

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Armstrong's Communication Ltd. v. Sure Safe Security Systems Inc.,
2007 NSSC 299

Date: 20071012

Docket: SH 285810

Registry: Halifax

Between:

Armstrong's Communication Limited

Applicant/Plaintiff

v.

Sure Safe Security Systems Incorporated

Respondent/Defendant

Judge: The Honourable Justice Glen G. McDougall

Heard: October 5, 2007, in Halifax, Nova Scotia

Written Decision: October 16, 2007

Counsel: Colin D. Piercey, L.L.B., for the applicant/plaintiff
Philip Whitehead, L.L.B., for the respondent/defendant

By the Court:

[1] The plaintiff, Armstrong's Communication Limited (henceforth referred to as "Armstrong's"), has applied for an order under section 51(7) of the *Personal Property Security Act*, S.N.S. 1995-96, c. 13, as amended (henceforth referred to as the "PPSA"). Specifically, Armstrong's seeks an order that a registration of a financing statement be maintained.

[2] “Financing statement” is defined in section 2(r) of the *PPSA* to mean:

2 (r)... the data authorized by the regulations to be entered in the registry to effect a registration for the purpose of perfecting a security interest in collateral pursuant to this Act and, where the context permits, includes

- (i) a financing change statement, and
- (ii) a security agreement registered pursuant to the Assignment of Book Debits Act, the Bills of Sale Act, the Conditional Sales Act or the Corporations Securities Registration Act before the coming into force of this Act, together with any writing that was registered with the agreement or registered to rectify, amend or renew the agreement;

[3] The application was prompted by a demand made by the Defendant, Sure Safe Security Systems Incorporated (henceforth referred to as “Sure Safe”), pursuant to section 51(3) of the *PPSA*.

[4] Under section 51(5) of the *PPSA*, the secured party when faced with such a demand must, within 15 days after the demand is made, either comply with the demand or provide a Court order confirming that the registration need not be amended or discharged as demanded by the debtor. Failure to respond in one of these ways allows the party making the demand to register the financing change statement initially sought.

[5] Given the time frames involved, Armstrong’s first had to seek an abridgement of time in order to relax the normal notice period for service of an originating application under **Civil Procedure Rule 3.03(1)**. Counsel for Sure Safe graciously agreed to the abridgement of time. In any event, the adjournment of the hearing on the Court’s initiative rendered this issue moot.

ISSUE:

[6] The substantive issue left to be decided is whether Armstrong’s is entitled to maintain its *PPSA* registrations against Sure Safe.

FACTS:

[7] A review of the relevant facts, I think, is in order. Armstrong's initially loaned William and Helen Craig the sum of \$130,000.00 in or about 1996. At the time, the Craigs were carrying on business under the firm name and style of First Choice Security.

[8] A written agreement evidencing this loan arrangement, dated the 31st day of October, 1996 is attached as an exhibit to the affidavit of Mr. Gary Armstrong and forms part of the Court record.

[9] The agreement was intended to cover a five year period. In or about October of 2000 the amount owing exceeded the initial loan by about \$20,000.00. The Craigs, who were by then operating under the business name of Sure Safe Security, agreed to pay Armstrong's the sum of \$75,000.00 in cash with the balance of \$75,000.00 to be paid by way of a transfer of pre-authorized payments from 125 of Sure Safe's customers directly to Armstrong's. Under the initial agreement, Armstrong's had a lien on 325 of Sure Safe's customer accounts. Under the new agreement, Armstrong's would release its lien but continue to collect from 85 of Sure Safe's customers along with an additional 40 new accounts bringing the total to 125 as previously indicated.

[10] The new arrangement was contained in a document typed on Sure Safe's letterhead bearing date of October 30, 2000, signed by Bill and Helen Craig and by Gary Armstrong on behalf of Armstrong's. Each of the 125 accounts was valued at \$600.00 which equates to a total value of \$75,000.00, determined by simply multiplying \$600.00 by 125 accounts.

[11] The agreement contained the following two paragraphs:

Armstrong agrees to acquire these accounts for a price of \$600.00 per account, and agrees to allow Sure Safe Security to re-acquire these accounts for a cash payment of the same amount per each account.

Sure Safe Security agrees to maintain that number of accounts and to maintain all work service and warrant until such time as Sure Safe has re-acquired the accounts.

[12] The specific customer accounts were not identified nor were they necessarily static. Accounts could be added to replace any that had been lost due to attrition. Armstrong's received the preauthorized monitoring payments direct from the customer. None of the fees collected were credited to Sure Safe nor was Sure Safe charged the normal monthly monitoring fee for these 125 customers. Armstrong's controlled the billing and collecting of preauthorized payments on all these accounts.

[13] Sure Safe continued service and warranty of these accounts in order to provide continuity of service and to allow Sure Safe to generate additional revenue for any servicing provided.

[14] On November 5, 2002, Armstrong's and the Craigs entered into another agreement. The Craigs who were still operating under the name of Sure Safe Security acknowledged owing Armstrong's \$58,000.00. This represented new money owing to Armstrong's which had accumulated since the signing of the last agreement on October 30, 2000. Sure Safe agreed to:

...place a further 97 accounts on Pre-Authorized Payment to Armstrong Communications.

The agreement further stated that:

Armstrong agrees to acquire these accounts for a price of \$600.00 per account in settlement of the above \$58,000.00 and agrees to allow Sure Safe to reacquire these accounts for a cash payment of the same amount per each account.

[15] The wording was virtually identical to the earlier agreement and was again signed by Mr. Craig and Mrs. Craig personally and by Gary Armstrong on behalf of Armstrong's. The agreement was typed on Sure Safe Security letterhead. As with the earlier agreement Sure Safe agreed:

...to maintain all service and warranty until such time as Sure Safe has reacquired the accounts.

[16] The addition of these 97 accounts raised the total of customer accounts acquired by Armstrong's under the 2000 and 2002 agreements to 222. Armstrong's had control over the billing and collecting of pre-authorized payments for all 222 accounts. Sure Safe was obliged to continued providing service and warrant on these accounts and were entitled to collect any fees for so doing.

[17] In or about April, 2006, the monitoring fees charged to all customers of Sure Safe were increased. The increase which amounted to \$1.67 per month was credited to Sure Safe by Armstrong's on the 222 accounts it owned.

[18] Sometime in January, 2004, Armstrong's requested Registry Investigations to register a *PPSA* financing statement with respect to the 222 accounts covered by the October 30, 2000 and October 31, 2002 agreements.

[19] Armstrong's received a Verification Statement confirming the registration on January 21, 2004 as Registration No. 7757509. Armstrong's at or near the same time requested Registry Investigations to register a *PPSA* financing statement with respect to all 1330 of Sure Safe's customers' accounts, included the 222 included in the first registration. A Verification Statement confirming this registration, as Registration No. 7752951, is dated January 20, 2004. It bears Registration No. 7752951. This registration expired on January 20, 2006 whereas Registration No. 7757509 expired on January 21, 2006.

[20] Armstrong's subsequently caused to be registered a *PPSA* financing statement with respect to all of Sure Safe's accounts as of March 8, 2006. At that time, the number of accounts totalled 1559 which, again, included the 222 accounts covered by the 2000 and 2002 agreements. The Registration No. for this was 10755080. An amendment to this financing statement bearing Registration No. 12888616 was registered on August 27, 2007. Prior to this, on March 9, 2006, Armstrong's caused to be registered a *PPSA* financing statement with respect to the 222 accounts. This bears Registration No. 10757839. An amendment to this registration was also filed by Armstrong's on or about August 27, 2007. Additional accounts were added at that time. It was given Registration No. 12889010.

[21] As of September 6, 2007, Armstrong's claimed to be owed an additional \$205,696.21 in overdue monitoring fees and accumulated interest by Sure Safe. By letter dated September 11, 2007 Sure Safe's solicitors demanded certain information from Armstrong's including a removal of *PPSA* Registration No. 10755080.

[22] As a result of this demand, Armstrong's solicitors have brought this application under section 51(7)(a) of the *PPSA*. If they had not withing 15 days after demand registered a financing change statement, or provided an Order of the Court confirming

that the registration need not be amended or discharged, then the debtor, under section 51(5) could have registered the discharge that had been demanded in the first place.

DISCUSSION:

[23] The issue then is: Should Armstrong's be entitled to maintain its registrations against Sure Safe?

[24] "Security interest" is defined in section 2(ar) of the *PPSA*. It states:

(ar) "security interest" means

(i) an interest in personal property that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and

(ii) the interest of

(A) a consignor who delivers goods to a consignee under a commercial consignment,

(B) a lessor under a lease for a term of more than one year,

(C) a transferee under a transfer of an account or a transfer of chattel paper, or

(D) a buyer under a sale of goods without a change of possession,

that does not secure payment or performance of an obligation;

[25] To determine if Armstrong's has a security interest capable of registration under the *PPSA* it is necessary to look at the two transfer agreements that the parties entered into in 2000 and 2002. These agreements are not sophisticated in the sense that they are not replete with legal jargon or complex terms. These agreements were drafted by business people to reflect a business arrangement. They are simple and straight forward and, as such, easy to comprehend. There are no ambiguities and, as such, it is not necessary to entertain any extraneous information beyond the contract itself in order to interpret it.

[26] Both the 2000 and 2002 agreements use the word “acquire” in respect to the customer accounts intended to be transferred to Armstrong’s. Both agreements contain a provision to allow Sure Safe to “re-acquire” the customer accounts at the same fixed price at which they were transferred as a means of repaying the indebtedness of Sure Safe to Armstrong’s at the respective times.

[27] According to the definition of “acquire” in **Black’s Law Dictionary**, Fifth Edition, “acquire” means:

To gain by any means, usually by one’s own exertions; to get as one’s own; to obtain by search, endeavor, investment, practice, or purchase; receive or gain in whatever manner; come to have. In law of contracts and of descents, to become owner of property; to make property one’s own. The act of getting or obtaining something which may be already in existence, or may be brought into existence through means employed to acquire it..... Sometimes used in the sense of “procure.” It does not necessarily mean that title has passed. Includes taking by devise. [emphasis added]

[28] As the definition states, “it does not necessarily mean that title has passed.”

[29] I am satisfied, based on my reading of the agreements, that what the parties intended was a transfer of ownership of 222 customer accounts in satisfaction of a debt. It was not a transfer to secure payment or performance of an obligation.

[30] Armstrong’s had a security interest in these 222 customer accounts within the meaning of section 2(ar) of the *PPSA*.

[31] The purpose of section 2(ar)(ii) is to “deem” certain transactions as security interests subject to the *PPSA* even though they do not meet the traditional definition because they do not secure payment or performance of an obligation. Authority for this can be found in the text entitled **Personal Property Security Law**, by Cuming, Walsh & Wood, published by Irwin Law, 2005. Allow me to read from this text at pp. 90-91:

The policy reason for including these transactions in the *PPSA* is clear. Endemic to each type of transaction is the potential for third-party deception and the consequent commercial disruptions that this entails. In the case of a lease and a consignment, there is a separation of ownership and possession, thus placing the lessee or consignee in a position to mislead third parties as to the extent of his interest in the

possessions. In the case of a transfer of an account, the transferor retains apparent control of the account even though she no longer owns or has an interest in it. By bringing these transactions within the scope of the registration and priority rules of the *PPSA*, third parties are placed in the possession of being able to discover the existence of these interests before dealing with a lessee, or assignor.

[32] A further quote from p. 91 of the text:

.... As note above, the legislative intention behind extending the scope of the Act to absolute transfers of accounts is to avoid third-party deception. The mechanism through which this is accomplished is to deem the transfer to be a security agreement providing for a deemed security interest. It follows that the account transferor is deemed to have rights in the account after transfer to the extent this is necessary to support the conclusion that an attached security interest exists....

[33] At p. 92 of the same text, the authors state:

It is clear that the assignment step in a securitization transaction involving accounts falls within the *PPSA*.

[34] I agree with this statement of the law as it relates to this situation that is before me. Armstrong's are entitled to the protection afforded to it under the *PPSA* as it relates to the 222 accounts acquired from Sure Safe under the two transfer agreements in 2000 and 2002.

[35] It is not, however, entitled to the security of all Sure Safe's customer accounts. It has over-stepped its rights under the *PPSA* by trying to make such a claim. It is only entitled to register a financing statement in relation to the 222 customer accounts designated by the two transfer agreements and nothing more. Armstrong's will have to file an amendment to have its registration properly reflect its security interest in the 222 accounts only. An order should be prepared to reflect this decision.

[36] After hearing from both counsel, and after considering the circumstances of this case, each party shall bear their own costs of this application.

J.