COURT OF APPEAL FOR ONTARIO

CITATION: Taylor Made Advertising Ltd. v. Atlific Inc., 2012 ONCA 459
DATE: 20120628
DOCKET: C54584

MacPherson and Juriansz JJ.A., and Pattillo J. (*ad hoc*)

BETWEEN

Taylor Made Advertising Ltd.

Plaintiff (Appellant)

and

Atlific Inc. and Royal Host Corp.

Defendants (Respondent)

Tara L. Lemke, for the appellant

Katherine J. Menear, for the respondent Atlific Inc.

Heard: March 19, 2012

On appeal from the order of Justice David Salmers of the Superior Court of Justice, dated October 13, 2011.

Pattillo J. (***ad hoc***):

Introduction

[1] Taylor Made Advertising Ltd. ("Taylor Made"), appeals from an order dated October 13, 2011 (the "Order") dismissing its action (the "Action") against the respondent Atlific Inc. ("Atlific") as an abuse of process.

[2] In 1999, Taylor Made commenced an action against Venture Inns Inc. ("Venture Inns") claiming $73,031.25 plus pre-judgment interest for promotional services rendered by Taylor Made in late 1998 and early 1999 (the "First Action"). In August 2000, following an undefended trial, Taylor Made obtained judgment against Venture Inns for the full amount of its claim plus costs. The judgment remains unpaid.

[3] Taylor Made commenced the Action against Atlific and Royal Host Corp. on February 10, 2005 and claimed the same principal amount plus pre-judgment interest in respect of the same services which were the subject of the First Action. The Action has subsequently been dismissed against Royal Host.

[4] Atlific moved to dismiss the Action as an abuse of process on the ground that Taylor Made had a contract with Venture Inns and had sued it and obtained judgment in the First Action for exactly the same amount.

[5] The motion judge found that the president of Taylor Made "purposely withheld" evidence from the trial judge during the trial of the First Action concerning Taylor Made's relationship with Atlific. As a result, the motion judge held it would be an abuse of the process of the court to permit Taylor Made to present evidence at the trial of the Action which had been knowingly and purposely withheld by it in the First Action.

[6] For the reasons that follow, I would allow the appeal. In my view, the motion judge erred in his conclusion that the Action was an abuse of process. The evidence does not support the motion judge's finding that Taylor Made's president "purposely withheld" evidence from or misled the court in the First Action. Further, and absent that error, I do not consider that the Action otherwise constitutes an abuse of process as that concept has been developed by the courts.

Background

[7] Taylor Made is in the advertising business. It was formed by Alistair Taylor in the fall of 1998. In the period 1998 to 1999, Atlific owned and managed hotels, one of which was Venture Inns. Atlific was a client Mr. Taylor had done work for at his previous firm. Mr. Taylor had also previously done work for Venture Inns under the direction of Atlific. In December 1998, Atlific retained Taylor Made to do a marketing program promotion for Venture Inns.

[8] Taylor Made carried out the work under the direction and approval of Atlific employees. The first invoice was addressed to the National Director Sales & Marketing of Atlific at Venture Inns/Atlific Hotel & Resorts. At Atlific's request, it was reissued to Venture Inns at the same address. Atlific noted that there was a sale taking place of Venture Inns and it wanted to ensure Taylor Made was paid

in a timely manner. The remaining two invoices were similarly addressed to Venture Inns. The invoices totalled $74,951.25.

[9] The First Action was commenced on November 10, 1999. Venture Inns filed a defence pleading there was no contract because the work was subject to approval of Venture Inns' purchaser and no such approval was ever granted. In the alternative, Venture Inns pleaded a number of the charges on the invoices were improper, excessive and that the materials were deficient and of no use to it.

[10] The trial of the First Action took place on August 14, 2004. Although Venture Inns had been represented by counsel up to that time, no one appeared at trial on its behalf. Mr. Taylor testified briefly on behalf of Taylor Made.

[11] Although Mr. Taylor initially said that his client was Venture Inns, he subsequently corrected that and said his client was Atlific Hotel & Resorts and Venture Inns was a chain of hotels owned by Atlific. On occasion, they would work directly for the Atlific chain and on other occasions, they would work directly for Atlific Hotels, but he said the two were "inseparable".

[12] The trial judge inquired about the sale of Venture Inns which was raised in the statement of defence. Mr. Taylor responded:

> At the time of rendering the first invoice, which we traditionally did to Atlific Resort Hotels/Venture inns, we were subsequently asked to change the invoice to Venture Inns Inc. and we were, at that point, told the

> hotel was being sold; that, you know, the transaction would happen as time went by, not to worry, you know, everything's under control, you know, 'You're part of the sale. You'll be paid, not to worry.' The hotel was then subsequently sold to 'Roy Host', a group out in Calgary.

[13] Mr. Taylor said that he received the assurance Taylor Made would be paid by the controller of Venture Inns or Atlific. He also said Atlific was an ongoing client at the time of the trial. The trial judge asked some additional questions concerning the amount claimed which was less than the amount of the invoices.

[14] At the conclusion of Mr. Taylor's evidence, the trial judge granted judgment against Venture Inns for the full amount claimed of $73,031.25 plus $4,888.49 for pre-judgment interest and $5,974.17 in costs.

[15] In its statement of claim in the Action, Taylor Made pleaded that Atlific and Royal Host "either jointly or individually" engaged it to do the work. In its defence, Atlific, among other things, denied that it entered into any agreement with Taylor Made either jointly with Royal Host or on its own behalf. It pleaded the First Action and Taylor Made's judgment against Venture Inns. In the alternative, if invoices were delivered to it, it was for convenience and not as an agent for Venture Inns. Finally, it pleaded in the further alternative that if it is liable, the amount claimed is excessive, unreasonable and does not reflect the value of the work.

The Reasons of the Motion Judge

[16] The motion judge concluded that the Action was an abuse of process because in order for Taylor Made to obtain judgment in the Action, it would have to adduce evidence that had been purposely withheld from the court by Mr. Taylor during his testimony at the trial of the First Action.

[17] In order to reach this conclusion, the motion judge made a number of findings arising from Mr. Taylor's testimony at the trial in the First Action.

[18] In particular the motion judge found that the trial judge was concerned about whether Taylor Made's contract for advertising services was with Venture Inns and/or with Atlific; that Mr. Taylor was concerned Atlific was still an ongoing client; that Mr. Taylor understood that the trial judge was concerned about whether liability for payment of the invoices rested with Venture Inns or Atlific; and that as a result of Mr. Taylor's testimony, the trial judge was reasonably satisfied and persuaded that Venture Inns was liable for payment of the invoices.

[19] Based on these findings, the motion judge went on to state at paragraph 16 of the reasons:

> During his testimony, in order to preserve the plaintiff's then ongoing business relationship with Atlific, Mr. Taylor purposely avoided testifying that, with respect to these particular invoices, the plaintiff's contract for advertising services was with Atlific or that Atlific was somehow liable for payment of the invoices. He intentionally and successfully persuaded and satisfied that trial judge that the plaintiff's contract for the invoices was with Venture and not Atlific; and that it was

> Venture, not Atlific that was liable for payment of the invoices.

Discussion

[20] In my view, Mr. Taylor's evidence at the trial of the First Action does not support the findings the motion judge made in reaching his conclusion that Mr. Taylor "purposely avoided" testifying that the contract was with Atlific or that he "intentionally and successfully persuaded" the trial judge that it was Venture Inns that was liable for payment of the invoices.

[21] As noted, the trial proceedings were brief. Mr. Taylor was the only witness. The transcript of his evidence is all of nine pages in length. During his evidence, he responded to questions asked by his counsel and the trial judge. In addition, a brief of documents was filed as an exhibit.

[22] While the trial judge asked a few questions during Mr. Taylor's evidence, they were for clarification and did not, in my view, indicate any concern on the part of the trial judge as to whom Taylor Made's contract was with.

[23] As noted by the motion judge, Mr. Taylor did not testify that Atlific was primarily or jointly responsible for the invoices in question. He was never asked that question. He did, however, explain how the contract came about and referred to Atlific as the client, its role in the formation of the contract, its request to re-address the first invoice and its assurances that Taylor Made would be paid.

[24] While Mr. Taylor indicated during his evidence that Atlific was an ongoing client, there was never any indication Taylor Made was suing Venture Inns to preserve its relationship with Atlific. Even if such an inference can be drawn from the evidence, that fact, by itself, is not sufficient to support the finding that Mr. Taylor purposely avoided testifying that the contract was with Atlific given his other testimony. As noted, Mr. Taylor testified that the contract was initially with Atlific but the invoices were changed to Venture Inns at Atlific's request. The documents filed with the court further support Mr. Taylor's evidence concerning the involvement of Atlific in the contract.

[25] Mr. Taylor answered the questions he was asked both by counsel and the trial judge. There is no evidence in the record to suggest that any of his answers were untruthful or misleading in any way. To the contrary, the evidence supports what Mr. Taylor testified to.

[26] This court may only interfere with the motion judge's findings of fact where there is a palpable and overriding error and such error affected the result. A "palpable and overriding error" has been described as one that is "clearly wrong". Findings of fact by a lower court which can be characterized as "unreasonable" or "unsupported by the evidence" are clearly wrong and entitle an appellate court to intervene. *L.(H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.) paras. 55 – 56.

[27] In my view, the motion judge's finding that Mr. Taylor purposely withheld evidence from the court at the trial in the First Action is clearly wrong. It simply cannot be supported by Mr. Taylor's evidence in the First Action. In addition, that finding clearly affected the result in the motion. It was the basis for the motion judge's conclusion that the Action was an abuse of process.

[28] In the circumstances, therefore, it is my view the motions judge committed a palpable and overriding error which entitles this court to intervene.

[29] Notwithstanding the absence of any evidence to conclude that Taylor Made misled the court in the First Action, is the Action otherwise an abuse of process?

[30] Courts have an inherent and residual discretion to dismiss or stay an action on the grounds of abuse of process. As Arbour J. stated in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 (S.C.C.) at para. 35:

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (R. v. Power, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > abuse of process may be established where: (1) the proceedings are oppressive

> or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

[31] In *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220 (C.A.) at p. 237, Blair J.A., in dissent, referred to the purpose of the doctrine of abuse of process:

> The concept of abuse of process protects the public interest in the integrity and fairness of the judicial system. It does so by preventing the employment of judicial proceedings for purposes which the law regards as improper. These improper purposes include harassment and oppression of other parties by multifarious proceedings which are brought for purposes other than the assertion or defence of a litigant's legitimate rights. Such abuse of process interferes with the business of the Courts and tarnishes their image in the administration of justice.

[32] The doctrine of abuse of process has been utilized by the courts in various ways in order to maintain the integrity of the adjudicative function. In particular, it has been invoked in civil proceedings in circumstances where the court’s procedure has been misused in such a way that the administration of justice would be brought into disrepute. As was further stated by Arbour J. in *Toronto (City) v. C.U.P.E., Local 79* at para. 37:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into

disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications

> recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson, supra*, at pp. 624-25).

[33] In the circumstances of this case, I do not consider the Action to be an abuse of process. In my view, it is not a misuse of the court's procedure which is manifestly unfair to Atlific or otherwise so serious that it brings the administration of justice into disrepute.

[34] The facts surrounding the formation of the contract at issue give rise to the argument that Atlific is jointly and severally liable for the work done. In circumstances of joint and several liability under a contract, judgment against one party does not bar further action against another for the same cause of action. *Campbell Flour Co. Ltd. v. Bowes* (1914), 32 O.L.R. 270 (C.A.) at pp. 279-80; *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 139(1).

[35] As Goudge J.A. noted in *Canam Enterprises*, as referred to above, courts have applied the doctrine of abuse of process in circumstances where a party is attempting to relitigate a claim which has been determined. That, however, is not the case here. There has been no determination of whether Atlific is liable to Taylor Made for the work done.

[36] While it no doubt would have been better if Taylor Made had joined Atlific in the First Action so that the issue of liability for the work done could have been determined in one proceeding, failure to do so in the circumstances of this case does not in my view constitute an abuse of process as the courts have defined

that term. The Action is not a misuse of the court's procedure that is so serious that it brings the administration of justice into disrepute. While s. 138 of the *Courts of Justice Act* provides that multiplicity of legal proceedings is to be avoided, where possible, failure to do so may give rise to cost consequences but not to the dismissal of an action.

[37] Nor in my view can it be said that the Action is unfair to Atlific. It was not involved in the First Action. The record clearly indicates that it had some involvement at the time of the formation of the contract and thereafter. It has denied in the Action that it was acting as an agent for Venture Inns. Whether it is liable to Taylor Made for the services rendered remains to be determined in the Action.

Conclusion

[38] The appeal is therefore allowed and the Order is set aside.

[39] Taylor Made is entitled to its costs, both of the motion and the appeal, which are fixed at $5,000 in each case, inclusive of disbursements and applicable taxes.

Released: June 28, 2012 ("J.C.M.")

"L.A. Pattillo J. (ad hoc)"
"I agree. J.C. MacPherson J.A."
"I agree. R.G. Juriansz J.A."