IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *DuraWest Property Services Inc. v. Great Bear Construction Group Inc.*, 2025 BCSC 860

Date: 20250422
Docket: S06552
Registry: Abbotsford

Between:

DuraWest Property Services Inc.

Plaintiff

And

Great Bear Construction Group Inc.

Defendant

Before: The Honourable Justice J. Walker

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	M. Dewolde Articled Student
Counsel for the Defendant:	M. Nied
Place and Date of Hearing:	Vancouver, B.C. April 9, 2025
Place and Date of Judgment:	Vancouver, B.C. April 22, 2025

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[1] **THE COURT:** These are oral reasons relating to the defendant, Great Bear Construction Group Inc.'s application to set aside a garnishing order before judgment and that the funds attached to that garnishing order be released.

Background

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[2] The plaintiff, DuraWest Property Services Inc. ("DuraWest") has commenced an action against the defendant, Great Bear Construction Group Inc. ("Great Bear") alleging breach of contract. It is alleged that DuraWest contracted to perform work for Great Bear. They completed the work and Great Bear has failed to pay the contracted amounts.

[3] At the time the plaintiff filed its notice of civil claim, the plaintiff sought and obtained a garnishing order before judgment. That order was granted by a Registrar on February 5, 2025. It is this garnishing order and the funds paid into court amounting to $133,509.99 that the defendant seeks to set aside.

[4] The application is brought under s. 5(2) of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 27, which states:

> 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 instalments.

[5] Guidance as to how a court should exercise its discretion under this provision is set out in *Yinghe Investment (Canada) Ltd. v. CCM Investment Group Ltd.*, 2023 BCSC 2295, at paras. 61 and 62:

> [61] Section 5(2) of the *COEA* provides the court with a discretion to set aside a garnishing order if it causes undue hardship, is an abuse, unnecessary, or unjust in the circumstances: *Webster v. Webster*, [1979] B.C.J. No. 918 at para. 21, 1979 CanLII 744 (C.A.); *0904329 B.C. Ltd. (Pacific Timber) v All American Forest Products Inc.*, 2018 BCSC 774 para. 12 [*Pacific Timber*].
>
> [62] A defendant bears the onus of establishing a lack of necessity and must demonstrate that there is little or no chance of a "dry judgment": Citing *Pacific Timber* at para. 13, citing *Eaglecrest Explorations*.

See also: *Clarke Communication Contracting Inc. v. Black Diamond Limited Partnership*, 2024, BCSC 465 at paras. 85 and 86.

[6] The authorities are clear the defendant must establish that it is solvent and there is little risk of a dry judgment.

[7] A Garnishing order before judgment is an extraordinary remedy obtained *ex parte* and, as a result, the onus a defendant must meet is modest: See *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857 at paras. 17, 59 to 61. There are a number of factors that a court can consider on this application. The relevant factors will, of course, vary depending on the circumstances, again, all aimed at ensuring that if judgment is obtained there is little risk that it will not be a dry judgment.

<u>Analysis</u>

[8] The defendant argues that the affidavit of Gerard Duran dated December 9, 2024, filed in support of the garnishing order, was defective, rendering the garnishing order a nullity. The defendant says that this is a sufficient basis to set aside the order. In the event that I find that the order was not a nullity, the defendant argues, based on the evidence before the court, they have established that if there is a judgment against them it will not be a dry judgment.

[9] On the assumption that the affidavit was properly considered by the Registrar, I have determined that on the evidence before me the defendant has met their onus and satisfied me that if judgment is rendered against them there is little risk that it will not be a dry judgment.

[10] The affidavits of Luca Sepe, the general manager of the defendant company, the first sworn on March 31, 2025, and the second sworn on April 8, 2025, in response to the plaintiff’s application response, satisfy me that requiring the garnished funds to remain held in court until this matter is finally determined is not necessary and that undue hardship has been caused to the defendant which will continue so long as the funds are held.

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[11] In his first affidavit Luca Sepe deposed at paragraphs 5 and 6, that the sudden garnishment has caused significant hardship as the funds depleted the defendant's operating capital and has left the company unable to pay various vendors and subcontractors. The garnishment came at a time when, because of the time of year, it is typical for revenue to drop. The defendant has had to postpone payments to vendors and subcontractors. Further details are provided in the affidavit which I need not describe.

[12] At paragraphs 7 and 8 of the same affidavit he deposed that the company is in an otherwise healthy financial position and would be able to pay any judgment that might be obtained in this action. Annual revenue is approximately 12 million dollars, and in 2025 revenue to date was approximately 4.2 million dollars. The company is projected to earn more than 16 million dollars in 2025. He also deposed the company owns considerable assets, which include, for example, three cranes which alone are worth more than one million dollars.

[13] Mr. Sepe's second affidavit sworn April 8, 2025, was sworn in response to the plaintiff's position that his first affidavit did not provide sufficient evidence of the "alleged assets." In paragraph 3 of the affidavit Mr. Sepe provided more detailed information about the assets, and in paragraph 4 he explained that the company had total assets of more than five million dollars and liabilities of approximately three million dollars.

[14] The plaintiff objects to me considering this second affidavit as it is alleged that it is improper backfilling or case splitting. In my view, the affidavit is proper reply and can be considered by me. Importantly, the plaintiff did not challenge the accuracy of the averments in either affidavit, only that the averments in the first affidavit did not provide sufficient information.

[15] In any event, even if I did not consider the second affidavit, based on the first affidavit alone I am satisfied the defendant has met its onus to establish the garnishment is not necessary and the defendant has also established that the

garnishment has caused and continues to cause undue hardship. I am satisfied there is little risk that if the plaintiff obtains judgment, the judgment will not be dry.

[16] The plaintiff also argues that releasing the garnished funds to the defendant will breach s. 10 of the *Builder's Lien Act*, S.B.C. 1997, c. 45, which provides that funds received in relation to subcontractors constitute trust funds and any knowing misappropriation of such funds will result in a breach of trust. It is argued that since Mr. Sepe admitted that upon release of the garnished funds, the funds will be used to pay vendors and subcontractors, should the defendant do so it will then constitute a breach of trust. Mr. Sepe does not depose that. This is an inference the plaintiff wishes me to draw. Second, it appears to me that some evidentiary link would be required to be shown between the funds sought to be released and how they were to be used if released. Third, no authority has been cited to suggest that if the defendant meets their onus under s. 5(2) of the *Court Order Enforcement Act*, the court should go on to scrutinize what those funds might be used for and, if so, whether there might be some breach of some other legislative provision.

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<u>The Defective Affidavit</u>

[17] As a result, I do not need to determine whether the garnishing order was a nullity because of the defective affidavit. However, it is readily apparent the affidavit is defective. Pre-judgment garnishment is an extraordinary remedy sought *ex parte* and, as a result, the authorities are clear that meticulous compliance with the governing legislation and *Rules* are required.

[18] While the defendant has pointed to three separate errors in the affidavit, in my view, the most concerning is that in the preamble, the drafter indicates the deponent "affirms"; however, in the jurat, the deponent has "sworn" to tell the truth of the contents of the affidavit. This is not a mere typographical error because the conscious understanding of the gravity of an oath or affirmation under written confirmation of the understanding are essential components of an affidavit. By indicating which method was used to bind the consciousness of the affiant the commissioner notarizing the affidavit reassures the court that they have ensured that

the affiant understood the gravity of attesting to an affidavit and the consequences of an affidavit. It also assures the court that the commissioner has carefully reviewed each asserted fact with the affiant and confirmed their completeness and veracity: See *PKS v. ANR*, 2024 BCSC 2110 at para. 75. This affidavit does not meet the meticulous compliant standard.

[19] The plaintiff advances numerous arguments supporting the proposition that the errors do not automatically result in deficient affidavits being excluded from consideration. I accept that, but the flexibility to accept the deficient affidavit is prospective and considered at the time a judicial officer is considering whether they will admit and rely on a *prima facie* defective affidavit and then consider it in determining whether the requested order should be granted. This situation is materially different because the order was issued on the basis of a *prima facie* defective affidavit.

[20] As I said, I need not determine whether that automatically leads to the order being set aside.

Costs

[21] The plaintiff seeks special costs payable by the defendant's counsel personally. The basis for the application relates to the conduct of counsel for the defendant in obtaining short leave and what was or was not said to the Associate Judge who granted the application. The plaintiff says the failure of defendant's counsel to advise the Associate Judge that the plaintiff was raising the builder's lien issue described above, was a failure in their duty. Counsel, in my view, was not obliged to advise the Associate Judge of all the arguments the plaintiff was intending to raise at the hearing of this application. The arguments the plaintiff wished to raise in response to the defendant's application to return the funds went to the ultimate merits of the application critical to a determination of whether short leave should be granted.

[22] It appears to me that the root of the plaintiff's complaints stem from their view that the application was not urgent. Of course, from the plaintiff's perspective it was

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not. Money had been paid into court to satisfy or partially satisfy a judgment that had not yet been obtained. From the defendant's perspective, in light of the sudden loss of operating capital it was urgent. Further, where the application was to be heard and when, was the subject of some disagreement, which is not uncommon.

[23] I need not go into the correspondence between counsel about these issues which was put before me. However, it does not appear to me that proceeding in the manner defendant's counsel did, breached any *Rules of Court* or otherwise meets the high threshold the plaintiff would have to meet to warrant the costs award sought.

[24] Costs against counsel is a power that must be used sparingly and only in rare or exceptional cases: *Walsh v. Muirhead*, 2020 BCCA 225 at paras. 30 to 34.

[25] The garnishing order issued by the Registrar on February 5, 2025 in this action, is set aside and the funds attached by the garnishing order are to be released forthwith to the defendant, Great Bear Construction Group Inc.

[26] Costs will be in the cause.

"Walker, J"

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