Cameron v. Aecometric Corporation, 1998 ABCA 106

Date: 19980331
Docket: 97-17173

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MR. JUSTICE O'LEARY
THE HONOURABLE MADAM JUSTICE RUSSELL

BETWEEN:

GLEN CAMERON

Appellant
(Plaintiff)

- and -

AECOMETRIC CORPORATION and AECOMETRIC CORPORATION operating under the trade name and style of CONAMERA GROUP

Respondents
(Defendants)

APPEAL FROM THE ORDER OF THE
HONOURABLE MR. JUSTICE G. FORSYTH
GRANTED THE 9TH DAY OF APRIL, 1997

RESERVED JUDGMENT

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CÔTÉ
CONCURRED IN BY THE HONOURABLE MR. JUSTICE O'LEARY

CONCURRED IN BY THE HONOURABLE MADAM JUSTICE RUSSELL

COUNSEL:

A. A. Fares
For the Appellant

D. A. Young
For the Respondents

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE CÔTÉ

A. Issues

[1] The issue here is two-fold:

1. When should a garnishee summons before judgment expire?

2. If money is paid in, but the summons is attacked in chambers, should

   (a) the summons and

   (b) the money

   remain or not?

B. Facts

[2] A small chronology is necessary:

February 12, 1997	Statement of Claim issued for wrongful dismissal and debt.
February 13, 1997	***Ex parte*** attachment order issued under ***Civil Enforcement Act***, said to expire at 4.30 p.m. on February 28 1997. It authorized a garnishee summons.
February 14, 1997	Garnishee summons before judgment issued.
February 14, 1997	Garnishee summons served on debtor of the defendant.
February 28, 1997	Attachment order expires by its terms.
March 3, 1997	Money paid into Court by garnishee.

April 1, 1997	More money paid into Court by garnishee.
April 3, 1997	Defendant files notice of motion to set aside attachment order and garnishee summons.
April 9, 1997	Same judge who gave attachment order deems "the garnishee" to "be expired on February 28, 1997" and orders the money in Court returned to the defendant.

C. When Does Garnishment Before Judgment Expire?

[3] If one looks only at the words of the ***Civil Enforcement Act*** which are immediately on point, one finds a small puzzle.

[4] The Act provides for continuing garnishment after judgment, and says that a garnishee summons is effective for a year in most cases (or 60 days for bank accounts and the like): s. 79(3). (The Court can terminate it earlier: s. 79(3)(d).) The Rules of Court also allow the garnishee an additional 15 days after that to pay into Court any money caught during the life of the garnishee summons: R. 474, and Form L of the Rules.

[5] A plaintiff can issue a garnishee summons before judgment, if it is one of the types of prejudgment relief authorized by an attachment order: s. 17(3) of the Act. Such orders can be obtained ***ex parte***, but when that is done, they are to have a life of only 21 days, unless the Court otherwise orders: s. 18(2), (3). They can be extended later (s. 18(4)), but that was never done here.

[6] I cannot find any legislation which gives a prejudgment garnishee summons any different term or wording than one after judgment. That is set by s. 79(3), and R. 472(3) and Form L of the Rules of Court. The summons expires only after one year. But Part 8 of the Act, on garnishment after judgment, applies: s. 17(7)(a). That Part contains s. 79 on life of the garnishee summons.

[7] The defendant here argues that the summons cannot live longer than the term of the attachment order. I do not see why that should be. There is no specific legislation to that effect. Nor does that follow in logic. Presumably a garnishee summons before judgment cannot be issued after the attachment order expires. Maybe it should be served during the life of the attachment order; I say nothing about that.

[8] But the attachment order does not itself garnish. Section 17 and the order here merely authorize the Clerk to issue a garnishee summons. So it sounds as though that is all that must occur before the attachment order expires. I see nothing anywhere which says the garnishee summons is part of the order, as the respondent suggests.

[9] The Act says that a garnishee summons remains in effect until it expires: s. 79(3)(a). It does not say, until the attachment order expires.

[10] There is another reason why the term of the summons need not be limited to that of the attachment order. Even before the ***Civil Enforcement Act***, a garnishee summons attached debts not yet due, but accruing due. The new Act broadens that, and removes technicalities surrounding what debts accrue and what do not. That is wise, for Alberta has no ***Apportionment Act***, and at common law most debts do not accrue from day to day: they spring up fully formed on their due date.

[11] Even if I am wrong on that topic, the law gives the garnishee an extra 15 days to respond to the garnishee summons and pay into Court. This garnishee summons was served two weeks before the attachment order expired, and the first payment in was only 3 days after it expired. So it seems highly likely that the debt existed, even that it was due, during the life of the attachment order. What if the garnishee summons is served during the life of the attachment order and attaches a debt then due? The fact that the garnishee does not pay into Court the same day, but waits out the grace period for payment in set by the Rules, surely cannot retroactively render the garnishment process a nullity.

[12] I will go further. Even if everything above is mistaken, and the garnishee summons should have been modified under s. 17(7)(a) and expressed to expire on February 28 at 4.30 p.m. because the attachment order did, that was not done. It was worded to be good for a year. The garnishee summons was a command of a superior Court, and that cannot be a nullity. The Act does not say that the order has to expire in 21 days: it can be longer.

[13] Therefore, for the above reasons, I am of the view that the payment into Court was pursuant to a valid garnishment. The formal order appealed from does not set aside the garnishment. It merely deems it to have already expired February 28. And for the reasons above, that is mistaken. In the second place, expiry does not lead to the other relief given, payment out to the defendant.

D. Technicalities vs. Merits

[14] But I cannot stop there. In my respectful view, the issues discussed above are somewhat tangential. The fate of the money should not turn on them. (Counsel told us that it has been agreed to extend the stay and hold the money pending this appeal.)

[15] The whole point of the ***Civil Enforcement Act*** is to abolish all the old technicalities which used to surround execution, whether before or after judgment. It is based on several Reports of the Institute of Law Research and Reform of Alberta (as it was then called). They make that plain.

[16] More specifically, the whole concept of the attachment order is to approach pre-judgment remedies in a comprehensive flexible way, which turns solely on the merits and the justice of the individual case. The broad criteria are in s. 17(2), (5), (6) of the Act. Issuing an attachment order is unfettered by other limits. The merits will emerge from the evidence which is then before the judge.

[17] And Rule 472(5) is expressed in mandatory terms. It says that the Court shall not set aside a garnishee summons for irregularity without finding prejudice to the debtor or garnishee from such irregularity. There is no evidence of prejudice here.'

[18] A judge issuing an attachment order can do so on virtually any terms and conditions which seem just and efficacious. So he or she can set any such terms for prejudgment garnishment. In Part C above, I cite some sections permitting that. That should be done on the merits and the evidence, without fear of supposed technical rules or time limits.

[19] And a judge asked to reconsider an ***ex parte*** attachment order should do the same. He or she should look at the present merits, and do what is just and proper. The Court is not confined to the evidence or facts existing at the time of the first ***ex parte*** order. It can look at new evidence and facts. If the first order is now unsatisfactory, the judge should amend it to make it satisfactory. If need be, the judge should give a new order. If further evidence has emerged, he or she should give an order which is now seen to be proper, not confine the Court to raking through the ashes of the previous ***ex parte*** order. See Alberta Law Reform Institute Report #50, at pp. 226-7 (Feb., 1988).

[20] Therefore, whether to let the money remain in court or not should not depend on whether the original garnishee summons, or the attachment order, was correctly issued.

[21] An attachment order can attach any kind of exigible property, wherever in Alberta it may be. That would easily include money which happened to be in Court. Therefore, even if money belonging to the defendant had been paid into Court which need not have been paid in, that does not end the discussion. That only begins it. Money in Court can be attached, wherever or however it arrived in Court.

[22] The chambers judge should have considered ***de novo*** whether to attach this money. He should have looked at the merits as disclosed by the evidence then before him, not at past history.

[23] Did the chambers judge do that?

[24] There are no recorded reasons for his decision. I presume that he gave oral reasons, but no one thought to turn on the tape recorder. This Court often hears appeals from formal chambers orders with no recorded reasons to back them up. I will forego metaphors, and simply say that that is very frustrating for whoever hears the appeal. One also wonders whether an appeal would have been brought, had the reasons been recorded. It is the duty of counsel to ask to have whatever reasons are given, recorded. This Court has very often said that. I doubt that any judge would refuse an express request to turn on the tape recorder.

[25] On appeal, counsel differed sharply on what had occurred in Chambers. One contended that the chambers judge had reconsidered the merits, and ruled that the money should not be attached. The other denied that, and said that the chambers judge simply found that the garnishment had expired, and so the money had not been caught.

[26] The formal order does not purport to deal with the merits. It does not set aside the earlier order, nor refuse to extend it, nor refuse a new attachment. It merely declares the old attachment to have expired. And none of the arguments before us pointed out the power of the Court to attach afresh, nor the intent of the ***Civil Enforcement Act*** to avoid technicalities. I much doubt that the merits were gone into in chambers.

[27] However, I need not finally decide that. Plainly the merits must govern, and there is real doubt that they did. If they were considered, there is no clue anywhere as to what form that consideration took. The only solution is to send the matter back to another

judge to consider the merits afresh. In other words, is it just that the Court attach these funds? If so they should remain in Court. If not, they should go to the defendant's lawyers. In the meantime, pending that new chambers hearing, the funds should remain where they are now, as agreed.

E. Conclusion

[28] I would allow the appeal and send the matter back.

[29] The appellant had to appeal, and the appeal succeeded. I would dispose of costs as follows. The appellant should get costs of the appeal and the April 9 motion in any event. Costs of the previous ***ex parte*** motion and of the garnishment proceedings should be as awarded and fixed by the new chambers judge.

APPEAL HEARD on January 15, 1998

JUDGMENT DATED at CALGARY, Alberta,
this day of
A.D. 1998

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COTÉ J.A.

I concur:

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O'LEARY J.A.

I concur:

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RUSSELL J.A.