IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Higginson v. Babine Forest Products Ltd.,* 2010 BCSC 614

Date: 20100430
Docket: S097630
Registry: Vancouver

Between:

Larry Higginson

Plaintiff

And

Babine Forest Products Ltd. and Hampton Lumber Mills Inc.

Defendants

Before: Master Scarth

Reasons for Judgment

Counsel for the Plaintiff:	C. R. Forguson
Counsel for the Defendants:	G. A. Marshall A. I. MacPherson
Place and Date of Hearing:	Vancouver, B.C. March 25, 2010
Place and Date of Judgment:	Vancouver, B.C. April 30, 2010

[1] The plaintiff has brought two applications before the court:

a. an application pursuant to Rule 27 that the defendant Babine Forest Products Ltd. (“Babine”) produce Glenn Gardner to be examined for discovery at a time and place to be determined by the court; and

b. an application pursuant to Rule 14(6) and 14(6.1) of the *Rules of Court* for an order that this action be dismissed or stayed as against Hampton Lumber Mills Inc. (“Hampton”) on the grounds that the court does not have jurisdiction over Hampton in respect of the claim made against Hampton in this action; in the alternative, an application for an order pursuant to Rule 15(5) that Hampton be removed as a party.

Background

[2] The plaintiff was employed by Babine for 34 years, latterly as the manager of the electrical department at Babine’s saw mill in Burns Lake, British Columbia. The plaintiff’s employment with Babine ended with his dismissal on October 14, 2009.

[3] The plaintiff’s claim is against Babine for damages for wrongful dismissal, and against Hampton, a U.S. company, for inducing breach of the plaintiff’s contract of employment. The plaintiff alleges that Hampton owns, either directly or through its subsidiaries, a sufficient number of voting shares of Babine, such that it controls Babine and directs Babine’s actions, and that Hampton directed and conducted the termination of the plaintiff’s employment.

[4] Babine and Hampton, in separate statements of defence, state that they are each part of a group of companies known as “Hampton Affiliates”, and, as part of the same corporate group, have a commonality of interest in this action, but that the plaintiff’s employment was with Babine. Both allege that Babine had just cause to terminate the plaintiff, and that Babine was not induced to terminate the plaintiff’s employment by any other person or corporate entity.

A. Application to Substitute Robert Evans

[5] The plaintiff seeks to examine Glen Gardner, his immediate supervisor, as Babine's representative. Babine would prefer that its representative be Robert Evans, the superintendent of the mill. The court has discretion under Rule 27(4) to substitute a representative other than the examining party's choice, on application by the opposing party. The parties agree that the plaintiff's application should be treated as an application by Babine to substitute Mr. Evans.

[6] Babine submits, firstly, that its case turns on the plaintiff's failure to perform his duties as a manager from January to August 2009, including his refusal to cooperate with steps taken by Babine to improve the operation of the mill. Babine submits that the plaintiff's supervisor during this period was Mr. Evans. The submission of the defendant Babine is that Mr. Evans is better able to address the cumulative effect of the plaintiff's failings, and his attitude with respect to Babine's initiatives.

[7] In addition, the defendant Babine submits that it is clear from the plaintiff's affidavit that his case is, in part, based on his view that Mr. Evans "set him up" for dismissal for cause by falsifying reports concerning critical aspects of his responsibilities. The submission is that it would be prejudicial to Babine if Mr. Gardner were to be its representative for examination because this underlying allegation cannot be tested through Mr. Gardner. The defendant Babine cites *Rainbow Industrial Caterers Ltd. v. C.N.R.* (1986), 6 B.C.L.R. (2d) 268 (S.C.) for the principle that where there are various serious allegations of misrepresentation, recklessness, and fraud, a party could be seriously prejudiced if the allegations cannot be canvassed through the person having the greatest knowledge.

[8] The plaintiff submits that Babine's application to substitute Mr. Evans amounts to an attempt to regulate its choice of representative to be examined, something which the court in *MacDonald* confirmed is inappropriate and has the potential for serious injustice: *supra,* at para. 26.

[9] The plaintiff submits that there is no prejudice to Babine in Mr. Gardner being examined in that it is open to Babine to call Mr. Evans at trial. On the other hand, the prejudice to the plaintiff should Mr. Evans be substituted for Mr. Gardner is that the plaintiff will lose the opportunity to examine the person who was "on the ground" at the most relevant time, and the person most likely to give favourable evidence for the plaintiff. Further, Mr. Gardner was the only representative of Babine present at the time the plaintiff is said to have encouraged members of his department to vote against a company proposal during critical union-management negotiations: see Babine's response to the request for particulars of its statement of defence.

[10] The test to be applied on an application under Rule 27(4) is set out in *MacDonald v. Roth*, 2000 BCSC 1670 and has been summarized as follows (see British Columbia Supreme Court Rules Annotated, 2010, Seckel and MacInnis, eds., *British Columbia,* (Thomson Reuters, 2009), at page 340):

> It is not enough for the opposing party to simply say that there is someone with more or better knowledge of the matters in issue. In order to preserve primacy of the examining party's choice, the exercise of discretion must turn on a balance of prejudice, and in the absence of overwhelming prejudice, the court should defer to the choice of the examining party. A party seeking to substitute a name for the examining party's chosen representative must demonstrate that the prejudice it will suffer if the court respects the examining party's choice will be greater than the prejudice suffered by the examining party if that party does not have its choice. If the chosen representative does not have sufficient knowledge of the matters in issue, that lack of knowledge must be linked to prejudice before it will defeat the primary choice.

[11] It is clear from *MacDonald* that it is not sufficient for purposes of an application to substitute under Rule 27(4) to show that the chosen representative does not have sufficient knowledge of the matters in issue: that is the plaintiff's "look-out": *Trinity College v. Levinter*, [1924] 2 D.L.R. 584 at 586 (Ont. S.C.); cited in *MacDonald* at para. 33. While the risk or prejudice to the plaintiff here may be mitigated given that he has an opportunity to examine a representative of Hampton to fill in the gaps, it is open to the defendants to seek an order that such a process would be inappropriate given the common interests of the defendants: *Blue Line Hockey et al v. Orca Bay Hockey et al*, 2007 BCSC 577.

[12] As to Babine's position that Mr. Evans is best placed to address the underlying allegations in the plaintiff's claim, I accept the submission of the plaintiff that the decision in *Rainbow* is distinguishable. In *Rainbow,* the "very serious" allegations - misrepresentation, recklessness, and fraud - which the court concluded should be addressed by the representative with most knowledge, were the subject matter of the action. In the case against Babine, the issue is dismissal and cause.

[13] In my view, Babine has failed to establish that the balance of prejudice favours an exercise of discretion in its favour. The application to substitute Mr. Evans for Mr. Gardner is dismissed.

B. Application Regarding Jurisdiction

[14] The issue on this application is whether the court has jurisdiction, or alternatively, should decline jurisdiction, over the defendant Hampton.

[15] Hampton submits that there are no facts to support an assertion of jurisdiction by this court over Hampton in respect of the subject matter of the litigation. It submits that there is no presumed connection with British Columbia given that the action against Hampton is in tort. Further, Hampton submits that the plaintiff's evidence as to Hampton's involvement in his dismissal is pure speculation and fails to establish an arguable case for jurisdiction: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85.

[16] The plaintiff submits that the court has jurisdiction over Hampton, against whom inducement of breach of contract is alleged, by virtue of its jurisdiction over the contract and the breach: *Red Back Mining Inc. et al and Champion Resources (Barbados) Inc. v. Geyser Inc.,* 2006 BCSC 316. Further, it is the plaintiff's submission that his affidavit evidence is sufficient for purposes of establishing jurisdiction and that he should not be deprived of the opportunity to gather further facts through the discovery process.

[17] Rule 14(6) sets out the procedure for challenging territorial competence. The objective under Rule 14(6)(a) is to determine whether the pleadings allege facts

which, if true, would establish jurisdiction. Under Rule 14(6)(b) a defendant can challenge jurisdiction even if a plaintiff has satisfied the requirements of Rule 14(6)(a). If facts sufficient to establish jurisdiction are not pleaded, or adduced in affidavit form, the pleadings are struck, or the action is dismissed or stayed. The plaintiff need only show an arguable case; it need not establish such facts on a balance of probabilities: *Purple Echo, supra.*

[18] The question of jurisdiction is to be determined exclusively by the substantive rules set out in the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*"): *Stanway v. Wyeth Pharmaceuticals Inc.,* 2009 BCCA 592, at para. 12.

[19] Section 3 of the *CJPTA* sets out the circumstances in which a court has territorial jurisdiction as follows:

> A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[20] Section 10 of the *CJPTA* sets out a list of circumstances that presumptively constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based for the purposes of Section 3(e). These include, at section 10(e), circumstances where the proceeding:

> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,

[21] The first question, under Rule 14(6)(a), is whether the pleadings allege facts which, if true, would establish jurisdiction. The plaintiff alleges that:

> 2. The plaintiff worked continuously for the defendant, Babine Forest Products Ltd. ("Babine") or its legal predecessors since January 27, 1975.
>
> 3. Babine...operates a sawmill and planer mill located 19 kilometres east of Burns Lake, British Columbia.
>
> 4. Hampton Lumber Mills Inc. ("Hampton") is a company carrying on business pursuant to the laws of the United States of America and is headquartered in Portland, Oregon. Hampton, either directly, or through its subsidiaries, owns a sufficient number of voting shares of Babine such that it controls Babine and directs Babine's actions.
>
> 5. The plaintiff's position was "Electrical Supervisor". In this role, he was directly and ultimately responsible for all of the electrical systems of the defendant's operations east of Burns Lake, British Columbia which includes a sawmill and planer mill.
>
> ...
>
> 10. The termination of the plaintiff's employment was directed by and conducted by Hampton and as such Hampton is liable for inducing Babine to breach the plaintiff's employment contract.

[22] The allegation is that Hampton was involved in terminating the plaintiff's employment contract with Babine. There is no dispute that the contract was to be performed in British Columbia. The proceedings against Hampton therefore concern contractual obligations which were to be performed in British Columbia, and accordingly, by virtue of the facts as pleaded, the plaintiff has brought himself within the presumptive circumstances in section 10 of the *CJPTA*. This reasoning is consistent with the decision in *Red Back, supra,* upon which the plaintiff relies: see paras. 19 to 21.

[23] It remains to consider, under Rule 14(6)(b), whether, the defendant having challenged the pleaded facts by way of affidavit, the plaintiff has established an arguable case. To reiterate the test set out in *Purple Echo, supra,* at para. 34*:*

> The court is not charged with the task of determining whether the facts are true. A plaintiff need only show an arguable case that they can be established.

[24] Hampton relies on the affidavit of Robert Bluhm, its chief financial officer, in support of its position that no one in Hampton had anything to do with the plaintiff's

dismissal, it being purely an internal matter for Babine. Mr. Bluhm sets out the corporate structure of Hampton and its relationship with Babine:

> 4. Hampton U.S. Inc. is a corporate legal entity separate from Babine Forest Products Ltd. ("Babine"). Babine is a company duly incorporated pursuant to the laws of the Province of British Columbia with a registered and records office at 1000-840 Howe Street, Vancouver, British Columbia.
>
> 5. Hampton U.S. Inc. and Babine are each part of a group of companies known as "Hampton Affiliates", and as the Chief Financial Officer for Hampton, I have direct knowledge of the corporate structure of the Hampton Affiliates.
>
> ...
>
> 15. Hampton U.S. Inc. has no presence in British Columbia.
>
> 16. Hampton U.S. Inc. has no extra-provincial office in British Columbia and is not required to have one, as it conducts no business in British Columbia.
>
> 17. Babine is not the agent or representative of Hampton U.S. Inc. in British Columbia or Canada.
>
> 18. As a member company of Hampton Affiliates, Hampton U.S. Inc. has a common business interest with Babine, including the outcome of the litigation.
>
> 19. As I understand it, the subject matter of the litigation between Larry Higginson and Babine deals with his dismissal from employment for cause, in British Columbia. To my knowledge, no employee of Hampton U.S. Inc. was involved in the decision to dismiss Mr. Higginson.

[25] The plaintiff deposes as follows:

> 3. Hampton USA (or its subsidiaries) acquired the Babine operation in approximately October, 2006. At that time, the General Manager of the Babine operation and the related Decker Lake sawmill was Henning Larsen. In or about March, 2007 Mr. Larsen's employment terminated. The person who took over his role as general manager of both operations (Babine and Decker Lake) was Dave Garcia.
>
> 4. I believe that Mr. Garcia's title is "Canadian Regional Operations Manager" of Hampton Affiliates as that is what was printed under his name on the employment contract I signed (Exhibit "GB" of Keri Wigle Affidavit #2). Decker Lake and Babine are the only Canadian operations I am aware of operated by Hampton USA or its subsidiaries.
>
> 5. Dave Garcia occupies the office that Henning Larsen used to occupy.
>
> 6. All of the senior operational managers at the Babine operation report to Dave Garcia.

7. To the best of my knowledge, Dave Garcia is a resident of the United States. He does not live full time in Burns Lake. When he is in town, he drives a truck with US licence plates.

8. To the best of my knowledge, Mr. Garcia is not employed by Babine Forest Products Ltd but rather by Hampton USA or4 some corporate entity controlled by Hampton USA.

9. When I was employed at the Babine operation, it was common knowledge that Dave Garcia was the boss. He made all major operational decisions in consultation with Hampton USA officers in Oregon.

10. Although I cannot prove it at this time, I would be surprised if the decision to terminate my employment was not made or approved by Dave Garcia and/or Dave Salmon and/or Bruce Mallory. I do not believe that Robert Evans or Glen Gardner had the authority to terminate my employment without input and approval by employees of Hampton USA. Through the discovery process, I expect that I will be able to prove that the decision to terminate my employment was made by Dave Garcia and/or Bruce Mallory and/or Dave Salmon. Bruce Mallory is an officer of Hampton USA and to the best of my knowledge, Dave Garcia reports to Bruce Mallory. To the best of my knowledge, Dave Salmon is the head of Human Resources for Hampton USA.

11. Although he was frequently out of Canada, Dave Garcia was present at the Babine operation on the day my employment was terminated.

12. To date, the defendants have not provided document disclosure so I have not had any access to documents that may indicate who made the decision to terminate my employment.

[26] In my view, the plaintiff has established an arguable case that facts related to Hampton's involvement in his termination can be established. His evidence is that Mr. Garcia runs the sawmill operation and that, to the best of his knowledge, Mr. Garcia is employed by Hampton. I accept the plaintiff's submission that this is the best evidence he is able to give at this stage of the proceeding, and that it amounts to an arguable case of Hampton's involvement in his contract and dismissal. It remains for Hampton to require proof of its involvement on a balance of probabilities at trial.

[27] Accordingly, I am of the view that this court has jurisdiction *simpliciter*, or territorial competence, in the proceedings against Hampton.

[28] Hampton also applies under Rule 14(6.1) for an order that this court decline jurisdiction. Section 11 of the *CJPTA* sets out a non-exclusive list of grounds upon which a court may decline to exercise its territorial competence:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient wording of the Canadian legal system as a whole.

[29] Hampton's submissions on this point echo its submissions on jurisdiction *simpliciter* – the allegation against it is in tort, with nothing to support the allegation. The plaintiff submits that, given that the breach of contract claim is clearly appropriately brought in this court, the inducement claim should be heard here as well. This issue was also addressed in *Red Back, supra,* at para. 35. Smith J. concluded that, in circumstances where there is an ongoing action in British Columbia for breach of contract,

> ...it is in the interests of both convenience and efficiency that the same court deals with the alleged tort. If one court were to have jurisdiction over the claim for breach of contract and another over the claim for inducing breach, there would be duplication in the proceedings and the possibility of conflicting results.

[30] On this basis, Hampton's application for an order that the court decline to exercise its jurisdiction is dismissed.

C. Application pursuant to Rule 15(5)

[31] Hampton also seeks an order pursuant to Rule 15(5), that it be removed as a defendant as it is not a proper or necessary party to the litigation. It appears to me that this can be addressed in short order. As it stands, the plaintiff's action includes

a claim against Hampton for inducing breach of contract. It is a necessary party to that claim. This application is dismissed.

[32] The plaintiff is entitled to his costs of these applications in the cause.

"Master S. Scarth"