

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20150909
Docket: S142635
Registry: Vancouver

Between:

PacBlue Digital Imaging Inc.

Plaintiff

And

Raj Bhatti, Ben Padilla and RBA Custom Graphics

Defendants

Before: The Honourable Mr. Justice Groves

Oral Ruling In Chambers

Counsel for the Plaintiff:

P.M. Pulver

Counsel for the Defendant Padilla:

R. Evans

Counsel for the Defendants Bhatti and RBA
Custom Graphics:

D.K. Georgetti

Place and Date of Hearing:

Vancouver, B.C.
September 9, 2015

Place and Date of Judgment:

Vancouver, B.C.
September 9, 2015

[1] **THE COURT:** This is my decision on the matter of PacBlue Digital Imaging Inc. versus Raj Bhatti, Ben Padilla and RBA Custom Graphics as defendants.

[2] The application before the Court is pursuant to a motion filed the 12th of November 2014, and it is an application in the usual form requesting security for costs to have \$27,371.20 security for the costs of Raj Bhatti and RBA Custom Graphics. There is, I understand, a similar motion requesting security for costs for Ben Padilla, also a defendant in the same amount, \$27,371.20.

[3] Claims for security for costs are claims brought under s. 236 of the *Business Corporations Act*, which allows the Court when there is corporate defendants to order security for costs. The section reads that:

If a corporation is the plaintiff in a legal proceedings brought before the Court and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence the Court may require security to be given by the corporation for those costs and may stay all legal proceedings until the security is given.

[4] I should add that the balance of the motions on behalf of both defendants add additional language as a request that the prosecution be stayed until security is posted, et cetera.

[5] The leading case in this area from my recollection of the matters is *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.*, 1993 CanLII 1669 (BC CA), a case which has its basis in a sad day for the Kamloops legal community when Fat Mel's Restaurant burnt down, allegedly at the hand of "Fat Mel", but that is another story.

[6] What that case deals with in terms of the security for costs is an often cited test which is set out in paragraph 3 of the notice of application. Essentially and crucially, the test suggests that once a defendant has shown a *prima facie* case that the corporate plaintiff may be unable to pay the costs, the burden shifts to the corporate plaintiff to produce evidence of exigible assets which would be available to satisfy a potential costs award.

[7] The defendants brought on their application early in the litigation when they “got word” that a company called Xibita, had they initially thought, purchased all the assets of the plaintiff, PacBlue. The basis for that seems to be some sort of press release or letter from Xibita indicating that they had purchased all the assets of PacBlue.

[8] In response to that the plaintiff filed an affidavit on November 25, 2014, in which Mr. Colley, the president on behalf of the plaintiff, said that some of the business had been sold by PacBlue to Xibita but not all. He says in the affidavit that Xibita acquired the assets of PacBlue's large format print division. That is what they sold.

[9] Mr. Colley points out in an affidavit of November 24, 2015 at paragraph 8, that PacBlue continues to operate its business as usual and continues to operate an array of business and commercial printed services, including marketing materials, high speed copying, scanning and imaging, et cetera.

[10] Additionally in that affidavit the plaintiff representative attaches a list of substantial assets which it still maintains.

[11] What is concerning to the Court, as I mentioned to counsel for the plaintiff, is that it appears that despite that affidavit being sworn on the 24th of November 2014, by the 1st of December 2015, a substantial amount of the remaining assets which he said on the 24th of November were going to be the continuing business of PacBlue were, in fact, sold to a company called ARC.

[12] As the evidence played out, it appears that Xibita's purchase of the large print division was for \$1.16 million. On the 4th of May 2015, it was suggested by Mr. Colley that payment on the promissory note would be between \$60,000 and \$80,000 every quarter. There is now some evidence in subsequent affidavits of two payments, two quarterly payments, one in May of \$28,000 and one by the end of September for which some money has already been advanced but are estimated to be \$51,128. So what that tells me is that the plaintiff is receiving some money on a

promissory note from another company but it is not the amount of money that he anticipated receiving.

[13] Additionally what I have learned by subsequent affidavits is that the sale of the remaining business to ARC should result in payments of 8 percent earn-out on the book of business sold to ARC to be paid on a monthly basis. On the 4th of May 2015, Mr. Colley estimated this to be \$20,000 to \$25,000 a month. The evidence now is that there is a payment in June of \$17,161, a payment in July of \$19,930 but no evidence of any further payments since that time.

[14] Additionally there is no evidence before me of any debts or liabilities of PacBlue at this point, which may impact their ability to use these funds for their own purposes.

[15] It is never helpful to a party wishing the Court to accept their word that their word turns out to be less than frank, and that is the unfortunate position for the Court find itself in regards to PacBlue. I cannot imagine a circumstances nor it is explained in subsequent affidavits as to why when Mr. Colley swore his affidavit on the 24th of November indicating that a substantial portion of his business was being retained and was operating as a going concern, how he could have sold that business by the 1st of December without knowing on the 24th of November that the sale was imminent. It is possible perhaps, but faced with that there should have been an explanation as to how he got to that stage.

[16] It causes the Court to have very little ability to rely on the word of Mr. Colley, and that is exemplified by the fact that word from Mr. Colley about the income stream of PacBlue in his 4th of May 2015 affidavit turns out to be substantially less than he had suggested.

[17] I am satisfied that the defendants have made out a *prima facie* case that the plaintiff may be unable to pay costs because the plaintiff has sold his business. He sold the income source for his business. He sold it to companies that I know nothing about, about their ability to pay for it. He sold it for payments over time, and I have

no idea about the ability of the purchasing companies to satisfy their obligations, in regards to Xibita the promissory note, and in regards to ARC, its obligations under its contract of purchase and sale of the remaining assets of PacBlue.

[18] The test in *Fat Mel's* also says that the Court has a wide discretion and can order an amount for security up to the full amount of the claim as long as the amount is more than nominal.

[19] Turning to the request and reviewing the bill of costs, the bill of costs for both parties are, with respect, wish lists. I am not sure why, for example, both defendants would require their private investigators at the cost of \$2,500 plus 12 percent tax. A number of the units claimed in with respect are at the higher end of the scale, but I do not doubt that costs associated with this matter if it does proceed would be significant.

[20] I am inclined to order costs, however, not at the higher end of the scale because there is some evidence, though not completely satisfactory, of an income stream for PacBlue.

[21] In all these circumstances what I am going to order is that PacBlue post security for costs for the potential costs claim of Raj Badii and RBA Custom Graphics in the amount of \$15,000 and that the claim for costs of Ben Padilla in the amount of \$15,000 for a total of \$30,000. Those payments are to be made to the trust account of Coutts Pulver Crawford in the amount of \$7,500 on the 31st of October, the 30th of November, 31st of December and all in 2015, and the 31st of January 2016.

[22] If by the 31st of January, 2016, those funds are not received by Coutts Pulver Crawford, they are to advise the defendants immediately and the balance of the requests will be granted at that time if the payments are not received.

[23] I am not ordering that the plaintiff is prohibited from taking any further steps until the security is posted. It is only if the security is failed to be posted by the 31st

of January, 2016, that the plaintiff is prohibited from taking any further steps to prosecute.

[24] 45 days will run as in number 3 after the 31st of January 2016. In regards to paragraph 4 that is granted as well.

[25] Costs of this application will be costs to the defendants in the cause. If they are successful in the cause they will have their costs of today. If they are not successful then each party will bear their own costs. Thank you.

“The Honourable Mr. Justice Groves”