

COURT OF APPEAL FOR ONTARIO

CITATION: Maresky v. Enthusiast Gaming Inc., 2025 ONCA 783

DATE: 20251118

DOCKET: COA-25-CV-0306

Copeland, Wilson and Pomerance JJ.A.

BETWEEN

Isaac Maresky and Gainsborough Capital Corp.

Plaintiffs  
(Appellants)

and

Enthusiast Gaming Inc.\*, Enthusiast Gaming Holdings Inc.\* and Menashe  
Kestenbaum<sup>1</sup>

Defendants  
(Respondents\*)

James W. Srebrolow and Alexander Chekina, for the appellants

Brian Chung and Michael Puopolo, for the respondents

Heard: November 6, 2025

On appeal from the judgment of Justice Loretta P. Merritt of the Superior Court of Justice, dated January 30, 2025, with reasons reported at 2025 ONSC 65 and from the costs order, dated March 18, 2025.<sup>2</sup>

REASONS FOR DECISION

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<sup>1</sup> The motion judge noted at para. 12 of her reasons: “The action against the Defendant Menashe Kestenbaum was dismissed on July 12, 2021.”

<sup>2</sup> The appellant appeals from an order dated March 18, 2025, that orders both relief on the merits and costs, and also from an amended order dated January 30, 2025, that is identical to the March 18, 2025 order except for the date.

[1] The appellants, Isaac Maresky and Gainsborough Capital Corp, (“Maresky”), appeal from an order awarding summary judgment to the respondents, Enthusiast Gaming Inc. and Enthusiast Gaming Holdings Inc. (“Enthusiast”).

[2] In anticipation of becoming a publicly traded company, Enthusiast retained Maresky to provide financial and consulting services. The agreement stipulated that Maresky would receive remuneration by way of shares and options in stages. One third of the options was to vest immediately upon execution of the agreement, one third was to vest on the 12-month anniversary of the agreement and one third was to vest on the 24-month anniversary. Maresky was only entitled to claim the non-vested options if it continued to be engaged with Enthusiast 12 and 24 months post-agreement date.

[3] This did not occur. Enthusiast terminated the relationship with Maresky after only five months.

[4] Maresky then brought two proceedings, the first of which was an application heard by Steele J.. Contrary to the agreement, Enthusiast did not provide Maresky with the options that were to have vested immediately. Steele J. found that this was a breach of contract and that Maresky was entitled to damages in lieu of specific performance in the amount of \$173,255.21.

[5] The second proceeding, the summary judgment motion that is the subject of this appeal, concerned the non-vested options. Maresky argued that he was entitled to the non-vested options even though he did not remain in a working relationship with Enthusiast. Maresky sought summary judgment on this basis. He also sought damages for wrongful dismissal but withdrew the employment claim after a case conference. Enthusiast brought a counterclaim but withdrew the counterclaim before the hearing of the motion. Enthusiast did, however, seek summary judgment itself, on the basis that Maresky had no entitlement to non-vested options and that there was no genuine issue for trial.

[6] The motion judge granted summary judgment in favour of Enthusiast. She found that the agreement was not a fixed term contract and that, accordingly, Maresky was not entitled to the shares and options that were to vest 12 and 24 months post-agreement. As she explained, at paras. 72 and 74 of her reasons:

The February 26, 2018 email says the vesting schedule was contingent on the Plaintiffs remaining with Enthusiast “on at least the same capacity and time as initially agreed on each vesting date”. The language of the email is clear and unequivocal: the Plaintiffs had to stay with Enthusiast to get the shares and options.

...

Enthusiast terminated the arrangement between the parties after five months, well before any of the relevant vesting dates at issue in this action. It was not disputed that the Plaintiffs were no longer engaged with Enthusiast in any capacity on any of the vesting dates other than the

date for the Vested Options which were the subject of the Application and not this action.

[7] On appeal, Maresky argues that the motion judge failed to consider whether the termination by Enthusiast reflected a breach of the duty of good faith that governs contractual relations. However, this argument was not advanced in the court below. It is true that in his Amended Amended Statement of Claim, Maresky claimed that the termination of its services by Enthusiast was “unilateral and unlawful”. However, on the hearing of the motion, the parties agreed that the only issue to be determined was whether the agreement was a fixed term contract.

[8] The motion judge expressly observed in her reasons: “The Plaintiffs concede that they are not entitled to the shares and options that had not vested unless there is a fixed term contract”.

[9] Maresky asserts on appeal that he did not make this concession. However, he has not pointed to anything in the record that would support the assertion that there was no concession. As such, for purposes of appellate review, we must accept that the motion judge accurately described Maresky’s position, and that the only issue to be determined was whether the agreement was a fixed term contract.

[10] That being the issue, we see no error in the motion judge’s analysis.

[11] The motion judge held that there was no evidence that the parties discussed, let alone agreed to, a fixed term contract for two years. The motion judge reasoned that, in the commercial context, it would lead to unreasonable and absurd results

if every contract that provides for shares or options that vest over time were to be deemed a fixed term contract. The language of the email setting out the agreement was clear and unequivocal: Maresky had to remain engaged with Enthusiast on the proposed vesting dates in order to obtain the shares and options. Maresky was no longer engaged with Enthusiast in any capacity on the vesting dates. Therefore, there was no breach of contract, and no corresponding entitlement by Maresky to damages.

[12] The reasons of the motion judge flowed inexorably from the terms of the agreement. It follows that there was no genuine issue for trial and that summary judgment was properly ordered in favour of Enthusiast. We see no basis for appellate intervention.

[13] Similarly, we see no error in the costs decision of the motion judge. The motion judge awarded \$118,490.30 in costs to Enthusiast, and \$7,091.74 to Maresky, with a set off resulting in \$111,398.56 payable to Enthusiast. The motion judge considered the procedural complexities leading up to the hearing of the motion, and the conduct of the respective parties. Discretionary costs decisions are entitled to deference particularly where, as here, the reasons set out a clear and proper basis for the conclusions.

[14] Therefore, the appeal from the order awarding summary judgment is dismissed. Leave to appeal the costs decision is granted, but the appeal from the costs decision is dismissed.

[15] In accordance with the parties' agreement, costs of the appeal are ordered against the appellants in the amount of \$17,500 all inclusive.

"J. Copeland J.A."

"D.A. Wilson J.A."

"R. Pomerance J.A."