

**CITATION:** Eurotex North America Inc. v Hardwood Apparel Ltd. 2024 ONSC 4494  
**COURT FILE NO.:** CV-22-681201  
**MOTION HEARD:** 20240813

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Eurotex North America Inc. and 12064502 Canada Inc., Plaintiffs

**AND:**

Hardwood Apparel Ltd., 2453047 Ontario Ltd., David Fiorante, Nicholas Joseph Fiorante, Alexander Zackery Medeiros Neto, and Print Simple Inc., Defendants

**BEFORE:** Associate Justice Jolley

**COUNSEL:** Brian Illion, counsel for the moving party plaintiffs

Tyler McLean, counsel for the responding defendants

**HEARD:** 13 August 2024

**REASONS FOR DECISION**

- [1] The plaintiffs seek an order striking paragraphs 40 and 59 of the defendants' statement of defence and counterclaim on the basis that those paragraphs plead privileged settlement discussions. In the alternative, they argue that they plead evidence and should be struck on that basis.
- [2] According to the statement of claim, the plaintiffs purchased the assets of the defendants' business. In connection with the purchase, the defendants signed a non-compete and non-solicitation agreement. The plaintiffs allege that the defendants breached the non-compete, failed to turn over access to necessary accounts needed for the business, such as PayPal, and failed to properly account.
- [3] Upon receipt of the claim, the defendants provided the plaintiffs with what they called a proposal for the plaintiffs to mitigate their damages, namely an offer to reverse the asset purchase. They offered on a with prejudice basis to buy the assets back for \$100,000. They advised that if the offer was not accepted, they would plead it as part of their defence in support of their position that the plaintiffs had failed to mitigate. The plaintiffs rejected the proposal and the defendants pleaded the offer to reverse the transaction as part of their defence.
- [4] Paragraphs 40 and 50 of the defence and counterclaim state as follows:
  40. After the commencement of this action, by letter dated 12 July 2022, the Corporate Defendants offered to reverse the Transaction, more specifically; they

offered to purchase those assets conveyed on 18 May 2020 for the consideration of \$100,000.00 on the same terms they were transferred to the Plaintiff(s), with a closing date of 28 July 2022. On the same date of the Offer, the Plaintiffs' lawyer wrote the Defendants' Lawyer stating the said offer was rejected ... " " ...

59. The defendants state and plead that the plaintiffs have not taken all reasonable steps to mitigate its business, including but not limited to; accepting the offer to reverse the 18 May 20 transaction, which was an asset sale. Specifically, the plaintiffs were offered all monies they paid for the assets in exchange for the assets. Such offer, if accepted, would have made the plaintiffs whole, or alternatively not admitting but strictly denying damages - reduced the same to a nominal quantum ... "

- [5] The defendants argue that their proposal is not caught by settlement privilege as it was made expressly *with prejudice*. It was never the express or implied intention that the proposal would not be disclosed to the court if it was not accepted; in fact, the defendants stated the exact opposite. Further, they argue that the proposal was not an attempt to effect settlement. (see the test in *Re Hollinger Inc.* 2011 ONCA 579 at paragraph 16).
- [6] The court in *Canadian Flight Academy v. Oshawa (City)* 2024 ONSC 2756 was faced with a similar argument concerning the admissibility of an offer that the plaintiff had delivered to the defendant clearly marked “with prejudice”. The court gave little weight to the labeling of the offer, holding that the content of the offer would determine whether it was privileged. If it was a proposal for settlement, it was privileged, even if marked “with prejudice”.
- [7] In considering the content of this proposal, the defendants argue that it could not be construed as an offer to settle the litigation, as it was simply an offer to buy back the goods. If the plaintiffs had accepted the proposal, in all likelihood, they would have continued their claim for loss of profits. They were unlikely to walk away from a \$10,000,000 claim solely as a result of a buy back worth \$100,000.
- [8] While the settlement offer is not as clear as that discussed in *Canadian Flight Academy Ltd., supra*, which expressly contemplated the exchange of releases and a dismissal of the action, and while the issue will ultimately be decided by the trial judge, I find that a reasonable interpretation of the proposal is that it was an offer to settle the action. On its face, the language of the proposal implies that it is intended to end the litigation, if accepted. Its concluding sentence notes that “if our clients offer is not accepted, we will begin to prepare our clients defence and counterclaim. [sic]”
- [9] Excluding reference to the proposal from the pleading does not preclude the defendants from introducing the offer at trial and arguing before the trial judge that it is admissible and relevant to the issue of mitigation. The plaintiffs have confirmed that they will answer questions put to them about the offer and their response to it, following the objection process outlined in rule 34.12(2). This ensures there is no prejudice to either side – the defendants may advance their argument that the plaintiffs’ failure to accept the offer

constituted a failure to mitigate and the plaintiffs will not be met with an argument that the offer and rejection are relevant by virtue of them being included in the pleading.

- [10] This exclusion is consistent with rule 49.06 which prohibits communication being made to the court about an offer to settle that is not accepted, until all questions of liability and the relief to be granted, other than costs, have been determined. (*Canadian Flight Academy, supra* at paragraph 17 ).
- [11] Paragraphs 40 and 59 are struck with leave to amend. The defendants are at liberty to plead that the plaintiffs had a duty to mitigate their damages and that they failed to do so, without reference to the offer and its rejection.
- [12] The parties agreed on costs of \$7,000 plus HST to the successful parties on the motion. The defendants shall pay the plaintiffs that sum within 30 days.
- [13] Order to go in terms of the draft which I have signed.

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Associate Justice Jolley

**Date:** 14 August 2024