

COURT OF APPEAL FOR ONTARIO

CITATION: OLA Staffing Inc. v. D'Angelo Brands (2156775 Ontario Inc.), 2018
ONCA 922
DATE: 20181119
DOCKET: C64856

Watt, Miller and Nordheimer JJ.A.

BETWEEN

OLA Staffing Inc.

Plaintiff (Respondent)

and

2156775 Ontario Inc. o/a D'Angelo Brands

Defendant (Appellant)

Gregory Hemsworth, for the appellant

Kathryn Bird and Edward O'Dwyer, for the respondent

Heard and released orally: November 16, 2018

On appeal from the judgment of Justice Freya Kristjanson of the Superior Court of Justice, dated December 11, 2017 with reasons reported at 2017 ONSC 7318.

REASONS FOR DECISION

[1] The defendant appeals from the summary judgment awarded by the motion judge for payment of outstanding invoices rendered by the plaintiff.

[2] The appellant contracted with the respondent for the provision of temporary employees to staff its manufacturing plant. There was a master contract between

the parties governing their relationship and then there were individual requests for the provision of temporary employees. These arrangements began in 2008. The issue between the parties arose in 2013.

[3] The practice was that, when the appellant needed employees, one of its employees would contact the respondent and make that request. The respondent would then provide the employees requested. The appellant would assign these employees to their duties and would advise the respondent of the hours worked. The respondent would pay the temporary employees for the work done and would then invoice the appellant for the costs of providing the employees.

[4] Unbeknownst to either of the parties, the appellant's representative engaged in a fraudulent scheme whereby he would request three specific temporary employees to work at the appellant's plant. However, those temporary employees did not actually work at the plant. Instead, the appellant's representative would certify to the respondent that the employees had worked and the employees would receive the payments. The appellant would then get invoiced by the respondent for these employees.

[5] The appellant eventually discovered this fraudulent scheme and advised the police. The appellant continued to use the services of the respondent. At a later point, the appellant refused to pay certain invoices due to the respondent on the

basis that it was recouping the monies paid to the respondent for the employees involved in the fraudulent scheme who had not actually worked.

[6] The respondent commenced this action to recover payment for the unpaid invoices. The appellant defended on the basis that it was entitled to a set-off for the earlier monies paid to the respondent for the employees who had not worked together with the costs of investigating the fraud. The appellant did not counterclaim for the amounts so paid.

[7] In granting summary judgment, the motion judge made three essential findings. The first was that much of the evidence that the appellant filed on the summary judgment motion was hearsay (or double hearsay) and was not entitled to any weight. We agree. The appellant's reliance on r. 39.01(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for the admissibility of this evidence falters on the fact that the deponent did not attest to his belief in the information provided.

[8] The second was that the appellant could not rely on the defence of legal set-off because the amount claimed by way of set-off was a claim for unliquidated damages and thus was not a debt. We agree with the motion judge's analysis on this issue.

[9] The third was that the defence of equitable set-off was not available because the "transactions were not sufficiently closely linked for equitable set-off to apply" (para. 45). We do not agree with the motion judge's reasoning in this respect. In

our view, the transactions were closely linked. They were all part and parcel of the same contractual relationship. That relationship had been ongoing for many years and was governed by an overriding master contract.

[10] That said, we nonetheless agree with the conclusion reached by the motion judge that equitable set-off was not available in this case. Our reason for that conclusion rests on the first requirement for the application of equitable set-off, that is, that the party relying on a set-off “must show some equitable ground for being protected against the adversary's demands”: *Algoma Steel Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.) at para. 26. In this case, there is no equitable ground favouring the appellant. It was the appellant's representative who orchestrated the fraud, including certifying to the respondent that the employees had worked which the respondent relied on for its invoices. In those circumstances, it is the appellant who should bear any loss that resulted. The appellant was also in the best position to discover and prevent the fraud since it knew, or ought to have known, whether the employees actually worked in its plant. This factor also argues in favour of the appellant bearing the resulting loss.

[11] Consequently, we agree with the motion judge that summary judgment was properly granted in favour of the respondent for the amounts due on the unpaid invoices.

DISPOSITION

[12] The appeal is dismissed. The appellant will pay to the respondent the costs of the appeal fixed in the agreed amount of \$10,000 inclusive of disbursements and HST.

“David Watt J.A.”

“B.W. Miller J.A.”

“I.V.B. Nordheimer J.A.”