

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1335921 BC Ltd. v. Horseshoe Press Inc.*,  
2024 BCSC 1036

Date: 20240617  
Docket: S230581  
Registry: Vancouver

Between:

**1335921 BC Ltd.**

Plaintiff

And

**Horseshoe Press Inc., 0514915 BC Ltd., formerly known as Horseshoe Press  
Inc. and Dickey Kit Chee Tam**

Defendant

And

**Austin Tran**

Defendant by Counterclaim

Before: The Honourable Justice Chan

## Reasons for Judgment

|  |                                  |
|--|----------------------------------|
| Counsel for the Plaintiff:                 | R. C. Stephens                   |
| Counsel for the Defendants:                | G. E. Edwards                    |
| Counsel for the Defendant by Counterclaim: | R. C. Stephens                   |
| Place and Date of Trial/Hearing:           | Vancouver, B.C.<br>May 28, 2024  |
| Place and Date of Judgment:                | Vancouver, B.C.<br>June 17, 2024 |

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## Introduction

[1] The defendants Horseshoe Press Inc. and Dickey Kit Chee Tam, seek summary judgment pursuant to R. 9-7 of the *Supreme Court Civil Rules* against the corporate plaintiff and Austin Tran, the defendant by counterclaim. The defendants sold the assets of a printing business to the plaintiff in 2021. The defendants claim for \$1.6 million plus prejudgment interest, which they say the plaintiff still owes on the contract. The plaintiff, the buyer of the assets, had started a claim against the defendants for breach of contract, as the plaintiff says it was misled by the defendants. In this application, the defendants also seek dismissal of the claim of the plaintiff pursuant to R. 9-5(1) of the *Supreme Court Civil Rules* as disclosing no cause of action.

[2] Austin Tran and his brother Martin Tran are in the printing business in western Canada. Dickey Kit Chee Tam was the principal of Horseshoe Press, owned by 0514915 BC Ltd., formerly known as Horseshoe Press Inc. (“915”). In 2021, Austin Tran approached Mr. Tam about buying the assets of his printing business 915. Mr. Tam had worked at 915 since 1996 and was looking to sell the business due to health challenges. Austin Tran and Mr. Tam negotiated the sale over a number of months in 2021. Austin Tran was looking to expand his printing business by buying out the assets of Mr. Tam’s printing company. Austin Tran used a company he incorporated, 1335921 BC Ltd., now known as Horseshoe Press (2021) Ltd. (the “Plaintiff”), for the purchase.

[3] On September 13, 2021, the Plaintiff and 915 entered into a letter of intent for the purchase of the business assets of 915. On October 14, 2021, the Plaintiff commissioned a valuation report from Ernst & Young Orenda. On December 8, 2021, the parties entered into a contract of purchase and sale for the business assets for the price of \$3.2 million. The business assets are identified in the contract. The sale completed on December 14, 2021.

[4] The Plaintiff paid \$1.6 million on completion date, with the remaining \$1.6 million to be paid by a set schedule in 18 months, by June 14, 2023 (the “Deferred

Purchase Price”). The Deferred Purchase Price was interest free until July 14, 2023. The Plaintiff provided to 915 as security for the Deferred Purchase Price a security agreement over the business assets of the Plaintiff, and a personal guarantee by Austin Tran. After completion, the Plaintiff did not make the first payment of the Deferred Purchase Price on December 14, 2022, as required. As a result, the whole \$1.6 million became due and payable.

[5] 915 demanded payment of \$1.6 million on January 20, 2023 from the Plaintiff. On January 23, 2023, the Plaintiff commenced this action, seeking approximately \$3.6 million in damages.

[6] The Plaintiff claims there were misrepresentations by 915 about the state of the machinery, its financial status, and Mr. Tam did not fulfill his agreement to work at 915 after the sale to train the staff and transition the business. The Plaintiff claims Mr. Tam also breached a non-competition agreement, by bidding on printing projects against the Plaintiff.

### **The Alleged Equipment Breaches: the MGI**

[7] One of the key features of the transaction was a sophisticated printing machine capable of specialized printing (the “MGI”), which 915 had purchased a few years earlier for more than \$1 million USD. Austin and Martin Tran had misgivings about the MGI, but Mr. Tam insisted that it be part of the transaction. The MGI was not set up at the time, but Mr. Tam assured them it was fully functional. Austin Tran’s evidence is Mr. Tam told him the MGI was an excellent machine and the issues did not affect its operation. Mr. Tam’s evidence is the MGI was fully operational before it was disassembled in March 2021, and that he had advised both Austin and Martin Tran there would be repairs and maintenance issues with it.

[8] Austin and Martin Tran had relied on representations by Mr. Tam that all the equipment was working. Mr. Tam’s wife had advised the business evaluator that the MGI was working. After completion, in early January 2022, the Plaintiff discovered that many machines had been poorly maintained and required extensive servicing to become operational. Austin Tran deposed that Mr. Tam stormed out when he was

confronted on the issue. While the Plaintiff was aware the equipment was used and purchased on an as-is basis, the contract stipulated the equipment was “adequate in all material respects to meet all present operational requirements of the Business as currently conducted”.

[9] Martin Tran deposed that the MGI machine did not work. The Plaintiff has never used it. Austin Tran was told by a service technician it would cost more than \$60,000 to make the MGI operational. Austin Tran deposed that on March 8, 2022, Mr. Tam forwarded to him three emails that revealed the extent of the issues with the MGI. The Plaintiff tried to sell the MGI, but could not find a buyer. The Plaintiff traded it for \$50,000 credit towards the lease of a label machine.

[10] Mr. Tam has deposed that all the machines were working at the time of completion, that the Plaintiff did not complain about the equipment after completion, and that the equipment may have been damaged during a move by the Plaintiff in February 2022.

### **The Alleged Misrepresentations of Financial Status**

[11] The contract stipulated that the financial statements of 915 correctly depict the financial conditions of 915 and the sales and earnings of 915 during the period covered in the financial statements.

[12] After completion, Austin Tran deposed he discovered 915 was not as profitable as stated in the financial statements, as the financial statements did not include wages of three employees, lowering the profits of 915. Austin Tran deposed that due to this misrepresentation, the Plaintiff paid at least \$600,000 more than it otherwise would have paid. Mr. Tam denies there was any misrepresentation in the financial statements, and claims they were accurate.

### **Employment of Mr. Tam after Completion**

[13] According to Austin Tran, a key feature of the transaction was for Mr. Tam to stay on after completion. It was important for Mr. Tam to train staff and assist in the transition of key accounts to the Plaintiff. The contract contained a post-closing

covenant of 915 that Mr. Tam and his wife would train staff for 30 working days after completion for no pay, and then after the Plaintiff at its sole discretion may hire Mr. Tam for 18 months. An employment agreement was a condition to the completion of the contract.

[14] Austin Tran deposed Mr. Tam would not cooperate after the sale. Mr. Tam yelled at the staff, refusing to train the employees. He would not assist in transitioning customer accounts. Mr. Tam left on March 15, 2022, after his demand for an annual salary of \$200,000 was rejected. His close associate Angela Leung left soon after.

[15] Mr. Tam deposed he left his job with the Plaintiff as it “did not work out” and he retired in March 2022 due to health issues. There is a clause in the employment agreement which allowed him to leave on two weeks notice, which he fulfilled.

### **The Alleged Breach of Non-Competition Agreement**

[16] Austin Tran deposed that in May 2022, he was asked by Sing Tao Newspaper to bid on printing a monthly magazine and to match a quote from a competitor. Austin Tran believes the competitor was Mr. Tam. Austin Tran deposed that on examination of Angela Leung’s emails at 915, Austin Tran discovered that she had forwarded to Mr. Tam on his personal email account two invitations to quote on jobs. Mr. Tam denies competing with the Plaintiff, and argues these allegations are based on hearsay.

### **Analysis**

#### **Application by 915 for Summary Trial**

[17] Rule 9-7(15) of the *Supreme Court Civil Rules* provides that:

Judgment

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[18] As can be seen, there are two questions to be considered in determining whether a matter is suitable for summary determination:

- a) Is there an adequate evidentiary base for the court to make the necessary findings of fact?
- b) Would it be unjust to decide the case on a summary trial application?

[19] In *Gichuru v. Pallai*, 2013 BCCA 60, the Court identified a number of factors at paras. 30–31 that may be considered in determining whether it would be unjust to give judgment on a summary trial:

- a) the amount involved;
- b) the complexity of the matter;
- c) its urgency;
- d) any prejudice likely to arise by reason of delay;
- e) the cost of taking the case forward to a conventional trial in relation to the amount involved;
- f) the course of the proceedings;
- g) the cost of the litigation and the time of the summary trial;
- h) whether credibility is a critical factor in the determination of the dispute;
- i) whether the summary trial may create an unnecessary complexity in the resolution of the dispute;

- j) whether the application would result in litigating in slices; and
- k) any other matters which arise for consideration on this important question.

[20] In my view, it is clear that the counterclaim of 915 for the Deferred Purchase Price is not suitable for summary determination. The Court cannot find the facts on the basis of affidavits, as the evidence on key points is in conflict between the parties.

[21] 915 claims the Deferred Purchase Price. 915 argues the contract is clear the Plaintiffs are to pay the Deferred Purchase Price, and the Plaintiffs have not done so. The Plaintiff's position is there has been a fundamental breach of the contract due to misrepresentations on the working status of the equipment and the accuracy of the financial statements. The Plaintiff claims the right of set-off both as an equitable remedy and as provided for in the contract. Where a claim is made under a contract for amounts owing, the other party is entitled, in the absence of a provision in the contract to the contrary, to set-off against the amount claimed any damages which it has suffered as a result of the other party's breach of the contract: *Swagger v. U.B.C.*, 2000 BCSC 1839 at para. 20. Further, the contract provides that if 915 is in breach, that allows the Deferred Purchase Price to be set-off by the Plaintiff.

[22] To determine the counterclaim of 915 for the Deferred Purchase Price, it is necessary to make findings of fact about whether there have been any breaches of the contract. The parties offer conflicting evidence on these points. While the Plaintiff's evidence is the MGI did not work, Mr. Tam's evidence is that all equipment was working. The Plaintiff's position is the contract provided that all equipment, though purchased as-is, was "adequate in all material respects" for the Plaintiff's operational needs. Mr. Tam's position is the Plaintiff was made aware of issues with the MGI prior to completion, while Austin Tran claims that he was told by Mr. Tam the MGI worked. With respect to the accuracy of the financial statements, the Plaintiff claims they were not accurate and the wage expense did not include wages of three employees. Mr. Tam claims the financial statements were accurate. With respect to Mr. Tam's employment at the Plaintiff's after completion, the Plaintiff claims Mr. Tam did not fulfill his obligation to train the staff and transition the accounts. Mr. Tam has not provided



a direct denial, but takes the position he quit as the arrangement did not work out. With respect to the non-competition agreement, the Plaintiff claims Mr. Tam was bidding against the Plaintiff for printing jobs, which Mr. Tam denies.

[23] The Court cannot find the facts on these key issues to determine if there were any breaches of the contract by 915 which would entitle the Plaintiff to set-off. This matter needs to be heard in a trial with cross-examination of witnesses.

### **Application by 915 to Strike Plaintiff's Claim**

[24] Rule 9-5(1) states:

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be...

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

[25] 915 seeks to strike the Plaintiff's claim as disclosing no cause of action. 915 argues even if the facts alleged in the notice of civil claim ("NOCC") are true, they do not disclose any cause of action against it or Mr. Tam. Further, 915 argues the Plaintiff failed to particularize any cause of action as against Mr. Tam.

[26] In my view, the NOCC sets out facts which if proven can support an action for damages for breach of contract. The NOCC alleges that 915 and Mr. Tam provided false representations to the Plaintiff including the accuracy of the financial statements, that all equipment was in working order, and that Mr. Tam would not compete against the Plaintiff's business for five years. If proven, these claims can amount to breaches of the contract. It cannot be said that the NOCC discloses no reasonable claim.

**Conclusion**

[27] The application of the defendants is dismissed.

[28] Costs of this application will be in the cause.

“Chan J.”