of the *Rules of Court*, which states:

> (1) The court may make an order for the detention, custody or preservation of any property that is the subject

> matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter upon any land or building.

[18] Mr. Seafoot seeks this order prior to the trial. As a general proposition, orders which have the effect of altering the parties rights over their property in the pre-trial period are rarely granted: *Canwest Pacific Television Inc. and Canwest Broadcasting v. 147250 Canada Ltd.* (1987), 14 B.C.L.R. (2d) 104 (C.A.), at paras. 16 through 20. On the other hand, the reluctance by courts with regard to execution before judgment does not apply when the property sought to be preserved is the very subject matter of dispute: *Dunkeld Ranching Ltd. v. Banco Ambrosiano Holdings S.A.*, (1987), 85 A.R. 278 (C.A.), at para. 13. I am satisfied that Mr. Seafoot's interest in the standing timber on the woodlot, while not the entire subject matter of his counterclaim, is nevertheless a significant part of the subject matter of the dispute between the parties. Accordingly, I grant an order pursuant to Rule 52 (1), preserving the remaining standing timber on the woodlot until the trial of this action, and I authorize Mr. Seafoot to enter upon the woodlot for the purpose of enabling this order to be carried out.

[19] A complicating feature of this remedy arises from the apparent incidental necessity for an interim injunction prohibiting Duke from harvesting timber from the woodlot pending the final resolution of this matter. The leading case on interim injunctions is *RJR - MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. That case adopted a three-stage test for courts to apply. At the first stage, the applicant must demonstrate that there is a serious question to be tried. However, the Supreme Court noted that the threshold at that stage is a low one and that this part of the test must be settled on the basis of common sense and an extremely limited review of the case on the merits. The

second stage of the three-part test requires the applicant to convince the court, on a balance of probabilities, that he will suffer irreparable harm if the relief is not granted. The third stage of the test requires an assessment of the balance of inconvenience.

[20] The evidence that Duke and/or Mr. Leduc has been harvesting timber from the woodlot since the demand letter of January 14, 2015 is sketchy. Mr. Seafoot deposed that is his understanding and belief that Mr. Leduc has been doing so and has been using the equipment for that purpose. While that is less than direct evidence, the allegation has not been denied by Mr. Leduc in his second affidavit. Even assuming that Mr. Leduc is not harvesting, there would still seem to be a significant amount of timber left to be harvested. The evidence here is variable as to how much timber has already been harvested. According to the affidavit of Frank Vullings, the amount could be anywhere from 618 to 656 cords. According to Mr. Leduc's Reply filed March 12, 2015, the amount could be 666 cords. In any event, assuming that there were as many as 900 cords originally available, as estimated by the parties in the agreement, and assuming approximately 650 cords have already been harvested, that would leave a potential 250 cords for future harvesting. The evidence indicates that Mr. Seafoot usually marketed his timber for $150 per cord. That would result in gross income of $37,500 if all 250 cords were sold at that price. That is not an insignificant sum, and in my view it is sufficient to demonstrate that there is a serious question to be tried in relation to the remaining standing timber.

[21] The second branch of the three-part test for an interim injunction is whether the applicant will suffer irreparable harm if the relief is not granted. One of the examples given in *RJR - Macdonald* is that this can include instances where a permanent loss of

natural resources will be the result when the challenged activity is not prohibited: *Conklin Estate v. Sailer*, 2011 YKSC 18, at para. 12. The loss of harvested timber would constitute a permanent loss of natural resources. Also, irreparable harm here means harm of a nature incapable of being quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other: *Conklin*, para. 15. Given my overall assessment of the evidence filed thus far, I do have concerns that Mr. Seafoot may be unable to collect any damages from Duke for wrongful removal of timber from the woodlot. Accordingly, I am satisfied that Mr. Seafoot has made a case for irreparable harm.

[22] The third branch of the interim injunction test is an assessment of the balance of convenience. This requires the court to determine which of the two parties will suffer the greater harm from the granting or the refusal of an interim injunction, pending a decision on the merits of the case. One of the factors that can be considered is which of the parties has acted to alter the balance of their relationship in order to affect the status quo: *Conklin*, at para. 16. In this case, it is Duke and/or Mr. Leduc which (who) has acted unilaterally in providing Mr. Seafoot the demand letter and in extra-judicially seizing the skidder and the Ford truck. Further, it strikes me that it is Mr. Seafoot who will suffer the greater harm if the interim injunction is refused. Accordingly, I find for Mr. Seafoot on this branch of the test as well.

[23] I therefore prohibit Duke and Mr. Leduc from harvesting any remaining standing timber from the woodlot (Permit # 2013FWL019-02) until the trial of this action.

[24] I also order an RCMP assistance clause in favour of Mr. Seafoot for the purpose of carrying out all these orders without further unpleasantries or interference from Mr. Leduc.

[25] Duke's application is dismissed.

[26] I will now hear from the parties on the issue of court costs.

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Gower J.