

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bowman v. Coastal Shellfish Corporation*,
2016 BCSC 726

Date: 20160322
Docket: S161872
Registry: Vancouver

Between:

Samuel Bowman

Plaintiff

And

**Coastal Shellfish Corporation and
Coastal Shellfish Limited Partnership**

Defendants

Before: Registrar Cameron

Oral Reasons for Decision

Counsel for the Plaintiff:

I.A. Kennedy

Counsel for the Defendants:

D. Bernstein

Place and Date of Hearing:

Vancouver, B.C.
March 21, 2016

Place and Date of Decision:

Vancouver, B.C.
March 22, 2016

INTRODUCTION

[1] This is an application by the Defendants to set aside a garnishing order before judgment. The Defendants submit that the Plaintiff has failed to comply with the *Court Order Enforcement Act*, R.S.B.C. 1996 c. 78, by overstating the amount allegedly owing to him following his termination of his employment by the Defendants. They also allege that the Plaintiff's affidavit material in support of the garnishing order is defective in that it fails to make reference to material facts and to provide full and frank disclosure as required by law.

[2] The Plaintiff submitted that there are no defects in the material filed in support of the garnishing order and that adequate disclosure was made in support of it.

FACTS

[3] The Defendants own and operate an aquaculture and shellfish production operation on the west coast of British Columbia. The Plaintiff, Samuel Bowman, was employed by the Defendant Coastal Shellfish Corporation as its president and chief executive officer pursuant to a written employment agreement dated April 30, 2014, that by its terms, *inter alia*, provided that for determining his length of service, his employment was deemed to have commenced on February 1, 2010.

[4] The employment agreement provided for dismissal for just cause "at any time, without notice or compensation in lieu thereof". It also provided for the Plaintiff's notice entitlement upon a without cause dismissal as follows:

The Company may terminate the Employee's employment at any time during the term of this Agreement without cause by:

(a) Providing a notice of termination to the Employee and continuation of payment of Base Salary during this period (the "Notice Period"). The Notice Period shall initially be 6 months and shall be extended by one month for every year of completed service with the Company under this Agreement to a maximum of 12 months, or;

(b) At the sole discretion of the Company by providing a lump sum payment equal to the Base Salary that otherwise would have been paid for the applicable Notice Period. . .

[5] In October 2015, the Defendants became concerned that the Plaintiff was failing to properly discharge his duties and placed him on a performance improvement plan. As matters transpired, the Defendants were not satisfied that the Plaintiff's performance was improving and on January 26, 2016, they terminated the Plaintiff's employment, asserting just cause to do so.

[6] The Plaintiff took quite a different view of his termination and on March 1, 2016, filed a notice of civil claim alleging that he was terminated from his employment without just cause and without notice or pay in lieu on January 26, 2016.

[7] In reliance upon the provisions in the employment agreement that provided for payment to him on a without cause dismissal, in the notice of civil claim that was filed he claimed, based upon his employment agreement, the liquidated sum of \$150,000. This amount was based upon his annual salary of \$150,000 and six completed years of service with the Defendants.

[8] On March 1, 2016, concurrently with filing the notice of civil claim, the Plaintiff obtained a garnishing order before judgment for the sum of \$150,000, based upon his supporting affidavit that set out his calculation of the applicable notice period and his base salary amount.

[9] Both the notice of civil claim and the affidavit sworn by the Plaintiff in support of the garnishing order before judgment are clear and consistent as to the amount alleged to be "justly due and owing after making all just discounts".

[10] On March 11, 2016, the garnishee paid the sum of \$150,000 into court and this application followed.

THE LAW

[11] Sections 3 and 5 of the *Court Order Enforcement Act* are pertinent and read as follows:

3 (2) A judge or a registrar may, on an application made without notice to any person by

- (a) a plaintiff in an action, or
- (b) a judgment creditor or person entitled to enforce a judgment or order for the payment of money,

on affidavit by himself or herself or his or her solicitor or some other person aware of the facts, stating,

. . .

- (d) if a judgment has not been recovered,
 - (i) that an action is pending,
 - (ii) the time of its commencement,
 - (iii) the nature of the cause of action,
 - (iv) the actual amount of the debt, claim or demand, and
 - (v) that it is justly due and owing, after making all just discounts,

and stating in either case

- (e) that any other person, hereafter called the garnishee, is indebted or liable to the defendant, judgment debtor or person liable to satisfy the judgment or order, and is in the jurisdiction of the court, and
- (f) with reasonable certainty, the place of residence of the garnishee,

order that all debts due from the garnishee to the defendant, judgment debtor or person liable to satisfy the judgment or order, as the case may be, is attached to the extent necessary to answer the judgment recovered or to be recovered, or the order made, as the case may be.

. . .

5 (1) If a garnishing order is made against a defendant or judgment debtor, he or she may apply to the registrar or to the court in which the order is made for a release of the garnishment, and if a judgment has been entered against him or her, for payment of the judgment by installments.

(2) If, under subsection (1), the registrar or judge considers it just in all the circumstances, he or she may make an order releasing all or part of the garnishment and if he or she does and a judgment has been entered, he or she must set the amounts and terms of payment of the judgment by installments.

[12] In accordance with s. 3(2)(d) of the *Court Order Enforcement Act*, an applicant for a garnishing order must set out the nature of the cause of action, the actual amount of the debt, claim, or demand, and that the amount claimed is justly due and owing after making all just discounts.

[13] Pre-judgment garnishing orders are an extraordinary remedy and require strict compliance with statutory requirements: *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560 (B.C.S.C.).

[14] The law has developed such that a standard of perfection is not required, but an applicant must still meticulously comply with the requirements of the *Act*. *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263.

DISCUSSION

[15] The principal attack the Defendants make on the garnishing order is stated by them in their written submissions as follows:

The garnished amount (\$150,000) represents exactly twelve (12) months' of the Plaintiff's base annual salary. The Bowman Affidavit states that this amount is justly due and owing to the Plaintiff on the basis of his entitlement to "payment of an amount equivalent to 12 months' salary." Upon a without cause dismissal, the Plaintiff was only entitled to eleven (11) months' notice or pay in lieu thereof, as he had only five (5) years of completed service (i.e. February 1, 2010 to January 26, 2016). The Without Cause Formula clearly contemplates "completed" years of service.

The Plaintiff has therefore overstated his notice entitlement by one month and as such the garnished amount is not accurate. This is not in compliance with the requirement that the Plaintiff set out the "actual amount of the debt, claim or demand".

[16] The Defendants rely upon *Hawley v. GMD Resource Corp.*, [1998] B.C.J. No. 1397, as follows:

[33] This leaves the issue of the apparent miscalculation in Mr. Dawson's affidavit. The plaintiff argues that if there is a discrepancy between the amount calculable on the pleadings and the amount set forth in Mr. Dawson's affidavit then a deduction can be made upon a proper calculation without setting aside the garnishing order. However, as I have already observed, *Knowles v. Peter*. . . establishes that the issuance of a garnishing order before judgment, because of its ex parte nature, requires a "meticulous observance" of the requirements and provisions of the *Court Order Enforcement Act*, specifically s. 3(2).

[34] Here the plaintiff has in my view met the requirements of s.3(2)(i), (ii) (iii) and (v). However, as for s. 3(2)(iv), the plaintiff has misstated the "actual amount of debt, claim or demand" by calculating the amount due under the contract based on 19 months rather than 17 months and 17 days. As a result, the plaintiff has stated the sum of \$71,250.00 instead of \$66,026.79, which is a difference of \$5,223.21.

[35] The plaintiff says that this is merely a technical imperfection which misled no one as the nature of the claim. GMD's view is that this is not the meticulous observance required by *Knowles v. Peter*.

. . .

[37] What has occurred here is not merely a technical imperfection. The plaintiff in his Statement of Claim asserts, first, the factual basis for a liquidated claim based upon an amount owing of \$3,750 per month for the period from February 11, 1998, to July 31, 1999 (i.e. 17 months and 17 days). Then there is a second contradictory, assertion that the liquidated claim is in the amount of \$71,250.00. That second assertion is repeated in Mr. Dawson's affidavit.

[38] Thus, there is both an internal inconsistency within the Statement of Claim and an apparent miscalculation of the actual amount claimed in Mr. Dawson's affidavit. This leaves this Court in confusion as to the actual amount of the claim.

[39] According to s. 3(2)(d)(iv), the extraordinary remedy of a garnishing order before judgment is only available to a plaintiff who by affidavit states the actual amount of his or her claim. This must be done with enough care that the court is not left in confusion. The plaintiff in this case has not met this requirement.

[17] In his submissions, Plaintiff's counsel distinguished *Hawley*, noting in that case the plaintiff claimed that there were 19 months remaining on his contract, when in fact there were only 17 months and 17 days remaining. In that case, the plaintiff's affidavit was clearly defective: the number of weeks left remaining in his contract had not been correctly counted and there was a patent discrepancy on the pleadings.

[18] Counsel submitted that in this case there is clearly no demonstrable error. Rather, the Plaintiff has asserted that he had completed six years of service as stipulated by his employment contract and he has claimed liquidated damages based upon those six years of service.

[19] While Plaintiff's counsel accepted that by just "looking at the calendar" it appears the Plaintiff had worked five days less than six years (his employment inception date being February 1, 2010, and his date of dismissal being January 26, 2016), he submitted that whether or not the Plaintiff actually completed six years of service will be a matter of contractual interpretation based upon the evidence to be led at trial, including evidence as to the Plaintiff's entitlement to any accrued vacation.

[20] Having reviewed the contents of the notice of civil claim and the affidavit in support of the garnishing order, I am satisfied that there is no internal inconsistency, unlike in *Hawley*, in the manner in which the amount of the claim is calculated that would warrant setting aside the garnishing order.

[21] The *Court Order Enforcement Act* requires that the affidavit in support of the garnishing order clearly state the “actual amount of the debt, claim or demand”. In this case, the amount claimed is clearly stated. Whether or not the Plaintiff establishes that he is entitled to any amount for termination in lieu of notice or without just cause will be decided at trial, as will the amount due if cause is not found for his dismissal.

[22] The Plaintiff has made a claim for an amount predicated on interpretation of the employment agreement that may or may not prevail at trial, but there has been no failure to be transparent in the manner in which the claim has been advanced.

[23] The Defendants conceded that it is not the function of the Registrar in issuing the garnishing order to decide the Plaintiff’s entitlement to the amount sought to be recovered.

[24] The Defendants raised but did not strenuously argue that the affidavit in support of the garnishing order failed to advert to the Defendants’ assertion that the Plaintiff was dismissed for just cause. While the affidavit does not address that issue, the draft notice of civil claim that is attached to the affidavit as an exhibit does clearly refer to the Defendants’ alleged grounds for termination, and I am satisfied that this amounts to sufficient disclosure on an *ex parte* application.

[25] Accordingly, the Defendants’ application to set aside the garnishing order is dismissed with costs at Scale B. Those costs are not payable forthwith.

“Registrar Cameron”