

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

KARL MUELLER CONSTRUCTION LTD.

Plaintiff

- and -

HAUL WELL CONSTRUCTION INC. and GERRY HODGSON

Defendants

MEMORANDUM OF JUDGMENT

[1] In this application, Karl Mueller Construction Ltd. (“Mueller”) seeks to recover from the Sheriff of the Northwest Territories: (i) the sum of \$6724.95 paid to the Sheriff arising out of the seizure of certain equipment and (ii) lawyers’ fees of approximately \$5000.00 incurred in relation to that seizure. Mueller was represented on this application by Karl Mueller, a director and officer of the company and by Ann Leskiw, his spouse.

[2] The background may be summarized as follows. Mueller obtained default judgment against the Defendants in this action. A writ of execution was filed and counsel for Mueller instructed the Sheriff to seize equipment owned by the Defendants and located in Fort Resolution. On December 22, 1995, the Sheriff caused seven pieces of equipment to be seized in Fort Resolution and transported to Mueller’s yard at Enterprise. The Sheriff had contracted with Carter Industries Ltd. (“Carter”) to transport the equipment and Carter subsequently rendered an account to the Sheriff in the amount of \$6724.95. Pursuant to the standard indemnification provided by Mueller’s counsel to the Sheriff, the account was paid. Mr. Mueller says that the account was excessive and seeks to recover the money as well as legal fees expended in having his lawyers communicate with the Sheriff and take steps for reimbursement of the money paid for Carter’s work.

[3] Mueller eventually purchased the equipment in question, along with other equipment belonging to the Defendants, for the amount owing under the judgment, apparently as part of a settlement with the Defendants. Counsel for Mueller filed a satisfaction piece in this action on July 10, 1997, so the costs of the seizure are no longer recoverable from the Defendants, as they would otherwise have been. Why it has taken this long for Mueller to pursue this matter was not explained save for the fact that an action was apparently commenced in the Territorial Court for recovery of the costs in question from the Sheriff. I was advised in Chambers that that action was eventually dismissed for lack of jurisdiction.

[4] In support of his application, Mr. Mueller raised a number of concerns about the way the seizure was handled and I will attempt to address each of those.

[5] Mr. Mueller submits that the Sheriff had no duty nor authority to do any more than seize the equipment. Specifically, he says that neither Karl Mueller Construction Ltd. nor Karl Mueller gave instructions to the Sheriff or his bailiff to transport the seized equipment to the Mueller yard in Enterprise.

[6] The affidavit evidence indicates, however, that such instructions were provided by the Yellowknife law firm acting as agents for Mueller's Edmonton solicitors. On October 31, 1995, the Sheriff received from that law firm a letter of instruction to effect seizure of equipment in the possession of the Defendants. The letter advised that the Defendants were located in Hay River and that they also had equipment in Fort Resolution. The letter asked that the Sheriff debit his charges from the law firm's expense account and it indemnified the Sheriff with respect to his fees, charges and expenses.

[7] The Sheriff's bailiff in Hay River did not receive the seizure documents and instructions to seize from the Sheriff's office until December 1995. Why there was a delay from October to December is not clear, although there was contact between Mueller's lawyers and the Sheriff's office in that interim. The affidavit of the Sheriff's officer, Mr. Smith, indicates that he had telephone communications with or messages from the law firm's articling student in November or December 1995 about the equipment in Fort Resolution and that she advised that Mueller wanted the seized equipment transported to the yard in Enterprise. Mr. Mueller correctly points out that there is little documentation of those instructions. There is, however, attached to Mr. Smith's affidavit, a telephone message to the Sheriff from the articling student advising of the location of the equipment in Fort Resolution and stating "Karl Mueller has stated

can store on his property in Hay River”. I accept that the latter reference is an error as the Mueller property is located outside Hay River at Enterprise. There is also a letter attached to Mr. Smith’s affidavit from the articling student to her instructing solicitor, dated December 28, 1995, advising that the seizure is nearly complete, that the bailiff had to get an appropriate tow truck to tow the larger pieces of equipment and that the Sheriff’s officer had advised her that the equipment was going to be stored at Mueller’s place, “... as per Mr. Mueller’s instruction to me in November”. That letter does not express any surprise or concern about the fact that the bailiff had arranged to tow the equipment as one might expect if the lawyers had not given those instructions.

[8] Mr. Smith further deposes that in December of 1995, the bailiff informed him that he had obtained an estimate from Carter for the cost of transporting the equipment from Fort Resolution to Enterprise, and that the estimate was several thousand dollars. He deposes that it is his practice, where seizure costs may be at issue, to seek direction from the creditor’s solicitor and that to the best of his recollection he followed that practice by relaying the estimate to the articling student before obtaining her instructions to proceed. Upon obtaining those instructions, he advised the bailiff to go ahead with the seizure and transportation of the equipment.

[9] Although there is nothing in the notes kept by the Sheriff’s office documenting the conversations described above, they are confirmed by the bailiff’s report to the Sheriff, in which the bailiff says that he advised the Sheriff’s officer that the cost to remove the equipment would be approximately \$7000.00 and that he was told to hold off until Mr. Smith could get permission from Mueller’s lawyer. Subsequently, Mr. Smith did authorize him to incur the costs and proceed with the removal of the equipment.

[10] It is clear from all of the above that Mueller wanted the equipment seized and he wanted it stored at his compound in Enterprise. There is no indication, and in fact the December 28, 1995 letter from the articling student suggests quite the contrary, that the bailiff was not to arrange for transport to Enterprise. The affidavits of the Sheriff’s officer and the bailiff along with the written documentation that does exist persuades me that Mueller’s lawyers did instruct that the equipment be transported to Enterprise at the cost as estimated by Carter.

[11] It is significant, in my view, that the only documentation in evidence which attempts to put restrictions on the Sheriff is a letter from the articling student to the Sheriff dated January 23, 1995 (which I take to be an error as it is stamped as received in the Sheriff’s Office on January 24, 1996). That letter requests that the Sheriff continue the seizure of the Defendants’ goods and asks that Mr. Mueller be contacted by the

bailiff as soon as the equipment has been seized and given an estimate of the transportation costs and an opportunity to move the equipment himself. The letter concludes by saying, “In the event of a failure to notify Mr. Mueller once the seizure has taken place, or in the event of any deviation from the foregoing, Mr. Mueller will not be responsible for the costs of removing the above noted equipment” (emphasis in the original). The inference I draw from this letter is that after Mr. Mueller voiced his concerns about the costs of the December seizure to his lawyers, they felt it necessary to have the Sheriff deal directly with Mr. Mueller as to the costs of the next seizure. There is a notable absence of any documentation expressing a similar concern prior to or during the December seizure.

[12] Mr. Mueller argues that the *Seizures Act*, R.S.N.W.T. 1988, c. S-6, authorizes the Sheriff to seize only, and not to haul, or arrange to haul, goods. However, s. 30(1) clearly gives the Sheriff the power to remove goods:

30.(1) Notwithstanding anything in this Act, where the Sheriff

(a) has lawfully seized goods under a writ of execution ...and

(b) believes that it is necessary or advisable that the goods be taken by the Sheriff and removed,

the Sheriff may make the removal and disposition of the goods that the Sheriff considers necessary without an order.

[13] Not only does the statute authorize the Sheriff to remove goods but in this case, as I have found above, in fact Mueller’s lawyers authorized the transport of the equipment to Enterprise.

[14] Mr. Mueller says, however, that the Sheriff should have asked whether Mueller, as a construction company which had hauled loads, wanted to transport the equipment itself or arrange for transportation through some other party. In response to that suggestion, the Sheriff’s officer deposes that he would not have considered Mueller as a carrier for the Defendants’ equipment, in the interests of avoiding a potential conflict between the creditor and debtor during seizure. That is a reasonable position for the Sheriff to have taken. More importantly, however, Mr. Mueller did not raise with the Sheriff the possibility of his company transporting the equipment prior to the December seizure.

[15] In any event, there was no need for the Sheriff in this case to look for other means of transportation for the equipment as the evidence indicates that he had the authorization of Mueller's lawyers to proceed on the basis of the estimate given by Carter. Although Mr. Mueller clearly was not happy with the expenses incurred for the seizure once he learned of the amount after the fact, there is no evidence at all that his lawyers disputed the estimate provided by Carter or suggested an alternate method of transport, before the seizure took place.

[16] The Sheriff was entitled to act on the instructions and authorization given to him by Mueller's lawyers. If those instructions and authorizations were contrary to the instructions given by Mueller to his lawyers or were given by the lawyers without his authorization (the lawyers were not represented on this application and therefore I make no finding in that regard), then Mueller's recourse is against the lawyers, not the Sheriff.

[17] Mueller also submits that the amount charged by Carter to the Sheriff was not reasonable, especially when compared to what another contractor, Stan Dean and Sons Ltd., charged for a second load of seized equipment that it hauled to Enterprise in February 1996. The reasonableness of the amount is not, however, open to question now because it was authorized by Mueller's lawyers at the time.

[18] Mueller also raised a number of concerns about the manner in which the seizure was carried out, for example, that seizure stickers were not placed on the equipment, that more suitable equipment could have been used for hauling than what was used by Carter, that some unspecified damage was done to some of the equipment, and that the bailiff listed the same equipment seized in December on a Notice of Seizure pertaining to the February 1996 seizure of other listed equipment. None of this, however, affects the validity of the seizure or the fact that the lawyers for Mueller both authorized and paid the expense charged by Carter.

[19] Mr. Mueller also questioned the bailiff's fees charged at \$50.00 per hour, his assistant's fee of \$75.00 and a \$10.00 fee paid to the Royal Canadian Mounted Police. None of these fees are excessive and item 8 of the Schedule in the *Seizures Fees Regulations* provides that the fees payable to a sheriff under the *Seizures Act* are, where assistance is required for removal or storage, such sum as, in the opinion of the Sheriff, is reasonably disbursed or, in the case of a dispute, as may be fixed by a judge. The Sheriff clearly thought the bailiff's and the other charges were reasonable disbursements and I see no basis upon which to question that assessment considering the nature of the seizure.

[20] It is true that more complete documentation would have been helpful. In addition to obtaining the standard indemnification, it would be good practice for the Sheriff's office to obtain written confirmation to proceed where significant costs will be incurred and written authorization to incur those costs. In this case, it would also have been advisable for the Sheriff to have obtained a breakdown of the \$6724.95 billed by Carter. However, that amount was within the \$7000.00 estimate provided to counsel for Mueller and there is no evidence before me that counsel sought a breakdown, either before or immediately after the seizure was completed, almost five years ago now. So the fact that Carter is not now able to produce a breakdown of the charges rather than only the general information in Mr. Carter's affidavit does not, in my view, cast doubt on the figure charged. It is acknowledged by Mr. Mueller that the seven pieces of equipment were hauled by Carter from Fort Resolution to his yard at Enterprise so there is no question that the work was done.

[21] Another issue raised by Mr. Mueller is the fact that the bailiff traveled three times from Hay River to Enterprise to attempt to have Mr. Mueller sign a bailee's undertaking for the equipment left in his yard after the December seizure. In his affidavit, Mr. Mueller questioned why the bailiff would travel to Enterprise without first calling to ascertain whether he was home. It is clear from the submissions made on his behalf that in fact Mr. Mueller refused to sign the undertaking. The reason he gave was that not all the equipment he had wanted seized was listed on the bailee's undertaking form. However, the point of the bailee's undertaking is to ensure that goods which have been seized are held and kept on the Sheriff's behalf, as required by s. 14 of the *Seizures Act*. In my view it was not unreasonable, with a seizure of this size, that the bailiff would make three attempts to have Mr. Mueller sign the undertaking and that he would make those attempts by attending in person in Enterprise.

[22] The evidence leaves me with no doubt that the Sheriff and his bailiff acted in good faith and on the instructions of counsel in doing what they did. That being the case, it cannot be said that there was no basis for what was done or that the Sheriff acted beyond his jurisdiction.

[23] It follows that Mueller's claims for reimbursement from the Sheriff of the amount billed by Carter and the legal fees expended to try to obtain such reimbursement must fail.

[24] The application is accordingly dismissed.

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

Dated at Yellowknife, NT,
this 22 day of November, 2001

Karl Mueller, in person and
Ann Leskiw speaking on behalf of Karl Mueller

Sheldon Toner, for the Sheriff of the Northwest Territories

CV 05460

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