Supreme Court of British Columbia
Byers v. Camfew Boats Ltd.
Date: 1988-04-19

F.G. Potts, for plaintiff.

R.D. Wilson, for defendant.

(Victoria No. 605/88)

[1] April 19, 1988. HUTCHISON L.J.S.C.:- The plaintiff's claim, endorsed on the writ of summons, is for the "return of a 1960 Chriscraft Sea Skiff Motor Cruiser". The defendant has entered an appearance but there is currently no statement of defence filed.

[2] By notice of motion the plaintiff seeks a declaration that the repairer's lien claimed by the defendant is null and void, and an order that the defendant deliver up the boat which is the subject matter of these proceedings.

[3] In July 1986 the plaintiff contracted with the defendant for certain repairs to his boat. The plaintiff deposes that the boat was returned to him 28th August 1987 with the repairs substantially completed. He states that he did not sign the acknowledgment of debt until 18th November 1987, and only signed then due to threats of seizure and sale made by the defendant and the defendant's nephew, a bailiff. The boat was seized on behalf of the defendant on 9th December 1987.

[4] The plaintiff submits that any lien the defendant may have had on the boat was lost in August when he obtained possession of the boat. He further submits that it cannot be revived by a later acknowledgment of the debt, or by the defendant recovering possession.

[5] The defendant deposes that the boat was moved from the defendant's shipyard to the plaintiff's marina slip in Sooke, British Columbia, for the purpose of further work which required the boat to be in the water. The defendant, and the defendant's president, did not intend that the change in location would transfer possession from the defendant to the plaintiff. The defendant indicates that he agreed to relinquish possession of the boat to the plaintiff in November 1987 upon his acknowledging his indebtedness to the defendant. He denies that any threats were made.

[6] The plaintiff asserts that the defendant is unlawfully detaining the boat. The affidavit of the defendant's president discloses that the defendant asserts a right of possession by way of a repairer's lien.

[7] In *Debor Contr. Ltd. v. Core Rentals Ltd.* (1982), 40 O.R. (2d) 24, 44 C.B.R. (N.S.) 9 at 14-15 (S.C.), Pennell J. made the following observations on the nature of mechanic's liens:

> At common law, a lien is given to an artisan or mechanic who performs labour and furnishes material upon any chattel in the alteration or improvement of it. The bestowing of labour in the credit of the chattel makes it a security for the prospective account of the mechanic or artisan. The lien may, however, be lost in several ways. If the work is not done on the credit of the chattel itself, but solely on the credit of the owner, there is a waiver of the lien. That case is not here. A lien is also lost if possession is lost. Essential it is that the lien claimant have possession of the chattel. Possession is a question of physical fact supplemented by the understanding and intention of the parties. *No general rule or test can be used to determine whether there was sufficient possession to establish a lien.* Each case must rest on its own bottom. To illustrate, a lien is not lost by delivery of a chattel to the owner for temporary use under an agreement that the chattel should be returned after use: *Albermarle Supply Co. v. Hind & Co.,* [1928] 1 K.B. 307 (C.A.). [emphasis added]

[8] *Deloitte, Haskins & Sells Ltd. v. Big Sky Steel Fabricators Inc.* (1983), 27 Sask. R. 179 (Q.B.), stands for the proposition that in some instances a lien may be preserved when the subject property goes out of the lienholder's hands for a period of time. Estey J. stated at p. 183:

> As to whether the removal of the chassis and derrick to the painter's place of business amounted to an interruption which prevented the possession from being continuous does on the above authority [24 Hals. (3d) 147, para. 269] depend on the intention of the parties and particularly the intention of the defendant.

[9] The plaintiff in support of its position cites *Re Aztec Steel Mfg. Inc.* (1983), 45 C.B.R. (N.S.) 241 (Ont. S.C.), where Registrar Ferron, Q.C., states at p. 243:

> Any arrangement or agreement which contemplates the release of the vehicle before the time of payment arises is inconsistent with and destructive of the lien.

[10] This statement of the law is modified at least in part by the provisions of the Repairers Lien Act, R.S.B.C. 1979, c. 363. Section 3 of that Act allows the continuation of a lien on a motor vehicle, aircraft, boat or outboard motor if an acknowledgment of indebtedness is signed prior to the surrender of possession.

[11] These cases clearly show that whether a lien exists is a triable issue. The fundamental issue is whether or not the defendant ever lost possession. The intention of the parties at the time the boat was relocated is critical. There is conflicting evidence as to the intentions of the parties.

[12] This is not an appropriate matter to be determined on an interlocutory application based on affidavit evidence. The plaintiff is in reality making an application for summary judgment, in that the order sought would give him before trial substantially all the relief he seeks in his action. The plaintiff's application for a declaration that the lien claimed is null and void ought to be dismissed.

[13] Pursuant to R. 46(4) the plaintiff seeks recovery of the boat pending outcome of the proceedings. Rule 46(4) provides:

> (4) Where a party claims the recovery of specific property other than land, the court may order that the property claimed be given up to the claimant pending the outcome of the proceeding either unconditionally or upon such terms relating to giving security, time, mode of trial or otherwise as it thinks just.

There has been no judicial discussion of the effect of such an order on the rights of a lienholder. *The Gaupen,* [1925] W.N. 138, 22 Lloyd L.R. 57, would suggest that if the court orders the defendant to give up the boat to the plaintiff, any possessory lien it may be entitled to could be lost. In that case the plaintiff lienholder wanted to move the vessel from its dry dock to a wet dock. Lord Merrivale heard the case. The report states at p. 138:

> It was suggested that the Court could turn a genuine possessory lien into a notional lien - a lien without any actual possession. No authority had been cited for such a proposition, and he did not think the Court had the power to make the declaration claimed.

This differs from the circumstance where the parties, by agreement, allow possession to change. In Halsbury's Laws of England, 3rd ed., vol. 24, at p. 171 [footnote], it is stated: "The parties may by agreement modify a legal lien in ways which the court would not arbitrarily impose."

[14] In these circumstances it may work an injustice to order the defendant to give up the boat to the plaintiff, unless the plaintiff can give security for the amount of the debt,

which also appears to be a matter in dispute although the claim is not for any alleged breach of contract.

[15] The appropriate remedy in these circumstances may be for the plaintiff to make application for an interlocutory injunction to prevent the defendant from pursuing any remedy under the lien claimed. In this event, the plaintiff applicant would have to meet the usual tests for the granting of an interim injunction. These tests have recently been reviewed in *B.C. (A.G.) v. Wale,* 9 B.C.L.R. (2d) 333 at 345, [1987] 2 W.W.R. 331, [1987] 2 C.N.L.R. 36 (C.A.).

[16] Rather than resorting to a Mareva injunction, the injunction could be granted under the provisions of R. 46(1), which provides:

> (1) *(a)* The court may take an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise.

This provision is a codification of the common law rule that a court could make an order for the preservation of property pending litigation. This is one of the exceptions to the rule against allowing execution prior to judgment.

[17] The difference between a Mareva injunction and an injunction to preserve the very subject matter of the action has been fully canvassed in *Aetna Fin. Services Ltd. v. Feigelman,* [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97 at 106-107, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241.

[18] If the plaintiff has concerns that the defendant may attempt to exercise his alleged right of sale under the Repairers Lien Act prior to trial, the balance of convenience may favour the granting of an interlocutory injunction to preserve the status quo. The words of McLachlin J.A. (Macdonald J.A. concurring, Seaton J.A. dissenting) in *B.C. (A.G.) v. Wale,* supra, at p. 346, are appropriate:

> One factor which may assist the court in assessing where the balance of convenience lies when the parties' interests are relatively evenly balanced is the fact that one side bases his claim on existing rights, while enforcement of the other's rights would change the status quo.

[19] It will be noted that the applicant need not show clear proof of irreparable harm. "Doubt as to the adequacy of damages as a remedy may support an injunction" (p. 346). In this regard, the evidence discloses that the boat in question is a 1960 model and was described as a "showpiece". In such circumstances damages may be inadequate if the defendant were to sell the boat.

[20] I am satisfied that the relief claimed in the notice of motion cannot nor should not be granted. On the other hand, the defendant should be restrained from selling or disposing of the vessel which is the subject matter of the proceedings. I am not disposed to making an order returning the vessel to the plaintiff under R. 46(4) because it is presently insured in the defendant's yard, whereas the affidavit material indicates that the plaintiff has allowed his insurance to lapse.

[21] The defendant has not made any specific application but has simply come in to defend the plaintiff's application before me under R. 46(4). In these circumstances, then, the application is dismissed but the defendant ex mero motu is restrained from exercising any rights claimed under the Repairers Lien Act and is ordered to protect the boat as bailee and not to cancel insurance of same without notice to the plaintiff or further order of this court or trial of this action. Since both parties seem to have been partially successful, costs shall be in the cause.

Notice of motion dismissed; defendant restrained ex mero motu from exercising any rights claimed under Repairers Lien Act.