

Midtown Wines Inc. v. Mogg Enterprises Inc.

Between
Midtown Wines Inc., and
Mogg Enterprises Inc. and others

[2001] O.J. No. 8
Court File No. 00-CV-195679CM

Ontario Superior Court of Justice
Nordheimer J.

Heard: January 3, 2001.
Judgment: January 4, 2001.
(12 paras.)

[Quicklaw note: Supplementary reasons for judgment were released January 23, 2001. See [2001] O.J. No. 167.]

Counsel:

Ben V. Hanuka, for the plaintiff/defendants by counterclaim.
J. Gardner Hodder, for the defendants/plaintiffs by counterclaim.

¶ 1 **NORDHEIMER J.** (endorsement):— The defendants seek what is, in essence, an injunction prohibiting the plaintiff and defendants by counterclaim from interfering with their right to appoint a receiver (which includes a receiver and manager) under the terms of a general security agreement between the plaintiff and the defendant, Mogg Enterprises Inc.

¶ 2 The action arises out of the sale of a franchised wine making business by Mogg Enterprises to the plaintiff. The defendant, D'Vine Wines Franchise Systems Inc., is the franchisor. The sale took place in September, 1999. As part of the sale the plaintiff gave certain promissory notes to Mogg Enterprises which were secured by the general security agreement.

¶ 3 On August 16, 2000 this action was commenced by which the plaintiff seeks rescission of the agreement of purchase and sale; an order for the return of all monies paid for the business and an order rescinding or annulling the promissory notes and the general security agreement. The plaintiff never signed a franchise agreement with the franchisor nor has it paid any franchise fees to the franchisor. In addition, the plaintiff has failed to make most of the payments called for under the promissory notes.

¶ 4 After this action was commenced, Mogg Enterprises delivered a Notice of Intention to Enforce Security. Subsequent to that, Mogg Enterprises delivered a Notice of Appointment to Debtor and an Appointment of Receiver. The receiver which Mogg Enterprises sought to appoint was the franchisor.

¶ 5 The plaintiff has refused to allow the proposed receiver to take possession of the business. However, all of the parties are in agreement that the business should be sold. They disagree on how that sale should be accomplished. The plaintiff wishes to continue to operate the business with the parties agreeing on a real estate agent to be appointed to sell the business. Mogg Enterprises wishes the franchisor to take control of the business and, once it is operating profitably, proceed to effect a sale of the business to a new franchisee.

¶ 6 I start from the premise that there is a prima facie right under the general security agreement to the appointment of a receiver. It is evident on the material that there have been defaults made by the plaintiff of its obligations under clauses 9(a), 9(h) and 9(i) of that agreement. The plaintiff asserts, however, that the right of Mogg Enterprises to appoint a receiver is in doubt because of the claim in the action that the general security agreement should be rescinded or annulled. It argues that the status quo should be maintained until that issue can be determined which would mean that the plaintiff would be entitled to continue to run the business.

¶ 7 The plaintiff has failed to satisfy me that there is a good reason to interfere with the prima facie right that Mogg Enterprises has under the general security agreement to appoint a receiver. While that agreement is being challenged in the action, until such time as the matter is adjudicated, the agreement should be taken as being valid and subsisting. I will say that the claim by the plaintiff that it should be entitled to continue to run the business would have a good deal more force to it if the plaintiff were not seeking, as its main relief, the rescission of the transaction. Once the plaintiff takes the position that it should not be bound by the agreement of purchase and sale and wishes to be relieved from it with the consequent result that the store would revert to the vendor, it seems to me to be much less compelling to assert that the plaintiff should nonetheless continue to operate the store in the interim period. The franchisor, which I acknowledge is not a disinterested party in this proceeding given that it is a defendant, appears to be the logical person to operate the store and to seek a buyer for it. The franchisor is in the business of selling such franchises and has a vested interest in ensuring that the store is a viable member of the franchise network. While the plaintiff expresses concerns about the franchisor's ability to successfully operate the business, there are no material facts offered to substantiate those concerns. Further, no alternatives to the appointment of the franchisor were suggested by the plaintiff other than leaving it in charge. Finally, I note that the plaintiff has been in a position to try and sell the business on its own for the past year and there is no evidence before me that it has made any efforts to try and attract prospective purchasers for the business.

¶ 8 Also of considerable importance in this particular case, is the fact that there are relatively small sums of money in issue in this action. The sale price for the business was \$120,000 of which \$60,000 is covered by the promissory notes. These facts give rise to a couple of additional considerations. First, because the plaintiff has made virtually no payments since the sale took place, Mogg Enterprises has every bit as much at stake financially in the ongoing

operation and successful sale of the business as does the plaintiff. Second, these facts also mean that to move to a full fledged receivership with a completely independent receiver, such as an accounting firm, would involve costs to all parties that would quickly diminish whatever proceeds might be available from a sale. The franchisor, on the other hand, is prepared to operate as the receiver on a very modest basis.

¶ 9 For the same reason, it would be counterproductive to invoke the court's authority to appoint a receiver under the Courts of Justice Act, R.S.O., 1990, c. C.43. Such a sweeping remedy is neither necessary for, nor does it fit the circumstances of, this case. I see no reason why the objective that the parties are agreed upon, that is the sale of the business, cannot be equally well accomplished at less expense by enjoining the plaintiff from interfering with the appointment of the private receiver. I would observe that the court's authority to support a private receiver, as opposed to substituting a court appointed receiver, is acknowledged in Bennett on Receiverships, 2nd ed. at p. 23.

¶ 10 However, I recognize that some terms are necessary to provide a measure of protection to the plaintiff's position while a private receiver is in place. Therefore I would make it a term of the injunction that the plaintiff is entitled to receive reports on a monthly basis, if requested, of the receiver's activities regarding the business and further that the receiver not be entitled to sell the business without the consent of the plaintiff. If the plaintiff should unreasonably refuse to consent to an advantageous sale, Mogg Enterprises and/or the receiver are fully entitled to then seek a further order of the court permitting the sale to take place.

¶ 11 Therefore an order is granted restraining the plaintiff and defendants by counterclaim from interfering with the appointment by Mogg Enterprises of D'Vine Wine Franchising Systems Inc. as receiver and manager of the subject franchise business and directing the plaintiff and defendants by counterclaim to forthwith deliver up possession of the business and undertaking of the subject franchise to the receiver and manager. Mogg Enterprises shall file with the court the normal undertaking as to damages consequent on the above order.

¶ 12 I am inclined to order that the costs of this motion be left in the cause. However, since the parties did not have an opportunity to address the issue of costs, if they have submissions to make on this point they may do so in writing. The defendants' submissions are to be filed with 10 days of the release of this endorsement and the plaintiff's response is to be delivered within 10 days thereafter. No reply is to be filed without leave.

NORDHEIMER J.

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Midtown Wines Inc. v. Mogg Enterprises Inc.

Between
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Mogg Enterprises Inc. and others

[2001] O.J. No. 167
Court File No. 00-CV-195679CM

Ontario Superior Court of Justice
Nordheimer J.

Heard: by written submissions.
Judgment: January 23, 2001.
(4 paras.)

[Quicklaw note: Original reasons for judgment were released January 4, 2001. See [2001] O.J. No. 8.]

Counsel:

Ben V. Hanuka, for the plaintiff/defendants by counterclaim.
J. Gardner Hodder, for the defendants/plaintiffs by counterclaim.

¶ 1 **NORDHEIMER J.** (endorsement):— On January 4, 2001. I granted an order restraining the plaintiff and defendants by counterclaim from interfering with the appointment by Mogg Enterprises of D'Vine Wine Franchising Systems Inc. as receiver and manager of the subject franchise business and directing the plaintiff and defendants by counterclaim to forthwith deliver up possession of the business and undertaking of the subject franchise to the receiver and manager. I said in my endorsement that I was inclined to order that the costs of the motion be left in the cause but allowed both parties to file written submissions if they disagreed with that inclination since the matter was not argued at the time of the motion.

¶ 2 I have now received written submissions. The defendants seek an order that the costs be to them in the cause and that it be indicated that if the validity of the General Security Agreement is upheld, those costs should be on a solicitor and client basis as provided for in the GSA and that they should be a first charge on the net proceeds of the realization as also provided for in the GSA. The plaintiff is content that the costs should be in the cause.

¶ 3 I do not accede to the defendants' request that it receive the costs in the cause. In my view, the appropriate disposition of the costs of the motion will be very much influenced by the ruling on the validity of the GSA and that will not be known until the trial of this action. I do, however, accept the point that if the GSA is held to be valid it provides for solicitor and client costs and it also provides that those costs will be a first charge on the net proceeds of realization. In order to permit those terms to have effect if the GSA is upheld, I will amend my proposed disposition of costs to specifically reserve to the trial judge the matters of the scale of costs to be awarded for the motion and the issue as to any priority which those costs may have against any proceeds of sale.

¶ 4 Therefore, I order that the costs of the motion are to be costs in the cause provided, however, that the trial judge shall determine the appropriate scale for these costs and any priority to be accorded those costs for the reasons set out above.

NORDHEIMER J.

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