

CANADA / JUDGMENT

Kaspersky Lab, Inc. v. Bradshaw

2010 BCSC 68

COURT

Supreme Court of British Columbia

DECIDED

19 January 2010

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2010 BCSC 68 Kaspersky Lab, Inc. v. Bradshaw IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: Kaspersky Lab, Inc. v. Bradshaw, 2010 BCSC 68 Date: 20100119 Docket: S084007 Registry:
Vancouver Between: Kaspersky Lab, Inc. Plaintiff And Terry Glenn Bradshaw carrying on
business as Technical Back Up and TBU Security Solutions Inc. Defendants Before: The
Honourable Mr. Justice Nathan Smith Reasons for Judgment (In Chambers) Counsel for Plaintiff:
J. E. Frank Counsel for Defendants: D. M. Rush Place and Date of Hearing: Vancouver, B.C.
November 2, 2009 Place and Date of Judgment: Vancouver, B.C. January 19, 2010

- [1] The plaintiff seeks judgment on summary trial for more than US \$273,000, plus interest, which it says is owing under a contract for the distribution of computer software. The defendants counterclaim for alleged wrongful termination of the contract and say that the issues cannot be decided on a summary trial. The plaintiff replies that the counterclaim is barred by the terms of the contract.
- [2] The plaintiff, Kaspersky Lab, Inc. ("Kaspersky"), is a Massachusetts company that sells anti-virus software and licenses technology to other vendors for use in their own products. The defendant, TBU Security Solutions Inc. ("TBU Inc."), is a company based in Kelowna of which the defendant, Terry Glenn Bradshaw, is the president. Prior to the incorporation of TBU Inc. in 2007, Mr. Bradshaw carried on business as a sole proprietor under the name of Technical Back Up ("TBU").
- [3] In 2006, Kaspersky and TBU entered into a licence agreement for the resale of Kaspersky products. Mr. Bradshaw says that TBU Inc. took an assignment of the contract after it was incorporated, but Kaspersky says that Mr. Bradshaw remains personally liable for the amount owing.
- [4] The agreement appointed TBU as a "non-exclusive independent partner" for resale of designated Kaspersky products. The agreement included para. 17, which read in part:
17. TERMINATION Either party may terminate this Agreement in the event of a material breach by the other party of any term and condition of this Agreement upon thirty (30) days prior written notice and failure to cure such breach.

- [5] Under the agreement, TBU was to submit purchase orders for products, with all purchase orders "subject to acceptance by Kaspersky", and to pay for products within 30 days from the date of Kaspersky's invoice. Kaspersky had the right to assess late payment charges of one and one-half per cent per month on overdue amounts.
- [6] In November 2007, there was an amending agreement that dealt with specific software referred to as "system builder products". This software was to be sold to makers of computer systems who would preload it into the systems that they were selling. It was a term of the amending agreement that this software was not to be sold to buyers who would resell it as a separate or stand-alone product.
- [7] In its statement of claim, Kaspersky alleges that TBU failed to comply with the restriction on the sale of system builder products and failed to pay invoices totalling US \$273,048.03 as of April 29, 2008. On this summary trial application, Kaspersky relies only on the debt claim arising from the unpaid invoices.
- [8] On April 14, 2008, Kaspersky advised Mr. Bradshaw of the overdue account balance and said no further purchase orders would be processed until it was paid. That was followed by a letter from its solicitors dated May 2, 2008, that purported to give notice of termination of the agreement, citing both the unpaid invoices and the alleged improper sale of the system builder products. That letter stated that the termination was effective immediately because TBU had waived its right to 30 days notice.
- [9] In their statement of defence and counterclaim, the defendants say that Kaspersky wrongfully terminated the agreement by failing to give the required 30-day notice and was previously in breach of the contract by failing to deliver products that had been ordered. The defendants do not dispute the fact that there are unpaid invoices, but seek to set off that amount against the damages they say they have suffered and will prove at trial.
- [10] Mr. Bradshaw says in an affidavit that well before April 14, 2008, when it said it said it would no longer be processing orders, Kaspersky had begun a practice of delaying or failing to deliver products ordered by TBU. At the same time, he says Kaspersky began selling software directly to TBU's customers and potential customers, effectively cutting TBU out of the supply chain.
- [11] Mr. Bradshaw refers in particular to two large orders in early March 2008, that he says Kaspersky represented it could and would fill immediately. He says Kaspersky's failure to deliver those two orders alone amounted to a loss of revenue to the defendants in an amount almost equal to the amount of the unpaid invoices upon which Kaspersky now relies. On the issue of those outstanding invoices, Mr. Bradshaw says that prior to April 2008, Kaspersky had always accepted regular partial payments on the outstanding balance and had never before objected to late payment.

- [12] The plaintiff's application for judgment on summary trial is made under Rule 18A of the Rules of Court. That Rule includes the following subrules: 18A (1) A party may apply to the court for judgment, either on an issue or generally, in any of the following;
- (a) an action in which a defence has been filed; 18A (8) On an application heard before or at the same time as the hearing of an application under subrule (1), the court may
 - (a) adjourn the application under subrule (1), or
 - (b) dismiss the application under subrule (1) on the ground that
 - (i) the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or (ii) the application under subrule (1) will not assist the efficient resolution of the proceeding. 18A (11) On the hearing of an application under subrule (1), the court may
 - (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and
 - (c) award costs.
- [13] Although the Rule allows judgment "on an issue or generally", the Court of Appeal has warned this court of the danger of "litigating in slices": *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138. However, it is also clear that the mere existence of a counterclaim is not a bar to a judgment under Rule 18A unless the issues are "inextricably interwoven": *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504 at para. 10.
- [14] The consideration of whether the issues are inextricably interwoven must begin with the pleadings. Paragraph 5 of the statement of claim sets out the terms of the agreement, including the following:
- 5. The terms of the Master Agreement (as amended) were, inter alia, as follows:
 - (e) TBU would pay fees to Kaspersky based on Kaspersky's current price list, plus all applicable taxes and other charges (the "Fees");
 - (f) The Fees were due and owing within 30 days of the date of Kaspersky's invoice to TBU;
 - (g) If the Fees were not paid within 30 days, Kaspersky was entitled to charge interest at a rate of one and a half percent per month, or the maximum allowable by law;
 - (h) Kaspersky was entitled to terminate the Master Agreement under the following circumstances:

(i) TBU materially breached its obligations under the Master Agreement; and such breach was not cured within the notice period; (ii) Kaspersky provided 30 days notice that the Master Agreement would be terminated; and (iii) TBU failed to cure the breach within 30 days.

(i) Upon termination of the Master Agreement, all Fees would become immediately due and payable.

[15] Paragraphs 6 and 7 of the statement of claim then say the following:

6. On or about April 2008, TBU breached the Master Agreement, the particulars of which include the following:

(a) TBU sold System Builder Products to System Builders who:

(i) Did not preload the System Builder Products on a computer system; (ii) Charged or promoted the sale of the System Builder [Products] as an individual or separate product; and (iii) Sold the System Builder Products as an individual or separate product; and

(b) TBU failed to pay Fees in the amount of US \$273,048.03 within 30 days of receiving the invoice for these Fees from Kaspersky.

7. Each act described above at paragraph 6 constitutes a material breach of TBU's obligations under the Master Agreement.

[16] The statement of defence also refers to the contract provision dealing with termination for material breach on 30 days notice and says at para. 9:

9. In breach of the terms of the Master Agreement, the Plaintiff failed to provide any notice of its intention to not renew the terms of the Master Agreement, or provide notice of any assertion that the Defendant was in material breach of any terms of the Master Agreement.

[17] There is no specific reference in any of the pleadings to another portion of the agreement dealing with unpaid invoices. Paragraph 7 of the agreement, after setting out the 30-day payment term, states in part: In the event that Partner fails to make any payment when due, Kaspersky may withhold further shipments or modify payment terms.

[18] That provision would seem to give Kaspersky the right to withhold deliveries because of unpaid accounts without necessarily terminating the contract. If Kaspersky had relied on that provision, it might be arguable that the unpaid invoices constitute a debt incurred during the life of the contract and are a separate issue, both factually and legally, from the alleged wrongful termination that forms the basis of the counterclaim. However, that provision is not referred to or relied upon in either Kaspersky's statement of claim or its defence to the counterclaim.

- [19] By its pleadings, Kaspersky has clearly alleged that the existence of the outstanding account constituted a material breach that gave it the right to invoke the termination clause in the contract. However, there is no evidence on this application that it provided the required 30 days notice or gave the defendants the opportunity to cure the breach during the notice period. Mr. Bradshaw says that by cutting off deliveries immediately, Kaspersky made it impossible for TBU to cure the breach.
- [20] I recognize that Kaspersky did not purport to formally terminate the contract until May 2, 2008, when its solicitors sent a letter, but on the evidence and in the pleadings it would appear that termination had already effectively taken place on April 14, 2008. Even if the May 2 letter can constitute notice of termination under the contract, that letter states on its face that the contract was being terminated without the required 30 days notice. The letter states that TBU waived the right to notice.
- [21] This waiver is alleged to be contained in a statement by an employee of the defendants that was made to parties other than Kaspersky. That communication occurred after Kaspersky had said it would withhold further shipments. Mr. Bradshaw raises a factual issue, saying that employee had no authority to waive rights under the contract. There is also a legal issue, not argued before me, about whether Kaspersky can rely on an alleged waiver in a communication that was not even addressed to it.
- [22] The claim and counterclaim in this case not only arise out of the same agreement, but each party relies on the same sentence within the agreement. The plaintiff says it exercised its right to terminate the agreement and the defendants say the plaintiff did so without giving the required notice and opportunity to cure the breach. In my view, those issues are inextricably intertwined and it would be unjust to decide only part of the case on this application. It would also not assist the efficient resolution of this proceeding because most of the same evidence would still have to be considered on the trial of the counterclaim.
- [23] Kaspersky says the defendants' counterclaim is barred by a clause in the agreement that stated neither party would be liable for: ...indirect, incidental, special, consequential or punitive damages or for direct damages in excess of the amounts paid by the partner for the software programs or services that gave rise to the liability...
- [24] The applicability of that clause clearly depends on whether the alleged liability arises from "software programs or services". The counterclaim includes a claim for failure to deliver certain software, which may arguably be covered by the limitation clause. However, there is also a claim for wrongful termination of the contract that is not related to any specific products or services and it is difficult to see how that would come within the limitation clause. In any case, it will be for the trial judge to first determine what breaches, if any, occurred and then to consider whether those specific breaches are covered by the limitation clause.
- [25] The plaintiff's application for judgment under Rule 18A is therefore dismissed. "N. Smith J."

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