

**CITATION:** Songbird Life Sciences Inc. v. Connectus Services Ltd. et al, 2023 ONSC 2089  
**COURT FILE NO.:** CV-21-709  
**DATE:** 2023-04-03

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**BETWEEN:** )  
 )  
 Songbird Life Sciences Inc. ) Justin Heimpel, for the Plaintiff  
 Plaintiff )  
 – and – )  
 )  
 Connectus Services Ltd. and Connectus ) Scott Beattie, for the Defendants  
 Services Ltd. C.O.B. as Connectus Global )  
 Defendants )  
 )  
 ) **HEARD:** By video conference March 30,  
 ) 2023

2023 ONSC 2089 (CanLII)

**REASONS FOR JUDGMENT**

**Introduction**

[1] At the height of the pandemic, in December 2020, the plaintiff Songbird Life Sciences Inc. (“Songbird”) contracted with the defendant Connectus Services Ltd. (“Connectus”) to supply products used to test for and monitor the COVID-19 virus. Connectus was using those products for its work in connection with two contracts it had entered into to provide human and environmental monitoring for the National Hockey League and the Winnipeg Jets hockey club. Accordingly, there were two contracts (the terms of which were identical) between Songbird and Connectus – one each for the N.H.L. and the Jets.

[2] Songbird provided the products which Connectus ordered and invoiced for them. After a period, Connectus fell behind in its payments for those products. A payment plan was agreed to, but when it appeared to Songbird that its overdue account with Connectus was not being addressed quickly enough, it stopped supplying its products to Connectus and sued for payment.

[3] Songbird now moves for summary judgment. There is almost no dispute on the facts in this case. For the following reasons, summary judgment will be granted.<sup>1</sup>

### **Background**

[4] The contracts between Songbird and Connectus were entered into in December 2020. They provided that Connectus would pay within thirty days of receipt of Songbird's invoices and that any amounts paid after 30 days would accrue interest at a rate of 1.5% per month, or 19.56% *per annum*. Connectus was required to identify any issues with Songbird's invoices within 15 days of receiving them. Where payment was late by more than 90 days, Songbird was permitted to suspend further delivery of products and/or terminate the contracts.

[5] There is no dispute that Connectus ordered products from Songbird, that Songbird provided the products requested, that Songbird provided invoices to Connectus, and that Connectus did not once take issue with any of Songbird's invoices.

[6] By the end of February 2021, Songbird had delivered and invoiced for over \$1.1 million of its products. Connectus had paid just over \$380,000. It was at that time in breach of the contracts and owed over \$750,000 to Songbird.

[7] After some negotiation between the parties, on March 21, 2021, they agreed in an email exchange to a payment plan whereby Connectus would pay down its debt to Songbird by paying \$25,000 weekly plus monthly "balloon payments" so that the account would no longer be in arrears by the end of June 2021.

[8] Thereafter, Connectus made payments of \$25,000 roughly weekly until April 28, 2022. Connectus also ordered further products from Songbird. Songbird filled two of those orders and invoiced Connectus for them. The first of these two invoices was for just over \$26,000 and is

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<sup>1</sup> Although Connectus also moved for summary judgment, that motion was abandoned at the outset of the hearing before me. Counsel for Connectus also sought to adjourn the argument of this motion, which request was resisted by Songbird. Counsel advised that Connectus has a new board of directors which wanted more time to consider its position on this matter. I denied the request for an adjournment given the passage of time, given that this matter appeared to be a straightforward one, and given that Connectus did not identify any prejudice to it should the matter proceed as scheduled. And, indeed, Mr. Beattie was well-prepared and argued the motion ably.

dated April 7, 2021. On April 16, 2021, Connectus made a payment of \$50,000 (“ballooning” its weekly payment by \$25,000). The second invoice was for over \$24,000 and is dated April 21, 2021. Two more payments of \$25,000 were made on April 23 and 28, 2021.

[9] When Connectus placed a further order on April 27, 2021, Songbird refused to continue to supply its products absent payment in full for accounts over 90 days old. Songbird had come to the conclusion that Connectus was not attending to the arrears as promptly as promised. The one balloon payment of \$25,000 on April 16, 2021, did nothing to reduce the debt since Connectus was ordering new product and building on Songbird’s receivable. The parties tried to reach a new arrangement for the payment of arrears but were unable to do so. The April 28, 2021, payment was the last payment made by Connectus before Songbird launched this action on May 13, 2021. There have been no payments since.

[10] In an affidavit from the C.F.O. of Connectus, it is asserted that “Songbird’s actions caused Connectus to suffer a loss of revenue and the inability to pay their outstanding balance.”

[11] The parties agree that the amount owed as of April 28, 2021, including interest for overdue accounts accrued to that date, is \$555,143.83.

### **Positions of the Parties**

[12] Songbird says that this is a straightforward case of goods having been supplied and the receiver of those goods having failed to pay for them. The breach of contract is obvious. The amount owing is not in dispute. As counsel put it in argument, this is a classic case for summary judgment.

[13] Connectus does not deny the debt but takes two positions which it says raise genuine issues for trial. First, Connectus says that the payment plan agreed to on March 21, 2021, constituted a new contract between the parties and that Connectus was never in breach of that contract. Second, Connectus says that at trial it will argue that it suffered damages as a result of Songbird’s refusal to continue supplying it products to Connectus, which damages ought to be set off against any debt owed to Songbird.

## Discussion

[14] I agree with the plaintiff Songbird that this is a case for summary judgment. Both the breach of contract and the amount owed are clear. As I have said, there is no dispute on these facts and no reason that this matter should go to trial so that either fact can be established.

[15] Nevertheless, Connectus argues first that the payment plan agreed to on March 21, 2021, constituted a new contract which superseded or replaced the payment terms of the original contracts and that Connectus was never in breach of that new contract. Songbird disputes both that the payment plan constituted a new contract and that Connectus abided by the payment plan. Moreover, Songbird points out (correctly) that the idea that the payment plan cured the default on the original contracts was not pled in the defendants' very brief statement of defence.

[16] In support of its first point, Songbird asserts that there was no consideration and therefore that the payment plan could not constitute a new contract. In this respect, Songbird rests its argument on clear authority for the proposition that a promise to do that which one is already obligated to do does not constitute consideration. Schroeder J.A. wrote as much in *K.M.A. Caterers v. Ltd. v. Howie*, [1969] 1 O.R. 131 (C.A.), at p. 134:

A promise to do what the promisor is bound to do under an existing contract cannot be consideration, for if a person gets nothing in return for his promise but that to which it is already legal entitled, the so-called consideration is not genuine and is not sufficient to support a contract.

See also: *Holland v. Hostopia.Com Inc.*, 2015 ONCA 762, at para. 52; *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19 (C.A.).

[17] In this case, the payment agreement was no more than a promise by Connectus to do what it had already promised and failed to do. There was no new consideration. The payment agreement did not constitute a new contract. Therefore, under the terms of the December 2020 contracts, Songbird was free to suspend the delivery of any new product and/or to terminate the contracts at any time after Connectus was in breach of those contracts (which was the case no later than the end of February 2021).

[18] Songbird was doing no more than accommodating Connectus in the absence of an obligation to do so. But Connectus argues that by continuing to order further products from

Songbird after the new payment arrangement was agreed to, it was providing consideration to Songbird. Again, this argument cannot succeed. First, the emails leading up to the March 21 payment agreement include no discussion of this topic. Indeed, the evidence suggests the opposite: at one point during the negotiations, Connectus offered to send products back to Songbird as a way to address the arrears, a proposal that Songbird refused.

[19] Second, prior authority suggests that the promise or assurance of further orders could not constitute consideration in these circumstances. In *Gilbert Steel, supra* (see: pp. 22 – 23), at issue was a change in the price at which materials for a construction project were to be supplied. Wilson J.A. (as she then was) found no error in the reasons of the trial judge, who refused to enforce the price change having concluded that it did not constitute a new contract. As here, this claim failed in part because it was not pled. Moreover, though, the trial judge found that there was no consideration to be found in the plaintiff’s assurances that he would give the defendant “a good price” on a future project if it went along with the proposed price. In *Gilbert Steel*, as here, that assurance was not enough to evidence a joint intention to “rescind their original contract and replace it with a new one.”

[20] In this case, nothing in the record suggests that orders post-dating the new payment agreement be treated as anything other than as orders governed by the December 2020 contracts. Nothing suggests that they were some new benefit to Songbird. In other words, there was no consideration for the new payment agreement.

[21] Although these conclusions are sufficient to dispose of this matter, I note also that Connectus stopped making payments on April 28, 2021, and failed to make any more payments (either weekly or balloon) during the period when the parties were trying to negotiate a second new payment plan (between April 28 and May 13, 2021) or thereafter. In other words, it is not correct that Connectus was at all times before this suit was launched compliant with the payment plan agreed to on March 21, 2021.

[22] Connectus also argues that the issue of set off is a genuine issue for trial. Apart from the bald statement in the affidavit of the C.F.O. of Connectus that losses were suffered because of “Songbird’s actions”, as counsel frankly conceded during argument, there is no evidence of any

such losses before me. On a summary judgment motion, I am entitled to assume that Connectus has “put its best foot forward.” In the absence of evidence of losses to Connectus, I cannot find that the issue of set off is a genuine issue for trial. In any case, having found that Songbird was entitled to act as it did under the contracts, losses suffered by Connectus are of no moment.

[23] Last, in the absence of evidence of any losses on the part of Connectus, even if the new payment agreement constituted a new contract for which consideration was provided, there is still no genuine issue for a trial. Connectus agrees that it failed to pay for the products Songbird provided. It agrees with Songbird’s calculation of how much is owing. In argument, Mr. Beattie said that Connectus was not looking to have that debt forgiven. In all these circumstances, there is nothing on this record that could justify a trial. Connectus admits that it owes the money. There is nothing to litigate.

### **Conclusion**

[24] For these reasons, the motion for summary judgment is granted. Songbird is entitled to damages in the amount of \$555,143.83 plus pre- and post-judgment interest at the contractual rate of 19.56% *per annum*.

### **Costs**

[25] The plaintiff may serve and file brief written submissions respecting costs within 10 days of the release of this judgment. The defendants may serve and file brief responding costs submissions within 7 days of receipt of the plaintiff’s submissions. The plaintiff may serve and file reply submissions, if any, within 3 days of receipt of the defendants’ submissions.

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I.R. Smith J.

**Released:** April 3, 2023

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**Released:** April 3, 2023