CITATION: Maresky v. Enthusiast Gaming Inc., 2025 ONSC 654
COURT FILE NO.: CV-20-00642740-0000
DATE: 20250130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Isaac Maresky and Gainsborough Capital Corp. Plaintiffs	*James W. Srebrolow*, for the Plaintiffs
– and –	
Enthusiast Gaming Inc., Enthusiast Gaming Holdings Inc. and Menashe Kestenbaum Defendants	*Brian Chung*, for the Defendants
	HEARD: December 14, 2024

REASONS FOR JUDGEMENT

MERRITT J.

OVERVIEW

[1] The Plaintiffs seek summary judgment for damages in lieu of specific performance and an order dismissing the counterclaim against them.

[2] The Defendants Enthusiast Gaming Inc. and Enthusiast Gaming Holdings Inc. ("Enthusiast") oppose the motion for summary judgment. They submit the Plaintiffs' claims are *res judicata* and should be dismissed. Enthusiast did not bring a motion for summary judgment but in their factum filed in response to the Plaintiffs' motion, they seek a "boomerang" summary judgment for a dismissal of the Plaintiffs' claims. Enthusiast also brings a motion for leave to discontinue its counterclaim.

DECISION

[3] The Plaintiffs' motion for summary judgment is dismissed. Enthusiast's boomerang motion for summary judgment is granted and the Plaintiffs' claim is dismissed.

BACKGROUND FACTS

[4] In January 2018, the Plaintiffs Isaac Maresky and Gainsborough Capital Corp. ("Maresky") and Enthusiast entered into discussions regarding Maresky's retainer with Enthusiast to provide certain financial and consulting services to assist with taking the company public.

[5] Maresky provided consulting and financial services to Enthusiast for five months between February and July 2018 before it went public. The services provided included participating in presentations to investors, drafting the "filing statement" for the company to go public and arranging capital investments.

[6] On July 23, 2018, Enthusiast terminated the arrangement between the parties.

[7] Enthusiast went public on October 4, 2018.

[8] Justice J. Steele heard an application on November 4, 2020 brought by the Plaintiffs against Enthusiast for damages in lieu of specific performance of options exercisable by Maresky and a declaration that Enthusiast was holding these options as constructive trustee (the "Application").

[9] On December 7, 2020, Justice J. Steele released her decision where she found that Enthusiast agreed to grant options to Marseky and that the grant of 219,399 options vested immediately (the "Decision").

[10] Justice J. Steele awarded Maresky damages in the amount of $173,325.21 in lieu of specific performance.

[11] On June 18, 2020, before the Application was heard, Maresky commenced the within action against Enthusiast seeking damages for breach of contract and breach of employment.

[12] The action against the Defendant Menashe Kestenbaum was dismissed on July 12, 2021.

Withdrawal of the Counterclaim

[13] Enthusiast commenced a counterclaim on May 3, 2021 in which it alleges that it lost profits due to Maresky's actions in preventing Enthusiast from acquiring the gaming website Bulbapedia (the "Counterclaim").

[14] Enthusiast now seeks to discontinue its counterclaim.

[15] Rule 23.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides:

> A plaintiff may discontinue all or part of an action against any defendant,

> (a) before the close of pleadings, by serving on all parties who have been served with the statement of claim a notice of discontinuance (Form 23A) and filing the notice with proof of service;
>
> (b) after the close of pleadings, with leave of the court; or
>
> (c) at any time, by filing the consent of all parties.

Rule 23.07 provides: "Rules 23.01 to 23.06 apply, with necessary modifications, to counterclaims, crossclaims and third party claims".

[16] The Plaintiffs initially opposed the discontinuance of the counterclaim. However, at the hearing of the motion for summary judgment, the Plaintiffs consented to the discontinuance of the counterclaim on condition that doing so did not limit their right to make submissions on the motion and without prejudice to their right to claim costs. Enthusiast agreed to these conditions; the discontinuance of its counterclaim is on consent of all parties and leave is not required.

POSITIONS OF THE PARTIES

[17] The Plaintiffs submit that the issues of whether there was an agreement between the parties and whether that agreement was breached are *res judicata*, having already been determined by Justice Steele. The Plaintiffs say the only issue on the motion is the quantification of their damages.

[18] Enthusiast submits that the Plaintiffs' claims are *res judicata* because any claims they now advance should have been pursued in the Application. Alternatively, Enthusiast says that the Plaintiffs are not entitled to damages for the shares and options that did not vest before Enthusiast terminated the arrangement between the parties because the Plaintiffs have abandoned their claim to damages in lieu of notice.

THE ISSUES

[19] There are three issues as follows:

1. Is this an appropriate case for summary judgment?
2. Does the doctrine of *res judicata* apply, and if so, how?
3. Is the plaintiff entitled to damages for breach of contract?

Issue 1: Summary Judgment

[20] Rule 20.04(2)(a) provides: "The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence".

[21] Rule 20.04(2.1) sets out the court's powers on a motion for summary judgment as follows:

> In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[22] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 66, the Supreme Court of Canada established a road map outlining how a motions judge should approach a motion for summary judgment:

> [T]he judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[23] There is no genuine issue requiring a trial when the court is able to reach a fair and just determination on the merits of the motion. This will be the case where the process (1) allows the court to make necessary findings of fact, (2) allows the court to apply the law to the facts, and (3) is a proportionate, more expeditious, and less expensive means to achieve a just result: *Hryniak*, at para. 49; *Moffitt v. TD Canada Trust*, 2023 ONCA 349, 483 D.L.R. (4th) 432, at para. 40.

[24] The court should use its enhanced powers and decide a motion for summary judgment only where it leads to "a fair process and just adjudication": *Ang v. Lin*, 2023 ONSC 4446, at para. 15, citing *Mason v. Perras Mongenais*, 2018 ONCA 978, at para. 44, and *Eastwood Square Kitchener Inc. v. Value Village Stores, Inc.*, 2017 ONSC 832, at paras. 3-6 (and cases cited therein).

[25] In *Joshi v. Chada*, 2022 ONSC 4910, Glustein J. set out the relevant legal principles applicable to summary judgment as follows:

(i) The purpose of r. 20 of the *Rules* is to (a) eliminate claims that have no chance of success at trial, and (b) provide judges with fact-finding powers to be used on a summary judgment motion: *Hryniak*, at paras. 44-45, 66;

(ii) The evidence on a summary judgment motion must enable the motion judge to be confident that they can fairly resolve the dispute: *Hryniak,* at para. 57;

(iii) The motion judge's enhanced powers allow the court to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence: *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, 141 O.R. (3d) 81, at para. 83;

(iv) The focus of a summary judgment motion is not on what kind of evidence could be adduced at trial, but rather on whether a trial is required: *Hryniak,* at para. 56;

(v) The court is entitled to assume that it has all the evidence that would be available at trial related to the matters at issue: *Portuguese Canadian Credit Union v. Pires*, 2011 ONSC 7448, at para. 11, aff'd 2012 ONCA 335;

(vi) The moving party has the onus of proving that there is no genuine issue requiring a trial. Then, the onus shifts to the responding party to provide evidence of specific facts showing that there is a genuine issue requiring a trial: *Sweda Farms Ltd. et al. v. L.H. Gray & Son Limited et al.*, 2013 ONSC 4195, at paras. 26-27, leave to appeal refused, 2014 ONSC 3016;

(vii) Summary judgment is not appropriate if the credibility of the parties is squarely in issue and requires a trial: *Demetriou v. AIG Insurance Company of Canada*, 2019 ONCA 855, 97 C.C.L.I. (5th) 204, at para. 9;

(viii) The more important credibility disputes are to determining key issues, the harder it will be to fairly adjudicate those issues solely on a paper record. "It is not always a simple task to assess credibility on a written record. If it cannot be done, that should be a sign that oral evidence or a trial is required": *Cook v. Joyce*, 2017 ONCA 49, at para. 92, citing *Trotter Estate*, 2014 ONCA 841, 122 O.R. (3d) 625, at para. 55; and

(ix) The court must take "great care" in assessing credibility and reliability on affidavit evidence, since "[e]vidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice". Consequently, the motion court must "ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears

> it all": *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, at para. 44.

[26] The court can draw an adverse inference that there is no better evidence available than that which is provided by that party: *Travelers Insurance Company of Canada v. LCL Builds Corporation,* 2018 ONSC 1805, 90 C.L.R. (4th) 217, at para. 46; *S.N.S. Industrial Products Limited v. Omron Canada Inc.*, 2018 ONCA 278, at para. 5.

[27] The court must take a hard look at the evidence. While the onus is on the moving party to establish there is no issue requiring a trial, the responding party must "lead trump or risk losing": *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.), at para. 36.

[28] I am satisfied that even without resorting to the powers under rr. 20.04(2.1) and (2.2) I can come to a fair and just result. This matter is appropriate for summary judgment because it can be determined on the basis of the materials filed as set out below.

Issue 2: *Res Judicata*

[29] As set out above, Justice Steele heard the Application on November 4, 2020. In the Application Maresky sought damages in lieu of specific performance for payment of 219,399 options exercisable by him at $0.47 and a declaration that Enthusiast was holding these options for him as constructive trustee.

[30] On December 7, 2020, Justice Steele released her decision where she found that Enthusiast agreed to grant options to Marseky and that the grant of the 219,399 options vested immediately (the "Decision").

[31] Justice Steele defined the issues before her as:

1. Did Enthusiast agree to issue the Vested Options (defined below) to Maresky?

2. Given that Enthusiast's corporate structure has changed and the Vested Options cannot now be issued, what is the appropriate remedy?

3. What is the appropriate deemed price for the exercise of the Vested Options?

[32] Justice Steele found as follows:

> [14] By email dated Feb. 28, 2018, Alan Friedman, an officer of Enthusiast, confirmed Enthusiast's proposal to Maresky. The email sets out various components of Maresky's compensation and describes the Options as follows:
>
> OPTIONS:
>
> Approximately 2% options of current shares in issue vesting as follows

> 1/3 initially
>
> 1/3 on 12 month anniversary
>
> 1/3 on 24 month anniversary
>
> The above shares and options to be issued is contingent on your being engaged with the company on at lease the same capacity and time as initially agreed on each vesting date.

[15] Enthusiast further confirmed the agreement related to the options in an email dated July 23, 2018 from Menashe Kestenbaum to Maresky, which stated:

> Even though we don't have a signed agreement between us, we DEFINITELY intend on honouring our discussions, in which you are to be issued 227,000 options, being calculated as 1/3 of 2% of the shares in issue on the date that we set out the proposal (34m shares outstanding, 2% = 680,000), as per Alan's below email being Feb 26th. To date that is the only equity that you are entitled to according to our vesting agreement.

[16] The 227,000 options were referred to again in an email from Alan Friedman to Maresky, dated August 17, 2018:

> The options owing as per the agreement amount to 227k. Menashe will provide you with an option to buy 227k of his shares at 47c.

[17] Although the number of shares that were subject to the initial option grant were described in the July 23, 2018 email as 227,000, there was some uncertainty regarding the precise number. Accordingly, Maresky requested that the court award payment of the lowest possible number of options discussed - 219,399

[18] I have determined that on balance Enthusiast agreed to issue the options to Maresky. Further, based on the record, the first grant of options (219,399) vested immediately (the "Vested Options").

[33] At the time the parties agreed to the options, Enthusiast was a private company. Enthusiast completed certain corporate amalgamations and share exchanges prior to taking the company public. As of October 4, 2018 (the “Going Public Date”), Enthusiast became a publicly traded company listed on the Toronto Stock Exchange (“TSX”). There were further corporate events following the Going Public Date.

[34] Justice Steele said that TSX policy requirements, specifically the TSX Company Manual, prevented Enthusiast from granting the Vested Options to Maresky at the agreed price because it was lower than the current market price at the time of the Application and because Maresky was

not then a current employee or consultant as required under the terms of the then current stock option plan.

[35] Justice Steele determined that the appropriate remedy was damages in lieu of specific performance and ordered Enthusiast to pay Maresky damages in the amount of $173,355.21 being the difference between the deemed exercise price and the option price on the day the company went public because this was the first day the options could be exercised and Maresky had given prior notice that he wished to do so.

[36] Enthusiast's defence relies in part on the doctrine of *res judicata* on the basis that the issues raised in the Action ought to have been raised in the Application.

[37] Maresky expressly relies on the Decision and submits that the Application concerned identical facts. In his factum Maresky submits that:

> [The] Agreement and its specific terms have already been determined as a FACT as between the parties to this action as a result of the aforementioned ruling of Madam Justice Steele.
>
> and
>
> The Plaintiffs further respectfully submit that in her aforementioned endorsement, Madam Justice Steele also ruled that the failure of ENTHUSIAST to issue stock options 'initially' at the time of the parties entering into such Contract/Agreement, amounted to a BREACH of such Contract/Agreement.

[38] Maresky submits that since Justice Steele has already decided that the agreement was made between the parties and was breached, the only issue before me is:

> … the quantum of damages flowing from the breach excluding the such quantification for the aforementioned 'initially vested 219,399 options' which value had previously been determined by Madam Justice Steele in her aforementioned endorsement.

[39] I find that the issue of Maresky's entitlement to any shares or options other than the Vested Options was not before Justice Steele.

[40] *Res judicata* applies where there is a final decision pronounced by a court of competent jurisdiction and identity of action or issue and parties or their privies*: 420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488, at p. 494, and *Re: Bullen* (1971), 21 D.L.R. (3d) 628, at p. 631.

[41] *Res judicata* applies in a subsequent proceeding:

> … if the applicant relies merely on his or her own failure to present certain material or arguments on the first application because whatever might have been litigation at the first proceeding will be deemed to have been adjudicated on its merits.
>
> Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th ed., (Toronto: LexisNexis, 2022), at p. 1568 [Footnotes omitted.]

[42] A party asserting a cause of action must claim all possible relief and cannot return to court asking for further relief arising out of the same matter. The plaintiff's cause of action is "merged" in the judgment:

> The judgment actually operates as a comprehensive declaration of the rights of all parties in respect of the matters in issue … This principal prevents the fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.
>
> *The Law of Evidence in Canada*, at p. 1574; *Maynard v. Maynard*, [1951] S.C.R. 346, at pp. 358-359.

[43] The doctrine of *res judicata* prevents parties from conducting "[lawsuits] by instalment": *Melcor Development Ltd. v. Edmonton (City)* (1982), 37 A.R. 532 (Q.B.), at para. 17.

[44] The requirements for cause of action estoppel, as laid out in *Dosen v. Meloche Monex Financial Service Inc. (Security National Insurance Company)*, 2021 ONCA 141, 457 D.L.R. (4th) 530, at para. 13, citing *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, 145 O.R. (3d) 759, leave to appeal refused, [2019] S.C.C.A. No. 284, are as follows:

1. A final decision of a court of competent jurisdiction;

2. The parties in both actions are the same or privies;

3. The cause of action in the prior action is not separate and distinct; and

4. The basis of the cause of action in the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[45] To prevent abuse of the decision-making process, *res judicata* protects finality to litigation: "[d]uplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided": *Dosen*, at para. 30, citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 18.

[46] There is no dispute that the Decision is a final judicial decision of a court of competent jurisdiction and that the parties are the same.

[47] There is also no doubt that the cause of action in the prior action is not separate and distinct. The issues before Justice Steele included whether there was an agreement between the parties regarding the Vested Options and whether the agreement was breached. Maresky relies on other provisions of the agreement in this action.

[48] The issue is whether the basis of the cause of action in the present case could have been argued in the prior action if the parties had exercised reasonable diligence.

[49] The Plaintiffs submit that it was appropriate to split their case by commencing the Application for the Vested Options only and then suing for the balance of the relief they sought in a separate action. They say there were no material facts in dispute with respect to their entitlement to the Vested Options and an Application was appropriate. On the other hand, there would be factual matters in dispute concerning the balance of relief they sought including, but not limited to, their entitlement to damages in lieu of reasonable notice of termination, severance damages, unpaid salary, commission and bonuses and damages for loss of reputation (the "Employment Claims") and entitlement to the shares and options that did not vest. They say these claims could not be determined on the Application and an action was the proper form of proceeding.

[50] The Plaintiffs submit that Enthusiast knew that there was a separate action pending, at least by the time Justice Steele released her costs endorsement on December 29, 2020. In the costs endorsement Justice Steele referenced the fact that the parties had exchanged offers to settle the Application but could not agree on whether the proposed full and final release should include only the Application or both the Application and this action.

[51] The Plaintiffs say, even if cause of action estoppel applies, the court has discretion to allow the action to proceed to prevent an injustice. They say it would be unfair to prohibit them from proceeding with this action given that Enthusiast knew about it and did not object until recently, i.e., when responding to the Plaintiffs' summary judgment motion.

[52] Enthusiast says there is no general discretion to allow the action to proceed. Rather, the court can exercise its discretion only if the law has changed in a way which justifies revisiting a cause of action that could have been addressed in a prior proceeding or if there are new facts of which the party was unaware and could not have uncovered with reasonable diligence. I do not agree.

[53] In *Minott v. O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (Ont. C.A.), the Court of Appeal set out several reasons why it would be unfair to apply issue estoppel in the context of a wrongful dismissal action after an administrative hearing under the *Employment Insurance Act*. At paras. 52-57, the court gave several reasons why it would be unfair to apply issue estoppel, including:

1. The administrative proceedings were adjudicated quickly, inexpensively and summarily and at a time when the employee was at their most vulnerable and may not be able to put their best foot forward.

2. The financial stakes in the application for unemployment insurance benefits are typically insignificant compared to the stakes in a wrongful dismissal lawsuit.

3. There were procedural differences in the two proceedings and the expertise of the Board of Referees is quite different than the expertise needed to decide a wrongful dismissal action.

[54] I am not suggesting that any of these factors apply in the present case; only that the reasons why it may be unfair to apply the doctrine of issue estoppel are not limited to situations where the law has changed or there are new facts.

[55] Enthusiast also says there are no cases that suggest there is a general discretion to allow the action to proceed if the defendant does not raise the issue of *res judicata* in a timely manner.

[56] I find the conduct of both parties problematic. It was not disputed that the Plaintiffs were aware of all of their claims, including the Employment Claims and the claims for the options and shares that did not vest before any legal proceedings were commended. The Plaintiffs first brought the Application for damages relating to the Vested Options. They then commenced separate proceedings for damages arising out of alleged breaches of the same agreement advancing the Employment Claims and claiming damages relating to the options and shares that did not vest. The difference between the Application and this action is the relief sought.

[57] The Plaintiffs then brought this motion for summary judgment seeking damages only in relation to the stock options and shares that had not vested (i.e., not the Employment Claims). The parties appeared at a case conference before Akazaki J. on August 16, 2024. At the case conference, Enthusiast objected to the Plaintiffs' motion for partial summary judgement being scheduled. The Plaintiffs' motion was for partial summary judgment because they were only moving on the shares and options and not the Employment Claims. In response to the objection, the Plaintiffs amended the Amended Statement of Claim to withdraw the Employment Claims leaving only the claims relating to the unvested shares and stock options. After the Amended Statement of Claim was amended to remove the Employment Claims, the Plaintiffs' motion became a motion for full, as opposed to partial, summary judgment.

[58] Parties should not litigate by instalments. There is a strong case to be made that the Plaintiffs should have sought all of the relief, particularly all of the relief relating to the shares and options, in the same proceeding to avoid potential inconsistent findings and for judicial economy.

[59] On the other hand, if Enthusiast was served with the Statement of Claim in this action prior to the November 4, 2020 hearing before Justice Steele[1], they could have objected to the Application being heard as a separate proceeding. They could have asked Justice Steele to order a

[1] It was not clear to me when the Statement of Claim was served on the Defendants.

trial of the issue of the Plaintiffs' entitlement to the Vested Options to be heard together with this action. Alternatively, if the claim was not served until after the November 4, 2020 hearing, Enthusiast could have raised the *res judicata* issue in a pleadings motion. Instead, they waited for four years and raised it in response to the Plaintiffs' summary judgment motion after considerable expense was incurred by both sides. As Enthusiast submits, significant time and resources have been spent litigating this matter over the last six years and with the passage of time, memories fade and evidence may be lost.

[60] I do not need to decide the *res judicata* issue because, for the reasons set out below, I find that there is no genuine issue requiring a trial with respect to the Plaintiffs' entitlement to the relief they seek on this summary judgment motion because the contract is not a fixed term contract.

Issue 3: No Breach of Contract

[61] The Plaintiffs say the February 26, 2018 email evidences the agreement between the parties and that it provides for a fixed term contract.

[62] The February 26, 2018 email provides, in part:

> Shares vesting as follows
>
> 400k shares on the earlier of 100mm market cap or 12 month post signing
>
> 100k shares 18 months after signing
>
> 100k shares 24 months after that
>
> Options
>
> Approx 2% options of current shares in issue vesting as follows
>
> 1/3rd initially
>
> 1/3 on 12 month anniversary
>
> 1/3 on 24 month of anniversary
>
> *The above shares and options to be issued is contingent on your being engaged with the company on at lease the same capacity and time as initially agreed on each vesting date.

[63] The Amended, Amended Statement of Claim at para. 8 specifically pleads that the particulars of the agreement between the parties are "set out above herein". This can only refer to para. 1(a)(i) and (ii) which provides:

> 1. The Plaintiffs claim as against the Defendants:

(a) Damages in lieu of specific performance for compensation in the amount of $5,000,000.00 for breach of contract/breach of employment, based on the Defendants' failure to:

(i) Issue 613,000 shares in the Defendant, ENTHUSIAST GAMING INC. (EGLX), vesting as follows:

(a) 400,000 after 12 months post-AGREEMENT;

(b) 100,000 after 18 months post-AGREEMENT;

(c) 113,000 after 24 months post-AGREEMENT;

(ii) Issue a 2% Option of current shares in the Defendant, ENTHUSIAST GAMING INC. (EGLX) @ $0.47/share, vesting as follows:

(a) Equivalent to 1/3 12 months post-AGREEMENT;

(b) Equivalent to 1/3 24 months post-AGREEMENT;

[64] The provisions of the alleged agreement as set out in the claim are similar to the provisions of the February 26, 2018 email with a few differences. First, the total number of shares is different (600,000 vs. 613,000). Second, the provision regarding the Vested Options in the February 26, 2018 email is excluded from the claim, having already been the subject of the Application and determined therein. Third, the pleading omits the statement in the February 26, 2018 email that issuing the shares and options is contingent on the Plaintiff being engaged with Enthusiast on each vesting date.

[65] The Plaintiffs concede that they are not entitled to the shares and options that had not vested unless there is a fixed term contract. The Plaintiffs abandoned their claims for damages in lieu of notice when they amended the Amended Statement of Claim.

[66] The Plaintiffs submit that I should find that the agreement was for a fixed term of two years because Enthusiast wanted the Plaintiffs to stay for at least two years and this is evidenced by the fact that some of the options and shares did not vest for 24 months.

[67] Contractual interpretation involves determining the objective intention of the parties based on the words they use and not their subjective intentions: *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 25; *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4, 441 D.L.R. (4th) 403, at paras. 26-31.

[68] The court must "read the contract as a whole" in light of its "purpose and commercial context" and give the words "their ordinary grammatical meaning": *Corner Brook*, at para. 20, citing *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at para 47;

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), 2010 SCC 4, 315 D.L.R. (4th) 385, at para. 64.

[69] The fact that the parties discussed an arrangement whereby the Plaintiffs would receive options and shares vesting over a 24-month period did not create a fixed term contract.

[70] There was no evidence the parties actually discussed, let alone agreed to, a fixed term contract for two years. In fact, there was no evidence that the parties ever discussed the term of the agreement at all.

[71] In terms of the commercial context, it would lead to unreasonable and absurd results if every contract that provides for shares or options that vest over time were to be deemed a fixed term contract.

[72] The February 26, 2018 email says the vesting schedule was contingent on the Plaintiffs remaining with Enthusiast "on at least the same capacity and time as initially agreed on each vesting date". The language of the email is clear and unequivocal: the Plaintiffs had to stay with Enthusiast to get the shares and options.

[73] The statement in the February 26, 2018 email that issuing the shares and options is contingent on the Plaintiff being engaged with Enthusiast on each vesting date provided Enthusiast with an opportunity to evaluate the Plaintiffs' performance and it complied with the employee stock option plan which requires options to vest in thirds over two years and also provides that that upon termination with or without cause, any unvested options expired immediately.

[74] Enthusiast terminated the arrangement between the parties after five months, well before any of the relevant vesting dates at issue in this action. It was not disputed that the Plaintiffs were no longer engaged with Enthusiast in any capacity on any of the vesting dates other than the date for the Vested Options which were the subject of the Application and not this action.

[75] The Plaintiffs were not entitled to the shares or options and are not entitled to damages in lieu of specific performance for breach of contract. The boomerang summary judgment motion in favour of Enthusiast is granted and the Plaintiffs' claim is dismissed.

[76] In the event that I am wrong about there not being a fixed term contract, this is not an appropriate case for summary judgment.

[77] There are serious credibility issues to be determined. There is a dispute about whether the essential terms of the contract were agreed upon. Enthusiast submits that there was no agreement on the essential terms, no agreement about how many shares the Plaintiff was to receive (i.e., 600,000 or 613,000), how the shares and options were to vest, how they were to be exercised, and at what price(s).

[78] Disputes over the intentions of the parties, in circumstances where there is no written agreement containing all of the essential terms, are best left to trial, as there are often credibility

issues that need to be determined through *viva voce* testimony: *Allen v. Succession Capital*, 2011 ONSC 3300 at paras. 56-57. In this case, there are numerous witnesses with varying and contradictory accounts.

COSTS

[79] I encourage the parties to agree on costs. If they cannot agree, I will consider brief written submissions. These costs submissions shall not exceed five pages in length (not including any bill of costs or offers to settle). Any party claiming costs shall file their written submissions within ten days of the date of these reasons. Any responding submissions shall be delivered within five days of receipt of the other party's costs submissions. Any reply to submissions shall be delivered within three days of receipt of responding submissions and shall be no more than three pages long. Costs submissions shall be uploaded to CaseCenter and delivered to me by way of email to my Judicial Assistant.

Merritt J.

Released: January 30, 2025

CITATION: Maresky v. Enthusiast Gaming Inc., 2025 ONSC 654
COURT FILE NO.: CV-20-00642740-0000
DATE: 20250130

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Isaac Maresky and Gainsborough Capital Corp.

Plaintiffs

– and –

Enthusiast Gaming Inc., Enthusiast Gaming Holdings Inc. and Menashe Kestenbaum

Defendants

REASONS FOR JUDGMENT

Merritt J.

Released: January 30, 2025