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Docket: CI 16-01-04719
(Winnipeg Centre)
Indexed as: *Stewart v. 6551450 Manitoba Ltd. et al.*
Cited as: 2021 MBQB 76

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Appearances:
HEATHER ANNE STEWART,	)	
	)	
plaintiff,	)	Renato Y. Mamucud,
	)	for the plaintiff
- and -	)	
	)	
6551450 MANITOBA LTD., SUSAN AUCH HOLDINGS LTD. AND SUSAN AUCH,	)	Rinus de Waal and Faron J. Trippier,
	)	for the defendants
defendants,	)	
	)	
- and -	)	Daniel W. Chornopyski,
	)	for the third parties,
PEGUIS FIRST NATION, ERROL WILSON IN HIS CAPACITY AS TRUSTEE OF THE PEGUIS FIRST NATION SURRENDER CLAIM TRUST, ROYAL TRUST CORPORATION OF CANADA IN ITS CAPACITY AS TRUSTEE OF PEGUIS FIRST NATION SURRENDER CLAIM TRUST, CHIEF PEGUIS INVESTMENT CORP., AND 6223291 MANITOBA LTD.,	)	Peguis First Nation, Chief Peguis Investment Corp., and 6223291 Manitoba Ltd.
	)	JUDGMENT DELIVERED:
third parties.	)	April 27, 2021

HARRIS J.

INTRODUCTION

[1] There are four motions before the court:

(a) a motion by Heather Anne Stewart ("Stewart") for summary judgment as against 6551450 Manitoba Ltd. ("655"), Susan Auch Holdings Ltd. ("Auch Holdings") and Susan Auch ("Auch") for $600,000.00;

(b) a motion by Stewart for summary judgment dismissing a claim by 655 for deposits retained by Stewart with respect to three agreements to buy and sell land which did not close;

(c) in the alternative, failing success in the above motions, a motion by Stewart for security for costs with respect to the above-noted claims; and

(d) a motion for security for costs by Peguis First Nation ("the First Nation"), Chief Peguis Investment Corp. and 6223291 Manitoba Ltd. ("622") (collectively, "the Peguis parties") in relation to 655's claim against those parties.

[2] For the reasons that follow:

(a) Stewart's motion for summary judgment with respect to her claim for $600,000.00 is dismissed;

(b) Stewart's motion for summary judgment with respect to 655's claim for the deposits is allowed;

(c) Stewart's motion for security for costs is dismissed; and

(d) the Peguis parties' motion for security for costs is allowed, in part.

MOTIONS FOR SUMMARY JUDGMENT

[3] The test for summary judgment in Manitoba was articulated by the Court of Appeal in ***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91 ("***DOCFS***") as follows:

> [108] At the hearing of the motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.
>
> [109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition"…or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.

STEWART'S MOTION FOR SUMMARY JUDGMENT REGARDING 655'S CLAIM FOR DEPOSITS

[4] The matters for which Stewart seeks summary judgment arise out of agreements made between Stewart and 655, and Stewart and 622 related to the sale and purchase of land near Rosser, Manitoba, owned at the material time by Stewart ("the land").

The Agreements

[5] On October 26, 2012, Stewart and 655 entered into an agreement ("the 655 Agreement"), for 655 to acquire the land for a total purchase price of $8,000,000.00. Terms of the 655 Agreement included, *inter alia*:

(a) an initial payment of $2,100,000.00 to Stewart, which was to be secured by way of four mortgages registered on the land;

(b) financing for the balance of the purchase price; and

(c) approval by the Rural Municipality of Rosser ("Rosser") for 655 to operate a quarry on the land by December 31, 2015.

[6] The closing date and possession were to be 90 days after 655 obtained approval from Rosser, however, 655 could waive this condition. 655 was required to submit its application to Rosser "as soon as this Offer is accepted".

[7] A year after the 655 Agreement was entered into, there was no progress being made by 655 with respect to either financing for the balance of the purchase price or the approval from Rosser. As a result, the 655 Agreement was replaced by an Amended and Restated Offer to Purchase and Mortgage Loan Agreement ("the Amended 655 Agreement") on August 9, 2013. This agreement included a condition that 655 was required to submit its application to Rosser no later than February 28, 2014.

[8] The purchase price was unchanged at $8,000,000.00, but the structure of payment of the purchase price was amended to require a payment to Stewart of $100,000.00 upon execution of the Amended 655 Agreement.

[9] In or around September 2013, 655 and the Peguis parties agreed to participate in a joint venture to purchase and develop the land.

[10] The Amended 655 Agreement was then terminated by written agreement ("the Termination Agreement") to facilitate an agreement between Stewart and 622, a corporation owned by the Peguis First Nation, for the purchase of the land ("the 622 Agreement"). It was agreed that 622 would take title to the land in trust for the joint venture. The closing date for the 622 Agreement was March 31, 2015 and was subject to 622 applying for approval from Rosser by February 28, 2014.

[11] In accordance with the 622 Agreement, 622 paid $3,700,000.00 to Stewart's lawyers (none of the lawyers referred to in these reasons are the lawyers representing the parties in this litigation) on account of the purchase price, $2,100,000.00 of which was to discharge the mortgages that had been placed pursuant to the 655 Agreement to secure the advances under that agreement. 622 then registered its own security to protect its interest in the land.

[12] On March 27, 2014, the 622 Agreement was amended to extend the deadline for 622 to submit its application for approval to operate a limestone quarry to May 31, 2014 ("the 622 Extension Agreement"). Pursuant to the 622 Extension Agreement, 622 was required to make a "further payment of $100,000 toward the purchase price" and "an extension fee of $75,000 forthwith to the Vendor which sum shall not be credited toward the purchase price". 655 paid those amounts on behalf of the joint venture.

[13] The approval process with Rosser was not pursued by 622 in accordance with the 622 Extension Agreement.

[14] On March 27, 2015, Stewart's lawyer tendered closing documents, but 622's lawyer advised that the sale would not be closing because the condition with respect to Rosser approval had not been fulfilled. 622 demanded return of $3,700,000.00, plus $185,000.00 interest, in order to discharge the mortgages it registered against the land as security. Stewart complied with that demand so that she could clear title and find another purchaser.

[15] This litigation was commenced shortly afterward.

655's Claims

[16] 655 has claimed against Stewart for:

(a) $100,000.00 which it alleges Stewart retained on the termination of the 655 Agreement;

(b) $100,000.00 retained by Stewart on the termination of the Amended 655 Agreement; and

(c) $100,000.00 retained by Stewart after the failure of 622 to close the sale pursuant to the 622 Agreement.

[17] Before considering the question as to whether Stewart has a right under vendor and purchaser law to retain the deposits, two of the claims by 655 can be disposed of for other reasons.

The 655 Agreement

[18] Stewart says that she has retained only $200,000.00 paid pursuant to the Amended 655 Agreement and the 622 Extension Agreement, and that she has fully refunded all payments made pursuant to the 655 Agreement.

[19] When Stewart and 655 entered into the 655 Agreement, Stewart was paid a total of $2,100,000.00. That sum was secured by mortgages registered against the land. Upon entering into the 622 Agreement, Stewart was required to discharge those mortgages, which she did using funds paid by 622 for that purpose. There is no evidence that 655 paid Stewart any other sums in connection with the 655 Agreement.

[20] Further, there is no evidence to support 655's claim that only $2,000,000.00 was repaid, and the evidence of the mortgage discharges clearly establishes this.

[21] I am satisfied that Stewart has repaid all of the money paid by 655 with respect to the 655 Agreement.

The Amended 655 Agreement and the Termination Agreement

[22] When Stewart and 655 entered into the Amended 655 Agreement, it was agreed that 655 would pay $100,000.00 to Stewart on account of the purchase price.

[23] There was no requirement that the money be held in trust, nor was it paid pursuant to any condition.

[24] Later, when 655 and the Peguis parties agreed to purchase the land through a joint venture, Stewart and 655 entered into the Termination Agreement pursuant to which each party released and discharged the other from all liability, claims and obligations pursuant to the Amended 655 Agreement. The Termination Agreement is expressed to contain the entire agreement between the parties. There is no requirement for Stewart to repay the $100,000.00 paid pursuant to the Amended 655 Agreement. If that was intended, that would have been included as a term of that agreement. It was not. As a result, 655 has no claim against Stewart for that $100,000.00.

The 622 Agreement and the 622 Extension Agreement

[25] As noted above, 655 made two payments to Stewart in accordance with the 622 Extension Agreement: $100,000.00 towards the purchase price and $75,000.00 as an extension fee not credited toward the purchase price. 655 claims that it is entitled to return of the $100,000.00.

[26] 655 agrees that the $100,000.00 was a deposit to be credited against the purchase price on closing. However, 655 claims that it was understood that the deposit was to be returned if the transaction did not close. Stewart says the $100,000.00 is to be forfeited as 622 refused to close when Stewart's lawyer tendered closing documents. The question is who is entitled to the deposit upon the failure of the purchaser to close.

[27] In ***Mowatt v. Paton*** (1982), 16 Man. R (2d) 23 (Q.B.), Hamilton J. (as he then was) turned to an old English authority when he was considering a similar question:

> [9] The principle quoted in many of the Canadian authorities is that of Fry, L.J. in *Howe v. Smith*, [1884] 27 Ch. D. 89, at p. 101:
>
> > Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

[28] In ***January Developments Ltd. v. Millions*** (1981), 15 Man. R. (2d) (Q.B.), Hewak J. (as he then was) referred to ***DePalma v. Runnymede Iron & Steel Company***, [1950] O.R. 1 (C.A.), 1 D.L.R. 557 at p. 561 where Laidlaw J.A. relied on ***Collins v. Stimson*** (1883), 11 Q.B.D. 142 at pp. 143-4 for the following principle:

> According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. (emphasis added)

[29] Following these authorities, Stewart is entitled to retain the $100,000.00 deposit upon the default of 622.

[30] If it was intended that the deposit would be returned on the purchaser's default, that should have been spelled out clearly (***Sinha v. Shabestari***, 2018

ONSC 298 ("***Sinha***") and ***Asumeng v. Cachet Estate Homes***, 2020 ONSC 2304). Further, it is not unconscionable that Stewart retain a deposit of $100,000.00 on an $8,000,000.00 contract. (***Sinha***, supra.)

[31] I am satisfied that there can be a fair and just determination of 655's claims to the deposits on the merits, and proceeding to trial on these claims would not be proportionate, timely or cost-effective.

[32] Stewart has met the evidential burden of establishing that there is no genuine issue requiring a trial. There is sufficient evidence to fairly and justly adjudicate the dispute and determine that:

(a) Stewart did not retain any money from the 655 Agreement;

(b) the Termination Agreement is a full release by 655 of any claims it may have against Stewart with respect to the Amended 655 Agreement, including a claim to the $100,000.00 paid pursuant to that agreement; and

(c) Stewart is entitled to retain the $100,000.00 deposit paid pursuant to the 622 Agreement, as that amount is properly forfeited to her as a result of the failure of the purchaser to close.

[33] 655 has not established that the record, the facts or the law preclude a fair disposition.

[34] Stewart shall have judgment dismissing 655's claim for $300,000.00 with respect to deposits.

STEWART'S MOTION FOR SUMMARY JUDGMENT FOR $600,000.00

[35] Stewart's claim for $600,000.00 relates to an alleged loan to 655 in 2013.

[36] Stewart says that in November 2013, the three directors of 655 – Marnie Larkin ("Larkin"), Floyd Campbell ("Campbell") and Giuseppe Leuzzi ("Leuzzi") - approached her for a loan to assist 655 with the costs of obtaining Rosser approval for the quarry project. Stewart says that it was in her interest for 655 to obtain approval so that the sale would close.

[37] In support of her motion, Stewart points to the following evidence:

(a) on November 4, 2013, 655's lawyer confirmed the terms of the loan in an e-mail to Stewart's lawyer;

(b) on December 20, 2013, 655's lawyer provided Stewart's lawyer with various documents regarding the loan, including a certified copy of the minutes of the directors of 655 authorizing the loan, a Promissory Note, a Guarantee executed by Larkin, Campbell and Leuzzi, and Certificate of Identities for each of the guarantors;

(c) on or about December 23, 2013, Stewart's lawyer advanced the $600,000.00 to 655's lawyer who promptly disbursed the funds, primarily to accounts controlled by Auch.

[38] Despite demands, the loan has not been repaid and Stewart now seeks judgment for $600,000.00 as against 655, Auch and Auch Holdings (I will refer to all three defendants collectively as "655" for this portion of the judgment).

[39] On this evidence, Stewart has met her evidential burden for summary judgment.

[40] 655 says that this claim cannot be resolved by way of summary judgment and that a trial is necessary. The key issue that they raise is the question as to whether there was in fact a loan as Stewart alleges.

[41] 655 says that the $600,000.00 was paid to them by the First Nation, through Stewart, to reimburse 655 for expenses it had incurred prior to the joint venture with respect to the purchase of the land, including seeking Rosser approval. The reimbursement had to flow through Stewart so that it appeared that it was being paid to Stewart on account of the purchase of land, a requirement for the use of funds from the First Nation's Treaty Land Entitlement Trust. From Stewart, it was paid to 655, and not as a loan.

[42] There is much evidence which puts in question whether this was a loan.

[43] In an e-mail to the First Nation's Treaty Land Entitlement Trust dated October 22, 2013, the First Nation's lawyer notes that the lawyer for 655 does not think "this Loan Agreement was necessary as it is not a loan, it is part of Peguis' investment in the Joint Venture. He will discuss with Marni this afternoon. I will get back to you on this."

[44] Despite receiving loan documents from 655's lawyer, Stewart's lawyer appears to have viewed it as a flow-through to the joint venture. When the sale of the land failed to close, the First Nation demanded repayment of the full $3,700,000.00 that it paid to Stewart, including the $600,000.00 that it says it paid

to Stewart for 655. Stewart's lawyer objected to repaying the whole amount, saying that $600,000.00 was "to flow through to the joint venture to allow the trust to have some security for its funding".

[45] Auch shares that view, saying that when the sale of the land to 622 did not close, the First Nation demanded return of $3,700,000.00, plus interest, from Stewart, "including the $600,000 she was to have paid to 655 for Peguis".

[46] According to an e-mail from the Director of Finance of the First Nation to the First Nation's lawyer after the transaction failed to close, Stewart contacted him about repayment of the $600,000.00 that she "lent to the First Nation". (emphasis added)

[47] In an e-mail on March 31, 2015, Auch responded to an e-mail from the First Nation's lawyer in which that lawyer asks, "What loan did the JV obtain and can you send me the loan agreement?".

[48] Auch expressed her anger and frustration at the First Nation's "lack of memory as to what we all agreed to." After referencing discussions leading to the agreement to reimburse 655 for expenses in the amount of $600,000.00, she says that, "Peguis then forwarded the whole $3,700,000 to Heather [Stewart] and she in turn loaned the JV $600,000 so that those expenses referred to above could be repaid and was to be paid back on closing by the JV next year." (emphasis added)

[49] This evidence is significantly at odds with that of Stewart and cannot be resolved on a motion for summary judgment. 655 has satisfied me that a trial is

required to resolve the factual contradictions and accordingly, I dismiss Stewart's motion for summary judgment regarding her claim against 655 for $600,000.00.

SECURITY FOR COSTS

[50] Manitoba, Court of Queen's Bench Rules, Man. Reg. 553/88, Rule 56.01 provides as follows:

> 56.01 The court, on motion in a proceeding may make such order for security for costs as in the particular circumstances of the case is just, including where the plaintiff or applicant,
>
> (a) is ordinarily resident outside Manitoba;
>
> (b) has another proceeding for the same relief pending;
>
> (c) has failed to pay costs as ordered in the same or another proceeding;
>
> (d) is a corporation or a nominal plaintiff, and there is good reason to believe that insufficient assets will be available in Manitoba to pay costs, if ordered to do so; or
>
> (e) a statute requires security for costs.

[51] The application of Queen's Bench Rule 56.01 is a two-stage process. At the first stage, the party seeking an order for security for costs must establish one of the grounds enumerated in the rule. Where that has been established, the onus then shifts to the plaintiff to demonstrate that an order for costs would not be just in the circumstances. (***Lindsay v. Hy-line Credit Union Limited et al***., 2003 MBQB 259)

[52] The Peguis parties and Stewart seek security for costs as against 655 asserting that there is good reason to believe that insufficient assets will be available in Manitoba to pay costs if 655 is ordered to do so.

[53] 655 acknowledges that it does not have assets and that it does not have access to assets, or an ability to raise funds, and it submits that these motions are in reality, an attempt to put an end to an otherwise meritorious claim.

[54] It is not sufficient for 655 to simply say that it does not have assets or access to assets or an ability to raise funds. In ***ABI Biotechnology Inc. v. Apotex Inc.*** (2000), 142 Man. R. (2d) 80 (C.A.), 2000 CanLII 27027, Philp J.A., writing for the court, said that:

> [45] …A corporate plaintiff with "insufficient assets" must also establish that it cannot raise the security; that its shareholders are unable to advance funds to allow it to post security. In my view, that is not an attack on the legal persona of a corporation or a lifting of the corporate veil. To me, it reflects the court's recognition of its duty to do what is just in the circumstances. Courts have determined that a corporate plaintiff without assets, manipulated by shareholders with assets, ought not to be able to say to the defendant, "Heads I win, tails you lose."

[55] 655 has an onus to establish that those who would benefit from successful litigation would be unable to raise funds to allow 655 to post security. 655 has filed no evidence to address this issue, so I conclude that 655 could raise the funds from those who would benefit from the litigation.

[56] 655 says that it would not be just to require it to post security for costs from the commencement of the litigation as requested by the Peguis parties. The litigation has been ongoing for five years, yet the motion was not filed until after the trial, originally scheduled for November 2020 was rescheduled to February 2022 due to COVID restrictions. From this, it is reasonable to infer that the motion for security for costs covering steps in the litigation which have already been completed, is an attempt by the Peguis parties to stifle an otherwise meritorious

claim. I agree. However, a material change in the litigation which arose when rescheduling the trial, supports a limited order for security for costs. When rescheduling, 655 advised that it intended to retain experts on the issue of damages moving the claim, according to 655's counsel, to a "$100,000,000 claim". To accommodate this development, the trial is now scheduled for nine days, four more than originally planned.

[57] Having regard to this material change and the financial circumstances of 655, it is just that 655 post security for costs for the time and expense that will be required to respond to its expanded damage claim. I assess those costs to be $24,700.00, calculated as follows:

(a) preparation for trial: 4 days x $1,000.00 per day = $4,000.00;

(b) additional pre-trial conferences: 2 x $350.00 = $700.00;

(c) expert report: $12,000.00; and

(d) trial: 4 days x $2,000.00 per day = $8,000.00.

[58] Such costs, or a bond in lieu thereof, shall be posted by May 28, 2021, failing which, 655's claim will be dismissed.

[59] Stewart also seeks security for costs, in part, related to 655's expanded damage claim.

[60] A claim for security for costs from the commencement of the litigation cannot be supported for the reasons stated above. Moreover, because 655's

damage claim against the Peguis parties does not involve Stewart, she is not entitled to security for costs for that portion of the proceedings.

[61] Finally, Stewart is only entitled to seek security of costs with respect to 655's claim *against* her. Queen's Bench Rule 56.01 allows the court to make an order for security for costs against a "plaintiff or applicant". As plaintiff, Stewart is not entitled to security for costs from 655 as defendant. Stewart was successful in her motion for summary judgment with respect to 655's claim against her, so there is no longer a basis for her motion for security for costs in relation to that matter.

[62] Stewart's motions for security for costs are dismissed.

COSTS

[63] As there was divided success with respect to Stewart's motions for summary judgment and the motion of the Peguis parties for security for costs, there will be no order for costs on those motions.

[64] As Stewart had no basis upon which to seek costs with respect to her claim against 655 for $600,000.00, 655 will have costs against Stewart, in any event of the cause.

Harris J.