

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hans v. Dynegent Technologies Inc.***,
2008 BCSC 494

Date: 20080422
Docket: S080758
Registry: Vancouver

Between:

Ajay Hans

Plaintiff

And

Dynegent Technologies Inc.

Defendant

Before: Master Scarth

Reasons for Judgment

Counsel for Plaintiff

B. Curtis

Counsel for Defendant

R. Sieg

Date and Place of Hearing:

March 13, 2008
Vancouver, B.C.

[1] The defendant applies to set aside pre-judgment garnishing orders issued on February 15, 2008.

[2] The action is framed in debt, relying on a severance provision in the plaintiff's contract of employment. There are alternative claims for damages for breach of contract and for wrongful dismissal.

[3] The relevant term in the contract, headed "Severance", provides as follows:

Other than termination for cause or if you terminate your employment with EXL, if your employment with EXL, is terminated prior to March 1st, 2008,

DTI shall guarantee severance in the amount of your monthly Base Salary for a period of six (6) months.”

[4] The plaintiff commenced this action on February 1, 2008. The statement of claim alleges, *inter alia*, as follows:

7. Although the entire Contract shall be relied upon for its full force and effect at trial herein, some of the relevant terms of the Contract were as follows:
 - a) The plaintiff was to work for the defendant as CEO;
 - b) The plaintiff's base salary was to be Canadian \$9166.67 per month;
 - c) The initial term of the Contract was for two years, between March 1, 2006 and March 1, 2008;
 - d) If the plaintiff's employment was terminated prior to March 1, 2008, the defendant promised to “guarantee severance in the amount of...monthly Base Salary for a period of six (6) months.”
8. The Plaintiff diligently and faithfully carried out his duties as CEO of the defendant.
9. On November 8, 2007 the defendant terminated the plaintiff's employment without cause and without any notice.
10. Accordingly, pursuant to the Contract, as outlined in paragraph 7(d) herein, on November 8, 2007 the defendant owed the Plaintiff a severance payment of \$55,000.02 (the “Severance Payment”), calculated as per the Contract – 6 months at \$9166.67 per month.
11. After the termination of his employment, on November 15, 2007, the plaintiff received a payment from the defendant in the gross amount of \$4583.33. This payment was partially compensation for the days the plaintiff worked in November 2007, and the balance was a partial payment towards the Severance Payment. Of the \$4583.33 payment received, the plaintiff had already earned \$2500.00 for the days he had worked. Accordingly, the balance of the payment received, being \$2083.33, was a partial payment by the defendant towards the Severance Payment.
12. Accounting for the \$2083.33 paid by the defendant towards the Severance Payment, the balance owing to the plaintiff was \$52,916.69 (the “Debt”).

[5] On February 15, 2008, the plaintiff issued the impugned garnishing orders, attaching the statement of claim and alleging a sum due from the defendant of \$52,916.69, after making all just discounts.

Positions of the Parties

[6] The defendant submits that the garnished amount is not a liquidated sum: firstly, because the plaintiff's employment was terminated for cause, and, accordingly, the precondition for the severance payment is not made out; and secondly, because the principles of mitigation apply and the amount owing to the plaintiff remains to be assessed. Further, the defendant submits that severance amount was not due and owing at the time the affidavit was sworn because six months had not passed since the alleged termination date.

[7] The plaintiff submits that the severance clause of the plaintiff's employment contract creates a liquidated claim or debt owing to the plaintiff upon termination. The plaintiff submits that, on the plain language of the clause, it is clear that the amount contemplated can be arithmetically calculated, is owing at the time of termination, not after a period of six months, and is a "guaranteed" amount, not subject to the principles of mitigation.

[8] The plaintiff further submits that the affidavit evidence upon which the defendant relies goes to the merits of the case, not to the issue of whether the garnishing orders were appropriate. The plaintiff's reply affidavit sets out another version of the events surrounding his termination. The plaintiff submits that these are matters which are properly addressed at trial, not on this application.

Discussion

[9] In *Drayton v. W.C.W. Western Canada Water Enterprises Ltd.* (1989), 63 D.L.R. (4th) 71, 28 C.C.E.L. 134 (B.C.S.C.), Donald J. (as he then was) explained the distinction between an action for damages for wrongful dismissal and an action on a severance provision. In the former, a pre-judgment garnishing order is not appropriate because the claim is not a liquidated demand. The amount of the claim cannot be readily ascertained at the outset. Mitigation must be taken into account and the quantification of the damages is more than a "mere matter of arithmetic". The latter, however, relies on a contractual provision for payment upon termination and can be the subject of pre-judgment garnishment.

[10] The defendant submits, relying on *Stovicek Estate v. Napier International Technologies Inc.*, [1995] B.C.J. No. 1761 (S.C.) (Q.L.) that, at this early stage, the court cannot make a finding as to whether the severance provision applies or whether the claim is one for damages for wrongful dismissal. While this may be so, it does not follow that the garnishing orders must be set aside. On this application, "it is not necessary to determine whether or not the plaintiff will succeed in his claim for a liquidated amount, but only that the claim made the plaintiff in his pleadings is a liquidated claim and not for unliquidated damages": *Byrne v. Vranckaert* (1990), 32 C.C.E.L. 58 (B.C.S.C. Master). What is required from the plaintiff is a "succinct and informative statement" as to the nature of the cause of action to enable the court to determine whether it is one to which the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 applies: *Knowles v. Peter* (1954), 12 W.W.R. (N.S.) 560 (B.C.S.C.).

[11] The court in *Stovicek* concluded that the circumstances of the case presented a difficulty in assessing the cause of action. In contrast, here it is clear from the affidavit that the plaintiff relies on the severance provision in the contract which "guarantees" a payment in the event of termination and sets out how the amount of the payment is to be calculated. That calculation is a "mere matter of arithmetic". It is fair to conclude that the claim is for liquidated damages. While there are alternative claims for damages for

breach of contract and wrongful dismissal, neither of which would support a pre-judgment garnishing order, the inclusion of those claims does not preclude a garnishing order being properly issued on the claim in debt: ***First Avenue Research Corp. v. Donar Chemicals Ltd.*** (1987), 11 B.C.L.R. (2d) 136 (S.C.).

[12] The defendant submits that the affidavit filed in support of the application for the garnishing orders is deficient in that it does not set out the severance provision in full. In ***Hamelin v. Seven Mile High Group Inc.*** (1991), 36 C.C.E.L. 45 (B.C.S.C.), on which the defendant relies, the affidavit was considered deficient because it failed to allege or particularize the factual basis for the occurrence of a precondition to the debt. I am satisfied that the affidavit here, by attaching the statement of claim, adequately sets out both the allegations of fact forming the basis for the entitlement to the severance payment, i.e. the plaintiff's termination by the defendant without cause, and the formula for calculation of the payment.

[13] As to the defendant's submission that the severance amount was payable over six months, and, therefore, not due and owing on termination, I accept the plaintiff's submission that the plain wording of the severance provision is consistent with the plaintiff's allegation of a debt due and owing to the plaintiff by the defendant.

[14] The application to set aside the garnishing orders is dismissed, with costs to the plaintiff in the cause.

"Master Scarth"

[Tevlin Gleadle Note: we have created this version of the Reasons for Judgment to incorporate the Corrigendum issued by the Court on April 23, 2008.]