COURT OF APPEAL FOR ONTARIO

CITATION: Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc., 2018 ONCA 839
DATE: 20181022
DOCKET: C64604

Pepall, Lauwers and Paciocco JJ.A.

BETWEEN

The Estate of Abdolrahim Hashemi-Sabet
By his Estate Trustee and Executrix Savitri Maharaj

Plaintiff/Respondent

and

Oak Ridges Pharmasave Inc., Yousef Kolahdouzan
and Hamidreza Zarrinkalalm

Defendants/Appellants

John Dent, for the appellants

Mark Johnston, for the respondent

Heard: May 4, 2018

On appeal from the judgment of Justice Bird of the Superior Court of Justice, dated October 18, 2017.

Pepall J.A.:

[1] This appeal addresses the principles relating to enforcement of a Rule 49 offer to settle. Rule 49.09 of the *Rules of Civil Procedure* provides that a party may bring a motion for judgment in the terms of an accepted offer and the judge may grant judgment accordingly or continue the proceeding as if there had been no accepted offer to settle. The appellants claim that the motion judge erred in giving judgment in the terms of a Rule 49 offer they had made because their offer was

revoked before it was accepted. The respondents contend that the offer had not been effectively revoked and that, since they accepted the offer, the motion judge did not err. I agree with respondents and would dismiss the appeal.

Background Facts

[2] The respondent, the Estate of Abdolrahim Hashemi-Sabet by his Estate Trustee and Executrix Savitri Maharaj, sued the appellants, Oak Ridges Pharmasave Inc., Yousef Kolahdouzan and Hamidreza Zarrinkalam, for damages for breach of contract, oppression, and various other causes of action relating to the opening and operation of a pharmacy. He claimed damages of in excess of $1,000,000.

[3] On June 8, 2015, the appellants served the respondent with a written Rule 49 offer to settle the action for $55,555.55. The offer provided that it would remain open until the trial of the action.

[4] In April, 2016, Elena Mazinani, the appellants' new counsel, served a Notice of Change of Lawyer.

[5] On September 20, 2016, counsel for both parties attended at the pretrial of the action. What happened next is disputed.

[6] The appellants took the position that their first offer had been rescinded orally at the pretrial, and in any event, on September 19, 2016, they served by

process server a second written Rule 49 offer to settle the action for $17,333; the second offer expressly revoked the June 8, 2015 offer.

[7] The respondent took the position that his counsel, Alfred Schorr, returned to his office following the pretrial and sent Ms. Mazinani a written acceptance of the appellants' June 8, 2015 offer by fax at 1:27 pm, September 20, 2016.

[8] Karen Bandura, a law clerk at the offices of Mr. Schorr, had a discussion with Mr. Schorr immediately after the pretrial in which he told her the appellants' offer was still open for acceptance and he instructed her to prepare and serve an acceptance of the first offer, which she did. Shortly afterwards, she received a phone call from Ms. Mazinani's law clerk, Delia La Madrid, asking for a copy of the June 8, 2015 offer. Ms. Bandura stated that she sent this to Ms. La Madrid by email at 2:34 pm on September 20, 2016.

[9] The respondent acknowledged receipt of the second offer to settle but maintained that it was not served until 5:23 pm, September 20, 2016, several hours after Mr. Schorr had already accepted the first offer. On receipt of the second offer, Mr. Schorr wrote the date and time he was served on the cover letter from Ms. Mazinani that enclosed the second offer. He confirmed with Riaz Ahmed, a lawyer with whom he shared office space, that at no time on September 19, 2016 from 4:30pm, when Mr. Schorr left, until after 7pm, did anyone attend at the office to serve any documents. Mr. Schorr also wrote to Ms. Mazinani on September 21,

2016, advising that he received her second offer on September 20 at 5:23 pm, after he had already accepted the first offer.

Motion for Judgment

[10] The respondent brought a motion for judgment in the amount of $55,555.55 in accordance with the terms of the accepted offer to settle pursuant to Rule 49.09.

[11] The motion judge granted the respondent's motion for judgment.

[12] In her reasons for decision, the motion judge noted that the parties agreed that the June 8, 2015 offer was made in accordance with Rule 49.02(1). As such, she concluded that the revocation of that offer had to comply with Rule 49.04(1), which states that any withdrawal is to be in writing. She noted that the governing jurisprudence and the provisions of Rule 49.04(1) supported this conclusion. This effectively answered the appellants' argument that the first offer could not be accepted because it had been orally withdrawn at the pretrial.

[13] The motion judge went on to reason that the timing of service of the second offer on Mr. Schorr would be determinative of the motion. However, she concluded that it was impossible to reconcile the positions of the parties on the timing of the service of the second offer to settle. She was of the view that this was not a case of honest mistake. She stated that she had come "to the unfortunate conclusion that a decision on this motion requires me to make credibility findings that must

include a determination that one side has deliberately submitted inaccurate information in support of its client's position."

[14] She determined that the second offer to settle purporting to revoke the first offer was served on Mr. Schorr at 5:23 pm on September 20, 2016, after the respondent had already accepted the first offer. She relied on six factors in reaching her decision.

[15] First, the accounts of Mr. Schorr and Ms. Bandera were detailed and consistent. She also noted Mr. Schorr's September 21, 2016 letter to Ms. Mazinani and his handwritten note of the date and time of receipt on her letter enclosing the second offer as being confirmatory of his position.

[16] Second, Ms. Mazinani and Mr. Schorr agreed that during the September 20 pretrial, Ms. Mazinani told the presiding judge that her clients were not prepared to pay any money to the respondent. This was inconsistent with service of an offer to settle the action for $17,333 delivered less than 24 hours prior to the pretrial.

[17] Third, Rule 16.05(1)(d) authorizes service of a document on the solicitor of record by fax. A resulting fax record is then created that shows the date and time the document is sent. It "does not make any sense" that Ms. Mazinani would pay a process server $90 to hand deliver a two-page document that could have been sent by fax.

[18] Fourth, the wording and format of the first and second offers were “virtually identical”. Ms. La Madrid asked Ms. Bandura to send her a copy of the first offer after receiving notification of its acceptance on September 20, 2016. If Ms. La Madrid already had a copy of the first offer, there would have been no need to request a copy of Ms. Bandura. The motion judge was inescapably led to the conclusion that Ms. Mazinani did not prepare the second offer to settle until after she received the acceptance of the first offer.

[19] Fifth, although the appellants produced affidavits of service for other documents served on Mr. Schorr during the progress of the action, the appellants failed to file an affidavit of service from the process server attesting to service of the second offer. The motion judge drew an adverse inference from this failure.

[20] Sixth, each of the affidavits of Ms. La Madrid and Ms. Mazinani attached as an exhibit a copy of an invoice from the process server, Shahnaz from ASEAA Process Servers. No surname for Shahnaz was noted. Problematically, the invoices were not identical. The version identified by Ms. La Madrid was also attached as a schedule to the appellants’ factum which was signed by Ms. Mazinani. In the notes section at the bottom of this invoice, were typed the words: ‘Dead-line September 19, 2016’ and under those words was the hand-written word: ‘done’. No date or time was noted. In contrast, the invoice attached to Ms. Mazinani’s affidavit included the added words: ‘Shahnaz on 19,09,2016 in the afternoon’. The motion judge concluded that those additional words were added to

the original invoice at some point after the invoice was attached to Ms. La Madrid's affidavit and the appellants' factum. Ms. Mazinani signed the factum with one version of the invoice and swore her affidavit with the altered version. The motion judge found that the invoice was intentionally altered. She could not say by whom but did conclude that Ms. Mazinani was aware of the difference between the two documents.

[21] The motion judge raised the discrepancy during oral argument and counsel then sought an adjournment. This was the fourth time the motion had been up for argument. There had been non-compliance with an earlier production order and the respondent wished to proceed. The motion judge declined the adjournment request. However in the end result, the motion judge stated that she placed no weight on either version of the invoice.

[22] The motion judge was satisfied that the respondent accepted the first offer before it had been revoked. Accordingly, she granted judgment in favour of the respondent as requested. She also awarded costs of $14,992.89 on a full indemnity basis given the appellants' conduct.

Appeal

[23] The appellants appeal from that judgment and also seek leave to admit fresh evidence.

(a) Grounds of Appeal

[24] Initially, the appellants took the position on appeal that the motion judge had misinterpreted Rule 49. They stated that even if the respondent had not received the second offer before he accepted the first offer, the third offer to settle allegedly made at the September 20 pretrial had already operated to revoke the first offer. At the commencement of oral submissions, the appellants withdrew this ground of appeal.

[25] Having acknowledged that the first offer was made in accordance with Rule 49.02(1), the motion judge correctly concluded that any revocation of that offer had to comply with Rule 49.04(1). That subsection provides that an offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal. This court has determined that the common law principles of contract law relating to offer and acceptance do not apply to Rule 49. That Rule requires that a Rule 49 written offer to settle may only be withdrawn in writing: *York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.* (1989), 70 O.R. (2d) 317. Moreover, there was no evidence of any third offer before the motion judge. She did not err in rejecting the appellants' argument on this issue and the appellants properly withdrew this ground of appeal.

[26] The focus of the appeal is the appellants' submission that the motion judge failed to recognize and apply the two-step analysis required on a motion to enforce

the acceptance of a Rule 49 offer. They argue that she erred in not hearing viva voce evidence and in failing to make credibility findings in the face of genuine, disputed issues of credibility.

[27] In *Capital Gains Income Streams Corp. v. Merrill Lynch Canada Inc.* (2007) 87 O.R. (3d) 464 at paras. 9-10, Carnwath J., sitting in Divisional Court, described the two step analysis to be followed when considering a request to enforce a Rule 49 offer. The first step is to consider whether an agreement to settle has been reached. In doing so, the motion should be treated as a Rule 20 summary judgment motion. The second step is to consider whether, on all the evidence, the agreement should be enforced. See also *Olivieri v. Sherman*, 2009 ONCA 772 at para. 27.

[28] Although *Capital Gains* was decided before the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, which altered the framework for granting summary judgment, the two-step approach applied to the enforcement of a Rule 49 offer remains unaltered.

[29] Neither counsel raised the approach described in *Capital Gains* with the motion judge. However, even though she did not expressly advert to that method, she nonetheless applied it. She recognized that her task was to determine three things: (i) whether the first offer was revoked at the pretrial; (ii) the timing of service of the second offer, and (iii) whether the settlement should be enforced.

[30] With respect to the first question, as already discussed, as a matter of law, the Rule 49 offer had to be revoked in writing. It is uncontested that it was not. In addition, as a matter of fact, there was no evidence before the motion judge that the first offer had been revoked at the pretrial.

[31] With respect to the second question, the arguments against the appellants' version of events were many. Indeed, the motion judge gave six reasons for rejecting the appellants' position. The appellants take issue with each of them.

[32] However, in my view, one factor in particular was fatal to the appellants' case. The motion judge noted that the appellants had known for over a year that the respondent was taking the position that their counsel was not served with the second offer until 5:23 pm on September 20, 2016. Yet, the appellants never provided an affidavit of service from the process server. This, in spite of the fact that they had produced affidavits of service for other documents served on the respondent, including two from the same process server who allegedly served the second offer on the respondent. This absence of an affidavit of service weighs heavily in the respondent's favour. The case turned on the timing of service of the second offer. In the absence of such critical evidence, it was reasonable for the motion judge to find against the appellants.

[33] While it was open to the motion judge to hear viva voce evidence, this was unnecessary. The motion judge had affidavits from Mr. Schorr and Ms. Bandera

that supported the respondent's position on the timing of the second offer. As has been repeatedly stated in the jurisprudence, on a summary judgment motion, the motion judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial: *Dawson v. Rexcraft Storage & Warehouse Inc.*, (1998), 111 O.A.C. 201 at para. 17; and *Chao v. Chao*, 2017 ONCA 701 at para. 24. The same is true on a motion to enforce a Rule 49 offer; a party must put its best foot forward: *Martin v. St. Thomas -- Elgin General Hospital*, 2018 ONSC 799 at para. 49.

[34] It was incumbent on the appellants to answer the respondent's version of events. However, they did not file an affidavit of service from the process server to establish the date and time of service. They never proposed that the process server be called as a witness, nor did they provide an explanation for the absence of an affidavit of service. Indeed, when the motion judge sought an explanation at the hearing before her, none could be given.

[35] Furthermore, the appellants opted not to cross-examine on any of the affidavits filed by the respondent. They had ample time to do so; indeed, the motion had been adjourned on three prior occasions. Based on the record before her, it was open to the motion judge to conclude as she did. At its core, this was not a case of a conflict in the evidence, but a case of lack of evidence.

[36] Nor was the motion judge required to grant an adjournment so that Ms. Mazinani could attend to explain the discrepancies in the copies of the invoice. The refusal to grant an adjournment is a discretionary decision. The scope for appellate review is limited to whether the discretion is exercised judicially on proper principles, after considering all relevant factors: *Estrada v. Estrada*, 2016 ONCA 697 at para. 2; *Romanko v. Aviva Canada Inc.*, 2018 ONCA 663 at para. 4. Absent any such omission, the decision not to grant an adjournment is entitled to deference. The motion had already been scheduled four times and the discrepancies ought to have been evident to counsel who had filed the differing versions of the invoice. In addition, and most importantly, the motion judge expressly placed no weight on either version of the invoice.

[37] In my view, the motion judge complied with the substance of the first step of the two-step approach described in *Capital Gains* and properly applied the analogous Rule 20 analysis.

[38] The appellants also submit that the motion judge erred in failing to recognize and apply the second step in that she neglected to consider relevant factors and instead considered irrelevant factors on whether it would be unjust to enforce the settlement.

[39] This argument is readily answered. First, counsel for the appellants candidly acknowledges that the motion judge was not asked to consider the second step.

The appellants also did not communicate to her that, when exercising her discretion, she ought to consider certain factors. Second, the motion judge nonetheless did consider whether on all the evidence she should enforce the offer. In *Milos v. Zargas* (1998), 38 O.R. (3d) 218 (C.A.), Osborne J.A. stated that in determining whether to enforce a settlement under Rule 49.09, all of the relevant factors disclosed by the evidence must be taken into account. Although the *Milos* decision was not brought to her attention, at para. 10 of her reasons, the motion judge stated:

> The defendants did not ask me to exercise my discretion to decline to enforce the terms of the June 8, 2015 offer to settle. In my view, there is no basis for me to do so. The fourth paragraph of the offer stated that it will remain open until the trial of the action. There is no evidence that the defendants were misled into making the offer or did so under some undue pressure. The offer was prepared and served by their lawyer at the time. As noted by the Court in *Yonge Village Recreation Centre Limited v. York Condominium Corporation No. 201*, (2007) 229 O.A.C. 144 (Div. Ct), the discretion not to enforce an offer to settle is to be exercised on a case by case basis and only rarely and in the presence of compelling circumstances. None exist in this case.

[40] Third, counsel was unable to point to any compelling inequity that arose from the enforcement of the settlement offer. It must be recalled that the appellants never took the position that the second offer was served twice or that this was a case of mistake. There was no legitimate basis on which equity might intervene.

Enforcement of the Rule 49 offer to settle, which was stated to be open for acceptance until the trial, cannot be said to have been unfair.

Fresh evidence

[41] Lastly, the proposed fresh evidence consists of an affidavit sworn by Ms. La Madrid, which is largely based on information received from Ms. Mazinani. It does not include any further affidavit from Ms. Mazinani herself, nor an affidavit from the alleged process server, Shahnaz, for whom no surname was provided. The proposed fresh evidence consisting of an affidavit from the appellant, Hamidreza Zarrinkalam, was withdrawn by counsel for the appellants at the commencement of the oral submissions.

[42] The fresh evidence does not meet the test articulated in *R. v. Palmer*, [1980] 1 S.C.R. 759 and *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.) and recast in *R. v. Truscott*, 2007 ONCA 575, 225 c.c.c. (3d) 321.

[43] Through the exercise of due diligence, the proposed fresh evidence could have been adduced prior to the return of the motion. More importantly, even if the evidence is reasonably capable of belief, which is questionable, it could not reasonably be expected to have affected the result.

[44] The proposed fresh evidence addresses the wording on the invoices filed by the appellants. The motion judge expressly gave no weight to the invoices. As discussed, the affidavits of Mr. Schorr and Ms. Bandera positively identified the

chain of events. There was no affidavit of service from the process server, nor any explanation for its absence. In essence, the evidence of the respondent went unanswered. The fresh evidence could not reasonably be expected to have altered the result.

Disposition

[45] In conclusion, I would dismiss the appeal and the motion to admit fresh evidence. I would order the appellants to pay the respondent costs of $10,500 on a partial indemnity scale inclusive of disbursements and applicable tax.

Released: “S.E.P.” October 22, 2018

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. David M. Paciocco J.A.”