IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brink v. Xos Services (Canada), Inc.,* 2025 BCSC 658

Date: 20250408
Docket: S255937
Registry: New Westminster

Between:

Kim Brink

Plaintiff

And

Xos Services (Canada), Inc., EMV Automotive USA Inc., and Xos, Inc.

Defendants

Before: Associate Judge Hughes

Reasons for Judgment

Counsel for Plaintiff:	J. Koschinsky
Counsel for Defendants:	C. Hamill A. Omale
Place and Date of Hearing:	New Westminster, B.C. February 28, 2025
Place and Date of Judgment:	New Westminster, B.C. April 8, 2025

[1] In this employment case, the plaintiff applies for summary judgment, pursuant to Rule 9-6, on the basis that the parties have reached a binding settlement agreement. The defendants deny that any such agreement was reached.

[2] The facts are not in dispute. The plaintiff was previously employed by the defendants (collectively "EMV") in the role of Chief Revenue Officer, pursuant to an executive employment agreement dated December 24, 2021 (the "Employment Agreement"). The plaintiff's employment with EMV ended on April 24, 2024, and shortly thereafter the parties entered into settlement discussions regarding the plaintiff's claim for compensation pursuant to the terms of the Employment Agreement.

[3] On August 26, 2024, the defendants' counsel presented a settlement offer which reads as follows:

> a) EMV will pay Ms. Brink a lump sum of $441,667.00 USD, less applicable deductions;
>
> b) EMV will pay Ms. Brink a lump sum of $10,768.00 USD in lieu of continuation of benefits for a period of 12 months; and
>
> c) Ms. Brink will execute a release in a form acceptable to EMV, which will include confidentiality and non-disparagement provisions.

[4] On September 3, 2024, prior to the expiry of the offer, the plaintiff's counsel responded as follows:

> We have instructions to accept your client's offer provided that the:
>
> - form of release is mutually acceptable (would you be able to provide us with a draft for review?); and
> - payments are made in a tax effective manner. In this regard, Ms. Brink requests that amount TBD be paid directly as legal fees (we can provide an invoice without narratives) and the balance paid as a 1099 (no withholdings at source).

A 1099 is a U.S. income tax form used to report various types of non-employment income.

[5] On September 5, 2024, defendants' counsel responded:

> Thanks for your email. We are confirming the payment details with our client and will get back to you once we have instructions. We will also prepare a draft release for your review.

[6] The issue to be determined is whether the foregoing exchange of emails constitutes a binding settlement agreement.

[7] Before addressing that substantive issue, I have considered the very recent decision of *Ursuliak v. Collins*, 2025 BCCA 71, released after this application was argued. In that case, the Court of Appeal held that on an application to enforce a settlement the threshold issue is whether a summary process is appropriate in light of the issues and evidentiary record: *Ursuliak*, para. 52. In other words, is there a genuine issue to be tried?

[8] In the case at bar, unlike *Ursuliak*, there are no issues with the reliability or credibility of the evidence before the court, nor any suggestion of inequality in bargaining power or fairness of the alleged settlement. Neither party raised any concern with the use of a summary process. I am satisfied that there is no genuine issue to be tried and that a summary process is appropriate in the circumstances of this case.

[9] In *Fieguth v. Acklands Ltd.*, 1989 CanLII 2744 (BCCA), the court considered the validity of a settlement agreement in an employment context. In that case, the parties agreed on an amount for settlement of the plaintiff's claim for wrongful dismissal, and the plaintiff's lawyer invited the defendant's lawyer to forward the settlement amount "along with the necessary documentation that you deem expedient in order to effectively release any and all claims on the part of my client". The defendant forwarded the settlement amount less a deduction for income tax, along with an unusual form of release. The plaintiff did not complain about the form of release, but did object to the tax withholding.

[10] The Court of Appeal, in upholding the settlement, said:

> [35] In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all its essential terms. There is not usually any

difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

[36] The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever release or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[37] Thus, it seems to me that the plaintiff in this case could have taken the position that he would not suffer a deduction for tax or that he would not execute an overreaching release, or he could have taken the same position on the tax but only executed a general release or he could have taken some other position.

[38] The defendant on the other hand could have stood firm on the tax but relented on the release and the matter might have been worked out or either party could have applied for summary relief under s. 8 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224, or R. 10(1)(b), or either party may have commenced an action for breach of the settlement contract and utilized R. 18A.

[39] But, on the facts of this case, the settlement contract remained on foot and I see no possibility of either party contending that the settlement contract had been terminated.

…

[44] if should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated, such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties

> have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to a repudiation.
>
> [Emphasis added.]

[11] *Fieguth* has been cited with approval by a number of cases, including by the Saskatchewan Court of Appeal in *Graham Construction and Engineering Inc. v. Great Sandhills Terminal Marketing Centre Ltd.*, 2008 SKCA 16. In that case, the court determined that the parties had entered into a binding settlement agreement despite not having concluded a form of release. The execution of releases containing fair and commercially reasonable terms consistent with the intentions of the parties was considered to be an aspect of performance or completion of the agreement rather than an essential element of the agreement: *Graham Construction*, para. 41.

[12] The plaintiff's position is that the case at bar parallels *Graham Construction* in that the parties reached a binding settlement agreement, and she says that the issues of the form of release and method of payment go to performance of the agreement.

[13] The defendants disagree, arguing that the plaintiff's response to the defendants' offer constituted a counter-offer rather than acceptance. In particular, they say that the plaintiff's requirements of a mutually acceptable form of release and payment in a tax effective manner introduced new essential terms and therefore cannot be construed as an acceptance of the defendants' offer.

[14] The defendants rely on *Jenneson v. Olson*, 2019 BCSC 2367 which confirmed that conditional acceptance of an offer is a counteroffer (para. 20).

[15] The defendants take particular issue with the plaintiff's inclusion of the term requiring payments to be made in a tax effective manner. They cite *Lacroix v Nanaimo Regional General Hospital Society*, 2001 B.C.W.L.D. 165, in which the court dismissed an application to confirm a settlement agreement in a wrongful dismissal case. The plaintiff insisted that she bargained for a settlement net of tax.

However, the court found that it was fundamental to the defendant that the tax treatment be addressed, as it would bear the risk of any potential recharacterization of the settlement payment by the tax department. In the result, the court dismissed the application on the basis that the parties had not reached an agreement on this fundamental term.

[16] In the case at bar, the defendants' settlement offer explicitly referred to the settlement amount "less applicable deductions". They say that the plaintiff's request for payment in a tax effective manner, specifically referring to the US 1099 form under which no tax would be deducted, was a significant departure from what the defendants intended. As in *Lacroix*, the defendants' evidence is that they may risk penalties for misclassifying the nature of the plaintiff's settlement payment and thereby failing to make appropriate source deductions.

[17] In response, the plaintiff argues that a request for settlement funds to be paid in a tax effective manner is standard practice, although no authority was provided to support this proposition. The plaintiff also points out that the defendant took no issue with this request until the filing of their response to civil claim in the within action. If the defendants truly considered the September 3, 2024 email to be a counter-offer, they gave no indication of the same in the subsequent communications in evidence.

[18] In my view, the plaintiff has not met her burden of proving that the parties reached a settlement agreement. Considering *Fieguth* and *Graham Construction,* I take the plaintiff's requirement of a mutually acceptable form of release to be an element of performance rather than an essential term in the formation of an agreement. However, the tax treatment of the settlement payment was a condition of fundamental importance to both parties. As an employee, the plaintiff was typically taxed at a rate of around 32% which, if applicable to the settlement funds, would result in a tax deduction of up to $143,300. The plaintiff sought the full settlement amount with no source deductions. The defendants offered to pay the settlement amount less applicable deductions, to avoid any negative tax implications for them.

This is a significant gap that cannot be overlooked or resolved by resorting to common sense or common practice, as was discussed in *Fieguth*.

[19] Accordingly, the plaintiff's application is dismissed, with costs payable to the defendants.

"Associate Judge Hughes"