Court of King's Bench of Alberta

Citation: O'Connor v Sivacoe Estate, 2024 ABKB 420

Date: 20240711
Docket: 2310 00189
Registry: Red Deer

Between:

Terry O'Connor

Plaintiff

- and -

Patrick V. Cherak, Personal Representative of the Estate of Orlande Wayne Sivacoe, Deceased

Defendant

Memorandum of Decision
of the
Honourable Applications Judge M.R. Park

Introduction:

[1] The Defendant seeks an order striking or staying this action pursuant to rule 3.68 (1). For the reasons that follow, that application is allowed, in part.

Background:

[2] Broadly speaking, this action involves a corporate entity known as D.D. Technology, Inc. ("**DDT US**").

[3] DDT US was incorporated in the State of Washington on June 1, 1992 by the late Orlande Wayne Sivacoe ("**Orlande**"). At all material times, it carried on business in the United States of America as a provider of oil refinery maintenance and decoking and descaling services. Although it's "head office" was located in Alberta, it has never been registered as an Alberta corporation and there is no evidence that it ever carried on business in Canada.

[4] On July 8, 1992, Orlande was issued 100 shares of stock in DDT US.

[5] On October 4, 1996, 400 additional DDT US shares were issued to Orlande, while 500 such shares were issued to the Plaintiff, Terry O'Connor ("**Terry**"). The consideration payable for Terry's shares was $500.00.

[6] Terry and Wayne were essentially childhood friends, having first met in 1961 while attending high school together in Stettler, Alberta. They remained friends and close business associates until Orlande's passing in September, 2019.

[7] Terry is ordinarily resident in Alberta.

[8] On August 19, 2015, Terry and DDT US entered into a written Recission Agreement, which provides, *inter alia*, that:

a) Terry was issued 500 shares of stock in DDT US but did not pay the stipulated consideration of $500.00 for those shares.

b) Terry was never engaged in any action as a shareholder, director or officer of DDT US.

c) Terry never received any compensation from DDT US.

d) Terry's purchase of his DDT US shares was rescinded, retroactive to the original date of issuance, namely October 4, 1996.

e) All rights and obligations of the parties to the agreement were to be governed by the laws of the State of Washington.

f) Jurisdiction over the parties and the venue of any legal action would be in Skagit County, Washington.

[9] My understanding is that the Recission Agreement was executed in Alberta.

[10] By way of "Declaration of Lost Stock Certificate and Indemnity Agreement" dated August 19, 2015, Terry confirmed that the certificate(s) for his DDT US shares had been lost, destroyed or otherwise misplaced but that he was nonetheless surrendering his interest in the certificate(s) to DDT US.

[11] As noted above, Orlande passed away in September, 2019. He was resident in Alberta at the time of his death.

[12] Orlande died testate. His will named Terry and Cathy Nesselbeck ("**Cathy**") as Personal Representatives of his estate. I understand that Orlande's will was probated in Alberta.

[13] On March 28, 2022, this court granted an order discharging Terry and Cathy as Personal Representatives and naming the Defendant ("**Patrick**") in their stead. Patrick is ordinarily resident in Alberta.

[14] Terry commenced this action by way of Statement of Claim filed on February 16, 2023. Essentially, he maintains that notwithstanding the Recission Agreement, he has ownership of fifty percent of the issued DDT US shares. There are also allegations that Patrick was negligent in the settlement of a lawsuit commenced in the United States related to properties Terry says were owned by DDT US and located in the State of Florida (the "**Florida Action**").

[15] The Florida Action was commenced by Terry and Cathy in their capacity as the Personal Representatives of Orlande's estate. The pleadings filed in the Florida Action were later amended so as to substitute Impact Industries (Western) Ltd. ("**Impact**") and Decoking Descaling Technology Inc. ("**DDT Canada**") as plaintiffs in the place of Terry and Cathy.

[16] DDT Canada is or was an Alberta corporation affiliated with DDT US. Impact is/was also an Alberta corporation.

[17] Orlande was a director, officer and shareholder of both DDT Canada and Impact.

[18] It seems that Terry once held shares in DDT Canada. He appears to have divested himself of those shareholdings prior to the settlement of the Florida Action, such that at the time the Statement of Claim was filed in these proceedings, he did not hold a stake in DDT Canada. Further, at no material time did Terry hold shares in Impact.

[19] The Florida Action pleadings also mention the following corporate entities:

a) Quality Tubing, a Canadian corporation the principal of which is/was Terry; and

b) Sivacoe 1560 LLC, an American corporate entity controlled by Orlande.

[20] The Statement of Claim filed in this action was served in August, 2013. A Statement of Defence was filed on September 7, 2023. The primary defence pled is that this court lacks jurisdiction to determine the matter. The Statement of Defence specifically provides that Patrick does not attorn to the jurisdiction of the Court of King's Bench of Alberta and that he has filed responsive pleadings only to avoid the matter resolving by way of default. Patrick also pleads defences to the claim on the merits which, based on the plain wording of the Statement of Defence, he means to have considered only in the event the Court finds that it can and should take jurisdiction over these proceedings.

[21] On September 15, 2023, DDT US brought proceedings against Terry in Skagit County, Washington seeking resolution of the issue of Terry's purported ownership of DDT US shares. Terry has defended that action, which is essentially on hold pending the outcome of this application.

Issues:

[22] Insofar as the Statement of Claim filed in these proceedings pertains to the Florida Action, Patrick says it should be struck under rule 3.68 (2) (b) on the basis that it discloses no reasonable claim.

[23] Patrick seeks to strike the claim as it pertains to the DDT US shares pursuant to rule 3.68 (2) (a). Jurisdiction *simpliciter* (i.e. whether the Court can assume jurisdiction over the matter) is conceded, so the question is whether the Court should take jurisdiction.

Analysis:

a. The Florida Action:

[24] Terry has admitted that he did not have a stake in either DDT Canada or Impact at the time the Florida Action was settled. Patrick relies on these admissions, which were given during a cross-examination on affidavit, in bringing this application to strike the claims related to the purportedly improvident settlement.

[25] Had this application been made under rule 7.2 (a) or 7.3 (1) (b), Patrick's position would be compelling.

[26] However, the application was brought under rule 3.68 (2) (b). No evidence can be submitted on an application made under that subrule: see **rule 3.68 (3).**

[27] Rather, on a rule 3.68 (2) (b) application, the Court must assume that what has been pled can be proved and then ask if it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action: ***Rudichuk v. Genesis Land Development Corp.,* 2019 ABQB 132 ("*Genesis*") at paras 8 & 10**. The defendant bears the burden of proof on this sort of application and the onus to be met is extremely high: ***Genesis* at para 10.**

[28] Based purely on what is pled, I am unable to conclude that the claim as it pertains to the settlement of the Florida Action is bound to fail. With that said, in determining his path forward, Terry would be well-advised to consider the comments made at paragraphs 24 and 25 above.

b. The DDT US Shares:

[29] Pursuant to rule 3.68 (2) (a), the Court may strike some or all of a claim if it lacks jurisdiction to hear that claim.

[30] Terry says that Patrick as attorned to the jurisdiction of this court by filing a Statement of Defence that speaks to the merits of the action.

[31] The filing of responsive pleadings is not a pre-condition to an application to strike under rule 3.68. Patrick did not need to defend this action in order to bring an application to strike it. Notwithstanding the plea in his Statement of Defence to the contrary, it is at least arguable that Patrick has attorned to the jurisdiction of this court through the filing of pleadings.

[32] However, attornment simply prevents Patrick from arguing the question of jurisdiction *simpliciter*, which he has conceded in any event: ***Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Inc.*, 2014 BCSC 752 at para 67.** Attornment to the jurisdiction is not determinative. It is only relevant to the question of jurisdiction, not whether the jurisdiction ought to be exercised. It is still open for a party who has attorned to argue that the jurisdiction is not the most convenient forum: ***Savanta v. Hilditch*, 2022 ONSC 1384 at para 12**.

[33] When, as is the case here, the Court has or can assume jurisdiction, a second issues arises, namely whether the court should take jurisdiction. This is a matter of judicial discretion.

[34] As noted by the Ontario Court of Appeal in ***Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722 ("*Momentous*"):**

> 37 The case law recognizes two different classes of cases in which the court is asked to exercise its discretion. One arises on a *forum non conveniens* motion; the other where the parties have agreed to a forum to resolve their disputes. Each class of case has its own onus, test and rationale.
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> 38 On the more usual *forum non conveniens* motion, a court must determine whether there is another more convenient forum to try the claim. The defendant has the onus of showing a more convenient forum. The test invites the application of a now well-recognized list of considerations, which assess the connections to the two competing forums. And the court's discretion is guided by the twin rationales of efficiency and fairness: see, for example, *Young v. Tyco International of Canada Ltd.* (2008), 92 O.R. (3d) 161 (Ont. C.A.).
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> 39 In the other class of case, of which the present appeal is an example, the parties have agreed to a forum to resolve their disputes. In this class of case, the onus is reversed. The plaintiff must show why Ontario should displace the forum chosen by the parties. The test is "strong cause" - the plaintiff must show strong cause why the choice of forum clause should not prevail. And in exercising its discretion, the court is guided by the rationale that ordinarily parties should be held to the bargain they have made.

[35] The "strong cause" test does not necessarily apply to all categories of contract containing a choice of forum clause. For example, it may not apply in the family law context (see ***DP v. MPCC*, 2023 ABKB)** or in the cause of a contract of adhesion (see ***Douez v. Facebook, Inc.*, 2017 SCC 33 ("*Douez*")**). It does, however, apply to commercial contracts entered into by sophisticated commercial parties which, in my view, was the case here.

[36] The law concerning contractual jurisdiction clauses contained in commercial agreements was expressed by the Supreme Court of ***Canada in Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450** and expanded upon in *Douez*.

[37] Courts are to employ a two-step approach in determining whether to enforce a forum selection clause and stay an action brought contrary to it. At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud: ***Douez* at para 28**.

[38] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons

why the court should not enforce the forum selection clause and stay the action. In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice". Policy may also be a relevant factor at this step: ***Douez* at para 29**.

[39] As the court noted in *Douez*:

> 31 ...the strong cause factors have been interpreted and applied restrictively in the commercial context. In commercial interactions, it will usually be desirable for parties to determine at the outset of a business relationship where disputes will be settled. Sophisticated parties are justifiably " . . . deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause" (*Aldo Group Inc. v. Moneris Solutions Corp*., 2013 ONCA 725, 118 O.R. (3d) 81, at para. 47). In this setting, our Court recognized that forum selection clauses are generally enforced and to be encouraged "because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness" (*GreCon Dimter inc. v. J.R. Normand inc*., 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 22).
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> 32 In *Pompey*, for example, our Court enforced a forum selection clause contained in a bill of lading concluded between two sophisticated shipping companies. The parties were of similar bargaining power and sophistication, since they were "corporations with significant experience in international maritime commerce . . . [that] were aware of industry practices" (para. 29). The Court held that the "forum selection clause could very well have been negotiated" between the parties (ibid.). This context manifestly informed the Court's application of the strong cause test.
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> 33 But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854, at para. 5 (CanLII)). And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do "the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account" (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7).

[40] As a threshold matter, it seems obvious that Terry and Orlande were both well-versed in commercial dealings at the material time. The evidence establishes that they were business associates for many decades and that both controlled a myriad of corporate entities. In other words, these were sophisticated businessmen.

[41] The contract here is the Rescission Agreement, which his clearly commercial in nature. The evidence does not disclose any sort of power imbalance as between the signatories. There is no evidence that the agreement was foisted onto Terry and he has not otherwise called into question its validity or enforceability. The Recission Agreement clearly applies to these proceedings as they relate to ownership of the DDT US shares.

[42] Has Terry established strong reasons as to why the Court should not hold him to his bargain? This begs the question as to what constitutes “strong cause”. The Ontario Court of Appeal’s decision in ***Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351** sets out a useful list of factors that may amount to a strong cause:

> 24 A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[43] None of these factors are present here.

[44] I appreciate that this litigation has connections to Alberta. The parties are Alberta residents. The Recission Agreement was executed in Alberta. DDT US is or was "headquartered" here. Orlande was ordinarily resident in Alberta at the time of his passing and his will was probated in this province. Alberta may well be the *forum conveniens* for this matter but for the jurisdiction clause. However, in my view, these Alberta connections are insufficient to oust the operation of the forum selection clause[1]. Terry has not shown strong reasons for why the Court should not enforce that clause.

Conclusion:

[45] The application as it relates to the allegations pertaining to the settlement of the Florida Action is dismissed. The claims related to ownership of the DDT US shares are struck.

[46] In my view, success on this application was divided. The parties will bear their own costs.

Heard on the 16th, 29th and 30th days of April, 2024.
Dated at the City of Red Deer, Alberta this 11th day of July, 2024.

M.R. Park
A.J.C.K.B.A.

Appearances:

Cory Ryan, Whitelaw Twining LLP
for the Plaintiff

Paul E. Reid, Carscallen LLP
for the Defendant

[1] See ***Guest Tek Interactive Entertainment Ltd. v. PricewaterhouseCoopers LLP*, 2017 ABQB 567**, where the court considered somewhat similar connections to Alberta.