Citation: *Hedmann v. City of Whitehorse,* 2016 YKSM 3

Date: 20160315
Docket: 15-S0037
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before Her Honour Chief Judge Ruddy

DAVID HEDMANN

Plaintiff

v.

CITY OF WHITEHORSE

Defendant

Appearances:
David Hedmann — Appearing on own behalf
Rita M. Davie — Counsel for Defendant

RULING ON APPLICATIONS

Introduction

[1] On June18, 2015, the Plaintiff, David Hedmann, filed a claim in the Small Claims Court of Yukon alleging that the Defendant, City of Whitehorse (the "City"), is liable for a sinkhole on his property located at 514 Grove Street in the Porter Creek C subdivision (the "Property"). The City denies responsibility. Three preliminary applications have been filed, and are the subject of this ruling: Mr. Hedmann seeks an order removing counsel of record for the City on the basis of a conflict of interest; the City seeks a stay of the claim, alleging that the Plaintiff has no standing to pursue the action following his assignment in bankruptcy; and Mr. Hedmann seeks further disclosure from the City in relation to the claim.

1. Conflict of Interest:

[2] Mr. Hedmann argues that counsel for the City has a conflict of interest with respect to this matter as the firm is or has represented Cynthia MacNeil. He indicates that Ms. MacNeil has a Writ of Seizure and Sale with respect to the Property. According to Mr. Hedmann, the bank is first in priority holding a mortgage of $516,000 on the Property. Next in priority are two liens amounting to roughly $59,000. Ms. MacNeil is fourth in priority and is owed an amount in excess of $100,000. The Property is valued at $625,000. Mr. Hedmann argues that if he is successful in his claim for $25,000 against the City, it will impact on the amount that Ms. MacNeil will recover. Accordingly, he argues that her interests with respect to the outcome are adverse to the City's, placing counsel in a conflict position.

[3] Mr. Hedmann concedes that there is no conflict of interest relating to him and he is unable to articulate any prejudice to his case as a result of the alleged conflict. Ms. MacNeil is not a party to these proceedings, and there is no information before me with respect to her interests or her position on this application. The Defendant takes the position that there is no conflict, and that Mr. Hedmann has no standing to assert a conflict as he is not himself a past or current client of the firm.

[4] In assessing this application, I have serious reservations with respect to Mr. Hedmann's right to assert a conflict wholly unrelated to him. However, even if I were to be satisfied that Mr. Hedmann is entitled to do so, the evidence before

me falls well short of satisfying me that there is indeed a conflict of interest which would necessitate removal of counsel for the City.

[5] In *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, the Supreme Court of Canada noted in paragraph 23:

> The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. …

[6] With respect to confidential information, the Court sets out a two-part test in paragraph 24: Was confidential information, relevant to the case at issue, received by the lawyer; and is there a risk the confidential information will be used to the prejudice of the client?

[7] On this ground, there is absolutely no evidence before me that counsel for the City received confidential information from Ms. MacNeil, during a solicitor/client relationship, that has any bearing on Mr. Hedmann's claim, let alone confidential information that could be used in these proceedings to the prejudice of Ms. MacNeil.

[8] With respect to the issue of effective representation, the Supreme Court of Canada in *CNR*, paragraph 8, affirmed the "bright line rule", enunciated previously in *R. v. Neil,* 2002 SCC 70, that "a lawyer, and by extension a law firm,

may not concurrently represent clients adverse in interests without obtaining their consent – regardless of whether the client matters are related or unrelated".

[9] While on its face it is arguable that Ms. MacNeil and the City may have differing interests with respect to the outcome of this claim, it is questionable whether the "bright line rule" is applicable in these circumstances.

[10] Firstly, it is clear in the *CNR* case that the "bright line rule" is applicable in situations where there is concurrent representation of parties whose interests are adverse. The question of effective representation is not applicable with respect to former clients (see paragraph 23 as quoted above). Mr. Hedmann has provided no evidence to indicate that Ms. MacNeil is a current client of the City's counsel or counsel's firm. Such information would obviously be known to the City's counsel; however, it must be remembered that, as this is Mr. Hedmann's application, he, and not the City, bears the evidentiary burden. Furthermore, it would be improper for the City's counsel to provide such information to the court, if there is indeed a current solicitor/client relationship, in the absence of Ms. MacNeil's express consent.

[11] Secondly, it should be noted that Mr. Hedmann is unable to articulate any prejudice to him or his case that would flow from any solicitor/client relationship that may exist or has existed between the City's counsel and Ms. MacNeil. In such circumstances, his efforts to remove the City's counsel would appear to be an effort to gain a tactical advantage. In *CNR*, paragraph 32, the Supreme Court

of Canada made it clear that the "bright line rule" "does not apply to condone tactical abuses".

[12] In all of the circumstances, I conclude that the evidence does not satisfy me that there is a conflict of interest which would necessitate removal of counsel for the Defendant.

2. Assignment in Bankruptcy:

[13] After filing this claim, Mr. Hedmann made an assignment in bankruptcy. Counsel for the City filed documentation indicating that this happened on September 3, 2015, with BDO Canada Ltd. assuming the role of trustee for Mr. Hedmann's estate. Mr. Hedmann had apparently also fallen behind with his mortgage payments, and the Property became the subject of a foreclosure petition in Supreme Court on November 17, 2015 and was foreclosed upon on February 16, 2016.

[14] Counsel for the City takes the position that Mr. Hedmann's assignment into bankruptcy vested this action and all his property, including 514 Grove Street, in the trustee in bankruptcy, leaving him without the capacity to maintain this claim. If this claim is to be pursued, the trustee would have to assume its conduct. Accordingly, it should either be dismissed or stayed.

[15] Mr. Hedmann opposes the City's application.

[16] Section 71 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as amended by S.C. 2004, c. 25) ("the *BIA*") reads:

> Vesting of property in trustee
>
> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

Section 2 of the *BIA* defines "property" as:

> … any type of property, whether situated in Canada or elsewhere, and includes money, goods, <u>things in action, land and every description of property, whether real or personal</u>, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property (emphasis added);

[17] There are a number of cases that make it clear that, except in very narrow circumstances, an undischarged bankrupt can neither deal with his property nor maintain a court proceeding based on the operation of s. 71 (see e.g. *Cotton v. Cotton,* 2004 CanLII 10486 (Ont. SCSM), *Hall-Chem Inc. v. Vulcan Packaging Co.* (1994), 21 O.R. (3d) 89 (C.A.), *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701).

[18] In my view, Mr. Hedmann effectively has two, if not three, barriers to his conduct of this action. Firstly, he no longer has the capacity to deal with the Property, secondly, he no longer has the capacity to continue this claim, and, thirdly, to the extent that the Property has been foreclosed on, it is not clear to me that it even forms part of his estate at this point.

[19] I conclude that I have no choice but to stay Mr. Hedmann's action. By virtue of s. 71 of the *BIA,* the capacity to pursue this claim has vested in BDO Canada as the estate's trustee. BDO Canada has made no appearance. If BDO Canada has sufficient interest in the Property following the foreclosure to continue this action, the decision to do so lies within its sole discretion and is out of Mr. Hedmann's hands.

[20] Where matters are not provided for under the *Small Claims Court Regulations,* the practice may be determined with reference to the Supreme Court Rules (s. 1(2)). Rule 15 provides that, while this claim survives Mr. Hedmann's bankruptcy, in order for it to proceed, BDO Canada must apply for an order substituting itself for Mr. Hedmann as Plaintiff.

3. Disclosure:

[21] Having determined that Mr. Hedmann has no capacity to pursue this claim as a result of the assignment in bankruptcy and subsequent foreclosure on the Property, it is unnecessary to rule on Mr. Hedmann's disclosure application.

Conclusion:

[22] In the result, Mr. Hedmann's application to remove counsel for the Defendant on the basis of a conflict of interest is dismissed. The City's application for a stay of proceedings is granted on the basis Mr. Hedmann has no capacity to pursue the claim as a result of the assignment in bankruptcy. I would direct counsel for the City to provide a copy of my order, once produced and

signed, to the Trustee in Bankruptcy such that the Trustee may determine whether or not to seek to reinstate and pursue the claim, substituting itself for Mr. Hedmann as Plaintiff. Mr. Hedmann's application for disclosure is dismissed as moot.

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RUDDY C.J.T.C.