

CANADA / JUDGMENT

Smartt Inc. v. Siphon Enterprises Corp.

2023 BCSC 2591

COURT

Supreme Court of British Columbia

DECIDED

14 November 2023

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2023 BCSC 2591 Smartt Inc. v. Siphon Enterprises Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smartt Inc. v. Siphon Enterprises Corp.,

2023 BCSC 2591

Date: 20231114

Docket: S234864

Registry: Vancouver

Between:

Smartt Inc.

Plaintiff

And

Siphon Enterprises Corp., Michael Romaniuk

and Katherine Romaniuk

Defendants

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Coulson

S. Wright

Counsel for the Defendants:

N. Lidder

A. Meyer

Place and Date of Hearing:

Vancouver, B.C.

November 14, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 14, 2023

- [1] THE COURT: This is an application by the defendants in this action, seeking an order under s. 236 of the Business Corporations Act, S.B.C. 2002, c. 57, to require the plaintiff to post security for costs in the amount of \$100,000.
- [2] The plaintiff commenced this action on July 10, 2023, which was just over four months ago. The notice of civil claim alleges that the defendants, who are either directors or minority shareholders of the plaintiff, have been unlawfully competing against the plaintiff and otherwise improperly undermining the plaintiff's business, in breach of their fiduciary duties or a shareholder agreement to which they are privy. The defendants deny those allegations.
- [3] The plaintiff is in the business of providing IT products and services to its clients. It has been in that business since 1995 but underwent a significant restructuring in 2017 to expand its operations and the breadth of the products and services it offers.
- [4] The plaintiff had been earning about \$2 million in annual revenue between 2019 and 2022, when revenue doubled. On January 1, 2022, the plaintiff amalgamated with a company known as Rent-A-Nerd Computer Services Inc., the principals of which were the personal defendants. That company and its line of business were of interest to the plaintiff because it provided what are known as "MS peer management services".
- [5] As a result of the amalgamation, the plaintiff's voting shares are owned 62.5% by its majority shareholder, 2ic Systems Inc. and 37.5% by the defendant, Siphon Enterprises Corp., whose principals are the two personal defendants.
- [6] The plaintiff's business has not done well since the amalgamation. The plaintiff attributes the downturn in its fortunes to the conduct of the defendants that is the subject of this action. It says that it has lost three of its main clients, who were formerly clients of Rent-A-Nerd prior to the amalgamation.

- [7] In any event, the plaintiff sustained significant operating losses in 2022 and 2023, to the point that it became necessary for the majority shareholder to infuse additional cash. This was done by a share offering that the majority shareholder took up, leading to an infusion of \$300,000 into the business. That sum was used to pay off the \$200,000 line of credit, leaving approximately \$100,000 in cash to meet the company's needs, including its own costs of this litigation and any costs order that may ultimately be imposed on it if it is unsuccessful in its claim.
- [8] This litigation is in its early stages. The parties have exchanged lists of documents but have not yet conducted examinations for discovery. There is no dispute between the parties as to the test to be applied on an application such as this, which was conveniently summarized by Griffin J., then of this court, in *Integrated Contractors Ltd. v. Leduc Development Ltd.*, 2009 BCSC 965, and in *Troico Home Solutions and Manufacturing Inc. v. Arondus*, 2020 BCSC 1623.
- [9] The first element of the test is a requirement for the applicant to make out a *prima facie* case that the respondent may be unable to pay the applicant's costs if the claim fails. If that requirement is met, then the respondent may resist the order by showing that it has sufficient exigible assets to satisfy a cost award or that there is no defence to the claim.
- [10] Finally, there are other factors to be considered in the court's exercise of its discretion, including (a) whether the proposed order would unfairly stifle a valid claim, and (b) whether the financial hardship giving rise to the plaintiff's inability to pay costs is due to the very actions of the defendants that are in issue in the claim.
- [11] The authorities also make it clear that the court has the discretion to set the quantum of the security in an amount that the court considers appropriate. In the first instance, the burden of proof is on the applicant to show a *prima facie* case as to the respondent's inability to pay a costs award. If that burden is discharged, then the onus shifts to the respondent to show that it has assets sufficient to meet the requirement or that there is no defence to the claim.
- [12] In this case, the defendants say that the evidence before the Court demonstrates that the plaintiff will likely be unable to meet any costs award that is made. The plaintiff is cash flow-negative. Its liabilities exceed its assets. The only reason it is not insolvent now is that the cash infusion that the majority shareholder has made has allowed it to continue in operation, but those funds will, the defendants say, quickly be exhausted at the plaintiff's current rate of consumption.
- [13] The defendants have prepared a draft bill of costs showing that if the case proceeds through to what they anticipate will be a 10-day trial, the bill will likely rise to almost \$120,000. They say that is a reasonable estimate of the anticipated costs award if they are successful in resisting the claim, in part, because, according to the defendants, the plaintiff has shown itself to be a combative litigant in the short history of the litigation to date.

- [14] The plaintiff disputes that it will be unable to pay any costs award that may be made against it. It argues that it has a viable business, which is not a fly-by-night operation, but has a long track record of profitability. The plaintiff also argues that it has assets available for realization, even if these are not ones that show up on a real and personal property registry search.
- [15] I agree with the defendants that the evidence establishes the requisite prima facie case that if the claim fails, the plaintiff may not be able to pay costs in light of its current financial circumstances. Moreover, I am also satisfied that the plaintiff may not have sufficient assets available to satisfy any such award in light of its sizeable liabilities.
- [16] However, I also agree with the plaintiff that there are other factors here weighing against granting the order sought, particularly, that such an order, if the security to be posted is excessive, may well stifle the claim. I also agree that the financial hardship that it is currently facing may well be attributable to the misconduct of the defendants that is the subject of this action. I hasten to add that none of this has been proven, given that we are at an early stage in this litigation. On balance, weighing all those considerations, I have concluded that it is appropriate to make an order that the plaintiff post security for costs.
- [17] Turning then to the issue of quantum, I agree with the plaintiff that the bill of costs submitted by the defendants is grossly exaggerated in many ways. Not only have the units been counted on the wrong scale, given the nature of the claim, but the defendants have chosen to tally the maximum number of units in most categories, and many of the line items are either duplicative, exaggerated, or not necessary at all. I agree with the plaintiff that this is not a case that appears to call for expert opinion evidence on either side. This is not a particularly complex case. I therefore prefer the plaintiff's estimate of three days for the anticipated trial, rather than the 10-day estimate proposed by the defendants.
- [18] On balance, I have concluded that security for costs in the amount of \$20,000 should be posted and that the posting of that security should be done by way of a payment to plaintiff's counsel, who is to hold that amount in trust, pending further order or agreement of the parties.
- [19] Finally, with respect to the costs of this application, although the defendants have been successful in the application, the amount of security I have ordered is much less than what the defendants were requesting.
- [20] I am told that the plaintiff made an offer in advance of the hearing to post securities for costs in the amount of \$15,000 but that the offer was rescinded minutes after delivery of the plaintiff's application response. Nevertheless, the defendants should have known, even before receiving the plaintiff's responding materials, that their bill of costs was grossly inflated and that the plaintiff's estimate was likely much closer to the mark.

- [21] Having weighed those considerations, I have concluded that the appropriate order in the circumstances is that costs of this application be payable to the plaintiff in the cause. That concludes my ruling.
- [22] THE COURT: Is there anything else we need to address today?
- [23] CNSL S. COULSON: Just the timeline of the posting of the security, is there any direction on that? Or is it just --
- [24] THE COURT: When can you do it?
- [25] CNSL S. COULSON: The reason I ask is because I have not asked my client yet, but I am going to assume they can do it quickly. I do not know. I think maybe a week would be sufficient time, but probably not necessary. I do not want to --
- [26] THE COURT: Is there going to be a problem with seven days?
- [27] CNSL N. LIDDER: There'd be no objection. Seven days to --
- [28] THE COURT: Okay, seven days.

"Milman J."

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