

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20180620
Docket: S165043
Registry: Vancouver

Between:

Coombes & Sons Administration Inc.

Plaintiff

And:

Copper Lake Resources Ltd.

Defendant

And:

Ronald Coombes and John Kowalchuk

Defendants
by Counterclaim

Before: The Honourable Mr. Justice D.M. Masuhara

**Oral Ruling Re Application for Judgment on a Debt
In Chambers**

Counsel for the Plaintiff:

P. Kressock

Counsel for the Defendant:

J.M.S. Woolley

Place and Date of Hearing:

Vancouver, B.C.
June 15, 2018

Place and Date of Ruling:

Vancouver, B.C.
June 20, 2018

[1] **THE COURT:** This is my ruling with respect to the matter that was heard June 15th. This ruling deals with the application by the plaintiff for judgment on a debt claim against the defendant in the amount of \$118,125 pursuant to Rule 9-7. The amount relates to consulting fees invoiced by the plaintiff between March 2015 and February 2016, which were unpaid. The sought-after amount has been paid into court as a result of a pre-judgment garnishing order. The validity of the garnishing order was upheld in an earlier proceeding before Master Muir.

[2] That amount has been admitted to by the defendant's representative and CEO, Mr. MacDonald. He also has admitted that Copper Lake, which is a junior exploration and development company which is publicly listed, had the money to pay the debt owing but had simply chosen not to. The plaintiff in this action also seeks damages related to the termination of the consulting agreement by the defendant but is not seeking judgment in this application.

[3] On this application Copper Lake, the defendant, while not disputing the debt takes the position that: A) the debt claim is not suitable for determination by summary trial on the basis that it has a claim of equitable setoff arising from certain cross claims; or alternatively, B) if this court grants judgment that it is entitled to a stay of execution.

[4] In terms of background and chronology, I note the various elements as set out in the plaintiff's written brief and the defendant's application response. I particularly note:

- 1) the separate contracts entered into by the plaintiff company and separately by Mr. Coombes with the defendant over the years, contracts which specified separate and distinct services and roles;
- 2) a letter from the shareholder to the defendant company demanding the resignation of the whole board and management within about 48 hours, all except for Mr. MacDonald. Failure to

- do so attracted the threat of steps by the shareholders to damage the reputations of the director and management;
- 3) the lack of funding to complete the required audited financial statements for regulatory filing;
 - 4) the refusal from shareholders to provide funding for that;
 - 5) the two news releases issued by Mr. Coombes on behalf of the defendant company. As well, I have reviewed the content and circumstances surrounding the information contained in them;
 - 6) the resignation of Mr. Coombes from the company as director and officer and the impact it had in terms of not meeting regulatory requirements for a number of directors;
 - 7) the termination by the defendant of the consulting agreement between the plaintiff and the defendant for cause;
 - 8) the March 2016 halt by IIROC of trading in the defendant company;
 - 9) the March 2016 cease-trade order of the B.C. Securities Commission;
 - 10) the financing difficulties faced by the defendant company and the eventual placement for funding in April; and
 - 11) the acknowledge of the amount of moneys earned and unpaid to the plaintiff by the defendant.

[5] Following the filing of the plaintiff's notice of claim on June 3, 2016, the defendant filed a response on July 7, 2016, along with a counterclaim against the plaintiff and Mr. Coombes personally. On October 6, 2016, the defendant obtained an order permitting the addition of John Kowalchuk as a defendant by counterclaim. I am advised that lists of documents were exchanged and examinations for discovery had been conducted of Mr. Coombes and the defendant's representative, Mr. MacDonald. The disclosure, I am told, did not reference any claim by the

defendant for increased costs of borrowing faced by the company when it made its placement, which is now part of the cross claim or description of the cross claim advanced.

[6] I note the defendant's assertions in its response to civil claim as contained in the various paragraphs, particularly paragraphs 14 to 23. I note the counterclaim asserts that Coombes and Kowalchuk each had a duty of good faith to the defendant and to exercise the care, diligence and skill that a reasonably prudent individual would have exercised in the circumstances, including to observe Copper Lake's internal policies.

[7] In its application response Copper Lake summarizes its cross claims as follows. The defendant's counterclaim focuses on the manner of Mr. Coombes' departure from the defendant in February 2016, which amounts to a breach of the plaintiff's obligations under the consulting agreement. It goes on to say the plaintiff breached its contractual obligations to the defendant when Mr. Coombes abruptly departed the defendant on the 29th of February, 2016, leaving the company without the required number of directors and issuing a news release on behalf of the company which was clearly improper and unquestionably against the company's best interests, that the plaintiff's actions resulted in a cease trade order against the defendant, damaged its reputation in the investment community and left the defendant in a desperate position when it came to obtaining financing for its continued operation.

[8] The defendant went on to obtain financing in April 2016 on terms that were considerably less favourable than it would otherwise have been able to obtain but for the plaintiff's breaches of duty. The differential in the cost of borrowing estimated by the defendant to exceed \$400,000 forms the basis of the defendant's cross claim for damage. I note that the recent affidavit of Mr. MacDonald provides more background to this estimated increase cost of borrowing.

[9] In terms of the defendant's position in this application, while the debt is not disputed by the defendant, it opposes judgment because the counterclaim is

inextricably intertwined with the debt claim. It is submitted that the plaintiff's claim is for fees for service under a contract which contract set out the terms of the plaintiff's engagement and the plaintiff's duties and that the damages claimed by the defendant arise from the plaintiff's breach of the contract by the manner in which the plaintiff performed the contract.

[10] It is argued that the plaintiff's compensation under the contract and the good faith and honest discharge of its contractual duties are components of a single transaction and that it would be unjust to grant the plaintiff judgment of one component only without regard to the other. The principle against litigating in slices is invoked. Alternatively the defendant seeks a stay of execution relying on the well-known factors said out in *RJR-MacDonald*.

[11] In regard to a serious question to be tried, the defendant argues that its damage claim easily meets the low threshold and argues that the actions of Mr. Coombes in February 2016 were clearly improper and in breach of the plaintiff's duty to act in the defendant's best interests and would result in foreseeable loss of damage.

[12] In respect to irreparable harm, it is argued that if the plaintiff received payment out of the funds held in court there would be irreparable harm and that it would be prejudiced in its ability to collect on any judgment it might ultimately obtain against the plaintiff. If successful on its counterclaim, the defendant's judgment would very likely exceed the plaintiff's claim in debt resulting in a net judgment in the defendant's favour.

[13] The defendant also says that the plaintiff appears to be a personal service company of Mr. Coombes' and that the company has not filed an annual report in over a year and is not known to have any substantial assets. There is good reason, it is argued, to doubt the ability of the company to satisfy a substantial monetary judgment.

[14] In terms of balance convenience, the defendant argues it favours the defendant, arguing that while the defendant would face irreparable harm in its ability to collect against the plaintiff if a stay is not granted, the plaintiff would suffer no similar prejudice if execution on judgment in its favour were preferred. Significantly in this case the plaintiff's debt claim is fully secured as a result of the pre-action garnishment and payment of the full debt amount into court.

[15] The plaintiff submits in respect of the inextricably intertwined argument, that there are several defects in the defendant's argument:

- 1) that the setoff sought by the defendant has not been pleaded and equitable setoff as a defence has not been set out;
- 2) that the counterclaim is brought against Mr. Coombes personally and not the plaintiff company. In this regard it is pointed out that the contractual relations between the plaintiff Mr. Coombes and the defendant have been clearly set out to demonstrate a distinction between the work of the plaintiff company and that of Mr. Coombes as seen in the separate contracts which were put in place with the Copper Lake over the years. And the capacity of Mr. Coombes to carry out certain functions such as press releases and securities filings, which the plaintiff company was not capable of doing. Mr. Coombes was president and CEO of Copper Lake until he resigned in February 2016. The plaintiff was a company that was an independent contractor of Copper Lake under a series of written consulting agreements, and it is noted that Copper Lake terminated a 2015 consulting agreement for cause and provided written notice of termination to the company.
- 3) in respect to capacity the plaintiff points out the cross claims are based on news release which was issued and that such release could be released by Mr. Coombes as an officer and director of

Copper Lake and not by the plaintiff or Mr. Coombes as agent of the plaintiff. The news release states that it was issued by Mr. Coombes as president and CEO;

- 4) the debt claim which has been admitted is based on the approval of unpaid invoices of the plaintiff which was issued monthly between March 2015 and February 2016. There is no issue that the amounts were earned under the terms of the contract. The complaints of Copper Lake contained in its cross claim are for actions subsequent to the period of the invoices.

[16] In terms of equitable setoff, the equitable setoff test is set out in the well-known case of *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.*, 1985 144 (BCCA). There are five conditions in this regard. The plaintiff cites cases to support its position of *Coolbreeze Ranch Ltd. v. Morgan Creek Tropicals Ltd.*, 2009 BCSC 151, and *Nie v. Kwang Chyun Enterprise Ltd.*, 2017 BCSC 1941, and the defendant cites the following cases: *Block Bros. Data Centre Ltd. v. Canjex Publishing Ltd.*, [1991] B.C.J. No. 3667 (S.C.); *Newgen McCallum Limited Partnership v. McCallum Professional Limited Partnership*, 2017 BCSC 784; and *Kaspersky Lab Inc. v. Bradshaw (c.o.b. Technical Back Up)*, 2010 BCSC 68.

[17] In my view I am persuaded by the plaintiff that while the cross claim is related to the plaintiff's claim, it is not so intertwined as to be considered inextricably so. I note the deficiency in pleading the defence and that the cross claim at its core is against Mr. Coombes personally. The debt claim was earned and undisputed. The cross claim arises from actions of Mr. Coombes while a director and officer after the services provided under contract by the plaintiff company were earned. Further, the claim for damages related to increased borrowing costs exceeding \$400,000. It has only been recently revealed, which is hard to understand given the significant size, and no mention of it at all in any of the disclosure as well as at the examination for discovery. Notwithstanding the fact that the funding was a significant matter as set out in the materials for the defendant company.

[18] While there is a pleading of the plaintiff under its contract breached the contract because of the actions of Mr. Coombes, at its root the cross claim is in relation to the actions of Mr. Coombes personally. The claims here are on a separate footing. They arose at different times for different reasons between different parties. As a result I grant judgment to the plaintiff in the amount of \$118,125 with prejudgment interest from the date on which of the unpaid invoices were rendered.

[19] I turn now to the question of whether the defendant should be granted a stay of execution. As mentioned the debt monies have been paid into court. In order to succeed in its application for a stay of proceedings, Copper Lake must satisfy the three-part test set out in *RJR-MacDonald*, the well known three factors. In considering whether to grant the stay, the court is entitled to consider the apparent merits of the counterclaim, what steps the defendant has taken to advance its counterclaim and how long the stay might be expected to remain in place. The plaintiff in support cites *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504, and *Nie*.

[20] In terms of the factors, the plaintiff submits: A) Copper Lake purports to include claims that are not in its pleadings, that amendments at this stage to the pleadings are not likely to be granted. B) there is no evidence before the court or otherwise produced in this litigation showing that the counterclaim has merit. C) the cost of borrowing claim in particular is based on speculation and opinion. On the second branch of the test there is no evidence that the defendant would suffer irreparable harm. The only claim of harm advanced by Copper Lake is that it suspects that the plaintiff would be unable to collect on its counterclaim.

[21] The plaintiff notes Mr. Coombes is a long-time resident of British Columbia, currently is the president, CEO and director of mining, earning some \$7,000 per month. He also earns director's fees from another mining company. He also is a shareholder in the defendant as well as holds shares in other companies. He is also the sole registered owner of his home in Surrey, BC, which is assessed at \$340,000.

[22] In contrast, it is pointed out the defendant is based in Toronto, has no source of operating cash flows, has yet to achieve profitable operations, has working capital deficit and accumulated losses and expects further losses and that the financial conditions cast significant doubt about the company's ability to continue as a going concern. I have taken note of defence counsel's comments regarding whether the earnings and income from Mr. Coombes' work with the other mining companies are just deferred and unpaid. I also note at that there appears to be a CPL registered in the matrimonial family proceedings against the home in Surrey.

[23] It is further argued that the defendant will not suffer irreparable harm in respect of the claim if not pleaded, that it has not pursued and no indication that it intends to pursue in the counterclaim. In terms of the balance of convenience, given the highly speculative nature and the weakness of the claim, it is noted that the defendant has not taken steps to proceed against Mr. Kowalchuk since the filing of his response to counterclaim in March 2017. The defendant has not sought any dates for mediation, summary trial or trial. It has not sought to amend or particularize its counterclaim to include the costs of borrowing in the claim. Again, I note that Mr. MacDonald's recent affidavit attempts to do so.

[24] Conversely it is argued that the plaintiff would suffer significant prejudice from a stay and recognizing the reality that the debt amount obtained by the plaintiff company is Mr. Coombes' personal source of income, which he has been denied for more than two years, and that the plaintiff has already expended significant time and cost simply to collect on its consulting fees and that the granting of a stay of an indeterminate length would be unjust in the circumstances.

[25] The position of the defence is that the counterclaim for damages for breach of consulting agreement easily meets the low threshold, as I have already mentioned, that his actions were clearly improper and in breach of the plaintiff's duty to act in the defence best interest and result in foreseeable loss. I do note that the damage claim for increased financial costs was only mentioned recently in the evidence in an affidavit filed just days before the hearing before me. I am advised that this is a

recent assertion of damage, as plaintiff's counsel has only been given limited information in a without-prejudice letter, which was first mentioned by defence counsel here before me and prompted the plaintiff's counsel to respond.

[26] In term of irreparable harm, the balance payment out of the debt amount would severely and irreparably prejudice the plaintiff and its ability to collect on any judgment it might ultimately obtain. It is argued that if the defendant is successful in its counterclaim, the defendant's judgment would likely exceed the plaintiff's debt claim. In terms of the balance of convenience, the defendant says it would face irreparable harm in its ability to collect.

[27] My assessment here is that the cross claim at its core, as I have already mentioned is against Mr. Coombes, the evidence suggests that he has assets, that he has a residence, that he has income and that his debt claim has been clearly established and that it represents his source of income, which has been held for some time. To the extent that there is some suggestion that his income is deferred with his mining company that he is working with right now, that still remains a chose in action and an obligation on the part to which he can collect upon. He also has other assets.

[28] I also note that the new assertion of loss is based on the view of Mr. MacDonald at this point, and there appears to be little supporting evidence to elaborate on that claim. It is clear that prior to Mr. Coombes leaving the defendant company, the defendant company was in significantly difficult financial straits, unable to pay for required regulatory filing that is required by the regulator, faced shareholder revolt and it appears the financial circumstances of the company have not improved in any significant way.

[29] My assessment in weighing the factors leads me to conclude that the stay of execution has not been justified and accordingly a stay is denied.

[30] This concludes my ruling.

[SUBMISSIONS ON COSTS]

[31] THE COURT: Okay. Well, I appreciate your positions. I am going to award costs to the plaintiff. I do not know what it means in terms of forthwith. Normally the order would just be you are entitled to your costs; correct?

[32] UNIDENTIFIED MALE SPEAKER: My submission, My Lord, is that the costs will not be payable at the end of the proceeding. But, I mean, the costs are not significant on a summary trial application, but the order that we are seeking is simply that the costs of the application be payable now rather than at some indeterminate time in the future.

[33] THE COURT: All right. So awarded.

[34] UNIDENTIFIED MALE SPEAKER: Okay. My -- but if I might, My Lord, my -- the final point that I would make is that in our notice of application we sought simply an order that if judgment were granted that the funds currently in court be paid out to the plaintiff care of his solicitors. I understand that that order is required to have funds paid out of court. I simply add to that [indiscernible] determine the order.

[35] THE COURT: So ordered. Thank you very much, counsel.

“The Honourable Mr. Justice Masuhara”