SUPREME COURT OF NOVA SCOTIA
Citation: *Elgebeily, Zaynluke v. Mezza***,** 2023 NSSC 399

Date: 20231114
Docket: 508745
Registry: Sydney

Between:

Elgebeily Restaurant Ltd., a body corporate and Zaynluke Restaurant Ltd., a body corporate, both carrying on business under the franchise trade name of Mezza Lebanese Kitchen

Plaintiffs

and

Mezza Franchising Limited, a corporation incorporated under the laws of Nova Scotia and carrying on business as Mezza Lebanese Kitchen

Defendant

Judge: The Honourable Justice Patrick J. Murray

Motion Heard: August 22, 2023 in Sydney, Nova Scotia

Written Decision: November 14, 2023

Counsel: Duncan MacEachern for Elgebeily Restaurant Ltd. and Zaynluke Restaurant Ltd.
Jeff Aucoin for Mezza Franchising Limited

By the Court:

Introduction

[1] The Plaintiff restaurant companies, Elgebeily Restaurant Ltd and Zaynluke Restaurant Ltd, (hereinafter referred to as "franchise companies"), entered into agreements to operate food establishments with the Defendant company, Mezza Franchising Ltd, (herein after referred to as "Mezza"). Mezza is a franchise that carries on business under the name, Mezza Lebanese Kitchen.

[2] The Plaintiffs signed franchise agreements for two locations, one in Sydney and the other in Truro. These agreements are dated September 29, 2016 and July 25, 2019 respectfully.

[3] On March 10, 2021 Mezza terminated the franchise agreements alleging that Hossameldin (Sam) Elgebeily, had breached a provision in the agreement because he became involved in a criminal offence. The termination was made "upon Notice" to the franchisee companies and the brothers Seif Elgebeily and Sam, whom were both Guarantors under the agreements.

[4] On September 8, 2021 the franchisee companies commenced an action in the Supreme Court of Nova Scotia seeking among other things, unjust enrichment and damages for wrongful termination of the franchise agreements at their places of business in Sydney and Truro, Nova Scotia.

[5] On October 20, 2021 Mezza filed this Motion seeking an Order to stay the Plaintiffs' action pursuant to section 9 of the *Commercial Arbitration Act*, (attached as Appendix "A").

[6] Following the filing of the Defendant's motion to stay, the Plaintiffs' have sought three amendments to their Statement of Claim, the most recent being, one (1) day before the last scheduled hearing of the motion on August 22, 2023.

[7] Mezza submits the franchise agreements contain an arbitration clause that governs this dispute, stating that all controversies, disputes or claims between the parties shall be exclusively determined by arbitration.

[8] In this particular case, it is relevant that s. 9 of the *Commercial Arbitration Act* provides that the Court must stay an action where a party commences an action

to resolve a dispute where the agreement is governed by an arbitration clause, save in exceptional circumstances.

[9] Section 9(2) of the *Act* sets out five (5) instances where the Court may refuse to stay the proceeding. These involve where there has been: a) legal incapacity in entering the arbitration agreement; b) the agreement is invalid; c) the subject matter of the dispute is not capable of being arbitrated; d) the stay motion was brought with undue delay; e) the matter is properly one for default or summary judgement.

Background

[10] As set out in the Plaintiffs' Statement of Claim, Mezza is a body corporate with a registered head office at 1300-1969 Upper Water Street, Purdy's Wharf, Tower II, Halifax, carrying on business as "Mezza Lebanese Kitchen".

[11] Zaynluke is a body corporate with a registered head office at 29 Carmichael Drive, Sydney, in the Cape Breton Regional Municipality, County of Cape Breton.

[12] Elgebeily is also a body corporate, with a registered head office at 266 Prince Street, Sydney, in the Cape Breton Regional Municipality, County of Cape Breton.

[13] On September 29, 2016, Elgebeily entered into a franchise agreement with Mezza (the "Elgebeily Franchise Agreement"), with Elgebeily as franchisee and Mezza as franchisor, permitting Elgebeily to operate a Mezza Lebanese Kitchen Franchise. [Nahas Affidavit, Exhibit "A"]

[14] On July 25, 2019, Zaynluke entered into a similar franchise agreement with Mezza (the "Zaynluke Franchise Agreement", referred to collectively with the Elgebeily Franchise Agreement as the "franchise agreements"), with Zaynluke as franchisee and Mezza as franchisor, permitting Zaynluke to operate a Mezza Lebanese Kitchen Franchise. [Nahas Affidavit, Ex. "B")

[15] The Mezza Lebanese Kitchen Franchise operated by Zaynluke is referred to herein as the "Truro Location".

[16] The President and Vice-President of Zaynluke and Elgebeily, Seif Elgebeily and his brother Sam Elgebeily, acted as guarantors under the franchise agreements. [Nahas Affidavits, Ex. "A" and "B"]

[17] The franchise agreements contain detailed arbitration provisions requiring that all "controversies, disputes, or claims of any nature whatsoever" between the parties "be determined solely and exclusively by binding arbitration pursuant to the *Commercial Arbitration Act* (Nova Scotia) as amended from time to time" (the "Arbitration Provisions").

[18] The relevant portions of the arbitration provisions are set out below. The full text of the arbitration provisions can be found in Exhibit "A" and Exhibit "B" to the Nahas Affidavit.

> 18. **ARBITRATION**
>
> (1) In this section 18, the term "Claims" means all controversies, disputes, or claims of any nature whatsoever between the Parties and includes claims in tort as well as contractual claims and any claims based upon any federal, provincial or municipal statue, law, order or regulation (including, without limitation, any applicable law governing franchises), but excludes controversies, dispute or claims (i) relating to the Marks or other marks or commercial symbols of Franchisor; or (ii) relating to the enforcement of the covenants not to compete contained in this Agreement.
>
> (2) Subject to the requirements of any applicable law governing franchises, Franchisor and Franchisee agree that all Claims between Franchisor (including, where applicable, the Franchisor's affiliates, shareholders, officers, directors, agents, and employees) and Franchisee (including, where applicable, Franchisee's owners, guarantors, affiliates, and employees) shall be determined solely and exclusively by binding arbitration pursuant to the *Commercial Arbitration Act* (Nova Scotia) as amended from time to time.
>
> (3) Arbitration under this section may be initiated on the written demand of either party. Arbitration proceedings will be conducted by one arbitrator at a location chosen by the arbitrator in the City of Halifax in the Province of Nova Scotia.[1]

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[1] In the Zaynluke Franchise Agreement, this provisions ends "in the province in which the Franchised Business is located", instead of "in the City of Halifax in the Province of Nova Scotia". Mezza states that this difference is not relevant for the purpose of this Motion.

…

(9) Nothing in this section will prevent either party from pursuing any remedy or equitable relief (including but not limited to injunctive relief or restraining orders) available to them pursuant to the terms of this Agreement or otherwise pursuant to the rules of equity.

(10) Franchisor and Franchisee will fully comply with all of the terms and conditions of this Agreement and will fully perform their respective obligations under this agreement while the arbitration process is ongoing.

(11) The arbitrator has the right to award or include in his or her award any· relief which he or she deems proper, including, without limitation, money damages (with interest on unpaid amounts from the date due), specific performance, injunctive relief, and attorneys' fees and costs, provided that the arbitrator may not under any circumstances assess punitive, speculative or exemplary damages against either party.

…

17. TERMINATION

Termination Upon Notice

(1) Franchisor shall have the right to terminate this Agreement and the rights granted hereunder, without prejudice to the enforcement of any other legal right or remedy, immediately upon giving written notice of such termination upon the happening of any of the following events:

…

(k) if any of the Franchisee or Guarantor are charged with a criminal or regulatory offense or found liable in civil proceedings in circumstances in which Franchisor believes it is reasonably likely that such charge or civil finding will have a detrimental or harmful effect on the goodwill or reputation of the Marks, the Franchisor or the System:

[19] On March 10, 2021, Mezza delivered a Notice of Termination pursuant to Section 17 of the franchise agreements after learning that Sam Elgebeily had been criminally charged with sexual assault, a fact Mezza alleges the Plaintiffs had not disclosed. [Statement of Claim, paragraphs 8 and 16]

[20] The Defendant is now operating the franchise at the Truro location, while the Sydney location owned by Elgebeily is "now operated" as "the Grill Hut". (Statement of Claim, paragraphs 26 and 27)

[21] Mezza claims that in September 2021, and in breach of the arbitration provisions, the Plaintiffs commenced the present action claiming the Defendant would be unjustly enriched if it were permitted to terminate the franchise agreements and to acquire the Plaintiffs' assets in accordance with the terms of the franchise agreements. (Paragraphs 34, 39 and 53 of the Statement of Claim)

[22] As set out in paragraph 14 of the Statement of Claim, the Plaintiffs allege that after Mezza delivered this Notice of Termination, it began exercising its rights under the franchise agreements to acquire the assets of the Plaintiffs.

Issue

[23] Should a stay of the Plaintiffs action be granted in this matter?

Position of the Parties on the Motion

Franchisor, Mezza

[24] The arbitration provisions in the franchise agreements entered into between Mezza, Elgebeily and Zaynluke require that <u>all</u> controversies, disputes or claims whatsoever between the parties "be determined solely and exclusively by binding arbitration pursuant to the *Commercial Arbitration Act* (Nova Scotia) as amended from time to time".

[25] Contrary to what the Plaintiffs argue, nowhere in the arbitration provision does it say the parties are entitled to pursue a claim for an equitable remedy without recourse to arbitration. On the contrary, paragraph 18(9) makes it clear the parties are free to pursue equitable remedies "within" the arbitration provisions.

[26] Further the definition of "claims" contained in paragraph 18(1) of the franchise agreements is broad, the language including "claims of any nature whatsoever" and includes "claims in tort as well as contractual claims…".

[27] Mezza acknowledges there are some specific claims that are excluded, but these are limited to two (2) items: 1) marks or symbols of the franchisor; and 2) disputes relating to the enforcement of the covenants not to compete on the agreement.

[28] Mezza claims that the Plaintiffs' action has been brought in breach of the arbitration requirement of the franchise agreements and should be stayed by this Court on this motion.

Franchisees, Elgebeily and Zaynluke

[29] The Plaintiffs are of the view that certain matters are not captured by the franchise agreement, and it is these matters that are properly before the Supreme Court. Examples of these are the enforcement of covenants not to compete and the awarding of exemplary or punitive damages. An arbitrator has no ability to deal with those matters which are issues in this proceeding.

[30] In later amendments, specifically August 17, 2023, the Plaintiffs plead conversion and conspiracy between Mezza and the CIBC. As of the date of the motion hearing, Mezza had not received a copy of that amended Statement of Claim.

[31] Further, CIBC was not represented at the motion hearing, given the timing, and lack of proper notice. The Defendant, Mezza, cites this as a further example of abuse of process by the Plaintiffs which Mezza alleges has plagued the Plaintiffs responses to the motion for a stay.

[32] That said, the Plaintiffs submit they have sought arbitration by filing a demand, as early as April 2021. No reply from Mezza has been received, they say.

[33] Further, the Plaintiffs argue s. 9(3) and s. 9(5) of the *Commercial Arbitration Act* are relevant. These provisions they say, allow for arbitration to be commenced and continued while the motion for a stay pursuant to s. 9(1) is before the Court. Further, s. 9(5) permits the Court to stay certain matters in dispute, while allowing the proceeding to continue with respect to other matters.

[34] The Plaintiffs argue there is an element of reasonableness and restriction that the Court must read into the definition of what is arbitrable and what cannot be arbitrated. Matters such as valuation of the assets, are properly matters captured by the provisions for arbitration in the franchise agreement.

[35] The more serious matters, the Plaintiffs submit are not captured and should not be stayed. They say there has not been delay on their part, but rather the Defendant has delayed by asserting this stay motion must first be decided.

[36] The Plaintiffs' claim is based on the equitable remedy of unjust enrichment. Their position is the arbitration provision does not unequivocally prohibit equitable claims from being brought in the Nova Scotia Supreme Court. (See paragraph 50 of the Statement of Claim filed September 8, 2021)

Analysis

[37] In the Statement of Claim the Plaintiffs allege that Mezza wrongfully terminated the franchise agreements stating throughout the claim that the Defendant was previously aware of the incident giving rise to the termination.

> 38. The Plaintiffs plead the termination of the Franchise Agreements was both unreasonable and unfair given the recognition that the Defendant was aware of the adult in early 2017.

[38] Further, the Plaintiffs state they seek arbitration with respect to the competing valuations of the assets (the Net Depreciated Book Value), while claiming the termination of the agreements was invalid:

> 25. The Plaintiffs will seek that an arbitration take place to determine which of the two valuations is more accurate and whether or not a duty of fairness affords the Plaintiffs an opportunity to present their calculation in regard to asset valuation.

[39] In its initial filing, the Plaintiffs claimed a number of equitable remedies, including unjust enrichment, equitable estoppel, and a declaratory order directing the termination to be invalid. Notably they seek that the non-competition clause in 18(1)(ii) be struck down. The doctrine of laches is also plead.

[40] In their initial claim, the Plaintiffs claimed punitive damages, for the Defendants precipitating the financial ruin of the Plaintiffs. The amendment of January 27, 2022, specifically pleads that the damages sought are "outside the scope" of the franchise agreements. (Paragraph 53 of Amended Claim). The March 10, 2023, amendment adds Mr. Nahas personally as a Defendant and alleges that he procured a third party and personally induced a breach of contract.

[41] Mezza submits it filed its motion to stay the proceeding as soon as the action was filed. Since then, they say, there has been a litany of amendments filed by the Plaintiffs resulting in a delay of a year to have the motion decided. This is all on the Plaintiffs, Mezza argues, and they are seeking to have these actions stayed and have the parties move to arbitration as agreed.

[42] There appears to be no dispute that the parties are bound by the terms of the franchise agreements or that the agreements contain arbitration provisions. The Plaintiffs, as has been stated, submit that certain provisions are unenforceable, with respect to certain matters and certain remedies, but also because Mezza was aware of the incident giving rise to the alleged breach, namely the assault.

[43] This is not a decision on the merits off the Plaintiffs action or the Defendant's position on the action. These provisions are relevant to the stay motion, given the position of the parties.

[44] In its brief Mezza states that, "on March 10, 2021 Mezza delivered A Notice of Termination pursuant to Section 17 of the Franchise Agreements after finding out that Sam Elgebeily had been criminally charged with sexual assault, a fact the Plaintiffs had not disclosed to the Defendant".

[45] I have earlier said the Plaintiffs take issue with this assertion. I set these out to provide context for this motion and in particular to describe the nature of the "controversy, dispute or claim".

[46] The stay sought by the Defendant is pursuant to section 9 of the *Commercial Arbitration Act*.

[47] Mezza says the purpose of this *Act* (as contained in section 2) is to promote the use of arbitration in resolving disputes between the parties to a contract. This preference has been recognized in the caselaw, it says, and the intent of section 9 is clear. The Court must stay the action except in exceptional circumstances. (***Black & MacDonald Ltd. v Degrémont Ltée.***, 2009 NSSC 85)

[48] Those circumstances are set out in section 9(2) (a-e) and the burden to demonstrate the action should not be stayed is on the Plaintiffs herein. It is the Plaintiffs who say the arbitration provisions should not apply.

The Legal Test for a Stay

[49] The framework to be applied by the Court is to interpret the arbitration provisions in relation to the claims made and determine whether they must be decided by an arbitrator under the terms of the agreement. (***Mantini v. Smith Lyons LLP***, 2003 O.J. No. 1831)

[50] Section 9 of the *Act* deals specifically with a stay of proceeding in court in situations where the parties are subject to an arbitration agreement. Because refusal of a stay is limited to certain exceptions, interpreting this provision becomes part of the analytical framework.

[51] There are principles governing the interpretation of the commercial contracts generally. Some of the principles in summary form include: i) interpreting the agreement as a whole so as to avoid one or more of the terms being ineffective; ii) determining the intention of the parties given the language used and presuming they have entered what they have said; iii) assessing objectively the underlying facts in entering into the contract and the extent there may be ambiguity; and iv) interpreting the contract in a manner that accords good business sense and avoids absurdity. (***Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust***, 2007 ONCA 205)

[52] The Plaintiffs argue that either party is free to pursue any equitable remedy or relief without recourse to arbitration and the scope of the agreement does not capture other relevant claims of the Plaintiffs in this proceeding. (Paragraph 50 of the Statement of Claim)

[53] The Defendant says the agreement allows either party to pursue equitable remedies and thus are captured by the agreement.

Decision

[54] In this motion, a number of the critical facts are uncontested. There is a franchise agreement, and it contains a clause for dispute resolution, by means of arbitration. Its wording is broad, referring to all manner of controversy or dispute or claims, "of *any* nature whatsoever". There are few limited exceptions. In particular, one exception deals with "enforcement" of the non-competition provision.

[55] In the action the Plaintiffs are not seeking to "enforce" the non-competition clause, as that would be for Mezza. On the contrary, they are seeking to have the covenant "struck". As for the Defendant seeking enforcement of this covenant there is evidence that this is intended, but at this point the non-compete period (2 years) has since expired. In its essential character, the matter before the Court is a suit for wrongful termination of the franchise agreements.

[56] There is little question that punitive damages cannot be assessed by an arbitrator, assuming entitlement to such damages can be established. What matters is that an arbitrator has the authority to "remedy the wrong" if or when it is proven.

[57] Turning to section 9(2) of the *Commercial Arbitrator Act*, Mezza submits that none of the exceptions contained in section 9(2)(a-e) permitting a stay to be refused have been established by the Plaintiffs. Mezza, states in fact that clauses (a), (b), (d) and (e) have not been plead and are otherwise not relevant.

[58] In my view, the clause that appears to be relevant is s. 9(2)(c) which states that a stay maybe refused where:

> (c) the subject-matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province.

[59] The real issue is whether the Plaintiffs' action is excluded from arbitration because of its claims for: i) equitable relief; and ii) punitive damages.

Equitable Relief

[60] The clause in question is 18(9) of the Agreement:

> 9. Nothing in this section will prevent either party from pursuing any remedy or equitable relief (including but not limited to injunctive relief or restraining orders) available to them pursuant to the terms of this Agreement or otherwise pursuant to the rules of equity.

[61] I have considered this clause having regard to the purpose of the *Act*, its language, the intent of the legislation and the expansive definition of claims in the agreement. Having done so I am of the view that it does not present a bar to either party pursuing such remedies through arbitration under the agreement. It clearly does not that state these remedies must be pursued by means other than arbitration.

Punitive Damages

[62] The clause in question is clause 18(11) of the agreement:

> 11. The arbitrator has the right to award or include in his or her award any· relief which he or she deems proper, including, without limitation, money damages (with interest on unpaid amounts from the date due), specific performance, injunctive relief, and

> attorneys' fees and costs, *provided that the arbitrator may not under any circumstances assess punitive, speculative or exemplary damages against either party.*

[63] The caselaw is clear that arbitration or choice of forum cannot be avoided by merely pleading a certain cause of action or claiming a particular remedy that is outside an arbitrator's authority under the agreement in question.

[64] I do not think that situation applies here or that it would apply in any situation where there is legitimate reason for claiming punitive damages, as opposed to merely "tacking" them on to the claim to obtain a strategic advantage. I would even say that tacking them on is not an improper pleading, if the grounds for such a claim exists. It is the "dressing up" of the pleading without any basis that is improper and must be discouraged.

[65] In this case, the Plaintiffs' claim for punitive damages is a factor that favours the matter being heard in Court, given that such damages are pretty clearly excluded from the authority of an arbitrator.

[66] This alone, however, does not provide a complete answer to the issue before the Court. As earlier mentioned, the Court must apply the governing principles of interpretation which require the whole of the agreement be considered.

[67] The agreements in question do not merely demonstrate a strong preference that arbitration be employed as the method to resolve disputes, nor is it merely implied. On the contrary, with very few limitations, there is express agreement in writing between the parties, that all claims or differences would be dealt with by arbitration.

[68] What matters is that the arbitrator is empowered to remedy the wrong. I find in these circumstances there is not such a remedial gap that would amount to an effective deprivation of a remedy sufficient to justify the assumption of jurisdiction by the Court. (***A. (K.) v. Ottawa (City)***, 80 O.R. (3d) 161, at paragraphs 20, 21)

[69] Section 9(2) states the Court "may refuse to stay the proceeding" in only those cases contained in s. 9(2)(a-e). On the whole of the agreement, I find that the Plaintiffs have not met their burden of proving, on a balance of probabilities, that the stay mandated by the *Act* should be refused. In my respectful view, the underlying facts justify that arbitration should be the forum of first resort, as chosen by the parties.

[70] In the result, the Defendant's motion for a stay pursuant to s. 9(1) of the *Act* is granted.

[71] Order accordingly.

Murray, J.

Appendix "A"

Stay

9 (1) Where a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding pursuant to subsection (1) only in the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province;

(d) the motion to stay the proceeding was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

(3) An arbitration of the matter in dispute may be commenced or continued while the motion pursuant to subsection (1) is before the court.

(4) Where the court refuses to stay the proceeding,

(a) no arbitration of the matter in dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued and anything done in connection with the arbitration, before the refusal of the court, is without effect.

(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if the court finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

(6) There is no appeal from the decision of the court pursuant to this Section. 1999, c. 5, s. 9.