

CITATION: Powerone Solutions Inc. v. Trans-Tec Inc., 2024 ONSC 1248
COURT FILE NO.: CV-21-2199
DATE: 2024 02 29

SUPERIOR COURT OF JUSTICE – ONTARIO
7755 Hurontario Street, Brampton ON L6W 4T6

RE: Powerone Solutions Inc., Plaintiff
AND:
Trans-Tec Inc., Defendant
BEFORE: Justice Bloom
COUNSEL: Mike Cashion, for the Plaintiff
Randy Schliemann, for the Defendant
HEARD: January 31, 2024

ENDORSEMENT

I. INTRODUCTION

[1] The Plaintiff brings a motion for summary judgment for damages for breach of contract.

II. UNDISPUTED FACTS

[2] The parties entered into a written contract dated July 11, 2018 under the terms of which the Plaintiff agreed to sell to the Defendant specific assets, called the “fixed assets” and “inventory.” Both the fixed assets and inventory were identified in the contract.

[3] The parties also agreed in the contract that “Time shall be of the essence of this Agreement.” The contract also provided, “The Purchase [sic] also agrees that time is of the essence and agrees to remove the [inventory and fixed assets] ...from the premises of the Vendor as soon as possible.”

[4] On or about July 25, 2018 the Plaintiff’s landlord locked it, the Plaintiff, out of its premises as a result of a dispute regarding the relationship between the Plaintiff and the landlord.

III. ARGUMENTS OF THE PARTIES

A. Arguments of the Plaintiff

[5] The Plaintiff argues that pursuant to the terms of the contract the Defendant owes \$70,565.04 in purchase monies, which it seeks by way of summary judgment. The Plaintiff submits that there is no genuine issue requiring a trial with respect to any defense raised by the Defendant.

[6] The Plaintiff contends that evidence of any representations made by it prior to the signing of the contract that access to assets would be provided to the Defendant until July 31, 2018 is inadmissible, including by the application of the parol evidence rule. Further, the Plaintiff argues that the principle of *contra proferentem* does not apply to the construction of the contract, since it was drafted by both parties.

[7] The Plaintiff also resists the arguments of the Defendant that the contract entitled the Defendant to access to the Plaintiff’s premises to obtain the assets

purchased until July 31, 2018; the Plaintiff bases those submissions on the application of estoppel and on the destruction of evidence by the Defendant. The Plaintiff puts emphasis in its argument on the contention that the Defendant did not complain about denial of access to assets until approximately two years after the signing of the contract.

[8] The Plaintiff also makes alternative arguments seeking partial summary judgment.

B. Arguments of the Defendant

[9] The Defendant argues that the Plaintiff breached the contract by not providing access to the assets purchased until July 31, 2018; and, therefore, cannot enforce it.

[10] The Defendant argues that the contract was between two sophisticated parties in a good business relationship; that as signed, the contract was ambiguous as it pertained to access by the Defendant to assets; and that, accordingly, the law mandates reference in the contract's interpretation to discussions between the parties during its negotiation. Further, the Defendant argues that prior to the signing of the contract and during those negotiations the Plaintiff had represented that the Defendant would have access to the assets until July 31, 2018; and that, therefore, the contract as properly construed provided for that access. The Defendant argues that the Plaintiff breached the contract when that access was not provided; and, therefore, cannot enforce it against the Defendant.

[11] The Defendant argues further that the principle of *contra proferentem* applies to the construction of the contract, because the Plaintiff drafted it.

[12] The Defendant submits that there is a genuine issue requiring a trial in relation to the interpretation of the contract and relating to defenses of set-off and frustration of contract. In respect of the defense of frustration, the Defendant argues that the landlord's barring access to the assets by the Defendant frustrated the contract; and, thereby, relieved the Defendant of its obligations under the contract, and, consequently, of any liability for damages to the Plaintiff.

[13] The Defendant further argues that partial summary judgment is inappropriate, *inter alia* because it was not sought in the Plaintiff's notice of motion.

[14] The Defendant argues that a trial is required so that findings of material facts, including some based on credibility, may be made on a record including *viva voce* evidence. Specifically, those findings of fact would include the content of negotiations between the parties leading to the signing of the contract, and the conduct of the parties after July 25, 2018, and the reasons for that conduct. Further, the Defendant contends that the interpretation of the contract could only be properly accomplished by applying the applicable legal principles to the findings of fact made on the trial record as so developed.

[15] The Defendant seeks dismissal of the motion at bar, and, alternatively, a judgment for any monies owed to it by the Plaintiff beyond what it owes the Plaintiff.

IV. GOVERNING LEGAL PRINCIPLES

[16] I intend in this part of my ruling to address key governing principles applicable to the case at bar. I will be addressing several other legal concepts in the appropriate context in my analysis below.

A. The Principles relating to Summary Judgment

[17] In *Yamada v. Joseph-Walker*, [2023] O. J. No. 1341 (Ont. Sup. Ct.) at paras. 18 to 21 Justice Emery set out the principles governing whether a case is an appropriate one to be decided on a motion for summary judgment:

18 The Supreme Court of Canada set out the principles the court is to apply on motions for summary judgment in *Hryniak v. Mauldin*, 2014 SCC 7. In *Mayers v. Khan*, 2017 ONSC 200 (aff'd at 2017 ONCA 524), Glustein J. summarized the *Hryniak* principles as follows:

Summary judgment must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. It is no longer merely a means to weed out unmeritorious claims but rather a "legitimate alternative means for adjudicating and resolving legal disputes" (*Hryniak*, at paras. 5 and 36);

An issue should be resolved on a motion for summary judgment if the motion affords a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive process to achieve a just result than going to trial (*Hryniak*, at paras. 4 and 49);

On a motion for summary judgment, the judge must first determine if there is a genuine issue requiring a trial based only on the evidence before the judge and without using the judge's fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the powers under Rules 20.04(2.1) and (2.2) (*Hryniak*, at para. 66); and

The standard for determining whether summary judgment will provide a fair and just adjudication is not whether the procedure is as exhaustive as a trial, but rather "whether it gives the judge confidence that [the judge] can find the necessary facts and apply the relevant legal principles so as to resolve the dispute" (Hryniak, at para. 50). A judge must be confident that he or she can fairly resolve the dispute (Hryniak, at para. 57).

19 On a motion for summary judgment, each party is required to put their best foot forward. A self-serving affidavit is not sufficient to create a genuine issue for trial in the absence of detailed facts and supporting evidence. See *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC) at para. 31, and *Grewal v. Khaira et al.*, 2021 ONSC 4908, at para 25.

20 The Court of Appeal explained in *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 that on a summary judgment motion, the court will assume that all necessary evidence has been tendered. A motions judge is entitled to presume that the evidentiary record is complete and there will be no further evidence at trial. A motions judge is not required to resort to the enhanced powers provided by subrules 20.04(2.1) and (2.2) to backfill a party's evidentiary shortcomings.

21 The anticipation of a party to have better evidence at trial will not defeat a motion for summary judgment: *Van Nispen v. McCarron & Chobotiuk Financial Services Inc.*, 2020 ONCA 146, at para. 4.

B. The Principles Relating to the Granting of Partial Summary Judgment

[18] In *Learmont Roofing Ltd. v. Learmont Construction Ltd.*, [2022] O.J. No. 5763 (Ont. C.A.) at paras. 19 and 21 to 23 the Court considered the availability of partial summary judgment:

19 Partial summary judgment is a "rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner": *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 418 D.L.R. (4th) 657, at para. 34. The more important

credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a partial summary judgment basis: *Cook v. Joyce*, 2017 ONCA 49, at para. 92.

....

21 In our view, the motion judge demonstrated a proper appreciation for the legal principles governing partial summary judgments. We see no error in her decision to grant it in the present case. We agree that the appellants raised no genuine issues requiring a trial. Further, after reviewing the evidentiary record, the motion judge concluded that it did not give rise to any credibility problems. We see no palpable and overriding error justifying appellate interference with the motion judge's findings.

22 We also find that the motion judge properly considered and rejected the risk of inconsistent factual findings. The motion judge recognized that the appellants have "a myriad of counterclaims" against the respondent, including allegations of fraud, misrepresentation, and conversion. However, these did not "prevent the plaintiff from moving forward to recover the outstanding amount owing to it on invoice #4" through a partial summary judgment motion. The motion judge's reasons referenced an earlier case management endorsement by Nicholson J., on August 4, 2021, who observed that "the counterclaims appear to involve entirely separate claims from the claim being made by [Roofing]."

23 We agree with the motion judge's assessment. The counterclaims are not intertwined with Roofing's trust claim in a manner which would lead to factual inconsistencies. Consequently, we find that, on the facts of the present case, it was appropriate for the motion judge to grant partial summary judgment.

C. The Role of the Parol Evidence Rule in Contract Interpretation

[19] In *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633 at paras. 47 to 61 Justice Rothstein for the Court placed the parol evidence rule within the framework of the broader principles applicable to the interpretation of contracts:

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding

concern is to determine “the intent of the parties and the scope of their understanding” (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law “are questions about what the correct legal test is” (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as “applying a legal standard to a set of

facts” (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

....

(b) *The Role and Nature of the “Surrounding Circumstances”*

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann,

“absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man” (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (*Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R.129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party’s ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and *Hall*, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

V. ANALYSIS

A. The Issue of Interpretation of the Contract Requires a Trial

[20] The principal issue in dispute in the proceeding is the interpretation of the contract on the matter of access to the assets until July 31, 2018. The Plaintiff does not dispute the principal, upon which the Defendant relies, and articulated as follows by Justice Perell in *285 Spadina SPV Inc. v. 2356802 Ontario Corp.*, [2020] O.J. No. 1374 at para. 196:

196 It is a principle of contract law that a guilty contracting party or a party that causes the other party to breach the contract cannot enforce the terms of the contract and cannot terminate the contract or sue for specific performance.**18** This principle is an aspect of the doctrine of good faith in the performance of contract obligations. It is an aspect of the doctrine that existed long before the recent attention given to the doctrine by the Supreme Court in *Bhasin v. Hrynew*.**19**

[21] Moreover, the Plaintiff does not dispute that the Defendant did not have access to the assets until July 31, 2018, since the landlord locked out the Plaintiff on July 25, 2018.

[22] I have concluded that the principles set out in *Sattva, supra*, including in relation to the parol evidence rule, as applied to the case before me, raise a genuine issue requiring a trial in relation to the defense raised that the contract as properly interpreted gave access to the Defendant to the assets until July 31, 2018;

and that, therefore, the Plaintiff breached the contract when that access was denied, and cannot enforce it. I shall now explain that conclusion.

[23] The affidavit of Tim Hall sworn October 20, 2023 on behalf of the Defendant asserted that he was vice-president of the Defendant; that the Plaintiff advised the Defendant that it would have access to the premises where the assets subject of the contract were located until July 31, 2018; that the Defendant worked with the Plaintiff after the lock-out in hopes that future sales to the Plaintiff by the Defendant would make up for the assets not retrieved from the premises of the Plaintiff because of the lock-out; that the basis of the contract included access by the Defendant to the Plaintiff's premises until the end of July of 2018; that Evan Baergen, the chief operating officer of the Plaintiff, and his agent, Dr. Mokhtor Kamli, informed him orally during negotiations of the contract that the Defendant would have access to the Plaintiff's premises until July 31, 2018; and that the Defendant understood that the phrases "time was of the essence" and "as soon as possible" in the contract meant that the Defendant had to remove the assets by July 31, 2018 (the wording in the affidavit was actually "before July 31, 2018" but the arguments of the parties treated the assertion as "by July 31, 2018").

[24] In relation to Hall's evidence, the Plaintiff does not rely upon cross-examination of Hall to undermine his evidence. The Plaintiff rather argues that Hall did not testify that access until July 31, 2018 was needed by the Defendant

as a term of the contract, and additionally relies upon the parol evidence rule to exclude any representation by the Plaintiff that the Defendant was to have access until July 31, 2018 to retrieve the assets.

[25] Evan Baergen gave affidavit evidence for the Plaintiff and was cross-examined. In cross-examination he testified that, although his recollection was vague, he thought that he had said to Hall that the assets had to be removed within a week after the contract was signed.

[26] In my view the interpretation of the contract as to whether it provided for access to the Defendant to retrieve the assets until July 31, 2018 is a genuine issue requiring trial. The court should hear the testimony of Hall, Baergen, and Mokhtor *viva voce*, including cross-examination and make findings of fact based on credibility and reliability. It will then apply the *Sattva* principles, which subsume the parol evidence rule, and determine whether the contract provided for access for the Defendant until July 31, 2018.

B. Estoppel by Convention does not Justify Summary Judgment

[27] The Plaintiff argues that, even if it was in breach of contract by the denial of access to July 31, 2018, the Defendant is barred from raising that argument by estoppel by convention. In that regard the Plaintiff relies on dealings between the parties after the lock-out until October of 2020 when the Defendant explicitly asked for an adjustment of the purchase price based on failure to retrieve all of the assets.

[28] The Defendant argues that the course of dealing after the lock-out and before the October 2020 complaint was simply a matter of the parties trying to do business with each other.

[29] In *Ryan v. Moore*, [2005] 2 S.C.R. 53 at paras. 59 and 61 Justice Bastarache discusses estoppel by convention:

59 This Court is not bound by any of the above analytical frameworks. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

- (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
- (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
- (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

....

61 The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind" (*Troop v. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), at p. 5; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), at para. 49). The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity: *Troop*, at p. 6; see also *Baird Textile Holdings Ltd. v. Marks*

& *Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274, at para. 84.

[30] I do not find the certainty and clarity of the convention necessary to overcome the need for a trial based on the test for summary judgment. Hall's affidavit evidence is that "[a]fter the lockout,...[the Defendant] continued to work with [the Plaintiff] in good faith on the assumption that ... [the Plaintiff] would strive to grow its business, and that any... [assets] not retrieved would be compensated for through future sales [to the Plaintiff]. However, no compensation through future sales ever materialized."

[31] It is clear to me that a trial with *viva voce* evidence, including cross-examinations, will be necessary to determine facts on which to apply the principles of estoppel by convention, particularly whether the parties were of "like mind" after the lockout in respect of the assets not retrieved.

C. The Effect of Destruction of Documents by the Defendant

[32] The Plaintiff in arguing for summary judgment argues for an adverse inference against the Defendant from its destruction of documents belonging to the Plaintiff, of which it did take possession from the premises of the Plaintiff. Hall's affidavit states that Baergen had an opportunity to review the documents once they were in the Defendant's possession; that he did not avail himself of that opportunity; and that ultimately the Defendant destroyed the documents, since

they no longer served a business purpose in view of the end of the business relationship between the parties.

[33] I am unable on the record before me to draw a sufficient adverse inference against the Defendant from the destruction of the records to change my conclusion that a trial is necessary.

D. Frustration of Contract Need Not be Addressed on this Motion

[34] The Defendant's alternative argument that the contract was frustrated by the lock-out need not be addressed, given my conclusion that a trial is necessary in the matter based on the defense that the Plaintiff breached the contract by virtue of the lockout. Moreover, in my view the same reasoning which requires a trial to apply the *Sattva* principles in respect of that defense would also require a trial to apply the principles of frustration of contract, since the facts in issue are the same.

E. The Issues of Set-Off and Partial Summary Judgment

[35] The Plaintiff raises as alternative arguments claims for various amounts as partial summary judgment. The Defendant at the same time raises claims for set-off and for summary judgment for monies owed it. None of these matters should be separated from the trial necessary to determine the result on the principal claim of the Plaintiff. To do so would risk incurring the dangers of partial summary judgment, namely inconsistent findings and duplication of adjudicative efforts,

since all of these additional claims are factually related to the contract signed July 11, 2018 and the subsequent dealings of the parties already discussed.

F. Conclusion

[36] Accordingly, I find that there is a genuine issue requiring a trial on the defense raised that the Plaintiff has breached the contract and cannot now enforce it. Therefore, I dismiss the motion for summary judgment.

VI. COSTS

[37] I will receive written submissions as to costs of no more than 4 pages, excluding a bill of costs. The Defendant shall serve and file its written submissions within 14 days; the Plaintiff shall serve and file its submissions within 14 days of service of the Defendant's submissions; and there shall be no reply.

Bloom J.

Released: February 29, 2024

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ENDORSEMENT

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