

Date: 1998 02 26  
Docket: CV 07184

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**METL-SPAN CORPORATION**

Plaintiff

- and -

**DUDLEY KILL AND SONS LTD. AND B.H.P. DIAMONDS INC.**

Defendants

**MEMORANDUM OF JUDGMENT**

[1] Humphrey Metal Buildings Inc., currently not a party to these proceedings, seeks to be added as a defendant notwithstanding the Plaintiff's objection. Humphrey also seeks to post a lien bond so as to have the registration of a miners lien vacated from certain property.

[2] In its Statement of Claim, the Plaintiff claims that it supplied materials to the defendant Dudley Kill and Sons Ltd. for use at the defendant B.H.P.'s mine site. The Plaintiff claims that it was never paid, although the materials were used at the site. The Plaintiff has filed a lien pursuant to s. 11(5) of the *Miners Lien Act*, R.S.N.W.T. 1988, c. M-12.

[3] Humphrey says that it contracted with B.H.P. for the supply of the aforesaid materials. Humphrey says that at the Plaintiff's suggestion, it ordered the materials from Dudley Kill and paid Dudley Kill and alleges that Dudley Kill was the Plaintiff's

agent. Humphrey wants to have the registration of the lien vacated because the contract between Humphrey and B.H.P. permits the latter to hold back monies from Humphrey when a lien is registered against the property.

[4] The Plaintiff denies that there was any agency relationship and says that Dudley Kill was instead a customer of the Plaintiff and did not pay it for the materials supplied. The Plaintiff objects to Humphrey being added as a defendant because of the costs and extra time that may be incurred as a result of amendment of the existing pleadings, but does not oppose deposit of the lien bond.

[5] Humphrey seeks to be added as a defendant pursuant to Rule 58(6), which reads as follows:

The Court may order a person who is not a party to an action to be added as a defendant and give all necessary directions where it is satisfied by the person that the person

- (a) has an interest in the subject-matter or result of the action; and
- (b) should be allowed to defend the action or any issue in the action.

[6] Humphrey's position is that the Plaintiff was paid because its agent, Dudley Kill, was paid. Dudley Kill has been noted in default for failure to file a Statement of Defence or Appearance and so has not raised the agency issue. It seems appropriate that Humphrey be permitted to do so, as the circumstances of the alleged agency relationship as represented to Humphrey are within its knowledge.

[7] In my view, the case of *Conquist v. Bernie's Ltd.*, [1993] N.W.T.R. 58 (S.C.), relied upon by counsel for the Plaintiff, can be distinguished. In that case, the application was brought by an existing defendant to add a non-party as a co-defendant or a third party, pursuant to s. 7 of the *Contributory Negligence Act*, R.S.N.W.T 1988, c. C-18. It was held by de Weerd J. that in the circumstances of that case the appropriate route was to add the proposed party as a third party. In this case, s. 7 is not applicable.

[8] The circumstances of this case are, however, similar to those in *Robert Erickson et al. v. Milta Contracting Ltd. et al.*; *Keller Construction Ltd. v. Robert Erickson et al.* (unreported, February 11, 1991, N.W.T.S.C. No. CV 02151). In that case, the applicant, which was not a defendant, had paid money into court to vacate a mechanics lien. The applicant alleged that it was the general contractor on the project in question

for the owner, which was a defendant, and that both the plaintiff and another defendant were its subcontractors. The plaintiff took the position that it had had no dealings with the applicant and opposed the order sought.

[9] In the *Robert Erickson*, de Weerd J. granted the applicant's request to be added as a defendant, saying:

It is not for me to resolve the disputed facts on this application. It is apparent that the applicant is interested in the subject matter and result of the action, both in the sense that the applicant stands to lose the money paid into court and in the sense that there appear to be legal and factual issues between the applicant (as the alleged contractor on the project) and the plaintiffs (as the applicant's alleged subcontractor).

[10] Similarly, in this case, the disputed issue as to whether Dudley Kill was the agent of the Plaintiff cannot be resolved on this application. Section 11(5) of the *Miners Lien Act* appears to permit an application to file a lien bond to be brought by one who is not a party to the lien action. The responding parties appearing on this application do not oppose the filing of a lien bond by Humphrey. If that application is granted, Humphrey will be in jeopardy of being called upon pursuant to the terms of the bond and the arrangements with the surety to satisfy any judgment on the amount represented by the lien. In that sense, Humphrey has an interest in the subject matter and result of the action.

[11] There are also legal and factual issues as to whether Dudley Kill was the agent of the Plaintiff and whether payment to Dudley Kill was therefore payment to the Plaintiff. These are issues between Humphrey and the Plaintiff.

[12] The Plaintiff also relies on the fact that Humphrey is not registered in the Northwest Territories as an extra-territorial company pursuant to the *Companies Act*, R.S.N.W.T. 1988, c. C-12 and argues that Humphrey cannot maintain a proceeding in this jurisdiction pursuant to section 169 of the *Act*. However, the affidavit material before me is insufficient to establish that Humphrey is required to register. Section 156 of the *Act* requires registration only for extra-territorial companies carrying on business in the Northwest Territories. And an extra-territorial company that is required to register and fails to do so is only disabled from maintaining an action or proceeding in respect of a contract made in whole or in part in the Northwest Territories: s. 169(1). In any event, the failure to register can be cured: s. 170(4).

[13] The Plaintiff claims that it will suffer prejudice in costs and time if Humphrey is permitted to defend the action. Any such prejudice must, however, be weighed against the interest that Humphrey has in the action, as set out above. In my view, in all the circumstances, it is both just and convenient that Humphrey be added as a defendant.

[14] The possibility of Humphrey being added as a third party was raised before me in Chambers. None of the defendants named in the Statement of Claim have, however, as yet advanced a claim against Humphrey and Humphrey is seeking to defend the action. It is therefore appropriate that Humphrey be added as a defendant under Rule 58(6).

[15] Rule 59 (1) refers to the Plaintiff filing an amended Statement of Claim unless otherwise ordered. In this case, the Plaintiff has already pleaded that it was not paid by Dudley Kill for the materials in question. Since the Plaintiff claims that no agency relationship existed, there would not seem to be any need for the Plaintiff to amend its Statement of Claim.

[16] I therefore order that Humphrey be added as a defendant and the style of cause in these proceedings be amended accordingly. The Plaintiff is not required to amend its Statement of Claim. Humphrey shall file and serve its Statement of Defence within two weeks of the date this Memorandum of Judgment is filed and the Plaintiff may file a Reply within two weeks of being served with the Statement of Defence.

[17] Humphrey's application to file a lien bond with the Court is also granted. Upon the bond being filed, the Mining Recorder shall vacate the registration of the claim of lien as set out in the draft order provided to me in Chambers. That order may issue upon counsel adding to it the terms set out above with respect to the filing of further pleadings. I note as well that in the first paragraph of the draft order, Metl-Span Corporation is incorrectly described as a defendant.

[18] Counsel may arrange to bring this matter on before me if any further directions are required. Costs of this application will be in the cause.

V.A. Schuler,  
J.S.C.

Dated at Yellowknife, NT, this  
26th day of February 1998

Counsel for the Plaintiff:	Elizabeth Hellinga
Counsel for B.H.P. Diamonds Inc.:	Kathryn Vennard
Counsel for Humphrey Metal Buildings Ltd.:	Paul Bolo
No one for Dudley Kill and Sons Ltd.	

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MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE V.A. SCHULER

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