

COURT OF APPEAL FOR ONTARIO

CITATION: Heydary Hamilton PC v. Bay St. Documents Inc., 2012 ONCA 832

DATE: 20121128

DOCKET: C54945

Blair, Rouleau and Tulloch JJ.A.

BETWEEN

Heydary Hamilton PC

Plaintiff (Respondent)

and

Bay St. Documents Systems Inc., Xerox Canada Ltd. and De Lage Landen
Financial Services Canada Inc.

Defendants (Appellant)

AND BETWEEN

De Lage Landen Financial Services Canada Inc.

Plaintiff by Counterclaim
(Appellant)

and

Heydary Hamilton PC and Heydary Hamilton Professional Corporation

Defendants to the Counterclaim
(Respondents)

Micheal Simaan, for the appellant De Lage Landen Financial Services Can. Inc.

David K. Alderson, for the respondent Heydary Hamilton PC

Heard and released orally: November 19, 2012

On appeal from the judgment of Justice J. Wilson of the Superior Court of Justice, dated December 22, 2011.

ENDORSEMENT

[1] The appellant appeals the dismissal of its summary judgment motion whereby it sought dismissal of the respondent's claim and judgment on its counterclaim. The appellant also appeals the dismissal of its counterclaim.

[2] In the present action, the respondent alleges that it was sold defective equipment by Xerox and its agent, Bay St. Documents Inc. The appellant financed the respondent's purchase by way of an equipment lease (the lease agreement). It counterclaimed, alleging default under the lease agreement.

[3] The motion judge held that no contract had been entered into between the appellant and respondent, either because the offer to lease had elapsed or was vitiated by events that intervened between the offer and acceptance. The respondent signed the proposed lease agreement on November 19, 2008, but the appellant did not sign and return it until sometime in January or February 2009. The motion judge considered this to have been an unreasonable length of time. Additionally, during the period between November 19, 2009 and February 2009, the equipment had come to appear defective. In the motion judge's view, these defects vitiated the respondent's offer before it was accepted by the appellant.

[4] We disagree with the motion judge's conclusion. On the issue of delay, although the appellant did not sign the lease agreement upon receipt and did not

promptly return a signed copy by the respondent, there remains at minimum a triable issue as to whether the contract was accepted by conduct. At common law, an offer can be accepted by conduct if a) the conduct was performed with a view to acceptance of the offer and not for some other motive and b) the conduct was intended to serve as acceptance of the offer in question: G.H.L. Fridman, *The Law of Contracts in Canada* at p. 52.

[5] In the present case, the funds advanced pursuant to the lease agreement were used to finance part of the buyout of the respondent's equipment lease for the Ricoh equipment being replaced, and to finance the purchase and delivery of Xerox equipment selected by the respondent. The advances were made before the respondent signed the lease. It is tenable that these acts were done with a view to accepting the offer and were, indeed, intended to be an acceptance of the offer.

[6] With respect to the submission that the offer had been vitiated due to an intervening event, we also disagree. There is at least a triable issue as to whether there was a change in the condition of the goods after the respondent signed the lease agreement.

[7] Unilateral mistake and unconscionability were also raised by the respondent as constituting a defence to the appellant's contractual claims. The motion judge was satisfied that there was sufficient conflicting evidence that a

trial was the most suitable medium for resolving these issues. We would not interfere with that finding.

[8] Although we agree that the existence of a contract may, generally, be an issue suited for summary judgment, we do not think the present matter constitutes such a case. The arguments raised in this appeal indicate that there might be a valid and enforceable contract, thus presenting a chance of success to the counterclaim. However, this issue can only be fairly and justly resolved by means of a trial. In the present case, the allegations impugn the role and involvement of Bay St. Documents Inc. in the transactions. Whether there was an offer and acceptance turns on an assessment of the parties' intentions at various points in the negotiations. Such an assessment is a matter best determined at trial.

[9] For these reasons, we would allow the appeal, set aside the judgment and substitute a dismissal of the appellant's summary judgment motion.

[10] Costs of the motion below are in the cause, in an amount to be determined by the trial judge. The appellant is entitled to its costs of the appeal fixed in the amount of \$12,500 inclusive of disbursements and all applicable taxes payable forthwith.

"R.A. Blair J.A."
"Paul Rouleau J.A."
"M.H. Tulloch J.A."