

CANADA / JUDGMENT

Smith v. Kim

2021 BCSC 170

COURT

Supreme Court of British Columbia

DECIDED

3 February 2021

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2021 BCSC 170 Smith v. Kim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith v. Kim,

2021 BCSC 170

Date: 20210203

Docket: S175819

Registry: Vancouver

Between:

Alan Gilbert Smith, Vesta Health Systems Inc. and Vesta Health Systems Inc.

Plaintiffs

And

Chil Young Kim and AlleVita Co., Ltd.

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

The Plaintiffs, Alan G. Smith, appearing on his own behalf and on behalf of Vesta Health Systems Inc. and Vesta Health Systems Inc.:

A.G. Smith

The Defendants:

No appearance at trial

Place and Dates of Trial:

Vancouver, B.C.

January 4-6, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 3, 2021

Introduction

- [1] Although broadly pleaded--seeking declaratory relief, specific performance of contracts, equitable damages, quantum meruit, restitution, and an accounting of profits--in substance, the plaintiffs' cause of action is a straight-forward claim in breach of contract and debt.
- [2] Despite having participated in the litigation process throughout, including having served a trial brief and attending a trial management conference on December 4, 2020 through counsel, neither of the defendants appeared at the trial. After attempts to contact the defendants were unsuccessful, the trial proceeded in their absence.
- [3] The court advised the self-represented plaintiffs that, even though no one was appearing to contest their claims, they were nevertheless required to prove them on the balance of probabilities.

Background

- [4] The plaintiff, Alan Gilbert Smith ("Smith"), is a Vancouver businessman and the sole director and officer of the two identically-named corporate plaintiffs, the first of which is incorporated in British Columbia ("Vesta BC") and the second of which is incorporated in the State of Nevada ("Vesta NV"). Vesta NV is a wholly-owned subsidiary of Vesta BC. Both Vesta BC and Vesta NV are Vancouver-based biotech companies.
- [5] The corporate defendant ("AlleVita") is a Korean company. The defendant, Chil Young Kim ("Kim"), is the Chief Executive Officer of AlleVita.
- [6] Prior to August 16, 2016, AlleVita was called "Dolki Korea Ltd." ("Dolki"). Evidence of the change of name was provided by way of the notarized affidavit of Kun Su Mok, Managing Partner of the law firm of HMP Law in Seoul, Korea. Mr. Kun deposed that he procured the AlleVita/Dolki corporate register from "the competent court registry". A copy of the corporate register was appended to Mr. Kun's Affidavit. I granted the plaintiffs leave to file Mr. Kun's notarized affidavit in the Court Registry after the conclusion of the trial. That filing was effected on January 12, 2021.
- [7] I will refer in these Reasons to the corporate defendant interchangeably as both Dolki and AlleVita, as the context requires.

- [8] At all material times, Kim was the Chief Executive Officer of Dolki. Dolki developed and patented certain antiviral, antibacterial, and antifungal products used in various medical applications ("Products"). Kim was the holder of the Intellectual Property related to the technology platform associated with the Products.
- [9] In 2009, while working for a Canadian public company involved in 3-D graphics, Smith travelled to South Korea to meet with representatives of a large international company based in South Korea. While there, Smith attended a trade show where he met Kim and one of Kim's business colleagues, S.K. Rho ("Rho"). Kim and Rho were exhibiting various anti-microbial nasal rinse technologies and devices (collectively, "Salicid"). Smith concluded that Salicid had great potential in the North American market.
- [10] Smith testified that he, Kim and Rho entered into an agreement pursuant to which Smith was granted the North American Intellectual Property rights as well as an option agreement with respect to Salicid. Subsequently, a dispute arose among the parties regarding the existence and/or extent of Smith's rights. The dispute was the subject of an arbitration in Vancouver conducted in February 2011. Smith was unsuccessful. The arbitrator ruled against him.
- [11] Smith was undeterred by the loss and by what he considered to have been Kim's dishonest dealings with him. He continued to believe that the Salicid technology was compelling and potentially very lucrative. Kim needed working capital for ongoing research and marketing. Because Smith viewed Kim as having been "contrite" regarding his arbitration victory, he was prepared to continue to try and do business with him.
- [12] On September 4, 2012, Vesta NV, Dolki and Kim entered into an agreement entitled "Dolki-Vesta Patent Licencing and Technology Transfer Agreement" ("PLTTA") pursuant to which, in relevant part, Dolki granted to Vesta NV the exclusive right and license ("License") to manufacture, sell and use the Products (including Salicid) in North America, in consideration for which Vesta NV agreed to:
- a) issue to Dolki a US\$1 million promissory note ("Promissory Note"), US\$500,000 of which was in consideration for the License ("License Fee") and US\$500,000 was to be used by Dolki as a credit facility ("Credit Facility"). Interest payable under the Credit Facility was of 7% per annum compounded annually and was repayable by Dolki in 36 equal installments of US\$15,438.55 each on the 1st day of each month commencing on April 1, 2013 ("Loan Repayment Schedule");
 - b) Kim and Dolki agreed to pledge the rights, title and interest to all patents and related technology in respect of the Products (current and future); and
 - c) Vesta NV agreed to pay a royalty to Dolki ("Royalty") of 7% of the gross sales proceeds from the sale of the Products manufactured by Vesta NV.

[13] Vesta NV executed the Promissory Note on September 4, 2012. By its terms, the US\$1 million under the PLTTA was to be paid by Vesta NV in the following tranches ("License Payment/ Loan Advance Schedule"):

a) Upon execution:

US\$50,000

b) September 30, 2012:

US\$50,000

c) October 31, 2012:

US\$50,000

d) December 31, 2012:

US\$400,000

e) March 31, 2013:

US\$450,000

[14] The Promissory Note stipulated that, if the Credit Facility was fully advanced by "March 31, 2012" [sic], Dolki would repay to Vesta NV the sum of US\$500,000 together with interest in accordance with the Loan Repayment Schedule.

[15] On the same date, September 4, 2012, Dolki and Smith executed a document entitled "Finder's Fee Agreement", pursuant to which Dolki agreed to pay Smith a finder's fee equal to 10% of the gross proceeds or value of each completed "Financing" consummated by Smith with any person, corporation, or entity introduced to Dolki by Smith during the 12-month term of the Finder's Fee Agreement. The term "Financing" was defined to mean:

any of the following transactions involving [Dolki] made or arranged by or through the efforts of any party introduced directly or indirectly by [Smith], including:

- (a) any acquisition, disposition or equity investment of a portion of or interest in [Dolki];
- (b) any loan or other credit transaction involving [Dolki] which could be reasonably interpreted under common language usage as a financing; or
- (c) acquisition by or of a publicly listed company on any stock exchange or public trading market.

[16] The September and October 2012 payments under the Promissory Note were made (in Canadian dollars) by or on behalf of Vesta NV by way of wire transfer to Dolki's Korean bank account. Smith testified that, at the time, the Canadian dollar had a higher value than its U.S. counterpart.

- [17] On November 29, 2012, in furtherance of the terms of the PLTTA, Dolki assigned to Vesta NV its right, title, and interest in and to various patents held by it in Canada, the United States, and Mexico. The assignments were held in escrow in Vancouver by Vesta NV's solicitors.
- [18] Because Kim and Dolki required additional funding before the next scheduled tranche on December 31, 2012, on December 4, 2012, the parties agreed to amend the PLTTA as follows:
- a) the License territory was expanded to include Great Britain, Northern Ireland and all countries within the European Union, provided that the European Union license would be "revoked" if an additional payment of US\$500,000 was not made by Vesta NV to Dolki by June 30, 2013 or, failing such payment, an additional payment of US\$750,000 was not made by December 31, 2013;
 - b) the License Payment/Loan Advance Schedule in respect of future payments was amended as follows:
 - i. December 4, 2012: US\$170,000
 - ii. December 31, 2012: US\$230,000
 - iii. June 30, 2013: US\$450,000
 - c) to secure repayment of the Credit Facility, Kim and Dolki agreed to provide "a security interest" in certain lands located in South Korea that were owned by Kim's wife ("South Korean Land"), as well as additional security over
- any property belonging to the debtor that now or later is in the possession or control of secured party.
- [19] The South Korean Land owned by Kim's wife, which was to be partial security for the Credit Facility, had already been mortgaged to a South Korean company called DreamFi.
- [20] The two December 2012 payments were made (in Canadian dollars) by or on behalf of Vesta NV by way of wire transfers to Dolki's Korean bank account. Accordingly, by December 31, 2012, Vesta NV had paid to Dolki C\$500,000 for the License together with C\$50,000 as an advance under the Credit Facility.
- [21] Smith testified that, in late December 2012, he and Kim/Dolki agreed that any finder's fee payable under the Finder's Fee Agreement would be capped at US\$50,000 and would be "rolled into" the debt owed under the Credit Facility. Smith testified further that there was no specific date stipulated for payment of the finder's fee debt.
- [22] On March 28, 2013, Vesta NV and Dolki entered into a further agreement entitled "Second Credit Agreement Amendment" which amended certain payment dates and amounts and stipulated that Vesta NV would make a further advance under the Credit Facility of US\$150,000 by March 28, 2013.

[23] By letter dated April 1, 2013 to the plaintiffs, and in consideration for ongoing funding under the Credit Facility, Kim agreed to be personally liable, inter alia, for:

- a) obtaining a first charge in favour of the plaintiffs over the South Korean Land; and
- b) the provision of a promissory note, convertible bond or debenture in favour of Vesta NV.

("Guarantee")

[24] Further advances under the Credit Facility totalling C\$123,000 were made to Dolki by or on behalf of Vesta NV by way of wire transfers to Dolki's Korean bank account as follows:

April 2, 2013:

C\$40,000

April 15, 2013:

C\$10,000

April 22, 2013:

C\$40,000

April 29, 2013:

C\$33,000

[25] Accordingly, a total of C\$173,000 had been advanced under the Credit Facility by the end of April 2013.

[26] On June 28, 2013, a further agreement entitled "Third Credit Agreement Amendment" was entered into by Dolki and Vesta NV, which provided, in relevant part, that:

- a) it was a condition precedent to any further advances by Vesta NV under the Credit Facility that Dolki provide to Vesta NV a General Security Agreement/Debenture ("GSA") as follows:

a demand debenture, promissory note or convertible bond, or in the alternative, a promissory note, debenture or convertible bond repayable in monthly instalments of 2.0% of the principal amount then advanced pursuant to the Credit Facility and commencing on January 1, 2014 at a rate of 10.0% per annum, granted by [Dolki] in favour of [Vesta NV] and others creating a floating charge over all real and personal property and assets of [Dolki] currently owned or hereafter acquired and on terms equivalent to those in favour of the entity referred to as DreamFi; [Emphasis in original.]

- b) the remaining advance of US\$360,000 under the Credit Facility would be advanced as follows:

Section 2(c)(i): if the GSA had been provided by Dolki by on or before June 28, 2013, US\$60,000 would be advanced no later than June 28, 2013;

Section 2(c)(ii): the remaining US\$300,000 would be advanced as soon as practicable once Vesta NV had received additional security ("Additional Security"):

" acting reasonably by September 1, 2013, or such other date as [Vesta NV] may require in its sole discretion (the "Security Date") including, without limitation: [Emphasis added.]

(A) the registration in South Korea of the security interest granted by [Dolki] in favour of [Vesta NV] creating a security interest over all [Dolki]'s present and after acquired personal property, substantially with the same effect as provided by the GSA;

(B) additional security prepared by [Dolki] and counsel in South Korea in favour of [Vesta NV] of the additional security creating a security interest over all of [Dolki]'s present and after acquired personal property, including, but not limited, to [the Products]; and

(C) the conditions precedent set out in the Second Credit Agreement Amendment.

[27] Smith acknowledged during his evidence-in-chief that the Third Credit Agreement Amendment was in error in stipulating that amount remaining to be advanced under the Credit Facility was US\$360,000 instead of US\$327,000. He testified that the error was likely due to the drafter of the document having failed to take the April 29, 2019 wire transfer of C\$33,000 into account.

[28] Section 2(c)(iv) of the Third Credit Agreement Amendment provided as follows:

Section 2(c)(iv): In the event that [Vesta NV] fails to receive adequate security acting reasonably under Section 2(c)(ii) of this Third Credit Amendment Agreement on or before the Security Date, [Dolki] shall pay to [Vesta NV]:

(A) the amount of \$500,000 USD, payable in 36 monthly instalments of \$16,133.59 plus interest at the rate of 10% per annum on the declining principal balance on the first calendar day of each month; and

(B) any amounts of the Credit Facility, in addition to the \$500,000 USD of Section 2(c)(iv)(A) above, advanced by [Vesta NV] to [Dolki] as of the Security Date, such additional amounts to be payable forthwith upon failure of [Vesta NV] to receive adequate security acting reasonably under Section 2(c)(ii) of this Third Credit Amendment Agreement on the Security Date.

[29] Smith testified that the US\$500,000 payment referred to in Section 2(c)(iv)(A) above represented liquidated damages as compensation for Kim/Dolki's breach of the Third Credit Agreement Amendment and was a genuine pre-estimate of the damages Vesta NV would suffer if Dolki failed to provide the Additional Security.

[30] The GSA to be provided under the Third Credit Agreement Amendment was provided as required.

[31] The following further advances were made by or on behalf of Vesta NV to Dolki under the Credit Facility by way of wire transfers to Dolki's Korean bank account:

July 8, 2013:

C\$60,000

July 31, 2013:

C\$20,000

August 26, 2013:

C\$20,000

October 1, 2013:

C\$35,000

October 28, 2013

C\$65,000

[32] Accordingly, by October 28, 2013, a total of C\$373,000 had been advanced by or on behalf of Vesta NV to Dolki under the Credit Facility.

[33] On October 15, 2013, presumably in furtherance of his obligations under the Guarantee, Kim caused Dolki to execute a document entitled "Secured Debenture Certificate" ("Debenture") in favour of both Vesta BC and Vesta NV in the principal amount of US\$500,000. By virtue of the Debenture, Dolki, inter alia:

- a) acknowledged its indebtedness to Vesta BC and Vesta NV in the amount of US\$500,000; and
- b) promised to pay the indebtedness commencing January 1, 2014 in monthly instalments of 2.0% of the principal amount then advanced at an interest rate of 10.0% per annum.

[34] Kim did not obtain a first charge in favour of the plaintiffs over the South Korean Land.

[35] The following further advances were made by or on behalf of Vesta NV to Dolki under the Credit Facility by way of wire transfers to Dolki's Korean bank account:

December 2, 2013:

C\$55,000

January 20, 2014:

C\$30,000

February 24, 2014:

C\$25,000

[36] Accordingly, the total amount advanced to Dolki under the Credit Facility was C\$483,000.

- [37] By letter dated June 2, 2015 to Dolki, Vesta NV/Vesta BC made demand for the Additional Security contemplated by the Third Credit Agreement Amendment and stipulated that the Security Date was June 20, 2015.
- [38] Dolki did not provide the Additional Security, by June 20, 2015 or otherwise.
- [39] In early July 2016, Dolki paid Vesta NV the sum of US\$389,210 (Korean Won 450,000,000) owing under the Credit Facility. The money was raised from the sale of the South Korean Land. The exchange rate on July 1, 2016 from U.S. to Canadian currencies was 0.77455. The payment made by Dolki equated to C\$502,498.22.
- [40] Neither Dolki nor Kim has made any further payments under the Credit Facility.
- [41] By letter dated July 21, 2016 to Dolki ("Demand Letter"), Vesta NV/Smith demanded that Dolki transfer to them "all patents of [Kim's] and Dolki's" as well as "[o]peration of the Vesta/Dolki Patent and Technology License contracts for the EU and North America " and the "[i]mmediate payment of the remaining debt that Dolki owes Vesta which includes the agreed-to compensation for not providing adequate security. This amount is approximately \$900,000 USD". Smith also demanded immediate payment of US\$97,000 in respect of a finder's fee.
- [42] By email dated August 2, 2016, Kim responded to the Demand Letter. He wrote, in relevant part:

Re: The remaining loan USD97,000 [sic]

I repaid Won,450,000,000 [sic] to you not because the due date came but because the land should be sold. I could keep the loan according to the terms of agreement but repaid to you earlier due to the other reason. So,it [sic] is not the time to mention this remaining loan at moment [sic]. As you know, you would not keep your obligation to wire 1 million US dollars completely yet.

- [43] Kim also disputed Smith's entitlement to the finder's fee.

Analysis

Dolki's Change of name to AlleVita

- [44] I accept the uncontroverted evidence of Mr. Kun that the corporate registry in South Korea discloses that, on August 16, 2016, Dolki changed its name to AlleVita. I find that Dolki and AlleVita are the same corporate entity.

Claims under the Third Credit Agreement Amendment

- [45] I am satisfied on the evidence as a whole that AlleVita failed to provide the Additional Security by the required date (June 20, 2015) or otherwise. Clause 2(c)(iv) of the Third Credit Agreement Amendment stipulates that, in such event, AlleVita is required to pay both the sum of US\$500,000 at an interest rate of 10% per annum (per sub para. (A)) and any amounts of the Credit Facility, in addition to the US\$500,000 advanced by Vesta NV as of the Security Date (per sub para. (B)).
- [46] I accept Smith's evidence that the US\$500,000 amount was a genuine pre-estimate of the damages Vesta NV would suffer if AlleVita was in default of its obligations under the PLTTA. I note that the onus lies on the party against whom the clause is being enforced--here, the defendants--to establish that such a clause constitutes a penalty: *Super Save Disposal Inc. v. Blazin Auto Ltd.*, 2011 BCSC 1784 [Blazin] at para. 33. The defendants did not raise the issue in their Response, let alone make any arguments (given they did not appear at trial) and, in any event, I am satisfied that the sum is not "extravagant and unconscionable in comparison to the greatest loss that could conceivably be proved to have followed from the breach": Blazin at para. 31.
- [47] Moreover, the defendants have repudiated their obligations, resulting in the plaintiffs having received no consideration whatsoever for the License Fee. Consequently, it is neither unconscionable nor penal to require the defendants return the amount advanced under the Promissory Note in respect of the License Fee.
- [48] Because AlleVita has not made any payment, interest at 10% per annum is payable on the entire amount from and after July 1, 2015. I have calculated the interest payable to December 31, 2020 (66 months) as follows:
- (66 months x 10% ÷ 12 months) x US\$500,000 = US\$275,000.
- [49] Smith submits, that, in addition to payment of the US\$500,000 and interest as set out above, Vesta NV is also entitled under clause 2(c)(iv)(B) of the Third Credit Agreement Amendment to payment of all of the funds that remain advanced under the Credit Facility. Although the clause in question is capable of being interpreted such that it only applies to funds that were advanced over and above US\$500,000, in my view the more sensible interpretation is the one advocated by Smith during his submissions: that in addition to the US\$500,000 plus interest that would be payable, all funds remaining advanced under the Credit Facility would also be payable. If the former interpretation were to prevail, clause 2(c)(iv)(B) could never be invoked because the maximum amount of credit available under the Credit Facility was US\$500,000.
- [50] Accordingly, I accept the plaintiff's submission that Vesta NV is entitled to payment of the unpaid amount of the Credit Facility. However, given the payment received by Vesta NV in early July 2016 of the equivalent of C\$502,498.22, all of the monies advanced under the Credit Facility had been repaid.

- [51] I find that Vesta NV is entitled to judgment against AlleVita in the total amount of US\$775,000 (including contractual interest) in respect of AlleVita's failure to provide security required under the Third Credit Agreement Amendment.

Smith's Claim for Payment of a Finder's Fee

- [52] Smith testified that, although the finder's fee payable under the Finder's Fee Agreement became payable upon the financing having been received by Dolki, he and Kim agreed in late December 2013 that the finder's fee would be capped at US\$50,000. They agreed the fee would be rolled into the debt payable by Dolki under the Credit Facility and that there was no specific date by which it was to be paid. However, Smith made a demand for payment of the finder's fee by way of his letter dated July 21, 2016. Smith explained during his evidence that he demanded payment of US\$97,000 rather than the previously agreed cap of US\$50,000 because he considered that Kim had reneged on their agreement.
- [53] I do not accept that the monies advanced under the Promissory Note (Licensing Fee and Credit Facility) constituted "Financing" within the meaning of the Finder's Fee Agreement. It is plain from a reading of that agreement as a whole that a finder's fee would be payable in the event that Smith was able to arrange financing from "financiers, investors or acquirers" within the next 12 months. The parties did not contemplate that such a fee would be paid in respect of financing that had already been secured, namely in the form of the Promissory Note and Credit Facility that Vesta NV and Dolki executed contemporaneously with the Finder's Fee Agreement.
- [54] Smith has failed to satisfy me, on the balance of probabilities, that he is entitled to payment of a finder's fee. His action in that respect is dismissed.

Patent Registration Maintenance Payments

- [55] Smith testified that, in the spring of 2016, Kim requested that Vesta NV provide the funding necessary to maintain the registration of the North American patents held by Dolki. Pursuant to that request, Vesta NV paid US\$9,750 by way of loan to Kim in order to preserve the defendants' Intellectual Property. The payment was acknowledged by Kim in an email from Kim to Smith on April 23, 2018.
- [56] Vesta NV is entitled to judgment against Kim in the amount of US\$9,750 together with court ordered interest from April 1, 2016 to the date of this judgment.

Plaintiffs' Additional Claims

- [57] The plaintiffs have not persuaded me that any of them are entitled to judgement against Kim personally in respect of the judgment I have rendered against AlleVita. First, such a claim under the Guarantee has not been pleaded. Second, there is no evidence that any of the plaintiffs suffered a loss as a result of a breach of the Guarantee. Third, in my view, any cause of action under the Guarantee arose at the latest on June 2, 2015, when Vesta NV issued the demand to AlleVita and, accordingly, the claim is statute-barred.
- [58] Finally, the plaintiffs have not demonstrated on the balance of probabilities that they or one or more of them is entitled to any additional relief claimed.

Foreign Money Claims Act, R.S.B.C. 1996, c. 155

- [59] Sections 1(1) and (2) of the Foreign Money Claims Act, R.S.B.C. 1996, c. 155, provide as follows:

1(1) If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

- (2) The conversion date is the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

- [60] These provisions are applicable in this case.

Conclusion

- [61] Vesta NV is entitled to judgment against AlleVita Co., Ltd., inclusive of interest up to and including December 31, 2020, in the amount of Canadian currency that is necessary to purchase US\$775,000 at a chartered bank located in British Columbia at the close of business on the conversion date as that date is defined in s. 1(2) of the Foreign Money Claims Act, namely, on the last day before the date on which a payment of this judgment is made.
- [62] Vesta NV is also entitled to judgment against Kim in the amount of Canadian currency that is necessary to purchase US\$9,750, plus court ordered interest from and after April 1, 2016 to the date of this judgment, at a chartered bank located in British Columbia at the close of business on the conversion date as that date is defined in s. 1(2) of the Foreign Money Claims Act, namely, on the last day before the date on which a payment of this judgment is made
- [63] All other claims of the plaintiffs are dismissed.

Costs

[64] The plaintiffs are entitled to their costs of this action at Scale B against the defendants, jointly and severally.

"G.C. Weatherill J."

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