

CANADA / JUDGMENT

Kassam v. Dream Wines Corporation

2022 BCSC 1069

COURT

Supreme Court of British Columbia

DECIDED

27 June 2022

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2022 BCSC 1069 Kassam v. Dream Wines Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kassam v. Dream Wines Corporation,

2022 BCSC 1069

Date: 20220627

Docket: S215255

Registry: Vancouver

Between:

Moez Kassam

Plaintiff

And

Dream Wines Corporation and Brian Gunsten

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

J. K. Bienvenu

R.A. Hira

Counsel for the Defendants:

C. Watson

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 27, 2022

Introduction

- [1] The defendant Dream Wines Corporation ("Dream Wines") brings this summary trial application for an order dismissing the claim of the plaintiff Moez Kassam. Alternatively, Dream Wines seeks an order allowing it to commence a third party claim against its ex-Vice-President, the defendant Brian Gunsten.
- [2] Mr. Kassam's claim arises from the alleged breach of a contract made in November 2020, under which Mr. Kassam advanced \$85,000 for the purchase of 138 bottles of wine (the "Contract"). Mr. Kassam alleges that he never received his wine and seeks \$85,000 in damages plus interest and costs. Mr. Kassam alleges that the Contract was made between him and Dream Wines through its employee Mr. Gunsten. Alternatively, Mr. Kassam claims that Dream Wines is vicariously liable for the tortious conduct of Mr. Gunsten, conversion, and therefore is obliged to pay the damages resulting from Mr. Gunsten's actions.
- [3] Dream Wines denies that it was a party to or had any involvement in the formation of the Contract, which it contends was made between Mr. Kassam's company Anson Advisors Inc. and Mr. Gunsten personally. It disclaims any responsibility for Mr. Kassam's alleged losses.
- [4] Alternatively, Dream Wines contends that if it is somehow bound by the Contract as a result of Mr. Gunsten's status as their Vice-President at the relevant time, that the Contract is unenforceable for public policy reasons as the contract is tainted with illegality in that it contemplated delivery of wine in the Province of Ontario in violation of Ontario's liquor control legislation. Finally, Dream Wines denies that it can be held vicariously liable for any wrongdoing by Mr. Gunsten as his actions did not arise in the course of his employment.
- [5] Mr. Gunsten did not file a response to the notice of application filed by Dream Wines and did not appear at the hearing before me on June 2, 2022. In addition, Mr. Gunsten has not filed a response to the third party notice filed by Dream Wines. Counsel for the parties before me advise that Mr. Gunsten is now bankrupt and that any proceedings against him are effectively stayed.

Issues

- [6] The issues to be decided in this summary trial application include the following:
- a) Was the Contract entered into, as Mr. Kassam contends, between him and Dream Wines, through its authorized employee or agent, Mr. Gunsten?
 - b) If the answer to issue a) is yes, should this Court decline to enforce the Contract for public policy reasons? That is, because doing so will bring the administration of justice into disrepute because the Contract is tainted with illegality?
 - c) If Mr. Kassam's claim for breach of the Contract fails, can Dream Wines be held vicariously liable for alleged tortious conduct of Mr. Gunsten - being conversion?

Analysis

Did Dream Wines enter into a Contract with Mr. Kassam?

- [7] As the party seeking to enforce the Contract Mr. Kassam bears the onus of proving that he entered into the Contract with Dream Wines. The fact that this summary judgment application was brought by Dream Wines does not shift the onus of proof: see *Foomani v. Baggoo*, 2013 BCSC 2297 at para. 14.
- [8] For the reasons that follow I do not find that Mr. Kassam has satisfied his onus to prove that he entered into the Contract with Dream Wines. As a result, Dream Wines cannot be held liable in contract for Mr. Kassam's alleged losses.

Pre-Contract Circumstances

- [9] Mr. Kassam, a resident of Ontario, is a business person and wine collector. He is the principal of Anson Advisors Inc.
- [10] Dream Wines is an Alberta company with a head office in North Vancouver. It is in the business of selling wine to businesses in British Columbia and Alberta through liquor distribution agencies in these provinces. It does not handle the wine it sells which is transported from wineries to government-controlled warehouses and then to the purchasers. Dream Wines does not sell or deliver wines to individuals in Ontario.
- [11] Mr. Gunsten is a former employee of Dream Wines and was a company Vice President from 2011 until he was terminated for cause on February 12, 2021. Mr. Gunsten was terminated for "moonlighting" by selling wine other than through Dream Wines.
- [12] In September 2020, Mr. Gunsten emailed Mr. Kassam offering to sell him 20 individual bottles of burgundy wine. Mr. Gunsten communicated with Mr. Kassam using his company email account with the email address brian@dreamwines.ca. Mr. Kassam agreed to purchase 18 bottles of wine for \$50,000. Mr. Gunsten prepared and sent an invoice to Mr. Kassam's company, Anson Advisors Inc. This invoice was sent by Mr. Gunsten personally and did not reference Dream Wines in any place. The Invoice did not include any amounts

for GST or provincial sales tax. Anson Advisors Inc. paid the agreed upon \$50,000 directly to Mr. Gunsten's Royal Bank of Canada account by wire transfer.

- [13] The bottles of burgundy wine purchased by Mr. Kassam, or alternatively by Anson Advisors Inc., which were air couriered from Alberta to Ontario in October 2020, had not been listed for sale on Dream Wines website.

The Contract Itself

- [14] On November 25, 2020 Mr. Gunsten contacted Mr. Kassam by email, again using his Dream Wines email account, and offered to sell an additional 138 bottles of wine. In an email confirming an agreement to sell the wine for \$85,000, sent November 27, 2020, Mr. Gunsten stated "[o]kay deal Hahah I am still making a couple k. Better [than] nothing. Can you wire the funds today and I can secure the deal" (emphasis added). Mr. Kassam replied on November 27 and instructed his employee Anthony to transfer \$85,000 from Anson Advisors Inc. to Mr. Gunsten. Mr. Kassam also advised Mr. Gunsten that he needed an invoice "like that last time pls."
- [15] As was the case with the September 2020 invoice, the invoice issued by Mr. Gunsten on November 27, 2020 was sent to Anson Advisors Inc. by Mr. Gunsten using his Dream Wines email account. The November 27, 2020 invoice did not include any amounts for GST or PST. Anson Advisors Inc. paid the agreed upon \$85,000 directly to Mr. Gunsten's Royal Bank of Canada account by wire transfer. The wines set out in the November 27, 2020 invoice had never been listed for sale on Dream Wines' website.

Post Contract Circumstances

- [16] On March 22, 2021, Mr. Kassam became aware that Dream Wines had terminated Mr. Gunsten's employment.
- [17] Between March and May 2021 Mr. Gunsten and Mr. Kassam exchanged text messages in which Mr. Kassam pursued Mr. Gunsten for repayment of the \$85,000 paid by Anson Advisors Inc. to Mr. Gunsten in November 2020. For example, on March 29, 2021, Mr. Gunsten texted Mr. Kassam offering to personally send him \$10,000 every Friday along with a list of wine. On April 1, 2021 Mr. Gunsten texted Mr. Kassam stating that "I will do my best to send some today. I have a funds arriving tomorrow that I guessing will get pushed until Monday " and later that day "I will do an etransfer on Saturday". On April 3, 2021, Mr. Gunsten sent a text to Mr. Kassam stating "[s]orry just waiting for my funds to arrive. I think the banks being closed yesterday didn't help."
- [18] Mr. Gunsten personally wired Mr. Kassam some money in partial repayment of the funds wired by Anson Advisors Inc., including sending \$1,500 on April 5, 2021 and \$200 on April 15 and 21, 2021.

Conclusion regarding the parties to the contract

- [19] Mr. Kassam contends that this Court should find that the Contract was entered into between him and Dream Wines, through Mr. Gunsten who entered into the Contract on Dream Wines' behalf in his capacity as its employee and Vice President.
- [20] Mr. Kassam relies on the objective evidence that Mr. Gunsten always used his work email address to communicate with him and on Mr. Gunsten's status as a Vice President with Dream Wines. In addition, he states that subjectively he believed that he was entering into a contract with Dream Wines and that Mr. Gunsten had the authority to bind the company.
- [21] The facts of this case are analogous to those in *Bourgeault v. McDermid, Miller & McDermid Ltd.* (1982), 140 D.L.R. (3d) 174, [1982] B.C.J. No. 1750 (C.A.). In *Bourgeault*, the plaintiff claimed against a stock brokerage firm for damages suffered as a result of the fraud of a salesman employed by the defendant brokerage, Mr. Good, involving a sham sale of bonds: *Bourgeault* at 174.
- [22] Justice McKinnon noted that the bonds at issue were purchased and paid for by the plaintiffs by cheques payable to Mr. Good and when the plaintiffs sought repayment they did not seek it from the brokerage but from Mr. Good. In addition, Justice McKinnon noted that there was no dispute that Mr. Good was authorized to receive payments for the purchase and sale of bonds, but found that the brokerage never granted any authority to him to receive funds from customers by payment to him personally. *Bourgeault* at 174.
- [23] Justice McKinnon found that in receiving funds directly from the plaintiffs Mr. Good was acting outside the scope of his employment and the brokerage could not be held liable for such conduct: *Bourgeault* at 177.
- [24] Employees must have express or apparent authority to bind their employer by a contract with a third party: G.H.L. Fridman, *Canadian Agency Law*, 3rd ed. (Markham, Ontario: LexisNexis Canada, 2017) at 25. No evidence suggests that Dream Wines gave Mr. Gunsten express or apparent authority to enter into the contract with Mr. Kassam. In addition, the Contract cannot be said to be one that is "customary or usual" for Dream Wines to enter into: *Business Corporations Act*, S.B.C. 2002, c. 57 s. 146(c)(ii).
- [25] Mr. Kassam's subjective belief that he was entering into the Contract, with Dream Wines, is not relevant. Parties must intend to be legally bound by their agreement for it to bind them. As well, the essential terms of the agreement, including the parties to the contract, must be settled. Finally, the terms agreed upon must be sufficiently certain. Whether these three requirements have been met must be determined from the standpoint of the objective reasonable bystander and not the subjective intentions of the parties: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at paras. 36-37; *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29 at para. 33. The determination is contextual and must take into account all material facts including communications between the parties and conduct before and after the agreement is made:

Oswald v. Start Up SRL, 2021 BCCA 352 at para. 34.

- [26] In my view, a reasonable objective bystander considering all of the circumstances before and after the Contract was formed would not find that Mr. Kassam had entered into the Contract with Dream Wines. The fact that Mr. Gunsten used his corporate email account to communicate with Mr. Kassam and his employment status with Dream Wines does not overcome the other objective evidence including the following:
- a) Dream Wines was not in the business of selling wine to individuals.
 - b) Dream Wines did not list the wine at issue for sale on its website.
 - c) Mr. Gunsten's messages to Mr. Kassam before the Contract was formed suggest that he was entering into the transaction on his own behalf to earn a commission.
 - d) The invoices for the first wine sale and the second failed wine sale (the subject of the Contract) were issued by Mr. Gunsten personally, did not include any amounts for GST or provincial sales tax - suggesting that the transaction was "off the books" - and on both occasions payment was sent from Mr. Kassam's company, Anson Advisors Inc. to Mr. Gunsten personally.
 - e) Despite paying \$85,000 to Mr. Gunsten in November 2020, Mr. Kassam continued to communicate only with him in an effort to obtain a reimbursement, including after March 22, 2021, when he became aware that Mr. Gunsten had been fired by Dream Wines. During the month of April 2021, it was Mr. Gunsten and not Dream Wines who partially reimbursed Anson Advisors Inc. Mr. Kassam did not reach out to the president of Dream Wines, Eric Tetrault, until May 12, 2021 - approximately five months after his company forwarded \$85,000 to Mr. Gunsten[1].
- [27] Mr. Kassam contends that under the "indoor management rule" codified in s. 146 of the Business Corporations Act applies. Section 146(c)(ii) of the BCA provides that a company may not assert that a person held out as a director, officer or agent of a company does not have the authority to exercise the powers or perform the duties that are customary in the business of the company or usual for such director, officer or agent.
- [28] In my view, before his termination in February 2021, Mr. Gunsten was in general acting as an agent of Dream Wines. I am not satisfied that Mr. Gunsten, in selling wine directly to either Mr. Kassam or his company Anson Advisors Inc., pursuant to the contract, was performing the duties customarily in Dream Wines business. Dream Wines has provided evidence which establishes that its customary business did not include selling wine directly to individuals. Dream Wines acted, in effect, as a broker between wine producers and purchasers and only sold wine through liquor distribution authorities in Alberta and British Columbia.

[29] In summary, I conclude that the Contract was between either Mr. Kassam or his company Anson Advisors Inc. (it is not necessary to determine which) and Mr. Gunsten in his personal capacity. Accordingly, there can be no claim for the alleged breach of the Contract made against Dream Wines.

Is the Contract unenforceable for public policy reasons?

[30] Given my findings above, it is unnecessary for me to consider whether the Contract is unenforceable for public policy reasons because it is tainted with illegality.

Should Dream Wines be held vicariously liable for the alleged tortious conduct of Mr. Gunsten - being conversion?

[31] Conversion is a tort that occurs when a person without authority or permission wrongfully interferes with the goods of another, such as by taking their goods. It is a strict liability offence and it is not a defence that the wrongful act was done innocently: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31.

[32] Having the funds of another person, without that person's permission, and without such possession being pursuant to any legal entitlement amounts to conversion: *Wymor Construction v. Gray*, 2012 ONSC 5022.

[33] The Contract was made between Mr. Kassam, or arguably Anson Advisors Inc., and Mr. Gunsten. In this case Mr. Kassam instructed an employee with his company Anson Advisors Inc. to wire transfer \$85,000 to Mr. Gunsten pursuant to the Contract. Accordingly, it cannot be said that the \$85,000 was received by Mr. Gunsten without the permission of Mr. Kassam or without legal entitlement.

[34] A number of BC cases stand for the proposition that funds can be the subject of conversion: *Ast v. Mikolas*, 2010 BCSC 127 at para. 128; *Pang v. Zhang*, 2021 BCSC 591 at para. 42; *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248 at para. 30.

[35] At para. 36 of *Nelson v. Gokturk*, 2021 BCSC 813, Justice Tucker referenced a list of "seven principled ways in which conversion can occur", from *Clerk & Lindsell on Torts*, 20th Edition at page 1115, which includes "when property is wrongfully retained".

[36] In 0923063 B.C. Ltd. v. JM Food Services Ltd., 2019 BCSC 553, Justice Macintosh found that the defendant's retention and use of funds, which had initially been paid as earnest-money towards a potential purchase of a franchise by the plaintiffs, to pay off an existing debt owed by the plaintiff constituted conversion: at paras. 98-99.

[37] In this case the documentary evidence suggests that Mr. Gunsten paid for the wine using the \$85,000 provided by Anson Advisors Inc. but the wine shipment was damaged and sent back. The evidence also suggests that Mr. Gunsten was seeking to obtain a return of the \$85,000 which would be reimbursed. This never occurred.

- [38] There is no evidence on which I can find that Mr. Gunsten converted the \$85,000 paid for the wine or the wine to his own use.
- [39] Mr. Gunsten's failure to return all of the \$85,000 does not constitute conversion of Anson Advisors Inc.'s funds - but rather breach of the Contract by not delivering \$85,000 worth of wine to Mr. Kassam as agreed.
- [40] In the application before me, other than the tort of conversion Mr. Kassam did not advance any other claims against Mr. Gunsten for which Dream Wines could be vicariously liable. As a result, given my finding that the tort of conversion does not arise in this case, there is no basis for a finding of vicarious liability against Dream Wines.

Conclusion

For the reasons set out above I dismiss the plaintiff's claim against the defendant Dream Wines Corporation.

"Mayer, J."

- [1] It is unnecessary for me to consider the conflicting evidence of Mr. Tetrault and Mr. Kassam as to whether Mr. Kassam advised Mr. Tetrault on May 12, 2021 that the Contract was a "personal matter", as Mr. Tetrault has sworn.

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