COURT OF APPEAL FOR ONTARIO

CITATION: MacQuarie Equipment Finance Ltd. v. 2326695 Ontario Ltd. (Durham Drug Store), 2020 ONCA 139
DATE: 20200220
DOCKET: C67478

MacPherson, Sharpe and Jamal JJ.A.

BETWEEN

MacQuarie Equipment Finance (Canada) Limited

Plaintiff (Respondent)

and

2326695 Ontario Ltd. operating as Durham Drug Store

Defendant (Appellant)

and

MedviewMD Inc., Leasecorp Capital Inc., and Daniel Nead

Third Parties (Respondent)

Amer Mushtaq, for the appellant

Ron Aisenberg, for the respondent, MacQuarie Equipment Finance (Canada) Limited

No one appearing for the respondent, Leasecorp Capital Inc.

Heard: February 3, 2020

On appeal from the judgment of Justice Lorne Sossin of the Superior Court of Justice, dated August 28, 2019, with reasons reported at 2019 ONSC 5019.

By the Court:

Introduction

[1] The appellant, 2326695 Ontario Limited operating as Durham Drug Store ("Durham Drug Store"), appeals from the motion judge's decision granting summary judgment to the respondent, Macquarie Equipment Finance (Canada) Limited ("Macquarie"), for $90,057.13 under a lease financing agreement dated February 19, 2016 (the "Lease").

[2] Macquarie cross-appeals the motion judge's decision to award pre- and post-judgment interest at the rates prescribed under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, rather than at the contractual rate under the Lease of "up to 2.0% per month (24% per annum)".

[3] For the reasons that follow, the appeal is allowed. In the unusual circumstances of this case, Durham Drug Store had a right to terminate the Lease and return the leased equipment to Macquarie upon the default of the respondent, MedviewMD Inc. ("Medview"). The cross-appeal is dismissed as moot.

Background facts

[4] Durham Drug Store operates a pharmacy in Pickering, Ontario, run by its principal, Ms. Zeinab Abdulaziz, a pharmacist.

[5] In late 2015, Mr. Daniel Nead met with Ms. Abdulaziz to propose a business arrangement between Medview, of which he was a representative, and Durham

Drug Store. Based on that proposal, Durham Drug Store engaged Medview to supply a telemedicine studio in the pharmacy to provide remote medical services to the public.

[6] Medview then contacted Mr. Barry Johnston, a representative of the respondent, Leasecorp Capital Inc. (“Leasecorp”), an equipment lease broker, to lease Durham Drug Store the necessary telemedicine equipment.

[7] Mr. Johnston met with Ms. Abdulaziz at Durham Drug Store on February 8, 2016, where they completed a credit application. It was approved the next day.

[8] Ms. Abdulaziz’s evidence was that she thought Mr. Johnston was a Medview representative and that he said he was “sent by Nead/Medview.” Mr. Johnston’s evidence was that he identified Macquarie as the equipment lessor.

[9] On February 11, 2016, Medview emailed Ms. Abdulaziz a copy of the written Master Service Agreement (“Medview MSA”) between Medview and Durham Drug Store, which set out the terms of Medview’s proposed telemedicine services, “for review and signing.” Medview’s cover email, copied to Mr. Johnston, stated: “I believe Barry [i.e., Mr. Johnston] will be visiting you tomorrow for signing.”

[10] The Medview MSA emailed to Ms. Abdulaziz was to have the same termination date as the equipment lease. The Medview MSA also contained a broad early termination provision, which reads in relevant part:

> **10. <u>Early Termination</u>.** A Party shall be entitled, at its option, to terminate this Agreement immediately upon notice in writing to the other Party
>
> …
>
> (g) if the other Party shall be in breach of or default under any of the terms, conditions, covenants or agreements contained in this Agreement (other than a breach default [sic] of its payment obligations to the other Party under this Agreement) and shall fail to cure such breach or default within fifteen (15) calendar days after delivery to the other Party of written notice to that effect.

[11] On February 19, 2016, Mr. Johnston visited Ms. Abdulaziz, but did not come with a copy of the proposed Medview MSA. Instead, he came with a proposed Lease between Macquarie and Durham Drug Store.

[12] Ms. Abdulaziz's evidence was that she was busy in the pharmacy with customers and did not review the Lease in detail, believing it to be a version of the Medview MSA. Although she noticed Macquarie's name on the document, she believed it was another business name for Medview. Ms. Abdulaziz's evidence was that Mr. Johnston asked her to sign the paperwork so that Medview could deliver the equipment to Durham Drug Store. She signed it and initialed each page. The whole meeting lasted just a few minutes.

[13] Durham Drug Store then took possession of the telemedicine equipment. Under the Lease, Ms. Abdulaziz was to pay a total of $98,522.31, with monthly payments of $50 for the first three months, and then $1,725.83 plus tax per month for the rest of the lease term. This tracked exactly the Equipment Fee she owed

Medview under the Medview MSA, both in total amount and in payment instalments.

[14] Durham Drug Store paid Macquarie under the Lease for almost a year, but then stopped in February 2017 because it learned that Medview had failed to disclose that its telemedicine services lacked the necessary regulatory approvals. As a result, Durham Drug Store ceased offering telemedicine services.

[15] Macquarie then contacted Durham Drug Store. Ms. Abdulaziz advised Macquarie that she had contacted Medview and it had advised her that the telemedicine equipment would be picked up. Macquarie responded that it had nothing to do with any arrangement she had with Medview, and Durham Drug Store would be responsible for any shortfall if she sold the equipment to Medview.

[16] At this point, Ms. Abdulaziz queried how she had become involved with Macquarie, separate and apart from Medview. She told Macquarie that it could pick up the equipment and sort out the issue with Medview and Mr. Nead.

[17] It was not until then, as the motion judge found, that Macquarie provided Ms. Abdulaziz with a signed copy of the Lease.

[18] Macquarie then sued Durham Drug Store, claiming $90,057.14 under the Lease and for possession of the leased equipment.

[19] Durham Drug Store defended on the basis that it believed that its contract was with Medview and Mr. Nead, not Macquarie, and that it was the victim of a

scam perpetrated by Medview and Mr. Nead. It claimed it was never advised that it was contracting with anyone other than Medview and Mr. Nead.

[20] Durham Drug Store issued a third party claim against Leasecorp, Mr. Nead, and Medview. Mr. Nead and Medview did not defend and were noted in default.

[21] On Macquarie's motion for summary judgment to enforce the terms of the Lease, the motion judge found that although Ms. Abdulaziz "appears to have been the victim of the fraud perpetrated by Medview and Nead, there is no evidence that either Macquarie or Leasecorp participated in or knew about the fraud". He concluded that because the Lease was signed by Ms. Abdulaziz, it was enforceable against Durham Drug Store:

> The failure to provide Abdulaziz with a copy of the lease, and the apparent failure of communication between Johnston and Abdulaziz with respect to the various parties involved in the transaction, and their roles, led to Abdulaziz's understandable confusion and consternation when eventually contacted by Macquarie in relation to the default under the lease agreement, but this confusion and consternation does not vitiate the enforceability of the agreement.

[22] Durham Drug Store now appeals this determination to this court.

[23] In advance of the oral hearing, the court wrote to the parties asking them to be prepared to address the potential application of *Tilden Rent-A-Car Co. v. Clendenning* (1976), 18 O.R. (2d) 601 (C.A.), and *Forest Hill Homes v. Ou*, 2019 ONSC 4332. These cases address how extremely onerous or unfair contract terms

may be unenforceable if inadequate notice of those terms was provided to the other contracting party at the time of contract formation.

[24] In response to the court's letter, the parties filed supplementary authorities and made oral submissions addressing the principles in these decisions.

Analysis

[25] In our view, on the evidence before him, the motion judge was entitled to find that Macquarie and Leasecorp did not participate in or have knowledge of any fraud allegedly committed by Medview and Nead, or fraudulently misrepresent anything to Durham Drug Store.

[26] The fraud alleged was outlined in an affidavit of a former Medview employee. Medview and Mr. Nead had allegedly defrauded several pharmacies by recruiting them to join its telemedicine business and to purchase related equipment. Medview allegedly advised pharmacies that its telemedicine services were approved by the Ontario Ministry of Health, when this was false. Several disputes involving these issues are or have been before the courts.

[27] The motion judge was also entitled to find that the evidence was insufficient to establish that the Lease was an unconscionable agreement, because neither Macquarie nor Leasecorp knowingly took advantage of Ms. Abdulaziz's vulnerability and the Lease was neither unfair nor improvident *per se*.

[28] However, that does not resolve all issues as to the enforceability of the Lease. The Lease also contained a term that purported to eliminate Durham Drug Store's ability to terminate or cancel the Lease during its term "for any reason, including equipment failure, damage or loss":

> **3. <u>Non-Cancellable:</u>** Lessee cannot terminate or cancel this Lease during the Term for any reason, including equipment failure, damage or loss. Lessee acknowledges and agrees that it has selected the Equipment and the Equipment Supplier and such acceptance cannot be revoked at any time. Lessor has purchased the Equipment at Lessee's request and instruction only.

[29] The effect of this provision is that Durham Drug Store would have to keep paying for the equipment even if Medview and Mr. Nead defaulted in providing telemedicine services. Without those services, the equipment was of no use.

[30] As is evident, this "no cancellation" provision in the Lease is at odds with the "early termination" provision of the Medview MSA.

[31] We do not dispute the ability of the contracting parties to agree to such a "no cancellation" provision in an adhesion contract such as the Lease between Macquarie and Durham Drug Store.

[32] Nor do we dispute the binding effect of a party's assent to a contract's terms by signing it, whether or not they read the contract with appropriate care or at all. As noted by Professor John D. McCamus in *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p. 193: "If an agreement is entered into on the basis

of a document proffered by one party and signed by the other, it is clearly established that the agreement between the parties contains the terms expressed in the document, whether or not the signing party has read the documents."

[33] However, Professor McCamus adds that sometimes, even with a signed agreement, inadequate notice of a particularly unfair term may render that term unenforceable, at p. 194:

> In many contractual settings, it will not be expected that a signing party will take time to read the agreement. Even if the document is read, it may well be, especially in the context of consumer transactions, the purport of particular provisions of the agreement will not be understood by the signing party. Under traditional doctrine, then, although the fact of the signature appears to dispense with the notice issue, the opportunities for imposing harsh and oppressive terms on an unsuspecting party are, as a practical matter, as present in the context of signed documents as they are in the context of unsigned documents. Accordingly, it is perhaps not surprising that the recent jurisprudence indicates that notice requirements are migrating into the context of signed agreements.

[34] The leading Ontario case on this point remains this court's decision in *Clendenning*. There, Dubin J.A. (as he then was) for the majority refused to enforce a limitation of liability provision in a car rental agreement that purported to exclude the rental company's liability for a collision where the customer had driven the car after consuming alcohol. Before renting the car, the customer had chosen to pay an additional premium for "collision damage waiver", which he had been led to

understand provided comprehensive insurance for vehicle damage. He signed the rental agreement without reading it.

[35] In finding the exclusion clause unenforceable, Dubin J.A. highlighted that such a rental transaction was typically concluded in a “hurried, informal manner”, and that the liability exclusion provision was “[o]n the back of the contract in particularly small type and so faint in the customer’s copy as to be hardly legible”: at pp. 602, 606. The exclusion clause was also “inconsistent with the over-all purpose for which the transaction is entered into by the hirer”: at p. 606.

[36] In these circumstances, Dubin J.A. concluded that “something more should be done by the party submitting the contract for signature than merely handing it over to be signed” (at p. 606) — namely, reasonable measures must be taken to draw harsh and oppressive terms to the attention of the other party, at p. 609:

> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or *non est factum*.

[37] In our view, the highly unusual circumstances of this case bring it within the principle in *Clendenning*. Without suggesting that there was any intention to mislead Ms. Abdulaziz, here, the no-cancellation provision should have been specifically brought to Ms. Abdulaziz's attention. It should have been explained to her that she would remain obligated to pay for the telemedicine equipment under the Lease even if Medview defaulted on its obligations.

[38] While on its face a no-cancellation clause is a commonplace provision that is neither harsh nor oppressive, here it became so when seen in the light of the interactions among the parties and when juxtaposed with the early-termination provision of the Medview MSA — the only agreement that Ms. Adbulaziz was sent and which Medview advised her, to Mr. Johnston's knowledge, that Mr. Johnston would bring to her for signature. The Lease was then signed in a hurried manner, with no opportunity to negotiate the terms, without Ms. Abdulaziz reading it with any care because Mr. Johnston came by when she was busy in the pharmacy, and without the benefit of legal advice. Moreover, the entire Lease is contained in two tightly-packed pages in extremely small font. While technically legible, it can only be read with difficulty.

[39] Mr. Johnston's evidence was that it was his standard practice to bring certain clauses to the attention of the lessee – the payment terms, the lessor's remedies, and lessee's obligations upon default – but he did not appear to do so in this case

with respect to the no-cancellation provision, nor did he explain that Durham Drug Store would have to keep paying for the equipment even if Medview defaulted.

[40] In these circumstances, it was not reasonable for Mr. Johnston or Macquarrie to have believed that Ms. Abdulaziz really assented to the no-cancellation provision of the Lease, which was at odds with the termination provision in the Medview MSA, without having first taken reasonable measures to bring that clause to her attention.

[41] As the motion judge found, the “apparent failure of communication” between Mr. Johnston and Ms. Abdulaziz and the failure to provide Ms. Abdulaziz with a copy of the Lease led to her “understandable confusion and consternation” when Macquarie ultimately contacted her about her default. In our view, in this case that failure of communication bears on the enforceability of the Lease.

[42] In all the circumstances, the no-cancellation provision is unenforceable. Upon Medview’s default, Durham Drug Store was entitled to terminate the Lease and return the leased equipment to Macquarie. This is in effect what it purported to do when Medview defaulted and it told Macquarie to pick up the equipment.

[43] Given this conclusion, it is not necessary to address whether interest is payable at the contractual rate of 2% per month for the remainder of the term of the Lease. That issue is moot.

Disposition

[44] The appeal is allowed. The cross-appeal is dismissed as moot. Costs of the appeal and cross-appeal are payable by Macquarie to Durham Drug Store in the agreed amount of $15,000, inclusive of disbursements and taxes.

Released: February 20, 2020 (“J.C.M”)

“J.C. MacPherson J.A.”
“Robert J. Sharpe J.A.”
“M. Jamal J.A.”