QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2014 SKQB 125**

Date: **2014 04 28**
Docket: Q.B. No. 721 of 2012
Judicial Centre: Saskatoon

BETWEEN:

THE TORONTO-DOMINION BANK

PLAINTIFF

- and -

101142701 SASKATCHEWAN LTD. and
CAVA SECRETA WINES AND SPIRITS LIMITED

DEFENDANTS

Counsel:

G. A. T. Meschishnick, Q.C.	for the receiver, PricewaterhouseCoopers Inc.
R. K. Gabruch	for Cellar Masters Enterprises Inc., and for 1725452 Alberta Ltd.
D. R. Burlingham	for Cameron Rizos
M. P. Morris	for Saskatchewan Finance
P. G. Wagner	for Saskatchewan Liquor and Gaming Authority
C. B. Barry	for Gayle McDonald

FIAT
April 28, 2014

ROTHERY J.

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[1] PricewaterhouseCoopers Inc. ("PWC") was appointed interim receiver of all the assets of the defendants, 101142701 Saskatchewan Ltd. and Cava Secreta Wines and Spirits Limited (the "Debtor") on May 8, 2012. PWC was later appointed receiver on June 14, 2012. The Debtor had carried on a business of retail sale of wines, spirits and beverage alcohol from business premises in Saskatoon, Saskatchewan under the business

name of "Cava Secreta". As chronicled in the affidavit sworn on May 4, 2012 on behalf of the secured creditor, The Toronto-Dominion Bank ("TD"), Cameron Rizos ("Rizos") was the chief executive officer of the Debtor, holding the position of president and was also a shareholder. TD demanded payment of its loans that were secured by a general security agreement on April 27, 2012. Saskatchewan Finance had demanded payment of over $280,000 for arrears of unpaid liquor consumption tax owed to the Province of Saskatchewan. Canada Revenue Agency served TD with requirements to pay under the *Excise Act,* R.S.C. 1985, c.E-14 pertaining to arrears owed by the Debtor in excess of $300,000. TD could not honour pending rent and employee pay cheques. All of that, along with a shareholder dispute between Rizos and other shareholders, led TD to apply for an interim receiver to preserve the value of the assets owned by the Debtor and to normalize the Debtor's business relations.

[2] As part of the receiver's role in securing the Debtor's assets, PWC applied to the court for a Claims Process Order to assist it in determining the claims of third parties against the assets of the Debtor. The procedure set out in the Claims Process Order was similar to the procedure referred to in the case of *Bank of Montreal v. Scott,* 2013 SKQB 64, 415 Sask.R. 58. PWC provided responses to the claimant's proofs of claim and by June 14, 2012, four parties applied to the court for determination of PWC's disallowance of their claim. The proceedings were adjourned to allow mediation to proceed. By March 4, 2014, only the claim of Rizos for wine and other personal property and of Cellar Master Enterprises Inc. ("CMEI") for certain wine inventory remained unresolved. The application for the court to determine Rizo's claim was set for April 22, 2014.

[3] TD assigned its security agreement and the Debtor's debt to 1725452 Alberta Ltd. on February 4, 2013. That agreement also provided for CMEI and Ren Holding Ltd. to abandon any claim to certain wine futures of the Debtor.

[4] Counsel for 1725452 Alberta Ltd. (the "Secured Creditor") objects to Rizos' claim and submits that all personal property claimed by him is subject to the Secured Creditor's security because it is personal property owned by the Debtor. Counsel submits Rizos is not entitled to the wine claimed because of its priority as provided by s. 30 of *The Personal Property Security Act, 1993,* S.S. 1993, c.P-6.2 ("*PPSA*").

[5] For analysis of Rizos' claim to the personal property, it is appropriate to consider them in four groups:

1. Wine futures bought from the Debtor for $100,000;
2. Numerous bottles of wine claimed to be purchased from the Debtor for $30,000 and located on the Debtor's premises;
3. Numerous bottles of wine located on the Debtor's premises that Rizos claims are owned by him;
4. Other personal property listed on Rizos' Property Proof of Claim dated May 31, 2012, including music, an I-pod, maps, books, magazines, a Dynasty stove, two Cornuefe demo stoves, and a Cornuefe range hood, all located on the Debtor's premises.

[6] The evidence filed on this application consists of the following:

1. The notice of motion of Rizos, dated June 7, 2012;
2. The supporting affidavit of Rizos sworn June 11, 2012;

3. The supplementary affidavit of Rizos sworn March 4, 2014;

4. The Certified Record of Proceeding filed by counsel for PWC, attaching the following documents:

a. PWC's proof of claim response disallowing Rizos' claim, dated June 5, 2012;

b. the property proof of claim provided to PWC by Rizos, dated May 31, 2012;

c. the order of May 19, 2012 setting out the property claims procedure.

[7] Counsel for Rizos sought to file two additional document at the application on April 22, 2014. These were copies of Rizos' credit card statements showing the payment for the two Cornuefe demo stoves. Counsel for the Secured Creditor objected to allowing this additional material being admitted at this late date because Rizos had almost two years to disclose this information. It was not even being tendered by way of affidavit, and counsel for the Secured Party argued that this additional information, if allowed, would be highly prejudicial to its position.

[8] The request by Rizos' counsel to file this additional information is denied. Because of my analysis of the evidence as a whole, it makes no difference to Rizos' application by admitting this information. The onus is on Rizos as the claimant to prove his entitlement to the personal property. For the following reasons, I find that Rizos has failed to meet that onus. Unlike the procedure in *Bank of Montreal v. Scott,* there is no need to direct a hearing. Rizos has had ample opportunity to file evidence to support his position.

THE WINE FUTURES

[9] The receiver disallowed Rizos' claim to ownership of his deposit of $100,000 to purchase 2010 Bordeaux wine futures from the Debtor, as set out in Invoice #593 dated November 14, 2011. The receiver applied the law as outlined in *Royal Bank of Canada v. 216200 Alberta Ltd. et al.*,(1987) 51 Sask.R. 146, [1987] 1 W.W.R. 545 (Sask. C.A.) and concluded that the wines that were purchased as wine futures were not in the Debtor's possession on May 8, 2012, the date of the receivership order. The Saskatchewan Court of Appeal stated that monies paid as a deposit or a partial payment for the purchase price of future goods of the debtor, even if the purchaser buys the future goods in the ordinary course of business, are subject to the priority claim of the secured party.

[10] There was no additional evidence filed by Rizos in this application to change the conclusions of the receiver. The receiver has correctly applied the law as set out in *216200 Alberta Ltd.* Because Rizos' claim for wine futures constitutes an agreement to sell future or unascertained goods, and the wines were not in the Debtor's possession at the time of the appointment of the receiver, Rizos' claim to those wine futures must fail.

THE BOTTLES OF WINE PURCHASED FROM THE DEBTOR

[11] Rizos claims that he purchased numerous bottles of wine from the Debtor, for a reduced price, and stored those bottles of wine separately from the Debtor's inventory of wine. A listing of the bottles of wine is included in Rizos' Property Proof of Claim

dated May 31, 2012, along with invoice #597 dated December, 2011, and various account activity statements totalling $30,000.

[12] The receiver assessed Rizos' claim and concluded that the bottles of wine were neither ascertained nor was the transaction conducted in the ordinary course of business to allow Rizos the benefit of s. 30 of the *PPSA* as against the Secured Creditor. The receiver observed that, while some of the wines described by Rizos were in the Debtor's possession, none of the bottles were marked, labelled or otherwise distinguished as wines which belonged to Rizos, nor were any in boxes, crates or shelves marked with his name or distinguishing mark. Bottles of wine matching Rizos' description were found intermingled among various other wines including ones with the same labels as on Rizos' list. The receiver concluded that Rizos' wine he claimed to have purchased from the Debtor were unascertained goods, and no property in those goods had passed to Rizos as the purchaser.

[13] The receiver observed a second problem with the list of wine Rizos claimed he purchased under invoice #597. The transaction was not conducted in the ordinary course of the Debtor's business as the seller of the bottles of wine. As a result, the receiver concluded that Rizos did not take the bottles of wine free of any security interest against the Debtor.

[14] PWC cites several reasons for reaching its conclusion, including the following. Invoice #597 was not issued until an unknown date in December, 2011. Rizos states that he transferred some payments for this invoice to the Debtor on May 5, 2011, seven months earlier, but no credit is shown on invoice #597 for these payments. The invoice

#597 does not appear to be an invoice generated by the Debtor's normal retail system and was not entered into the Debtor's retail sales records. The receiver questions the credibility of an invoice of $30,000 (in round figures) to match amounts transferred into the Debtor's bank account. The purchase prices listed in the invoice #597 show amounts lower than the Debtor's normal list price in its retail system for the wines listed.

[15] In his affidavit sworn June 11, 2012, Rizos provides the following explanation. He asserts that the sale as shown in invoice #597 was one conducted in the ordinary course of business because the sale of wines to private clients was always completed by Rizos himself generating the invoices and the purchaser typically paying by way of electronic funds or wire transfer. He uses as an example the transaction the Debtor completed with CMEI. The invoices for private client transactions, as with CMEI, were not generated by the retail system. Pricing for almost all private clients was discounted. In short, Rizos states that his purchase of the wines in invoice #597 were conducted in the ordinary course of business.

[16] Rizos also swore the following in his June 11, 2012, affidavit:

> These wines [purchased as per invoice #597] were segregated from general inventory and held in a separate store room that was specifically used for "private client wines" and private wines. These wines were not on the shelf or in general storage of wine store inventory areas. All wine store staff knew and were instructed that wines stored in this area were not for general sale and/or were already sold. Just because the wines were not marked and labelled does not make the sale any less valid.

[17] Rizos' counsel relies on the case of *NEC Corp. v. Steintron International Electronics Ltd.*, 59 C.B.R. (N.S.) 91;[1985] B.C.J. No. 611 (Q.L.)(BCSC) for support

for the proposition that Rizos' bottles of wine were ascertained as defined by s. 19 of *The Sale of Goods Act,* R.S.S. 1978, c.S-1 which states:

> **19**(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at the time the parties to the contract intend it to be transferred.
> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

[18] In *NEC Corp.,* McLachlin J. (as she then was), determined that "ascertained" goods as defined by British Columbia's equivalent section in its *Sale of Goods Act* means identified in accordance with the contract. Furthermore, to determine when the property in the ascertained goods passes to the buyer, the court must consider the terms of the contract, the conduct of the parties, and the circumstances of the case.

[19] On the facts of the case in *NEC Corp.*, the court concluded that certain electronic equipment claimed by the purchaser was ascertained because it was placed on pallets with the purchaser's name on it. The court found that the seller and purchaser intended title in the electronics to pass when they were placed on the pallets and identified with the purchaser's sign. The court relied on evidence of the seller's warehouse foreman that supported the intention that title to the electronics passed to the purchaser once they were taken out of inventory and placed on separate pallets. The seller's credit manager supported the same intention with his own evidence that once the goods were paid for, they no longer showed as inventory, and title passed to the purchaser. As a result, for the electronics that the purchaser had paid for prior to the seller being placed in receivership, McLachlin J. found the seller's intention was that the property in the goods should pass when they were placed on pallets for shipment for the purchaser. The purchaser expected to receive its property without delay because it had

paid for it in full. There was no issue that property would pass upon delivery to the purchaser. That purchaser was successful in its claim to the electronics over the claim by the vendor's secured creditor.

[20] In *216200 Alberta Ltd.,* Vancise J.A. explained how a buyer is entitled to benefit from the protection of s. 30 of the *PPSA.* At para. 12, he stated:

> I am of the opinion that before a buyer can take property free of the security interest of the appellant, he must establish that there has been a sale and that he is a buyer in the ordinary course of business. The application of the provisions of *The Sale of Goods Act*, while not being specifically referred to in s. 30, must be referred to to determine whether or not there has been a sale. Section 3(4) of *The Sale of Goods Act* defines "sale" as follows:
>
> > 3(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or is subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.
>
> Goods are sold when title passes to the buyer and sections 18, 19 and 20 are relevant for the determination of that issue. The import of those sections is that no title passes to the buyer in unascertained goods until the goods are ascertained and appropriated to the sale. When there is a sale of specific or ascertained goods, title passes when the parties intend it to pass. Unless a different intention appears from the documentation, s. 20 sets out the rules for ascertaining the intention of the parties as to the time at which the property or the goods is to pass to a buyer. ...

[21] I must conclude, on all the facts in this case, that Rizos has failed to prove that the list of wines he claims to have purchased pursuant to invoice #597 are ascertainable goods as required by s. 19 of *The Sale of Goods Act.* While they may have been in a separate room in the retail store, these bottles of wine were intermingled with wines of

other customers. There was nothing to distinguish the listed bottles of wine so as to ascertain them as the wine subject to the contract for sale under invoice #597.

[22] Unlike in *NEC Corp.,* even if the wine had been ascertained, there is no corrobative evidence of the Debtor's staff that the bottles located in the separate store room "were not for general sale and/or were already sold." That phrase alone in Rizos' affidavit shows the intention as to when the title in the wines passed to the buyer is ambiguous. It is unclear whether the wines Rizos swears were in a separate room were intended to have actually had title passed or whether they were not to be sold as a general sale to the public. All of this ambiguity leads the court to conclude that the wines Rizos claimed he purchased from the Debtor has not been sold as defined by s. 30 of the *PPSA*, and remain subject to the Secured Creditor's security interest.

BOTTLES OF WINE STORED AT THE DEBTOR'S WINE STORE

[23] Rizos swore in his June 11, 2012 affidavit that a list of bottles of wine were owned by him, and merely stored at the Debtor's wine store. He stated that some bottles were gifts from others, some wine he had purchased from other retailers and brought from other countries, and some he had purchased from various sources to teach wine classes at the Debtor's store. Because his house was under construction, he typically stored wine at the Debtor's store. He swore that none of these bottles of wine had been purchased from the Debtor.

[24] The receiver found bottles of wine matching the description in Rizos' Property Proof of Claim dated May 31, 2012. However, those bottles were intermingled with other bottles of the same wine in the Debtor's possession.

[25] Thus, the only evidence that the court may assess is the assertion by Rizos that the listed bottles of wine belong to him and not to the Debtor. There is no supporting documentation to prove the purchases from elsewhere or even affidavits of the people who gifted Rizos bottles of wine. The bottles of wine were not segregated in a separate area to indicate that Rizos personally owned them. The onus is on the claimant to prove his ownership of the property. Rizos has fallen far short of meeting that onus of proof. Rizos' claim to that list of wine is disallowed.

OTHER PERSONAL PROPERTY

[26] Rizos swore in his affidavit that various personal items were located throughout the wine store, the Cava Cuisine retail store and the warehouse. They are listed in his Property Proof of Claim.

[27] The receiver observed that the personal property claimed by Rizos and found in the Debtor's possession were found throughout the Debtor's locations intermingled among various other goods and equipment, and not identified as property belonging to Rizos. The items, including the Dynasty stove/range appeared to be the stove/range installed in the kitchen at the Debtor's retail location and used in the conduct of the

Debtor's business. The other items listed in Rizos' claim were also being used in the conduct of the Debtor's business.

[28] In his affidavit, Rizos stated that, because his house was under construction, it was convenient to keep his items at the wine store. They added to the atmosphere and functionality of the wine store. He swore that the Dynasty range/stove was temporarily installed in the wine store. Rizos swore that he paid for the two Cornuefe ranges that were on display in the Cava Cuisine store by his personal credit card. The Debtor never reimbursed him for these stoves, nor did he ever submit these purchases for reimbursement by the Debtor. Rizos swore that he was the authorized distributor for the province of these ranges. Invoices from the supplier and serial numbers would be provided.

[29] No invoices have been tendered in evidence. No distributor agreement has been filed. While Rizos said he was having difficulty locating documents because his records were at the Debtor's location, that was in June, 2012. Ample time has passed for Rizos to tender corrobative evidence to his claim to these stoves.

[30] It is clear that these items of personal property were being used in the Debtor's business. Rizos, as president of the Debtor, knew that the Debtor had pledged all of its present and after-acquired property to the Secured Creditor as security for its indebtedness. Rizos knew of the extent of the Debtor's indebtedness. If these items were personally owned by Rizos, he took the risk of co-mingling them with the Debtor's assets.

He cannot now expect that his claim to ownership of these items can succeed merely because he says he owns them.

[31] In conclusion, Rizos' claim to the assets listed in his Property Proof of Claim dated May 31, 2012 is dismissed in its entirety.

A. R. Rothery J.

A. R. ROTHERY