

CITATION: Jonathan's - Aluminum v. Retail, 2015 ONSC 6485
COURT FILE NO.: CV-12-462259
DATE: 20151020

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JONATHAN'S - ALUMINUM & STEEL
SUPPLY INC.

Plaintiff

- and -

RETAIL ALLOY METAL & PLASTIC
PLUS LIMITED and BHARATHY
THARUMARASA

Defendants

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)
) *Paul H. Starkman*, for the Plaintiff
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) *H. Keith Juriansz*, for the Defendant
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) **HEARD:** September 14, 15, 18, 21, 22, 23,
24, 25, 2015 and October 19, 2015

K.P. WRIGHT, J.

REASONS FOR JUDGMENT

[1] This is a claim for payment of inventory.

[2] The dispute is between two business owners.

[3] The plaintiff claims that he sold the chattels and inventory from his business to the defendants on January 4, 2012. The plaintiff claims that the defendants have failed to pay him for the inventory and are thereby in breach of their agreement of sale dated December 5, 2011.

Background

[4] The plaintiff Mr. Liu is the owner and operator of Jonathan's - Aluminum & Steel Supply Inc. ("Jonathan's"). He has operated this company since 2005.

[5] The defendants, Retail Alloy Metal & Plastic Plus Limited ("Retail") is owned by co-defendant Bharathy Tharumarasa ("Bharathy"), but operated by her husband Mr. Tharumarasa ("Ram"). Bharathy is also a named defendant.

[6] Ram had been a customer and doing business with Mr. Liu since before 2005. He ran a machine shop and would purchase small quantities of materials from Mr. Liu.

[7] There is no dispute that on December 5, 2011 both parties entered into the following contract (the "Contract"), [Exhibit 4A, Tab 1]:

I, Bharathy Tharumarasa hereby offer to purchase all the Chattels (set out in the attached list) of the business Jonathan's Aluminum & Steel Supply Inc. located at 70 Milner Avenue, Scarborough for the sum of Sixty Thousand (\$60,000).

I also offer to buy the inventory of the said business. The inventory shall be physically counted on the date of closing.

The cost of the inventory shall be at invoice price. The cost of the inventory shall be paid in the following manner.

1. 40% of the value of the inventory on the date of closing;
2. 30% of the value of the inventory 30 days after closing;
3. 30% of the value of the inventory 60 days after closing.

The date of the closing shall be on January 4, 2012 which date shall be mutually extended.

Dated this 5th day of December 2011.

Bharathy Tharumarassa/

In trust for a corporation to be incorporated

Kuo Yu Jonathan Liu

Per: Jonathan's Aluminum & Steel Inc.

[8] The following is the chattel/equipment list: [Exhibit 4A, Tab 10]

Equipment List:

Lathe Machine:
Victor - 2460 sr#98056

Milling Machine
First sr # VH-73064081

Pedestal Grinder:
Shopcraft – 8” with base

Horizontal Ban saws: (2)
Power Fist 9” metal sr# 0402459
Viper – Model 220Z 18” x 13” sr# 490135

Welder: Canox – Model – C250S AC/DC
Sr # HD 711388

Plasmarc – PCM-150 plasma cutter
SR# A88D-81753 p/n 680905

1 compressor S F W 5100805
(CRN B672.1234567890)

Fork Lift – Caterpillar Model – GP 25 sr# 6AM-90087

Wire strapping cart set

TRUCK –Hino – 2003 VIN#JHBF4JH231S12114

[9] There is no dispute that the defendants paid the plaintiff the \$60,000.00 for the chattels upon closing as required in the Contract.

[10] There is also no dispute that the defendants have, to date, paid the plaintiff nothing towards the cost of the inventory.

[11] There is no dispute that on February 13, 2012, the plaintiff drafted and signed a non-competition agreement, as set out below [Exhibit 5A, Tab 18]:

IN CONSIDERATION of and notwithstanding to the closing of the above transaction, JAS hereby agreed to this NON-COMPETITION AGREEMENT with the following conditions:

1. JAS will not open a metal retail store in the area of Scarborough for a period of two (2 Years) from date of this transaction.
2. JAS will not engage in retail sale of metals as to compete with Retail Metal Alloy & Plastic Plus in any shape of form in the area of Scarborough for a period of two (2) years from the date of the transaction.

Further more JAS hereby guaranteed that all assets sold to: Bharathy Tharumarassa And to: Retail Alloy Metal & Plastics Plus is free of all debts and liens.

Dated at the City of Scarborough. On the 15th day of February, 2012

Position of the Parties

[12] The plaintiff claims that the total cost of the inventory is \$132,827.88 including HST.

[13] The defendants take issue with the accuracy of the inventory count by the plaintiff and further claim that the prices assigned by the plaintiff are inflated. The defendants have taken the position that the total cost of the inventory is \$71,527.00. They argue that amount must be set-off against their loss of business and income caused by the plaintiff's breach of the non-competition agreement.

The Evidence

[14] I will now briefly review the evidence. I will further develop the evidence only when required in my analysis.

Evidence of Mr. Liu

[15] Mr. Liu testified that he was the sole owner and operator of Jonathan's since 2005. It was a small retail metal shop that mainly sold small quantities of material to machine shops and construction companies.

[16] He said in 2008 he decided he wanted to sell his business. He listed it for sale in October 25, 2011. He received no offers and that listing was ultimately withdrawn. He said his desire to sell was motivated after he was diagnosed and treated for cancer. He said he made his desire to sell known to those in his business community.

[17] He said he had a number of informal conversations with Ram about purchasing his business. He said Ram was not interested in buying the "business" but he was interested in buying the equipment and inventory.

[18] On December 5, 2011, the Contract was drawn up and signed by Mr. Liu and Bharathy. The Contract states that Bharathy signed the Contract in trust for a corporation to be incorporated. Mr. Liu was clear that all his business dealings and conversations were with Ram and not Bharathy. He agreed that they incorporated Retail shortly after the Contract was signed. This did not come as a surprise to him, he said he expected it but it was of no importance to him. His only concern was that he got paid.

[19] He testified that he spent from Christmas 2011 and into January 2012 physically counting the inventory. He said his sons assisted him up until January 4, 2012. After the inventory was counted and priced, he presented the defendants with an invoice [Exhibit 4A, Tab 3]. The total amount owing for inventory was \$110,644.14, plus HST.

[20] Mr. Liu's calculations were based on the current market value, prior prices taken from past invoices, and his experience and expertise in the business. He believed that the price he assigned to each item to be fair and reasonable.

[21] By February 13, 2012, Mr. Liu said he still had not been paid for the inventory. At Ram's request he entered into a non-competition agreement [Exhibit 5A, Tab 18]. He drafted the agreement and signed it. He said the only reason he entered into this agreement was so he would get paid what was owed to him.

[22] I found Mr. Liu to be a very thoughtful and considerate witness. I am mindful that Mr. Liu admitted to having some memory problems as a result of his illness and the passage of time. Mr. Liu was very forthright about the areas he was struggling with due to a memory deficit. As such I have been able to examine those specific instances and remain unconcerned about them. Despite the lengthy and aggressive nature of the cross examination, he remained considerate and attentive throughout. I find Mr. Liu to be a credible and reliable witness and I fully accept and rely upon his evidence in its entirety.

Witnesses: Fredrick Liu & David Liu

[23] Fredrick Liu and David Liu, Mr. Liu's sons, both testified that they assisted their father with the inventory count.

[24] There is no dispute that they participated from some point in December 2011 but not passed the closing of January 4, 2012.

[25] There is also no dispute that they only assisted when their father was present.

[26] Both these young men had some familiarity with their father's business and the materials involved as they had worked there on weekends and summers since the company's inception.

[27] They explained that their father provided them inventory sheets to work from. They compared it with the current physical inventory in stock, by counting and measuring each individual piece. They said their father was always present and was also assisting. They said that if they were unsure about an item that they would alert their father.

[28] Both young men testified that, to their knowledge, their father was only selling the inventory and not his business.

[29] Both these young men presented as honest and forthright witnesses. I find them to be credible and reliable witnesses. I accept and rely on their evidence in its entirety.

Witness: Mr. Tharumarasa ("Ram")

[30] Ram testified that it was he, not his wife that dealt with the sale and purchase of the chattels and inventory from Mr. Liu.

[31] He said these discussions started in December 2011.

[32] He testified that he believed Mr. Liu was quitting the "business". He said that when asked by Mr. Liu to purchase the "business" he said no because he already had the burden of running two companies. He then said he sent an employee over to get a feel for the place and

when he came back they discussed it. He said he discussed it with an accountant. He gave no details about this discussion but said that it was after this that he decided there was "good potential to take it over." Ram testified that he believed he was taking over the business but not the name.

[33] He is the one that had his lawyer draft the Contract that was signed. He said Mr. Liu did not want lawyers involved.

[34] He said that he is the one who came up with the \$60,000.00 for the cost of the chattels. He said that \$20,000.00 of that amount was for the equipment. Later, he said he allotted \$30,000 for the chattels and \$30,000 for the good will, phone numbers, customer list and one month of training. This is just one example of the many internal inconsistencies in his testimony that impinge on his credibility.

[35] He said that the price was fair, which is remarkable given that he did not even look at the equipment or inspect it before making this offer. It is equally remarkable that he made no inquiry or investigation in what the business was worth or if it was even viable, yet says he was prepared to pay \$30,000 for it.

[36] In cross examination, Ram agreed that the training, the customer list, phone number and good will were not in the Contract he had drafted and signed. He testified that it was in his mind and that he didn't need to spell it out for Mr. Liu.

[37] It is agreed by early January Mr. Liu had finished his inventory count and submitted an invoice showing the cost of the inventory to be \$110,644.14.

[38] Ram testified that he refused to pay Mr. Liu because he was running a competing retail business. He said he believed that Mr. Liu was quitting and shutting down his business and was upset that he did not.

[39] In February 2012, Mr. Liu drafted and signed a non-competition agreement, on the basis that he would get paid for the inventory. Ram says that even after that date Mr. Liu was in breach of that agreement because he was making retail sales and refused to pay for the inventory.

[40] Ram took issue with the price and count of the inventory done by Mr. Liu and his team. In March of 2012, Ram, along with five other people, conducted their own inventory count. He says the inventory was worth \$71,527.00.

[41] I found Ram's evidence to be confusing and, in large measure, self-serving. I found his evidence to be internally inconsistent, all of which significantly impinges on his credibility.

Issues

[42] There are three main issues in this case:

1. Liability and section 21 of the *Ontario Business Corporations Act*.

2. The Contract and the inventory.

3. The non-competition agreement.

Issue One: Section 21 Ontario Business Corporations Act

[43] I will first turn to the issue of liability and the Section 21 of the *Ontario Business Corporations Act*.

[44] There is no issue that Bharathy signed the Contract on behalf of a corporation to be incorporated on December 5, 2011.

[45] There is no dispute between the parties that it was the intention that Bharathy and Ram would be incorporating a new business as soon as possible after signing the Contract.

[46] Accordingly, on December 13, 2011, Retail Alloy Metal and Plastic Plus Limited was incorporated. Mr. Liu was immediately made aware and, as such, invoiced Retail Alloy Metal as directed.

[47] In deciding whether a corporation has adopted a pre-incorporation contract all that is required is a simple notification of intent. [see *Sherwood Design Services Inc. v. 872935 Ontario Ltd.* (1998), 39 O.R. (3d) 576 (Ont. C.A.)]

[48] I adopt the test as out by Karakatsanis J. in *Design Home Associates v. Raviv*, 2004 CarswellOnt 1660, where she stated:

There is no requirement for a formal adoption of a pre-incorporation contract or of formal advice to the other party. Section 21(2) of the OBCA does not set out the manner of adoption of a pre-incorporation contract and there is no principled basis for imposing a stringent requirement of formality. The section permits adoption “by any action or conduct signifying its intention to be bound thereby.” In *Sherwood Design Services Inc. v. 872935 Ontario Ltd.* (1998), 39 O.R. (3d) 576 (Ont. C.A.), the Ontario Court of Appeal found a letter from counsel indicating a shell company’s intention to be bound was sufficient to adopt the contract even though the corporation was never transferred to the individual defendants. The court held that the statutory provision should be interpreted in light of the realities of what occurs on a day-to-day commercial basis. A simple notification of intent is all that is required.

[49] I am mindful that the plaintiff is holding on to the position that Bharathy still remains personally liable and that section 21 of the *Ontario Business Corporations Act* is not applicable.

[50] I disagree. I find the following factors to weigh in favour of adoption of the Contract by the corporation:

- The Contract clearly states that Bharathy is signing in trust for a corporation to be incorporated;
- The incorporation happened within 8 days of the Contract being signed;

- The plaintiff was immediately notified;
- The plaintiff testified that he was aware that this was the intention of the defendants and took no issue with it;
- The plaintiff generated an invoice on January 4, 2012, the closing date in the Contract for payment, in the amount of \$192,827.88 to the new corporation and not to Bharathy;
- The signs were changed to the name of the new corporation;
- Business cards were generated in the name of the new corporation;
- The lease agreement was in the name of the new corporation;
- The phone bill was in the name of the new corporation.

[51] The above factors in combination make it clear that the new corporation did adopt the Contract of December 5, 2011.

[52] For these reasons, I find that section 21 of the *Ontario Business Corporations Act* does apply, and that it was the intention of the parties that Bharathy would only be bound by the Contract until the new corporation came into existence on December 13, 2011. There is no ambiguity on this point and the test has been met.

[53] Accordingly, I find that the corporation did adopt the contract and that Bharathy Tharumarasa is not personally liable.

Issue Two: The Contract and the Inventory

[54] I will now turn to the issue of the Contract and the inventory.

[55] Ram claims that he purchased the entire business, except the name, and the inventory. He claims that this purchase included the equipment, the customer list, the phone number, the good will and training.

[56] I disagree, and here is why.

[57] The Contract, as set out above, clearly states the purchase was for chattels and inventory. The Contract indicates that the chattels are set out in the attached list [Exhibit 4A, Tab10]. That is a list of equipment and makes no mention of the customer list, the phone number, the training and the goodwill.

[58] This is not surprising given that Ram admitted that he did not communicate to Mr. Liu that the purchase was to include goodwill, customer lists or phone numbers. He said that he only thought about it. Unfortunately, thinking about it is not good enough, and unless Mr. Liu was told and agreed to it, he cannot be bound by it.

[59] Moreover, given that it was Ram who had the Contract drafted, it makes sense that if he were buying the entire “business” he would have made that clear. He was an experienced business man and would have known the significance and importance of ensuring clarity on this point. He said the he did not include those details that pointed to a buying of the ‘business’ because Mr. Liu wanted to keep the Contract simple. Again, this makes no sense at all and the fact that he would offer it as an explanation impinges significantly on his credibility.

[60] I accept and rely upon Mr. Liu’s evidence that the understanding and the Contract was for the purchase of the equipment and the inventory and nothing more.

[61] Mr. Liu and Ram disagree on the price of the inventory and the count. The Contract states that the cost of the inventory shall be at invoice price. The parties disagree on what the appropriate invoice price should be.

[62] The Contract did not set out any particular formula to be followed in reaching a price.

[63] I find the formula and the price assigned to the inventory by Mr. Liu to be both fair and reasonable. Mr. Liu based the price on material prices from his purchase book and on his experience in the industry. The purchase book contained invoices for all material purchased since the company’s inception 6 years earlier.

[64] The parties also disagree on the inventory count.

[65] I fully accept the inventory count conducted by Mr. Liu. I find his methodology and approach to be both fair and accurate. He oversaw the entire count and he was intimately familiar with the product and the pricing. His sons, who assisted him, were also familiar with the materials and kept detailed notes about what they did. I have complete confidence in the accuracy and fairness of Mr. Liu’s inventory count and I accept it in its entirety.

[66] I have no confidence in the inventory count as conducted by Ram and his team. There was a lack of record keeping done during the count. I have no confidence that the people assisting Ram had any knowledge or familiarity with the materials.

[67] Moreover, I found the evidence given by Ram on this issue to be confusing and difficult. The fact that he did not conduct an inventory count until the end of March 2012 is disconcerting. If he was truly concerned about the inventory count why would he wait almost three months before conducting his own count? It makes absolutely no sense and there was no satisfactory explanation given for it. He did say that the real issue for him was that Mr. Liu was competing in business. I was left with the impression that, but for the competition issue, Ram would have had no concerns with the inventory count. I find Ram’s intentions and motivations to be highly suspect and as such I place no weight upon his evidence.

Issue Three: The Non-Competition Agreement

[68] I will now turn to the non-competition agreement.

[69] There is no dispute that the December 5, 2011 Contract does not include a non-competition clause.

[70] It was Mr. Liu who drafted and signed a non-competition agreement in February 2012 at the request of Ram and in the hopes of getting paid for the inventory.

[71] The plaintiff argues that because there was no consideration for the non-competition agreement, it is not valid in law. [see *Francis v. Canadian Imperial Bank of Commerce*, [1994] O.J. No. 2657, Ont. CA]

[72] The defendants argue that the non-competition agreement simply varied the original Contract and therefore no consideration was necessary. [see *Greater Fredericton Airport Authority v. NAV Canada*, 2008 NBCA 28]

[73] It is clear from the case law that, unsupported by fresh consideration, may be enforceable provided that it was not procured under economic duress.

[74] If ever there was a case that demonstrated that entry into a contract under economic duress, this is it. The plaintiff's evidence, upon which I accept entirely, clearly makes out the case that he only agreed to this non-competition agreement because he was desperate to get paid for the inventory. He believed if he did not do so, he would never get paid and he communicated this to Ram.

[75] I find that the two pre-conditions as outlined in *NAV Canada*, are clearly made out on the unique facts of this case.

[76] I further find that Mr. Liu had no other viable alternative but to enter into this agreement. He did so under protest and voiced that protest. The idea for the non-competition agreement was that of Ram. He testified that this was his main concern and it was only because he believed that Mr. Liu was competition that he decided to pursue that inventory issue.

[77] Counsel argues that Mr. Liu omitted the requirement that he disavow the promise as soon as possible. This step is only a requirement in circumstances where the promise was not made under protest or prejudice. Given my finding that Mr. Liu entered into the agreement under protest, it does not apply. However, in my view, the initiation of this litigation some 8 months after the signing of the agreement, in the circumstances that attach to this case, are reasonable and meet the as soon as possible test.

[78] I have considered counsel's submission that Mr. Liu could have and chose not to get advice from a lawyer. The reality is he did not seek out advice from a lawyer, for a variety of reasons, but in large measure because he was desperate to get paid and by February 2012 the Contract in his mind had been breached, given he had not been paid for the inventory. This put significant financial pressure on him and I draw no adverse finding from Mr. Liu's decision. I accept it and completely understand it.

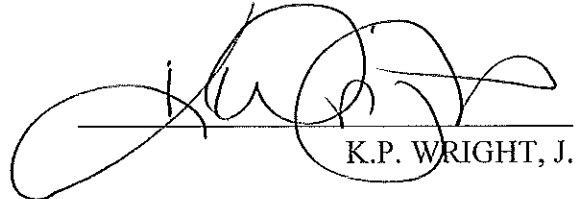
[79] For the above reasons, I find that the non-competition agreement was not a variance of the Contract. I find that there was no fresh consideration for entering into it. Accordingly, I find it not to be valid.

[80] Even if I am wrong on the above analysis, I find the non-competition agreement to be a completely separate and distinct issue from the Contract entered into on December 5, 2011. In my view, it is nothing more than a red herring and, as such, plays no role in this action.

Conclusion

[81] For the reasons stated above, the plaintiff is entitled to judgment against the defendant, Retail Alloy Metal & Plastics Plus Limited, in the amount of \$132,827.88.

[82] As to costs, if the parties are not able to agree on costs, an appointment may be made through the trial coordinator's office within 14 days of the date of release of this decision. Written briefs shall be filed by the respective parties at least seven days prior to the hearing of the costs application. The costs brief is to be no more than 2 double spaced pages in length. If no steps are taken to request a hearing within 14 days, I make no order with respect to costs and leave it up to the parties to resolve.



K.P. WRIGHT, J.

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REASONS FOR JUDGMENT

K.P. WRIGHT, J.

Released: October 20, 2015