



NO. VLC-S-S-183355
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALL CANADIAN INVESTMENT CORPORATION

PLAINTIFF

AND:

BDO CANADA LLP

DEFENDANT

AND:

DONALD BERGMAN

THIRD PARTY

NOTICE OF APPLICATION

Name of applicant: Third Party, Donald Bergman

To: The Defendant, BDO Canada LLP

And to: Its counsel, Gudmundseth Mickelson LLP,
Attention: Janet Gardiner

TAKE NOTICE that an application will be made by the Applicant to the Presiding Judge or Master at the Courthouse, 800 Smithe Street, Vancouver, British Columbia, at 9:45 a.m. or so soon thereafter as counsel may be heard, on Tuesday, the 17 day of July, 2018, at 9:45 a.m., for Orders set out in Part 1 below;

Part 1: Orders Sought

1. The Third Party Notice be struck pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules.

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2. Costs of the application to be awarded to the Third Party on a scale or basis as this Honourable Court may allow.

Part 2: Factual Basis

1. The Defendant is a limited liability partnership and is a firm of chartered professional accountants and auditors and has a place of business within British Columbia of Suite 201, 571 6th Street NE, Salmon Arm, British Columbia, V1E 1R6.
2. The Defendant agreed to act as auditor of All Canadian Investment Corporation, the Plaintiff in the underlying action.
3. The Plaintiff commenced proceedings against the Defendant on March 1, 2018. The Plaintiff alleges, amongst other things, that the Defendant was in breach of a contract to perform an Independent audit for the Plaintiff for its 2015 Financial Statements.
4. The Plaintiff states that on March 29, 2016, without notice and without warning, the Defendant wrongly resigned from its role as auditor effective immediately and advised it would not fulfill its obligation to complete the audit for the 2015 Financial Statements.
5. The Plaintiff further alleges that, by breaching its duty to provide audited financial statements for the Plaintiff, the Plaintiff was unable to file its 2015 tax return in time because it could not file its audited financial statements.
6. The Plaintiff also alleges that the Defendant knew that resigning without explanation and an acceptable reason that the shareholders, regulatory authorities, security holders and the investing public would lose confidence in the financial viability and stability of the Plaintiff.
7. The Plaintiff further alleges that the absence of the 2015 audited financial statements meant the Plaintiff was unable to raise additional

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capital, the Plaintiff had to resort to borrowing funds at high rates of interest to meet funding commitments and the Plaintiff had to lower its dividend payments to shareholders and that there were unprecedented redemption requests by investors.

8. Due to the Plaintiff's inability to raise additional capital or pay dividends, some 65% percent of the Plaintiff's preferred shareholders submitted redemption notices.
9. As a result, the Plaintiff applied for and was granted creditor protection pursuant to the ***Companies' Creditors Arrangement Act (Canada)***.
10. The Defendant filed a Response to Civil Claim on March 29, 2018.
11. In its Response to Civil Claim, the Defendant admits that BDO was retained by the Plaintiff to provide an audit opinion for the 2015 financial statements. [see paragraph 1, Part 1: Response to Notice of Civil Claim Facts]
12. Further, in paragraphs 21 to 45 and 47, the Defendant pleads allegations of fact against the Plaintiff's Director, Mr. Donald Bergman. [see Part 1: Response to Notice of Civil Claim Facts].
13. The Defendant specifically pleads that the Defendant's sole client and contractual responsibility under the 2015 Audit Engagement was to the Plaintiff. [see paragraph 12 and 17, Part 1: Response to Notice of Civil Claim Facts]
14. Further, in its Response to Civil Claim, the Defendant pleads that the Plaintiff breached the Engagement Letter to perform the 2015 audit.
15. On March 29, 2018, the Defendant filed a Counterclaim against the Plaintiff.

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16. The filing of the Counterclaim is in contravention of an Order of this Honourable Court made November 10, 2017 (the "Stay Order"), which stayed all proceedings against the Plaintiff.
17. The Defendant failed to obtain leave of the Supreme Court to commence the Counterclaim.
18. On April 18, 2018, the Defendant issued this Third Party Notice against the Director of the Plaintiff, Mr. Donald Bergman.
19. The filing of the Third Party Notice is in contravention of the Stay Order which prohibits proceedings being taken against any officers or directors of the Plaintiff.
20. The nature of the claim against the Third Party is for alleged representations made by the Third Party in his capacity as a representative of the Plaintiff.
21. The Third Party Notice is a nullity and ought to be struck.

Part 3: Legal Basis

Introduction

1. The Third Party brings this application pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules:
 - (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - (a) It discloses no reasonable claim or defence, as the case may be,
2. Pursuant to Rule 9-5(2), no evidence is admissible on such an application.

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3. It is plain and obvious that the Defendant has no claim against the Third Party, as pleaded or as may be amended. See for example **Scott v. Canada (Attorney-General)**, 2017 BCCA 422 (CanLII)
4. The Defendant's Third Party Notice is a nullity.

Company Cannot Speak for Itself

5. A company cannot act for itself. It can only act through individuals who are conferred authority to represent it. See for example:

Business Development Bank of Canada v. 0792989 B.C. Ltd., 2014 BCSC 611 (CanLII)

Oxford Holdings Ltd. v. People's Trust Co., 2002 BCSC 957 (CanLII)

6. At all material times the Third Party acted for and on the behalf of the Plaintiff.
7. The Defendant pleads it entered into a contract with the Plaintiff. It does not plead any contract with the Third Party.

No Personal Liability for Incorporated Companies

8. The Defendant pleads that the Third Party is the controlling shareholder of the Plaintiff and that on this basis the Third Party is personally responsible for the representations of the Plaintiff.
9. Such a plea ignores the rule that shareholders have no personal liability for the acts of a limited liability company.
10. The Defendant has no cause of action against the shareholders of a limited liability company for contracts entered into by the company. See for example:

Salomon v. A. Salomon & Co. Ltd., [1897] AC 22 (H.L.)

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11. Control of a corporation by a person is expected and that on its own is not sufficient to disregard the separate legal personality of the corporation. See for example:

Hotel Concepts Ltd. v. Diversified Millwork Inc., 2012 BCSC 1832 CanLII

Edgington v. Mulek Estate, 2008 BCCA 505 (CanLII)

Third Party Proceeding Do Not Lie If Matter Can be Raised in Defence

12. A third party claim does not lie against a stranger with respect to an obligation belonging to the Plaintiff which the Defendant can raise directly as a defence. See for example:

Adams v. Thompson Berwick, Pratt & Partners, 1987 CanLII 2590 (BCCA)

Laidan Holdings v. Lindt & Sprungli (Canada) Ltd. Inc., 2012 BCCA 22

13. Here the Defendant has raised the same facts and allegations against the Third Party as in its Response to Civil Claim.
14. It already has raised the same facts directly in its defence.
15. It is not entitled to make a third party claim.
16. The third party claim fails to raise a cause of action. See for example:

Soprema Inc. v. Woldridge Mahon LLP, 2016 BCSC 813 (CanLII)

17. Alternatively, where the fault alleged against the proposed third party is in fact the fault of the plaintiff, the defendant can raise the default by way of defence making third party proceedings unnecessary.

Adams v. Thompson Berwick, Pratt & Partners, 1987 CanLII 2590 (BCCA) at para. 4

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18. Here, the alleged representations made by the Third Party are in fact the representations of the Plaintiff.
19. Where the alleged representations are attributable to the plaintiff, there is no need for third party proceedings. The defendant has his full remedy against the plaintiff.

Adams at para. 16

Statutory Duty is Not Private Law Liability

20. An alleged breach of Section 217 of the **Business Corporations Act** creates a statutory offence under the **Offence Act**. It does not bestow a private law duty owed by the Third Party to the Defendant, as alleged or at all. See section 426(1)(a) of the **Business Corporations Act**.

Breach of Duty to Company Belongs to Company

21. If the Third Party breached any duty, as alleged, which is denied, then the breach of the duty is a breach of a duty owed by the Third Party to the Plaintiff. It is not a breach of a duty owed to the Defendant.
22. Such a cause of action belongs to the Plaintiff and to no one else. See for example:

Foss v. Harbottle, (1843) 2 Hare 461 (Ch)

Everest Canadian Properties Ltd. v. CIBC World Markets Inc., 2008 BCCA 276 (CanLII)

23. The proper plaintiff in respect of a wrong alleged to be done to a company is the company itself.
24. The Defendant has no standing to bring a claim against the Third Party.

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Summary

25. The Third Party Notice discloses no claim in law and must be struck pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules.
26. The Third Party is to be awarded costs on a scale or basis as this Honourable Court may allow.

Part 4: Material to be Relied on

1. Notice of Civil Claim filed March 1, 2018
2. Response to Civil Claim filed March 29, 2018
3. Counterclaim filed March 29, 2018
4. Response to Counterclaim filed April 18, 2018
5. Third Party Notice filed April 19, 2018
6. Response to Thlrd Party Notice filed June 8, 2018
7. Court Order pronounced November 10, 2017.

The applicant estimates that the application will take 2 hours.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that

- (i.) you intend to refer to at the hearing of this application, and
 - (ii.) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
- (i.) a copy of the filed application response;
 - (ii.) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of

this application and that has not already been served on that person;
 (iii.) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: June 22, 2018



 Alastair Wade
 Counsel for Applicant

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

Date: [dd/mmm/yyyy]

 Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

This NOTICE OF APPLICATION is given by Alastair Wade of the firm of Shields Harney, Solicitors for the applicant, whose place of business and address for service is 490 - 1177 West Hastings Street, Vancouver, B.C. V6E 2K3 Telephone (604) 682-7770; Fax (604) 682-1822.