

CANADA / JUDGMENT

Marshall v. Gain Auto Group

2021 BCSC 125

COURT

Supreme Court of British Columbia

DECIDED

28 January 2021

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2021 BCSC 125 Marshall v. Gain Auto Group

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marshall v. Gain Auto Group,

2021 BCSC 125

Date: 20210128

Docket: 194754

Registry: Victoria

Between:

Kristine Marshall and Allan Marshall

Plaintiffs

And

Gain Auto Group, Gain-VI Inc., Volkswagen Group Canada Inc.,

and 1839928 Ontario Limited d.b.a. Volkswagen Victoria

Defendants

Before: The Honourable Madam Justice Murray

Reasons for Judgment

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Place and Date of Hearing:

Victoria, B.C.

January 14, 2021

Place and Date of Judgment:

Victoria, B.C.

January 28, 2021

Introduction

- [1] The applicant Gain-VI Inc. Ltd. ("Gain-VI") applies to strike the Marshalls' claim against them pursuant to Rule 9-5(1) on the basis that it does not disclose a reasonable cause of action. Alternatively, Gain-VI applies for an order pursuant to Rule 9-6 dismissing the claim against it.
- [2] Gain-VI is an extraprovincial company. It owns 1839928 Ontario ("Numbered Co."), another extraprovincial company, which operates the Volkswagen Victoria ("VW Victoria") car dealership.
- [3] Numbered Co. has a dealership contract with Volkswagen Group Canada Inc. ("VW Canada") to sell Volkswagen vehicles and perform all functions of a full Volkswagen dealership.
- [4] On September 12, 2017, Kristine and Allan Marshall ("the Marshalls") entered into a contract with Numbered Co. to purchase a brand new 2018 VW Atlas for approximately \$60,000, which the Marshalls paid in full before taking possession of the Atlas. The Atlas was covered by a four-year/80,000km limited warranty which covered manufacturer's defects (with some exceptions) and a powertrain warranty.
- [5] Put bluntly, the Atlas was a lemon. The Marshalls were in and out of VW Victoria repeatedly with countless issues regarding the infotainment system, the safety system, the stalling/ EVAP system and various other defects. The problems persisted.
- [6] Finally, on or about August 14, 2019, a VW Victoria salesperson handed the Marshalls a letter stating that the Atlas was unsafe to drive. The Marshalls were asked to sign the letter to acknowledge their sole responsibility for any potential risks to themselves or the public. VW Victoria represented that the letter was prepared by VW Canada. The Marshalls refused to sign the letter and left the Atlas at VW Victoria.

- [7] The Marshalls drove a courtesy car while VW Victoria performed further repairs. At the end of August 2019, VW Victoria demanded that the Marshalls return the courtesy car and retrieve their Atlas. VW Victoria assured the Marshalls that the Atlas was, as a result of their further work, safe to drive but refused to provide a letter to that effect.
- [8] On August 28, 2019, the Marshalls had the Atlas towed to their home. They drove it about 50 feet to a parking spot and a warning light came on. A few days later when they tried to move it to an adjacent parking place the engine light came on and the interior filled with the strong odour of gasoline. Out of fear of a fire hazard, the Marshalls turned the car off, opened the doors and hood and called the fire department. Firefighters attended, unhooked the battery and told them not to reattach the battery or attempt to operate the car until it was repaired. The Atlas was left on the Marshalls' lawn.
- [9] Between September 2017 and August 2019 the Marshalls took the Atlas into VW Victoria more than 40 times for repairs of the defects. The car remains un-driveable. Since late August 2019, the Marshalls have been driving rental vehicles.
- [10] They have been trying to obtain financing to get a replacement vehicle from another manufacturer/dealership. They say that because of the nature, extent, persistence and irreparability of the defects the Atlas is both unsafe to drive and unsellable.
- [11] On October 25, 2019 the Marshalls filed a notice of civil claim seeking an order that the defendants reclaim the Atlas at their expense, and damages for breach of contract and mental distress. Specifically, they say the vehicle was provided in breach of contract, either as an express warranty under the contract or the implied condition under s. 18 of the Sale of Goods Act, R.S.B.C. 1996, c. 410, that the car is fit to drive. They claim damages flowing from the defendants' breach. They further claim damages for mental distress, frustration, anxiety and inconvenience suffered as a result of the breach and what they describe as VW Victoria's high-handed and malicious conduct toward them.
- [12] Gain-VI argues that, while the Marshalls may have valid claims against Numbered Co. and Volkswagen Canada, they do not have a claim against them.

Positions of the Parties

- [13] The applicant Gain-VI submits that the plaintiff's claim against them should be struck for two reasons:
- a) there is no contract between them and the Marshalls; and
 - b) the Marshalls have provided no particulars to substantiate an agency relationship between them and Numbered Co.
- [14] Overall, Gain-VI says that to allow the Marshalls to proceed against Gain-VI is to allow them to pierce the corporate veil of Numbered Co.
- [15] The Marshalls argue that their claims are made out against Gain-VI in these ways:

- 1) VW Victoria's general manager made representations to them that he took instructions from representatives and employees of Gain-VI including its CEO; and
 - 2) the proposed amended notice of claim and reply pleads sufficient particulars to bring an air of reality to their allegations that Gain-VI was party to the contract between the plaintiffs and VW Victoria as a consequence of VW Victoria acting as an agent of Gain-VI at all material times.
- [16] In addition, the Marshalls argue that there is a reasonable prospect that further disclosure and discovery will uncover material evidence to support their claim of an agency relationship between VW Victoria and Gain-VI. They submit that their claim should not be prematurely struck before they have the chance to explore it in examinations for discovery.

Issue

- [17] The issue is whether the Marshalls' claim against Gain-VI should be struck pursuant to Rule 9-5(1) as the pleadings disclose no reasonable claim.
- [18] If the answer is no, I must go on to consider whether the claim against Gain-VI should be dismissed pursuant to Rule 9-6.

Issue 1: Whether the Marshalls' claim against Gain-VI should be struck

The Law

Rule 9-5

- [19] Rule 9-5(1)(a) of the Supreme Court Civil Rules provides that the court may strike the whole or any part of a proceeding on the ground that it discloses no reasonable claim.
- [20] A claim will be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. The court must read the plaintiff's pleadings as generously towards the plaintiffs as possible: *Knight* at para. 17.
- [21] Rule 9-5 is an attack on pleadings on the basis that the claim as pleaded or as it may reasonably be amended cannot succeed as a matter of law. In assessing an application under Rule 9-5 the court is confined to a consideration of the pleading. Evidence is not to be considered: *Drummond v. Moore*, 2012 BCSC 496 at paras. 16-23.
- [22] In terms of particularization of claims, the threshold is low to support a plaintiff's claim prior to discovery. It has been described as "some evidence even if very little": *Protonic Electronics Limited and Far East United Electronics Ltd. v. Wong et al.*, (1985) 67 B.C.L.R. 237 at p. 241 as followed in *Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.*, [1993] B.C.J. No. 599 at para. 15. The plaintiff must be able to explore its claim without having its hands tied, particularly when some required information might be in the hands of yet-to-be discovered defendants: *Cambie Forming Ltd. v. Accuform Construction Ltd.*, 2016 BCSC 266

at paras. 34-43.

Agency

[23] In *CIT Financial Ltd. v. Gee Force Logistics Inc.*, 2020 BCSC 18 at paras. 49-51, Russell J. summarized the law of agency as follows:

49 The meaning of an agency relationship was recently explored in *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 (B.C. C.A.):

[65] It may be useful to recall how an agency relationship may arise, and the meaning of "actual" and "apparent" agency. F.M.B. Reynolds, the author of *Bowstead and Reynolds on Agency* (17th ed., 2001) states succinctly:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.

...

Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

50 An agency relationship can derive from actual or apparent (ostensible) authority. Further, actual authority can be attributed to an agent by a principal through express or implied conduct. Thus, the principal-agent relationship can manifest in three ways: express agency, implied agency, and ostensible agency.

51 The parties disagree on which form of agency is relevant to the facts at hand. The defendants cite *Doiron v. Devon Capital Corp.*, 2003 ABCA 336 (Alta. C.A.), an authority on ostensible agency which has been cited favourably by this Court: see *Soleil Hotel & Suites Ltd. v. Soleil Management Inc.*, 2009 BCSC 1303 (B.C. S.C.) at para. 348; *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2013 BCSC 866 (B.C. S.C.) at para. 156. In *Doiron*, the Alberta Court of Appeal states:

[13] The doctrine of ostensible authority serves to give an agent the authority to bind a principal to agreements made with third parties in circumstances where the agent has no actual authority to do so. The requirements to establish ostensible authority are set out in the leading case of *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 1 All E.R. 630 (C.A.). They are:

- a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

- b) that such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
- c) that the contractor was induced by such representation to enter into the contract (i.e. that he in fact relied upon it); and
- d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

[14] The test for ostensible authority has also been stated by Slade, J., in *Rama Corp. Ltd. v. Proved Tin & General Investments Ltd.*, [1952] 2 Q.B. 147 at pp. 149-50:

Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance.

Analysis

[24] There is no contract between Gain-VI and the Marshalls. The Marshalls' contract for purchase of the Atlas is with VW Victoria on behalf of Numbered Co. The contract contains an entire agreement clause stating that:

This Agreement constitutes the entire agreement between the Buyer and the Seller and there are no representations, warranties or guarantees except as expressly set out in this Agreement.

[25] The Marshalls' claim against Gain-VI is contingent on an agency relationship being found between Gain-VI and VW Victoria. That is made clear from their response to this application in which they state that "the Claim and Reply, or alternatively the draft Amended Claim, pleads sufficient material facts to bring an air of reality to the plaintiffs' allegations that [Gain-VI] were parties to the contract between the plaintiffs and VW Victoria as a consequence of VW Victoria acting as the agent of [Gain-VI] at all material times".

[26] The plaintiffs' pleadings (including their reply and proposed draft amended notice of civil claim, which is appended to an affidavit) regarding apparent authority are as follows:

- 1) Daniel Shaver, the general manager of VW Victoria, made representations that he took instructions from representatives of Gain-VI Inc. including its CEO.
- 2) VW Victoria acted as, or led the plaintiffs to reasonably believe that it was the ostensible/ actual agent of Gain-VI with regard to the sale of the Atlas, the plaintiffs' requests for a refund for the Atlas, and all matters relating to the Purchase Agreement and the Sale of Goods Act warranty.

- 3) VW Victoria employees who interacted with the plaintiffs were agents of Gain-VI as Gain-VI was their employer/principal.
- 4) There was agency by estoppel because:
- (a) it was reasonable for the plaintiffs to believe VW Victoria's representations of apparent authority and that it was acting as an intermediary between the plaintiffs and the other defendants [Gain-VI and/or VW Canada];
 - (b) Gain-VI and VW Canada knew/ought to have known about some or all of the representations of authority VW Victoria made to the plaintiffs, some of which the plaintiffs advised them of directly;
 - (c) the plaintiffs detrimentally relied on those representations; and
 - (d) none of the defendants took any steps to clarify VW Victoria's actual authority, or lack thereof, to the plaintiffs at any material time prior to the start of this proceeding.
- [27] There are a number of difficulties with these assertions. First, there are no material facts pled by the plaintiff establishing that VW Victoria or Gain-VI made any pre-contractual representations that the Marshalls were entering into the purchase agreement with Gain-VI or that Gain-VI was a party to the purchase agreement. All that is alleged is that Gain-VI instructed VW Victoria, presumably about dealing with the plaintiffs' warranty and refund requests, sometime after the purchase agreement was executed.
- [28] Second, the "representations of authority" relied on by the Marshalls occurred only after the formation of the contract. All of the Marshalls' claims flow from the contract itself, including their claim for damages for mental distress, which is not an independent tort: *Wharton v. Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, 2002 BCCA 78 at paras. 47-61. To put it in the words used by the Court of Appeal in *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235 at paras. 64-68, there was no "authorization" or "manifestation of consent", express or implied, made by Gain-VI or VW Victoria to the Marshalls that VW Victoria was an agent of Gain-VI around the time the contract was entered into.
- [29] Third, as to Gain-VI's contention that allowing the Marshalls' claim against it would be to pierce the corporate veil, the fact remains that only Numbered Co. through VW Victoria was bound by the purchase agreement. There is a lack of privity between Gain-VI and the Marshalls, which precludes a claim for damages against Gain-VI via breach of contract or warranty. In *Century 21 Coastal Realty Ltd. v. 0863846 B.C. Ltd.*, 2017 BCSC 1498 at para. 44, *aff'd* 2018 BCCA 298, *Dardi J. cited Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256 for the following principles regarding the lifting of the corporate veil:

[49] While a corporation is a legal entity distinct from its shareholders, this principle may be disregarded by 'lifting the corporate veil' and regarding the company as the agent or vehicle of its controlling shareholder or parent corporation where enforcing the 'separate entities' principle would yield a result "too flagrantly opposed to justice": *Kosmopoulos v. Constitution Ins. Co. of Canada*, [1987] 1 S.C.R. 2, at para. 12, citing L.C.B. Gower, *Modern Company Law* 4th ed. (London: Stevens, 1979), at p. 112.

[50] But this does not mean that the courts enjoy 'carte blanche' to lift the corporate veil absent fraudulent or improper conduct whenever it appears 'just and equitable' to do so. In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), aff'd, [1997] O.J. No. 3754 (C.A.), Sharpe J. (as he then was) indicated at pp. 433-34:

[T]he courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently . . .

The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights"? (Citations omitted.)

[30] In my view, there are no material facts that suggest grounds for piercing the corporate veil. Specifically, there is no indication in the pleadings that VW Victoria, which is one of the various car dealership businesses that Gain-VI owns, was a "mere corporate façade" for Gain-VI's own activities or that it was used to shield Gain-VI from fraudulent or improper conduct: *Century 21* at para. 45. I am not persuaded that the corporate veil should be pierced. To do so would be to disregard Gain-VI's distinct legal personality, which would undermine entirely the purpose of its corporate structuring.

[31] Based on the pleadings alone, I am satisfied that it is plain and obvious that the Marshalls will not succeed in establishing the required elements of breach of contract or warranty against Gain-VI- either directly or through ostensible agency. As such, their claim against Gain-VI is bound to fail. There remains a viable action against Numbered Co. and VW Canada.

[32] Examinations for discovery may reveal further insight into Gain-VI's involvement, if any. Should the plaintiffs decide to pursue a claim against Gain-VI based on new information, they may apply to add them as parties via Rule 6-2(7).

Conclusion

[33] The action against Gain-VI is struck pursuant to Rule 9-5(1).

[34] I will hear further submissions from the parties with respect to the costs of this application. The parties may contact Supreme Court scheduling to set a one hour hearing at 9:00 a.m. any morning before court.

"The Honourable Madam Justice Murray"

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