

In the Court of Appeal of Alberta

Citation: Song v 2083878 Alberta Ltd, 2024 ABCA 157

Date: 20240521
Docket: 2301-0093AC
Registry: Calgary

Between:

**Yuhan Song, Jeremy Song and
Heilongjiang Xinguangyuan Realty Development Limited**

Appellants

- and -

2083878 Alberta Ltd.

Respondent

- and -

Wentao Liu

Not Party to the Appeal

The Court:

**The Honourable Justice Peter Martin
The Honourable Justice Bernette Ho
The Honourable Justice April Grosse**

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice C.C.J. Feasby
Dated the 21st day of March, 2023
Filed the 6th day of July, 2023
(2023 ABKB 166, Docket: 1901-13254)

Memorandum of Judgment

The Court:

[1] This appeal challenges the decision of the chambers judge dismissing an application for summary judgment and the alternative remedy requested, security for costs.

[2] The matter has a complicated and somewhat lengthy history which was fully described by the chambers judge in *Song v 2083878 Alberta Ltd*, 2023 ABKB 166 (*Song ABKB*). For our purposes, the following summary will suffice.

[3] The appellants (the “Vendors”), who brought the application in the court below, jointly incorporated SanLing Energy Ltd. in 2015 to invest in Alberta’s oil and gas industry. Among other acquisitions, SanLing acquired assets in the Valhalla area and later, through another company, the Vendors acquired Insignia Energy Ltd. In November 2017, Insignia purchased SanLing’s Valhalla-Dixonville assets for \$226.5 million, paid by:

- i. Cancellation of a loan from Insignia to SanLing in the amount of \$28,946,846;
- ii. Cancellation of shareholder loans owing to the Vendors in the amount of \$102,172,529; and
- iii. Issuance of promissory notes by SanLing to the Vendors in the amount of \$95,380,625, which were then assumed by Insignia.

[4] The respondent, 2083878 Alberta Ltd. (“208” or the “Purchaser”), was incorporated in 2017 to participate in the purchase of SanLing with another company, MIE Holdings Ltd. Ultimately, MIE Holdings did not directly participate in the transaction, leaving 208 as the sole purchaser.

[5] Following negotiations and a letter of intent in the summer of 2017, the sale of SanLing to 208 occurred via a share purchase and sale agreement effective on January 1, 2018. In the agreement, the Vendors made a representation and warranty that there had been no material adverse change in the financial condition of SanLing between June 30, 2017 and January 1, 2018.

[6] After the agreement closed, the Purchaser sued the Vendors, claiming the Vendors had failed to disclose a material adverse change in SanLing’s financial condition and seeking to recover that portion of the purchase price it had already paid, approximately \$12 million. It is the Purchaser’s position that while the Valhalla-Dixonville transaction was the major contributor to SanLing’s adverse financial condition, there were also other transactions that contributed to SanLing’s financial deterioration. In those transactions, here referred to as the ASC Transactions, the Purchaser alleges that SanLing was wrongly deprived of its share of the proceeds and has included those transactions as part of its claim in the Amended Statement of Claim.

[7] The Vendors applied for summary judgment, seeking dismissal of the Purchaser's claim on the basis that there was no material adverse change in the financial condition of SanLing or, if there was, that it was known to the Purchaser.

[8] In dismissing the application for summary judgment, the chambers judge found the ASC Transactions to be insignificant in comparison to the impact the Valhalla-Dixonville transaction had on SanLing's financial condition between June 30, 2017 and January 1, 2018, and accordingly focused only on the Valhalla-Dixonville transaction: *Song ABKB* at para 38. The Vendors submit the chambers judge erred in doing so and in failing to at least grant partial summary judgment with regard to the ASC Transactions. We agree the evidence relating to the ASC Transactions claim is sparse, but we do not agree that the chambers judge erred in refusing to dismiss those claims by way of summary judgment in the context of the claim, the counterclaim, and his other findings.

[9] The chambers judge's assessment of the facts, application of the law to those facts, and ultimate determination of whether summary resolution is appropriate are entitled to deference: *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at para 10, citing *Hryniak v Mauldin*, 2014 SCC 7 at paras 81–84 and *Amack v Wishewan*, 2015 ABCA 147 at para 27. It was open to the chambers judge to decline to parse out individual transactions for summary resolution if partial summary judgment would not achieve a just result: *Hryniak* at para 60. The chambers judge's ultimate decision that summary disposition was not appropriate is owed deference and we decline to interfere.

[10] As to whether there was in fact a material adverse change in the financial condition of SanLing during the relevant time, of which the Purchaser was not notified, after comparing SanLing's financial statements of June 30, 2017 to December 31, 2017, the chambers judge concluded:

There was, without question, a material adverse change in the financial condition of SanLing between June 30, 2017 and December 31, 2017. On January 1, 2018, SanLing was a different and much less viable entity than it had been six months earlier.

Song ABKB at para 37.

[11] The chambers judge also found that this change in SanLing's financial condition "was clearly known to each of the Vendors": *Song ABKB* at para 44.

[12] The Vendors maintained that the Purchaser was made aware of the financial condition of SanLing prior to December 31, 2017, either by direct communication, or by access to relevant documents which had been made available to the Purchaser. The chambers judge disagreed, finding no evidence that the details of the one transaction which had the greatest detrimental impact on SanLing's financial condition—the Valhalla-Dixonville transaction—had been communicated to the Purchaser in a manner contemplated by the agreement, or at all.

[13] The chambers judge ultimately concluded there was a genuine issue for trial:

... the Vendors have not met their burden to show that the Purchaser's claim has no merit on a balance of probabilities as required by *Weir-Jones*. Based on the evidence before the Court, there is a genuine issue for trial as to whether there was a material adverse change in the financial condition of SanLing contrary to the representation and warranty of the Vendors in the [share purchase and sale agreement].

Song ABKB at para 49.

[14] The Vendors assert that the chambers judge was mistaken in his understanding of some of the evidence leading to his finding that there had been an undisclosed material adverse change in SanLing's financial condition. The Purchaser agrees that there were some particular factual errors, as do we, but we find the errors did not impact his ultimate decision. Put differently, the result would have been the same in any event. In particular, we see no reviewable error in the chambers judge's conclusion that the Vendors had failed to prove on a balance of probabilities that the Purchaser was notified that a component of the Valhalla-Dixonville transaction (the \$95 million) was satisfied by a promissory note as opposed to cash: *Song ABKB* at para 47. The chambers judge's finding that there is a genuine issue for trial is owed deference and we see no basis to interfere.

[15] The Vendors argue that the chambers judge erred in law in his interpretation of the share purchase and sale agreement by misinterpreting the disclosure requirement of the Vendors and holding them to a standard not contemplated by the agreement. We do not read the reasons of the chambers judge as imposing a standard on the Vendors that is different from the one set out in the agreement.

[16] The Vendors also submit that the chambers judge erred in failing to grant summary judgment of their counterclaim for payment of the outstanding purchase price, approximately \$6.8 million.

[17] The chambers judge explained his refusal to grant summary judgment with regard to that matter by noting that the Purchaser's claim was not only for damages, but also for rescission based on "a breach of representation and warranty". And, if that claim was successful, the amount claimed by counterclaim would not be due. He concluded:

Given that I have found that the Purchaser's claim raises a genuine issue for trial, I must also conclude that there is a genuine issue for trial with respect to the Vendors' counterclaim.

Song ABKB at para 52.

[18] The Vendors note that as SanLing is now bankrupt and its assets have been sold, rescission is no longer possible. That may be, but if, following trial, it is accepted that the Vendors misrepresented the change in SanLing’s financial condition, any award of damages may take into account the outstanding purchase price. Accordingly, we will not interfere with the chambers judge’s decision not to grant summary judgment for the counterclaim.

[19] As to the security for costs, the Vendors note that neither the Purchaser nor its principal, Mr. Liu, have any assets or active business in Alberta and submit it would therefore be appropriate to order security for costs. The Purchaser counters that its current dire financial circumstances are due to the Vendors’ breaches, and it would be unjust to impose security for cost as a roadblock to their action. The chambers judge focused on the merits of the Purchaser’s claim and response to the counterclaim, which he assessed as reasonable, in declining to order security for costs. Ordering security for costs is a highly discretionary decision, and this Court will not interfere unless there has been an error of law, an unreasonable exercise of discretion, or a misapprehension of an important fact: *Prestigious Properties Inc v Cold Lake Estates Inc*, 2018 ABCA 218 at para 2. We see no reason to interfere.

[20] Accordingly, the appeal is dismissed.

Appeal heard on January 15, 2024

Memorandum filed at Calgary, Alberta
this 21st day of May, 2024

Martin J.A.

Ho J.A.

Grosse J.A.

Appearances:

L.Y. Pan, KC
K.P.R. Millar
for the Appellants

L. Rasmussen
for the Respondent