COURT OF APPEAL FOR ONTARIO

CITATION: King v. 1416088 Ontario Ltd. (Danbury Industrial), 2015 ONCA 312
DATE: 20150504
DOCKET: C58694

Simmons, Gillese and Rouleau JJ.A.

BETWEEN

Jack King

Plaintiff (Respondent)

and

1416088 Ontario Ltd., c.o.b. as Danbury Industrial and Danbury Sales Inc. and 1416087 Ontario Ltd. c.o.b. as Danbury Appraisal and 2184493 Ontario Ltd. c.o.b. as Danbury Solutions and 986866 Ontario Ltd. c.o.b. as Danbury Capital and/or DSL Commercial

Defendants (Appellants)

R. G. Chapman, for the appellants

Matthew A. Fisher and Bram A. Lecker, for the respondent

Heard: April 30, 2015

On appeal from the judgment of Justice Graeme Mew of the Superior Court of Justice, dated March 25, 2014, with reasons reported at 2014 ONSC 1445, 16 C.C.E.L. (4th) 331.

ENDORSEMENT

[1] Jack King worked as an accountant for the Danbury group of companies from September 1973 to October 2011, a period of 38 years. His employment was terminated without cause. The Danbury group has carried on a liquidation and auctioneering business in Toronto for decades through various corporations.

[2] Mr. King was formally employed by a series of different Danbury corporations. In 1981, Mr. King entered into an agreement with the Danbury company that was his formal employer at that time. Under the terms of the agreement, he was entitled to retirement compensation of $736.60 per month, for life, so long as he continued to be employed with the company or its successors until he was 65 (the “pension agreement”).

[3] At the time his employment was terminated, Mr. King’s formal employer was the appellant 1416088 Ontario Ltd., carrying on business as Danbury Industrial. Two months later, the appellant company 986866 Ontario Ltd., carrying on business as Danbury Capital and/or DSL Commercial (“DSL”), held an auction and was operating a liquidation and auctioneering business using the Danbury name and premises. Mr. King had assisted with the “groundwork” necessary for DSL’s start-up prior to the end of his employment with the Danbury group.

[4] The president of Danbury Industrial (Mr. King’s formal employer at the time of termination) was David Ordon. The president of DSL is David’s son, Jonathan Ordon. All of the employees of Danbury Industrial, with the exception of David Ordon, were terminated at the same time. David Ordon and five other former Danbury Industrial employees were later hired by DSL. Mr. King was not.

[5] When Mr. King's employment was terminated, he was nearly 73 years of age. He was given no compensation for the wrongful termination – no pay in lieu of notice, no statutory termination pay, no vacation pay and no pension payments.

[6] Mr. King sued various Danbury corporations (the "appellant companies") for which he had worked over his career. Part of his claim, including that part relating to the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"), was settled before trial.

[7] At trial, the issues to be decided were: (1) which of the appellant companies were liable for payment of the amounts that Mr. King was owed; and (2) whether Mr. King was entitled to the retirement compensation promised under the pension agreement.

[8] The trial judge found that all of the appellant companies were Mr. King's common employer, and so were jointly and severally liable for the monies owed to Mr. King. The trial judge also found that the pension agreement was valid and that all of the appellant companies were liable for the benefits due under that agreement.

[9] On appeal, the appellant companies contend that the trial judge erred in both of these determinations.

[10] The court found it unnecessary to call on the respondent and dismissed the appeal with reasons to follow. These are the promised reasons.

ANALYSIS

[11] The appellant companies first submit that, apart from Danbury Industrial, they were not Mr. King's employer. They say that there was insufficient evidence of "common control" for the trial judge to have found that they were Mr. King's common employer. In particular, they say that DSL should not be liable because it did not even begin operating until some months after Mr. King's employment had been terminated.

[12] We do not agree.

[13] We see no error in the trial judge's conclusion that there was a sufficient relationship among the appellant companies that they should be regarded as one, for the purpose of liability for the wrongful termination of Mr. King's employment.

[14] There is no dispute that the trial judge set out the applicable legal principles from this court's decision in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.). The trial judge made clear findings of fact that supported his conclusion and demonstrated the interconnections among the Danbury businesses and Mr. King's contributions to them all.

[15] Moreover, his findings make it clear that although DSL was owned by Jonathon Ordon and may not have formally started operating until after Mr. King's employment was terminated, Mr. King did work for DSL prior to its formal launch. Paragraphs 50 to 51 of the trial judge's reasons are instructive in this regard. They read as follows:

> DSL has too many attributes in common with other companies who have traded under the Danbury name to escape from liability to the plaintiff.
>
> DSL is the current incarnation of the business that the plaintiff worked for over a period of 38 years. Far from there being clear water between the termination of the business by Danbury Industrial and the recommencement of business by DSL, the groundwork for DSL's start-up was already being laid, with the assistance of the plaintiff, in October 2011 while the plaintiff continued to be formally employed by Danbury Industrial. Indeed, from May 2010 to October 2011, David Ordon's company (Danbury Industrial) had been using the Danbury name and goodwill even though Jonathan Ordon's company (866 Inc.) [*i.e.*, DSL] was the sole holder of the license to use the name. This further supports the interconnectedness of the entities.

[16] The appellant companies' second and third submissions relate to s. 4 of the *ESA*. These submissions are irrelevant because the *ESA* issue was resolved prior to trial and forms no part of the judgment under appeal. In any event, however, we do not accept the appellant companies' submission that the principles in *Downtown Eatery* are modified by s. 4 of the *ESA*.

[17] The appellant companies' fourth submission is that Mr. King is entitled to enforce the pension agreement only against the Danbury company that was a party to it. The appellant companies contend that the trial judge erred in finding them liable to Mr. King under that agreement.

[18] Again, we would not accept this submission. Once the trial judge found that the pension agreement was valid and that Mr. King had provided essentially the same services throughout his 38 years of service, in light of his findings on the matter of common employer, it follows that the appellant companies were jointly and severally liable for the amounts owing under that agreement. The fact that the appellant companies did not execute the pension agreement does not relieve them of liability.

DISPOSITION

[19] Accordingly, the appeal is dismissed with costs to the respondent, fixed at $15,000, all inclusive.

"Janet Simmons J.A."
"E.E. Gillese J.A."
"Paul Rouleau J.A."