SUPREME COURT OF NOVA SCOTIA
Citation: Martin v. Hawkins, 2012 NSSC 32

Date: 20120111
Docket: Hfx No. 312185
Registry: Halifax

Between:

Jeffrey D. Martin and Martin Pultrusion Group Inc.

Applicants

v.

Terry Hawkins and Terry Hawkins Industries Ltd.

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 4, 2012, in Halifax, Nova Scotia
Decision:	January 11, 2012 (Orally)
Written Release of Decision:	January 23, 2012
Counsel:	Rebecca L. Hiltz LeBlanc, for the applicants Terrance R. Hawkins, self-represented, for the respondents, and Donald Cleveland, as agent for the respondents

By the Court:

Background

[1] On February 13, 2009, the Court of Common Pleas of Summit County, Ohio issued a Consent Judgment and Order of Replevin, in proceedings in which Martin Pultrusion Group Inc. ("Martin Pultrusion") was the plaintiff, Terry Hawkins ("Hawkins") and Terry Hawkins Industries Limited ("Hawkins Industries") were defendants, with Jeffrey D. Martin ("Martin") as third party. The order was signed by Martin and Hawkins in their personal capacities and also on behalf of the two companies ("the Ohio Order").

[2] The Ohio Order required Hawkins and Hawkins Industries to pay a total of $240,000.00 U.S. to Martin and Martin Pultrusion within seventy-five days, failing which an order of replevin would be issued giving Martin the right to enter premises in Shelburne, Nova Scotia to take possession of certain listed equipment and materials ("the Equipment").

[3] The Ohio Order further provided that in the event replevin was required, this would satisfy the judgment in full as long as Hawkins and Hawkins Industries co-operated. The order included additional provisions concerning the obligations of Hawkins and Hawkins Industries, which will be discussed further in this decision.

[4] In June, 2009, this proceeding was commenced when Martin and Martin Pultrusion filed a Notice of Application in Chambers seeking an order recognizing the Ohio Order in Nova Scotia based upon the common law principles for registration of foreign judgments. This resulted in a consent order being issued by Justice Bourgeois of this Court on August 6, 2009 ("the Nova Scotia Order").

[5] The Nova Scotia Order required Hawkins and Hawkins Industries to pay Martin the sum of $105,000.00 U.S. and Martin Pultrusion the sum of $140,000.00 U.S., both within sixty days. The order further provided that if payment was not made, the applicants were entitled to possession of the Equipment.

[6] The parties agreed that the additional $5,000.00 U.S. judgment amount in the Nova Scotia Order was intended to compensate the applicants for the costs of having the Ohio Order enforced in Nova Scotia.

[7] Although the Nova Scotia Order did not incorporate all of the provisions of the Ohio Order with respect to satisfaction of the judgment by replevin of the Equipment, the parties in their submissions confirmed that that was the understanding which had been reached. In other words, the Nova Scotia Order was intended to reflect in all respects the terms of the Ohio Order, with the exception that the judgment amount was increased by $5,000.00.

[8] On November 10, 2009, Justice McDougall of this Court issued a recovery order in favour of the applicants, directing the sheriff to seize the Equipment from the premises of Hawkins Industries in Shelburne, Nova Scotia ("the Recovery Order").

[9] On November 11 and 12, 2009, representatives of the office of the Sheriff of Yarmouth County attended at the premises of Hawkins Industries with Martin and arranged to take possession of the Equipment and deliver it to the applicants in accordance with the terms of the Recovery Order.

[10] In the spring of 2011, a credit application by the respondents disclosed an unsatisfied judgment in the amount of $245,000.00 U.S. in favour of the applicants arising out of the Nova Scotia Order. As a result, Hawkins and Hawkins Industries have made this motion. Although the notice of motion describes the relief sought as being an order for the rescinding and removal of judgments, I believe it is more properly characterized as a motion for an order declaring that the judgments have been satisfied.

[11] In support of this motion, Hawkins filed two affidavits of his own, deposed to on August 10, 2011 and September 16, 2011. In opposition to the motion, Martin filed his own affidavit, deposed to on May 16, 2011, as well as the affidavit of Robert L. Miedema, deposed to on September 6, 2011. Messrs. Hawkins, Martin and Miedema were cross-examined at the hearing of the motion.

[12] The issue for my determination is whether the delivery of the Equipment to the applicants pursuant to the Recovery Order satisfies the respondents' obligations under the Ohio Order, and consequently the Nova Scotia Order.

Position of the Parties

[13] The position of Hawkins is that the terms of the Ohio Order have been complied with and therefore, the judgments arising out of the Nova Scotia Order have been satisfied.

[14] The position of Martin is that Hawkins did not meet the obligations imposed on him under the Ohio Order, and in particular the requirement to co-operate fully in the replevin process. As a result, the applicants say that they are only required to give the respondents credit for the fair market value of the Equipment at the date of seizure, and they are entitled to all additional costs incurred in obtaining the Equipment and returning it to the United States.

Analysis

[15] The Ohio Order is central to the issues to be determined on this motion, and so I will set out the relevant provisions:

> IT IS FURTHER ORDERED that in the event Defendants fail timely to make the payment described above, Martin agrees that the replevin of the Equipment as described herein shall satisfy in full the judgment, so long as Defendants fully cooperate in the replevin effort.
>
> IT IS FURTHER ORDERED that the Defendants will keep the above-referenced Equipment at its facility located at 448 Sandy Point Road, Shelburne, Nova Scotia, Canada, for the pendency of the seventy-five (75) days described herein or until Martin takes possession of the equipment whichever date is later. The Defendants waive any requirements, procedural or substantive, to enforcing this judgment in Canada and consent to the jurisdiction of a Canadian court with competent jurisdiction to enforce this agreement.
>
> IT IS FURTHER ORDERED that in the event Martin executes on the Order and replevin Defendants agree to use best efforts to provide Martin with a forklift at Defendants' expense for the removal of the Equipment, and agree to detach the equipment from its electrical connection to the plant prior to removal.
>
> IT IS FURTHER ORDERED that in the event the Defendants fail to make payment herein or to allow access by Martin for the removal of the Equipment, the Defendants shall be jointly and severally liable for the full judgment amount offset by the fair market value of any Equipment returned by Defendants and the

> costs included in retrieving the Equipment, including reasonable attorney fees incurred in the enforcement of the judgment in a Canadian court of competent jurisdiction.

[16] It is clear that the agreement reached between the parties and reflected in the Ohio Order is that Hawkins and Hawkins Industries are to pay Martin the sum of $100,000.00 U.S. and Martin Pultrusion the sum of $140,000.00 U.S. within seventy-five days of the order. If that does not happen, then Martin and Martin Pultrusion are entitled to an order of replevin to take possession of the Equipment, and this will satisfy the judgment debt in full, provided Hawkins and Hawkins Industries have co-operated in the replevin effort.

[17] If Hawkins and Hawkins Industries do not provide the necessary co-operation in the replevin exercise, then there is to be a further accounting between the parties to give credit for the fair market value of the Equipment, as well as compensate Martin and Martin Pultrusion for the costs incurred in recovering the Equipment.

[18] The replevin process referred to in the Ohio Order is, in my opinion, essentially the same as a recovery order in Nova Scotia. As a result, it was always within the contemplation of the parties that a further court order would be needed in order for Martin and Martin Pultrusion to take possession of the Equipment in Nova Scotia if payment was not made.

[19] The events which unfolded over November 10 to 12, 2009 in Shelburne were the focus of the parties' submissions. I have carefully reviewed the affidavits filed, considered the evidence presented through cross-examination and heard the submissions made by each party. Based upon this process, I find that the following is the sequence of events:

1. On November 4, 2009, Robert Miedema, who was an associate lawyer with the law firm representing Martin and Martin Pultrusion, telephoned Hawkins to arrange access to the respondents' premises in order to take possession of the Equipment. At that time, Hawkins advised that he was attempting to make arrangements to obtain financing to pay out the judgment debt.

2. Mr. Miedema advised Hawkins that Martin would be travelling from Ohio to Nova Scotia, and that if payment of the judgment amount was not made

the applicants would require access to the premises for purposes of taking the Equipment by 9:00 a.m. on November 10, 2009.

3. There is no evidence that either Hawkins or Martin attended at the premises at 9:00 a.m. on November 10, 2009.

4. On November 10, 2009, the applicants obtained the Recovery Order on an emergency basis and provided a copy to the Sheriff for Yarmouth County.

5. On November 10, 2009, Martin attended at the premises and met with the driver of the transport truck that he had retained for purposes of returning the Equipment to the United States. Martin directed the driver where to park the vehicle.

6. On November 11, 2009, representatives of the Sheriff's office, together with Martin, attended at the premises and, with the permission of the owner of the building (which was leased to Hawkins Industries), cut the padlocks in order to gain access.

7. An antique motor vehicle was observed to be blocking access to the Equipment and so no further steps were taken to remove anything at that time. Photographs were taken.

8. On November 12, 2009, representatives of the Sheriff's office, Martin and a work crew retained by Martin attended at the premises. They moved the antique automobile and loaded the Equipment in the transport truck. That exercise took four to five hours and was completed by shortly after 1:00 p.m.

9. After the Equipment had been loaded in the truck and Martin and the work crew left the site, Hawkins was called by the Sheriff and advised of the situation. He came promptly to the scene and was served with a copy of the Recovery Order. He was described in the Sheriff's report as being very co-operative and left after fifteen minutes.

10. Hawkins was never called by the Sheriff, Martin or anyone on behalf of Martin to provide assistance in relation to the execution of the Recovery Order. I accept Hawkins' testimony that if he had received such a call, he would have attended and provided assistance.

[20] Counsel for the applicants argued strenuously that Hawkins had not met his obligation to co-operate with the replevin process. She submitted that the following had been established by the evidence:

- Hawkins advised counsel for the applicants by telephone on November 9, 2010 that he would not allow access to the premises in order for Martin to take possession of the Equipment.

- Hawkins disconnected electrical service to the premises, which meant that removal activities could only occur during daylight hours.

- Hawkins did not provide a key to the padlocks on the building.

- Hawkins left an antique car and other materials in locations so as to impede removal of the Equipment.

- Hawkins did not provide a functioning forklift to be used in the removal and loading of the Equipment.

- Hawkins did not detach the Equipment from its electrical connection to the premises.

[21] With respect to the alleged declaration by Hawkins that he would not provide access to the premises and Equipment, the applicants rely on the following paragraphs from the affidavit of Mr. Miedema:

> 14. I am advised and do verily believe that the Respondent, Terry Hawkins, contacted Boyne Clarke on Monday, November 9, 2009 and spoke with James D. MacNeil, solicitor of record for the Applicants.
>
> 15. I am advised and do verily believe that the Respondent, Terry Hawkins advised Mr. MacNeil that he would not allow access to the Respondent's property nor would he allow the Applicant to take possession of the equipment and materials identified in the Consent Order.

[22] Hawkins testified that he did not make such statements to Mr. MacNeil. He also indicated that he had multiple conversations with lawyers at Boyne Clarke between November 4 and 9, 2009.

[23] Despite the fact that the evidence in para. 15 of Mr. Miedema's affidavit was hearsay, counsel for the applicants urge me to conclude that the conversation took place as described, as there was no other explanation for why an emergency application for a recovery order was made on November 10, 2009. In his submissions, Hawkins suggested that it may have been because counsel was in a panic when they realized that Martin was in Nova Scotia to take possession of the Equipment and a recovery order had not been obtained.

[24] I am not satisfied that Hawkins gave a clear statement to the effect that he would not co-operate in Martin taking possession of the Equipment. In light of the multiple phone calls in the days leading up to the repossession, I believe that it is reasonable to conclude that there may have been some misunderstanding between Hawkins and the law firm representing Martin.

[25] Hawkins testified that electrical service to the premises had been disconnected by Nova Scotia Power several weeks earlier and the plant was in the process of being shut down. There was a generator on site which was fuelled and available to provide electrical service if needed.

[26] Hawkins was never asked to provide keys to the padlocks and therefore, did not do so. Given the valuable Equipment located in the premises, it would have been unreasonable if he had left the buildings unlocked.

[27] Hawkins acknowledged that there were a number of antique vehicles located in and around the premises, and that there was some debris on the loading dock where Martin parked the truck. Hawkins testified that the truck should have been parked at a different loading dock where the Equipment was much more accessible. Simply put, he says there was a more convenient point of access to the building and Equipment than the one chosen by Martin.

[28] Hawkins also testified that there was a forklift on the premises which was available for use. The wires to the battery had been disconnected due to the tendency of the battery to drain if the wires remained connected. If he had been asked, Hawkins says that he would have advised Martin to connect the battery, in which case the forklift would have been functional.

[29] There was no evidence presented as to whether the Equipment was detached from the electrical connection to the plant prior to the arrival of Martin.

[30] The explanations provided by Hawkins satisfy me that the impediments alleged by Martin would have been addressed very simply had Hawkins been contacted. In any event, they do not appear to have caused much difficulty for Martin as the Equipment was removed from the premises and loaded on the transport truck over the space of a few hours on the morning of November 12, 2009.

[31] I am satisfied on the evidence before me that Hawkins did not intentionally make efforts to frustrate the recovery process. He was ready and willing to provide assistance if it had been requested. In these circumstances, I cannot find that he failed to meet his co-operation obligations under the Ohio Order.

[32] In light of my findings, I conclude that the provision of the Ohio Order declaring full satisfaction of the judgment debt upon replevin of the Equipment is applicable. As indicated by the submissions of the parties, this also applies to the terms of the Nova Scotia Order.

[33] As noted above, the judgment amounts between the two orders are not identical. The Nova Scotia Order provides for an additional amount of $5,000.00, and I do not believe that this is satisfied by the replevin of the Equipment, and this obligation remains outstanding on the part of Hawkins and Hawkins Industries. In addition, the Recovery Order provided for payment of costs to the applicants in the amount of $500.00 and that obligation is also outstanding.

[34] The result of my decision is as follows:

1. The judgment in favour of Martin and Martin Pultrusion issued on September 24, 2009 in the amount of $140,000.00 U.S. is satisfied in full, and the Prothonotary is ordered to issue a certificate of satisfaction with respect to that judgment.

2. The amount outstanding on the judgment in favour of Martin in the original amount of $105,000.00 U.S. issued on September 24, 2009 is now $5,000.00 U.S. Hawkins and Hawkins Industries are entitled have the Prothonotary issue a certificate of satisfaction with respect to that judgment on

payment of the amount of $5,000.00 U.S., together with interest at a rate of 5% from September 24, 2009 to the date of payment.

[35] I will hear submissions from the parties on the issue of costs. The $500.00 in costs awarded with respect to the recovery order will be dealt with in that process and either added to or set off against costs awarded as a result of this motion.

Wood, J.