

SUPREME COURT OF YUKON

Citation: *Mao v. Grove*, 2019 YKSC 62

Date: 20191202
S.C. No. 19-A0091
Registry: Whitehorse

Between

**WEN-TAI “DANIEL” MAO
I LIKE HOME DESIGN LTD., and
318 ARCTIC COLOR TOURISM DEVELOPMENT LTD.**

Plaintiffs

And

WAYNE GROVE

Defendant

Before Chief Justice R.S. Veale

Appearances:

Wen-Tai “Daniel” Mao

Representing himself and
the corporate Plaintiffs

Graham Lang and
Sarah Hart

Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Counsel for the defendant, Wayne Grove, apply for security for costs in the amount of \$29,316 to be paid into Court by the plaintiffs. They also apply for an order that the extra-territorial corporate plaintiffs register pursuant to s. 296(1) of the *Business Corporations Act*, R.S.Y. 2002, c. 20. Counsel for Wayne Grove abandon their application to strike the statement of claim for failure to disclose a reasonable cause of action under Rule 20(26)(a).

BACKGROUND

[2] The following are not findings of fact but the context and circumstances giving rise to this court application.

[3] Wayne Grove entered into a Lease Agreement in August 2016 for the lease of his rural property to Arctic Color Tourism Inc. (“the 2016 Lease”), a company apparently represented by individuals known as Lawrence Wei and James Pan. Arctic Color Tourism Inc. agreed to construct buildings on the rural property and then to operate a bed and breakfast under the terms of the 2016 Lease. Arctic Color appears to have breached that lease by failing to complete the construction of the main building and permitting liens to be registered, among other allegations.

[4] On May 11, 2017, Wayne Grove terminated the 2016 Lease. Wen-Tai (“Daniel”) Mao (“Daniel Mao”) alleges that Lawrence Wei and James Pan requested another chance to complete the construction and introduced Daniel Mao as an investor in the project.

[5] Wayne Grove entered into a new lease agreement for his rural property dated August 31, 2017, with 318 Arctic Color Tourism Development Ltd. (“318 Arctic Color”), a British Columbia company incorporated by Daniel Mao (“the 2017 Lease”). Daniel Mao states that he has invested \$650,000 into the rural property. The 2017 Lease is a complex document that permits 318 Arctic Color to construct buildings and operate a business on the understanding that the buildings are owned by Wayne Grove but leased to 318 Arctic Color.

[6] There is a dispute between Daniel Mao and Lawrence Wei and James Pan as to the ownership of 318 Arctic Color. There is a court action in the Supreme Court of

British Columbia (“the British Columbia action”) wherein 318 Arctic Color Tourism Development (Shanghai) Co. Ltd. alleges that it had an oral agreement with Daniel Mao that he was their General Manager and not the owner of 318 Arctic Color. In other words, there is a dispute as to the authority of Daniel Mao, as sole shareholder of 318 Arctic Color, to enter into the 2017 Lease with Wayne Grove. However, that dispute is not directly at issue as the persons involved in that dispute are not party defendants in the case at bar.

[7] In the meantime, Lawrence Wei and James Pan have been operating a tourist business on the rural property in Yukon, of which 318 Arctic Color claims to be the lawful tenant. Counsel for Wayne Grove state that the rental payments in the 2017 Lease of the rural property are in good standing and appear to be paid by Daniel Mao from July 2017 to June 2019.

[8] However, Wayne Grove has retained an Exclusive Licence Area in the 2017 Lease and the road access to the tenant’s area runs through it. In an attempt to prevent Lawrence Wei and James Pan from accessing the 2017 Lease, Daniel Mao put a lock on the entry gate. Wayne Grove cut that lock to access his Exclusive Licence Area but that action apparently allows Lawrence Wei and James Pan, or others, to continue to access and use the rural property leased by 318 Arctic Color.

[9] Thus, Daniel Mao claims that Lawrence Wei and James Pan, or others, continue to use his tenancy of the 2017 Lease to 318 Arctic Color unlawfully. He claims, in effect, Wayne Grove is aiding that unlawful use, as he prevented Daniel Mao from blocking access to the 2017 Lease and will not take action to remove Lawrence Wei and James Pan, or others, from the property. Counsel for Wayne Grove assert that Wayne

Grove does not wish to take sides in the business dispute between Daniel Mao and Lawrence Wei and James Pan.

[10] Daniel Mao seeks a variety of remedies that essentially evict Lawrence Wei and James Pan from the rural property, and award damages to Daniel Mao for the unauthorized cutting of the gate lock by Wayne Grove, restitution for the unjust enrichment Wayne Grove has received from Daniel Mao and a return of rent from Wayne Grove. One further observation is that Daniel Mao is not a party to the 2017 Lease but it appears that he has personally paid rent to Wayne Grove for the 2017 Lease.

ISSUES

[11] There are three issues as follows:

1. Are the corporate plaintiffs entitled to commence a court action without extra-territorial registration, pursuant to the *Business Corporations Act*?
2. Should the defendant be granted security for costs against the corporate plaintiffs?
3. Should the defendant be granted security for costs against the plaintiff Daniel Mao?

ANALYSIS

Issue 1: Are the corporate plaintiffs entitled to commence a court action without extra-territorial registration, pursuant to the *Business Corporations Act*?

[12] Section 296 of the *Business Corporations Act* states as follows:

296(1) An extra-territorial body corporate while unregistered is not capable of commencing or maintaining any action or other proceeding in any court in the Yukon in respect of any

contract made in the course of carrying on business in the Yukon while it was unregistered.

(2) If an extra-territorial body corporate was not registered at the time it commenced an action or proceeding referred to in subsection (1) but becomes registered afterward, the action or proceeding may be maintained as if it had been registered before the commencement of the action or proceeding.

[13] There is no evidence before me that the corporate plaintiffs, which are incorporated under the laws of the Province of British Columbia, have been extra-territorially registered in the Yukon, pursuant to s. 296 of the *Business Corporations Act*.

[14] Therefore, I order that the action by the corporate plaintiffs be stayed until the corporate plaintiffs are registered extra-territorially as required by s. 296(1) of the *Business Corporations Act*.

Issue 2: Should the defendant be granted security for costs against the corporate plaintiffs?

[15] Section 254 of the *Business Corporations Act* 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.

[16] The test to be applied to a corporate plaintiff was stated recently in *Freedom TV v. Holland*, 2016 YKSC 52, at para. 28, as follows:

1. Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails?
2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
3. Is the court satisfied that the defendants have an arguable defence to present?

4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?

[17] Thus, once the defendant shows that the corporate plaintiffs will be unable to pay the defendant's court costs if the plaintiffs' action fails, the onus shifts to the corporate plaintiffs to meet the test above.

[18] The only evidence that the corporate plaintiffs will not be able to pay the defendant's costs comes from Daniel Mao himself. In an e-mail to Wayne Grove, dated June 12, 2019, Daniel Mao states:

1. He brought his own money, construction team, professional skill, experience and other resources to rescue the project.
2. He has had no income for 2 years, it is the most difficult time in his life.
3. He spends out all of his "saving money" to build the improvements, pay rent and purchase a tour bus.

[19] Unfortunately, Daniel Mao is self-represented and does not address the allegation that the corporate plaintiffs would be unable to pay the defendant's costs if the defendant is successful.

[20] However, in my view, when applying the first step of the test, the onus does not shift to the corporate plaintiffs unless there is some specific evidence of a failure to pay outstanding debts from general creditors, previous cost orders or judgment creditors.

[21] In this application, there is no allegation of financial impecuniosity much less evidence of such. The expression by Daniel Mao that he is going through financial difficulties does not satisfy the Court that security for costs should be ordered.

[22] I therefore dismiss the application for security for costs against the corporate plaintiffs.

Issue 3: Should the defendant be granted security for costs against the plaintiff Daniel Mao?

[23] The general rule for ordering security for costs against an individual is best described by Madam Justice Dillon in *Han v. Cho*, 2008 BCSC 1229, at para. 27, and adopted in *Gichuru v. Pallai*, 2014 BCSC 2330, at para. 10:

The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances. Such special circumstances could arise if an impecunious plaintiff also has a weak claim, or has failed to pay costs before, or refused to follow a court order for payment of maintenance.

[24] In *Gichuru v. Pallai*, 2015 BCCA 81, the Court of Appeal confirmed the *Han v. Cho* test and the trial judge's decision that failure to pay previous court cost awards amounted to egregious circumstances justifying security for costs.

[25] The applicable principles for ordering security for costs have been adopted by this Court in *37790 Yukon Inc. v. Skookum Asphalt Ltd.*, 2007 YKSC 24; *Freedom TV v. Holland*, 2016 YKSC 52; and *Kiselbach v. DeFilippi*, 2019 YKSC 35.

[26] In *Freedom TV v. Holland*, 2016 YKSC 52, I addressed the security for costs test for individuals at para. 39:

The principle of access to justice for individuals is generally applied so that the mere fact that a plaintiff resides out of the jurisdiction, has no assets within the jurisdiction or is impecunious is not sufficient to attract an order for security for cost. See *Koch (Guardian ad litem of) v. Koch Estate*, 2005 YKSC 47, at paras. 47 – 54.

[27] While Daniel Mao appears to fit the profile of a person who resides out of the jurisdiction and has no assets within the jurisdiction, I am not satisfied that he is impecunious or that he has any onus to establish that he has exigible assets to satisfy an award of costs against him. The allegations of the defendant do not establish egregious circumstances.

[28] I dismiss the application for security for costs against Daniel Mao.

CONCLUSION

[29] The defendant's application to stay the proceeding brought by the corporate plaintiffs is granted and the claims of I Like Home Design Ltd. and 318 Arctic Color Tourism Development Ltd. are stayed until extra-territorial registration is completed.

[30] The defendant's application for security for costs against the plaintiffs is dismissed. There will be no award for costs.

VEALE C.J.