

COURT OF APPEAL FOR ONTARIO

CITATION: McDowell v. Barker, 2012 ONCA 827

DATE: 20121127

DOCKET: C53273

Simmons, Cronk and Rouleau JJ.A.

BETWEEN

Roderick Edward McDowell

Plaintiff (Appellant)

and

Stephen A. Barker

Defendant (Respondent)

Roderick McDowell, in person

Nancy Tourgis and Raffaele Sparano, for the appellant

George Tsakalis, for the respondent

Heard and released orally: November 16, 2012

On appeal from the judgment of Justice H.K. O'Connell of the Superior Court of Justice, dated January 12, 2011.

By the Court:

[1] The appellant appeals from the judgment of H.K. O'Connell J. of the Superior Court of Justice dismissing his action against his former litigation counsel, the respondent, for damages allegedly arising from solicitor's negligence, breach of contract and breach of fiduciary duty. He also seeks leave

to appeal the trial judge's costs award against him and, if leave be granted, appeals from that award.

(1) Liability

[2] The appellant, the owner of several farming properties, retained the respondent to assist him in dealing with his major creditor, the Royal Bank of Canada, when he defaulted on several mortgages and other security held by the Bank on his properties.

[3] The appellant claims that he engaged the respondent to arrange a settlement with the Bank whereby an orderly disposition of his farm properties, over which the appellant would maintain control, would be undertaken to fully retire his debt to the Bank. In the alternative, the appellant says that the respondent was to defend any proceedings commenced by the Bank against him and take those steps necessary to defer enforcement by the Bank of any judgment it might obtain.

[4] The appellant asserts that the respondent failed to perform these obligations thereby breaching his contract with the appellant and, further, that the respondent was negligent in the performance of the duties he owed to the appellant, in numerous respects. He argues that the trial judge erred by failing to find that the respondent breached his contractual obligations to the appellant and that he was negligent in the manner alleged. The appellant submits, in particular,

that the respondent: (1) wrongly consented to default judgment in favour of the Bank in the absence of a concluded written agreement with the Bank regarding the orderly disposition of the appellant's properties; (2) failed to respond to communications from the Bank's counsel on a timely basis, resulting in the Bank's appointment of a receiver to the detriment of the appellant; and (3) erred in his assessment of the appellant's evidence and his credibility.

[5] In our view, the appeal must be dismissed.

[6] The trial judge concluded that the appellant failed to establish any breach of contract or negligent conduct by the respondent. He made the following key findings:

- (1) it was "manifestly apparent" that the respondent was "carrying out his client's wishes in a diligent, prudent and exemplary fashion" and that he was "truly 'on the case'" (para. 121);
- (2) the respondent's efforts on the appellant's behalf were "expended on an exquisitely timely basis" (para. 121);
- (3) the respondent had no part in any process of improvident sales of the appellant's properties by the Bank, if such sales occurred (para. 122);
- (4) the appellant's objective of protecting at least two parcels of land, in particular, his home farm, was impeded by the contamination of a gravel pit property and delay in subdividing other lands owned by the appellant. The issues concerning the gravel pit and subdivision lands, properties that the trial held were "cornerstones to the debt reduction that was necessary to quell the bank's concern",

existed prior to, during and after the respondent's retainer. Further, these critical matters were "totally outside" the respondent's control (para. 125);

- (5) the respondent's approach to the Bank was "realistic, yet firm". Further, the respondent "wanted to do what he could to preserve what he could" for the appellant and the respondent did so "in full recognition of [the appellant's] instructions; [the appellant's] own [informed] understanding of the process; and the law that applied with respect to the debt" (para. 127);
- (6) the respondent "comported himself throughout [his retainer] in an extremely diligent and exceptionally profession[al] manner. His obligations to his client were met with fastidious application" (para. 128); and
- (7) the appellant's claims were devoid of merit (para. 129).

[7] During oral argument, the appellant advanced three main complaints in support of his contention that the respondent was negligent and breached the terms of his retainer with the appellant. He argued, first, that the respondent wrongly consented to default judgment in the absence of a binding written agreement with the Bank regarding the disposition of the appellant's assets.

[8] There are two difficulties with this argument. First, the appellant's position at trial was that he did not know of the consent default judgment at the time it was issued and the respondent's consent thereto was provided without instructions. The trial judge, as he was entitled to do, rejected these claims. The appellant now seeks to argue that his consent to the default judgment was

subject to the pre-condition that a binding written agreement be in place with the Bank before consent was given to any default judgment.

[9] More importantly, however, the trial judge held that, “It was just a matter of time before the bank pulled the plug, a plug that it had already started to pull well before [the respondent] was retained.” Further, “[The respondent] proved very successful in getting additional time for [the appellant] based on the priority that he wished for the disposition of his assets.” The trial judge also held: “[The respondent] clearly couldn’t compel the bank to agree to anything. They held all of the cards.”

[10] The findings detailed above (at paragraphs 6 and 9) were open to the trial judge on the evidence. His function, unlike that of this court, was to consider and weigh all the admissible evidence, assess the credibility of the witnesses and determine whether, on the civil standard of proof, the appellant had made out his claims against the respondent. The trial judge did exactly that. Where, as here, the trial judge’s factual findings are supported by evidence at trial, they attract deference from this court.

[11] The appellant’s second complaint, regarding the respondent’s conduct in relation to the Bank’s first appointment of a receiver, is similarly unsustainable. The trial judge fully considered the evidence on this issue and concluded that no negligence was exhibited in the receivership process. In particular, he held: “The

very short injection of the receiver into the process ... was very quickly rectified by the efforts of [the respondent]. As a result, the failure by [the respondent] to respond to [the Bank's lawyer] within a short time period, on one occasion, is a non event." Contrary to the appellant's submission, this finding, as well, was available on the evidence at trial.

[12] The appellant's third complaint is that the trial judge erred by failing to properly consider and accord sufficient weight to the appellant's evidence, in contrast to his favourable treatment of the respondent's evidence. We reject this claim.

[13] The trial judge reviewed the evidence of both parties in a detailed and even-handed manner. As we have said, this was part of his proper role. It was for the trial judge to assess credibility, to determine what evidence he accepted, and to accord weight to that evidence. His appreciation of and his assignment of weight to the evidence attracts considerable deference from a reviewing court.

[14] At the end of the day, the appellant asks us to set aside the trial judge's critical factual findings, including his credibility findings. However, the impugned findings are firmly anchored in the evidentiary record. The appellant has failed to demonstrate that the findings in question are tainted by palpable or overriding error. These findings are fatal to the appellant's attack on the trial judge's liability findings.

[15] We also note that the appellant led no expert evidence at trial regarding the applicable standard of care. This omission, itself, may well have doomed the appellant's negligence claims to failure.

[16] In summary, while the appellant's loss of his various properties is unfortunate and understandably tragic for the appellant, we are unable to conclude that his trial was in any way unfair or that the trial judge committed reversible error in his assessment of the evidence and findings of fact. In the result, therefore, the appellant's challenge to the trial judge's liability findings fails.

(2) Trial Costs

[17] The jurisdiction of this court to interfere with a trial judge's costs award is also limited: unless the award is plainly wrong or the trial judge committed an error in principle in fashioning his costs award, appellate intervention with the award is not justified: see *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303.

[18] We are not satisfied that the appellant has met the test for interference with the trial judge's discretionary costs award. The argument concerning costs advanced by counsel on the appellant's behalf is, in effect, premised on a finding of negligence against the respondent, in particular, with respect to the respondent's conduct regarding the default judgment obtained by the Bank. That

is not what the trial judge found. Indeed, he found the opposite: the respondent was not negligent in his handling of the appellant's affairs. Moreover, the respondent was entirely successful at trial and the trial judge's reasons indicate that he considered and applied the governing principles regarding costs. In all these circumstances, we are unable to say that his costs award is unfair or unreasonable, especially after a 12-day trial.

(3) Disposition

[19] For the reasons given, the appeal is dismissed. Leave to appeal costs is granted and the appeal from the trial judge's costs award is also dismissed. The respondent is entitled to his costs of the appeal on the partial indemnity scale, fixed in the amount of \$3,500, inclusive of disbursements and all applicable taxes.

"Janet Simmons J.A."

"E.A. Cronk J.A."

"Paul Rouleau J.A."