
CANADA / JUDGMENT

EtherDEG Ltd. v. Liu

2018 BCSC 2442

COURT

Supreme Court of British Columbia

DECIDED

6 November 2018

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2018 BCSC 2442 EtherDEG Ltd. v. Liu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

EtherDEG Ltd. v. Liu,

2018 BCSC 2442

Date: 20181106

Docket: S187446

Registry: Vancouver

Between:

EtherDEG Ltd. and Jun Chen

Plaintiffs

And

Wen Qing Liu

Defendant

Corrected Oral Ruling: The text of the judgment was corrected
at paragraphs [13] and [17] on November 29, 2018.

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Ruling Re Application to Dismiss an Action for Lack of Jurisdiction

In Chambers

Counsel for the Defendant:

N. Yan

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

November 6, 2018

Place and Date of Ruling:

Vancouver, B.C.

November 6, 2018

- [1] THE COURT: The defendant, Mr. Liu, applies for an order under Rule 21-8(1)(a) and (b) for an order that this action be dismissed or alternatively stayed under Rule 21-8(2) on the basis that this court lacks jurisdiction against him, or alternatively this court should decline to accept jurisdiction.
- [2] Mr. Liu filed a jurisdictional response and has not attorned to the jurisdiction of this court. He relies on s. 11 of the Court Jurisdiction and Proceedings Transfer Act to argue forum non conveniens and asks this court to decline jurisdiction.
- [3] The underlying action, commenced on July 4, 2018 (the "BC Action"), relates to a scheme launched by a small group of Chinese citizens to purchase a US-based cryptocurrency trading platform called EtherDelta.com ("EtherDelta") based in Boston, Massachusetts, for \$15 million USD. One of those individuals, the plaintiff Mr. Chen, appears to have been the driving force behind that scheme.
- [4] Briefly, the plan involved Mr. Chen and his Chinese associates using an internet-based chat room called WeChat to persuade other Chinese citizens to invest in EtherDelta in exchange for the promise of receiving electronic currency tokens called Ethereum ("Tokens"). Mr. Liu was one such investor.
- [5] The plaintiffs in this action make allegations of fraud, breach of contract, oppression and other misdeeds made by the plaintiffs against Mr. Liu. The same or similar allegations are made by Mr. Liu against the plaintiffs and others in a State of New York action that was filed by Mr. Liu in May 2018 ("New York Action"). All defendants in the New York Action, save Mr. Chen, have been served. Mr. Liu believes that Mr. Chen is deliberately evading service.
- [6] The notice of application to have this court decline jurisdiction in the BC Action was filed on October 22, 2018. Mr. Liu's counsel first gave notice that she intended to bring this application on September 5, 2018. Affidavits in support of the application were filed on October 23, 2018 and November 2, 2018. All were promptly served on the plaintiffs' Canadian counsel, Mr. Robert Cohen and Ms. Brigeeta Richdale of the firm Cassels Brock, a large Canadian law firm. By email dated October 30, 2018, Ms. Richdale advised Mr. Liu's counsel

as follows:

As of now we do not expect to be filing any responding materials or opposing the application on November 6. If that changes, we will let you know.

[7] I am going to pause here to ask that that email be marked as Exhibit 1 on the application.

[8] THE CLERK: Exhibit 1, My Lord.

EXHIBIT 1: Email dated October 30, 2018, from Ms. Richdale to Ms. Yan

[9] THE COURT: I am advised by Ms. Yan that she has not been told anything to the contrary by the plaintiffs' counsel. She delivered written submissions to plaintiffs' counsel this morning, and there was no indication that they or anyone on the plaintiffs' behalf would be appearing. The defendant's application, therefore, proceeded without appearances on behalf of or by the plaintiffs.

[10] In a nutshell, the defendant says that this action should not have been brought in British Columbia in the first place. There is a pending action in the State of New York that was brought by Mr. Liu against the same parties. The New York Action was filed more than two months before the BC Action was commenced. The New York Action raises issues and alleges facts and matters that are substantially the same as in the BC Action.

[11] Mr. Liu disputes the jurisdiction of this court to hear this case because even if the facts and matters alleged by the plaintiffs in the BC Action were true, this court would still not have territorial competence to hear it. Alternatively, if this court were to find that it has territorial competence, it should still decline to exercise its jurisdiction because:

- 1) all the contracts arising from this case were negotiated, executed and performed in either the United States or in China;
- 2) all potential witnesses pertaining to this action other than Mr. Liu are situated either in the US or in China; and
- 3) there is a pending New York action against the same opposite parties on the same issues.

Background

[12] The details of what occurred are somewhat complicated and are set out in detail in the notice of application and supporting affidavits. I will try to briefly summarize some of the background.

[13] Mr. Chen is a Chinese citizen residing in Changzhou. In the fall of 2017, he and his partners were able to raise more than \$15 million USD from unsuspecting investors in China within a period of approximately three months. He did so by offering an initial coin offering ("ICO") of the Tokens at a reduced price. He did not have any connection with EtherDelta or the Tokens at the time and therefore had no authorization or authority to make the ICO to the investors. His plan was to use the money raised to later purchase EtherDelta and then issue

the tokens.

- [14] One of his partners at the time was a Ms. Yao Sun ("Ms. Sun"). Two other partners, Mr. Zhou and Mr. Qu incorporated a company called EtherDEG Ltd. in the territory of British Virgin Islands in order to circumvent Chinese laws that prohibited cryptocurrency trading platforms. That was going to be the corporate vehicle they would use to purchase EtherDelta.
- [15] Relying on representations that Mr. Liu received from Ms. Sun, he invested \$2.23 million USD into EtherDelta ICO on the basis that he would receive the Tokens. Because he was such a large investor, Mr. Chen and Ms. Sun persuaded him to become EtherDEG's CEO. With that position, he was to become a large shareholder of EtherDEG as well.
- [16] The ICO took place in the United States between January 1 and 14, 2018. Shortly thereafter, Mr. Chen took unilateral steps to have Mr. Liu removed as CEO of EtherDEG and a dispute then arose between the existing shareholders.
- [17] Mr. Liu commenced the New York Action in May 2018 for, among other things, breach of contract and the return of his investment of \$2.23 million USD. In June 2018, Mr. Liu reported Mr. Chen to the Chinese Public Security Bureau in Changzhou, China. The evidence discloses that Mr. Chen is now under criminal investigation by the Chinese Public Security Bureau.

Jurisdictional Dispute

- [18] Rule 21-8 relates to jurisdictional disputes. The relevant portions read:

Disputed jurisdiction

- (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,
- (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
- (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
- (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

Order declining jurisdiction may be sought

- (2) Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceeding on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceeding.

[19] The question of jurisdiction is determined exclusively by the substantive rules set out in the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 ("CJPTA"). The relevant portion of section 3 of the CJPTA provides:

Proceedings against a person

3 A court has territorial competence in a proceeding that is brought against a person only if

...

- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding.

[20] The other subsections (a), (b), (c) and (e) do not apply to Mr. Liu.

[21] Mr. Liu has not attorned to the jurisdiction of this court and, despite being a resident of BC, challenges this court's territorial competence over this matter. He relies on s. 11 of the CJPTA to argue that this court is not the forum conveniens. He asserts that this court must consider all the circumstances relevant to this proceeding in deciding whether or not to accept jurisdiction or defer jurisdiction to the New York court as the most appropriate forum to hear the dispute. Section s. 11 of the CJPTA reads:

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

[22] This is a non-exhaustive list of considerations. Ms. Yan has referred me to a series of ten cases dealing with jurisdictional issues. From those cases I can summarize the law as it relates to this application as follows.

[23] The first question is whether the pleadings allege jurisdictional facts sufficient to establish a real and substantial connection to the defendant or to the cause of action. Here, Mr. Liu resides in British Columbia. The pleadings allege facts that, if true, could establish this court has jurisdiction over Mr. Liu, however, the burden of proof is on the plaintiff to establish that a good arguable case can be made.

[24] The ultimate question on jurisdiction is governed by principles of comity, order and fairness. There must be a substantial connection, not just a passing connection of relative insignificance, to British Columbia. Residency of Mr. Liu in British Columbia alone is not sufficient to establish jurisdiction. The court must still determine whether it will decline jurisdiction after considering the factors set out in s. 11 of the CJPTA. Ultimately whether this court should take jurisdiction depends on what is just and fair to all parties.

[25] In my view, this court is not the convenient forum for adjudicating this matter. It should be adjudicated in the New York Action. In making that determination, the following factors are persuasive:

- a) there is a parallel lawsuit against both plaintiffs, Mr. Chen and EtherDEG Ltd., in the State of New York that was filed in May 2018, pertaining to the same or similar circumstances. EtherDEG has been served, and the evidence suggests that Mr. Chen is aware of the New York Action but has been evading service. The New York Court has granted an extension to Mr. Liu until May 2019 to serve Mr. Chen personally;
- b) the purchase of the EtherDelta platform was completed in China and the United States. There is no relationship between that transaction and British Columbia;
- c) the shareholders' agreement entered into between EtherDEG's new shareholders was negotiated and entered into in China;
- d) the employment contract between Mr. Liu and EtherDEG was negotiated and executed in China, and it was to be performed for the benefit of the EtherDelta platform in the United States;
- e) the EtherDelta ICO was launched in the United States;
- f) the allegations in the pleadings of defamatory postings made by Mr. Chen against Mr. Liu were posted in China and in the United States, viewable by readers located in China and the United States. The allegation of breach of privacy by disseminating Mr. Liu's personal information publicly was allegedly posted by Mr. Chen or someone at his direction in either China or the United States, viewable by readers located in China and the United States;

- g) persons who were involved in this scheme are located either in China or in the United States. Mr. Chen, Mr. Qu and Ms. Sun are located in China. Mr. Zhou and Mr. Coburn are both located in Boston, Massachusetts;
 - h) The scheme whereby the Chinese investors invested in tokens for EtherDelta was hatched in China. There are apparently more than 100 victims of this scheme, mostly located in China;
 - i) EtherDEG Ltd. is an offshore company incorporated in the British Virgin Islands. There is no evidence that it has any presence or assets in British Columbia;
 - j) There is no evidence that Mr. Chen has any assets or presence in British Columbia; and
 - k) The asset purchase agreement between Mr. Coburn, who was then the owner of EtherDelta, and EtherDEG, was executed in China and the United States. That agreement contains an exclusive jurisdiction and choice of law clause governing that both the forum and the applicable laws are the State of New York. Much of the dispute amongst the various shareholders, and in particular between Mr. Liu and Mr. Chen, will be concerning the asset purchase agreement that was entered into.
- [26] Examining the evidence before me, I am satisfied that the forum conveniens of this dispute is New York and not British Columbia.

Disposition

- [27] One option I have as a result of my ruling is to simply stay the BC Action pending the disposition of the New York Action. However, the plaintiffs, through their counsel, knew that Mr. Liu had brought this application seeking an order dismissing the BC Action. They have stated that they do not oppose the application.
- [28] Accordingly, I allow the defendant's application and dismiss the BC Action on the grounds that this court declines to exercise jurisdiction over Mr. Liu in respect of the claims made against him.

(Submissions on Costs)

- [29] THE COURT: Following my dismissal of this action, the defendant applied for an order for special costs against the plaintiffs on the following grounds:
- a) the notice of civil claim is a public document and makes very serious allegations against Mr. Liu, a resident of Richmond, British Columbia, including that he is guilty of conversion of substantial funds, misappropriation of substantial funds, breach of fiduciary and contractual duties to EtherDEG and that he is guilty of breach of trust; and

- b) on the basis that a formal offer to settle pursuant to Rule 9-1 of the Supreme Court Civil Rules was delivered to the plaintiffs' British Columbia counsel on October 12, 2018, which stated in part that the defendant was confident that he was going to succeed in the application to have this claim struck on the basis of jurisdiction and that he would be seeking special costs for "their high handed conduct and abuse of process."
- [30] Clearly the plaintiffs, through their counsel, knew that the defendant was going to be seeking an order for special costs. Also clearly, the allegations made in the notice of civil claim against Mr. Liu are very serious allegations that could have a far-reaching and significant impact on him.
- [31] The standard for awarding special costs is conduct that can be described as reprehensible or outrageous or that is deserving of this court's rebuke. In *Casses v. Canadian Broadcasting Corporation*, 2016 BCSC 949, the court stated at paragraphs 17 to 19:
- [17] The single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible." The word "reprehensible" has a wide meaning. It encompasses scandalous or outrageous conduct, but it also encompasses milder forms of misconduct deserving of reproof or rebuke. See *Behan v. Park*, 2014 BCSC 1982, at para. 28 and *Wilson v. Switlo*, 2016 BCSC 130, at paras. 24 and 25. See also *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 (cited in both *Behan* and *Wilson*, among other cases), where Madam Justice Gropper very helpfully reviews a number of authorities and summarizes the law.
- [18] Special costs may be awarded where a party made the resolution of an issue far more difficult than it should have been, or where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party. See *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, at para. 11.
- [19] A party who alleges serious misconduct against another in a civil lawsuit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: See *Taseko Mines*, at para. 187 (citing *Gichuru v. Smith*, 2014 BCCA 414, at paras. 78 and 79).
- [32] I am satisfied that the allegations made by the plaintiffs in this action against Mr. Liu are deserving of rebuke and I award the defendant special costs.

"G.P. Weatherill, J."

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