

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kooner v. Epix Squamish Limited Partnership*,
2024 BCSC 528

Date: 20240313
Docket: S251267
Registry: New Westminster

Between:

Rupinder Singh Kooner

Plaintiff

And

**Epix Squamish Limited Partnership, Epix Squamish GP Inc.,
and Epix Squamish BT Inc.**

Defendants

Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

L. Robertson

Counsel for the Defendants Epix Squamish
Limited Partnership and Epix Squamish GP Inc.:

M.G. Swanson

For the Defendant Epix Squamish BT Inc.

No appearance

Place and Date of Hearing:

Vancouver, B.C.
March 13, 2024

Place and Date of Judgment:

Vancouver, B.C.
March 13, 2024

[1] **THE COURT:** The applicants Epix Squamish Limited Partnership (“Epix LP”) and Epix Squamish GP Inc. (“Epix GP”) seek a stay of the underlying proceeding in favour of the parties' agreement to submit the underlying issues to arbitration.

[2] I will grant the application of the applicants/defendants for the following reasons. My reasons rely heavily on the submissions of the applicants.

The Partnership Agreement and the Arbitration Agreement

[3] On May 20, 2016, Epix GP entered into a partnership agreement, creating Epix LP for the purpose of, among other things, acquiring, developing, financing, constructing, holding, managing, operating, marketing and selling a mixed-use retail and residential condominium project in Squamish, British Columbia (the "Partnership Agreement").

[4] Section 4(c) of the Partnership Agreement sets out the steps and conditions for distributing assets of the Partnership:

c. Distributions. Subject to receiving, if required, the approval of the Partnership's bank, and to the extent cash not required to operate the Business of the Partnership is available as determined by the General Partner, distributions will be made after the development of the Project is completed and sold. Distributions will be made according to the attributes of the class of Units held by each Partner.

[5] On July 26, 2016, the plaintiff, Mr. Kooner became a limited partner of Epix LP pursuant to a subscription agreement (the "Subscription Agreement"). The Subscription Agreement contains various terms and conditions, including terms that expressly incorporate the terms and conditions of the Partnership Agreement and the Arbitration Agreement contained within the Partnership Agreement.

[6] Section 22 of the Partnership Agreement is an arbitration agreement (the "Arbitration Agreement"). The Arbitration Agreement requires all parties to use best efforts to resolve disputes within 30 days of the delivery of a notice of dispute. If the parties fail to resolve disputes within 30 days of the delivery of the notice of dispute, the dispute shall be submitted to arbitration pursuant to British Columbia's arbitration legislation. The Arbitration Agreement reads as follows:

22. Arbitration

In the event any difference or dispute shall arise between the Partners or any of them, in respect of the Partnership or this Partnership Agreement, the parties hereto agree to use their reasonable best efforts to resolve such difference or dispute within a thirty (30) day period from notice in writing detailing the nature of the dispute given by the party alleging the dispute to the other parties hereto. In the event that the difference or dispute is not so resolved within the said thirty (30) day period, such difference or dispute shall be submitted to arbitration pursuant to the Commercial Arbitration Act (British Columbia).

[7] In these circumstances, Mr. Kooner, Epix GP, and Epix LP each agreed to be bound by the Arbitration Agreement.

[8] Pursuant to Schedule "A" of the Subscription Agreement, Kooner agreed to be bound by each and every term of the Partnership Agreement:

Schedule "A"

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

Reference is made to the Limited Partnership Agreement of Epix Squamish Limited Partnership (the "Partnership") dated as of May 20, 2016 among Epix Squamish GP Inc. (the "General Partner") and the Limited Partners referred to therein (as amended from time to time, the "Partnership Agreement"). Capitalized terms referred to but not defined herein have the same meanings as are given in the Partnership Agreement.

In consideration of the acceptance by the General Partner of the undersigned as a Limited Partner in the Partnership, the undersigned hereby acknowledges the terms of the Partnership Agreement and agrees to be bound by each and every provision of the Partnership Agreement, to the same extent as a Limited Partner, including, without limitation, Section 1(e) thereof pursuant to which the undersigned confirms that it hereby constitutes, appoints and grants to the General Partner a power of attorney on and subject to the terms described therein.

[9] Pursuant to s. 13 of the Subscription Agreement, the Subscription Agreement, the Partnership Agreement, and all other documents referred to in the Partnership Agreement together constitute the entire agreement between the parties:

13. Entire Agreement.

This Subscription Agreement, the Partnership Agreement and other documents referred to in the Partnership Agreement constitute the entire agreement between the parties relating to the subject matter of this Subscription Agreement. There are no representations, warranties, covenants or other agreements between the parties in connection with such

subject matter except as specifically set forth in this Subscription Agreement and in the Partnership Agreement.

Mr. Kooner's claim

[10] On October 10, 2023, Mr. Kooner filed a notice of civil claim beginning this proceeding seeking a determination as to the parties' rights and obligations in respect of Kooner's purported Partnership interest. Mr. Kooner seeks judgment in the amount of \$50,000.00 plus his purported share of Partnership profits.

[11] Mr. Kooner characterises his claim as one based in debt and his creditor relationship with the defendants. However, that relationship only exists due to the Partnership Agreement. The dispute Mr. Kooner has brought in the underlying proceeding solely concerns the Partnership and obligations arising out of the Partnership Agreement.

[12] On January 30, 2024, Epix LP and Epix GP filed a jurisdictional response.

Should the Court stay the within proceedings in light of the Arbitration Agreement?

[13] Rule 21-8(1)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 permits a party who has been served with an originating pleading, after filing a jurisdictional response, to apply to dismiss or stay the proceeding on the ground that the Court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[14] Sections 2(1) and 2(2)(b) of the *Arbitration Act*, SBC 2020, C. 2, apply where there is an arbitration agreement and that agreement provides that the arbitration laws of British Columbia are applicable to the dispute.

[15] The Arbitration Agreement requires parties to submit disputes about the Partnership to arbitration pursuant to British Columbia's arbitration legislation. Therefore, the *Arbitration Act* governs the interpretation and enforcement of the Arbitration Agreement.

[16] Pursuant to ss. 7(1) and 7(2) of the *Arbitration Act*, if a party applies to stay legal proceedings in a matter agreed to be submitted to arbitration, the court must make an order staying the legal proceeding unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

7 (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[17] In *Prince George (City) v. McElhanney Engineering Services Ltd.*, 1995 CanLII 2487 at para. 22, the Court of Appeal set out the following three prerequisites to the application of s. 7 of the *Arbitration Act* (which was then numbered as s. 15 of the *Arbitration Act*, R.S.B.C. 1996, C. 55):

- a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- c) the application must be brought timely, i.e. before the applicant takes a step in the proceeding. (*Gulf Canada Resources Ltd. v. Arochem International Ltd*, *supra*, at 119-120).

[18] The general rule in British Columbia is that court proceedings are stayed whenever the applicant makes out an "arguable case" that the dispute is one that the parties have previously agreed will be resolved by way of arbitration: *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, at para. 21

[19] Mr. Kooner, Epix GP, and Epix LP are parties to the Arbitration Agreement. They are each parties to the Subscription Agreement. Pursuant to Schedule "A" of the Subscription Agreement, Mr. Kooner agreed to be bound by "each and every

provision of the Partnership Agreement", and the Partnership Agreement contains the Arbitration Agreement.

[20] The Notice of Civil Claim filed by Kooner in this proceeding is in respect of his \$50,000.00 contribution to the Epix LP and, more broadly, the parties' rights and obligations pursuant to the Subscription Agreement and the Partnership Agreement.

[21] Epix LP and Epix GP brought this Application in a timely manner before taking a step in this proceeding.

[22] Section 7 of the Arbitration Act does not require pre-arbitral steps to have been taken in the manner set out in the arbitration clause. Section 7 merely requires that the dispute be one which the parties have agreed to resolve by arbitration, and that the party has applied to the court for a stay before submitting their first response in the court proceedings: *Burlington Northern Railroad Co. v. Canadian National Railway Co. (1995)*, 1995 CanLII 1802 (BC CA) at paras. 56-57, 59 B.C.A.C. 97, per Cumming J.A., dissenting, whose view was upheld by this Court (1997 CanLII 395 (SCC), [1997] 1 S.C.R. 5).

[23] If there is any doubt as to whether the issues in this proceeding relate to matters which the parties agreed to submit to arbitration, the authorities direct that the matter should be referred to arbitration, unless it is clear the dispute falls outside the scope of the relevant arbitration agreement: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, at paras. 84-85.

[24] Where it is at least arguable that a dispute falls within the ambit of an arbitration agreement, the court proceeding should be stayed and the question of whether the dispute should be arbitrated should be resolved first by the arbitrator: *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, at para. 45

[25] In this case, the issues raised in the notice of civil claim are not clearly outside the scope of the Arbitration Agreement. The Arbitration Agreement is worded in the broadest of manners. There is a clear nexus between Mr. Kooner's dispute with respect to his purported share of the Partnership assets, and the Partnership

Agreement, despite his characterization as the claim being one in debt only: At the heart of the matter is the plaintiff's allegation that he has not received his payment from the distributions reported but still owing under the Partnership Agreement: *Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572.

[26] The applicants brought this application before they took any further steps in the proceedings.

[27] The three prerequisites for a stay have been met.

[28] I cannot say that the agreement is void, inoperative or incapable of being performed pursuant to s. 7(2) of the *Arbitration Act*.

[29] I note that Epix Squamish BT Inc. did not participate in this application. It is the bare trustee, hence the "BT" in its name. It appears to me that the claims against BT are peripheral to the claims against the other defendants.

[30] I order the claim stayed against all defendants pending the outcome of the referral to arbitration: *Northwestpharmacy.com Inc.*, at para. 58.

[Submissions on costs]

[31] Costs are ordered against the plaintiff to the applying defendants in any event of the cause forthwith, at Scale B.

"Wilkinson J."