Pacific Islands Express P/L v Empire Building Development P/L [2008] Adj.L.R. 06/12

JUDGMENT : AUSTIN J. Supreme Court, New South Wales, Equity Division Corporations List. 12th June 2008.

1 By an originating process filed on 30 April 2008, the plaintiff applies for an order setting aside the defendant's statutory demand, or alternatively an order extending the time for compliance to a period of 28 days after determination of the application.

2 The statutory demand was served on 9 April 2008. It demands payment of a debt of $104,156.74, being the amount of a judgment entered by the defendant against the plaintiff in the District Court of New South Wales on 19 March 2008.

3 Section 459G(3)(a) states that an application to set aside a statutory demand is made in accordance with the section only if, within 21 days after the demand is served, *"an affidavit supporting the application is filed with the Court*". In ***Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund*** (1996) 21 ACSR 581 at 587, Sundberg J said:

"In a s 459H(1)(a) case, the affidavit must in my view disclose facts showing there is a genuine dispute between the parties. A mere assertion that there is a genuine dispute is not enough. Nor is a bare claim that the debt is disputed sufficient. It follows from the fact that the affidavit need not go into evidence, which is the customary function of an affidavit, that it may read like a pleading."

4 The so-called "***Graywinter principle",*** emerging from these observations, has been considered and applied by courts on many occasions. One consequence of the principle is that the company cannot rely on new grounds that are not contained in the affidavit supporting the application to set aside the demand, and its subsequent evidence is confined to the elaboration of the grounds contained in the evidence filed within the 21 day period. In ***Process Machinery Aust Pty Ltd v ACN 057 260 590 Pty Ltd*** [2002] NSWSC 45 at [22] Barrett J summarised the effect of the cases thus:

"The real point is that the application and affidavit filed and served within the 21 day period must fairly alert the claimant to the nature of the case the company will seek to make in resisting the statutory demand. The content of the application and affidavit must convey, even if it be by necessary inference, a clear delineation of the area of controversy so that it is identifiable with one or more of the grounds made available by s 459H and s459J. That process of delineation may not be extended after the end of the 21 day period, although it is open to the plaintiff to supplement the initial affidavit by way of additional evidence relevant to the area of controversy identified within the period."

5 In the present case the application to set aside the demand is supported by a short affidavit by Marcel Dagher made on 28 April 2008. Mr Dagher is the sole director of the plaintiff. He annexes to his affidavit what he refers to as a copy of the plaintiff's financial statements to be used to prepare its tax returns for the year ending 30 June 2006. In fact what is annexed to the affidavit seems to be a draft tax return. Apart from the fact that this information is outdated, it provides very little cash flow information and falls well short of demonstrating that the company is solvent.

6 Mr Dagher asserts in the affidavit, without further support, that "the plaintiff is solvent and able to pay its debts as and when they arise". The remainder of his affidavit comprises the following two paragraphs:

"4. The judgment obtained in the District Court of NSW dated 19 March, 2008 was a judgment pursuant to an Adjudication Application in the Defendant's favour under the Building and Construction Industry Security of Payments Act 1999 NSW [sic]. That debt is disputed by the Plaintiff.

5. The plaintiff is filing proceedings in the District Court of New South Wales for damages against the defendant which proceedings it is intended will have the effect of staying the District Court Judgment."

7 In my view Mr Dagher's affidavit is not an affidavit "supporting the application", for the purposes of s 459G(3)(a), because it amounts to nothing more than a mere assertion that the debt claimed by the defendant is disputed and that the plaintiff has an unspecified claim for damages against the defendant. The affidavit fails to alert the defendant to the nature of the case the company seeks to make in resisting the statutory demand.

8 The assertion that the judgment obtained by the defendant was pursuant to an adjudication application made under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") does not advance the plaintiff's case, in the absence of some particulars of the grounds upon which the plaintiff disputes the defendant's claim. Under the Act, the respondent to an adjudication application is required to pay the adjudicated amount on or before the date stipulated in s 23, and if it fails to do so, the claimant may obtain an adjudication certificate under s 24. An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly (s 25). I infer from Mr Dagher's evidence that this is the procedure followed by the defendant in the present case.

9 Under s 25(4) of the Act, if the respondent commences proceedings to have the judgment set aside, the respondent is prevented from bringing any cross-claim in those proceedings or raising any defence in relation to matters arising under the construction contract, or challenging the adjudicator's determination, and the respondent is required to pay into court the unpaid portion of the adjudicated amount pending final determination of the proceedings. Section 32 has the effect of preserving any right that a party to a construction contract may have under the contract, or might have apart from the Act in respect of anything done or omitted to be done under the contract. It is unnecessary in this case to investigate the difficulties that these sections have created, when juxtaposed (see, for example, in ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394; P Dawson, "Security of Payment in the Building and Construction Industry: from 'Security' to 'Payment'," (2003) 19(2) BCL 107).

10 The plaintiff does not allege that it intends to commence proceedings to have the judgment set aside, but instead it seeks to assert rights preserved by s 32. In para 5 of his affidavit Mr Dagher speaks of the plaintiff filing District Court proceedings for damages, without giving any indication of the nature or basis of the claim. At the hearing in this court, the plaintiff sought to tender an unsigned form of statement of claim for proceedings to be bought by it against the defendant in the District Court for damages of $750,000, and for an order staying the defendant's District Court judgment for debt. The statement of claim asserts various breaches of the construction management agreement between the parties, relating to defective work and delay and failure to provide information. Damages are sought under ss 52 and 82 of the Trade Practices Act 1974 (Cth). As to the defendant's judgment against the plaintiff, the statement of claim alleges that the plaintiff has paid all outstanding amounts and that the defendant "by false statement" submitted an application for a claim under the Act. No particulars are given of these various allegations and the draft certificate by the plaintiff's solicitor certifying that there are reasonable grounds for the claim has not been signed.

11 I was referred to ***Max Cooper & Sons (Builders) Pty Ltd v M & E Booth & Sons Pty Ltd*** [2003] NSWSC 929. In that case a statutory demand was made on a company based on an adjudicator's determination under the Act. The company applied to vary the demand by reducing the amount claimed, on the ground that there was an offsetting claim for damages for defective work. After referring to s 32 and discussing the case law on the interpretation of the Act and on the requirements for establishing an offsetting claim, Macready AsJ made an order varying the demand. The case indicates that it is permissible, notwithstanding s 25(4), for a company to challenge a statutory demand for an adjudicated amount on the ground that there is an offsetting claim. But it is of no assistance here, because in that case there was no issue as to whether the affidavit supporting the application to vary the demand satisfied the ***Graywinter*** principle. Here the problem is that, assuming a statutory demand based on an adjudicated amount under the Act can be set aside on the ground that there is a genuine dispute or offsetting claim, it is nevertheless necessary for the affidavit to "support" the application by delineating the area of controversy.

12 It is unnecessary to decide whether the draft statement of claim, had it been annexed to Mr Dagher's affidavit, would have rendered the affidavit satisfactory as a "*supporting affidavit*" under the ***Graywinter*** principle. It was not annexed to the affidavit and the plaintiff sought to tender it well after the 21 day period.

13 The affidavit itself is manifestly inadequate, as I have explained, and therefore the plaintiff's application to set aside the demand does not comply with s 459G(3)(a). In these circumstances, the correct course is to dismiss the application to set aside the demand, with costs.

14 The plaintiff makes an alternative application for an order extending the time for compliance with the statutory demand to a period of 28 days after determination of the application. The court's power to extend the period for compliance with a demand is conferred by s 459F(2)(a)(i). Under that provision the power is available "*if the company applies in accordance with section 459G for an order setting aside the demand*". In the present case the company has not applied "*in accordance with*" s 459G because it has failed to comply with s 459G(3)(a) for the reasons I have explained. Therefore the court's power to extend the period for compliance has not been enlivened. I add that if, contrary to my view, the statutory power to extend the period for compliance were available, I would not exercise it in this case. I can see no ground for doing so, given that the plaintiff's application falls so far short of being an acceptable application under s 459G and the evidence does not reveal any special circumstances. The application for such an extension is dismissed with costs.

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