

COURT OF APPEAL FOR ONTARIO

CITATION: Sabongui v. Soon-Shiong, 2019 ONCA 64

DATE: 20190128

DOCKET: C65426

Rouleau, van Rensburg and Benotto JJ.A.

BETWEEN

Andre Sabongui and Maribeth Sabongui

Plaintiffs/ Defendants by Counterclaim
(Respondents)

and

Dr. Greg Soon-Shiong and Pinnacle Diagnostics Inc.

Defendants/Plaintiffs by Counterclaim
(Appellants)

Jeffrey Kaufman, Bradley Adams and Diana Blesko, for the appellants

Jamie Spotswood and Anna-Catherine Norwood, for the respondents

Heard: January 25, 2019

On appeal from the judgment and order of Justice Markus Koehnen of the Superior Court of Justice, dated March 29, 2018.

APPEAL BOOK ENDORSEMENT

[1] The appellants argue that the trial judge erred in finding that they had been unjustly enriched by the transfer for no payment of two valuable licenses. They maintain that the parties had tried but were unable to reach a contractual agreement.

[2] In their submission where, as in this case, there is a failed contract negotiation, a court cannot use unjust enrichment to, in effect, impose a contract on the parties. In that regard, the appellants rely on *Skibinski v. Community Living British Columbia*, 2012 BCCA 17.

[3] We reject this submission. This is, in effect, the same submission that was made and rejected at trial. As explained by the trial judge, the circumstances in *Skibinski* were materially different than those of the present case. *Skibinski* did not involve obtaining a valuable asset without consideration and the court in that case found that there was no reasonable expectation of payment.

[4] In the present case, the trial judge found as a fact, based on the record before him, that the appellants had no reasonable expectation that they were to receive the licenses for nothing.

[5] The appellants further argue that the trial judge erred in reaching this conclusion. They submit that in making the finding that at the time of the transfer of the licenses, the appellants had no reasonable expectation of receiving the licenses for nothing, the trial judge improperly relied on post transfer evidence. We disagree. The trial judge was entitled to and in fact, required to consider all admissible evidence in making his findings.

[6] The appellants further submit that the equitable remedy was not available because the respondents – having misrepresented facts to the Ministry – did not

come to the court with clean hands. Again, we disagree. The respondents' conduct of which the trial judge was aware, did not relate to the benefit conferred on the appellants and did not bar the claim.

[7] The appellants also challenge the damage award. They allege the trial judge erred in including \$5,871 for which there were not receipts, in allocating only 17.6% of the expenses to the respondents and in awarding \$25,000 for Mr. Sabongui's services. We disagree. The trial judge's assessment of damages is entitled to deference.

[8] In determining the amount for expenses, the trial judge relied on the evidence of Ms. Zidel, hired by the appellants who was tasked with reconciling the respondents' expense claim. She was able to reconcile \$55,913.01 of expenses before her departure and the trial judge accepted that a further \$50,993.62 of expenses were supported by invoices. Although invoices for a small amount of expenses may have been missing, there was oral evidence supporting the expenses.

[9] As for the allocation, the appellants argue that it is based on an incomplete calendar of diagnostic appointments prepared by Ms. Zidel. Because it was based on an incomplete calendar, the appellants argue that, that claim should have been dismissed. The appellants however acknowledged that the respondents were

entitled to some reimbursement. The trial judge was entitled to do the best with the evidence he had to arrive at a reasonable allocation.

[10] We would also not interfere with the award of \$25,000 for Ms. Sabongui's services. The trial judge accepted that services were provided, that the award was in the circumstances modest compared to what was claimed.

[11] For these reasons, the appeal is dismissed.

[12] Costs to the respondents fixed at \$20,786.59 inclusive of disbursements and applicable taxes.