

# SUPREME COURT OF YUKON

Citation: *Sparkling Creek Mining ULC v. Fischer*,  
2017 YKSC 71

Date: 20171123  
S.C. No. 15-A0104  
Registry: Whitehorse

**BETWEEN**

**SPARKLING CREEK MINE ULC**

**PLAINTIFF**

**AND**

**WAYNE FISCHER**

**DEFENDANT**

Before Mr. Justice R.S. Veale

Appearances:  
Richard Needs  
Meagan Hannam

Appearing for the plaintiff  
Counsel for the defendant

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] On April 3, 2017, this Court ordered Sparkling Creek Mine ULC (“Sparkling Creek”) to post security for Wayne Fischer’s costs in the amount of \$7,500 on or before September 1, 2017.

[2] This Court further ordered that failure to pay the security for costs “on or before September 1, 2017” would result in a stay of proceeding.

[3] Sparkling Creek has not paid the security for costs and counsel for Fischer now applies for an order dismissing the proceeding under Rule 2(6) of the *Rules of Court*, which permits a dismissal of the proceeding if a court direction is not complied with.

## **BACKGROUND**

[4] Wayne Fischer is a placer miner and the sole shareholder of 46391 Yukon Inc., which is the registered owner of 52 placer mining claims in the Dawson Mining district.

[5] The principals of Sparkling Creek are Larry and Richard Needs. Sparkling Creek was incorporated under the laws of Alberta but has not been registered in the Yukon.

[6] On or about June 30, 2014, Wayne Fischer agreed to sell his shares in 46391 to Sparkling Creek for the sum of \$2,600,000.

[7] The purchase price was to be paid by a deposit of \$200,000 and a further payment of a minimum of \$200,000 from the revenue from the 2014 mining season. The deposit was paid but the payment of \$200,000 was not. The balance of the purchase price was to be paid by two payments of \$750,000 in 2015 and 2016, with the balance due on October 1, 2017.

[8] The litigation was initiated by Sparkling Creek, which alleges that Wayne Fischer breached the agreement by failing to provide equipment, misdirecting the 2014 mining activities and failing to assist in mining so that the revenue from the 2014 mining season was significantly less than \$200,000. Sparkling Creek seeks an order to mine in 2016 and delay the payments accordingly. The Statement of Claim has not been amended.

[9] Wayne Fischer denies these allegations.

[10] Sparkling Creek commenced this action on October 22, 2015. On December 8, 2015, Wayne Fischer applied for an order to stay the action as Sparkling Creek is not registered in the Yukon. He also applied for posting security for costs, failing which the plaintiff's action would be stayed.

[11] The application was heard on April 3, 2017. The Court ordered the following:

1. The plaintiff post security for the defendant's costs in the amount of \$7,500 on or before September 1, 2017, by paying the required sum into court;
2. If the plaintiff does not post security for the defendant's costs as required by paragraph 1 of this Order on or before September 1, 2017, the plaintiff's action is stayed; and
3. Costs of the application are in the cause.

[12] Richard Needs filed two brief affidavits for Sparkling Creek but has not indicated any intention to pay the sum of \$7,500 into court, nor given a date when it might be paid.

[13] Richard Needs filed a notice of self-representation on October 12, 2017.

## **THE LAW**

### **Security for Costs**

[14] The application of Wayne Fischer proceeded on two grounds: a stay of proceeding under s. 296 of the *Business Corporations Act*, R.S.Y. 2002, c. 20, as amended, where the action of an extra-territorial body is stayed until registered and an application for security for costs under s. 254 of the *Act*, which states:

254 In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

[15] It should be noted that in *Global Banking Systems v. Datawest Solutions Inc.*, 2006 BCCA 577, the Court was critical of the so-called "guillotine order" dismissing a

court action automatically on failure to pay security for costs by a certain date as it might lead to prejudice merely on the failing of an event to occur.

[16] On the other hand, the Court, referring to s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57, stated at para. 16:

... In making an order under the statute, the court may also exercise its inherent jurisdiction to control its process and prevent abuse by requiring the plaintiff to pay the security within a limited time, to ensure that the action does not simply stay on the court files indefinitely.

[17] The Court concluded that the appropriate order would impose a deadline for posting security for costs and grant leave to apply to dismiss the action where a party fails to do so. The order should include a stay pending the posting of security.

## **ANALYSIS**

[18] In this case, the chambers judge ordered payment of security for costs in the amount of \$7,500 on or before September 1, 2017, and that there would be a stay of the action if the security was not paid. The order is precisely what the defendant applied for. The security for costs has not been paid. Unfortunately, that results in the court action remaining active on the books of this Court, potentially indefinitely, and leaves the defendant with an outstanding court action against his business. Neither of these outcomes is desirable, and the defendant now applies to dismiss the action under Rule 2(5) and (6), which states as follows:

(5) Where a person, contrary to these rules and without lawful excuse,

...

(f) where the person is the plaintiff, petitioner or a present officer of a corporate plaintiff or petitioner, or a partner in or manager of a partnership plaintiff or petitioner, the court may dismiss the proceeding, and

(g) where the person is the defendant, respondent or a third party, or a present officer of a corporate defendant, respondent or third party, or a partner in or manager of a partnership defendant, respondent or third party, the court may order the proceeding to continue as if no appearance had been entered or no defence had been filed.

(6) Where a person, without lawful excuse, refuses or neglects to comply with a direction of the court, the court may make an order under subrule (5)(f) or (g).

[19] There is no doubt that the dismissal of the plaintiff's claim under Rule 2(6) would be a blunt instrument or a draconian order. See *Dhillon v. Pannu*, 2008 BCCA 514, at paras. 26 – 30. There, the Court of Appeal of British Columbia, at para. 35, approved the dismissal of the claim as the plaintiff was granted an extension following a breach of one order and then proceeded to breach a second order.

[20] The plaintiff in this case has done nothing to advance its claim or pay the security for costs into court. It would appear that Sparkling Creek is prepared to sit on the court case and ignore the court order to pay security for costs.

[21] I have little sympathy for the plaintiff's position in this matter but the previous order permitted this state of affairs.

## **CONCLUSION**

[22] I conclude that the plaintiff should be given a further opportunity to pay the security for costs, failing which, the court action will be dismissed.

[23] I order that the plaintiff's action shall be dismissed unless the full amount of \$7,500 is paid into court as security for costs on or before January 31, 2018.

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VEALE J.