Hertz Car/Truck Rental v. Mendo, 2001 NWTSC 88

Date: 2001 12 07
Docket: S-001 CV 2001000434

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Reciprocal Enforcement of Judgments Act*

AND IN THE MATTER OF a Judgment of the Court of Queen's Bench of Alberta Obtained by Default and Dated September 7, 2001

BETWEEN:

HERTZ TRUCK/CAR RENTALS, a Division of DALLAS INVESTMENTS INC.

Applicant

- and

JIMMY MENDO and WILBERT MENACHO, and JIMMY MENDO and WILBERT MENACHO c.o.b. as WILLOWLAKE SLASHING SERVICES and WILLOWLAKE SLASHING SERVICES, THE PARTNERSHIP

Respondents

MEMORANDUM OF JUDGMENT

[1] The Applicant seeks an *ex parte* order for registration of an Alberta judgment under the *Reciprocal Enforcement of Judgments Act*, R.S.N.W.T. 1988, c.R-1, section 2(3) of which provides as follows:

> An order for registration under this Act may be made *ex parte* in all cases in which the judgment debtor was personally served with process in the original action, or in which, though not personally served, the judgment debtor appeared or defended or otherwise submitted to the jurisdiction of the original court, but in all other cases reasonable notice of the application for the order must be given to the judgment debtor.

[2] The Applicant sued the Respondents in the Court of Queen's Bench of Alberta for monies owing and damages to a vehicle, pursuant to a vehicle rental agreement. The Respondents, who reside in the Northwest Territories, were served *ex juris* by single registered mail pursuant to an order of the Alberta Court. The Respondents did not defend the action and default judgment was entered against them in the amount of $27,225.87.

[3] The Respondents were not personally served with process in the Alberta action, nor did they appear or defend. The issue is whether they "otherwise submitted to the jurisdiction of the original court". If not, the Applicant is not entitled to an *ex parte* order for registration, but must apply for that order on reasonable notice to the Respondents.

[4] In arguing that the Respondents did otherwise submit to the jurisdiction of the Alberta Court, the Applicant relies first on the decision of Marshall J. in *Canadian Imperial Bank of Commerce* v. *Kabat*, [1984] N.W.T.J. No.17 (S.C.). The Applicant relies on *Kabat* for the proposition that because the Respondents have ongoing obligations to indemnify the Applicant under the vehicle rental agreement, they can be said to have otherwise submitted to the Alberta Court's jurisdiction.

[5] In my view, *Kabat* does not stand for that proposition. The reason the judgment debtor was found in that case to have otherwise submitted to the jurisdiction of the original court (British Columbia) was because the guarantee he had executed and upon which the judgment was based contained a clause whereby he accepted and irrevocably submitted to the jurisdiction of the British Columbia courts and agreed to be bound by any judgment of those courts.

[6] The reference in *Kabat* to an ongoing contractual obligation was clearly to the express submission to the courts of British Columbia found in the guarantee. Marshall J. dealt with that because the section he was faced with, then s.3(3)(b) [now s.2(4)(b)] prohibited registration in certain circumstances where the judgment debtor did not "otherwise submit during the proceedings to the jurisdiction" of the original court. The judgment debtor was found to have submitted during the proceedings by reason of the ongoing contractual obligation set out in the guarantee which bound him to the jurisdiction of the British Columbia courts.

[7] In this case there is no such contractual submission to the courts of Alberta and the fact that the Respondents may have other contractual obligations to the Applicant does not suffice.

[8] As I understand the Applicant's alternate argument, it is that the "real and substantial connection" test for whether a court has properly exercised jurisdiction over an out-of-province defendant is met on the facts of this case and leads to an inference that the Respondents "otherwise submitted" to the jurisdiction of the Alberta Court. In this regard, the Applicant relies on comments made by Professor Hogg as cited in *Morguard Investments Ltd.* v. *De Savoye*, [1990] S.C.J. No.135. In *Morguard*, the Supreme Court of Canada found Professor Hogg's approach attractive but did not have to pronounce on it as it related to a constitutional issue not raised in argument. The approach was simply that the substantial connection rule to determine whether a tort can be said to have been committed in a province could also serve as a statement of the constitutional limits applicable on the jurisdiction a provincial legislature can confer on the courts of the province, for example with respect to rules regarding jurisdiction based on service *ex juris*. The reason Professor Hogg felt the rule could serve in the context of the constitutional issue was because it required "a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province".

[9] The Applicant relies on the words just quoted and says, in effect, that there is a substantial connection in this case and that this Court should infer from that that the Respondents have "otherwise submitted" to the jurisdiction of the Alberta Court.

[10] In my view, Professor Hogg was simply characterizing the nature of the substantial connection required for purposes of the constitutional limits and jurisdictional issues. Although the Applicant's argument is interesting, it fails to recognize that there is a difference between the "convenient and summary" procedure which must be observed under the reciprocal enforcement legislation [see *First City Trust Co.* v. *Inuvik Automobile Wholesale Ltd.*, [1993] N.W.T.J. No.77 (S.C.)] and the principles for recognition of an extraprovincial judgment when sued upon in another province.

[11] The test under s.2(3) of the *Reciprocal Enforcement of Judgments Act* is whether the judgment debtor otherwise submitted to the jurisdiction of the original court. When read in context with the rest of s.2(3), that requirement seems to me to be aimed at ensuring that an *ex parte* order will issue only in circumstances where it is clear that the judgment debtor had notice of the proceeding which resulted in the judgment which the judgment creditor seeks to register. Obviously if he was personally served with process or he appeared or defended, it will be clear that he had notice. So in my view for the judgment debtor to be held to have "otherwise submitted" to the jurisdiction of the

original court there must be some clear act or step on his part in or in connection with the proceeding. It is not sufficient merely to show facts in support of the original court's jurisdiction, which is the issue when the reciprocal enforcement legislation is not available. A similar issue arose in *Davis & Company* v. *Dunn*, August 21, 1996, S.C.N.W.T. No. CV 06503 (unreported), in which I held that the procedure under the *Reciprocal Enforcement of Judgments Act* is not significantly affected by the "real and substantial connection" test used for recognition of foreign judgments where the statute is not applicable.

[12] In the result, I am not persuaded by the arguments put forward by the Applicant and the application to proceed on an *ex parte* basis is dismissed. Counsel may proceed on notice as required by s.2(3).

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

Dated at Yellowknife, NT, this
7th day of December 2001

Agent for Solicitor for the Applicant: Arthur von Kursell

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER