

CITATION: 2089322 Ontario Corporation v. DesRoches, 2024 ONSC 3917
COURT FILE NO.: CV-07-201
DATE: 2024-07-10

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2089322 Ontario Corporation) Nicholas Macos and Christina El-Azzi, for
) the Applicants
Applicant)
– and –)
) Christopher J. Sparling, for the Respondent,
Luc W. DesRoches and Rezmart Gas and) Luc DesRoches
Tobacco)
)
Respondents)
) **HEARD in Parry Sound:**
) January 8, 2024
)
)

DECISION ON APPLICATION

CULLIN, J.

Overview

[1] This litigation arises from a joint venture agreement between the applicant and the respondents.

[2] On March 17, 2023, I released a decision which found that the version of the joint venture agreement, dated February 3, 2006 and containing redactions initialled by the respondent Luc DesRoches (“the JVA”), was the original, authentic version of the joint venture agreement and binding on the parties. I further found that the JVA was not wholly or partially voided by the operation of s. 28 of the *Indian Act*, R.S.C. 1985 c.I-5.

[3] The parties now appear before me seeking a determination of the applicant’s rights and the ultimate relief available to it under the JVA.

Relevant Background Facts and Findings

[4] A thorough review of the parties' history leading to the JVA and this litigation is summarized in my decision of March 17, 2023 (*2089322 Ontario Corporation v. DesRoches*, 2023 ONSC 1681 (CanLII)) and will not be repeated here.

[5] What is relevant for the purpose of this decision are the following facts, which are either undisputed in the record before me or arise from the findings in my decision of March 17, 2023:

- a. The applicant and the respondents are parties to the JVA, dated February 3, 2006.
- b. The purpose of the JVA was to facilitate the establishment, operation, and management of a convenience store and gas bar ("Rezmart") on the Wasauksing First Nation ("WFN") reserve.
- c. On the strength of the respondents' undertakings in the JVA, the applicant invested substantial funds into Rezmart.
- d. The respondents are in default of the JVA and have not remedied those defaults.

Relevant Terms of the JVA

[6] In the event of a default of the JVA, the following terms govern the rights and obligations of the parties:

3.5 Failure to Make Required Contributions

If a Venturer fails or refuses to make any Contribution when and as a Contribution is required to be made under this Agreement with time being of the essence of this requirement,

- a. the other Venturer shall have the right, at its sole option, to pay the required sum, and upon payment, the non-paying Venturer shall reimburse that Venturer for the amount paid together with interest on such sum from the date of payment to the date of reimbursement, at a rate equal to Prime plus 2% per annum; and,
- b. subject to the notice and cure period set forth in paragraph 10.1 the non-paying Venturer shall be deemed to be in default, and the rights of the non-defaulting Venturer pursuant to paragraph 10.2 shall apply.

...

10.1 Events of Default

The occurrence or happening of any one or more of the following events shall constitute an event of default on the part of a Venturer (Default):

- a. if the Venturer shall fail to pay any Contributions as required and the failure to make a Contribution is not rectified within 30 days of receipt of notice of default from the other non-defaulting party;
- b. fails to perform or observe any other covenant, condition or agreement to be performed or observed by it under this Agreement and such default is not rectified within 60 days of notice from the other non-defaulting party;
- c. if the Venturer shall make any assignment for the general benefit of creditors or is adjudged insolvent or bankrupt within the meaning of the bankruptcy laws of Canada;
- d. if any proposal is made or petition filed by the Venturer under any law having for its purpose the extension of time for payment, composition or compromise of the liabilities of the Venturer;
- e. if any resolution is passed for or judgment or order given by any court of competent jurisdiction ordering the dissolution, winding-up or liquidation of the Venturer;
- f. if a petition or other application is made for the winding-up of the Venturer, unless and for so long as the Venturer shall be contesting the petition or other application in good faith with all due diligence and by appropriate proceedings;
- g. if the Venturer defaults on any agreement under which the Venturer's Interest in the Business is encumbered and such default is not cured within the time period permitted under such Agreement; or
- h. if any representation of a Venturer in this Agreement is found to be incorrect or untrue at the time it was made.

10.2 Rights Upon Default

In the event of Default, the non-defaulting Venturer shall have the right:

- a. to bring any proceedings in the nature of specific performance, injunction, or other equitable remedy, it being acknowledged by the Venturers that damages at law may be an inadequate remedy for a Default, breach or threatened breach of this Agreement;
- b. to bring any action at law or in equity as may be permitted in order to recover damages or for such other remedy or remedies as may be available to it; and
- c. at its sole option, wind-up the Business. On a wind-up of the Business, the non-defaulting Venturer shall have the option of purchasing the Interest owned by the defaulting Venturer at a price equal to the Venturer's Proportionate Share of the Value of the Business, and the insolvent or defaulting party or its successors or legal representatives shall be entitled to be paid, subject to payment of those obligations set forth in paragraph 8.1b. and c., for that price within 120 days of notice of the other party's exercise of this option net of its share of liabilities. The non-defaulting Venturer is

appointed attorney of the defaulting Venturer for the purpose of Transferring the Property pursuant to this subparagraph. If the non-defaulting Venturer chooses not to purchase the assets of the Business, the assets shall be liquidated and the insolvent or defaulting party or its successors or legal representatives shall be entitled to its share of the net proceeds, distributed in accordance with the order of priority set forth in paragraph 8.1.

d. Where a Default has been rectified prior to a proceeding or action being commenced under paragraph a. or b., or prior to the wind-up of the Business, provided all of the non-defaulting Venturer's costs of pursuing its remedies, including legal fees and disbursements on a solicitor and his/her own client basis, have been reimbursed by the defaulting Venturer, the right to pursue any remedy under this Agreement for such Default shall cease.

Discussion

Relief Sought by the Applicant

[7] The applicant seeks a permanent injunction in the form of a mandatory order giving it possession of Rezmart, specifically the Rezmart business and its assets.

[8] Although the applicant has had interim possession of the Rezmart business premises since April 27, 2018 pursuant to the Order of Justice Koke, Rezmart has not been a going concern since September 2018. The order sought by the applicant will permit it to either operate, sell, or wind up Rezmart as it deems appropriate, in accordance with the terms of the JVA.

Position of the Respondents and Reply of the Applicant

[9] The respondents do not, in principle, disagree that the JVA would entitle the applicant to possession of the Rezmart business assets following a default. Their issue is with what is properly considered a Rezmart business asset. They submit that any order should be limited to personal property of the business, to distinguish it from real property interests. It is their position that the court cannot grant a permanent possessory interest in the real property on which the business operates because it is reserve land under the jurisdiction of WFN.

[10] The applicant submits that the order should not be limited to personal property of the business, but rather it should pertain to all realizable assets of the business. It concedes that WFN is not a party to this proceeding and that the court has no jurisdiction to make permanent orders regarding the occupancy and use of reserve land that would have the effect of binding WFN. The order, it submits, would give it the authority to deal with WFN on behalf of Rezmart to realize any assets under WFN's jurisdiction without the requirement that it involve the respondents.

Analysis

[11] A party seeking a permanent injunction must establish: (1) the legal rights it is asserting in the proceeding; and (2) that an injunction is an appropriate remedy to enforce those rights (*1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125 (CanLII), at paras. 74-80).

[12] The applicant has established that it is a party to an enforceable agreement with the respondents, namely the JVA. There are no remaining issues to be determined by the court regarding the enforceability of the JVA against the respondents.

[13] The respondents are in default of the JVA. The applicant is entitled to a remedy for the default. The JVA provides that, in the event of a default, the non-defaulting party (in this case the applicant) should have all available legal and equitable remedies at its disposal to recover its losses, including injunctive relief.

[14] The respondents' default of the JVA has been ongoing since 2007, shortly after the JVA was signed. That default has not been rectified. Court orders attempting to bring the respondents into compliance have had no effect and have resulted in findings of contempt against them. In these circumstances, it is my view that specific performance is not a suitable remedy.

[15] Likewise, an award of damages is not a suitable remedy. While the applicant is able to quantify its investments into the business, it is not in a position to quantify its loss of revenue, through no fault of its own. The respondents have admitted that Mr. DesRoches operated the business as a cash business, to the exclusion of the applicant, and that there are no records of its income or expenses from 2007 onwards.

[16] I find that, in the circumstances of this case, the most appropriate relief to grant the applicant is injunctive relief in the form of a mandatory order giving it permanent possession of the Rezmart business and all of its assets. This will permit the applicant to deal with the business and its assets in the manner that it deems most appropriate to recover its losses, whether that be by operating the business, selling the business, or winding up the business, subject to the terms of the JVA.

[17] In granting this relief to the applicant, I recognize that the realization of some of the Rezmart business assets may be subject to the authorization and consent of WFN. That is an issue to be resolved between the applicant and WFN, and possibly between the respondent Luc DesRoches and WFN. It will not be resolved in this proceeding where WFN is not a party. What is resolved in this proceeding is the fact that any rights of the respondents to possession of the Rezmart business and its assets pursuant to the terms of the JVA are at an end.

Disposition

[18] For the reasons given, I hereby make the following orders:

- a. The applicant, 2089322 Ontario Corporation, shall have permanent and exclusive possession and control of the business known as Rezmart Gas and Tobacco ("the business"), presently located on Parry Island at 3371 Deemeemguk Rd, Parry Sound, ON, and all assets of that business.
- b. The respondent, Luc W. DesRoches, shall provide his full and complete cooperation in transferring the business and its assets to the applicant.

- c. The applicant may either operate, sell, or wind up the business as it deems appropriate, in accordance with the terms of the original, authentic Joint Venture Agreement (the “JVA”) between the parties, dated February 3, 2006.
- d. Nothing in this order shall be deemed to bind Wasauksing First Nation in its management and administration of any reserve lands under its jurisdiction.
- e. Either party may, through a written request directed to the attention of the Local Administrative Judge at Parry Sound, ask that a reference be directed pursuant to Rule 54.02 of the *Rules of Civil Procedure*, relating to the taking of accounts, sale, or winding up of the business, or relating to any other issue with respect to the enforcement of this order.
- f. Should the parties be unable to agree upon the issue of costs, they may make written submissions within (45) days of the date of this order.



Cullin, J.

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Released: July 10, 2024