

Date: June 9 1997
Docket: CV 06850

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LURIC ENTERPRISES LTD.

Plaintiff

- and -

882509 N.W.T. LTD. and OTTO CHANKASINGH

Defendants

Application by Plaintiff for summary judgment. Granted.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V. A. SCHULER

Heard at Yellowknife, Northwest Territories on May 9, 1997

Reasons Filed: June 9, 1997

Counsel for the Plaintiff: Charles Thompson

Counsel for the Defendants: Tom McCauley

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Reasons for Judgment

[1] This is an application by the Plaintiff for summary judgment against the Defendants.

[2] The Plaintiff's action is for monies owing by the corporate Defendant pursuant to an equipment purchase agreement. The Plaintiff claims against the Defendant Otto Chankasingh as a guarantor of the amount owing.

[3] Rules 174(1) and 176 are relevant for purposes of this application. They read as follows:

174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.

176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

(4) Where the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

[4] The Defendants submit that I should refuse the application but give directions under Rule 179(1), subsections (c), (d) and (e), which read as follows:

179. (1) Where summary judgment is refused or is granted only in part, the Court may make such directions or impose such terms as it considers just for the further conduct of the trial, including an order...

(c) limiting the nature and scope of discovery;

(d) specifying the issues to be tried;

(e) specifying material facts not in dispute;

[5] Two affidavits were filed on behalf of the Plaintiff. The affidavit of Richard Dempster swears to the execution of the agreement, a copy of which is attached to his affidavit, and the guarantee, a copy of which is also attached. He deposes that payments were made initially as required by the agreement but then became sporadic. The monies payable under the agreement were to have been paid in full by June 1, 1996 but were not. As at November 30, 1996, the balance owing was \$57,506.36.

[6] Parts of Mr. Dempster's affidavit, and all of the affidavit of Perry Smith, also filed on behalf of the Plaintiff, address allegations contained in the Defendants' Statement of Defence that certain items of equipment were missing or not working when the Defendants came into possession of the equipment under the agreement.

[7] There has been no cross-examination on the Plaintiff's affidavits. Rule 381(1) permits cross-examination without leave of the court.

[8] No affidavit material was filed on behalf of the Defendants. Counsel for the Defendants argued that Rule 176(1) only prohibits a defendant from relying on "mere" allegations or denials in his or her pleadings, by which I understand him to mean that a defendant must at least provide some detailed allegations or denials. In my view, however, Rule 176(1) is clear in not permitting a defendant to rely only on his pleadings. Pleadings are not sworn. They are not evidence. They are mere allegations or denials. Rule 176(1) requires evidence of specific facts. That evidence may take the form of affidavit material or other evidence.

[9] I have before me no affidavit material or other evidence setting out specific facts showing that there is a genuine issue to be tried arising from missing or

malfunctioning equipment. The fact that that issue was raised in the Defendants' pleadings does not, therefore, stand in the way of summary judgment.

[10] Counsel for the Defendants submits that even without affidavit material pursuant to Rule 176(1), I can look at issues of law in determining whether summary judgment should be granted. I agree that is the case, so long as a genuine issue of law arises from the affidavit material before me or the nature of the Plaintiff's claim.

[11] Counsel for the Defendants submits as an issue of law that the equipment purchase agreement does not provide for monthly calculation of interest, but only an annual interest rate.

[12] The paragraph in question, paragraph 1(ii) of the equipment purchase agreement, reads as follows:

1. 882509 agrees to buy and Luric agrees to sell the interest of Luric in the Equipment for the purchase price of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS payable as follows:
 - i) the sum of TEN THOUSAND (\$10,000.00) DOLLARS previously paid, the receipt whereof is hereby acknowledged by Luric;
 - ii) the sum of NINETY THOUSAND (\$90,000.00) together with interest thereon at the rate of 8% per annum amortized over 4 years by way of equal consecutive monthly payments of principal and interest in the sum of \$2,197.00 per month commencing with the 1st day of July, 1992, continuing each and every month thereafter, to and including the 1st day of June, 1996, at which time the outstanding balance of principal and interest, if any, together with any other charges owing hereunder shall be paid. Interest on overdue

interest shall be paid at the same rate as on the principal before and after maturity up to the date of payment.

[13] In my view, it is clear from the above paragraph that while the interest is stated at a rate per annum, it is to be paid monthly (as part of the consecutive monthly payments). I infer also that it is to be calculated monthly, and that is how the monthly payment amounts were arrived at.

[14] In any event, this does not appear to me to be a question of law, but rather one of fact. What was the repayment schedule agreed to between the parties? The answer is that it was as set out in paragraph 1 of the agreement. There is no factual basis upon which I can find that the calculation of the amount owing to the Plaintiff is incorrect.

[15] On behalf of the Defendants it is also argued that the Plaintiff's affidavit material is not conclusive about delivery of the equipment. As indicated above, I have no affidavit or other evidence from the Defendants indicating that the equipment was not delivered. I do have Mr. Dempster's affidavit, which indicates that the Defendant 882509 N.W.T. Ltd. assumed possession of the equipment on May 14, 1992, one week before the purchase agreement was executed. I note further that paragraph 3 of the executed agreement indicates as follows:

3. 882509 has been in possession of the Equipment since the 14th day of May, 1992 and accepts the Equipment in its present condition without reservation.

[16] Nowhere in this material do I see a genuine issue raised about the delivery of the equipment. In my view, the Plaintiff having set out the existence and terms and performance of the agreement, and the Defendants' default under the agreement and the guarantee, it is up to the Defendants to raise a triable issue relating to non-delivery of the equipment. That they have not done because there is no evidence before me as required by Rule 176(1).

The Plaintiff has made out its case for summary judgment. Accordingly, Rule 179(1) is not applicable. I therefore order that summary judgment issue against the Defendants jointly and severally, in the amount of \$57,506.36 with interest thereon as set out in the Statement of Claim. Counsel for the Plaintiff will have to provide the interest calculation to the date of judgment.

[17] The Plaintiff will also have its costs.

V. A. Schuler
J. S. C.

Dated this 9th day of June, 1997

Counsel for the Plaintiff: Charles Thompson

Counsel for the Defendants: Tom McCauley

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