

SUPREME COURT OF NOVA SCOTIA

Citation: *Namgoong v. Lee*, 2013 NSSC 232

Date: 20130614

Docket: Hfx. No.341309

Registry: Halifax

Between:

Youngjong Namgoong

Plaintiff

v.

Yeon Wook Lee

Defendant

v.

Hyeong Doo Lee

Defendant

Judge:

The Honourable Justice Michael J. Wood

Heard:

May 15 and 28 and June 7, 2013, in Halifax, Nova Scotia

**Written Release
of Decision:**

July 19, 2013 (**Oral: June 14, 2013**)

Counsel:

Kent L. Noseworthy, for the plaintiff
Matthew J.D. Moir, for the defendant

Wood, J.: (Orally)

[1] This is a motion for summary judgment by the plaintiff, Youngjong Namgoong, against the defendant Yeon Wook (“Paul”) Lee. The motion is made on affidavit evidence.

[2] This proceeding was started in December 2010. The statement of claim recites the existence of a purchase agreement for shares in Coinca5000Fisheries Limited. It alleges that Paul Lee agreed to purchase the plaintiff’s shares in the company for \$225,000 with an initial payment of \$50,000 and a promissory note for the balance. The promissory note was allegedly signed by Paul Lee and the other shareholder in the company, the defendant Hyeong Doo (“Jason”) Lee.

[3] The plaintiff claims the promissory note was due on September 30, 2010 and was not paid. As a result, he seeks judgment for \$175,000 plus interest.

[4] Jason Lee did not file a defence and default was entered against him on October 3, 2012.

[5] Paul Lee filed a defence on January 11, 2011, in which he specifically admitted the share purchase agreement and the promissory note. Mr. Lee also admitted that the note was unpaid despite demands by the plaintiff. The defence says that in addition to the promissory note the defendants had given the plaintiff a pledge of their shares in the company as security for payment of the balance of the purchase price. The defendant claims that it was not the intention of the parties that the promissory note remain payable if the shares were seized.

[6] Mr. Lee’s defence also says that Paul Lee does not speak English as his first language and did not receive independent legal advice.

[7] On the summary judgment motion, both the plaintiff and Paul Lee filed affidavits and were cross-examined.

[8] The parties are in agreement with the principles applicable to a motion for summary judgment on evidence.

[9] I will refer to one of the decisions provided to me, which is the decision of Justice Peter Bryson, who as at the time a member of this Court in *AFG Glass Centre v. Roofing Connection*, 2010 NSSC 108. And in particular, para. 13, which says:

- 13 Keeping in mind that it is that is *plaintiff* who is moving for summary judgment, and who must establish that there is no “genuine issue” for trial, I would characterize the test and applicable legal principles in this way;
- (1) The plaintiff must show that, on uncontroverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to cause of action that is in issue;
 - (2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;
 - (3) The responding party must put “its best foot forward” or risk losing. This requires more than a simple assertion, but requires evidence, *United Gulf, supra*;
 - (4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter, *Eikelenboom, supra*;

[10] As noted in that passage, the test to be applied is essentially a two step process, with the initial burden on the plaintiff to establish that there is no genuine issue for trial. Typically the plaintiff will not get past this hurdle if there is a dispute of material fact, which requires resolution at trial.

[11] If the plaintiff can satisfy this preliminary burden, the defendant must provide evidence to show that their defence has a real prospect of success, in other words, that there is a genuine issue of material fact related to the defence that requires resolution at trial.

[12] The defendant’s burden is not terribly high but they must ensure that they put their best foot forward. If they do not, then they run the risk that they may lose the motion.

[13] In this case, the defence admits the existence of the share agreement and the promissory note, and that the note is unpaid. The affidavit evidence and the cross-examination, confirms these facts.

[14] There is no dispute between the parties about these essential elements of the plaintiff's claim, and I am satisfied that the plaintiff has met the initial burden imposed on him in the first part of the test for summary judgment.

[15] I must now consider whether the defendant, Paul Lee, has shown that he has a real prospect of success.

[16] In order to determine this issue, I must understand what defence is being advanced by Mr. Lee. The defence as drafted is not entirely clear. At the hearing, Mr. Noseworthy on behalf of the plaintiff, assumed that it was really a *non est factum* defence. However, Mr. Moir on behalf of Mr. Lee, denied this.

[17] At the hearing, Mr. Moir clarified that the defences being advanced by his client were essentially three alternative positions:

- (1) That the share purchase agreement properly interpreted, meant that if there was default on the promissory note and a retransfer of the shares by Paul and Jason Lee to the plaintiff, that would satisfy any further obligation on the promissory note.
- (2) If the share agreement is ambiguous, then the surrounding circumstances (including the discussions leading to the signing of the documents as well as "reasonable business standards") allow the agreement to be interpreted in a manner consistent with the first alternative position advanced. If need be, Mr. Moir says that the court should rectify the agreement to reflect this true intention of the parties.
- (3) In all of the circumstances, the plaintiff had an obligation to mitigate his damages by realizing on the shares transferred from Paul and Jason Lee. Mr. Moir argues that the "exceptional circumstances" in this case are sufficient to justify refusal of the summary judgment motion.

[18] This is not a situation where there is a stand alone promissory note. The note here came into existence as a term of the share purchase agreement and it has a copy of that agreement attached to it. For purposes of this motion, I am satisfied that these documents must be read together and interpreted as part of a complete transaction.

[19] Clause 1(c) of the share purchase agreement refers to the consequences of failure to pay the balance of the purchase price. It says:

c. If the balance to close is not paid within six (6) months the Purchaser agrees to pay interest at the Royal Bank prime interest rate, plus three (3) percent until paid in full. Provided, however, that should the balance of the purchase price not be paid on or before September 30, 2010, the Purchaser, Yeon Wook Lee, and Hyeong Doo Lee agree to transfer their shares in COINCA5000Fisheries Limited to Yong Jong Namgoong absolutely.

[20] The agreement is silent on the effect of the share transfer on the obligations of Jason and Paul Lee on the promissory note. I believe that this lack of detail may open the door to allow the Court to consider the surrounding circumstances in determining the actual objective intention of the parties concerning the effect of non-payment and retransfer of the shares.

[21] According to the evidence at the hearing, there appears to be agreement between the parties that, upon default of payment of the balance of the purchase price, the fish processing business carried on by the company would be transferred to the plaintiff. Jason Lee said this in his affidavit and his cross-examination and, the plaintiff said this in his cross-examination. The share purchase agreement said this in clause 1(c), which I have referred to.

[22] All the defences advanced by Mr. Moir, on behalf Paul Lee, are based upon the effect of such a transfer after default. His first argument is the share purchase agreement interpretation. The second I will call the “rectification” argument (if the agreement is not interpreted as he proposes). Finally is the “exceptional circumstances” argument, where he indicates that one of the exceptional circumstances for consideration is the fact that these shares were to be transferred to the plaintiff, and he would also keep the money paid and have the benefit of the promissory note.

[23] It is an essential element of all of these defences that the transfer of ownership of the company take place.

[24] I have carefully reviewed the evidentiary record and I can find no indication that ownership of Coinca5000Fisheries Limited was transferred to the plaintiff, by Paul and Jason Lee, or by anyone else.

[25] The only evidence which even remotely touches on this is Mr. Paul Lee's description of leaving the key to the fish plant with the manager so that the plaintiff could pick it up. Even if there was no dispute about this event, it does not amount to transfer of ownership.

[26] The affidavit evidence suggests that there has been no share transfer to the plaintiff. Attached as Exhibits E, F, and G, to the affidavit of Mr. Lee is correspondence from Mr. Noseworthy to Mr. Brian Church, the corporate solicitor of October 1, 2010; Mr. Moir who was acting for Paul Lee to Mr. Church of October 6, 2010; and then finally, another letter from Mr. Moir to Mr. Church of October 21, 2010. That correspondence indicates to me that the share transfer has not occurred.

[27] Based upon this undisputed evidence, I am prepared to conclude that shares were never transferred to the plaintiff. Even without that inference, it is clear to me that Paul Lee has not shown that he has a real prospect of establishing the required transfer of ownership. He does not say anymore than that the key to the plant was left for the plaintiff to pick up. He does not say that the ownership of the company was transferred to the plaintiff, and to the contrary, the evidence at the hearing indicates that it was not. I note that in cross-examination, Mr. Paul Lee says that the shares were not given to the plaintiff.

[28] Even if I accept that the legal propositions put forward by way of defence on behalf of Mr. Lee, have merit, he has not provided the necessary evidence to establish the key factual component, which is that the transfer of the business took place.

[29] I conclude therefore, that the defendant, Paul Lee, has not met the burden of showing that his defence has a real prospect of success, and so I grant the

plaintiff's motion for summary judgment in the amount of \$175,000, plus interest from April 1, 2010.

Justice Michael J. Wood