
CANADA / JUDGMENT

Ohman v. Synq Access + Security Technology Limited

2018 BCSC 1078

COURT

Supreme Court of British Columbia

DECIDED

29 June 2018

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2018 BCSC 1078 Ohman v. Synq Access + Security Technology Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ohman v. Synq Access + Security Technology Limited,

2018 BCSC 1078

Date: 20180629

Docket: S187014

Registry: New Westminster

Between:

Grant Ohman

Plaintiff

And

Synq Access + Security Technology Limited

Defendant

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment on Summary Trial

Counsel for the Plaintiff:

R.A. Finlay

Counsel for the Defendant:

P.F. Waller

Place and Date of Hearing:

New Westminster, B.C.

October 27, 2017

January 19 and February 7, 2018

Place and Date of Judgment:

New Westminster, B.C.

June 29, 2018

- [1] The plaintiff seeks judgment on a summary trial under Rule 9-7 of the Supreme Court Civil Rules, for debt and money had and received in an amount of \$225,000 plus accrued contractual interest to the date of judgment. The claim is based upon a promissory note dated July 21, 2016. As well, the plaintiff seeks judgment in an amount of \$8,268.51 plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, which was the amount of business expenses charged by the defendant on a credit card owned by the plaintiff. Finally, the plaintiff seeks "legal and execution costs on a solicitor-client basis".
- [2] The amended response to civil claim denies: (1) the promissory note was made; (2) any contract or relationship between the parties included terms that were a loan or indebtedness; (3) that advances were repayable on demand; (4) that the advances are due and owing; (5) that the defendant authorized or accepted the advances totalling \$8,268.51; (6) that the defendant received consideration as alleged; (6) that the defendant promised to repay the advances; and (7) that the plaintiff has made demand.
- [3] Further, the defendant has listed significant additional facts in the amended response to civil claim which set out a detailed and very complex relationship between the parties and several other persons and corporations which will be referred to later in these reasons. These facts essentially allege that the plaintiff and an associate of the plaintiff gained access to the defendant's confidential and proprietary information so that the information could be converted to the plaintiff's use and to the use of other persons and corporations.
- [4] The defendant describes its business in the amended response to civil claim as follows:
1. The Defendant is in the business of developing, manufacturing and selling security systems to prevent theft. Primarily, it designs, manufactures, distributes and installs technology to prevent shoplifting.

- [5] The plaintiff has set out its claim as a simple debt action centering around a promissory note whereas the defendant alleges the plaintiff has worked with others to transfer and assign the right, title and interest in the defendant's technology to a new company for their own purposes in breach of the plaintiff's obligations to the defendant.

Background Facts

- [6] The plaintiff, Grant Ohman, is businessman who met Nolan Wheeler, the principal of the defendant, in 2016. Discussions ensued in which Mr. Ohman expressed interest in investing in the defendant, Synq.
- [7] On May 18, 2016, Mr. Ohman and two of his associates, Greg Watkin and Lee Edmonston (collectively referred to as "Greg Associates") entered into a Term Sheet, under which Greg and Associates would loan \$250,000 to a new company, the shares of which were to be held by Greg Associates and Synq. As part of the Term Sheet, Synq was to assign certain physical and intellectual property to the new company, which was incorporated as 1076342 B.C. Ltd.
- [8] Mr. Ohman has deposed that Synq failed to assign the physical and intellectual property which resulted in Mr. Ohman and Mr. Watkin terminating the Term Sheet on July 8, 2016.
- [9] Between May 26, 2016 and July 28, 2016, Mr. Ohman advanced a total of \$225,000 to Synq. The defence admits to having received that amount from Mr. Ohman.
- [10] On July 21, 2016, Mr. Wheeler for Synq provided a promissory note in the amount of \$250,000 to Mr. Ohman. Mr. Wheeler has admitted that he signed the promissory note as an officer of Synq. Mr. Wheeler has deposed that his investment advisor, Mr. Sexsmith, had provided advice to Mr. Wheeler to obtain a promissory note as Mr. Wheeler wanted to be clear that Mr. Ohman was not to be an owner of Synq or its assets. Mr. Wheeler deposed, at paras. 123, 125, 126 and 130 of his affidavit #1 of January 30, 2017:
123. Mr. Sexsmith stated to me that the investment of the plaintiff had to be clarified in order to enhance the attractiveness of the new company. He stated that a promissory note with the plaintiff would be simply a placeholder, and that it was required due to a potential position the plaintiff might try to make on assets.
-
125. As part of my efforts to attract investors, I asked [the] plaintiff if he would sign a promissory note. I wished to have him clarify that he was not presently an owner of assets or shares.
126. The Promissory Note was written by Mr. Sexsmith
-
130. I signed the Promissory Note. I delivered it to the plaintiff on July 21, 2016.

The facts deposed to in para. 123 are hearsay, however, do reflect Mr. Wheeler's understanding of the nature of Mr. Ohman's investment and is not evidence of the truth of Mr. Sexmith's statements.

- [11] The promissory note was signed by Mr. Ohman in his own right and by Mr. Wheeler for Synq on July 21, 2016. The promissory note is in an amount of \$250,000, however, only a total of \$225,000 was advanced to Synq by Mr. Ohman. The relevant terms of the promissory note are:

Promissory Note

\$250,000 Date: July 21, 2016

For value received, the undersigned SYNQ ACCESS + SECURITY TECHNOLOGY LIMITED (the "Borrower") at Sumas St., Victoria, B.C. — promises to pay to the order of Grant Ohman (the "Lender") . . . the sum of \$250,000 with interest from July 1, 2016, on the unpaid balance at the rate of 3.25% per annum.

The advances of 25,000 (May 16, 2016), \$50,000 (June 8, 2016), \$50,000 (July 19, 2016) and a due sum of \$125,000 upon signature of this document.

1. Terms of Repayment

A. Payments

The unpaid principal and accrued interest shall be payable in full on any future date on which the Lender demands repayment (the "due date").

. . . .

- [12] The promissory note also stated that all principal and interest is to be paid in the legal currency of the United States and also listed several possible acts of default, including the failure of the Borrower to pay the principal and interest when due. The funds advanced were all in Canadian dollars. The apparent contradiction of the loan having been made in Canadian funds and being repayable in U.S. funds was referenced by Mr. Ohman in his affidavit #1 as follows:
11. The defendant seems to be confused regarding the currency of the Promissory Note. The Note says (at paragraph vi) that all payments must be made by the defendant in the currency of the United States. It does not say that the amount loaned was in U.S. currency. It simply requires the Defendant to repay in U.S. currency.
 12. I advanced Canadian dollars to the Defendant and have claimed in debt in Canadian dollars for the amount of \$225,000 as evidenced by the Note. Whether one calculates the debt in U.S. funds or Canadian funds does not alter the character of the transaction, or this lawsuit. The defendant owes the sum I have claimed, regardless of the currency it is paid in.

- [13] The final advance of funds contemplated in the promissory note was to be in an amount of \$125,000, however, Mr. Ohman only advanced \$100,000 in the final advance on July 26, 2016. No evidence has been provided to explain why the lesser amount was paid on the final advance and Synq has not raised any objection to the amount of the final advance.
- [14] At paras. 131 to 176 of his affidavit #1, Mr. Wheeler has described in detail negotiations which continued between him, Mr. Ohman and others. Much of the content of those paragraphs amount to hearsay and opinion evidence regarding negotiations which continued until late November or early December 2016. In his affidavit #2 dated October 2, 2017, Mr. Wheeler repeated and expanded upon the actions of Mr. Ohman, Mr. Wheeler and others in which he alleges several parties conspired to appropriate the technology developed by Synq.
- [15] Also in his affidavit #1, Mr. Wheeler deposed at para. 168 that he received the executed promissory note attached to a letter dated December 5, 2016 from Mr. Ohman. The covering letter from Mr. Ohman stated as follows:
- Enclosed is a signed copy for your records of the promissory note you provided July 21, 2016.
- It's been a disappointing journey which I see no resolution to resolving and therefore my interest in supporting SYNQ Access + Security Technology is terminated as of today.
- Please return all monies and expenses incurred by myself immediately to the address above.
- [16] Mr. Ohman relies on the letter of December 5, 2016 as the demand which was intended to trigger payment on the promissory note.
- [17] Also attached to Mr. Ohman's affidavit #1 are credit card statements and charges which Mr. Ohman deposes as having been "specifically discussed and agreed to by Mr. Wheeler . . .". Mr. Ohman also attached in the same affidavit a copy of an email string with Mr. Wheeler's assistant, the latter of whom stated on September 16, 2016:

Great, thanks Grant.

Before I write your cheque, I will just send you an excel spreadsheet reflecting the amounts owing for expense reimbursement for you to review so you can ensure that we aren't missing anything. .

- [18] Mr. Wheeler has deposed as follows in his affidavit #1 sworn January 30, 2017 in regards to the claim for \$8,268.51:
193. That document [the Notice of Civil Claim] contains the first notice to me and the defendant that the plaintiff claimed \$8,268.51 to be owing from the defendant for certain expenses on his credit card.
194. Neither me nor the defendant has received a demand for payment of this amount, aside from the Notice of Civil Claim.

195. There was no agreement that dealt with this amount.

. . . .

200. Neither me nor the defendant authorized these purchases. Mr. Watkin, the CEO of 1076342B.C. Ltd, instructed these items to be purchased.

201. There has never been any conversations or negotiations about funds to be repaid, what qualifies as funds differentiated for re-payment vs. funds used for other matters (as per the Term Sheet).

[19] In September of 2017 the defendant commenced action No. 173415 in the Victoria Registry of this court against Mr. Ohman, Mr. Watkin, Thomas Kyle Hall, Alex Holowko, Flashgate Technology Inc., Provent Technologies Corporation, Anne Flanagan, Alliance Patents Limited, Dawn Wattie and Dawn Wattie Law Corporation. That action contains allegations of those defendants having obtained, through negotiations and agreements with Synq, proprietary information and technology which was in turn provided to others including the defendant Flashgate Technology Inc. The claims are many and relate to an application for a declaration that a patent application is void, special damages, aggravated damages, injunctive relief, unjust enrichment, special costs and interest. Portions of the amended response to civil claim in the present action are repeated in the Victoria action including an allegation that the plaintiff, Mr. Watkin and others had converted confidential information of the defendant for their own use and "used their status under the Term Sheet to gain access to the defendant's confidential and proprietary information so they could convert it to their own use".

[20] The defendant then seeks, at para. 3 of Part 3 of the amended response to civil claim in this action:

3. The defendant will seek to set off the sum, if any, due from it to the Plaintiff. The facts which give rise to the set-off are set out in the additional facts set out in paragraphs 1 to 35 of Part 1 of this amended response to civil claim.

[21] There is no mention of the promissory note in the notice of civil claim in the Victoria action. In the amended response to civil claim in this action, in addition to the claim for a set-off, the defendant pleads it did not receive consideration for the promissory note, denies it received a demand for payment and finally, that if the advances were loans, the sums are not due and owing. The defendant has not pleaded an amount claimed by way of set-off in this action or in the Victoria action.

[22] Based upon the pleadings of the defendant in this action and in the Victoria action, the defendant claims this claim should be heard together with the Victoria action, although no application has been made by the defendant to consolidate the actions or to have the actions heard together.

Suitability for Summary Trial

- [23] The plaintiff submits this action is suitable for determination by summary trial in that the essential facts to prove in order to prove the debt, ie. the advance of funds by the plaintiff to the defendant, the execution of a promissory note evidencing the debt and the demand by the plaintiff for payment are all either admitted or not denied by the defendant: see *Charest v. Poch*, 2011 BCSC 1165.
- [24] The defendant submits that the defences set out in the amended response to civil claim and the claims described in the notice of civil claim in the Victoria action are peripheral to the essential facts the plaintiff needs to prove in order to be entitled to a judgment in debt. As well, the complex facts deposed to in the affidavits of Mr. Wheeler illustrate conflicts in the evidence of the two parties which cannot reasonably and fairly be resolved by way of affidavits in a summary trial, ie. that it would be unjust to decide the issues by way of affidavits on a summary trial. Finally, the defence submits the plaintiff's affidavits contain argument, opinion and hearsay and are largely inadmissible.
- [25] I was referred by the defence to the decision of *Gichuru v. Pallai*, 2013 BCCA 60 at para. 30, in which the court also referenced *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) [*Inspiration Management*]:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [26] In this case, the question before the court is whether the conflicting evidence is such that the essential issues cannot be resolved based upon the affidavit evidence before the court.
- [27] After careful consideration of the submissions of both parties, I am satisfied that the claims of the plaintiff are clearly and simply supported by the affidavits of Mr. Ohman in that they evidence the advance of the sum of \$225,000 to the defendant, the promissory note which also reflects the advance of funds and the terms of the loan including events of default and the delivery of a demand for payment which triggered the defendant's obligation to pay. The defendant acknowledges receipt of the funds and that it had the promissory note prepared

by a lawyer before presenting the same to Mr. Ohman. The terms of the promissory note are clear and identify a loan as opposed to an investment in the defendant which is what had been contemplated in the Term Sheet.

[28] I also note that the essential elements of the claim are deposed to by Mr. Ohman and could not be considered to be argumentative or hearsay as submitted by the defence. Mr. Ohman was directly involved in the discussions with Mr. Wheeler. There was no hearsay respecting the essential elements of the plaintiff's claim.

[29] I find, considering all factors set out in Inspiration Management and the other authorities referred to me that it is appropriate and just that this matter be decided on a summary trial and that to do so is not "unjust" regarding the interests of the defendant.

Decision

[30] For the reasons set out below, I find that the plaintiff is entitled to judgment in the amount of \$225,000 plus contractual interest at 3.25% from the date of the advances.

[31] Judgment is based upon the following:

- a) Mr. Wheeler's affidavit #1 includes many statements by third parties which are hearsay and not admissible on a summary trial. Much of the remaining portions of that affidavit include statements that do not relate to the promissory note.
- b) The affidavits of Mr. Ohman include proof of the essential elements of this claim for debt including evidence of the advance of the funds, those advances are acknowledged to be a loan in the terms of the promissory note which is to be paid upon demand of the plaintiff. Mr. Wheeler has admitted, or at least acknowledged, receipt of the \$225,000 from Mr. Ohman and by executing the promissory note acknowledges it amounted to a demand loan.
- c) The advance of funds was not made pursuant to the Term Sheet. The Term Sheet preceded the promissory note and was terminated prior to the promissory note being presented by Mr. Wheeler to Mr. Ohman. Much of the evidence deposed to by Mr. Wheeler regarding the allegations that Mr. Ohman and others conspired to appropriate the technology of Synq rely upon the Term Sheet.
- d) As the promissory note was prepared by a lawyer instructed by Mr. Wheeler and contains wording typical of a promissory note or loan, I find it was Mr. Wheeler's intention that Synq enter into a loan agreement with Mr. Ohman which is confirmed by his statement in Mr. Wheeler's affidavit #1 at para. 125 that he required the promissory note to "clarify that [the plaintiff] was not an owner of assets or shares". In addition, as the promissory note was drafted by the lawyer for the defendant without negotiation, if there were any ambiguity in its terms, the principle of contra proferentum would apply against the interests of the defendant. The promissory note is clear on its terms, subject to the references to currency and the amount of the advances not totalling the face value of the promissory note.

- e) The letter of December 5, 2015, although not as precise as it could have been, make it clear that payment was being demanded by Mr. Ohman. The substance of the letter enclosing the promissory note and stating: "Please return all monies and expenses incurred by myself immediately to the address above" would have left no doubt that Mr. Ohman was demanding payment of the amount secured by the promissory note and for the expenses incurred by him on account of the defendant which triggered an obligation to repay the funds.
- f) Regarding the clause of the promissory note requiring re-payment on demand of the loan in U.S. funds when the funds advanced were in Canadian currency, that issue has not been raised by the defence and the plaintiff has submitted it will accept funds in either currency. It seems that the requirement the loan be repaid in U.S. funds was an error. Accordingly, payment is to be made in Canadian currency.
- g) The most significant issue raised by the defence is whether judgment should be granted in light of the defence of set-off in the amended response to civil claim and the claims made in the Victoria action are pending against Mr. Ohman and nine other defendants. The law applicable to such a situation is ably set out in the decision of *Clearly Canadian Beverage Corp. v. Remic Marketing & Distribution Inc.* [1992] B.C.J. No. 1867 (S.C.) [Clearly Canadian]. In *Clearly Canadian*, Tysoe, J. stated:

Defendants often put forward cross-claims as a delaying tactic. The cross-claim is frequently expressed as a defence as well as a counterclaim. Sometimes the cross-claim has little merit and, even when it does have sufficient merit to warrant a trial, the magnitude of the cross-claim may be much less than the amount of the plaintiff's claim. A defendant should not be permitted to delay the granting of judgment pending the trial of a cross-claim that may well not succeed or that is in an amount less than the plaintiff's claim. A plaintiff should be able to obtain summary judgment and execute upon it to the extent that it exceeds the probable amount of an award on the cross-claim.

- [32] In the case of the defendant's "cross-claim", no monetary amount of the claim is stated, although based upon the extent and seriousness of the allegations, the claim could exceed the amount of the plaintiff's claim. I also am not in a position to weigh the merits of the defendant's claims against the many defendants in the Victoria action and how much of the claim is being sought from Mr. Ohman. There are multiple claims being made against ten defendants and those claims appear to have no connection to the loan made by Mr. Ohman. For example, the Victoria action includes a claim for damages against a solicitor.
- [33] The defendant has referred to the decision of *Wilson v. Fotsch*, 2010 BCCA 226 [Wilson], regarding the legal test for an equitable set-off. *Wilson* was a case in which the parties to a common law relationship had advanced claims of unjust enrichment against each other. That case was, as a family case, dealing with equitable set-off only two persons in a family context. There were no other parties to that action, unlike the case at bar.

- [34] The court in *Wilson* did discuss equitable set-off as opposed to legal set-off where there are mutual debts for liquidated sums and continued to state, at paras. 70 and 71:
- [70] Where one or both of these requirements cannot be established, legal set-off is not available. Equitable set-off may be: *Holt* at 205-206. By its nature, equitable set-off is more difficult in application. In *Irving Oil Ltd. v. Blanchard*, 2002 PESCTD 52, DesRoches C.J.T.D. helpfully explained its essence at para. 9:
- [9] Equitable set-off arises where there are certain equitable circumstances which give a right to a person who sets them up against an opposing party to an action. It is a doctrine based on fairness. Equitable set-off is available provided there is a relationship between the cross-obligations such that it would be unfair or inequitable to permit one to proceed without taking the opposing claim into account.
- [71] The authorities "are clear that a defendant's claim will not be viewed as an equitable set-off ... unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim": *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 at para. 44.
- [35] The Court of Appeal continued the discussion and referred to *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (C.A.) [*Coba Insustries*], in which the court set out the requirements for a claim of equitable set-off beginning at para. 23:
1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.).
 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: *Br. Anzani*.
 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: *Fed. Commerce & Navigation Ltd.*
 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Banks v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
 5. Unliquidated claims are on the same footing as liquidated claims: the *Nfld.* case.
- [36] Considering the requirements set out in *Coba Industries*, the equitable ground as put forward by the defendant does not go to the "very root of the plaintiff's claim". If it were to be established, the cross-claim, based on the pleadings, would rely in part on the terms of the Term Sheet, not the promissory note and similarly, the cross-claim is not so clearly connected with the demand of the plaintiff so it would be manifestly unjust for the plaintiff's claim to proceed. Also, it would be unjust to the plaintiff to force him to be subject to a set-off which is being made not only against him, but first and foremost against a claim of damages also being pursued against another party (Mr. Watkin) and on other grounds against eight other persons.

- [37] Turning to the claim for expenses paid by Mr. Ohman for the defendant, Mr. Ohman deposes that the repayment of these expenditures to the plaintiff "was specifically discussed and agreed to with Mr. Wheeler". Mr. Wheeler denies any such agreement and deposed that he was first aware of such a claim when he received the notice of civil claim.
- [38] Also, the email from Mr. Wheeler's assistant to Mr. Ohman is vague and even if it could be interpreted as an agreement to pay on the part of Synq, it is not at all clear that the assistant would have had the ostensible authority to commit the defendant.
- [39] As a result, the claim for repayment of expenditures totalling \$8,268.51 cannot be resolved on affidavits and is to be decided at trial, if necessary.
- [40] The final issue raised by the parties is whether, in these circumstances, the court should issue a stay of execution on the judgment granted to the plaintiff. The plaintiff has deposed to statements in an affidavit by Mr. Wheeler to the effect that the defendant is insolvent and as such, any delay in being able to execute on the judgment would be prejudicial to the plaintiff who would likely be less able to collect on its judgment the longer this matter continues, especially with the Victoria action still pending and the cost of proceeding through that action. Considering the authorities submitted by the plaintiff in particular, ie. *Rana v. Payless Tiles Ltd.* 2008 BCSC 458 and *Natco International Inc. v. Photo Violation Technologies Corp.* 2009 BCSC 1504, I agree the plaintiff would be significantly prejudiced in its ability to collect on its judgment. Based upon the above considerations the court declines to order a stay of execution.

Costs

- [41] The plaintiff has been successful in its principal claim, ie. the claim for payment on the promissory note, but a judgment on summary trial has been denied the plaintiff. By far, the majority of the evidence and submissions have dealt with the claim on the promissory note and, unless there are relevant factors of which I am not aware and could affect an order for costs, I order costs on Scale B to the plaintiff. If submissions are to be made by the parties on costs, those submissions should be filed and directed to my attention no later than 30 days after issuance of these reasons for judgment.

"Jenkins J."

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