COURT OF APPEAL FOR ONTARIO

CITATION: RJM56 Holdings Inc. v. Michel Bazinet, 2018 ONCA 791
DATE: 20181002
DOCKET: C64658

Simmons, Miller and Fairburn JJ.A.

BETWEEN

RJM56 Holdings Inc. and Kobuck Ltd.

Applicants (Appellants)

and

Michel Bazinet, Robert Jennings and Replicor Inc.

Respondents (Respondents)

Melvyn L. Solmon and Cameron Wetmore, for the appellants

Craig Colraine and Matthew Di Giovanni, for the respondent, Michel Bazinet

Linda Fuerst and Ted Brook, for the respondent, Replicor Inc.

Heard: September 24, 2018

On appeal from the judgment of Justice Frederick L. Myers of the Superior Court of Justice, dated October 26, 2017.

REASONS FOR DECISION

[1] The motion judge characterized the appellants' claim as one for oppression under the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 (the "CBCA"). Relying on *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, 63 O.R. (3d) 431 (C.A.), leave to appeal to S.C.C. denied, [2003] S.C.C.A.

No. 186, he found that Ontario was *forum non conveniens*. While many of the factors in the analysis did not satisfy what he described as “the heavy burden at play” for a stay of the Ontario application, he concluded that the core of the dispute involved shareholders' dissatisfaction with internal management decisions and actions of a company based in Quebec, which dictated that any proceeding be dealt with there.

[2] The appellants appeal from the motion judge’s decision. They argue that he misconstrued their claim as being simply for oppression and by failing to appreciate that it also included a common law claim for fraudulent misrepresentation. The appellants contend that had the motion judge understood the broader scope of the claim, he would have understood that it had a strong connection to Ontario where the fraudulent misrepresentations are said to have been made. His failure to do so is said to be an error in principle, entitling this court to revisit the *forum non conveniens* analysis.

[3] We reject this argument. In their factum filed before the motion judge, the appellants characterized their claim as "an oppression application brought pursuant to s. 241 of the [CBCA]" and “a statutory oppression application based on material misrepresentations.” They asserted that the applicable law is the oppression provisions of the CBCA. As the motion judge noted, the appellants commenced their proceeding by application and chose not to sue by action for fraudulent misrepresentation.

[4] Before us, the appellants pointed out that they relied on rule 14.05(3)(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits applications even where an action would be the norm "where it is unlikely that there will be any material facts in dispute." They pointed also to para. 1(e) of the prayer for relief in their amended notice of application in which they claim an order setting aside or rescinding the sale transactions in issue – a remedy available in a common law action for fraudulent misrepresentation. In oral argument, they also provided copies of *1100997 Ontario Ltd. v. North Elgin Centre Inc.,* 2016 ONCA 848, 409 D.L.R. (4th) 382, a decision confirming that courts must consider affidavit materials on an application as pleadings. In that case, a decision precluding the plaintiffs from adding certain claims for relief following a direction to deliver a statement of claim in an application was reversed on appeal because the material facts necessary to support the proposed claims had been set out in affidavits and were based on the same factual nexus as originally set out in the notice of application.

[5] We find the appellants' argument that any common law claim for fraudulent misrepresentation they may wish to pursue could proceed by application under rule 14.05(3)(h) a significant stretch. Because of the early stage of the proceeding and the *forum non conveniens* motion, the respondents have not delivered responding material. Given the nature of the claim, which normally proceeds by action, we consider the possibility "it is unlikely that there will be any material facts in dispute" remote. In any event, the appellants did not pursue a common law

remedy in their application. The prayer for relief in their amended notice of application is explicitly confined in the preamble to requests for relief under the CBCA. Further, the appellants' position before the motion judge as set out in their factum was that their claim was for oppression. Whether *1100997 Ontario Limited* might permit some form of amendment or addition is not the issue. The motion judge made no error in characterizing the claim that was in front of him.

[6] We also reject the appellants' arguments that the motion judge erred by failing to consider or give proper weight to relevant factors and by taking account of irrelevant factors in holding that Ontario was *forum non conveniens*.

[7] The motion judge took account of the Ontario defamation action in reaching his decision and held that it weighed weakly in favour of keeping the case in Ontario. In our view, the appellants' argument concerning this issue is no more than a request to have us reweigh the relevant considerations. As the *forum non conveniens* analysis is discretionary, that is not our function on appeal: *Black v. Breeden,* 2012 SCC 19, [2012] 1 S.C.R. 666.

[8] The motion judge also noted this proceeding is at a very early stage and concluded there would be no extraordinary costs involved in either moving the case or keeping it here. Even assuming there is no case management system in Quebec, something the appellants maintain that the respondents should have proven, we fail to see how the presence of case management in Ontario demonstrates the case would necessarily proceed more quickly or efficiently in

Ontario than in Quebec. There was limited evidence on the motion concerning Replicor Inc.'s financial position. We see no basis on which to interfere with the motion judge's assessment of costs and efficiency factors in conducting his analysis. The proposed fresh evidence does not alter this conclusion.

[9] The motion judge's references to the Quebec oppression proceeding brought by Mr. Jennings were in the nature of a comment on the genuineness of the appellants' purported concerns about efficiency and the risk of inconsistent verdicts and on the significance of the libel case. These comments did not drive the outcome of his analysis.

[10] Finally, the appellants' claim that post representation events were irrelevant is without merit. As the motion judge observed, the representations themselves are not really in issue. Rather, it is the post representation actions of the respondents that are at the core of the dispute and likely to render material facts in dispute. This reality is what drove the motion judge's analysis.

[11] The fresh evidence motion and the appeal are dismissed. Costs of the appeal are to the respondents on a partial indemnity scale payable by the appellants fixed in the agreed upon amounts of $22,000 to Mr. Bazinet and $7,500 to Replicor Inc.

"Janet Simmons J.A."
"B.W. Miller J.A."
"Fairburn J.A."