CITATION: 1289867 Ontario Ltd. v. Band World Mobile Stage Inc., 2024 ONSC 3736
COURT FILE NO.: CV-21-00661985-0000
DATE: 20240703

ONTARIO SUPERIOR COURT OF JUSTICE

RE: 1289867 ONTARIO LIMITED, Applicant

-and-

BAND WORLD MOBILE STAGE INC., Respondent

BEFORE: L. Brownstone J.

COUNSEL: *Warren S. Rapoport*, for the Applicant

Amrita Mann, for the Respondent

HEARD: May 15, 2024

ENDORSEMENT

Introduction

[1] The applicant 1289867 Ontario Limited ("867") was in the business of renting and selling musical instruments and related equipment. The respondent Band World Mobile Stage Inc. ("BWM") supplied stages for entertainment and corporate events. On July 1, 2019, BWM began to operate 867's business during a transition period before it purchased 867's assets.

[2] On November 15, 2019, the parties entered into an asset purchase agreement ("APA") under which BWM purchased assets of 867's business. The APA had an effective date of July 1, 2019. Part of the purchase price was payable as a deposit, part was payable at the time of closing, and the balance was to be paid in installments under a promissory note. The first installment under the note was paid; no other payments followed. 867 seeks payment of the remaining amount under the note. It seeks this relief under r. 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits an application to be brought where the relief claimed is the determination of rights that depend on the interpretation of, among other things, a contract or other instrument.

[3] BWM argues that a trial is required to determine what is owing under the note. Because the purchase price was subject to adjustment, so too was the amount owing under the note. BWM is one of two defendants, and a plaintiff by counterclaim, in an action with the court file number CV-21-00660994-0000 (the "Action"). 867 is one of three plaintiffs in the Action. BWM seeks orders converting this application into an action and having the two files consolidated or heard at the same time, or an order that the application be heard immediately after the hearing of the Action.

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Terms of the APA

[4] BWM was to pay $400,000 in total for the assets. Payment under the APA was structured according to the following provisions:

> 2.02 **Purchase Price and Allocation Thereof**
>
> The purchase price payable to the Vendor for the Purchased Assets (such amount being hereinafter referred to as the "Purchase Price") will be $400,000.00 subject to adjustments and will be allocated between the Purchased Assets as agreed between the parties before Closing, acting reasonably.
>
> 2.05 **Accounts Receivable Adjustment**
>
> If, after commercially reasonable efforts by the Purchaser to collect any of the accounts receivable of the Purchased Business purchased by the Purchaser remain outstanding 90 days after the Closing Date, the Vendor will pay to the Purchaser by way of a price adjustment the amount of such outstanding accounts receivable and the Purchaser will, if required by the Vendor, assign to the Vendor such outstanding accounts receivable. The Vendor, after such assignment, may take such proceedings as it deems advisable to collect the accounts receivable so assigned, provided that the Vendor will not interfere with the goodwill of the Purchased Business transferred to the Purchaser and will indemnify and save harmless the Purchaser from and against all Claims incurred by the Purchaser directly or indirectly by reason of such proceedings.
>
> 2.07 **Payment of Purchase Price**
>
> (1) The Purchase Price will be payable as follows:
>
> (a) $10,000.00 on execution of this Agreement by certified cheque or bank draft payable at par in Brantford to Waterous Holden, counsel for the Vendor, in trust, as a deposit to be held and paid as provided in Section 2.07(3);
>
> (b) $141,000.00 by the delivery to the Vendor at the Time of Closing of a certified cheque or bank draft payable at par in Toronto to or to the order of the Vendor; and,
>
> (c) the balance of the Purchase Price by payment to the Vendor in 12 quarterly installments, without interest, as set out in the Promissory Note attached hereto as Schedule 2.07 (c).

[5] The parties agree that the only adjustment to the purchase price was covered by the accounts receivable clause set out above. In respect of the accounts receivable, 867 represented and warranted that "The accounts receivable of the Purchased Business are good accounts

receivable collectible within 90 days and are not subject to any defence, counterclaim or set- off." That representation and warranty survives closing. The APA contains an entire agreement clause.

[6] The promissory note is appended to the APA as contemplated in s. 2.07(1)(c). It is dated November 15, 2019 and signed by BWM's president. It reads as follows:

> PROMISSORY NOTE
>
> FOR VALUE RECEIVED, the undersigned hereby promises to pay at Toronto the sum of TWO HUNDRED AND FORTY-NINE THOUSAND DOLLARS ($249,000) in lawful money of Canada, without interest, to or to the order of 1289867 ONTARIO LIMITED in 12 quarterly instalments of TWENTY THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($20,750) commencing on first day of the month after the first full quarter after the Closing Date.
>
> All payments hereunder will be made without days of grace, presentment, protest, notice of dishonour or any other notice whatsoever, all of which are hereby expressly waived by the maker and each endorser hereof.
>
> The principal amount hereof may at any time be repaid in part or in full without notice or bonus.
>
> This Promissory Note will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein.

History of the proceedings

[7] 867 issued this application on April 29, 2021. 867, its president, and one of its former employees also served a fresh as amended statement of claim on April 27, 2021 in the Action. The defendants in the Action are BWM and its president. In the Action, the plaintiffs seek relief for claimed conversion by the defendants of excluded assets under the APA. In addition, one of the two personal plaintiffs claims consulting fees, and the other claims termination pay.

[8] In its statement of defence and counterclaim, the defendants added another former employee of the plaintiff as a defendant by counterclaim. The defendants, plaintiffs by counterclaim, plead various breaches of the APA. In respect of the accounts receivable, they claim by counterclaim as follows:

> BWM pleads that 867, CC, KB and JK acted in a concerted plan to defraud BWM and intentionally interfere with its economic interests, the particulars of which includes but is not limited to:
>
> (a) preparing false invoices for the purposes of directing accounts receivable to CC's personal account;

(b) misappropriating payments, including accounts receivable, away from BWM for CC's personal and/or 867's benefit; …

[9] BWM brought a motion in July 2022 to convert this application into an action or, alternatively, to stay the application until the Action is determined. The motion was dismissed by Ramsay J., and the Divisional Court denied BWM leave to appeal that decision.

[10] In dismissing BWM's motion, Ramsay J. stated:

> 3. The application deals only with the enforcement of a promissory note.
>
> 4. The respondent concedes that the validity of the promissory note is not an issue. On the pleadings motion before me, there [are] therefore no factual issues in dispute with respect to the validity of the promissory note. The determination of the enforcement of the promissory note therefore falls squarely within clause 14.05 (3)(d) of the Rules of Civil Procedure.
>
> …
>
> 5. This is essentially a pleadings motion, and the court should not be asked to determine the merits of the claims or defences at this stage. Those arguments ought to be made to the judge hearing the application who would be in the best position, at that time, to determine whether the application ought to be converted to an action. On the facts before me, I am not convinced that it should be.
>
> 6. On the evidence before me, the promissory note, whether stand alone or not, can be dealt with on an application.
>
> 7. … I would anticipate that if the purchase price is impacted then the court may make any award for damages in the action which is not contingent upon the enforceability of the promissory note.
>
> 8. … In my view, it will be up to the application judge, hearing the application to determine whether the promissory note is indeed a stand-alone document or whether it ought to be considered in the context of the larger agreement (APA), that is, a determination that there are material facts in dispute such that Rule 14.05(3)(h), which authorizes proceeding by way of application, does not apply.
>
> 9. In the result, I agree with the respondent that the moving party may raise this as a defence at the hearing before the application judge.
>
> 10. In any event, I am not satisfied that the application in this case should be joined with the action as the determination of whether the applicant is able to enforce the promissory note may in fact narrow the issues in the outstanding action, subject to any right of appeal.

> 11. On the other hand, the action involves a number of parties and involves a claim by the respondent and others for non-payment on the consulting agreement, and a claim by Kandiss Bradley for non-payment of employment wages. The action is not based on the promissory note but on income of Ms. Bradley and for assets that were allegedly taken (conversion). The moving party has counter claimed for misappropriation. …
>
> 12. While counsel for the respondent argues that the promissory note is a stand-alone document from the purchase agreement, I do not have to decide that issue. Counsel for the moving party points to the fact that it was an Appendix to the APA, though conceded that it was not referenced in the adjustment clause in the Asset Purchase Agreement.
>
> 13. Finally, given the nature of a promissory note, I am not inclined to grant a stay, which is an extraordinary remedy.

[11] 867 argues that Ramsay J. has already determined that this matter is appropriate for determination by way of application. According to 867, the result of Ramsay J.'s decision is that the only thing left for me to decide is whether the note should be enforced or whether the application should be stayed pending the determination of the Action.

[12] I do not accept 867's argument that Ramsay J.'s decision precludes the relief sought by BWM. On the contrary, Ramsay J. specifically stated that the application judge would have to determine whether the note is a standalone document and whether there are material facts in dispute such that the matter cannot be determined on an application. Paragraphs 5, 8, 9, and 12 of Ramsay J.'s endorsement make this abundantly clear.

The applicant's position

[13] 867 argues that the promissory note is payable, not subject to set-off, and enforceable as a standalone debt, separate and apart from the outcome of the Action. 867 argues that, as the note makes no reference to an adjustment to the purchase price, and the APA makes no reference to the note's face amount being varied for any reason, the note is enforceable as a separate, standalone document.

[14] 867 acknowledges that there are allegations in the Action that the assets that formed part of the consideration for the note "may be lacking". However, it asserts that BWM has not put forward any persuasive evidence to support its claim. The claim remains speculative and does not provide a basis to stay enforcement of the note or to determine that the issue cannot be determined by application: *Vizinczey v. Serendipity Point Films Inc*. (2007), 40 C.P.C. (6th) 339, (Ont. S.C.), at paras. 13-14. 867 argues there are no credibility issues in dispute, and therefore the matter can and should properly be decided by way of application.

The respondent's position

[15] BWM argues that the note is not a separate, standalone document but must be interpreted in the context of the factual matrix in which it was signed, which means in the context of the issues raised in the Action. It argues that the purchase price was subject to adjustment, and therefore the actual value of the promissory note cannot be determined until the issues raised in the Action are determined. BWM argues that the proper interpretation of the entire APA is the subject of the Action, and it would be inappropriate to hive off the promissory note from the entire agreement. A trial is required to determine the amount owing under the note. The application should be converted to an action and heard at the same time as, or immediately following, the Action.

Facts relating to the accounts receivable

[16] BWM claims that during the transition period, it had become aware that 867 had not provided BWM with some accounts receivable as required. According to BWM, this situation was resolved by 867 paying the amounts in question to BWM and the parties agreeing that BWM was entitled to all accounts receivable. After closing and after the first installment was paid, BWM raised a number of issues about the APA and its execution. One issue BWM raised was its discovery that 867, with the assistance of at least one of the named defendants by counterclaim in the Action, was diverting one or more accounts receivable to itself.

[17] On April 9, 2020, BWM's counsel raised several issues with 867's counsel after a "post-closing reconciliation". With respect to the accounts receivable, BWM's counsel wrote:

> 1. Accounts receivable
>
> The Agreement of Purchase and Sale (sic) transfers to Band World all of the accounts receivable of 867 Ontario as of July 1, 2019.
>
> It has come to the attention of Band World through admissions by Mr Collet and review of exchanges of emails between Mr. Collet, Kandiss and Jacob that there have been attempts to redirect payment of receivables purchased by Band World to Mr. Collet and/or 867 Ontario.
>
> To reconcile, Band World requires:
>
> 1. a summary of all 867 Ontario accounts receivable by customer to July 1, 2019;
>
> 2. bank statements from 867 Ontario from June 1, 2019 to present; and
>
> 3. bank statements from Mr. Collet from June 1, 2019 to present.
>
> Please have Mr. Collet provide the requested information immediately, After receipt and review, if additional information is required, we will advise.
>
> …

> 5. Payments under the Promissory Note:
>
> Until such time as these issues have been remedied to the satisfaction of Band World, all payments under the Promissory Note will cease. Notwithstanding, Band World reserves its rights to take any and all other actions it deems appropriate against 867 Ontario, Mr. Collet, Kandiss and/or Jacob.
>
> If you have any questions, please advise.

[18] According to BWM, 867 contacted it after receiving this letter and "admitted to misdirecting and misappropriating additional customer payments of accounts receivable in the amount of approximately $13,000.00 from [BWM] to his personal bank account or the bank account of 867." BWM further deposed that 867 "suggested that [BWM] should simply deduct the amount of $13,000 from the next payment to 867 under the Promissory Note. [BWM] advised Craig that [BWM] would not be making any further payments towards the Promissory Note/Purchase Price until it had investigated the matter thoroughly and determined the full extent of Craig's and 867's misconduct, including the misdirection and misappropriation of funds."

[19] 867 states that this rendition of events is "wholly fictitious". It states that the discussion that occurred was about who should obtain any accounts receivable relating to the period from before July 1, 2019 (a discussion BWM states occurred during the transition period).

[20] There is a further dispute between the parties about whether 867 gave BWM the accounting and other information it needed and had requested in order to fully investigate the extent of the accounts receivable issue. 867 claims no information remains outstanding; BWM claims it has yet to receive the information it requires to resolve the accounts receivable issue.

[21] The documentary evidence reveals that in January 2020, a former employee of 867, who was now working for BWM, appears to have sought to have an invoice for a contract between Yamaha and 867 from June 2019 paid to 867. There is also evidence 867 paid some funds to BWM in March 2020 that appear to be in respect of earlier accounts receivable.

Law and analysis

[22] A promissory note is defined in s. 176(1) of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4, as "an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer."

[23] Section 185 of the *Act* provides that the maker of a note engages that he will pay it according to its tenor, which has been interpreted to mean its true intent and meaning: *Pietzsch v. R-Tek Corp.* (1993), 87 Man. R. (2d) 293 (K.B.), at para. 20. A promissory note is generally not subject to equitable set-off rights: *1652620 Ontario Inc. v. Cornerstone Builders Ltd*., 2018 ONCA 973, at paras. 6-7; *Lee v. Jung*, 2019 ONSC 5950, at paras. 95-96.

[24] BWM does not dispute the validity of the note or that the formalities required by the *Bills of Exchange Act* are present. BWM acknowledged that it had legal counsel advising it on the APA, and that the agreement could have been struck in a manner that did not involve a promissory note. BWM also acknowledged there was no subsequent agreement that amended the note.

[25] Both parties refer to *Jackson v. Solar Income Fund Inc.*, 2016 ONCA 908. That case dealt with a later agreement that may have amended the terms of the promissory note, which BWM concedes does not exist here.

[26] However, the promissory note is a schedule to the APA. I must read that agreement in its entire context and give it its grammatical and ordinary meaning in order to discern and give effect to the intent of the parties and the meaning of the agreement: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633.

[27] The parties agreed that an adjustment to the purchase price could be made up to 90 days after closing. Since the first two installments would have been paid by this time, the only way the purchase price could have been adjusted would be by adjusting the amount owing under the note. As noted above, s. 2.07(1)(c) states that the "balance of the purchase price" was to be paid in 12 installments as set out in the attached promissory note. This provision follows just below the price adjustment clause (s. 2.05) and does not set out, as do 2.07(1)(a) and (b), specific dollar amounts. While the note itself does set out the dollar amount, I must read the contract as a whole. The APA clearly contemplated a purchase price adjustment, which would have to adjust the amount payable under the note.

[28] 867 deposed that "even if such price adjustments may be argued by BWM, these are matters for trial, whereas the enforcement of a Promissory Note is [a] separate and distinct obligation of BWM for which a trial is not appropriate or necessary." I disagree. The amount owing under the note, when read as part of the entire APA, must necessarily have been subject to adjustment. The note can only be enforceable on demand if the purchase price, and therefore the value of the note as amended by the agreement itself, is known.

[29] The issues about the accounts receivable clearly involve a material factual dispute between the parties. The statement of defence and counterclaim and affidavits before me clearly allege misfeasance with respect to the accounts receivable. While I am not determining the issue, the emails with respect to the Yamaha invoice that are before the court on this application belie 867's assertion that BWM's claim on this issue is speculative. Even as 867 explained it, there are "differences in perspectives with respect to accounts receivables (sic)." An assessment of credibility will be important in making the factual findings necessary to resolve the accounts receivable, and therefore the adjusted purchase price, issue. Trial testimony is required.

[30] There are questions of fact in common between the application and the Action. The relief claimed in both proceedings arises out of the same transactions and facts. Having the matters heard one after the other will not result in increased costs to the main parties – the two corporations and the personal litigants who are the controlling minds of each. I am confident that the trials can be managed so as not to increase the costs to the personal defendants by counterclaim. Further, if the

proceedings are not heard one after the other, there is a risk of inconsistent findings with respect to the accounts receivable issue at least.

[31] I therefore order that the application be converted to an Action and heard at the same time as, or immediately following, the Action, as the trial judge may determine appropriate.

Costs

[32] If the parties are unable to agree on costs, the respondent may provide up to three pages of submissions, double-spaced, along with any offers to settle within seven days. The applicant may provide submissions within seven days thereafter, with the same page limits. There will be no reply submissions. Submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Date: July 3, 2024