IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Wirop Industrial Company Limited v. Baydar & Associates Incorporated, 2007 NSSC 332

Date: 20071121
Docket: SH 276040
Registry: Halifax

Between:

Wirop Industrial Company Limited and
Foard Yon Trading Company Limited

Plaintiffs

v.

Baydar & Associates Incorporated

Defendant

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: August 16, 2007 in Chambers, in Halifax, Nova Scotia

Written Decision: November 21, 2007

Counsel: **Carl A. Holm, Q.C.**, for the applicant
Brian J. Hebert, for the respondent

By the Court:

INTRODUCTION

[1] One plaintiff seeks summary judgment in a debt action for goods sold and delivered to the defendant. The defendant has counterclaimed alleging that it was the exclusive agent for both plaintiffs and that the plaintiffs breached their contract with it without notice.

ISSUES

1. Are there material facts in dispute?
2. Is there a claim for equitable set-off such that summary judgment should not be granted?

FACTS

[2] Wirop Industrial Company Limited is a manufacturing company in Taiwan. The manufacturer’s products are used in the wire rope industry. Its products are sold through Foard Yon Trading Company Ltd. which is Wirop’s export company

in Taiwan. Baydar & Associates Incorporated is a Nova Scotia company incorporated in 1999 to supply wire rope to the scaffolding industry.

[3] Although the nature of the relationship among these parties is in dispute, it is clear that Baydar began to sell Wirop's products in North America in 2000. Baydar established warehouse facilities in the United States and Canada and bought products to have for inventory purposes.

[4] The arrangement between Baydar, Wirop and Foard Yon collapsed in 2006 leaving Baydar with unsold product. According to the affidavit of Said Baydar in para. 35:

> 35. Baydar has had no business dealings with Wirop/Foard Yon since then. Word spread quickly that Baydar was not representing Wirop. Baydar was left with Wirop inventory that it could not sell or had to sell at below cost. Baydar still has $43,000.00 worth of Wirop inventory that remains unsold. This is part of the inventory that Wirop and Foard Yon is seeking payment for in this claim. Baydar only purchased the inventory to keep a stock of Wirop products to sell as exclusive agent. Part of the loss claimed by Baydar in its counterclaim relates to lost profit on these inventory items. I offered to return the inventory to Wirop as long as Wirop paid for the freight. Wirop refused.

[5] Wirop commenced action against Baydar in January 2007 claiming $189,636.20 (Canadian) for goods delivered and not paid for. Baydar defended

and counterclaimed on February 7, 2007. In its defence and counterclaim, it stated in para. 3.

> 3. The defendant states that the plaintiff is the manufacturer of products used in the wire rope industry. In the year 2000, the plaintiff and its subsidiary, Foard Yon Trading Co., Ltd., (the 'Subsidiary') of Taiwan, entered into a contract, part oral and part written, with the defendant, whereby the defendant was appointed the exclusive agent to distribute the plaintiff's products in North America.

[6] In paras. 6 and 7, Baydar set out what it says were the order and payment arrangements as follows:

> 6. For machines and other specific orders, the defendant would collect one-third of the retail price from the customer when the customer placed an order with the defendant. The defendant would then place an order with the Subsidiary and pay the Subsidiary one-third of the wholesale price. When the product was ready for shipping, the customer would pay the defendant another one-third of the retail price and the defendant would pay one-third of the wholesale price to the Subsidiary. Upon delivery of the product to the customer, the customer paid the balance of the retail price and the defendant paid the Subsidiary the balance of the wholesale price.
>
> 7. For certain consumables, primarily wire rope sleeves, the defendant would order in bulk and maintain an inventory of various products at its warehouses in Texas, Louisiana and Nova Scotia. The plaintiff, the Subsidiary and defendant agreed that the defendant would purchase the product on account from the Subsidiary with no fixed terms of payment and without interest. The defendant would place an order with Subsidiary for the product at wholesale prices and the Subsidiary would ship the product to the defendant which would store the product at its facilities until sold to customers. The defendant would sell the product to customers upon order at retail prices set by the defendant. The defendant would

> pay the Subsidiary for the product based on turnover of the inventory usually within 180 days.

[7] Baydar says in paras. 11 and 12:

> 11. Baydar states that the plaintiff had no cause to terminate the agency relationship and the statements made to the previous and potential customers were false and malicious.
>
> 12. The said statements caused serious damage to the defendant's reputation and that of its principal, Said Baydar, and are slanderous and libelous.

Baydar's counterclaim is for damages for breach of contract, defamation, libel and special damages.

[8] As a result of the allegations in Baydar's defence, the statement of claim was amended on April 4, 2007 to add Foard Yon as a plaintiff. The amended claim said in para. 6: "Prior to February 2006, Baydar had inappropriately represented itself as the sole or exclusive authorized agent for Wirop in North America." The monetary claim then became the claim of Foard Yon. Wirop claimed:

> 10. Wirop claims the following relief:

(a) Injunctive relief to prohibit Baydar from continuing to advertise itself as the exclusive agent for Wirop in North America;

(b) specific performance requiring Baydar to remove any reference in its advertising materials to it being the exclusive agent for Wirop in North America;

(c) aggravated and punitive damages for Baydar failing to remove all references to it being the exclusive agent for Wirop in North America despite repeated requests to do so;

(d) general damages for lost sales and profits due to Baydar failing to remove all references to it being the exclusive agent for Wirop in North America;

(e) pre-judgment interest;

(f) costs; and

(g) such further Order and relief as this Honourable Court may grant.

[9] On the same date, the plaintiffs/defendants by counterclaim entered their defence to the counterclaim alleging, *inter alia*, that payments to Foard Yon on its invoices began to be delayed in 2004 and, by September 2006, the delays were so serious that Wirop terminated its business relationship with Baydar (paras 11 and 12 of the Defence to Counterclaim).

[10] Foard Yon seeks summary judgment on its monetary claim. The action by Wirop is not the subject of the summary judgment application.

ANALYSIS

[11] The summary judgment rule provides as follows:

> **Application for a summary judgment**
>
> **13.01** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> ...
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; ...

[12] The defendant does not dispute that the invoices are correct and that the items referred to on them were ordered and delivered. If that were the end of it, summary judgment could be granted. However, the defendant says the terms of payment are in dispute and equitable set-off applies. The question posed by the defendant is: "Is it equitable for a manufacturer to terminate an exclusive agency

agreement without notice and then force the distributor to pay for goods it can no longer sell or must sell at a discount" because it was no longer the manufacturer's agent?

[13] The defendant says there is an issue of material fact requiring trial, that is, the nature of the relationship between the plaintiffs and the defendant and the credit arrangements between them as a result. Alternatively, the defendant says that, even if the claim is made out, it has an arguable defence, that of equitable set-off.

[14] The defendant referred the court to *Key Equipment Finance Canada Ltd. v. Jacques Whitford Ltd.,* 2006 NSSC 68 where the court referred to the role of the chambers judge on a summary judgment application. The court said in para. 18 and 19:

> 18 The role of the chambers judge on a summary judgment application has been set out in *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 (N.S.C.A.) and in *Campbell v. Lienaux* (1998, 167 N.S.R. (2d) 196 (N.S.C.A). In *Oceanus*, Pugsley, J.A. said at para. 20:
>
>> **[20]** It was, with respect, not the function of the chambers judge, on an application for summary judgment, to determine matters of fact or law which were in dispute. Matters of controversy should be left for

> resolution at trial. (***Irving Oil Ltd. v. Jos. A. Likely Ltd.*** (1982), 42 N.B.R. (2d) 624, 110 A.P.R. 624 (C.A.))

> 19 In Campbell, Cromwell, J.A. quoted the chambers judge at para. 7 as follows:
>
> > [7] ... As I and other judges in Nova Scotia have said repeatedly, it is not my function in this setting to determine matters of fact or of law which are in serious dispute. Such matters should only be left for resolution at trial.

[15] In para. 20, the court also referred also referred to the test for summary judgment set out by the Supreme Court of Canada:

> 20 The Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) set out the test for summary judgment as follows in para. 27:
>
> > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1977] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc*. (1998); 164 D.L.R. 4th 257 Ont. C.A.), at pp 267-68; *Irving Ungerman Ltd. v. Galanis* (1991, 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then ‘establish his claim as being one with a real chance of success’. (*Hercules, supra*, at para. 15).

[16] The court said it must first determine whether there is a genuine issue of material fact requiring a trial; if so, the summary judgment application must be dismissed. The court said in para. 22:

> 22 The first question is whether there is a genuine issue of material fact requiring trial. If there is, the chambers judge is not to further consider the summary judgment application but must dismiss it.

[17] In the affidavit of Said Baydar, he says the defendant was the exclusive agent of Wirop. Attached to his affidavit are copies of emails and ads referring to the defendant as Wirop's "sole agent". In paras. 25, 26 and 27 of his affidavit Mr. Baydar sets out the "arrangements for ordering and payment."

[18] In para. 29 and 30, he referred to cancellation of the credit arrangements.

> 29. ... Mr. Chiu told us that Wirop would set up its own direct distribution company, Wirop U.S.A. ...

> 30. ... Wirop/Foard Yon refused to ship any further products ... unless Baydar paid its accounts ... in full. This was contrary to the credit terms of the exclusive agency agreement we had with Wirop/Foard Yon. Wirop/Foard Yon essentially revoked all credit terms.

[19] Based upon the affidavit and the exhibits to it, I conclude there is an issue of material fact about how payment was to be made. That is an issue that must be determined at trial. For that reason, I dismiss the application for summary judgment.

EQUITABLE SET-OFF

[20] In the event I am wrong about the issue of material fact requiring trial, I will deal with the defendant's claim for equitable set-off. If there is no issue of material fact requiring trial, that is, if the applicant has proven his claim, the onus is then on the respondent to establish that this is an arguable issue for trial.

[21] The defendant has counterclaimed against the plaintiffs. In its counterclaim, it says it was the exclusive agent to distribute Wirop products in North America and that it was an implied term of their contractual arrangement that reasonable notice would be given of termination. In the defence to the counterclaim, Wirop and Foard Yon deny there was an exclusive agency or any need for notice of termination.

[22] In order for the matters in the counterclaim to raise an issue of equitable set-off, the matters must be closely connected, go directly to impeach the plaintiff's claim and it would be manifestly unjust to enforce payment without considering the counterclaim. *Rule* 14.20 provides:

> **14.20** Where a claim by a party to a sum of money, whether the amount is ascertained or not, is relied on as a defence to the whole or part of a claim made by an opposing party, it may be included in a defence and set-off against the claim, whether or not it is also added as a counterclaim.

[23] In *Purdy v. Fulton Insurance Agencies Ltd.*, 1991 CarswellNS 74, Chipman, J.A., in para. 11, referred to *Telford v. Holt*, [1987] 2 S.C.R. 193 which in turn referred to the decision of Lord Denning in *Federal Commerce & Navigation Ltd. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066. Lord Denning said at p. 1078:

> ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

[24] Chipman, J.A. also referred to *Atlantic Lines and Navigation Co. v. "Didymi" (The)* (1987), [1988] 1 F.C. 3, 78 N.R. 99, 39 D.L.R. (4th) 399, quoting from it in para. 12 as follows:

> It is true that the claims on both sides arose out of the same charter-party agreement. In that sense they are closely connected. On the other hand, I fail to see how it can be said that any of the respondents' claims asserted by the counterclaim go directly to impeach the appellant's claim ...

[25] In *Singer v. Sommex Maritime Ltd*., (1996), 148 N.S.R. (2d) 118 (N.S.S.C.), Davison, J. also referred to *Telford*, *supra*, quoting Justice Wilson at p. 394. He then said at para. 15:

> 15 ... Wilson J. allowed the equitable set-off of a sum 'which arises out of the same contract or interrelated contracts'.

[26] Davison, J. referred to the decision in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. et al* (1985), 20 D.L.R. (4th) 689, which Wilson, J. spoke of with approval. In the *Coba* decision, Macfarlane, J.A. set out the principles with respect to equitable set-off. Davison, J. set them out in para. 16 as follows:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands. ...

2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed. ...

3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim. ...

4. The plaintiff's claim and the cross-claim need not arise out of the same contract. ...

5. Unliquidated claims are on the same footing as liquidated claims. ...

[27] Subsequently in *HSBC Capital Canada Inc. v. First Mortgage Nova Scotia Fund (III) Inc.*, 2002 NSCA. 32, Bateman, J.A. dealt with equitable set-off on an application for summary judgment. She too referred to *Purd*y and *Atlantic Lines*. She concluded in para. 36:

> 36 It is my view that, similarly, the 'set-off' claimed here by HSBC does not impeach the Funds' ownership of the money and that Nunn J. did not err in so holding. I am not persuaded that the release of the money to the Funds through the summary judgment resulted in a manifest injustice.

[28] In *Royal Bank v. Speight*, 2006 NSSC 151, there were allegations of improper conduct on the part of the party raising the issue of equitable set-off. In *Purdy, supra*, the controller of the company was alleged to have converted the company's funds and defrauded the company. His action against the company was

for unjust dismissal. The court said that the controller admitted that he had the funds but denied any wrongdoing. As Chipman, J.A. said in para. 7:

> 7 Mr. Justice Goodfellow found that on the basis of the discoveries and pleadings the appellant admitted that he had funds of the respondent totalling $57,700, of which $12,000 have been repaid. That finding is not in question, but the appellant throughout denies any wrongdoing, fraud or conversion in respect of the transaction, and asserts a right of set-off with respect to his claim for damages for wrongful dismissal.

[29] Chipman, J.A. said in para. 15:

> 15 ... The claim for wrongful dismissal may be connected, but not closely. It does not go to impeach the respondent's demand for $45,700 admittedly due even without proof of fraud on conversion. Most important, it would not be manifestly unjust to order the return of $45,700 without taking into account the cross-claim.

[30] In *Speight*, *supra*, the bank changed the status of the defendant company's bank account without notice to the company or to the defendants. The bank sued the defendants on their guarantee and the defendants counterclaimed that the effect of the bank's actions disrupted and ultimately ended the company's business. There were allegations of wrongdoing which the defendants denied (para. 10):

> 10 The defendants says that RBC improperly made allegations that Roadmaster was engaged in improper activity with respect to the accounts, described by a bank official as 'kiting'.

[31] Robertson, J. concluded in para. 22:

> 22 In the circumstances of this case, however, I find that the causes of action are not so closely related that the applicant should be denied its right to summary judgment in its claim against the guarantors. The situation is more akin to *Purdy* than *Singer*. In *Singer* an arguable case had been made on an accounting delivery of a single shipment of goods, all arising out of similar contractual dealings. In fact these causes are more distinct than *Purdy* where the claim and counterclaim arose out of the employment contract. It would not be manifestly unjust to require that the respondents honour their guarantees before the cross-claim proceeds to trial.

[32] In *HSBC*, *supra,* HSBC:

> ... was the custodian of the monetary assets of the Funds. Those Agreements have now come to an end and the Funds seek return of the remaining monies held by HSBC, but belonging to the Funds. (para. 2)

An investigator was appointed (KPMG) and it rendered an invoice for its services. A decision was pending several months later on who would be responsible for paying that account. In the meantime, HSBC wished to retain the funds it held for Funds until that decision was rendered. HSBC refused to give the money to Funds. Funds sued and sought summary judgment.

[33] Bateman, J.A. said in para. 28:

> 28 The refusal to turn over the monies to the Funds was motivated by HSBC's attempt to secure its position pending determination by Tidman J. of the amounts, if any, owing to it by the Funds. If the Summary Judgment is stayed until the appeal can be heard, HSBC will accomplish what it originally set out to do. ...

As quoted above, Bateman, J.A. did not conclude that the claim of equitable set-off was made out.

[34] In *Singer*, *supra*, the plaintiff sued for unpaid invoices for 176 beds delivered and not paid for. Sommex said that the beds were "of poor and unmerchantable quality, did not correspond with the description supplied to the plaintiff and were not fit for the purpose made known by the defendant."

Davison, J. said in para. 10:

> 10 ... Mr. Balmanoukian agreed he ordered and received these beds and the amount on the invoice was $7,922.28 and that the defendant did not pay any portion of the amount of the invoice. Mr. Balmanoukian also admitted that the beds, to which the invoice applied, were not beds which failed to conform to the description supplied as alleged in paragraphs 3(b) of the statement of defence.

He characterized the defence as follows in para. 12:

> 12 ... Yet now the defendant advances a claim for set-off because of the poor quality of goods shipped over the years from Empire to the defendant.

[35] Davison, J. dealt with this defence in paras. 22 and 28 where he said:

> 22 ... If Sommex cannot attribute a deficiency to the shipment which is the subject of the plaintiff's claim, it cannot be said there is proof the defects relate to that shipment.

> 28 An order will issue granting to the plaintiff summary judgment in the amount of $7,922.28 together with pre-judgment interest. The order shall state that any claims for set-off arising from contracts or deliveries, other than the shipment which gives rise to the plaintiff's action, are dismissed. The execution on the summary judgment will be stayed pending further order of this court which should follow a determination of whether the defendant has a successful set-off defence with respect to the contract and delivery of the 176 London beds.

[36] In my view, there is a close connection between the claim made by Wirop and Foard Yon and the counterclaim by Baydar. They clearly arise out of the same contractual relationship between the parties. The transactions arose out of the contractual relationship between the parties. It was that contractual relationship which Baydar says could not be terminated without notice. The connection is a close one because Baydar alleges that, because of the cancellation without notice, it was left with product which it could not sell (or sell only at a loss) and that product is the subject of Foard Yon's application. The counterclaim directly impeaches the

claim of Foard Yon; if the counterclaim is proven, Wirop would not have been entitled to terminate the relationship without notice. Baydar would have had notice and time to sell the product. It therefore would not have been left with unsold inventory which it could not sell (or sell only at a loss). It is that very inventory for which Foard Yon now seeks payment. As Davison, J. said in para. 27 of *Singer*:

> 27 There is a burden on the defendant to produce evidence of an arguable point, but that burden is not a heavy one. The material before the court satisfies me there may be an arguable point which can be advanced at trial for equitable set-off. ...

[37] I am satisfied that the defendant has met the burden on it, which is not a heavy one, that the issue of equitable set-off should be left to be determined at trial. Under these circumstances, I conclude it would be manifestly unjust to grant summary judgment without taking the counterclaim into consideration.

[38] Baydar is not in a position like the defendants in *Purdy* and *Speight*. There is no allegation that it does not come with clean hands seeking an equitable remedy. Baydar's position is more akin to that of the defendant in *Singer*.

[39] I dismiss the application for summary judgment. The respondent is entitled to its costs of $900.00 payable forthwith.

Hood, J.