

CANADA / JUDGMENT

Edwards v. Spektrum Glasses Ltd.

2022 BCSC 1657

COURT

Supreme Court of British Columbia

DECIDED

22 September 2022

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2022 BCSC 1657 Edwards v. Spektrum Glasses Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Edwards v. Spektrum Glasses Ltd.,

2022 BCSC 1657

Date: 20220922

Docket: S222551

Registry: Vancouver

Between:

James Edwards, Edwards Family Trust

Siarhei "Sergei" Kadach, Kadach Family Trust

Yuliya Kadach

Plaintiffs

And

Spektrum Glasses Ltd., 12114089 Canada Inc.,

Alexandre Pavlov

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for the Plaintiffs:

L. Kotler

The Defendant, Alexandre Pavlov, appearing in person and on behalf of Spektrum Glasses Ltd.,
and 12114089 Canada Inc.:

A. Pavlov

Place and Date of Hearing:

Vancouver, B.C.

September 8, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 22, 2022

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I. Introduction

[1] There are 2 applications before me.

- [2] The first is filed by the plaintiffs, seeking judgment pursuant to R. 9-6 and 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, on amounts owing pursuant to a vendor take-back loan in the sale of the shares in the defendant, Spektrum Glasses Ltd. ("Spektrum"), together with collateral relief.
- [3] The second application is filed by the defendants, represented in-person by the defendant Alexandre Pavlov. Mr. Pavlov's relief sought does not follow the conventional form, but in essence he seeks an order that this claim is not suitable to be determined on a summary application and should proceed to a full trial. He also seeks to join this action with an earlier action filed by the plaintiffs arising out of the share purchase agreement which included the vendor take-back loan ("VTB") as part of the consideration. Finally, the defendants seek to have the application, and likely the entire action, dismissed on jurisdictional grounds.

II. Background

- [4] 12114089 Canada Inc. purchased Spektrum from the plaintiffs through a share purchase agreement dated July 20, 2020 (the "SPA"). The purchase price included an initial payment and a series of deferred payments.
- [5] 12114089 Canada Inc. was represented at all times by its director, Mr. Pavlov.
- [6] The initial payment was made in the amount of USD \$2,336,437.87. The VTB was taken out in the amount of USD \$762,397.65, which was secured by a promissory note and a personal guarantee in the amount of USD \$381,198.83. Quarterly earn-out payments were also to be made totalling USD \$495,684.28.
- [7] The VTB and its related security is the subject of this action, which was filed March 21, 2022.
- [8] On August 20, 2021 the plaintiffs filed an earlier action (Action S217534) against the same defendants, claiming various breaches of the SPA and failures of the defendants to act honestly and in good faith in relation to their obligations. The plaintiffs also make claims in relation to representations made by the defendants, and claims in oppression.
- [9] In the earlier action there are no claims which duplicate the claims made in this action.
- [10] In this action, the plaintiffs allege the defendants breached the VTB entered into as part of the consideration for the sale of the shares, and seek judgment and collateral relief in relation to the breach of the VTB.
- [11] The key facts in this action are as follows:
- a) The defendants agreed to a VTB in the amount of USD \$762,397.65 as part of the consideration for the purchase of Spektrum shares.
 - b) The VTB required the purchaser to make quarterly interest-only payments on the principal amount of the loan.

- c) The principal amount was payable in a lump sum amount three years after the closing date.
- d) The VTB is secured by a promissory note.
- e) The VTB and the promissory note were guaranteed by Mr. Pavlov in the amount of USD \$381,198.83.
- f) In 2022, the defendants ceased paying the quarterly interest payments in the amounts required by the VTB.

III. Issues

[12] The issues raised in the two applications are:

- a) Does this Court have jurisdiction to determine the plaintiffs' application?
- b) Is the plaintiffs' application suitable for determination pursuant to R. 9-6 or 9-7?
- c) Should Action S217534 be joined with Action S222551?
- d) Is 12114089 Canada Inc. permitted to reduce the quarterly interest payments required under the promissory note?
- e) If no reduction in the interest payments is permitted, are the plaintiffs entitled to judgment?

A. Does this Court have jurisdiction to determine the plaintiffs' application?

[13] The jurisdictional claims asserted by Mr. Pavlov must fail for two reasons.

[14] First, Mr. Pavlov has filed a response and counterclaim in this action. As such, he has attorned to the jurisdiction of the BC courts. He cannot now assert a jurisdictional objection to these matters being heard in the BC courts.

[15] Second, s. 6.9 of the SPA itself expressly states that the provisions of the SPA which deal with the VTB and the personal guarantee will be governed by, interpreted and enforced in accordance with the laws of BC, and each party irrevocably attorns to the non-exclusive jurisdiction of the courts of BC in relation to these issues. The promissory note, on its face, states that it will be governed by, and construed and enforced in accordance with the laws of BC.

[16] In the result, I find that the jurisdictional objection taken by the defendants must fail.

B. Is the plaintiffs' application suitable for determination pursuant to R. 9-6 or 9-7?

[17] Mr. Pavlov argues that the issues raised in this action are complicated and the evidence required to resolve the issues is extensive and is not available on the record before me. Mr. Pavlov also argues that the SPA requires this issue to be determined in Ontario, and submits this Court does not have jurisdiction to determine the application.

- [18] Dealing first with the length of the affidavit material on this application, Mr. Pavlov points to the main affidavit in support of the application, which is 190 pages long, and argues that he is not able to properly respond. This application was filed on June 15, 2022, with the accompanying 190-page affidavit sworn by Mr. Edwards. While this affidavit is lengthy, that is only because it exhibits the SPA, promissory note, guarantee, and non-competition agreement, all of which were signed by Mr. Pavlov and comprise 128 pages of the exhibits. The remaining exhibits are email sent between Mr. Pavlov and the plaintiffs or their counsel, 20 pages of bank statements showing interest payments were not received by the plaintiffs in 2022, and a corporate search for the defendant 12114089 Canada Inc.
- [19] A second affidavit was sworn July 5, 2022 in support of the plaintiffs' application, and it contains several emails between Mr. Pavlov and the plaintiffs or their counsel. Other than the 20 pages of bank statements in Mr. Edwards' affidavit, all of the exhibits in both affidavits are documents known to Mr. Pavlov.
- [20] Mr. Pavlov has had the affidavits for two months. He filed two affidavits of his own on June 24, 2022. Mr. Pavlov gave no specifics as to why these affidavits were not sufficient, what other evidence he felt was necessary, or why he has not been able to provide whatever materials he felt were necessary in the two and half months since this application was filed.
- [21] I do not agree that Mr. Pavlov is prejudiced in his ability to respond to the volume of material advanced by the plaintiffs on this application.
- [22] With respect to what Mr. Pavlov says are the complicated facts on this application, Mr. Pavlov agreed with me that the only issues for determination are the interpretation of ss. 2.3 and 2.4 of the SPA, together with the VTB, the promissory notes, and the guarantees. He agreed that the issue really came down to whether the language of the agreements provided for a reduction of the quarterly interest payments under the VTB prior to the expiry of three years from the date of closing.
- [23] As Mr. Pavlov did not explain to me how any additional facts were required to allow for the interpretation of the various agreements, I cannot accede to his argument that the materials before me are insufficient to decide the issues on this application.
- [24] Mr. Pavlov filed a counterclaim in this action, which is substantively similar to the counterclaim he filed in Action S217534. He argues that the issues in the counterclaim should be determined at the same time as the issues raised in the notice of civil claim. The counterclaim seeks a return of all quarterly interest payments under the VTB as a result of various alleged breaches of the SPA and misrepresentations made by the plaintiffs, and seeks a reduction in the VTB principal in the amount of \$277,054.01 in relation to unsold inventory.

- [25] The SPA provides for a reduction in the VTB principal, on account of deductions related to inventory. This is not disputed by the plaintiffs. However, on this application the plaintiffs argue that Mr. Pavlov's breach in failing to make the required quarterly interest payments results in a number of remedies set out in the security agreements, including an acceleration of the full amount of the promissory note, enforcement of Mr. Pavlov's guarantee, and a declaration that the non-competition agreement is of no force and effect.
- [26] Mr. Pavlov's response is that the SPA provides for a reduction in the principal of the VTB on account of inventory and all quarterly interest payments must be adjusted to reflect the reduced principal amount, even though the payment of the principal is deferred until three years after the closing date.
- [27] If Mr. Pavlov's interpretation of the SPA and associated agreements is correct, his counterclaim in relation to the reduction of the principal of the VTB will be unaffected.
- [28] I am satisfied that the counterclaim does not need to be heard at the same time as this preliminary issue. Further, if the plaintiffs are correct and payment of the full principal amount of the VTB is required as a result of the defendants' breaches, this will be an efficient use of the court's time as it will eliminate all outstanding issues relating to inventory claims under the SPA.
- [29] I am satisfied that I have all relevant evidence before me to allow me to decide the issues raised by the plaintiffs on this application. There are no credibility issues raised on the evidence. All parties agree that the sole issue is one of interpretation of the agreements between the parties, and have introduced or referred to no extrinsic evidence that is required to allow for such a determination to be made. I am satisfied that I can find the facts necessary to decide the issues raised by the application, determination of the issues will assist in the efficient resolution of the proceedings, and it is in the interests of justice for this application to be determined summarily: *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504 at paras. 10-12.

C. Should Action S217534 be joined with Action S222551?

- [30] For the reasons set out below, I have determined that the plaintiffs' interpretation of the SPA and associated agreements is correct. This interpretation disposes of the issues raised in the notice of civil claim. The defendants have filed a counterclaim, which may continue notwithstanding the resolution of the plaintiffs' claims. As I have already noted, the counterclaim in this action is essentially duplicative of the counterclaim filed in Action S222551. The plaintiffs suggested that the new counterclaim in this action is an abuse of process as it repeats existing claims in Action S222551. However, there is no application to strike the counterclaim in this action before me. How the counterclaim in this action is resolved will be left for another day.
- [31] I am not satisfied that it is in the interests of justice to join these actions at this time.

D. Is 12114089 Canada Inc. permitted to reduce the quarterly interest payments required under the promissory note?

[32] The vendors under the SPA are Spektrum Glasses Ltd., James Edwards (personally and in his capacity as trustee of the Edwards Family Trust), Siarhei Kadach (personally and in his capacity as trustee of the Kadach Family Trust), and Yuliya Kadach. The purchaser under the SPA is 12114089 Canada Inc., and Mr. Pavlov is the covenantor.

[33] Section 2.3(b) of the SPA stipulates the following:

- a) the vendors will provide a vendor take-back loan to the purchaser in the sum of USD \$762,397.65;
- b) interest accrues on the VTB at a rate of 5% per annum, compounded annually;
- c) the purchaser shall execute a promissory note setting out its obligations with respect to the VTB. The purchaser shall make quarterly interest-only payments, with the first payment being made three months after the closing date of July 24, 2020;
- d) the full amount of the VTB shall be due as a lump sum payment three years after the closing date; and
- e) Mr. Pavlov shall sign a personal guarantee for 50% of the VTB.

[34] Section 2.4(e) of the SPA provides for an evaluation of certain inventory and states:

If any inventory that forms part of the Closing Working Capital is not sold by October 1, 2021, the value of such inventory included in the Closing Working Capital will be offset against the lump sum due pursuant to the VTB on the date that is three (3) years from the Closing Date.

[35] The purchaser, 12114089 Canada Inc., executed the required promissory note on July 24, 2020. Pursuant to the terms of the promissory note, 12114089 Canada Inc. (defined as the "debtor" pursuant to the promissory note) promised to pay James Edwards (personally and in his capacity as trustee of the Edwards Family Trust), Siarhei Kadach (personally and in his capacity as trustee of the Kadach Family Trust), and Yuliya Kadach the sum of USD \$762,397.65, together with interest at 5% per annum calculated and compounded annually, not in advance. Interest-only payments will be made quarterly, starting three months after the date of the promissory note. The debtor promises to pay the principal amount with any accrued interest three years after the date of the promissory note.

[36] The promissory note includes the following term with respect to any defaults:

Upon default of any payment on the date such payment is required to be made pursuant to this Promissory Note, and provided such default is not cured within thirty (30) days of notice provided the Debtor, the full balance due hereunder will become immediately due and payable.

- [37] Mr. Pavlov executed the required guarantee on July 24, 2020. The guarantee provides that Mr. Pavlov will unconditionally guarantee the payment and performance of the obligations of 12114089 Canada Inc. (the "borrower") to James Edwards (personally and in his capacity as trustee of the Edwards Family Trust), Siarhei Kadach (personally and in his capacity as trustee of the Kadach Family Trust), and Yuliya Kadach (defined collectively as the "Lender") pursuant to the VTB and the promissory note.
- [38] The obligations guaranteed include all cost, charges and expenses (including legal fees on a solicitor and own client basis) incurred by the lender in enforcing the guarantee and any security held by the lender.
- [39] The liability of Mr. Pavlov was expressly limited to USD \$381,198.83, together with interest at 5% per annum compounded annually, as well as before default and judgment.
- [40] Upon any default by the borrower Mr. Pavlov shall be bound directly to the lender as principal debtor in respect of the payments guaranteed.
- [41] As a term of the guarantee, Mr. Pavlov agreed:
- The Undersigned [Mr. Pavlov] acknowledges that this Guarantee has been delivered free of any conditions and that no statements, representations, agreements, collateral agreements or promises have been made to or with the Undersigned affecting or limiting the liability of the Undersigned under this Guarantee or inducing the Undersigned to grant this Guarantee, and the Undersigned acknowledges that this Guarantee is in addition to and not in substitution for any other guarantees held or which may hereafter be held by the Lender.
- [42] Each quarterly interest payment under the VTB was USD \$9,529.97 based on the principal amount of USD \$762,397.65.
- [43] Since entering into the SPA, Mr. Pavlov has performed a calculation as to deductions permitted to the lump sum due pursuant to the VTB, pursuant to s. 2.4(e) of the SPA. He calculated that the VTB must be reduced by USD \$277,054.01. As a result, he recalculated the interest payable at 5% on the reduced principal and, on January 24, 2022, he advised counsel for the plaintiffs that he had over paid interest in the amount of USD \$17,315.88 and would not be making a quarterly payment. For the next quarterly interest payment, he would again deduct the remaining interest overpayment.
- [44] There is no dispute that Mr. Pavlov failed to make a quarterly payment in January 2022.
- [45] On March 21, 2022 the within action was filed.
- [46] Mr. Pavlov did not make a quarterly interest payment in April 2022.
- [47] On July 25, 2022 Mr. Pavlov wrote to Mr. Kadach and Mr. Edwards setting out the following calculations:

VTB owing 762,397.65

Unsold inventory 277,054.01

Remaining VTB owing 485,343.64

Previous quarterly interest payments 9,529.97

New quarterly interest payments 6,066.80

Overpayment of interest per quarter 3,463.18

Total overpayment until Oct. 24, 2021 17,315.88

[48] In his July 25, 2022 email, Mr. Pavlov stated:

The new quarterly interest is 6,066.80. There was a credit to you of -1,744.07 left over from last time due to overpayment adjustments. Therefore the amount of \$7,810.86 has been transferred to James' account.

[49] The plaintiffs have not consented to Mr. Pavlov's unilateral reduction in interest payments.

[50] Before me, Mr. Pavlov argued that, because the SPA provided for an adjustment to the VTB principal, he was entitled to reduce the interest payments now in accordance with the reduced principal. He argued that if he did not reduce the interest payments now, the vendors would have to repay him the interest "overpayments" on the three-year anniversary of the closing date, when the reduced principal was due and owing. He argued it was a necessary inference of the SPA in its entirety that interest would only be payable on the final principal amount owing pursuant to the VTB.

[51] The plaintiffs bring this application to enforce the promissory note and the guarantee. The monetary relief they seek is in relation to these instruments, not the SPA per se. They argue the language of the promissory note is clear, not ambiguous, and capable of only one meaning, relying on *Ewachniuk Estate v. Ewachniuk*, 2011 BCSC 395 at paras 13-14 and 17. They argue that the promissory note ought to be enforced in accordance with its clear terms.

[52] In particular, the defendants rely on the default provision of the promissory note and submit that, in the event of default, the full USD \$762,397.65 becomes due and payable. They submit this is security which they bargained for as part of the whole agreement and it should be enforced.

[53] The promissory note does not provide for any adjustment in the principal amount, and does not provide for any recalculation of interest payments, or reduction in interest payments, during its term.

[54] The promissory note is an independent obligation the parties bargained for. They could have relied solely on the SPA with respect to future payments, but they agreed to the additional security of the promissory note. To accede to Mr. Pavlov's argument would be to re-write the agreement between the parties. I note that the parties were all represented by legal counsel in the drafting of the agreements used to complete the share purchase, and no

complaints with respect to the advice they received has been raised. I find that the nature of the obligations set out in the SPA and associated agreements were understood by the parties at the time they entered into the agreements.

- [55] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva], the Supreme Court of Canada confirmed that the surrounding circumstances around the contract formation may be used to assist in contractual interpretation. The court may use the surrounding circumstances to understand the objective mutual intentions of the parties. In this sense, I agree that I can look to the SPA when interpreting the promissory note. However, at paras. 57-58 Sattva makes it very clear that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement".
- [56] I am satisfied that the clear mutual objective intention of the parties was that, pursuant to the promissory note, the defendant 12114089 Canada Inc. was obliged to make quarterly interest payments on the full USD \$762,397.65 for three years after the closing date. If 12114089 Canada Inc. defaulted on this obligation, the entire principal and interest became immediately due and owing. The parties negotiated this remedy for default to ensure that 12114089 Canada Inc. would not default.
- [57] The parties did not include any language in the promissory note which would support an interpretation permitting the borrower, 12114089 Canada Inc., to unilaterally reduce the required quarterly interest payments at any time.
- [58] I find the language of the SPA, which permits a reduction in the VTB principal amount payable after three years, is not sufficient to support the interpretation urged by Mr. Pavlov. While it is clear that the parties agreed that three years after closing the VTB principal may be reduced by the value of acceptable inventory remaining, it does not follow that one party can unilaterally reassess the clear ongoing interest payments.
- [59] Mr. Pavlov argues that it is clear that the parties agreed that interest would only be payable on the principal and, if the principal is reduced, it follows that the interest must also be reduced. However, it is equally plausible that the parties agreed to fix the interest payment obligation for three years at the amount calculated against the principal owing on closing, providing that the principal could only be reduced three years after closing in accordance with s. 2.4(e) of the SPA. There is no language in the SPA which supports a recalculation of the interest payments owing over the past three years if the principal was reduced three years after closing.
- [60] In the result, I find that the clear language of the promissory note, in light of all the surrounding circumstances, does not permit 12114089 Canada Inc. to unilaterally reduce the specified quarterly interest payments.

E. If no reduction in the interest payments is permitted, are the plaintiffs entitled to judgment?

[61] I have found that 12114089 Canada Inc. was not permitted under the promissory note to unilaterally reduce the specified interest payments. What are the remedies for the plaintiffs arising from the actions of 12114089 Canada Inc.?

1. Accelerated payment under the promissory note

[62] I find that 12114089 Canada Inc. failed to make the interest payments required under the promissory note. On January 28, 2022, Mr. Kadach and Mr. Edwards wrote to Mr. Pavlov two times requiring full payment of the outstanding interest in the amount of USD \$9,529.97. In the second email, Mr. Kadach suggested to Mr. Pavlov that he seek legal advice with respect to his decision not to make the interest payment. On March 21, 2022, this action for breach of the promissory note was commenced. On July 25, 2022, Mr. Pavlov acknowledged that he had not made the requirements under the agreement, setting out his theory as to the recalculation of interest.

[63] I am satisfied that the plaintiffs gave notice of default to Mr. Pavlov, the authorized signatory for 12114089 Canada Inc., and that 12114089 Canada Inc. failed to cure the default within 30 days or at all.

[64] In the result, I am satisfied that the plaintiffs are entitled to the remedy set out in the promissory note, namely immediate payment of the full balance outstanding under the note.

[65] The plaintiffs produced evidence that 12114089 Canada Inc. has been amalgamated into Spektrum Glasses Ltd. as of September 8, 2020. Pursuant to s. 186 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, the amalgamated corporation continues to be liable for the obligations of each amalgamating corporation. As such, the defendant Spektrum Glasses Ltd. is liable for the obligations of 12114089 Canada Inc. pursuant to the promissory note.

2. Judgment pursuant to the guarantee

[66] Pursuant to s. 10 of the guarantee, upon any default by 12114089 Canada Inc. Mr. Pavlov is personally liable as principal debtor up to the amount of USD \$381,198.83 for the obligations of 12114089 Canada Inc.

[67] I find that the plaintiffs are entitled to judgment against Mr. Pavlov in the amount of USD \$381,198.83.

3. Non-competition and non-solicitation agreement

[68] Pursuant to s. 4.1(c) of the SPA, the vendors agreed to enter into a non-competition agreement.

[69] This non-competition and non-solicitation agreement was executed by Spektrum Glasses Ltd., 12114089 Canada Inc. (the "purchaser"), and James Edward and Sergei Kadach (defined collectively as the "vendor"). Pursuant to this agreement the vendor agreed with Spektrum and the purchaser that it would not directly or indirectly carry on a business in competition with the business (as defined in the SPA) for a period of five years from the closing date.

[70] The non-competition agreement provides:

7. Any default of the Purchaser in payment of the VTB or the Earn-Out (as such terms are defined in the Purchase Agreement) in accordance with the Purchase Agreement, provided that such default is not rectified within thirty (30) business days of receipt by the Purchaser of notice of such default, shall cancel this Agreement, and thereafter this Agreement shall be considered null, void and of no force or effect.

[71] The promissory note set out the obligations of 12114089 Canada Inc. in relation to the VTB. I have found that 12114089 Canada Inc. defaulted under the promissory note and did not rectify the default within 30 days. As a result, by operation of s. 7 of the non-competition agreement, the non-competition agreement is null, void and of no force or effect.

IV. DISPOSITION

[72] I order judgment in favour of the plaintiffs against Spektrum Glasses Ltd. in the amount of USD \$762,397.65.

[73] I order that Mr. Alexandre Pavlov is liable to pay USD \$381,198.83 of the total judgment owing by Spektrum Glasses Ltd. to the plaintiffs.

[74] I order that all amounts payable in US dollars shall be paid pursuant to the Foreign Money Claims Act, R.S.B.C. 1996, c. 155 for the amount of Canadian currency that is necessary to purchase the equivalent amount of US dollars.

[75] I declare that the non-competition and non-solicitation agreement made between Spektrum Glasses Ltd., 12114089 Canada Inc., James Edwards, and Siarhei Kadach is of no force and effect.

[76] I dismiss the application of the defendants.

[77] I award the costs of both applications in favour of the plaintiffs.

"W.A. Baker J."

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