

CANADA / JUDGMENT

Houm Services Inc. v. Lettuce Eatery Development Inc.

2020 BCSC 430

COURT

Supreme Court of British Columbia

DECIDED

25 February 2020

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2020 BCSC 430 Houm Services Inc. v. Lettuce Eatery Development Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Houm Services Inc. v. Lettuce Eatery Development Inc.,

2020 BCSC 430

Date: 20200225

Docket: S1913206

Registry: Vancouver

Between:

Houm Services Inc.

Plaintiff

And

Lettuce Eatery Development Inc.

Defendant

- and -

Docket: S1913658

Registry: Vancouver

Between:

Houm Services Inc.

Plaintiff

And

Jessica Stoller and Darrell Meier

Defendants

- and -

Docket: S1913884

Registry: Vancouver

Between:

Houm Services Inc.

Plaintiff

And

Jessica Stoller and Jeremy Mandel and

Julie Oye and Sean Oye and Blake Joiner

Defendants

Corrected Judgment: This judgment was corrected at paragraph 40 on March 26, 2020

Before: The Honourable Madam Justice MacNaughton

Oral Reasons for Judgment

In Chambers

Appearing for Houm Services Inc.:

Y. Xiao,

an officer of the company

Counsel for the Defendants Lettuce Eatery Development Inc., Jessica Stoller, Jeremy Mandel, Julie Oye, and Sean Oye:

P. Senkpiel

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2020

- [1] THE COURT: The applications before me are brought in three different actions and a petition, all filed by Houm Services Inc. ("Houm") as plaintiff or petitioner. They are in respect of a May 6, 2014 franchise agreement entered into between Houm, as franchisee, and Lettuce Eatery Developments Inc. ("LEDI"), as franchisor (the "Franchise Agreement").
- [2] The notice of application seeks an order dismissing Supreme Court Actions S1913206, S1913658, S1913884, and S202070 against the applicants or, in the alternative, an order staying the actions filed by Houm against the applicants (except for Julie and Sean Oye in S1913884), pending the determination of all issues in an arbitration proceeding. The applicants also seek an order that Houm and Yafeng Xiao be prohibited from starting further legal proceedings against them without leave of the court, pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 [SCA].

The Parties and the Franchise Agreement

- [3] LEDI, through its franchisees, operates restaurants selling healthy meals under the operating name Freshii Restaurants. When Houm entered into the Franchise Agreement, Ellie Xu, who signed the Franchise Agreement on Houm's behalf, owned its shares.
- [4] Houm operated the Freshii Restaurant located at 765 Nelson Street, near the corner of Howe Street in Vancouver, in a building owned by the Manufacturer's Life Insurance Company ("Manulife"). On a date that is unclear in the record, but appears to have been in March 2019, Yafeng Xiao purchased the shares of Houm and began operating the restaurant.

The Default Notices and the Termination of the Franchise Agreement

- [5] On July 24, 2019, LEDI notified Houm and Ms. Xu that Houm was not in compliance with a number of terms of the Franchise Agreement and required that those deficiencies be cured.
- [6] On September 5, 2019, pursuant to the terms of the Franchise Agreement, LEDI delivered a default notice to Houm and Ms. Xu requiring that the deficiencies be cured.
- [7] Because the deficiencies were not cured, on October 25, 2019, LEDI delivered notice to Houm and Ms. Xu of the termination of the Franchise Agreement. The alleged breaches leading to the termination included Houm's sale of unauthorized food products; purchase of products from unauthorized suppliers; use of unauthorized marketing, advertising, and promotional materials; and various other breaches involving communications to the public, customers, and Freshii suppliers.

The Injunction Proceedings

- [8] On November 18, 2019, LEDI filed a petition seeking, among other relief, an interlocutory injunction against Houm. The injunction application was heard by Justice Jackson on November 19, 2019.
- [9] Houm was represented by Mr. Xiao, who by then had taken over Houm from Ms. Xu. LEDI's counsel advised me that his client first learned of Mr. Xiao's ownership of Houm at the hearing before Justice Jackson. Prior to that, LEDI believed that Mr. Xiao was an employee.
- [10] Justice Jackson granted the injunction prohibiting the respondents, and any person with notice of the order, from:
- (a) using the Freshii trademarks referred to in the Franchise Agreement, including by operating the restaurant under the Freshii name;
 - (b) disposing of, encumbering, dissipating, or relocating any of the "operating assets" as that term was defined in the Franchise Agreement; and
 - (c) operating any "competitive business" as that term is defined in the Franchise Agreement from the location at 765 Nelson Street in Vancouver.
- [11] On November 19, 2019, LEDI's counsel sent Mr. Xiao an email attaching a copy of LEDI's notice to arbitrate as provided for under the Franchise Agreement.

Mr. Xiao's and Houm's Actions Following the Injunction

- [12] On November 20, 2019, LEDI's British Columbia counsel received an email from Mr. Xiao attaching a notice of civil claim in action number S1913206. Houm is the plaintiff and LEDI is the defendant. The claim seeks the following relief:
1. Comply Franchises Act and Fair dealing; 2. Purchase back any supplies and equipment that we had purchased under the franchise agreement at a price equal to the purchase price paid by us; 3. Compensation for economic losses.
- [13] Also on November 20, 2019, LEDI received reports that the restaurant at 765 Nelson was still open and operating as if it were a Freshii franchise. LEDI's counsel emailed Mr. Xiao a copy of Justice Jackson's entered order and put him on notice that he was required to comply with it immediately.
- [14] On November 21, 2019, LEDI received indications that 765 Nelson remained open, and on November 22, 2019, LEDI's counsel sent a further email to Mr. Xiao advising that he was in breach of Justice Jackson's order.
- [15] Later on November 22, 2019, LEDI's counsel received an email from Manulife's counsel advising that:

- (a) Manulife had terminated Houm's lease effective November 21 for non-payment of November 2019 rent;
 - (b) Manulife had delivered a notice of re-entry and termination of the lease to 765 Nelson and arranged for the locks to be changed on the night of November 21;
 - (c) on the morning of November 22, 2019, Mr. Xiao had attended at 765 Nelson with a locksmith and sought to remove the new locks in an attempt to regain possession of the restaurant;
 - (d) the Vancouver Police Department attended, and the situation was diffused; and
 - (e) Manulife had no intention of reinstating Houm's lease and was interested in knowing whether LEDI had a prospective franchisee for the address.
- [16] A second notice of termination of the lease was apparently issued by Manulife on December 13, 2019.
- [17] On November 25, 2019, Mr. Xiao sought to regain access to the Freshii designated Google email account for 765 Nelson and, according to the affidavit of Ms. Stoller, may have been handing out Freshii discount cards to be used at other LEDI franchise locations in Vancouver.
- [18] On November 28, 2019, LEDI sent Mr. Xiao an email requesting that he immediately stop unauthorized distribution of Freshii coupons, failing which it would commence contempt proceedings. LEDI's email also attached a letter concerning the appraisal of the Operating Assets, a term defined in the Franchise Agreement, at 765 Nelson. The Operating Assets will be discussed below.
- [19] Apparently, on November 29, 2019, Mr. Xiao attempted to break into 765 Nelson a third time. A window may have been smashed. The Vancouver Police arrested Mr. Xiao. Mr. Xiao was released on undertakings to appear, not to attend at 765 Nelson, and not to be in possession of tools.
- [20] On December 3, 2019, Houm filed another notice of civil claim in respect of the Franchise Agreement. This claim, action number S1913658, names Houm as plaintiff, and Jessica Stoller, a LEDI employee, and Darrell Meier, a Manulife employee, as defendants. It seeks the following relief:
1. stop illegal actions against Houm Services Inc.; and
 2. compensation for economic losses.

Steps Following LEDI's Attempts to Find a New Franchisee

[21] Shortly after LEDI delivered the termination notice to Houm, LEDI selected JOMM Ventures Inc. ("JOMM") as a new franchise partner to operate 765 Nelson. The beneficial owners of JOMM are Sean Oye and Julie Oye (through their family trust), and Lisa Yoon Kyung Kwon. Mr. and Ms. Oye are also the beneficial owners of Oye Ventures Inc., which operates a successful Freshii franchise at 1541 West Broadway in Vancouver.

[22] On December 2, 2019, Mr. Xiao attended at the Broadway Freshii and told Mr. Oye that, contrary to Manulife's assertions, Mr. Xiao did not owe Manulife rent in respect of 765 Nelson. Mr. Xiao said he would continue to break into 765 Nelson to attempt to obtain items in the store that he claimed belonged to him or his employees. Mr. Xiao threatened that if Mr. Oye purchased the Operating Assets at 765 Nelson, Mr. Xiao would involve him in the ongoing lawsuits Houm had commenced against Manulife and LEDI.

[23] On December 3, 2019, Mr. Xiao sent an email to Mr. Oye, and others, with the subject line, "Regarding the status of freshii restaurant located at 765 Nelson, Vancouver." In the email, Mr. Xiao:

- (a) questioned whether Mr. Oye was involved in a sale of 765 Nelson that Mr. Xiao asserted was taking place illegally;
- (b) suggested that Mr. Oye "keep away from this mess";
- (c) requested Mr. Oye's assistance in a purported "investigation" into the location; and
- (d) told Mr. Oye that "If under any circumstance you are unwilling to cooperate with the investigation or if we do not receive any response from you, we shall assume that you have participated in this illegal sale of the property. In this case you will be included in our lawsuits against Freshii and Manulife."

[24] On December 3, 2019, a further exchange of emails took place between Mr. Xiao and Mr. Oye in respect of Mr. Oye's potential involvement in the alleged illegal sale of 765 Nelson. In the exchange, Mr. Oye states that he had done nothing wrong and did not appreciate being threatened with a lawsuit. Mr. Xiao responded to Mr. Oye on December 4, 2019, stating, among other things:

If we do not receive direct answer from you before next Monday (December 9th, 2019) regarding the questions we send in the previous emails, we have to include you in the lawsuit.

[25] On December 6, 2019, Houm filed another notice of civil claim, action number S1913884. It named as defendants: Mr. Oye; Ms. Oye; Jerry Mandel, who was the corporate counsel for LEDI; Blake Joiner, who was an independent appraiser at Joiner Sales Corporation ("Joiner"); and Ms. Stoller. The relief sought in that claim is:

1. Stop illegal actions against Houm Services Inc.; and

2. Compensation for economic losses.

LEDI's Attempts to Purchase the Operating Assets

- [26] The termination notice delivered to Houm states that LEDI was exercising its option, pursuant to clause 16.E of the Franchise Agreement, to purchase all of the Operating Assets at 765 Nelson at fair market value, or to assign this option to purchase to a third party.
- [27] As I have said, LEDI intends to facilitate the transition of the operations of the Freshii at 765 Nelson to a new franchisee. As many of the Operating Assets are in good condition, and can be used once the restaurant opens again, LEDI intends to assign the Operating Assets, or the right to purchase them, to the new franchisee.
- [28] What constitutes the Operating Assets is defined in clause 2.D of the Franchise Agreement and includes all required furniture, fixtures, equipment, vehicles, small wares, and signs that the franchisor periodically requires for the restaurant and the business that the franchisee operates under the Franchise Agreement. It also includes the Computer System, another defined term in clause 2.E of the Franchise Agreement.
- [29] The process for agreeing on a fair market purchase price for the Operating Assets is set out in clause 16.E of the Franchise Agreement. I need not set out the clause for current purposes. Clause 16.E provides a 30-day window, after determination of the purchase price, for the closing of the purchase. On closing, LEDI is required to pay the purchase price to Houm, and Houm is required to deliver instruments transferring to LEDI good and merchantable title to the Operating Assets, free and clear of all liens and encumbrances.
- [30] On November 28, 2019, LEDI sent Houm an offer to purchase all of the Operating Assets at 765 Nelson for \$25,000. The offer indicates that LEDI considered the offer to reflect the fair market value of the Operating Assets.
- [31] In his submissions, Mr. Xiao indicated that he values the assets at about \$600,000. LEDI received a "Notice of Reject" from Mr. Xiao, calling LEDI's offer a joke, and threatening to commence a class action against Freshii.
- [32] On December 4, 2019, LEDI sent Mr. Xiao an email in response to his November 28 letter. LEDI advised that, as there had been no agreement on the purchase price for the Operating Assets, it was engaging the independent appraisal process for determining the purchase price set out in clause 16.E of the Franchise Agreement and was designating Joiner as the appraiser. LEDI explained that both it and Houm were required to submit to Joiner their respective calculations of the purchase price within 10 days. LEDI's email provided Mr. Xiao with the contact details for Joiner.
- [33] Later on December 4, 2019, LEDI's Ontario counsel, Tyr LLP, sent an email to Joiner, with a copy to Mr. Xiao, advising of the process for the independent appraisal of the Operating Assets pursuant to clause 16.E of the Franchise Agreement. Attached to the email was a list of the specific items that comprised the Operating Assets. On the evening of December 4,

2019, Mr. Xiao sent emails to various individuals, contesting the independent appraisal process. In particular, he sent an email to the CEO of Freshii, Matthew Corrin. In response to LEDI's email designating Joiner as the independent appraiser of the Operating Assets, Mr. Xiao's email stated, among other things, "[W]e don't need your designated appraiser" and "we have an offer of Canadian dollars, \$600,000 (according to our sales revenue)."

- [34] Mr. Xiao also sent an email to representatives of Manulife, copied to Mr. Corrin, stating that "we don't need Freshii HQ's designated appraiser."
- [35] Finally, Mr. Xiao sent an email to LEDI, with a copy to Joiner, stating that the independent appraisal of the Operating Assets was prohibited and that LEDI was trying to steal his assets. Mr. Xiao threatened to commence legal proceedings in the B.C. courts against both LEDI and Joiner.
- [36] On December 6, 2019, Tyr LLP sent an email to Joiner requesting Joiner to proceed with the independent appraisal process despite Mr. Xiao's threat to sue. The email also delivered LEDI's justification for its \$25,000 offer for the Operating Assets. A few hours later, Joiner responded stating, among other things, that it was not comfortable accepting the assignment in light of the threat of a lawsuit.
- [37] As noted, Mr. Xiao commenced his civil claim against Mr. Joiner, and others, on December 6, 2019.
- [38] On December 11, 2019, LEDI's counsel sent an email to Mr. Xiao indicating that it would likely commence proceedings seeking various forms of relief, including an order declaring that Mr. Xiao is a vexatious litigant.
- [39] On December 12, 2019, Mr. Xiao sent an email to LEDI's counsel, making various allegations of misconduct against "your group" and indicating, among other things, that he had sent a letter to Justice Jackson about the situation and "your group robbery purpose."
- [40] On February 24, 2020, Houm filed a petition bearing action S202070 against LEDI and Manulife. In it, he seeks various orders that clarify some of the relief sought in Houm's other actions.
- [41] In addition to the actions that Houm has brought against LEDI and its employees, the Oyes, and Mr. Joiner, Houm has also commenced a number of actions solely against Manulife. The details of those actions are set out in the materials but are not directly relevant to the application before me.

Analysis

- [42] Having considered the factual background as set out primarily in Ms. Stoller's affidavit, I have decided to deal with LEDI's application by way of a stay pursuant to s. 15 of the Arbitration Act, R.S.B.C. 1996, c. 55. As set out, LEDI filed a notice of arbitration dated November 14, 2019, pursuant to the terms of the Franchise Agreement. Mr Xiao and Houm have been served with the notice.
- [43] The disputes raised in Houm's actions, and the petition as it relates to Houm, appear to fall within the scope of the arbitration clause in the Franchise Agreement.
- [44] Section 15 of the Arbitration Act raises two primary jurisdictional issues:
- (1) Are the disputes in respect of a matter agreed to be submitted to arbitration?
 - (2) Is the arbitration agreement void, inoperative, or incapable of being performed?
- [45] The case law is clear that, as a general rule, the arbitration panel is the first decision-maker with respect to the jurisdictional issues, absent narrow exceptions, which do not apply here.
- [46] The question for me in deciding whether to remit the jurisdictional issues to arbitration is whether it is arguable that the matters are within the jurisdiction of the arbitrator.
- [47] I am satisfied that the disputes as framed in the actions filed against LEDI and its employees appear to fall within the scope of the arbitration clause in the Franchise Agreement.
- [48] The Franchise Agreement is attached as part of Exhibit CC to Ms. Stoller's December 13, 2019 affidavit. I need not set out the entirety of clause 18.F for present purposes. However it is broadly and comprehensibly worded to include disputes under the Franchise Agreement, arising from the franchisor's relationship with the franchisee, the scope and validity of the Franchise Agreement or any other agreement between the parties, and with respect to any "system standard" as that term is defined in the Franchise Agreement.
- [49] The arbitrator is given broad remedial powers, including the power to award damages and to make orders for specific performance, injunctive relief, and costs.
- [50] In *ABOP LLC v. Qtrade Canada Inc.*, 2007 BCCA 290 at para. 24, the court held that if there was still a dispute between the parties, requiring additional relief outside the scope of the arbitration clause, the matter could be pursued in the courts after the conclusion of the arbitration. A stay of the actions and the petition simply holds those proceedings in abeyance until an arbitrator does the work that the parties have agreed should be arbitrated if the parties to the Franchise Agreement cannot resolve their issues.
- [51] I am also satisfied that the arbitration clause 18.F in the Franchise Agreement is valid as between these parties. By its term, it specifies that the arbitration will occur in British Columbia and is, therefore, in compliance with the terms of the Franchises Act, S.B.C. 2015, c. 35 [Act] as they apply, in a limited way, to the Franchise Agreement in this case.

- [52] Pursuant to s. 2 of the Act, it only applies to franchise agreements signed after the Act comes into force, or to renewals or extensions signed thereafter. Here, the Franchise Agreement was signed prior to the coming into force of the Act and has not been renewed or extended since. As a result, with the exception of the sections set out in s. 2(2), the Act does not apply to the Franchise Agreement.
- [53] Section 2(2), provides that certain provisions of the Act apply to the Franchise Agreement but, based on the wording of clause 18.F, the applicable provisions are not of concern in this case. In particular, the arbitration clause defaults to an arbitration in British Columbia which is in accordance with the Act. The requirement for fair dealing does apply but, in any event, applies at common law.
- [54] In submissions before me, Mr. Xiao agreed to a consent dismissal of his claims as against Mr. and Mrs. Oye. He also agreed that his claim against Mr. Joiner should be dismissed.
- [55] All of the actions filed by Houm against LEDI and its employees, and the petition proceeding, are stayed as against LEDI, pending the outcome of the arbitration process commenced by LEDI. It is in that forum that Houm will be able to raise concerns about the terms, operation, and application of the Franchise Agreement.
- [56] Because Houm has filed a number of duplicative proceedings, arising from the same set of facts, I conclude that it is appropriate to make an order under s. 18 of the SCA, prohibiting Houm and/or Mr. Xiao from instituting further legal proceedings naming LEDI and/or its employees or agents as defendants without leave of this Court.
- [57] Finally, I conclude that LEDI is entitled to its costs of this application as it has been entirely successful. I fix those costs in the amount of \$1,500 for the filing of these applications, inclusive of disbursements.

"MacNaughton J."

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