

COURT OF APPEAL FOR ONTARIO

CITATION: 1250264 Ontario Inc. v. Pet Valu Canada Inc., 2015 ONCA 5

DATE: 20150107

DOCKET: M44521 & M44540

Pardu J.A. (In Chambers)

BETWEEN

1250264 Ontario Inc.

Plaintiff (Moving Party/
Responding Party by way of cross-motion)

and

Pet Valu Canada Inc.

Defendant (Responding Party/
Moving Party by way of cross-motion)

Jean-Marc Leclerc, for the moving party/responding party by way of cross-motion

Derek Ronde and Stefanie Holland, for the responding party/moving party by way of cross-motion

Heard: December 23, 2014

On motion for an extension of time to file a notice of appeal and for an extension of time to perfect the appeal.

ENDORSEMENT

[1] 1250264 Ontario Inc. ("125") seeks an order extending the time to file its notice of appeal and to extend the time to perfect the appeal. According to its notice of motion, it failed to file its notice of appeal on time because of an

administrative error, although it was served in time. It wants the time to perfect this appeal extended so that appeals from related orders in this action can be dealt with at the same time as this appeal.

[2] Pet Valu Canada Inc. brought a motion to strike the notice of appeal on the basis that the generic grounds of appeal give no hint of any alleged errors committed by the motion judge. If this appeal is permitted to proceed, Pet Valu seeks an order for security for costs on the ground that the appeal is frivolous and vexatious, and on the ground that 125 has insufficient assets to satisfy any judgment for costs.

[3] This appeal arises from the summary dismissal of two common issues raised in this class proceeding. Pet Valu successfully moved to dismiss the following claims defined as common issues:

- Has the defendant breached its contractual duty to the Class Members at any time during the Class Period by failing to share Volume Rebates with them?
- If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has the defendant been unjustly enriched by such conduct, if so found?

[4] The motion judge found that Pet Valu was contractually obliged to share Volume Rebates with franchisees in a reasonable manner, but found as a fact

that all of the Volume Rebates were passed on and shared with franchisees, subject to reasonable mark-ups by Pet Valu, the franchisor. The second common issue failed as a result of the factual findings on the first.

[5] The motion judge's decision was released on October 31, 2014. According to 125's notice of motion, as a result of an administrative error, no effort to file the notice of appeal was made until December 10, 2014. It was not accepted for filing because it was defective. The notice of appeal states the following grounds of appeal:

1. The court below made palpable and overriding errors of fact;
2. The court below made errors of mixed fact and law;
3. The court below made errors of law; and
4. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[6] As Gillese J.A. observed in *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15:

The test on a motion to extend time is well-settled. The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including:

- (a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period;
- (b) the length of, and explanation for, the delay in filing;

(c) any prejudice to the responding parties, caused, perpetuated or exacerbated by the delay; and

(d) the merits of the proposed appeal.

[7] Here, the delay is short, an explanation has been provided for the delay, and there is no prejudice to Pet Valu. However, I am unable to find any scintilla suggesting that the appeal has merit. The affidavit filed in support of the motion to extend time is silent on the issue of the merits. The notice of appeal is so general that I am unable to construct any basis for an arguable appeal from the motion judge's factual findings. Very little would be required to show that there is some basis for an appeal in these circumstances, but I can find nothing.

[8] The motion judge accepted the appellant's argument that the contract required the respondent to share volume rebates with its franchisees, but made the purely factual finding that the respondent had in fact shared all of the volume rebates with the franchisees, subject only to a reasonable markup. This factual conclusion will be entitled to a high degree of deference. There is no hint of anything in the material before me which undermines that finding. I conclude therefore that the appeal does not have merit. Under these circumstances, the justice of the case does not require granting an extension.

[9] For these reasons, the motion to extend time to file the notice of appeal is dismissed. As a result of this conclusion, there is no need to address the cross-motion, or the motion to extend the time to perfect the appeal. The appellant

proposes to appeal from other decisions made more recently by the motion judge, and these reasons do not foreclose those steps.

[10] Accordingly, the motion to extend the time to file the notice of appeal and to extend the time to perfect the appeal is dismissed with costs to the respondent fixed at \$2000, including disbursements and HST.

[11] Pet Valu's motion is dismissed as it is now moot.

"G. Pardu J.A."