Federal Court

Cour fédérale

Date: 20090915

Docket: GST-6823-07

Citation: 2009 FC 912

Ottawa, Ontario, September 15, 2009

PRESENT: The Honourable Mr. Justice de Montigny

In the matter of the *Excise Tax Act*

and

In the matter of an assessment or assessments established by the Deputy Minister of Revenue of Québec under the *Excise Tax Act*

against

POLYMÈRE EPOXY-PRO INC., a legal person legally constituted, whose head office is located at 460 Roland-Godard Blvd., in Saint-Jérôme, province of Quebec J7Y 4G8

Judgment Debtor

and

FRARE & GALLANT LTÉE, a legal person legally constituted with its place of business at 1355 Valleyfield Avenue, in Laval, province of Quebec H7C 2K5

Moving Party-Garnishee

REASONS FOR ORDER AND ORDER

[1] The garnishee, Frare & Gallant Ltée, is appealing an order issued June 22, 2009, by Protonotary Richard Morneau, which confirmed an interim order issued August 1, 2008, stating that [TRANSLATION] “ . . . any amount owing or that will become owing by the garnishee to the judgment debtor and, specifically, any contractual retention resulting from a contract between the garnishee and the judgment debtor for the construction and/or renovation of an immovable located at 150 Montréal-Toronto Blvd. in Montréal, province of Quebec, be garnisheed to satisfy the amount of $12,361.19 . . .”.

[2] The garnishee alleges essentially that the Protonotary erred because it does not owe any amount to the judgment debtor, Polymère Époxy-Pro, in view of the right of retention that it can legally claim on the amounts it owes to the judgment debtor to the extent and until the judgment debtor obtains acquittances from all its suppliers.

[3] After considering the written and oral representations of the parties and their respective records, I have reached the conclusion that the Protonotary’s order should be upheld.

FACTS

[4] The facts are not in dispute for the most part and may be summarized as follows. The garnishee obtained from the owner of the immovable located at 150 Montréal-Toronto Blvd. in Montréal (hereinafter the immovable) a contract as a general contractor to renovate the immovable. To carry out this work, the garnishee hired the judgment debtor, which subcontracted with various material suppliers including Peinture Micca Inc. and Chemor Inc. These suppliers gave notice of

their respective contracts with the judgment debtor to the owner of the immovable, but they never formally gave notice of them to the garnishee. At the very most, these contracts were [TRANSLATION] “discussed” with the president of the garnishee (as it appears from his affidavit), who also received a copy of the notices sent by the two suppliers to the owner of the immovable.

[5] Although Micca and Chemor completed their respective contracts with the judgment debtor, they were not paid in full and registered legal hypothecs against the owner as material suppliers. They subsequently filed a prior notice of intention to exercise a hypothecary right against the immovable.

[6] In addition, on November 12, 2007, this Court registered a certificate that has the force and effect of a judgment for the amount of $12,361.19 (plus interest) in favour of the Deputy Minister of Revenue of Québec and against the judgment debtor, in accordance with the provisions of section 316 of the *Excise Tax Act* (R.S.C. 1985 c. E-15; hereinafter the ETA). It should be noted here that the Deputy Minister of Revenue of Québec, for purposes of this Act, represents Her Majesty in right of Canada and acts in her name.

[7] On November 22, 2007, the Deputy Minister of Revenue of Québec sent a formal requirement to pay to the garnishee under subsection 317(3) of the ETA. It required the garnishee to pay to the Deputy Minister of Revenue of Québec without delay the moneys otherwise payable to the tax debtor or to a secured creditor of the tax debtor, not exceeding the amount owed by the tax debtor to the Deputy Minister of Revenue of Québec, i.e., $12,391.70.

[8] Since the garnishee paid nothing to the Deputy Minister of Revenue of Québec after receiving the formal demand, Protonotary Morneau issued an interim garnishee order against the garnishee on August 1, 2008, as previously stated.

[9] While acknowledging in its written statement dated August 11, 2008, that there is a contractual balance owing to the judgment debtor in the amount of $81,506.32, the garnishee maintains that the Deputy Minister of Revenue of Québec cannot claim this amount because it has a right of retention.

ISSUE

[10] This appeal essentially raises the issue of whether the right of retention relied on by the garnishee, assuming that it exists, can be set up as a defence against the Deputy Minister of Revenue of Québec to defeat the garnishment issued under the authority of section 317 of the ETA.

ANALYSIS

[11] The parties did not discuss the principles applicable to reviewing a prothonotary's decision. However, these principles were clearly established in *Canada v. Aqua-Gem Investments Ltd.,* [1993] 2 F.C. 425 and *Merck & Co. v. Apotex Inc*. [2004] 2 FCR 459. Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless (a) the orders are clearly wrong in the sense that the exercise of discretion by the prothonotary was based on a wrong principle or a

misapprehension of the facts or (b) the orders raise questions that are vital to the final issue of the case.

[12] In this case, there is no doubt that the prothonotary's order raises a question that is vital to the final issue of the case because it raises the question of the validity of the garnishment itself. Since the parties did not argue that his assessment of the facts was clearly wrong, the only issue is his interpretation of the applicable law.

[13] The garnishee contends that it has both a contractual and legal right of retention. With respect to the contractual aspect, the Protonotary found that there was insufficient evidence to give effect to the garnishee's arguments since the purchase orders and the supplementary general conditions on which the garnishee relied to assert its right were not signed by the judgment debtor. As to the legal authority for the right of retention claimed by the garnishee, the Protonotary was of the opinion in *obiter* that article 2123 of the *Civil Code of Québec* did not apply because it is aimed only at the owner of the immovable on which the renovation work was performed, not the garnishee, which acted as a general contractor. In any event, the Protonotary determined that the deemed trust in favour of Her Majesty in right of Canada under section 222 of the ETA displaces and supersedes any right of retention that the garnishee might claim.

[14] The moving party-garnishee did not emphasize, either in its written representations or at the hearing, the contractual existence of the right of retention that it claims to have. This seems completely justified to me based on the evidence in the record. On the one hand, the garnishee

admitted in its written submissions before the Protonotary that there was never a formal contract between it and the judgment debtor, only purchase orders, which refer to supplementary general conditions.

[15] On the other hand, purchase orders that have been signed unilaterally cannot ground a contractual right of retention. It appears, in fact, that none of the purchase orders in the record were signed by the judgment debtor. As for the document entitled [TRANSLATION] "Supplementary General Conditions" referred to in the purchase orders, it specifically indicates in the second-last point on page 2, in the section entitled [TRANSLATION] "*Billing and payment*", that [TRANSLATION] "where mutually agreed upon, a 10% retention applies". Not only was this document not signed by the judgment debtor, but a review of the purchase orders themselves reveals that half of them were not checked off [TRANSLATION] "net 30 days with 10% retention". In these circumstances, the contractual basis for a right of retention in favour of the garnishee appears to me to be at the very least tenuous, if not non-inexistent.

[16] Let us now review the legal right of retention under the *Civil Code of Québec*. In view of the Québec Court of Appeal decision in *Dans l'affaire de la faillite de Daltech Architectural Inc.*, 2008 QCCA 2441, the right of retention may have both a contractual and a legal foundation. The Chief Justice wrote in this decision: [TRANSLATION] "Even where the right of retention is provided in a contract, it nonetheless flows directly from the exception for nonperformance expressly provided in the Civil Code of Québec." (paragraph 46).

[17] In this respect, the garnishee's submissions also face some obstacles. First, it seems clear that it cannot take advantage of the exception for nonperformance in article 1591 of the *Civil Code of Québec*, of which the right of retention is only one illustration. This provision reads as follows:

1591. Where the obligations arising from a synallagmatic contract are exigible and one of the parties fails to perform his obligation to a substantial degree or does not offer to perform it, the other party may refuse to perform his correlative obligation to a corresponding degree, unless he is bound by law, the will of the parties or usage to perform first.	**1591.** Lorsque les obligations résultant d'un contrat synallagmatique sont exigibles et que l'une des parties n'exécute pas substantiellement la sienne ou n'offre pas de l'exécuter, l'autre partie peut, dans une mesure correspondante, refuser d'exécuter son obligation corrélative, à moins qu'il ne résulte de la loi, de la volonté des parties ou des usages qu'elle soit tenue d'exécuter la première.

[18] The judgment debtor's alleged obligation to provide acquittances to the garnishee to obtain payment was simply not proven by the garnishee. In fact, the judgment debtor's obligation to provide the garnishee with acquittances from its subcontractors in order to obtain payment of the work performed is nowhere to be found in the documents the garnishee provided to the Prothonotary.

[19] If article 2123 of the *Civil Code of Québec* does not, strictly speaking, constitute a right of retention but an illustration of the exception for nonperformance as the Québec Court of Appeal stated in *Daltech*, and if the garnishee did not prove the obligation it alleges the judgment debtor had to obtain acquittances from Micca and Chemor and provide them to the garnishee to obtain

payment of the contractual balance, how can the garnishee benefit from the right under article 2123 of the *Civil Code of Québec*?

[20] Even assuming that this provision applies nonetheless, again the conditions to exercise it must be met. In that respect, two problems arise. First, it is not at all certain that article 2123 of the *Civil Code of Québec* applies to a general contractor. It is true, as the representative of the Deputy Minister of Revenue of Québec notes, that this provision does not refer to the owner of an immovable but to the "client". The legislator referred explicitly to the owner of an immovable in other provisions of the *Code* (see, in particular, articles 2726 and 2731), which would suggest that article 2123 must be given a wider application.

[21] Although tempting, this textual argument is not necessarily determinative *per se*. Ultimately, it is the intention of the legislator that must prevail. Micca and Chemor must give notice to the owner of their respective contracts with the judgment debtor to acquire the right to register a legal hypothec under article 2728 of the *Civil Code of Québec*, as the representative of the Deputy Minister of Revenue of Québec aptly puts it. Would that not be an indication supporting an inference that the right of retention under article 2123 is only aimed at the owner of an immovable, so that the owner can retain sufficient moneys to deal with the legal hypothecs that subcontractors can register against the immovable?

[22] It is not necessary for me to determine that question in this case for a number of reasons. First, because the Québec Court of Appeal seems to have assumed (although it did not really discuss

the issue) that a general contractor could claim the right of retention under article 2123 of the *Civil Code of Québec:* see *Daltech*, above.

[23] Second, even assuming that the garnishee can take advantage of this provision, it has not satisfied the pre-conditions. Article 2123 states as follows:

2123. At the time of payment, the client may deduct from the price of the contract an amount sufficient to pay the claims of the workman, and those of other persons who may exercise a legal hypothec on the immovable work and who have given him notice of their contract with the contractor in respect of the work performed or the materials or services supplied after such notice was given.	**2123.** Au moment du paiement, le client peut retenir, sur le prix du contrat, une somme suffisante pour acquitter les créances des ouvriers, de même que celles des autres personnes qui peuvent faire valoir une hypothèque légale sur l'ouvrage immobilier et qui lui ont dénoncé leur contrat avec l'entrepreneur, pour les travaux faits ou les matériaux ou services fournis après cette dénonciation.
The deduction is valid until such time as the contractor gives the client an acquittance of such claims.	Cette retenue est valable tant que l'entrepreneur n'a pas remis au client une quittance de ces créances.
The client may not exercise the right set out in the first paragraph if the contractor furnishes him with sufficient security to guarantee the claims.	Il ne peut exercer ce droit si l'entrepreneur lui fournit une sûreté suffisante garantissant ces créances.

[24] As previously stated, the suppliers Micca and Chemor did not give notice of their contract with the judgment debtor to the garnishee, but only to the owner of the immovable.

[25] But more fundamentally, the applicability of article 2123 of the *Civil Code of Québec* becomes moot in view of subsections 222(1) and (3) and subsection 317(3) of the ETA. These provisions read as follows:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).	**222. (1)** La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).
. . .	[…]
(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the Bankruptcy and Insolvency Act), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured	**(3)** Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la Loi sur la faillite et l'insolvabilité), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente

creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

317. (3) Despite any other provision of this Part, any other enactment of Canada

partie, les biens de la personne -- y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens -- d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie ;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie ;

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

317. (3) Malgré les autres dispositions de la présente partie, tout texte législatif

other than the Bankruptcy and Insolvency Act, any enactment of a province or any law, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

(*a*) to a tax debtor, or

(*b*) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by notice in writing, require the particular person to pay without delay, if the moneys are payable immediately, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under this Part, and on receipt of that notice by the particular person, the amount of those moneys that is so required to be paid to the Receiver General shall, despite any security interest in those moneys, become the property of Her Majesty in right of Canada to the extent of that liability as assessed by the Minister and shall be paid to the Receiver General in

fédéral à l'exception de la Loi sur la faillite et l'insolvabilité, tout texte législatif provincial et toute règle de droit, si le ministre sait ou soupçonne qu'une personne est ou deviendra, dans les douze mois, débitrice d'une somme à un débiteur fiscal, ou à un créancier garanti qui, grâce à un droit en garantie en sa faveur, a le droit de recevoir la somme autrement payable au débiteur fiscal, il peut, par avis écrit, obliger la personne à verser au receveur général tout ou partie de cette somme, immédiatement si la somme est alors payable, sinon dès qu'elle le devient, au titre du montant dont le débiteur fiscal est redevable selon la présente partie. Sur réception par la personne de l'avis, la somme qui y est indiquée comme devant être versée devient, malgré tout autre droit en garantie au titre de cette somme, la propriété de Sa Majesté du chef du Canada, jusqu'à concurrence du montant dont le débiteur fiscal est ainsi redevable selon la cotisation du ministre, et doit être versée au receveur général par priorité sur tout autre droit en garantie au titre de cette somme.

priority to any such security interest.

[26] Under the first two paragraphs, a deemed trust is created in favour of Her Majesty in right of Canada with respect to amounts collected for the Goods and Services Tax (the GST) when the tax debtor fails to comply with its obligation to remit. In addition, by virtue of the provisions of subsection 222(3)(*a*) of the ETA, the judgment debtor's property is deemed to be held in trust for Her Majesty in right of Canada from the time the GST was collected, and this deemed trust continues to apply until the day of payment. The equivalent provisions of the *Income Tax Act* (R.S.C. 1985, c. 1 (5th Supp.), subsections 227(4) and (4.1)) were upheld by the Supreme Court in *First Vancouver Finance v. M.N.R.*, [2002] 2 S.C.R. 720.

[27] These particular provisions displace and supersede the provisions of provincial legislation, including the *Civil Code of Québec*, as well as any legal principle and create a priority in Her Majesty in right of Canada, not only in relation to ordinary creditors of the tax debtor, but also in relation to secured creditors. Moreover, subsection 317(3) of the ETA provides that, when the debtor of the tax debtor receives the formal demand for payment from Her Majesty in right of Canada, the garnishee's claim against the judgment debtor becomes the property of Her Majesty in right of Canada, notwithstanding provincial law or any other legal principle.

[28] The garnishee did attempt to claim that its obligation towards the judgment debtor had not yet arisen since the judgment debtor had not provided it with the acquittances from its suppliers, and that the trust created in favour of Her Majesty in right of Canada could not create a debt that did not

yet exist. With respect, this argument appears specious to me. The right of retention, even assuming that it applies in this case, and regardless of how it is characterized, cannot be anything other than [TRANSLATION] "an interest in property granted by statute to secure the performance of an obligation" (Jobin, P.-G. and J.L. Baudouin, *Les obligations*, 6th ed., Yvon Blais, p. 816).

[29] The definition of a "security interest" in section 123 of the ETA is not only very broad but corresponds exactly to the definition of the right of retention given by authors Jobin and Baudouin. This definition reads as follows:

123. (1) In section 121, this Part and Schedules V to X, . . . *"security interest"* "security interest" means any interest in property that secures payment or performance of an obligation, and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for.	**123. (1)** Les définitions qui suivent s'appliquent à l'article 121, à la présente partie et aux annexes V à X. […] *« droit en garantie »* « droit en garantie » Droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont notamment des droits en garantie les droits nés ou découlant de débentures, hypothèques, *mortgages*, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'ils soient créés, réputés exister ou prévus par ailleurs.

[30] Based on the clear wording of the ETA, there appears to me to be no doubt that the garnishee cannot set up its alleged right to retain the moneys owing to the judgment debtor against the garnishment issued in favour of the Deputy Minister of Revenue of Québec, acting for Her Majesty in right of Canada. This finding may appear harsh in that it puts the garnishee at risk of paying amounts due to unpaid suppliers twice. But that is the effect of the Act, and it is not for this Court to amend it.

[31] For all the foregoing reasons, the garnishee's motion is dismissed, and the order issued by Protonotary Richard Morneau on June 22, 2009, is confirmed, with costs in favour of the Deputy Minister of Revenue of Québec.

ORDER

THE COURT ORDERS that the garnishee's motion is dismissed and that the order issued by the Protonotary on June 22, 2009, is confirmed, with costs.

"Yves de Montigny"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	GST-6823-07
STYLE OF CAUSE:	Polymère Epoxy-Pro Inc., a legal person legally constituted, whose head office is located at 460 Roland-Godard Blvd., in Saint-Jérôme, province of Quebec J7Y 4G8 and Frare & Gallant Ltée, a legal person legally constituted with its place of business at 1355 Valleyfield Avenue, in Laval, province of Quebec H7C 2K5
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 31, 2009
REASONS FOR ORDER AND ORDER BY:	Mr. Justice de Montigny
DATED:	September 15, 2009

APPEARANCES:

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Simon Turmel	FOR THE MOVING PARTY-GARNISHEE

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