

CITATION: Business Development Bank of Canada v. Astoria Organic Matters Ltd. and
Astoria Organic Matters Canada LP, 2018 ONSC 6062
COURT FILE NO.: CV-17-11760-00CL
DATE: 20181108

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
BUSINESS DEVELOPMENT BANK OF) *Miranda Spence and Kyle Plunkett, for the*
CANADA) Applicants Business Development Bank of
) Canada
Applicants)
)
- and -)
)
ASTORIA ORGANIC MATTERS LTD.) *Melvyn L. Solomon, for the Respondents for*
and ASTORIA ORGANIC MATTERS) SusGlobal Energy Belleville Ltd.
CANADA LP)
)
Respondents)
)
) **HEARD:** September 21, 2018

REASONS FOR DECISION

MCEWEN J.

[1] SusGlobal Energy Belleville Ltd. (“SusGlobal”) brings this motion to reopen a prior motion heard by me in which SusGlobal sought leave to sue the receiver (“BDO”) for damages. SusGlobal now seeks to file fresh evidence, being the 2017 Annual Environmental Report (“2017 Annual Report”) that it submitted to the Ministry of the Environment and Climate Change (the “MOECC”) on March 29, 2018 as well as the material evidence related thereto.

[2] For the reasons that follow I dismiss this motion.

[3] First, SusGlobal has not met the test to introduce fresh evidence. The purported fresh evidence that it relies upon consists of the 2017 Annual Report and appendices. SusGlobal concedes that it had all of the underlying documentation that it now relies upon as fresh evidence available at the hearing of the original motion. SusGlobal simply submits, in this regard, that the

CEO of SusGlobal, Gerald Hamaliuk, did not turn his mind to it since he was busy with other tasks.

[4] Second, SusGlobal's reliance on any MOECC correspondence is misguided and provides no assistance to SusGlobal. The MOECC correspondence simply confirms receipt of the 2017 Annual Report without substantive comment. As before (see paragraph 23 of my Reasons for Decision), the MOECC took no investigative steps.

[5] Third, the purported fresh evidence upon which SusGlobal seeks to rely would not have changed the result in the original motion for the following reasons:

- The purported fresh evidence does not remedy one of the primary criticisms I had, as set out in paragraph 19 of my Reasons for Decision, concerning the lack of any eye-witness evidence from SusGlobal's own employees or from any other sources who attended at this site before and after closing, including personnel from the MOECC and Mr. Ben Hamilton, the former operations manager of Astoria.
- The purported fresh evidence is also of the same type that I also rejected in paragraph 20 of my Reasons for Decision. It is another effort by Mr. Hamaliuk to calculate a number based on a convoluted document review, in an attempt to establish a *prima facie* case of willful misconduct and/or gross negligence. As I noted in paragraph 20, SusGlobal's case is not helped by the fact that in these proceedings it has provided various estimates of the organic waste. The newest number of 1,492 MT is the fourth such estimate.
- As I pointed out in paragraph 70 of my Reasons for Decision, even if I accepted SusGlobal's evidence, the amount of excess organic waste would have been in plain view of SusGlobal. BDO made the facility available to SusGlobal and its representatives toured the facility on numerous occasions. There is no evidence that there were any hidden or latent defects or any credible or reliable evidence that BDO knowingly concealed information. As a result, section 3.03 of the APA (the "As Is, Where Is" clause) absolves BDO of any liability.
- Last, as I set out in paragraph 75 of my Reasons for Decision, even in the absence of the provisions of the APA, and if I were to conclude that there was 1,300 - 2,100 MT of organic waste, I still do not accept this constitutes *prima facie* evidence of willful misconduct/gross negligence.

[6] One submission of SusGlobal's that I wish to highlight is that it seeks to excuse the fact that it had all of the relevant evidence in its possession prior to the hearing of the original motion on the basis that it would constitute a miscarriage of justice if I were not to allow the evidence to be introduced at this time. In this regard SusGlobal relies upon the decision of the Ontario Court of Appeal in *Degroote v. Canadian Imperial Bank of Commerce* (1999), 121 O.A.C. 327.

[7] Based on the above reasoning, I do not believe I should exercise my discretion to relax the reasonable diligence rule in this case. I do not agree with SusGlobal that the failure to do so would result in a miscarriage of justice where, even if I had admitted the new evidence, I would still have dismissed SusGlobal's motion for the reasons as indicated above.

[8] I should also note that I do not accept SusGlobal's submission that the purported new evidence establishes that Mr. Alan Hamilton misled SusGlobal, BDO, and the court. Again, for the reasons above, the evidence that SusGlobal now purports to rely upon does not lead to that conclusion given SusGlobal's multiple estimates of excess organic waste and its failure to obtain firsthand evidence.

[9] As such, SusGlobal has not met the test established in the case law to adduce further evidence after a motion for summary judgment is determined: see *R & G Draper Farms (Keswick) Ltd. v. Nature's Finest*, 2015 ONSC 7035. In my view, this is simply a situation where SusGlobal was unsuccessful in the original motion and thereafter has performed additional calculations to see if it could come up with a better theory of a case based on the information already known to it. In all of these circumstances it would be inappropriate to allow the motion.

Disposition

[10] For the reasons above the motion is dismissed.

[11] With respect to the issue of costs BDO seeks full indemnity costs on the basis that the motion had no reasonable prospect of success and it is essentially a delaying tactic.

[12] I am of the view that this is one of those rare cases in which costs above a partial indemnity scale ought to be awarded. In light of SusGlobal's own admission that it had all of the available information to make the calculations it now relies upon, in advance of the original motion and my Reasons for Decision, there was not a reasonable prospect of this motion succeeding.

[13] I would therefore award costs on a full indemnity basis in the amount of \$30,156.54 as claimed. The amount sought is reasonable. Having previously awarded costs to BDO on a partial indemnity basis in the original motion I see no reason why it should not receive full indemnity and not have to bear any of the ongoing costs of this second motion.



McEwen J.

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**ASTORIA ORGANIC MATTERS LTD. and
ASTORIA ORGANIC MATTERS CANADA LP**

Respondents

REASONS FOR DECISION

McEwen J.

Released: November 8, 2018