
CANADA / JUDGMENT

Brax Capital Group, LLC v. 0787223 BC Ltd.

2010 BCSC 1187

COURT

Supreme Court of British Columbia

DECIDED

23 August 2010

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2010 BCSC 1187 Brax Capital Group, LLC v. 0787223 BC Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brax Capital Group, LLC v. 0787223 BC Ltd.,

2010 BCSC 1187

Date: 20100823

Docket: S088275

Registry: Vancouver

Between:

Brax Capital Group, LLC

Plaintiff

And

0787223 BC Ltd.

Defendant

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

Howard A. Mickelson, Q.C.

Counsel for the Defendant:

R.J. Randall Hordo, Q.C.

Place and Date of Trial:

Vancouver, B.C.

November 23-27 and 30,

December 1-4, 7-11, 14-18, 2009, January 18, 20-22, 25-29,

February 1-5, 8, 10, March 16-19, 24 and April 6-8, 2010

Place and Date of Judgment:

Vancouver, B.C.

August 23, 2010

Introduction

- [1] The plaintiff claims that it is entitled to a fee for the work that it did to assist in the sale of an enterprise based upon contract, damages for breach of an exclusivity provision in that contract, or in quantum meruit.
- [2] On January 19, 2007, Floyd Sully accepted the terms of a Letter of Intent from Securus Technologies Inc. whereby his corporate interests would be transferred to Securus Technologies, Inc. and Appaloosa Acquisition Company Ltd. (collectively "Securus") for consideration of US \$45 million in cash, US \$10 million in shares of Securus, and the potential for a further US \$15 million in earnings for the three years that followed a completed sale of the corporate interests. The proposed sale was subject to a due diligence investigation satisfactory to the purchasers. That due diligence investigation proved satisfactory to the purchasers and the sale was agreed to on April 11, 2007. It was completed by the transfer of US \$45 million and US \$10 million in shares of Securus to the solicitors for Floyd Sully on June 29, 2007. I will refer to this as the sale of the "Syscon Enterprise".
- [3] In separate proceedings, under Action Number S075894 in the Vancouver Registry of this Court, Craigdarloch Holdings Ltd. also claims entitlement to a fee for the work that it did to assist in the sale of Floyd Sully's corporate interests. Its claim is based upon either contract or quantum meruit.
- [4] This case was heard together with Craigdarloch Holdings Ltd. v. Syscon Justice Systems Canada Ltd., et al, Action Number S075894 (the "Craigdarloch case"). The two actions were not consolidated, but the Reasons for Judgment in the Craigdarloch case were released concurrently with these Reasons for Judgment.

Findings of Fact

- [5] I have set out the facts that generally pertain to this action in the companion Craigdarloch case, so I will not repeat them here. I will, however, set out the additional facts that pertain specifically to this action.

- [6] As I stated in my Reasons for Judgment in the Craigdarloch case, 0787223 B.C. Ltd. is the company that held the corporate interests of Floyd Sully at the time of the sale to Securus. As Floyd Sully was the company's sole officer and its directing mind, I find that his knowledge, intentions, and acts as its directing mind should be attributed to the company: *R. v. Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662 at para. 16.
- [7] A.J. DiScala was the principal and directing mind of the plaintiff, Brax Capital Group, LLC ("Brax"). That company was in the business of providing financial advisory and consulting advice to companies, including assisting on mergers and acquisitions. It was not a registered broker/dealer.
- [8] Mr. DiScala met Craig Watson in February or March of 2006, and the two became friends. Mr. DiScala permitted Craig Watson to stay at his home in Los Angeles, California, and to use the Brax offices in that city for Craig Watson's own business purposes.
- [9] I heard a great deal of evidence about what Craig Watson was alleged to have said to Mr. DiScala, much of which was challenged as untrue. I accept that Craig Watson was certainly less than candid with Mr. DiScala, but I am not persuaded that he was as untruthful as counsel for Brax alleged, or that it is necessary to parse out each of Craig Watson's misrepresentations or half-truths to Mr. DiScala in order to resolve the issues in this case.
- [10] I do find that Craig Watson and Mr. DiScala operate in a milieu where candour may not be highly prized, and individuals and companies pursue their own best interests above all else.
- [11] Sometime after they met, Craig Watson advised Mr. DiScala that he was engaged in an effort to sell the Syscon Enterprise. Arrangements were made for Mr. DiScala to meet with Floyd Sully in Los Angeles, California on June 23, 2006. Mr. DiScala gave evidence that he reviewed the wide range of options open to Floyd Sully for the sale or other disposition of the Syscon Enterprise. While I am prepared to accept that Mr. DiScala discussed some options with Floyd Sully at this time, I do not accept that Mr. DiScala had the time or the background information about the Syscon Enterprise that would have enabled him to have more than a very general discussion of the types of options that might be considered by Floyd Sully.
- [12] I am not prepared to find, as urged by counsel for the plaintiff, that Mr. DiScala discussed the existence of Securus with Mr. Sully at the meeting of June 23, 2006. I reject Mr. DiScala's evidence that he recalls Securus being named at that meeting. Indeed, Mr. DiScala qualified his evidence on that point by saying that the name of Securus came up "either at that meeting or in the ride over or at the - they were definitely discussed". His vague evidence on the point is far from sufficient to meet the onus of proof on the point.
- [13] Similarly, Floyd Sully's evidence that the topic of Gores' competitors "I would expect ... was a topic that would come up" is insufficient to persuade me that the name of Securus was identified to him by Mr. DiScala.

- [14] Later the same day, Mr. DiScala, Craig Watson, and Floyd Sully met with representatives of Gores, an entity to which Mr. DiScala had an entrée through his acquaintance with its principal, Alec Gores.
- [15] After this initial meeting, Floyd Sully, through the vehicle of his company, 0748745 B.C. Ltd., entered into a contract with Brax on June 27th or 28th, 2006, whereby Brax was given the exclusive opportunity to identify prospective purchasers of the Syscon Enterprise. The contract did not limit those prospective purchasers to those previously unknown to Floyd Sully. The contract stipulated that the only service that Brax was to provide was to produce a list of investors and that if an investment was made by one of those identified during the term of the agreement, or within 12 months of its termination, Brax would be entitled to a cash fee of 2% of the purchase price. Mr. DiScala divined relatively early in the relationship that Floyd Sully did not want to see his company "broken up" after he sold it, and concluded that a "strategic sale" to an entity in the same or a similar business to that of the Syscon Enterprise made the most sense.
- [16] It was admitted by the defendant that as a result of the Securus transaction it became the successor to any obligations of 0748745 B.C. Ltd. in respect of the Brax contract.
- [17] The contract provided, among other things that:

The Company hereby authorizes Finder, on an exclusive basis, to identify investors, underwriters, joint ventures, lenders and/or guarantors (collectively "Investors") interested in purchasing (as defined below) shares in the Company on terms acceptable to the Company and the Investors.

...

This Agreement relates solely to Finder's services rendered in providing Company with a list of Investors. There are no additional services that Finder is required to perform to be entitled to the compensation set forth below in the event an investment is made...

...

If Purchase is closed within twelve (12) months after termination of this Agreement, then Finder shall be entitled to a cash fee as follows:

- 2% of the Purchase Price

The "Purchase Price", as used herein, shall mean all amounts furnished to or for the use of the Company with Investors directed or introduced by, or through the efforts of, Finder after the date of this Agreement, whether by investment in equity or debt securities of the Company, loans, loan commitments, guarantees of indebtedness, leasing, sale and leaseback, joint ventures licensing or any other transaction the result of which results in direct or indirect financing to or equity in the Company.

- [18] I accept that anyone researching companies in the same or a similar business to that of the Syscon Enterprise in 2006 would have quickly ascertained that the two largest potential purchasers of the Syscon Enterprise by way of a strategic sale were GTL, a subsidiary of Gores, and Securus, a subsidiary of an enterprise known as HIG.
- [19] On three occasions during the term of Brax contract relating to the Syscon Enterprise, without advising either Craig Watson or Floyd Sully, Mr. DiScala approached one of the executives of Gores seeking a fee of 1% of any purchase price agreed to as between the Syscon Enterprise and Gores.
- [20] On July 11, 2006, the Gores executive sent an email to some of his colleagues. The subject matter of the email was described as "Syscon Offer".
- [21] At trial, Mr. DiScala initially denied receiving any offer from Gores or GTL at this time. After the email was disclosed during the course of the trial, he returned to give further evidence to the effect that the "offer" was only "banter" and that, as a result, he did not recall communicating it to either Craig Watson or Floyd Sully, both of whom denied ever being told of the "offer". I find that this "offer" was never communicated to either Craig Watson or Floyd Sully.
- [22] The author of the email also gave evidence dismissing the email, as had Mr. DiScala. He denied that the email was a formal offer, testifying that he had been merely "feeling him [Mr. DiScala] out, trying to get an idea".
- [23] Despite his view that Floyd Sully would only dispose of his company by way of a strategic sale, Mr. DiScala arranged that he, Floyd Sully, Craig Watson, and Scott Earthy meet on August 15, 2006, in Los Angeles with representatives of investment bankers and licensed brokers referred to as "JMP" and "Cowan" to discuss the potential for their acquisition of the Syscon Enterprise by way of a reverse takeover or a public offering. These discussions ultimately bore no fruit.
- [24] In the mean time, Mr. DiScala had his employee, Marshall Lee, look into the operation and finances of the Syscon Enterprise. I am satisfied that Mr. Lee devoted a significant amount of time and effort to that exercise.

Analysis

- [25] I find that by September 2006, the Brax strategy was to give Gores the first and exclusive opportunity to bid on the Syscon Enterprise, with the expectation that such an opportunity would elicit the highest offer that Gores was prepared to make, in order to avoid a bidding contest. Thereafter, unless other bidders were to be pursued, there would have been no reason for Brax to identify any other prospective acquirors. Given that the 2005 financial statements for the Syscon Enterprise were unavailable before September 2006, I find that Gores could not have been expected to make any binding bid on the purchase of the Syscon Enterprise until they had some time to review and ask questions based upon those financial

statements.

- [26] As I have found that the Brax deal would never have come to pass, I dismiss Brax's claim for damages for the loss of any finder's fee from Gores.
- [27] I find that Mr. DiScala did not "identify" Securus to Floyd Sully. Despite that, I dismiss the submission of the defendant in these proceedings that Brax is not entitled to compensation.
- [28] The Brax contract provided that the Brax would identify investors and potential purchasers on an exclusive basis. Certainly that provision was known to Floyd Sully; it was raised by him with Craig Watson when it was first proposed.
- [29] I find that, unbeknownst to Mr. DiScala, and in breach of Brax's exclusivity provision, by October 2006, Craig Watson and his associate, Scott Earthy, were pursuing a strategy inconsistent with that of Brax; they were, in effect, organizing a bidding process for the sale of the Syscon Enterprise. I find that the efforts of Craig Watson and Scott Earthy were known to Floyd Sully, and if they had been known to Mr. DiScala he would, at a minimum, have identified prospective purchasers for the sale of the Syscon Enterprise, if he could not persuade Floyd Sully to pursue his strategy. I find that had Mr. DiScala known of the efforts being pursued at that time by Craig Watson and Mr. Earthy, and had he been unable to persuade Floyd Sully not to pursue those efforts, he would have provided a list of prospective purchasers for various types of transactions, and that list would have included Securus. I accept Mr. DiScala's evidence that but for being asked to step aside by Craig Watson (which I find Floyd Sully knew of), he would have approached Securus himself if he concluded that either Gores or Floyd Sully were not very enthusiastic about a deal between them.
- [30] I find that Brax is thus entitled to damages from the defendant for the breach of the exclusivity provision of its contractual agreement.
- [31] While I have concern about Mr. DiScala's conduct in seeking a finder's fee from Gores without disclosing his efforts to do so to Floyd Sully or Craig Watson, the evidence is that Floyd Sully unconditionally waived that conflict in writing on January 11, 2007, once he was fully informed of it. I therefore find that that conduct on the part of Mr. DiScala cannot, in the circumstances, deprive him of his right to a fee from the defendant. I conclude that the measure of damages to which Brax is entitled is that amount that it would have recovered under its contract with Floyd Sully and his company had it identified Securus as a potential buyer. That amount is 2% of the purchase price paid to Floyd Sully through the defendant by Securus.
- [32] The purchase price is fully discussed in my Reasons for Judgment in the Craigdarloch case, and will not be repeated here.

- [33] The purchase price against which Brax's fee entitlement of 2% is to be applied is the sum of US \$41 million, which then results in a fee entitlement to the plaintiff of US \$820,000.00. I decline Brax's request to order that the judgment be awarded in US dollars. The parties will convert the judgment to Canadian dollar amounts.
- [34] The parties shall make written submissions as to costs. Counsel for the plaintiff will have two weeks from the date of these Reasons for Judgment to file and serve submissions. Counsel for the defendant will have two weeks from receipt of the submissions of the plaintiff to file and serve submissions. Counsel for the plaintiff will then have one week from the receipt of the submissions of the defendant to file and serve any reply submissions.

"Hinkson J."

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