CITATION: OW Technologies, LLC v. OTO.Coach Inc., 2024 ONSC 6917
COURT FILE NO.: CV-23-00702428-0000
DATE: 20241211

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: OW TECHNOLOGIES, LLC AND OW INTERNATIONAL, LLC, Plaintiffs

-and-

OTO.COACH INC., Defendant

BEFORE: Jane Dietrich J.

COUNSEL: *Cameron J. Wetmore*, for the Plaintiffs

Peter Leigh, for the Defendant

HEARD: December 4, 2024

ENDORSEMENT

Introduction

[1] OTO.Coach Inc. ("OTO"), the defendant, originally brought a motion to dismiss or stay the underlying claim by the plaintiffs on the basis that the court has no jurisdiction to adjudicate the action or, in the alternative that Ontario is *forum non conveniens*. In its factum and during submissions, OTO conceded this court has jurisdiction to adjudicate the action, but rather claims Delaware is the more appropriate forum.

[2] In the underlying claim, the plaintiffs, OW Technologies, LLC and OW International, LLC (collectively, the "Holders") seek payment in the Canadian equivalent of the amount of $1,878,626.37 USD plus pre- and post-judgment interest and costs from OTO, as a result of OTO having failed to make payments to the Holders under a promissory note dated September 15, 2022 (the "Promissory Note").

[3] The essence of OTO's argument is that the Promissory Note relates to an agreement of purchase and sale (the "APS") between OTO as purchaser and Omegawave OY ("Omegawave") as vendor. There is litigation ongoing between OTO and Omegawave in Delaware in respect of the APS. OTO asks this court to find that Delaware is the f*orum conveniens* for the Holders' claim under the Promissory Note against OTO as well, as OTO claims the two matters should be heard in some coordinated fashion.

[4] For the reasons that follow, I do not agree. OTO's motion to stay the Holder's claim is dismissed.

Background

[5] The underlying action is a claim for breach of a Promissory Note. The Promissory Note provides it is to be interpreted in accordance with the laws of Ontario. OTO as obligor under the Promissory Note has its head office located in Toronto, Ontario.

[6] There is no dispute that the Promissory Note was executed by OTO and that OTO failed to make any of the required payments under the Promissory Note, including a payment of $100,000 which was due on signing of the Promissory Note on March 15, 2022.

[7] There is further, no dispute that an event of default under the Promissory Note has occurred and the entire amount owing under the Promissory Note has been accelerated and is due.

[8] OTO states that it intends to defend the action by claiming unspecified misrepresentations were made to OTO in connection with the APS.

[9] The Holders are not party to the APS. However, the assignment of the debt to OTO (which was owed to the Holders by Omegawave prior to the APS closing) was contemplated under the APS. The Holders are not a party to that assignment agreement, however, they have consented to the assignment and restructuring of the debt as part of the Promissory Note.

[10] During the negotiations of the Promissory Note (which was occurring in tandem with negotiations of the APS), OTO specifically requested a term in the Promissory Note that would have reduced the amount owing under the Promissory Note if representations made in connection with the APS were not true. The Holders rejected this term. A representative of the Holders, Mr. Huffstutter sent an email to Mr. Evans (of OTO) specifically rejecting the proposed term and stating that the Holders had no idea what representations were being made in the APS or if those representations were true.

[11] The evidence of Mr. Huffstutter is that he had not received (or reviewed) a copy of the APS.

[12] In its factum, OTO took the position that the terms of the APS were incorporated into the Promissory Note, including a forum selection clause which provided that if litigation was commenced in Delaware in respect of the APS or the transactions completed thereby, the parties irrevocably submitted and agreed to attorn to the exclusive jurisdiction of the State of Delaware.

[13] There is no language in the Promissory Note incorporating all of the terms of the APA into the Promissory Note. Rather, Schedule A to the Promissory Note includes a statement saying that capitalized terms used but not defined in the schedule to the Promissory Note have the meaning given to them in the APS. The schedule to the Promissory Note addresses the calculation of Gross Profit (upon which certain payments under the Promissory Note were to be made). Those terms are not at issue in the proceeding as OTO failed to make any of the payments under the Promissory Note, including the first payment due on signing.

[14] OTO's primary argument appears to be that Mr. Huffstutter was involved in devising a plan to sell Omegwave's assets in order to have the Holders' debt repaid. The Holders had previously sold the underlying business to Omegawave in 2012. The Holders had no involvement in the Omegawave business after 2012 but remained a creditor. Mr. Huffstutter was an employee of Omegawave, Inc. from 2012 to 2015, but had no personal involvement in the business after that time.

[15] Mr. Huffstutter did advise Mr. Evans that he had suggested in 2020 that Omegawave look at a sale of its assets so that the Holders would be repaid their debt on closing of the transaction. However, that is not what actually occurred.

[16] Rather, starting in or around May of 2021 through to 2022, OTO conducted due diligence on the Omegawave business. The Holders and Mr. Huffstutter were not involved in that process; however, Mr. Evans did advise Mr. Huffstutter that 'red flags' emerged during the due diligence process, but OTO was still going to proceed to purchase the assets. Given the results of due diligence, OTO proposed that rather than pay the Holders on closing as originally contemplated, OTO would assume responsibility for the debt to the Holders and pay it over time.

[17] The Holders agreed to restructure the debt as part of the Promissory Note. As noted above, OTO made no payments at all under the Promissory Note.

[18] With respect to the APS, Omegawave commenced litigation against OTO in Delaware by issuing a complaint on November 8, 2023. It appears Omegawave filed an entry of judgment by default in that action on July 1, 2024, as OTO had not filed the necessary responding material. However, one a day prior to this motion being heard, on December 3, 2024, OTO sent a letter to the Delaware Court indicating OTO intended to defend that action.

[19] The Holders are not party to the Delaware action. Rather, in submissions counsel for OTO argued that if the Holders action in Ontario, which is the subject of their motion, was stayed, the Holders could then begin an action in Delaware that should in some fashion be heard together with the existing action by Omegawave against OTO relating to the APS as OTO's defence to both proceedings will overlap and involve the same witnesses and issues.

Issues

[20] The issue to be determined on this motion is whether OTO has established that the underlying action by the Holders is *forum non conveniens*.

Analysis

[21] In C*lub Resorts Ltd. V. Van Breda*, 2012 SCC 17 [*Van Breda*] at paras 103, Justice LeBel stated that the first step in invoking the doctrine of *forum non conveniens* is that the party seeking to invoke the doctrine must identify another forum that has *jurisdiction simpliciter*:

> If a defendant raises an issue of *forum non conveniens,* the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has

> an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate. (emphasis added)

[22] With respect to first portion of the test – does another forum have an appropriate connection - *Van Breda* set out four presumptive connecting factors, which, if found, entitle a court to assume jurisdiction over a tort dispute (and accordingly should be used to determine if an appropriate connection has been established): the domicile of the defendant, where the defendant carries on business, if the tort was committed in the jurisdiction, and if a contract connected with dispute was made in the jurisdiction. Here, none of those presumptive connecting factors point to Delaware. OTO is not domiciled, nor does it carry on business in Delaware. The dispute is not related to Delaware nor was the Promissory Note made in Delaware.

[23] *Van Breda* notes at para 91 that the list of presumptive connecting factors is not closed. The Ontario Court of Appeal in *Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada* 2022 ONCA 862 [*Vale Canada*] held that the *Van Breda* presumptive connecting factors are also applicable in a contract dispute. *Vale Canada* also provides that in contract claims reference to Rule 17.02(f) which addresses service outside of Ontario may be relevant. However, in this case, those factors also do not point to Delaware.

[24] In this respect, OTO argues that the Holders have agreed to Delaware as a jurisdiction because the Holders implicitly consented to the choice of law and attornment clause within the APS. As noted above, the Holders are not parties to the APS. The terms of the APS are not incorporated into the Promissory Note save and except for a limited number of defined terms being incorporated into one schedule. I do not agree that by referencing a limited number of defined terms from the APS in a schedule to the Promissory Note the Noteholders have implicitly consented to a forum selection clause within the APS.

[25] As such, on the evidence before me, I do not find that Delaware has an appropriate connection to the claim by the Holders under the Promissory Note against OTO and accordingly OTO has not satisfied the first part of the test laid out in *Van Breda*.

[26] Even if I am wrong, and Delaware does have an appropriate connection to the claim at issue, for the reasons that follow, OTO has also failed to demonstrate that Delaware should be preferred and considered more appropriate.

[27] In turning the second part of the analysis, Justice LeBel in *Van Breda* described the relevant considerations at para 105 as follows:

> A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine

> focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "[a]fter considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

[28] In considering these factors, Ontario appears to be the more appropriate forum: the evidence shows that OTO's headquarters is in Ontario and its principal Caleb Evans resides in Ontario; the Promissory Note is to be governed by Ontario law; and if an order is issued, it would need to be enforced in Ontario.

[29] To the contrary, Delaware does not appear to be the more appropriate forum: if an action was commenced in Delaware, new counsel would need to be retained by the Holders; to the extent a party wished to argue that Ontario law was different than Delaware law, expert evidence would need to be tendered; and, if the Holders obtained judgement in Delaware, they would then need to return to Ontario to seek to have that judgment recognized before they could enforce it.

[30] OTO relies on a decision of Lederman J. in *Molson Coors Brewing et al v. Miller Brewing Co et al.* (2006) 83 O.R. (3d) 331 (Ont Sup Ct) at para 39 where emphasis is placed on the policy reasons behind the desire to avoid a multiplicity of proceedings in considering the *forum non conveniens* factors. OTO argues that this factor should be determinative such that parallel proceedings in Ontario and Delaware should be avoided along with the possibility of inconsistent results. That argument fails to recognize, however, that there are no parallel proceedings involving the Holders in Delaware. The Holders were not party to the APS nor did they agree to be liable for any misrepresentations contained in the APS.

[31] Accordingly, I also find that OTO has failed to satisfy the second part of the test for *forum non conveniens* as set out in *Van Breda*.

Disposition

[32] For the reasons set out above, I dismiss the defendant's motion and decline to stay the action by the Holders.

[33] At the hearing, the parties both provided cost outlines to the Court. The amounts claimed by both parties on a partial indemnity basis were very similar.

[34] Fixing costs is a discretionary decision under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43. In exercising my discretion, I may consider the result in the proceeding, any offer to settle or to contribute made in writing, and the factors listed in Rule 57.01. These factors include but are not limited to: (i) the result in the proceeding; (ii) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer; (iii) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed; (iv) the amount claimed and the amount recovered in the proceeding; (v) the complexity of the proceeding; (vi) the importance of the issues; and (vii) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding. Rule 57.01(1)(f) provides that the court may also consider "any other matter relevant to the question of costs."

[35] In exercising my discretion to fix costs, I must consider what is fair and reasonable for the unsuccessful party to pay in this proceeding and balance the compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at paras. 26 and 37.

[36] For these reasons, I fix the costs of the motion at $20,000, inclusive of disbursements and Harmonized Sales Tax, and order the defendant to pay that amount to the plaintiffs within 30 days of the date of this order.

Jane Dietrich J.

Date: December 11, 2024