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Business

Ontario court stays action in favour of arbitration in shareholder dispute

By **Karunjit Singh**

(August 3, 2023, 3:27 PM EDT) -- The Ontario Superior Court has granted a stay in favour of arbitration in an action involving allegations of fraudulent misrepresentation and breach of contract related to a share purchase agreement.

In *Spasiw et al v. Quality Green Inc. et al*, 2023 ONSC 4422, released on July 31, Associate Justice Robert Frank held that allegations of fraudulent misrepresentation did not necessarily vitiate an agreement to arbitrate.

"I find that the claims arguably fall under the Arbitration Clauses. To the extent that there is a challenge to the arbitrator's jurisdiction, as a general rule, that challenge must be resolved first by the arbitrator," the judge wrote.

In 2018, the plaintiffs, Andrew Spasiw and Astute Ventures Ltd, entered into a share purchase agreement with the defendants, Quintet Ventures Inc., Andrew Robinson, Adrian Robinson, 1160094 B.C. Ltd. and 1161845 B.C. Ltd., through which the plaintiffs acquired shares in Quintet.

The plaintiffs also entered into a shareholders agreement with the defendants. Both agreements contained arbitration clauses which provided that any dispute concerning the construction, meaning, effect or implementation of the agreements must be submitted to binding arbitration.

Shortly after entering into the agreements, the plaintiffs began to raise certain complaints about the defendants' performance of their obligations.

In May 2020, the plaintiffs commenced an action seeking a declaration that they were entitled to rescind the share purchase agreement as well as a declaration that the defendants had breached their obligations to the plaintiffs.

They sought general damages in the amount of \$7 million for fraudulent misrepresentation, negligent misrepresentations, conversion and breach of contract among various other remedies.

The defendants contended that the action should be stayed in favour of arbitration.

The plaintiffs submitted that pith and substance of the claim revolved around allegations of fraudulent misrepresentation and oppression and that based on their Charter rights, they could not be denied their right to have these allegations dealt with by the court rather than through arbitration.

Associate Justice Frank rejected the plaintiffs' submission finding that their claims with respect to misrepresentation and oppression largely related to the alleged failures of the defendants to perform their obligations under the agreements.

The judge concluded that the plaintiffs' claims were contractual in pith and substance.

The judge cited *Haas v. Gunasekaram*, [2016] O.J. No. 5286 in which the Ontario Court of Appeal held that since the arbitration agreement between the parties contained broad language referring to any dispute respecting the agreement, there was no exclusion for tort claims, misrepresentation or fraud.

The judge observed that in the case at bar, the arbitration clauses similarly referenced any dispute, difference or question concerning the agreement, and that this broad language that did not exclude claims for fraudulent misrepresentation or oppression.

In a separate application, Spasiw asserted that a stay should be denied because it would violate the plaintiffs' rights under the *Canadian Charter of Rights and Freedoms*.

The plaintiffs submitted that the steps taken to stay the action in favour of arbitration restricted

Spasiw's expression, including his right to be heard by an impartial decision-maker, deprived him of his liberty and security interests and failed to treat him with fundamental equality before the law.

The judge rejected these submissions noting that Charter rights were not a bar to the requested stay which was expressly permitted in the *Arbitration Act*.

"As noted, the Court of Appeal has recognized the mandatory wording in s. 7 of the *Arbitration Act* and that the law favours giving effect to arbitration agreements, which is evident in both legislation and in jurisprudence," wrote the judge.

The court stayed the action in favour of arbitration and ordered the plaintiffs to pay the defendants \$20,000 as costs of the motion.

The decision clarifies that in considering whether the subject matter of a dispute falls within the scope of an arbitration agreement, courts can look beyond a plaintiff's claim to the "pith and substance" of their dispute and the broader nature of their allegations, said Reuben Rothstein of McMillan LLP, counsel for the defendants.

"[T]he court held that parties who agree to arbitrate contract disputes cannot avoid arbitration by framing their claims as tort claims or by seeking equitable relief (i.e. artful drafting). To prevent parties from avoiding arbitration in this manner, courts will consider whether a Plaintiff's non-arbitrable claims are 'mingled with', or 'based on the same factual matrix' as their arbitrable ones," he told Law360 Canada in an email.

He further noted that the decision was a reminder that self-represented litigants are not immune to significant costs awards.

Counsel for the plaintiffs was Andrew Spasiw.

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