

CANADA / JUDGMENT

Vestergaard v. Digital Caddies, Inc.

2020 BCSC 1444

COURT

Supreme Court of British Columbia

DECIDED

1 October 2020

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2020 BCSC 1444 Vestergaard v. Digital Caddies, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vestergaard v. Digital Caddies, Inc.,

2020 BCSC 1444

Date: 20201001

Docket: S180597

Registry: Vancouver

Between:

Steven E. Vestergaard

Plaintiff

And

Digital Caddies, Inc., Izon Network, Inc., Brad Nightingale,

Theodore H. Konyi, and Allan Kaplan

Defendants

Before: The Honourable Mr. Justice Majawa

Reasons for Judgment

Counsel for Plaintiff:

M. M. O'Neill

Counsel for Defendant:

No appearance

Place and Date Notice of Application Filed:

Vancouver, B.C.

August 7, 2020

Date Written Submissions Received:

August 26, 2020

Place and Date of Hearing:

Vancouver, BC

August 27, 2020

Place and Date of Judgment:

October 1, 2020

INTRODUCTION

- [1] The plaintiff, Mr. Vestergaard, brings this application for the assessment of damages and costs following his receipt of default judgment against the defendant IZON Network Inc. (formerly Digital Caddies Inc.) ("the Company"). The plaintiff received a default judgment against the Company on March 15, 2019.
- [2] In this application, the plaintiff seeks an assessment of damages under Rule 3-8(13) in respect of the default judgment. He also seeks costs of the application. I note that this application was made by way of written submissions in accordance with the procedure set out in the Court's COVID-19 Notice #14. Although duly served with the materials, no application response was filed by the Company and thus, no one "appeared" on behalf of the Company for this application.

BACKGROUND AND FACTS

- [3] The plaintiff filed a Notice of Civil Claim ("NOCC") on January 17, 2018, and an amended NOCC on May 25, 2018. The plaintiff's action against the Company was founded upon breach of contract, negligent and fraudulent misrepresentation and unjust enrichment. In his amended NOCC, he sought unspecified general, special and punitive damages.
- [4] The Company failed to file a response to the NOCC within the time provided for by the Supreme Court Civil Rules. Consequently, the plaintiff obtained default judgment against the Company for damages and costs to be assessed pursuant to R. 3-8(5). In support of this application, the plaintiff has filed an affidavit affirmed by the plaintiff. The damages sought are in respect of breach of contract and misrepresentation.

- [5] There are two incidents that give rise to the causes of action described in the amended NOCC. The first is an investment made by the plaintiff in the Company and the second is in respect of a debt owed for services provided by the plaintiff to the Company.

Burden of Proof

- [6] The plaintiff has received a default judgment and the defendant is deemed to have admitted the allegations of fact in the amended NOCC. Nonetheless, the plaintiff has the burden to prove the damages he claims on a balance of probabilities (*Wearne v. Rosbergen*, 2019 BCSC 1783). The plaintiff relies on the affidavit of Steven Vestergaard in support of his application.

The Investment and Damages for Misrepresentation

- [7] The plaintiff invested \$50,000 US in the Company in October 2013. The plaintiff decided to invest following a meeting he had earlier that same month with: Brad Nightingale, the President and Director of the Company; Theodore Konyi, a director of the Company; and, Allan Kaplan, a member of the Company's advisory board. At the time of the meeting, the Company had been issued a cease trade order by the British Columbia Securities Commission. That cease trade order was issued on February 6, 2013. The plaintiff claims that Nightingale, Konyi and Kaplan solicited him to invest in the Company at the October meeting. Importantly, the plaintiff claims that at the time of the October meeting, Nightingale, Konyi and Kaplan knew that cease trade order had been issued and knew that the plaintiff was a resident of British Columbia, yet they did not advise the plaintiff of the cease trade order.
- [8] Following the meeting, the plaintiff invested \$50,000 US in the Company in exchange for 333,333 shares in the Company, valued at \$0.15 US per share, (the "Investment"). The evidence indicates that the shares were purchased on or around October 18, 2013. In his affidavit, the plaintiff deposes that the existence of the cease trade order was a material fact and that he would not have made the Investment had he been made aware of the cease trade order. He also claims that Nightingale, Konyi and Kaplan, on behalf of the Company, knew, or should have known, that he would not have made the Investment had he been aware of the cease trade order. Thus, the plaintiff claims that the defendants made a negligent or fraudulent misrepresentation by not disclosing the existence of the cease trade order.
- [9] Despite the cease trade order, the Company issued the shares to the plaintiff by way of subscription agreement dated October 18, 2013.
- [10] The Company's share price fluctuated significantly after the Investment was made. According to the plaintiff, it reached a high price of \$0.50 US per share on May 1, 2014, some six and one half months after the plaintiff made the Investment. As of August 6, 2020, the closing share price of the Company was \$0.0066 US per share.

- [11] In his written submissions, the plaintiff argues that he suffered damages in respect of the Investment in two ways:
- a) First, the plaintiff suffered damage by making the \$50,000 US investment for 333,333 shares of the Company which he would not have made if there had not been a misrepresentation regarding the cease trade order.
 - b) In addition, the plaintiff suffered consequential damages by not being able to make a profit on his investment. In this respect, the plaintiff argues that the consequential loss is the profit he would have made had he been able to sell the shares when they reached a high of \$0.50 US per share on May 1, 2014. The plaintiff argues that he was unable to sell due to the cease trade order. If the plaintiff had sold on May 1, 2014, he argues he would have received proceeds of disposition of approximately \$166,666.50 US. He argues that his profit would have been US\$116,666.50 (\$166,666.50 US less the \$50,000 US investment).
- [12] The plaintiff acknowledges that damages for fraudulent misrepresentation is the amount of money required to put the plaintiff in the position it would have been had the misrepresentation not been made (*Satnam Education Foundation v. MC Dream Construction & Supplies Ltd.*, 2020 BCSC 1089 at para. 101). The traditional award for damages is the loss of capital. However, he argues that in addition to the initial investment, consequential damages, including lost profits, can also be recovered if those damages (or profits in this situation) are not too remote. He cites *Battrum v. MacKenzie*, 2010 BCSC 1285, *Wiebe v. Gunderson*, 2004 BCCA 456, and *Kaboodani v. Esfahani*, 2007 BCSC 1654, in support of this position.
- [13] It is not necessary for me to decide whether the authorities support the plaintiff's recovery of the specific consequential damages claimed by the plaintiff in the circumstances of this case. That is because the argument that the plaintiff is entitled to recovery of profits based upon the plaintiff having sold his shares of the Company at a particular time suffers from a significant evidentiary deficiency.
- [14] The plaintiff has not provided any evidence that would lead me to find that on balance he would have actually sold the Company's shares on May 1, 2014, and not some other day, or at all, if the cease trade order had not been in effect. It appears that the plaintiff has simply chosen the day upon which the Company's shares traded at their highest value in the period between April 1, 2014, and May 30, 2014, and argues that he should be entitled to the profits as if he had sold the shares on that day. Moreover, in his affidavit, the plaintiff only goes so far as to depose that he would have been "able" to sell the shares when they reached \$0.50 US per share had the cease trade order not been in effect. The plaintiff does not depose that he would have sold them on that day and no explanation or other evidence is provided as to why the plaintiff would have sold his shares on that particular day.
- [15] I am not persuaded that the plaintiff would have sold the shares as he argues. My conclusion would be the same even if the plaintiff had deposed that he would have sold the shares on that day without providing significantly persuasive evidence beyond a merely stated

intention made with the benefit of hindsight. Thus, even if the measure of the consequential loss is based upon the profit the plaintiff would have made from the sale of the Company's shares, which it is not necessary for me to decide, I do not have any persuasive evidence of what that loss would be.

- [16] I am, however, satisfied on the evidence before me that the plaintiff made an investment of \$50,000 US in the Company on or around October 18, 2013. Having regard to the default judgement that the plaintiff has obtained, I accept that the plaintiff was deprived of this money by the negligent or fraudulent misrepresentation of the Company and that he is entitled to the return of his capital because if he had known the true state of affairs, he would not have made the Investment in the first place. Therefore, I assess the damages for misrepresentation in respect of the Investment as being \$50,000 US.

The Consulting Services Agreement and Damages for Breach of Contract

- [17] In the fall of 2013, the plaintiff claims to have entered into a consulting agreement with the Company and he claims to have provided consulting services to the Company in 2013 and 2014 (the "Consulting Services"). The Company was supposed to compensate the plaintiff for the Consulting Services provided between November 1, 2013, and October 31, 2014, by paying him \$50,000 US. The Consulting Services were described as "Financial Consulting" in a letter of acknowledgement signed on behalf of the Company by Nightingale and Konyi in a facsimile transmission dated January 22, 2016, and the debt of \$50,000 US was acknowledged (the "Acknowledgement Letter").
- [18] In the Acknowledgement letter, the Company agreed to make payments towards the \$50,000 US owed for the Consulting Services in ten \$5,000 US monthly installments beginning March 1, 2016, and ending on December 1, 2016 (the "Payment Schedule"), with interest afterwards at 1% per month.
- [19] The plaintiff deposes that the Company only made the first payment of \$5,000 US on March 1, 2016, under the Payment Schedule and thus, he argues, the Company still owes him \$45,000 US plus interest for the Consulting Services. The plaintiff argues that interest on the debt began to accrue on April 1, 2016. The default judgement in this matter was entered on March 15, 2019, and therefore, he argues that the contractual interest owed on a debt of \$45,000 US at a rate of 1% per month is \$15,750 US. In total, the plaintiff claims \$60,750 US for the Company's breach of contract respecting the Consulting Services.
- [20] The measure of damages for breach of contract is that the plaintiff should be returned to the position he would have been in had the contract been performed (*AME Distribution Inc. v. Wang*, 2018 BCSC 426 at para. 83).

- [21] On the evidence before me in light of the default judgment, I am satisfied that the Company breached the Consulting Services agreement by not paying the initial amount and the subsequent agreement by not paying the interest on the outstanding debt. Thus, I assess the damages for breach of contract as being \$60,750 US being the amount that the plaintiff would have received if the Company had not breached the agreement.

Conclusion and Application of the Foreign Money Claims Act

- [22] The plaintiff's damages for the Company's misrepresentation in respect of the Investment are assessed at \$50,000 US. The plaintiff's damages for the Company's breach of contract in respect of the debt owed for the Consulting Services are assessed at \$60,750 US. Consequently, the plaintiff's damages for this action are assessed at \$110,750 US.
- [23] The plaintiff submits that s. 1 of the Foreign Money Claims Act, R.S.B.C. 1996, c. 155 ("FMCA"), applies, such that the damages awarded should be converted from United States dollars to Canadian dollars on the date on which payment of this judgment is made. The courts of this province are generally sympathetic to the plaintiff's position when determining the appropriate date for converting a foreign judgment to Canadian currency (*Wei v. Mei*, 2018 BCSC 1057, at para. 54). While this is not an action to enforce a foreign judgment, I see no reason why the approach should not be the same in this case. I am satisfied that the plaintiff will be most "truly and exactly" compensated if the damages that have been assessed are payable in United States dollars because the Investment was made in United States dollars and the Company was to compensate the plaintiff for the Consulting Services in United States dollars. Thus, pursuant to s. 1 of the FMCA, the defendant Company shall pay to the plaintiff the amount of Canadian currency that is necessary to purchase \$110,750 US at a chartered bank located in British Columbia at the close of business on the conversion date which is the last day before the date on which a payment of this judgment is made.

Costs

- [24] The plaintiff is entitled to his costs at Scale B.

"Majawa J."

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Prepared on 28 October 2026 · Esheria