COURT OF APPEAL FOR ONTARIO

CITATION: Zwaniga v. Johnvince Foods Distribution L.P., 2013 ONCA 271
DATE: 20130426
DOCKET: C56119

Laskin, Cronk and Hoy JJ.A.

BETWEEN

David Zwaniga and Jennifer Zwaniga

Plaintiffs (Appellants)

and

Johnvince Foods Distribution L.P. and
Revolution Food Technologies Inc.

Defendants (Respondent)

Alan A. Farrer, for the appellants

Jill M. Knudsen, for the respondent, Johnvince Foods Distribution L.P.

Sonu Dhanju-Dhillon, for Revolution Food Technologies Inc.

Heard: April 24, 2013

On appeal from the judgment of Justice Paul Perell of the Superior Court of Justice, dated September 19, 2012.

By the Court:

[1] The appellants, David and Jennifer Zwaniga, appeal the September 19, 2012 summary judgment of Perell J., dismissing their claims against the respondent, Johnvince Foods Distribution L.P.

[2] The appellants argue that:

> (1) the respondent's motion was not properly the subject of a Rule 20 motion;
>
> (2) the motion judge erred in concluding that the respondent was not a "franchisor's associate" within the meaning of s. 1(1) of the *Arthur Wishart Act*, S.O. 2000, c. 3 (the "AWA"); and
>
> (3) the motion judge failed to consider the legal impact of the representations made by the respondent in conjunction with Revolution Food Technologies Inc.'s marketing of machines intended to vend products supplied by the respondent.

[3] Briefly, the background is as follows.

[4] The respondent distributes Planters® peanuts in Canada. Revolution Food Technologies Inc., an unrelated third party, approached the respondent with the idea of a vending machine program. Revolution wished to sell vending machines to individual distributors who would become members of a buying group that would buy through Revolution the products dispensed by the vending machines.

[5] The respondent and Revolution entered into a supply agreement, which provided that the respondent would supply Planters® products and granted Revolution a non-exclusive licence to display Planters® trademarks and logos. The respondent could terminate the supply agreement for cause or upon notice.

[6] Revolution was responsible for developing and running the distribution program and made all the day-to-day and long term decisions with respect to the

distributors. The respondent did not lead, regulate, direct, oversee or govern Revolution or its distributorship program.

[7] Revolution represented to prospective vending machine owners/ distributors that they were free to stock their machines with any products they wished, and were not restricted to Planters® products.

[8] The program was not a success.

[9] The appellants commenced a proposed class action against both the respondent and Revolution claiming that class members were induced to purchase vending machines by material misrepresentations. Before the proposed class proceeding had been certified, the respondent brought a motion for summary judgment under Rule 20, seeking to have the action dismissed against it. The motion judge granted summary judgment dismissing the action against the respondent.

[10] With respect to the first argument raised by the appellants, the motion judge correctly applied this court's decision in *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764 in determining that it was an appropriate case for summary judgment. We see no basis for disturbing the motion judge's conclusion that he could achieve a full appreciation of the evidence and the issues and there were no genuine issues requiring a trial. As the motion judge noted, the record was largely documentary and there were few, if any, contested factual issues.

[11] As to the appellants' second argument, we note that, only for the purposes of the summary judgment motion, it was conceded that the distribution program was a franchise. This placed the appellants' case at its highest, and permitted the motion judge to narrow his analysis with respect to the AWA to a single dispositive issue, namely whether or not the respondent was a "franchisor's associate" within the meaning of that term in the AWA.

[12] We agree with the motion judge, for the reasons he provided, that the respondent did not, directly or indirectly, control Revolution for the purposes of the definition of "franchisor's associate" in the AWA and, therefore, was not a "franchisor's associate". The provisions in the supply agreement that the appellants point to on appeal as indicative of *de facto* control – for example, the requirement that Revolution meet annual targets and the provision that Revolution's marketing materials were subject to approval by the respondent with respect to the use of the Planters trademark – are, in our view, provisions reasonably included to protect the licensed trademarks and ensure that they were not licensed to enterprises that did not generate a meaningful return. They do not establish direct or indirect control of Revolution by the respondent.

[13] There is no merit in the appellants' third ground of appeal. Before the motion judge, the appellants unsuccessfully argued that the respondent was liable for misrepresentations made by Revolution because it was Revolution's partner or a "franchisor's associate".

[14] On the record before the motion judge, the only independent statements by the respondent to the appellants were those in a "Letter of Introduction" from the respondent that Revolution included in the marketing materials that Revolution provided to the appellants. In that letter, the respondent invited prospective distributors to "seriously consider" the opportunity to acquire a vending machine. The appellants concede that they abandoned their pleaded claims of independent fraudulent and negligent misrepresentations against the respondent.

[15] The appellants cannot argue their abandoned claims on this appeal. Indeed, in the course of oral submissions, counsel for the appellants acknowledged as much and made clear that, in raising this third argument, the appellants only wished to assert their position that a judicial determination binding on other purchasers of vending machines as to whether the respondent is liable for independent fraudulent or negligent misrepresentations in relation to the marketing of Revolution's vending machines had not been made.

[16] In the result, this appeal is dismissed.

[17] The respondent is entitled to its costs of the appeal on a partial indemnity scale fixed at $8,250, inclusive of disbursements and applicable taxes.

Released: APR 26 2013

D.L. Lauwers J.A.

S.A. Crane J.A.

Alexander J.A.