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Decisions

Peinture Ross et Montmagny inc. v. Montmagny, 6 November 2018, Court of Québec, EYB 2018-304882

Claim for a penalty and damages under a shareholders' agreement. Dismissed.

Non-competition and non-solicitation clause; Departure of a shareholder; Shareholder having incorporated another corporation in the same field; Activity, duration and territory being reasonable; No direct solicitation of former clients; Invalidity of the penalty clause; Agreement freely negotiated by the shareholders.

The plaintiff claims a penalty of $ 25,000 and $ 30,000 for damages on the ground that the defendant breached a contractual non-competition clause in the shareholders' agreement.

The incorporation of a non-competition clause in the agreement was freely decided by the parties in order to ease their mutual fears of departure. The same was true of the amount of the penalty which they also negotiated, in case of violation of their mutual commitment.

The wording of the clause of the agreement, despite the title "Non-competition", contains two clearly separable obligations, namely one of non-competition and the other of non-solicitation. These obligations have been freely agreed by the parties. The criterion of the activity as well as the commitment not to solicit clients is reasonable.

The criterion of duration, which expresses a period of 24 months following the disposition of the shares with respect to the non-compete undertaking, is reasonable.

The territorial criterion expresses its extent to the entire territory served by the applicant and this criterion is reasonable. The clause in the shareholders agreement is valid with respect to the non-competition and non-solicitation agreements.

It appears that the parties understood that a penalty clause was to be a penalty in addition to the damages, a kind of minimal penalty without determining and limiting the calculation of damages, and without excluding any other remedy that the plaintiff could have against the defendant. The presence of a penalty clause has the effect of excluding any possibility of requesting both the execution of the penalty clause and damages in compensation for the same loss.

Consequently, the penal clause contained in the agreement does not meet the definition of a penal clause within the meaning of CCQ. It follows that the $ 25,000 penalty claim cannot be granted.

Fiducie MacAllan v. Gauthier, 13 December 2018, Superior Court, EYB 2018-305248

Applications for leave to exercise an oblique action under section 239 of the *Canada Business Corporations Act*, for the repayment of an amount and the dissolution and liquidation of a corporation. Granted.

The plaintiff satisfies the conditions of section 239(2) CBCA. It is entitled to take legal action against the defendant on behalf of 6074 for a refund of $ 70,000 under the promissory note. A notice of default was given to the defendant as a director of 6074 and the respondent did not follow up.

The proposed judicial application is not frivolous nor vexatious. A preliminary review of the proceedings and the evidence presented amply supports the plaintiff's claims and the conclusions sought. Finally, it is in the interest of 6074 to introduce the claim since the conviction of the defendant to pay the sum sought is not insignificant.

The defendant asks that the court only decide on the application for authorization and that the claim on the merits can be postponed. This request is not accepted. There is nothing to prevent the case from proceeding on authorization as well as on the merits, on the same evidence, in one and the same instruction. It would be contrary to the interests of justice and the principle of proportionality to limit the debate to a question of authorization.

Tandem Avocats-Conseils inc. v. Pilotte, 18 March 2019, Court of Québec, EYB 2019-309870

The plaintiff claims from the defendants, jointly and severally, the payment of a balance due for professional services rendered. Partly granted.

It seems that, by a process that may raise questions, the plaintiff replaced the original invoices by keeping the same dates, but substituting Via Sauvagia immobilier inc. by the names of the four defendants. Issuing invoices with a different date and invoice number could have resulted in additional tax obligations.

On the merits, case law generally considers, in cases similar to the present, that in the absence of a specific written agreement, the services rendered by lawyers to a company and its shareholders personally make them responsible for the payment of fees. jointly with the company

Solidarity can be generated either by the second paragraph of section 1525 of the CCQ or by section 2156.

In summary, the evidence established that the services rendered by the plaintiff were for the benefit of both Via Sauvagia immobilier inc. and its shareholders, the defendants. It was important that the interests of the latter be defended.

All stages of the case and the final result benefited each of the defendants. The entire case shows that the plaintiff is entitled to recover the fees from the defendants in a joint and several manner.

Sucriers du Mont-Bleu ltée v. Ferme Gérard Renaud inc., 12 February 2019, Superior Court, EYB 2019-310011

Claim for damages based on the cancellation of a lease and sale agreement. Partly granted.

Analysis of the binding nature of an offer to lease a sugar shack grove and the sale of equipment as well as the conformity of the contracts presented to the notary; Analysis of the formalism required for the ratification of contracts concluded before the incorporation of a corporation.

The plaintiff, a corporation incorporated for the exploitation of a sugar shack belonging to the defendant, claims $ 642,326.99 from the latter, including $ 592,208.95 in lost profits for the duration of the contract, on the ground that the defect to comply with the sale and lease agreements between the parties constitutes an abuse of rights.

Section 319 CCQ allows a new corporation to ratify, expressly or tacitly, a contract that has been concluded for its benefit before its incorporation. No formality is required. In this case, the plaintiff's intention to ratify the contracts is inferred from the instructions of its president to the notary. The plaintiff therefore has sufficient legal interest to bring the present action.

The binding nature of an offer emerges from the common intention of the parties. The essential elements of a contract are determined objectively according to its nature, the minimum requirements of civil law and the common intention of the parties.

It is not possible to refuse to honor one's obligations by mere pretexts and the other party does not have to give in to that whim. In this case, it has been demonstrated that the parties have entered into three contracts, namely an agreement to manage the sugar shack for the 2015 season, a long-term operating lease and a sales contract for the necessary equipment.

The contracts presented to the notary were to reflect the word given, nonetheless a rent increase of $ 4,000 appeared to the notarial contract in connection with the inclusion of a building necessary for the exploitation of the sugar shack that had been forgotten by the parties. After reflection, the offer was withdrawn. The withdrawal of the offer presented by the defendant before the notary was cavalier and abusive.

The argument that the plaintiff should have quickly found another sugar shack to minimize her damage is dismissed. A normally prudent and diligent person should not be subject to such an obligation.

The defendant is ordered to pay $ 296,104.45 for the loss of a chance. The defendant is also ordered to pay $ 25,059 in execution of the verbal agreement entered into between the parties.

Motion for appeal dismissed, C.A. Montreal, No. 500-09-028177-194, 3 June 2019