
CANADA / JUDGMENT

Zale v. Johns

2014 BCSC 90

COURT

Supreme Court of British Columbia

DECIDED

21 January 2014

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2014 BCSC 90 Zale v. Johns

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zale v. Johns,

2014 BCSC 90

Date: 20140121

Docket: 13-0211

Registry: Victoria

Between:

Gregory Zale and Bonnie Zale

Plaintiffs

And:

Steven Mark Johns and Burt Johns

Defendants

Before: The Honourable Mr. Justice Bracken

Reasons for Judgment

Counsel for the Plaintiffs:

J.A.S. Legh

Counsel for the Defendant B. Johns:

C.A. Siver

No one appearing for the

Defendant S. M. Johns

Place and Date of Hearing:

Victoria, B.C.

October 18, 2013

Place and Date of Judgment:

Victoria, B.C.

January 21, 2014

- [1] This is an application pursuant to Rule 9-7 of the Supreme Court Civil Rules for judgment on summary trial against Steven Mark Johns ("Steven"), for breach of his obligation to make payments required pursuant to a Share Purchase Agreement between him and the plaintiffs. The plaintiffs also claim against Burt Johns ("Burt") pursuant to his Personal Guarantee of the obligations of Steven for the limited amount of \$200,000.
- [2] The amount of the debt is alleged to be \$204,593.85 as at September 3, 2013 together with interest at the rate of 1.5% per annum thereafter. Burt is Steven's father and as both defendants have the same last name I will refer to them by their given names as a matter of convenience. I mean no disrespect to either of them by doing so.
- [3] The plaintiffs operated a retail shoe business in Victoria under the name Foot Solutions. The operating company was Foot Solutions Victoria Ltd. The plaintiffs entered into a Share Purchase Agreement with Steven who wanted to purchase all of the shares of Foot Solutions Victoria Ltd. and to take over the business. An arrangement was made by which the plaintiffs sold all of the issued shares in Foot Solutions Victoria Ltd. to Steven for the price of \$298,500. The purchase was to be fully financed by the plaintiffs; however, they only agreed to finance the sale if Burt provided his Personal Guarantee of Steven's promise to pay.
- [4] The terms of the financial portion of the Share Purchase Agreement were that Steven was to make 60 monthly payments in the amount of \$5,166.40 each, including interest. The first payment was to be made on February 15, 2011 and the last payment was to be made on January 15, 2016. Steven had the right to pay the contract in full at any time. Any unpaid portion of the purchase price was to become due in the event Steven sold the business within the 60-month period.
- [5] The sale of shares was documented by a detailed Share Purchase Agreement which had annexed to it financial statements of Foot Solutions Victoria Ltd. dated October 31, 2010 along with the Vendors' Closing Certificate stating that that the vendors had performed all of their obligations under the contract and that all of the representations made in the share purchase were still true at the date of closing of the sale.

- [6] The purchase price was secured by a Promissory Note for the full amount of the purchase price of \$298,500 with interest at 1.5% per annum. Paragraph 3 of the Promissory Note contained a provision for a 10% penalty on any payment that was not made within 5 days of the due date. Paragraph 2 of the Promissory Note contains an acceleration clause in the event any payment was not made on time. It is my understanding from the affidavit material that no penalty has been included in the amount claimed by the plaintiffs and that the amount claimed to be due and owing is for principal and interest only. If I am not correct in that understanding, the matter may be spoken to.
- [7] For the first few months following the completion of the sale, Steven made the payments as required. However, he then fell into a pattern of late or missed payments. The email correspondence between Steven and the plaintiffs indicates the various reasons given by Steven for his failure to make the payments on time. The plaintiffs granted extensions from time to time by which they agreed to defer some of the payments to a later time. There is no evidence Burt was made aware of Steven's failure to make payments or the indulgences that were granted by the plaintiffs.
- [8] By the end of 2012, it was evident to the plaintiffs that Steven would not continue making the payments, and on January 11, 2013, the plaintiffs' solicitor demanded payment in full from Steven and they also demanded payment from Burt based on the Personal Guarantee. No payments were received from either Steven or Burt and this action was commenced on January 18, 2013. Burt has filed a Response to Civil Claim; however, Steven has not.
- [9] In his Response to Civil Claim, Burt states that he was told by the plaintiff Gregory Zale that the limited Guarantee would be reduced by the amount of any payments made on the Share Purchase Agreement by Steven. Burt says that he asked Mr. Zale if Steven paid \$150,000 whether the Guarantee would then be reduced to \$50,000 and he said that Mr. Zale agreed that it would.
- [10] Gregory Zale does not recall that conversation. He says that the Guarantee is limited to the amount of \$200,000, but it was never intended that each and every payment made by Steven would be deducted from the amount of the Guarantee and he would not have agreed to such an arrangement. It appears to be Burt's position that every payment made by Steven should be deducted from the \$200,000 limit on the Guarantee so that every time Steven made a payment of \$5,166.40, the limited amount of the Guarantee would be reduced accordingly. The plaintiffs deny that was the arrangement and say that they never agreed to reduce the Guarantee amount by every payment Steven made.
- [11] The Guarantee is in writing and it provides as follows:

LIMITED PERSONAL GUARANTEE

IN CONSIDERATION of GREGORY ZALE and BONNIE ZALE (the "Vendors") selling their shares in FOOT SOLUTIONS VICTORIA LTD. (the "Company") pursuant to the Share Purchase Agreement of January 31st, 2011 (the "Company Purchase Agreement") and granting a Promissory Note of

January 31st, 2011 by STEVEN MARK JOHNS (the "Purchaser") to the Vendors, the undersigned BURT JOHNS ("the Guarantor") unconditionally guarantees to the Vendors the due performance and fulfilment by the Purchaser for all the obligations, liabilities and duties that the Purchaser may owe to the Vendors but defaults in their fulfilment.

1. Copies of the Company Purchase Agreement and the Promissory Note are attached.
2. This Guarantee shall be limited to the sum of TWO HUNDRED THOUSAND (\$200,000.00) DOLLARS inclusive interest and any applicable charges, costs or penalties.
3. The liability of the Guarantor shall be payable within ninety (90) days upon delivery of a written demand addressed to the Guarantor at the following address (or such other address as the Guarantor may provide to the Vendors in writing):

506 - 640 Montreal St.

Victoria, BC V8V 1Z8

4. The Guarantor agrees to remain fully bound until all amounts owing under the Company Purchase Agreement and the Promissory Note shall be fully paid, and:
 - (a) He waives demand, presentment and protest and all notices hereto.
 - (b) He further agrees to remain bound notwithstanding any extension, modification, waiver, or other indulgence or discharge or release of any obligor regarding the Company Purchase Agreement or the Promissory Note or exchange, substitution, or release of any collateral granted as security for the obligations.
 - (c) No modification or indulgence by any holder hereof shall be binding unless in writing; and any indulgence on any one occasion shall not be an indulgence for any other or future occasion.
 - (d) The rights of any holder hereof shall be cumulative and not necessarily successive.
 - (e) This guarantee shall take effect as a sealed instrument and shall be construed, governed and enforced in accordance with the laws of the Province of British Columbia.
 5. This Guarantee shall extend to and bind my executors, administrators and assigns.
- [12] Burt also claims that the plaintiffs stripped the company of cash and inventory between the time the sale was agreed to and the time it closed. He says the conduct of the plaintiffs reduced the value of the business significantly. Burt bases this submission on what he was told by Steven. Burt has raised the contractual defences of Steven in his Response to Civil Claim. He argues that the alleged conduct of the plaintiffs should result in his release from his Guarantee. The difficulty with his submission is that there was no evidence presented at the summary trial by either Burt or Steven that is sufficient to support those allegations.

- [13] The plaintiffs have filed affidavit material as well as a reconciliation of the financial transactions between the time the sale was agreed to and the time it completed. It appears from that document and from the affidavit evidence of Mr. Zale that all of the funds and inventory sales were accounted for and that Steven agreed with the accounting. It also is clear that Steven received the profit from the sales activity during the period, net of expenses and the salaries that were paid to Mr. and Mrs. Zale. As to those salaries, they were reduced by \$1,000 each by way of an agreement made with Steven.
- [14] The evidence establishes that Steven was aware of what was happening with the operation of the company between the date of the Agreement and the closing date and that he participated in the operations of the business. As well, he received his share of the profits earned by the business between the date of the Share Purchase Agreement and the closing of the sale. The evidence shows that the plaintiffs accounted for the changes to the assets of the business.
- [15] Steven has not filed a response to the civil claim. In his affidavit he says that the plaintiffs sold much of the saleable stock in a 5-day period from December 26 to December 31, 2010. When he started working in the store on January 1, 2011 he says the remainder of the stock was out of date and he says the plaintiffs advised him to sell that stock at an 80% discount and he agreed.
- [16] He attached sale flyers to his affidavit to illustrate the sales advertising. The first flyer is dated December 28, 2010, which was apparently two days after the day he said the sale was agreed to and three days prior to when he claims he took effective ownership of the shares of the company.
- [17] The plaintiffs deny Steven was to have beneficial ownership of the shares on January 1, 2011 and say that the share purchase did not complete until January 31, 2011. However, they say it was agreed that he would work in the store commencing January 1, 2011 and that he was entitled to all net sale proceeds as of that day. They were to continue receiving their normal salaries. They also say that he was paid a total of \$15,121.95 which represented the net sale proceeds of the business from January 1 to 31, 2011.
- [18] The plaintiffs deny they sold all saleable merchandise at deeply discounted prices between December 26 and December 31, 2010. They say that Steven was well aware that they were conducting sales of merchandise prior to October 31, 2010 and that only old and discontinued stock was significantly reduced in price.
- [19] Paras. 6.4 and 6.5 of the Share Purchase Agreement contain covenants requiring the plaintiffs to conduct the business in a "normal, businesslike and efficient manner and not to engage in any conduct that is outside of the ordinary course of business." There is no evidence that Steven has threatened or commenced any legal action based on those covenants. The only evidence respecting the plaintiffs' conduct of the business presented on behalf of Burt is hearsay evidence stating what he was told by Steven.

- [20] Burt also claims that the interest on the Promissory Note is excessive. He says that the effective rate could be 1700% over the life of the Agreement, assuming that 10% penalties are added in. However, there is no evidence that any penalties form part of the amount claimed by the plaintiffs, nor is there any expert evidence to state that the interest as calculated could actually amount to a rate of 1700%. There is no evidence of how that figure was arrived at.
- [21] With respect to the claim against Steven, I am satisfied on the material as filed that Steven is indebted to the plaintiffs in the amount of \$204,593.85, together with interest at the rate of 1.5% per annum from and after September 3, 2013. The plaintiffs are at liberty to enter judgment for that amount against Steven.
- [22] With respect to the claim on the Personal Guarantee against Burt, I must conclude that the Personal Guarantee is enforceable in the full amount of \$200,000.
- [23] Burt's submission is that the terms of the written Guarantee should be varied in accordance with the interpretation of its terms based on what he was told by Steven, or perhaps what he was told by Mr. Zale. However, in my view, it is not open to Burt to seek to place an interpretation on the terms of the written Guarantee based on alleged verbal assurances by Mr. Zale if that interpretation differs from the clear terms of the written Guarantee. See *Hawrish v. Bank of Montreal* (1969), 2 D.L.R. (3d) 600 (S.C.C.), *Eli Lilly and Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 57, and *Bank of Montreal v. Bal*, 2012 BCSC 1505.
- [24] While the law is solicitous of sureties, it is not open to Burt to claim he is not bound by the Guarantee based on his own misconception of its written terms, or on what he was told it meant by Steven. To give effect to his submission I would have to add terms to the already clear words of the Guarantee.
- [25] Burt also argues that the plaintiffs have released the Guarantee by their conduct in dealing with Steven. However, there is nothing in the material to suggest that the plaintiffs have conducted themselves in a manner that should result in a release of the Guarantee that was entered into by Burt. He relies on a line of cases following *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551. However, all of the cases referred to, in my view, are distinguishable upon their facts.
- [26] In this case, Steven was obliged to make certain payments in exchange for the purchase of shares from the plaintiffs and he failed to do so. There is no evidence of any conduct upon which it is possible to find that the plaintiffs breached the contract they made with Steven and thus in some way caused a release of the Guarantee. I accept the principle that any material variation of the terms of the contract between the creditor and the principal debtor that works to the prejudice of the guarantor will discharge him provided he has not consented to the conduct. Here, there is no admissible evidence of such conduct. Even if there was such evidence on the part of the plaintiffs, para. 4 of the Limited Personal Guarantee provides that Burt is to remain fully bound notwithstanding any extension, modification, waiver or other indulgence granted to Steven.

- [27] Finally, Burt submits that this matter is not suitable for summary trial. However, the only admissible evidence on the essential facts is contained in the affidavit evidence of Mr. Zale. The evidence of Burt is largely based on the hearsay evidence of what he was told by Steven. Even if there was a conversation between him and Mr. Zale as he alleges, the essence of the alleged assurance is equivocal and even if such an assurance was given verbally by Mr. Zale, it cannot stand as a contradiction to the clear terms of the written Guarantee. Thus, there is no factual conflict or credibility issue that cannot be resolved on the affidavits.
- [28] I have considerable sympathy for Burt given his evidence that he has not only signed this Guarantee in support of his son, but has also expended in excess of \$216,000 by way of other payments made to his son over the course of the short time Steven operated the business. He notes in his affidavit that he was unaware that some of that money went elsewhere than to the operation of the business. However, that is of no moment with respect to his obligations to the plaintiffs.
- [29] On all of the evidence before me, I find that the matter is suitable for summary trial and I grant judgment in favour of the plaintiffs against Steven in the amount of \$204,593.85 together with interest at the rate of 1.5% per annum from September 3, 2013 to the date of judgment. Court order interest is granted thereafter. I also find that the Limited Personal Guarantee signed by Burt is valid and enforceable against Burt in the full limited amount of \$200,000. The plaintiffs are entitled to court order interest from the date of judgment. Costs follow the event.

"J. K. Bracken, J."

The Honourable Mr. Justice Bracken

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