Kila v. *The Commissioner of the Northwest Territories (the DOT)*, 2010 NWTSC 06

Date: 2010 01 27
Docket: S-0001-CV-2008000104

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KILA ENTERPRISE LTD. (KILA)

Plaintiff

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES (THE DOT), WESTERN ARCTIC BUSINESS DEVELOPMENT SERVICES (WABDS), NORTHWEST TERRITORIES BUSINESS DEVELOPMENT AND INVESTMENT CORPORATION (BDIC) AND INUVIALUIT REGIONAL CORPORATION (THE IRC)

Defendants

MEMORANDUM OF JUDGMENT

[1] Both Western Arctic Business Development Services ("WABDS") and Inuvialuit Regional Corporation ("IRC") are defendants in an action commenced by Kila Enterprise Ltd. ("Kila"). Each applies for summary judgment pursuant to Rule 175, seeking to have Kila's claim against them dismissed. Although the applications were argued separately, I will deal with both of them in this judgment.

Background

[2] In 2005 Kila obtained a contract with the Government of the Northwest Territories ("GNWT") to work on the Mackenzie Highway (the "highway contract"). Kila borrowed approximately $144,000.00 from WABDS in order to provide a letter of credit to the GNWT to secure Kila's obligations under the highway contract. WABDS took security for the loan over Kila's assets and from its principals.

[3] Eventually the GNWT called upon the letter of credit and WABDS paid. WABDS in turn demanded that Kila repay the loan. Kila did not repay and WABDS commenced action CV2007000083 in this Court against Kila and the loan guarantors, Johnnie *(sic)* Lennie and Beverly Lennie. Although all three defendants were noted in default, judgment was taken out against only Johnnie and Beverly Lennie, but not Kila. Instead, WABDS seized and sold various assets of Kila under a chattel mortgage it took as security for the loan. The proceeds of sale were used to pay down the loan which is currently outstanding in the amount of approximately $45,000.00.

[4] IRC's involvement in all this was limited to reviewing and rejecting for purposes of application of its business policy a Memorandum of Understanding between Kila and a third party (the "MOU") as described below.

[5] In 2008 Kila commenced this action against the GNWT, WABDS, IRC and the Northwest Territories Business Development and Investment Corporation ("BDIC") for damages it claims to have suffered as a result of their actions connected with the matters set out above.

Legislation and legal principles

[6] WABDS and IRC bring their applications pursuant to Rules 175 and 176, which provide as follows:

> 175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing 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.
> ...

[7] The essential question under the Rules is whether there is a genuine issue for trial. The objective is to screen out claims that, based on the evidence provided, ought not proceed to trial because they cannot withstand a "good hard look". The moving party has the burden of establishing that there is no genuine issue for trial, while the responding party also bears an evidentiary burden to put evidence before the court showing the existence of issues requiring a trial: *923087 N.W.T. Ltd. v. Anderson Mills Ltd.*, [1997] N.W.T.R. 212 (S.C.).

[8] A judge hearing an application for summary judgment is entitled to assume that the parties have "put their best foot forward" and would present no additional evidence at trial: *Arctic Environmental v. Northern Mgmt. & Komaromi et al*, 2000 NWTSC 53.

[9] WABDS and IRC both argue that there is no genuine issue for trial of the claims asserted against them and that Kila has not presented evidence to the contrary. Kila, on the other hand, argues that there are genuine issues for trial as well as issues of concern that should be heard by this Court.

The claim against WABDS

[10] Kila obtained a loan from WABDS as set out above. When the loan went into default, Kila asked that payments be deferred for several months until it could find an investor and also secure other contracts for work to generate funds to pay down its debt. All the evidence before me indicates that WABDS would not agree to defer payments or hold off on action to collect the money owed.

[11] Kila's claim against WABDS (and BDIC, which has not applied for summary judgment) is summarized in section B., paragraph 5 of its statement of claim:

> 5. Despite Kila's requests for deferral, and despite the fact that a commercial lender that was owed significantly more money by Kila granted such deferral, and despite their government-owned and publicly-driven mandate to support NWT businesses as a lender of last resort, WABDS and BDIC seized Kila's assets. As a result of these seizures, Kila was put out of business and not able to bid on the upcoming season in the Mackenzie Delta.

[12] As compensation for the damages suffered by Kila as a result of the above actions, Kila claims $750,000.00 from WABDS.

[13] The affidavit of WABDS' general manager sets out the history of the default by Kila on the loan and the steps taken by WABDS to seize the assets, obtain appraisals and apply proceeds from sale of the assets to Kila's loan, which has now been reduced to approximately $45,000.00. For at least two of the assets sold by WABDS, the price at which the asset was sold exceeded the appraised value of the asset.

[14] Kila says, in Johnny Lennie's affidavit, that there are genuine issues for trial for a number of reasons, which may be summarized as follows: other lenders gave Kila more time to pay; other lenders similar to WABDS have given other debtors lengthy periods of time to pay; people associated with Kila suffered hardship because Kila went out of business; if Kila had been given more time to pay by WABDS, it would have been able to pay the debt owed.

[15] There is no evidence, however, that WABDS had any legal obligation to desist from collecting the debt owed by Kila or refrain from realizing on the security it held over Kila's assets. There is no evidence or argument made that the notices of demand given to Kila by WABDS were inadequate or that anything WABDS did was illegal or something it was not entitled to do. In the absence of a legal obligation to act a certain way, the fact that WABDS did not act as Kila wished does not give rise to a triable claim.

[16] In another affidavit filed on behalf of Kila, Mr. Lennie says that Kila had other buyers who would have paid more money than WABDS obtained for some of the assets seized and sold but WABDS would not wait for those buyers. There is no evidence, however, that any of Kila's proposed buyers contacted WABDS or that Kila did anything to put the proposed buyers in touch with WABDS. Nor did Kila take steps through the Court to ask that the sales proposed by WABDS be halted so that other offers could be considered.

[17] WABDS submits that its obligation as a secured lender was to exercise and discharge its rights, duties and obligations in good faith and in a commercially reasonable manner: s. 65(3) *Personal Property Security Act* , S.N.W.T. 1994, c. 8. I agree. The fact that WABDS obtained a better sale price for some of the seized assets than their appraised value indicates that it acted in a commercially reasonable manner. The time for Kila to dispute the appraised values or bring forward better offers was the time when the assets were being seized and sold, not after the fact.

[18] Much of Kila's argument is to the effect that WABDS is a lender of last resort that should be more flexible and lenient in dealing with default by a debtor. WABDS disputes that characterization and says that Kila is confusing its mandate with that of BDIC. Neither WABDS nor Kila put any objective evidence before me as to the exact nature of WABDS (allegations in WABDS's statement of defence were not repeated in the affidavit filed on its behalf). In any event, the evidence that was presented by Kila goes no further than Mr. Lennie's opinion that WABDS should have given Kila more time to deal with its debt. There is no basis upon which it can be said that WABDS had a legal duty to do that.

[19] Kila also submits that this matter should go to trial because it needs more time to get legal advice and this is an important case because Kila has not been treated the same as other debtors. These factors are irrelevant to whether there is a genuine issue for trial. In any event, Kila has had ample time to seek legal advice.

[20] For the foregoing reasons, I find that there is no genuine issue for trial and accordingly the application for summary judgment is granted and the claim against WABDS is dismissed.

[21] WABDS asked for costs in a lump sum of $5,000.00, however no rationale for that particular sum was presented. WABDS will have its costs of the application on a party party basis.

The claim against IRC

[22] Kila's claim against IRC is for $2,300,000.00 and is set out in the amended statement of claim in the following four paragraphs:

> 1. The IRC was established with the overall responsibility of managing the affairs of the Inuvialuit Settlement Region (ISR) as outlined in the Inuvialuit Final Agreement (IFA). Its mandate is to continually improve the economic, social and cultural well-being of the Inuvialuit through implementation of the IFA and by all other available means. One of its chief functions is the setting requirements for, and maintaining a list of businesses approved to work in the ISR (i.e. the Inuvialuit Business List).
>
> 2. Kila negotiated a memorandum of understanding (MOU) with Mackenzie Valley Construction (MVC) to sell 49% of Kila to MVC for $300,000.00 and submitted the proposed restructuring of Kila to the IRC for approval and membership in the IRC's Inuvialuit Business List.
>
> 3. The IRC intentionally blocked the sale of 49% of Kila to MVC by rejecting the MOU MVC, even though the IFA clearly states that an Inuvialuit company is to be 51% owned by an Inuvialuit which the restructured Kila/MVC would have been. The IRC provided no reason for its rejection of the MOU.
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> 4. As a result of the IRC's refusal to recognize a restructured Kila per the MOU on the Inuvialuit Business List, Kila lost potential profits of $2,000,000.00 in total in respect of the 2006-07, 2007-08, 2008-09, and 2009-10 seasons.

[23] The crux of Kila's claim against IRC is that IRC intentionally blocked the sale of 49% of Kila to MVC by rejecting the MOU, as a result of which Kila lost potential profits.

[24] In its affidavit material, IRC says that its general goals are to promote economic development within the Inuvialuit Settlement Region. Under the Inuvialuit Final Agreement with the Government of Canada, the IRC establishes priority access to procurement initiatives for Inuvialuit businesses to encourage the participation and capacity of such businesses. For that purpose, IRC has created a business policy that sets out the rationale and criteria for designation as an Inuvialuit-owned business.

[25] IRC says it had no knowledge of a sale of Kila and it did not block any sale. It points out that the MOU makes no mention of any agreement to sell part of Kila to MVC.

[26] IRC says that Kila asked it whether Kila could list additional services based on the MOU but IRC interpreted the MOU as a marketing agreement under which Kila was to receive a fee for marketing MVC's services. Since MVC was not Inuvialuit-owned, the arrangement would not increase Inuvialuit capacity but would give a non-Inuvialuit business venture priority access to procurement opportunities. For this reason, IRC determined that the MOU did not comply with its business policy. IRC acknowledges that in a separate instance, it conditionally approved a similar MOU between Kila and another company.

[27] In response to IRC's affidavit evidence, Kila relies on the affidavits of Johnny Lennie. In his affidavit sworn December 1, 2009, Mr. Lennie says that a sale of 49% of Kila's assets was discussed with "Flint Energy", which wanted the venture to flow through its affiliate in the region, MVC. The affidavit states, "Flint management would seriously consider a purchase should Kila obtain an Inuvialuit approved MOU with MVC." Mr. Lennie denies that the MOU was a marketing agreement and refers to other companies and joint ventures that he says were similar to the Kila/MVC venture and were approved by IRC. He makes other allegations about the conduct of IRC and its personnel that are unrelated to the claim in his statement of claim.

[28] In a second affidavit sworn December 19, 2009, Mr. Lennie states that Kila proposes to call as a witness at trial a vice-president of Flint Energy to testify that "they were considering purchasing 50% of Kila Enterprise Ltd. should a MOU be established with Mackenzie Valley Construction".

[29] The MOU itself is an exhibit to Mr. Lennie's affidavit. There is no reference to a proposed sale to Flint Energy or MVC in the MOU. Nor is there any evidence or suggestion that IRC was made aware of a proposed sale; as I have indicated above, IRC denies any knowledge of it. Kila's argument that IRC intentionally blocked the sale is based solely on IRC's rejection of the MOU. However, there cannot have been an intentional blocking of the sale if IRC was not aware that there was to be a sale.

[30] A further problem with Kila's position is that the sale was not definite. The affidavit material referred to above makes it clear that Flint Energy was at most considering a purchase of either Kila's assets or the company.

[31] Mr. Lennie raised a number of issues about IRC's rejection of the MOU, claiming that it was unfair and that Kila has not been treated the same as other companies in the same position. Whether IRC was correct or fair in the way it dealt with its business policy is not the point. The statement of claim specifies that Kila's claim is based on an intentional blocking of the sale, which is described in the statement of claim as a sale to MVC but in the affidavits as a sale to Flint Energy. In either case, there is no genuine issue for trial because there is no evidence that IRC knew about the sale or intentionally blocked it and no evidence that there was anything more than just the possibility of a sale.

[32] Although neither Kila nor IRC described Kila's claim as such, in legal terms it appears to be based on the tort of inducing breach of contract. To succeed, a plaintiff claiming that tort must establish the following elements: (i) the existence of a valid and enforceable contract, (ii) awareness by the defendant of the existence of the contract, (iii) that the defendant procured a breach of the contract, (iv) that the defendant intended to procure a breach of the contract and (v) that damage was suffered by the plaintiff as a result of the defendant inducing breach of the contract: Klar, *Remedies in Tort*, Carswell, 2009, ch. 8.

[33] In this case, there is no evidence of any of the required elements, primarily because there is no evidence of a contract for sale of Kila or its assets. The claim is therefore bound to fail and there is no genuine issue for trial.

[34] Kila also argues that its claims against IRC would be precedent-setting and for that reason this matter should be allowed to proceed. However, since there is no genuine issue for trial and the pleaded claim cannot succeed, this civil suit is not the proper forum for Kila to pursue its complaints about how IRC dealt with the MOU.

[35] Accordingly, IRC's application for summary judgment is granted and the claim against IRC is dismissed. IRC will have its costs of this application on a party party basis.

[36] To summarize, both applications for summary judgment are granted. The claims against WABDS and IRC are dismissed. WABDS and IRC will each have their costs on a party party basis.

V.A. Schuler
J.S.C.

Heard at Yellowknife January 6, 2010.

Dated at Yellowknife, this
27th day of January 2010.

Counsel for the Applicant, Western Arctic Business Development Services: Douglas McNiven.

Counsel for the Applicant, Inuvialuit Regional Corporation: Paul Smith.

Kila Enterprise Ltd. represented by Johnny Lennie pursuant to Order of July 18, 2008.

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Defendants

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