On appeal from an endorsement decision of a master of the Court of Queen's Bench dated September 18, 2020.

Date: 20210421
Docket: CI 17-01-11025
(Winnipeg Centre)
Indexed as: *Toromont CAT v. Erickson Construction (1975) Ltd. et al.*
Cited as: 2021 MBQB 75

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Appearances:
TOROMONT CAT, A Division of Toromont Industries Ltd.,	)	
	)	John B. Martens,
plaintiff (defendant by counterclaim),	)	for the plaintiff
	)	Amanda E. Verhaeghe,
- and -	)	for the defendant Erickson
	)	Construction (1975) Ltd.
ERICKSON CONSTRUCTION (1975) LTD. AND THE GOVERNMENT OF MANITOBA,	)	
	)	
defendants (plaintiffs by counterclaim).	)	JUDGMENT DELIVERED: April 21, 2021

HARRIS J.

INTRODUCTION

[1] This is an appeal from a decision of a master ordering Erickson Construction (1975) Ltd. ("ECL") to post security for costs in the amount of $42,000.00 by November 27, 2020, failing which its counterclaim would be dismissed. ECL says that the master erred in finding, without evidence, that the "litigation is being funded in some unknown fashion", and thereby rejecting ECL's claim that it was

insolvent and that any requirement to post security for costs would prevent ECL from proceeding with its counterclaim.

[2] In his decision, the master concluded that, "no evidence whatsoever was filed by the defendant…which would allow an assessment of whether security for costs would prevent it from proceeding with the counterclaim". The master observed that "there would be a positive obligation on the defendant to put forward evidence to establish that it would be unable to fund security for costs. With no such evidence filed, that position is not made out". The defendant seeks to adduce evidence on this appeal, which it says addresses this issue.

[3] Appeals of a decision of the master are "fresh" hearings and deference is not owed to the master. "It is for the judge hearing the appeal to decide how much consideration to give to the master's decision in light of the master's reasons, the record both on appeal and before the master, error(s) committed by the master, and any other relevant matter." (***Laing v. Sekundiak***, 2013 MBQB 17, 286 Man. R. (2d) 273 at para. 85)

[4] For the reasons that follow, the motion to adduce additional evidence and the appeal from the decision of the master are both dismissed.

BACKGROUND

[5] In 2013, ECL contracted with Toromont CAT ("Toromont") to provide construction equipment, services, and materials for the completion of construction activities performed by ECL for the Ruttan Mine Site Remediation Project. ECL was

the general contractor pursuant to an agreement made with the Province of Manitoba ("Manitoba").

[6] On or about November 5, 2015, ECL voluntarily declared itself in default of its agreement with Manitoba. On November 23, 2015, Toromont filed a Notice of Claim for Lien in accordance with the ***The Builders' Liens Act***, C.C.S.M. c. B91 ("the ***Act***") with respect to invoices unpaid by ECL. PricewaterhouseCoopers Inc. was appointed as receiver for ECL December 7, 2015. As required by the ***Act***, on October 31, 2017, Toromont filed a Statement of Claim in these proceedings for the sum of $280,003.87, the amount owing by ECL.

[7] ECL defended the claim alleging that Toromont failed to perform the contract in that Toromont supplied equipment that was unfit for the purpose for which it was intended and defective, required considerable repair before it was made operational, and/or repeatedly broke down or otherwise out of commission. ECL alleges that this combined to prevent ECL from carrying out its obligations with Manitoba, and declared itself in default.

[8] Based on these allegations, on December 21, 2017, ECL counterclaimed for loss of profits and damages, which have been quantified to be in the neighbourhood of $15 million.

[9] On June 9, 2020, Toromont filed a motion for security for costs. The motion was heard by the master on September 15, 2020, with written reasons ordering security for costs issued on September 18, 2020. The master determined that the new facts and legal issues raised in the counterclaim would account for

approximately 60 percent of the costs of the proceeding and ordered ECL to pay costs in the amount of $42,000.00 by November 27, 2020, failing which, its counterclaim would be struck. A request for a stay of the order was denied by me on November 26, 2020. Security for costs have not posted as ordered by the master.

DOES ECL HAVE STANDING?

[10] Toromont raises two preliminary issues with respect to ECL's standing to bring this appeal.

[11] First, Toromont observes that ECL was dissolved by the Manitoba Companies Office on February 17, 2017, and as of the hearing of the appeal on March 31, 2021 had not been revived, although counsel for ECL represented that this was "in progress".

[12] The law is clear that a dissolved corporation does not have capacity to do anything. It has no legal standing to commence or advance any claim. In ***Wolf Offshore Transport Ltd. v. Sulzer Canada Inc. et al.*** (1992), 100 Nfld. & P.E.I.R. 178 (S.C. (T.D.)), 1992 CanLII 7362, Riche J. said as follows (at para. 8):

> … A dissolved company is akin to a deceased person. It has no capacity to do anything. It is nothing. A person which is nonexistent could hardly be said to do anything. If it had a right of action prior to dissolution, it would have that right on being revived unless it is statute barred. The action could be commenced when the company was revived.

[13] This statement was cited with approval by Joyal J. (as he then was) in ***Grant Design Group Inc. v. Neustaedter et al.***, 2008 MBQB 336, 235 Man. R. (2d) 190 at para. 24.

[14] When the counterclaim was filed, ECL had been dissolved for at least ten months. The issue of ECL's status was raised by Toromont in its briefs of June 26, 2020, September 14, 2020 and November 23, 2020. Despite knowledge of this issue, ECL continues to act as though it has the capacity to pursue its counterclaim when it in fact does not.

[15] I agree that ECL's lack of corporate existence deprives it of the ability to pursue its counterclaim and therefore, this appeal.

[16] Second, Toromont says that as ECL failed to pay security for costs by November 27, 2020 in accordance with the master's order, its counterclaim must be considered to be struck, therefore depriving it of standing to pursue this appeal.

[17] I do not agree. As a party affected by an order of a master, ECL is entitled to appeal that order to a judge under Court of Queen's Bench Rule 62.01(1). (***see*** Rule 62.01(1), *Court of Queen's Bench Rules*, Man. Reg. 553/88 ("Queen's Bench Rules"))

ECL's REQUEST FOR LEAVE TO ADDUCE FURTHER EVIDENCE

[18] ECL seeks leave pursuant to Queen's Bench Rule 62.01(13)(b), to adduce further evidence regarding ECL's impecuniosity, lack of assets and inability to pay costs through the Affidavit of Michelle Erickson, an officer and director of ECL. It chose not to lead this evidence before the master.

[19] In ***Green v. Tram et al.***, 2013 MBQB 305 ("***Green***"), Bryk J. set out the criteria for introducing new evidence on appeal from the master (at para. 19):

> (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
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> (2) the evidence must be relevant, in the sense that it bears upon a decisive or potentially decisive issue in the trial;
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> (3) the evidence must be credible, in the sense that it is reasonably capable of belief; and
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> (4) it must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result …. ….

[20] ECL relies on the decision of Joyal A.C.J.Q.B. (as he then was) in ***2841836 Manitoba Ltd. et al. v. 4011198 Manitoba Ltd. et al.***, 2009 MBQB 62, 238 Man. R. (2d) 101 ("***2841836 Manitoba Ltd.***") where, on a similar motion, Joyal A.C.J.Q.B. said that, to deny the admission of the evidence would (at para. 31):

> ….deprive the court of the very explanation that directly responds to the identified evidentiary void that grounded the apparent adverse inference that the Master implicitly drew. ….

[21] I agree with Toromont that the circumstances in ***2841836 Manitoba Ltd.*** are entirely different. In that case, the applicant had no indication that its evidentiary foundation would be characterized as insufficient. Further, the evidence sought to be introduced in that case would be decisive of the issue.

[22] In the present case, ECL knew that Toromont's motion raised the issue of its alleged impecuniosity and that was open to ECL to lead evidence on that issue. It decided not to do so. In my opinion, ECL has failed to exercise due diligence

and must suffer the consequences of its failure to do so. As Bryk J. noted in ***Green*** (at para. 21):

> …giving them an opportunity at this stage to adduce additional evidence which was clearly available to them and clearly relevant would be tantamount to affording them the "second kick at the can" referred to by Joyal A.C.J.Q.B. in *2841836 Manitoba Ltd.*

[23] Moreover, and in any event, Ms. Erickson's affidavit does no more than confirm what Toromont alleged in its motion – that ECL is a dissolved corporation, is impecunious and has no assets in Manitoba to pay costs if ordered to do so. In my opinion, that evidence would not have affected the result before the master.

[24] In ***ABI Biotechnology Inc. v. Apotex Inc.*** (2000), 142 Man. R. (2d) 80 (C.A.) 2000 CanLII 27027, Philip J.A., writing for the court, said that (at para. 45):

> …A corporate plaintiff with "insufficient assets" must also establish that it cannot raise the security; that its shareholders are unable to advance funds to allow it to post security. In my view, that is not an attack on the legal persona of a corporation or a lifting of the corporate veil. To me, it reflects the court's recognition of its duty to do what is just in the circumstances. Courts have determined that a corporate plaintiff without assets, manipulated by shareholders with assets, ought not to be able to say to the defendant, "Heads I win, tails you lose."

[25] The cross-examination of Michelle Erickson on her affidavit establishes that several members of the extended Erickson family stand to benefit from the claim, yet there is no evidence that any of these people are unable to advance funds to allow ECL to post security for costs. Thus, even if Ms. Erickson's affidavit had been before the master, because it fails to address this issue it would not have affected the outcome of the motion.

[26] I also agree with Toromont that the Erickson affidavit is not reasonably capable of belief, in that it was only on cross-examination that she admitted many of the facts which demonstrate that members of the extended Erickson family would benefit from a successful claim against Toromont.

[27] For all of these reasons, the motion to adduce further evidence is dismissed.

SECURITY FOR COSTS

[28] The authority for ordering security for costs is found at Queen's Bench Rule 56.01:

> 56.01 The court, on motion in a proceeding may make such order for security for costs as in the particular circumstances of the case is just, including where the plaintiff or applicant,
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> (a) is ordinarily resident outside Manitoba;
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> (b) has another proceeding for the same relief pending;
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> (c) has failed to pay costs as ordered in the same or another proceeding;
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> (d) is a corporation or a nominal plaintiff, and there is good reason to believe that insufficient assets will be available in Manitoba to pay costs, if ordered to do so; or
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> (e) a statute requires security for costs.

[29] The two-stage test for the application of Queen's Bench Rule 56.01 is set out in ***Lindsay v. Hy-Line Credit Union Limited et al.***, 2003 MBQB 259 as follows (at paras. 7 and 8):

> … During the first stage, the onus is upon the person applying for the order to establish the basis upon which the order should be granted.

> …. the onus then shifts to the plaintiff to argue against the granting of an order on proper grounds such as impecuniosity.

[30] Toromont relies on subsections 56.01(b), (c) and (d) in its motion. With respect to subsection (b), ECL acknowledges that it has another proceeding for the same relief pending in Queen's Bench, Winnipeg Centre, File No. CI 17-01-10944 (***Smook Contractors Ltd. v. Erickson Construction (1975) Ltd.***). In addition, Travelers Insurance Company of Canada, as assignee of ECL's claim against Smook, has brought two further proceedings in Queen's Bench, Winnipeg Centre, File Nos. CI 17-01-08678 and CI 18-01-16084, seeking the same relief.

[31] While Toromont relies on Queen's Bench Rule 56.01(c), there is no evidence that ECL has failed to pay costs in the same, or another proceeding.

[32] ECL admits that it has insufficient assets to pay costs if ordered to do so. ECL has not demonstrated that it is otherwise unable to raise the security. I agree with Toromont that even if ECL were granted leave to rely on the Affidavit of Michelle Erickson, it contains no such evidence. Accordingly, I conclude that there is no evidence that an order for security for costs would stifle an otherwise meritorious claim.

[33] ECL argues that the master erred in his application of ***TDL Group (The) v. Zabco Holdings Inc. et al.***, 2007 MBQB 303, 224 Man. R. (2d) 23 ("***TDL***"). ECL says that the rationale in ***TDL*** is that a plaintiff is not entitled to an order for security for costs as against a defendant in respect of a counterclaim which is based upon the same facts as the defence and flows from the defence. ECL argues

that the master incorrectly found that the counterclaim "greatly expanded [the] factual and legal landscape".

[34] The plaintiff's claim is for a debt arising from unpaid invoices. While ECL's counterclaim incorporates some of the allegations in the Statement of Defence, ECL essentially alleges that Toromont's breach of contract caused ECL's business to fail. ECL claims damages of $15 million. I agree that the counterclaim raises legal and factual issues that go well beyond what is alleged in the Statement of Defence.

[35] A counterclaim of similar scope was considered significant by McLachlin J.A. (as she then was) in ***Honda Can. Inc. v. Tonka Motorcycle Sales Ltd.*** (1986), 7 B.C.L.R. (2d) 124 (C.A.), 1986 CarswellBC 310 (at para. 11):

> I am satisfied that in this case, as in *McKenzie,* the contention that security need not be paid because the claim is advanced by a counterclaim, would not succeed on appeal. The basis of the counterclaim is distinct from the basis of the claims advanced by Borg-Warner and Honda. The actions of Borg-Warner and Honda are essentially actions for debt pursuant to contract. Tonka's counterclaim, on the other hand, is an action for damages for wrongful termination of the contract. Moreover, Tonka's counterclaim cannot be regarded as a cloaked defence to the actions brought against it by Borg-Warner and Honda; the great amount by which the counterclaim exceeds the claims of Borg-Warner and Honda is itself sufficient to belie this contention.
>
> [Emphasis added]

[36] The master concluded likewise, and I agree.

[37] Having regard to all of the circumstances, it is just that ECL post security for costs in the amount of $42,000.00.

[38] ECL's appeal is dismissed. Toromont will have its costs on the stay application and this appeal, in any event of the cause.

Harris J.