

COURT OF APPEAL FOR ONTARIO

CITATION: Gold Leaf Products Ltd. v. Pioneer Flower Farms Ltd., 2015 ONCA 365

DATE: 20150522

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Strathy C.J.O., LaForme and Tulloch JJ.A.

BETWEEN

Gold Leaf Garden Products Ltd.

Plaintiff (Respondent)

and

Pioneer Flower Farms Ltd.,
Henk Sikking Sr. and Henk Sikking Jr.

Defendants (Appellant)

Joanna Nairn and Jonathan Rosenstein, for the appellant

R. Leigh Youd, for the respondent

Heard: May 15, 2015

On appeal from the judgment of Justice J. Christopher Corkery of the Superior Court of Justice, dated June 12, 2014.

ENDORSEMENT

[1] Pioneer Flower Farms Ltd. (“Pioneer”) and Gold Leaf Garden Products Ltd. (“Gold Leaf”) entered an agreement whereby Gold Leaf would solicit new customers for Pioneer. In return, Pioneer was to pay Gold Leaf a 5% commission on sales to customers it brought in. Pioneer later terminated the agreement.

[2] The parties disagreed on whether Pioneer was required to pay Gold Leaf ongoing commissions post-termination for sales to those customers Gold Leaf

had brought in. Gold Leaf brought an action seeking the commissions for sales following the termination of the agreement.

[3] On Gold Leaf's motion for summary judgment, the motion judge held that the agreement required Pioneer to continue to pay Gold Leaf the commissions. Pioneer appeals and raises three issues, which we conclude have no merit.

(i) **Interpretation of the Agreement**

[4] On the first issue — the interpretation of the agreement — the motion judge found that para. 5 could be read in two alternative ways. First, that commission will be paid only during the period of the agreement. Or second, that commission will be paid only for new clients brought to Pioneer during the period of the agreement. Read in the latter way, para. 5 would not terminate commission from those customers recruited during the agreement who continued to purchase from Pioneer. The motion judge chose the second reading.

[5] Pioneer says that given the two possible readings, the motion judge should have found ambiguity. Once he found ambiguity, the rules of construction should have led the motion judge to treat para. 5 as a qualification of the general term providing for the payment of commissions. We disagree.

[6] The motion judge found that the first interpretation creates inconsistencies between para. 5 and the remainder of the agreement, specifically paras. 4 and 7. He found that the second interpretation was correct because it gives reasonable meaning to each of the terms of the agreement. In other words, he determined

the objective intentions of the parties, which is the goal of contractual interpretation: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 49.

[7] Pioneer has not satisfied us that the motion judge made any error. Accordingly, the motion judge's interpretation is entitled to deference and this ground of appeal is dismissed.

(ii) ***Non est factum***

[8] On the second issue of *non est factum*, the law says a person who fails to exercise reasonable care in signing a document is precluded from relying on this defence: *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774, at p. 785. Henk Sikking Jr. did not read the agreement when he signed it on behalf of Pioneer. He accordingly failed to exercise reasonable care in signing the agreement. The motion judge was correct in holding that the defence was unavailable to Pioneer. This ground of appeal is dismissed.

(iii) **Set-off**

[9] Finally, on the third issue of set-off, Pioneer submits that the motion judge, prior to hearing the summary judgment motion, misdirected Pioneer's counsel such that he reasonably believed the court would not decide the question of equitable set-off on summary judgment. Because of this reasonable belief, Pioneer says that it led no evidence on the issue of set-off. It was therefore denied natural justice when the motion judge dismissed the defence.

[10] Pioneer has filed what it refers to as fresh evidence consisting of its motion solicitor's affidavit and his "understanding" as to what transpired before the court below. Transcripts of the proceedings on December 7, 2012 are attached as appendices. While the affidavit is not proper fresh evidence, we take no issue with the filing of the transcripts for consideration on this appeal. Pioneer's factum and oral arguments sufficiently convey the interpretation that Pioneer submits this court should take from the transcripts. We disagree with Pioneer.

[11] The motion for summary judgment did not proceed on December 7, 2012 as scheduled. However, at the hearing, the parties and the motion judge discussed the possibility of bifurcating the proceedings between set-off and the rest of the issues. Gold Leaf sought to bifurcate the proceedings, to which Pioneer said it could not consent. The motion judge did not agree to bifurcate and did not appear to see bifurcation as necessary. Furthermore, the order from the December 7 hearing does not order bifurcation.

[12] On April 10, 2013, Gold Leaf filed a Fresh as Amended Notice of Motion for summary judgment. Under grounds, the Notice asserted that "[t]here is no genuine issue requiring a trial with respect to the defence." The Notice did not identify any particular defences. It requested summary judgment or, if appropriate, partial summary judgment. In our view, a reasonable solicitor would have read the Notice as denying all defences, set-off or otherwise, and asking for as much relief on summary judgment as possible.

[13] In sum, as Pioneer did not agree to bifurcation and the motion judge did not order it, Pioneer should have known that set-off had not been split off from the rest of the issues. Taking the Notice and the absence of a bifurcation order together, Pioneer should have known that set-off was at play in the summary judgment motion.

[14] Pioneer, in response to the summary judgment motion, was required to put its “best foot forward” – to “lead trump or risk losing” – and it failed to do so. It was not denied procedural fairness with respect to equitable set-off. It knew or ought to have known that this issue was before the motion judge.

Disposition

[15] For these reasons, the appeal is dismissed. Gold Leaf is awarded its costs of the appeal in the agreed upon amount of \$12,500, inclusive of disbursements and HST.

“G.R. Strathy C.J.O.”

“H.S. LaForme J.A.”

“M. Tulloch J.A.”