

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Apex Packaging v. Winterland Beverages Ltd.*,  
2023 BCSC 69

Date: 20230116  
Docket: S215057  
Registry: Vancouver

Between:

**Apex Packaging**

Plaintiff

And

**Winterland Beverages Ltd.**

Defendant

Before: The Honourable Chief Justice Hinkson

## **Reasons for Judgment**

Counsel for the Plaintiff:

A.S. Maheem

Counsel for the Defendant:

R. Davis

Place and Date of Hearing:

Vancouver, B.C.  
December 14, 2022

Place and Date of Judgment:

Vancouver, B.C.  
January 16, 2023

**I. INTRODUCTION**

[1] The plaintiff is a sole proprietorship operated by Craig Davies and duly registered to operate in British Columbia under the business name Apex Packaging (“Apex”). The plaintiff seeks a summary judgment against the defendant, pursuant to R. 9-6(5)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], for the liquidated sum of \$46,283.51 USD, to be converted into Canadian funds pursuant to the provisions of the *Foreign Money Claims Act*, R.S.B.C. 1996, c.155.

[2] The defendant, Winterland Beverages Ltd. (“Winterland”), is an Alberta corporation that manufactures alcoholic beverages in Kelowna, British Columbia. Its principal is Karen Labossiere.

[3] Since the plaintiff is a sole proprietorship, it is not a separate legal entity from Mr. Davies, meaning that in this action Mr. Davies is personally suing the defendant. While R. 20-1(10) of the *Rules* allows a sole proprietorship to be sued under its business name, there is no corresponding rule allowing it to sue using its business name. There is clearly a dispute between Mr. Davies and Winterland so, for the purposes of this application, I will treat this as a procedural irregularity and proceed with the application: *Rules* at R. 22-7(1), (2)(e). Nonetheless, Mr. Davies should apply to amend the style of cause in these proceedings to name both “Craig Davies doing business as Apex Packaging and Apex Packaging” as plaintiffs.

[4] I refer to the “plaintiff” and Mr. Davies throughout these reasons. As discussed, they are one in the same. However, I refer specifically to Mr. Davies to clarify who made certain statements.

[5] The basis for the plaintiff’s claim is for payment for goods supplied pursuant to a credit agreement between the parties.

[6] The application is opposed by the defendant, on the basis that it has raised genuine issues for trial in its response to the plaintiff’s notice of civil claim.

[7] For the reasons below, I decline to grant summary judgment as requested by the plaintiff.

**II. BACKGROUND**

[8] The plaintiff supplies packaging materials, including custom made packaging materials to the food services industry.

[9] On October 1, 2019, Ms. Karen Labossiere signed a credit application, on behalf of the defendant, on the letterhead of Apex Packaging. The document described Apex as a “Division of BCK International Ventures Inc.”. The application contained a statement:

TERMS OF PAYMENT: The Applicant agrees to pay the balance on account on a net 30 days basis and further agrees to pay a service charge of 2% per month (26.83% per annum) on overdue accounts.

[10] Mr. Davies is an officer and director of BCK International Ventures Inc., a company which he swore has “no direct or indirect ownership” interest in the plaintiff, save common ownership.

[11] The plaintiff delivered rolls of branded packaging to the defendant, under invoice numbers 2255 and 2273 for the respective amounts of \$36,320.97 USD and \$21,548.71 USD, which the defendant paid to the plaintiff.

[12] On June 27, 2020, Mr. Taylor Labossiere, the defendant’s operations manager, emailed Mr. Davies about the defendant’s new machine, advising, in part, that:

[...]

We are having a major issue with the rolls though. So far we have ran 2 strawberry rolls which were fine to run. There is a few spots that have a blue ink mark on them but it doesn’t affect running.

The peach on the other hand has dots randomly through the roll on the side the photo eye is on. We’ve ran two rolls of peach and both had it. We’ve been having someone sit at the roll to watch them go up and try to catch it as when we miss it, it causes the machine to cut off, spills a big mess, which causes the machine to shut off, blows a fuse and takes a good 45 min of downtime until we are back up and running again.

I've attached pictures. There are three I took, but many more than that. It's quite the pain to run through them. We are keeping notes of the added cost it's costing us with clean up and waste and having someone sit and watch it. Hopefully the factory can deduct from our bill or add rolls as compensation for their mistake.

[...]

[13] Later on June 27, in an email, Mr. Davies acknowledged the defects and said he would take steps to resolve them at the manufacturing stage. On June 28, Mr. Davies emailed Mr. Taylor Labossiere stating that the likely cause of the ink splashes was a printing process defect and apologized for the error.

[14] More packaging was delivered to the defendant on or about July 24 and 27, 2020. Mr. Davies inquired over email on the quality of the packaging. Mr. Taylor Labossiere responded in an email on August 11, 2020, that the rolls delivered on or about July 27 "have run great and without issue".

[15] The plaintiff delivered more goods to the defendant on or about August 17, 2020, under invoice number 2283 for the amount of \$98,432.21 USD. This invoice and the goods listed therein are the ones at issue. That invoice stated:

Merchandise supplied by Apex Packaging is custom made to the Customer's specifications and any errors in workmanship or material defects must be reported to Apex Packaging within 48 hours of receipt of order.

[16] In her affidavit of December 6, 2022, Ms. Karen Labossiere swore that initially the defendant indicated to Mr. Davies that the packaging under invoice 2283 "was running without issue". It was only under subsequent testing that the defendant discovered the issues with the packaging. Namely, that the packaging allegedly caused leakage issues in the packing machine. There is no evidence before me of such issues with these goods being communicated by the defendant to the plaintiff.

[17] The defendant made a partial payment of invoice 2283 in the amount of \$55,000 USD, but the balance of the invoice was not paid. When the plaintiff demanded payment of the balance of the invoice, Ms. Labossiere emailed Mr. Davies the following message on January 28, 2021:

Hi Craig,

We will be paying the balance of the invoice within two weeks.

We have some meetings with our distributors scheduled for the next couple of weeks. We will have a better idea for forecasting what our needs will be for this season. We have heard of the resin Shortages and the container problems for shipping. Are you being affected by these issues as well?

Regards,

Karen

[18] The plaintiff's notice of civil claim for the outstanding amount of invoice 2283 was filed on May 26, 2021. In its response to civil claim, the defendant denied any relationship between it and the plaintiff, and denied that the plaintiff or its proprietor supplied goods to it. It pleaded in the alternative that if it did enter into an agreement with the plaintiff, it did not agree to the payment terms set out in the agreement, or the interest rates set out in invoice 2283.

[19] In the further alternative, the defendant said that if goods were supplied to it, they were not fit for use, and contained faults and defects that rendered them unfit, and that the goods were not of merchantable quality.

[20] In further response to the notice of civil claim, the defendant also asserted entitlement to a set-off on the basis that the goods were unfit for use and not of merchantable quality.

### **III. DISCUSSION**

#### **A. Summary Judgment**

[21] Rules 9-6(2) and (5)(a) and (d) provide:

(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

[...]

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

[...]

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[22] Summary judgment will be granted if it is “beyond a doubt” or “plain and obvious” that there is no genuine issue for trial: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 12 [*Skybridge*]. The standard for granting summary judgment is high; essentially, the defendant must be “bound to lose”: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 65 [*Beach Estate*]. This is a factual inquiry to determine if the plaintiff has proven sufficient material facts to establish its cause of action: *Skybridge* at para 12. To this end, the court cannot weigh the evidence before it; if there is contested evidence on a material point, then there is a triable issue and the matter cannot be resolved by way of summary judgment. Thus, the court may only weigh the evidence to determine whether it is incontrovertible: *Beach Estate* at paras. 48–49.

[23] In *Beach Estate*, the chambers judge dismissed the plaintiff’s action contesting a settlement agreement by way of summary judgment. The judge drew the inference that it was unlikely that there was “misinformation, duress and undue influence” in the settlement process given that the plaintiff was represented by senior counsel. The Court of Appeal determined that this was improper weighing of evidence and that the plaintiffs were not bound to lose on these facts (paras. 65–67).

**B. The *Sale of Goods Act***

[24] Sections 31, 39, and 56(1) of the *Sale of Goods Act*, R.S.B.C., 1996, c. 410 [SGA], provide that:

31 It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

[...]

39 The buyer is deemed to have accepted the goods when

(a) the buyer intimates to the seller that the buyer has accepted them,

- (b) the goods have been delivered to the buyer, and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, or
- (c) after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that the buyer has rejected them.

[...]

56(1) If there is a breach of warranty by the seller, or if the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not merely because of the breach of warranty entitled to reject the goods, but the buyer may

- (a) set up against the seller the breach of warranty in diminution or extinction of the price, or
- (b) maintain an action against the seller for damages for the breach of warranty.

[25] This case concerns the sale of goods; therefore, the *SGA* applies.

#### **IV. DISCUSSION**

[26] The plaintiff argues that this is a straight-forward matter: it delivered goods to the defendant and was not paid. Therefore, there is no genuine issue for trial and he should be granted summary judgment.

[27] The defendant argues that there are two triable issues. First, it claims that the contract may be “set aside” as this is a case of mistaken identity given that Winterland thought Apex was a large corporation rather than a sole proprietorship. Second, the defendant claims that the packaging supplied was not of merchantable quality and it is entitled to set-off the diminished value of the defective goods against the outstanding purchase price.

[28] On the facts before me, I find it uncontradicted that the defendant accepted the goods under invoice 2283 by its representations to the plaintiff that there was no issue with the goods, by partially paying for them and promising to pay the balance, and by retaining the goods for 11 months without intimating to the plaintiff that it had rejected them: *SGA* at s. 39. This triggers the obligation to pay the purchase price: *Valoroso Foods (1996) Ltd. v. Ma-Nina Limited*, 2014 BCSC 880 at para. 52 [*Valoroso Foods*].

[29] In the result, the defendant cannot now reject these goods for a breached condition, any breach of contract must be treated as a breach of warranty. Thus, the defendant may be entitled to a set off or damages for a breach of warranty if the invoice 2283 goods were defective: *SGA* at s. 56(1). Importantly, the defendant purports to treat the plaintiff's alleged breach of contract as a breach of warranty, implying it concedes that it accepted the goods.

[30] The plaintiff referred me to *Valoroso Foods* for the proposition that since the defendant has accepted the goods, I should grant summary judgment regardless of the defendant's proffered defences. In *Valoroso Foods*, Associate Chief Justice Cullen, as he was then, found that the buyers had accepted the goods delivered and therefore were obligated to pay the purchase price (para. 60). However, the buyers had outstanding claims for breach of warranty relating to the quality of the goods. Therefore, Cullen A.C.J. granted the sellers summary judgment, but ordered a partial stay of execution in the estimated amount of the buyer's outstanding claim (paras. 62–65). In doing so, Cullen A.C.J., at para. 49, endorsed the following framework from *Canadian Beverage Corp. v. Remic Marketing & Distribution Inc.*, 22 C.P.C. (3d) 387 at para. 12, 1992 CanLII 613 (B.C.S.C.) [*Canadian Beverage*]:

1. The Court should grant summary judgment in favour of the plaintiff.
2. The Court should allow the counterclaim to proceed to trial (subject to an application for summary dismissal of the counterclaim).
3. The Court should assess the merits of the counterclaim and the potential amount of an award on the counterclaim, and after weighing these considerations, the Court should stay execution on the judgment in whole or in part for the period until the hearing of the counterclaim or for such other period as may be appropriate in the circumstances. Execution on the entire judgment will not necessarily be stayed and the amount of the judgment to be stayed will not necessarily be the maximum amount of the counterclaim. The amount should be a reasonable figure determined in the same fashion in which the Court establishes the amount of security to be posted for a claim (for example, security posted for the release of a *lis pendens* pursuant to ss. 235 and 236 of *the Land Title Act*).
4. As a term of the imposition of the stay of execution or upon separate application by the plaintiff, the Court can consider whether the stay of execution should cease if the plaintiff posts a letter of credit (or other form of security) to act as security for the counterclaim.

[31] The purpose of this framework is to ensure that defendants are not allowed to put forth meritless cross-claims and defences as a delaying tactic to deny the plaintiff summary judgment: *Canadian Beverage* at para. 11.

[32] *Canadian Beverage* concerned a payment dispute over delivered goods. Justice Tysoe granted the sellers summary judgment, but stayed the judgment since the value of the buyer's counterclaim could not be determined on the evidence.

[33] Thus, I return to the defendant's proffered defences.

[34] I have grave doubts regarding the proffered defences that there was no relationship between the defendant and the plaintiff, or that the plaintiff or its proprietor did not supply goods to Winterland. Further, there is ample email evidence that Ms. Karen Labossiere and Mr. Taylor Labossiere knew they were dealing with Apex and Mr. Davies. Since Apex and Mr. Davies are the same legal person, I also have grave doubts regarding the mistaken identity argument. However, it is unnecessary for me to resolve those issues.

[35] I am satisfied that, unlike *Valoroso Foods*, even though the fitness or merchantability of the goods supplied by the plaintiff to the defendant was not raised until the plaintiff issued its notice of civil claim, that defence and/or claim of set-off does raise a triable issue. As discussed, there had been issues with the quality of the prior shipments of packaging. In Winterland's affidavit, Ms. Karen Labossiere also gave unchallenged evidence that the goods at issue are unusable and are still in Winterland's warehouse. Thus, I am unwilling to grant summary judgment and this precludes the need to address a stay of execution.

**V. CONCLUSION**

[36] In the circumstances, I must dismiss the plaintiff's application. I decline to award either party the costs of the application or the preparation therefore, and will permit the parties to seek those costs on any application for a summary or conventional trial of this action.

“The Honourable Chief Justice Hinkson”