COURT OF APPEAL FOR ONTARIO

CITATION: Catanzaro v. Kellogg's Canada Inc., 2015 ONCA 779
DATE: 20151116
DOCKET: C59545

Cronk, Epstein and Huscroft JJ.A.

BETWEEN

Claudia Catanzaro, Nick Catanzaro and Alessia Catanzaro as represented by her Litigation Guardian, Claudia Catanzaro

Plaintiffs (Appellants)

and

Kellogg's Canada Inc.

Defendant (Respondent)

Mark Wiffen, for the appellants

Michael White, for the respondent

Heard: November 12, 2015

On appeal from the amended order of Justice Joseph M. Fragomeni of the Superior Court of Justice, dated October 9, 2014 with reasons reported at 2014 ONSC 5691 and additional reasons reported at 2014 CanLII 59211.

ENDORSEMENT

[1] Claudia Catanzaro and Nick Catanzaro appeal from the order of the motion judge enforcing a settlement of their claims in this action.

[2] By statement of claim issued April 28, 2008, the Catanzaros and their daughter, Alessia Catanzaro, through her litigation guardian, Claudia Catanzaro,

sued the respondent, Kellogg's Canada Inc. for damages suffered after a mouldy piece of chicken was allegedly found in a box of cereal the Catanzaros had purchased.

[3] On September 29, 2011, Mr. White, counsel for Kellogg's, served an offer to settle on the plaintiffs' counsel, Ms. Hamilton. In the offer, Kellogg's agreed to consent to an order dismissing the action without costs. On September 30, 2011, Ms. Hamilton informed Mr. White that her clients had accepted the offer. On November 24, 2011, Ms. Hamilton provided Mr. White with draft motion materials to have the court approve the infant settlement relating to Alessia Catanzaro and dismiss the action. On January 9, 2012, Ms. Hamilton's office notified the court that the matter had been settled.

[4] On November 8, 2012, new counsel for the plaintiffs notified Mr. White that his clients were resiling from the settlement agreement and intended to proceed with the action.

[5] Kellogg's moved to enforce the settlement pursuant to rule 49.09 of the *Rules of Civil Procedure,* to approve the settlement as against the infant plaintiff, Alessia Catanzaro, and to dismiss the action.

[6] The Catanzaros resisted the motion on the basis that the infant settlement was not in the best interests of their daughter and that the court should exercise its discretion to refuse to enforce the settlement on the basis it would be unjust to

do so given Ms. Catanzaro had accepted the offer on behalf of the plaintiffs in haste and at a time when she was depressed.

[7] The motion judge ordered the settlement be enforced as it affected the Catanzaros. She found that Ms. Hamilton had the authority to settle the case, that the Catanzaros had agreed to settle on the terms set out in the offer and that the Catanzaros had not met their onus of establishing that the settlement (as it related to them) ought to be set aside. The motion judge dismissed the motion in relation to the infant on the basis that it was not supported by the material required under rule 7.08(4).

[8] On appeal, the Catanzaros, relying on this court's decision in *Milios v. Zagas* (1998), 38 O.R. (3d) 218, submit that the motion judge erred by failing to consider the circumstances surrounding the acceptance of the settlement – circumstances they say support their position that the settlement should be set aside.

[9] We do not agree. The policy of the courts is to promote settlement. The discretion to refuse to enforce a settlement should be exercised rarely. In our view the evidence before the motion judge did not support refusing to enforce the settlement.

[10] The factors in the *Milios* case this court relied upon in allowing the plaintiffs to resile from their settlement agreement – mistake, significant compromise and

prompt notification of the mistake – are not present in this case. While the various factors identified in *Milios* were relevant to the motion judge's analysis, the critical factors the Catanzaros relied on to support their argument that the settlement should not be enforced were that Ms. Catanzaro accepted the offer in haste and was under stress at the time. These factors were considered and expressly rejected by the motion judge: the evidence simply did not support either assertion. We see no error in this finding.

[11] In our view, the record supports the motion judge's conclusion that, on the basis of the evidence the Catanzaros adduced, they were unable to satisfy their onus of demonstrating that the circumstances surrounding their acceptance of the offer to settle were such that they should be allowed to resile from their settlement agreement.

[12] The exercise of the motion judge's discretion to enforce the settlement is entitled to deference. There is no reason to interfere.

[13] The appeal is dismissed. The respondent is entitled to costs in the agreed-upon amount of $2,500, including disbursements and applicable taxes.

"E.A. Cronk J.A."
"Gloria Epstein J.A."
"Grant Huscroft J.A."