SUPREME COURT OF YUKON

Citation: *Evans v Bauman*, 2016 YKSC 71

Date: 20161215
S.C. No.: 16-A0029
Registry: Whitehorse

BETWEEN:

VERNON EVANS

PLAINTIFF

AND

LARRY BAUMAN

DEFENDANT

Before Mr. Justice L.F. Gower

Appearances:
Mark E. Wallace — Counsel for the plaintiff
Peter B. Sandiford — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the defendant, Larry Bauman ("Bauman"), to set aside a default judgment obtained by the plaintiff, Vernon Evans ("Evans") on August 26, 2016. Bauman and Evans were formerly equal partners in a placer mining venture. The default judgment is for $34,000, plus interest and costs. The $34,000 represents one half of the value of two mining hoes which were jointly purchased by the partners, but which were retained by Bauman following the dissolution of the partnership. The issue is whether Bauman has a meritorious defence, or at least a defence worthy of investigation. His asserted defence is that there ought to be an accounting of the

partnerships liabilities and assets before Evans is granted any judgment against Bauman for any portion of the partnership's assets.

BACKGROUND

[2] In 2010, Bauman and Evans entered into an oral partnership agreement for the purpose of mining mineral claims owned by Evans in the Mayo Mining District (the "Evans claims"). Pursuant to that agreement, Bauman was to move equipment owned by him onto the Evans claims and conduct mining operations from the spring to the fall of that year, and in each subsequent year for an unspecified duration. In particular, Bauman was to provide his equipment, materials, and services and undertake the work to develop, remove overburden, and mine the claims. Evans' contribution to the partnership was to provide the mining claims and the associated water licence. The operational expenses were to be covered by the minerals recovered, with any loss or profit being divided equally between the parties on an annual basis.

[3] The parties performed their obligations without issue from 2010 through 2014. Each would provide the other with details of their respective operational expenses for each mining season. Recovered minerals would often be sold intermittently throughout the mining season to cover these expenses. At the end of each season, if the value of the remaining minerals exceeded the total operational expenses, then the excess would be divided equally between the parties. Similarly, if there was a loss, the parties were to each pay half or, alternatively, carry the loss over to the following year.

[4] In 2010, the parties jointly purchased a JCB 330 mining hoe with partnership money. In 2014, the parties jointly purchased a Hitachi 330 mining hoe with partnership

money, including a clean-up bucket and a digging bucket. The current depreciated value of the two hoes is approximately $68,000.

[5] Towards the end of the 2014 season, the parties settled the operational expenses for that year. Bauman carried over a loss of $8,236.35, half of which was to be repaid by Evans. Evans carried over a loss of $139.

[6] Following the settlement of the expenses at the end of 2014, and before the end of that year, Bauman continued to perform a further 14 days of additional work removing overburden. For this work he is claiming an additional $40,320 for his labour and the use of his machinery, on the basis of the number of hours he worked certain machines and at a fixed price per hour which he set.

[7] During the first part of the 2015 mining season, the parties did further work on the Evans claims for which Bauman claims an additional total of $96,000, again calculated on the basis of the number of hours certain machines were used and a price per hour for each machine.

[8] Evans was aware of this additional work in 2014 and 2015 and I find that he implicitly assented to it.

[9] Also in the spring of 2015, Evans engaged a third party to begin work on nearby mining claims owned by him (the “Enviro claims”), using the same water licence as was being used for the Evans claims.

[10] On June 11, 2015, the Water Board Inspector and the Mayo Mining Inspector came to the Evans claims and notified Bauman that the work being done on the Enviro claims was not authorized under the water licence. Bauman claims that Evans breached the agreement between them by failing to provide an adequate water license.

[11] Also on June 11, 2015, Evans told Bauman to cease operations indefinitely and to leave the Evans claims.

[12] Bauman claims that he is entitled to be paid for his equipment hours for overburden removal in the fall of 2014 ($40,320) and the spring of 2015 ($96,000), totalling $136,320 (the "overburden removal expenses").

[13] Bauman has also claimed that he incurred additional operational expenses, again in relation to the work done in the fall of 2014 in the spring of 2015, totalling $128,686.37. I infer that these expenses would likely have been for such things as fuel, parts and other recurring supplies. The total of $128,686.37 also includes Bauman's carried over loss from 2014 in the amount of $8,236.35. He claims Evans' 50% share of these expenses is $64,343.19 (the "operational expenses").

[14] Bauman also says that he incurred $22,800 in expenses in order to remove and relocate the equipment and supplies from the Evans claims (the "demobilization expenses"). The equipment he removed included the two mining hoes.

[15] Further, as a result of the work done by Bauman on the Evans claims, the claims were credited with the Mayo Mining Recorder's Office for a total of 493 years, at a value of $250 per year.[1] Bauman claims that this results in a total value of $123,250, half of which ($61,625) is owed to him by Evans (the "assessment credits").

[16] The total amount which Bauman claims as due from Evans, for overburden removal ($136,320), demobilization ($22,800), and operational expenses ($64,343.19), and one half the value of the mining claim assessment credits ($61,625) is $285,088.19. Against this sum, Bauman admits that Evans should be credited with his $34,000

[1] A miner must perform a minimum of $250 worth of work each year on a mining claim in order to maintain the currency of the claim with the Mining Recorder's Office.

interest in the mining hoes and his $139 carried over loss for 2014. That reduces Bauman's total claim to $250,949.19.

[17] In September 2015, Bauman filed a petition in this Court claiming a miner's lien against the Evans claims for the alleged debt of $250,949.19. Evans successfully applied before me to strike the petition on the basis that the miner's lien was invalid. In my reasons cited as 2016 YKSC 6, I concluded that by virtue of Bauman being an equal partner in the partnership, he had an interest in the Evans claims and could therefore be considered a statutory owner. Accordingly, I determined that his miner's lien was invalid because, as an owner, he could not file a lien against his own property. I also declined to allow the petition to be continued as an action because of a number of problems with the way the petition had been pled. However, I left it open to Bauman to consider commencing a fresh action by way of a statement of claim. To date, he has not done so.

[18] In the petition and in his supporting affidavit, Bauman admitted that Evans is entitled to be credited for one half of the value of the two hoes. For example, in the petition, Bauman stated:

> [Evans] has a half interest in the Hoes which are valued at approximately $68,000, and therefore shall be credited $34,000.

Further, in his affidavit, Bauman deposed:

> In consideration of our retention of the Hoes, [Evans] should be credited half of the current depreciated value, which is approximately $68,000/2 = **$34,000** total for both hoes. (his emphasis)

[19] On May 24, 2016, Evans commenced the within action claiming entitlement to possession of either the Hitachi or the JCB hoe, each valued at $34,000, or alternatively, a judgment for the sum of $34,000. On August 26, 2016, Evans obtained a

judgment against Bauman in the amount of $34,000, plus pre-judgment interest, post-judgment interest and costs.

ISSUE

[20] As noted above, the only issue on this application is whether Bauman has met his onus of establishing that he has a meritorious defence, or at least a defence worthy of investigation. In particular, Bauman submits that when the partnership came to an end, both partners became entitled to settle the accounts between them pursuant to ss. 41 and 46 of the *Partnership and Business Names Act*, RSY 2002, c 166 (the "*Act*"). These sections generally provide that, upon the dissolution of a partnership, the partners are required to pay out all liabilities, before distributing partnership assets to the partners. In particular, s. 46 requires that debts and liabilities are paid first, and then each partner who has made "advances" is paid next, then each partner is repaid rateably what he or she has contributed in respect of "capital", and finally the remaining assets, if any, are divided in proportion to the interests of the respective partners in the partnership.

ANALYSIS

[21] The language "meritorious defence or at least a defence worthy of investigation" comes from the criteria for setting aside a default judgment summarized in *Miracle Feeds v D & H Enterprises Ltd*, (1979), 10 BCLR p.58 (Co Ct) ("*Miracle Feeds*"):

> [5] …it appears that in order for a defendant to succeed on an application to set aside a default judgment, he must show:
>
> > 1. That he did not wilfully or deliberately fail to enter an appearance or file a defence to the plaintiff's claim;

> 2. That he made application to set aside the default judgment as soon as reasonably possible after obtaining knowledge of the default judgment, or give an explanation for any delay in the application being brought;
>
> 3. That he has a meritorious defence or at least a defence worthy of investigation; and
>
> 4. That the foregoing requirements will be established to the satisfaction of the court through affidavit material filed by or on beh him him alf of the defendant.

[22] With respect to the first two criteria, Evans acknowledges that:

a) There is no evidence that Bauman wilfully or deliberately failed to respond to the statement of claim; and

b) Bauman made his application to set aside the default judgment in a reasonable time after September 8, 2016, which was the date when he first received notice that the judgment had been entered.

[23] Similarly, Bauman takes no issue with the fact that Evans legitimately obtained an order for substitutional service of the statement of claim. However, he does ask this Court to take into consideration the fact that the substitutional service was ultimately ineffective. The substitutional service order stated that service would be effective 10 days after the statement of claim was mailed to the last known post office box address for Bauman in Mayo, Yukon. The mailing occurred on July 11, 2016, however Bauman did not actually receive the statement of claim until September 8, 2016. In the meantime, as noted, the default judgment was granted on August 26, 2016. Bauman's counsel submits that this ineffective service is a factor that I should take into account in exercising my discretion whether to set aside the default judgment, and I do so.

[24] *Miracle Feeds* has been applied by the Court of Appeal of Yukon in *Mills v Grunow*, [1998] YJ No 80, ("*Mills*") at para. 5. It has also been applied by the British Columbia Court of Appeal in *BCI Bulkhaul Carriers Inc v Aujla Trucking Inc*, 2015 BCCA 411.

[25] The Supreme Court of British Columbia has said that the criteria in *Miracle Feeds* do not constitute an inflexible test, but rather should be viewed as a non-exhaustive list of factors to be taken into consideration. Accordingly, there may be additional factors which the court considers relevant to the exercise of its discretion. Further, the inability of a defendant to address a particular factor is not necessarily fatal. These propositions were addressed in *British Columbia (Director of Civil Forfeiture) v John Doe*, 2010 BCSC 940:

> 14 More recently, Mr. Justice Rogers, in *McEvoy v. McEachnie*, 2008 BCSC 1273, 87 B.C.L.R. (4th) 149, said:
>
> > [12] The defendant's position comes down to this: they say that *Miracle Feeds* comprises an immutable list of the factors that the court must consider on an application to set aside a judgment. They say that if the application misses on one of the factors, then the application must fail.
> >
> > [13] The flaw in the defendants' position is that it takes too narrow a view of the scope of the court's discretion in these matters. Whether to set a default judgment aside is an exercise of discretion, and the *Miracle Feeds* criteria are nothing more than a non-exhaustive set of factors to be taken into account when considering whether to exercise that discretion. That this is so was established by the Court of Appeal in *H.M.T.Q. In Right of the Province of British Columbia v. Ismail*, 2007 BCCA 55.
>
> 15 Thus, it does not follow as a matter of necessity that the failure of the defendants to expressly address each of the various requirements set out in *Miracle Feeds* precludes them

> from being successful on an application under Rule 17(12). These requirements are not immutable. The failure or inability of a defendant to address a particular factor in *Miracle Feeds* is not necessarily fatal. Conversely, there may well be additional factors identified by a defendant which are relevant to its application and to the court's discretion. (my emphasis)

[26] That said, the Court of Appeal of Yukon in *Mills*, cited above, referred to the *Miracle Feeds*, cited above, criteria as a "test" (para. 5) and the criteria regarding a meritorious defence or defence worthy of investigation as "the third and crucial aspect of that test" (para. 7). These comments are, of course, binding upon me.

[27] As to what constitutes a defence worthy of investigation, McEwan J. said this in *Hawkins v Fernie One Outfitters Ltd.*, 2012 BCSC 84:

> 25 The "interpretation" issue is counter-intuitive and the material in support does not have the degree of plausibility that might be described as a "defence worthy of investigation." In this regard I think the law set out by Silverman J. in *(Director of Civil Forfeiture) v. Doe*, 2010 BCSC 1784, is pertinent:
>
> > [21] The phrase "worthy of investigation" requires more than merely making an allegation. It requires sufficient detail to enable the judge to correctly exercise his mind upon whether there is indeed such a defence: *Schmid v. Lacey,* [1991] B.C.J. No. 3501 and *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp.,* 2008 ONCA 894.

[28] In *Al Boom Wooden Pallets Factory v Jazz Forest Products (2004) Ltd*, 2012 BCSC 487, Fitzpatrick J. stated that while the burden rests on the defendant seeking to set aside the default judgment to establish such a defence, the burden at this stage is a low one (para. 48). Further, referring to the British Columbia Court of Appeal case of *Irving v Irving* (1982), 38 BCLR 318, Fitzpatrick J. commented that:

> [52] …the court must have regard to all the circumstances and any relief - or refusal to grant relief- must be consistent with the overarching aim of the court to do justice as between the parties…

[29] In determining whether Bauman has a defence worthy of investigation, I return to comments I made in my reasons for judgment dismissing Bauman's earlier petition. It strikes me that many of Bauman's claims giving rise to the total debt of $250,949.19 allegedly owing to him do not appear to flow from the partnership agreement, and accordingly would not be the subject of a settling of accounts between the partners under the *Act.*

[30] Rather, if there is to be some form of notional accounting between the partners, it seems that there would have to be evaluation of the operational expenses versus the mineral values at the time that the partnership was dissolved, in order to determine whether Bauman has lost an opportunity for profit or whether Evans is obliged to share in any loss. But one thing is certain to happen in that accounting and that is that Evans is to be credited with the $34,000 due to him as a result of Bauman retaining possession of both of the mining hoes.

[31] First, the claim for overburden removal is based upon Bauman operating certain pieces of equipment in late 2014 and in the early part of the 2015 season. In his affidavit in support of the petition, Bauman particularized the number of hours that he worked each piece of equipment and attributed an hourly rate to each machine. The total of all of this work claimed is $136,320. However, the partnership agreement was <u>not</u> that Bauman would be paid an hourly rate for his machinery regardless of the value of the minerals recovered.

[32] Secondly, the damages related to the assessment credits granted by the Mining Recorder's Office of $61,625 also do not appear to flow from the partnership agreement. They may be of benefit to the parties, but it appears that this was not something that was in their contemplation when they made their oral partnership agreement.

[33] Thirdly, the claimed demobilization expenses of $22,800 do not appear to flow from the partnership agreement either.

[34] Therefore, Bauman's total claim of $250,949.19, insofar as there ought to be a settling of accounts between the partners for matters arising under the partnership agreement, should be reduced by $136,320 for the overburden removal, $61,625 for the assessments, and $22,800 for the demobilization. This would reduce his claim against Evans for matters arising under the partnership agreement to $60,225.01 (for one half of the alleged operational expenses of $120,450.02), plus $4,118.18 (for one half of Bauman's carried over loss from 2014 of $8,236.35), for a total of $64,343.19, which is exactly what Bauman deposed to in his affidavit in support of the petition as owing to him from Evans for "Expenses".

[35] However, this total needs to be reduced further to account for errors made by Bauman in his calculation of the operational expenses incurred in late 2014 and the early-season of 2015.

[36] First, Bauman claimed as an expense the purchase price of the Hitachi hoe (including GST) of $47,250[2]. This is clearly an error, as Bauman admits in his affidavit in support of the petition that the Hitachi hoe was purchased with partnership money. It was therefore a partnership asset and not an operational expense.

[2] Affidavit #2 of Jennifer Whipple, Exhibit A, p. 53.

[37] Secondly, Bauman's claim of $64,343.19 for operational expenses includes the sum of $10,409.70, for "Quotation" provided by Union Tractor Ltd. 2000 on November 5, 2013, for certain equipment parts. This is also clearly an error, as the claimed operational expenses purport to be solely for late 2014 and early-season 2015. Further, a quotation, by definition, is not an expense; it is merely an estimate on future parts or labour work which may or may not be supplied or performed by the estimator. In any event, Bauman's affidavit in support of the petition indicates that there were zero operational expenses as of September 2013[3].

[38] Thirdly, Bauman's claim for operational expenses includes the sum of $11,240 for expenses for which no invoices have been provided in support, i.e.:

a) $7,000 for fuel purchased on an unknown date from ADF; and

b) $4,240 paid to "Travis" on an unknown date.

Without invoices in support, I fail to see how Bauman will be able to prove this claim.

[39] Fourthly, Bauman's claim for operational expenses includes $606.25 for expenses unrelated to the mine site, i.e.:

a) $93.45 for a hotel room for Bauman's common-law spouse in Whitehorse;

b) $405.80 for fuel purchased in Whitehorse;

c) $67 for fuel purchased in Edmonton, Alberta ; and

d) $40 for fuel purchased in Edson, Alberta.

[40] These four errors total $69,505.95 ($47,250 + $10,409.70 + $11,240 + $606.25).

[41] Therefore, Bauman's claim that Evans owes him $64,343.19 (i.e.one half of the total operational expenses claimed of $128,686.37, for expenses incurred in late 2014

[3] Affidavit #2 of Jennifer Whipple, Exhibit A, p. 9.

and early-season 2015) must be reduced by the erroneous expenses totalling $69,505.95, leaving a negative remaining balance of minus $5,162.76.

[42] Even if I were to allow that Bauman may have a defence worthy of investigation, by setting off the expenses for which there are no invoices ($11,240) and the unrelated expenses ($606.25), it still seems clear that the cost of the Hitachi hoe ($47,250) and the Union Tractor Quotation ($10,409.70) must be deducted from Bauman's claim against Evans for operational expenses arising from the partnership agreement. Therefore, at a minimum, Bauman's claim in this regard would be reduced from $64,343.19 to $6,683.49.

[43] However, Bauman concedes that Evans is to be credited with $34,000, representing one half of the value of the two hoes. Therefore, it would appear that Bauman has no remaining claim against Evans arising under the partnership agreement. Accordingly, in my view, he does not have a meritorious defence or a defence worthy of investigation.

[44] In addition, it must be remembered that when Bauman demobilized his equipment, he also took possession of a number of significant partnership assets, which he has had the benefit of using since June 11, 2015. These include the value of the two mining hoes, totalling $68,000, as well as an unspecified amount of fuel located in a 20 foot white fuel container, as well as the value of miscellaneous parts, hoses and steel.

[45] In all of the circumstances, the result of the overarching aim of the court to do justice as between the parties here leads me to refuse to grant the relief sought.

[46] All of this is not to say that Bauman is not free to pursue his other claims against Evans. However, I have restricted my analysis to those claims specifically related to the partnership agreement.

CONCLUSION

[47] Bauman's notice of application filed September 20, 2016 to set aside the default judgment filed in this action on August 26, 2016 is dismissed. As the successful defendant, Evans will have his costs on the application.

GOWER J.