

COURT OF APPEAL FOR ONTARIO

CITATION: Tiwari v. Singh, 2023 ONCA 163

DATE: 20230307

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Roberts, Nordheimer and Favreau JJ.A.

BETWEEN

Sangeeta Tiwari

Plaintiff (Respondent)

and

Baljinder Singh, Bhinder Law Office, Rajeev Gulati and
ISH Financial Services Ltd.

Defendants (Appellants)

Amanpreet Singh Nagpal, for the appellants

Raj Datt, for the respondent

Heard: March 3, 2023

On appeal from the judgment of Justice Lucy K. McSweeney of the Superior Court of Justice, dated December 21, 2021.

REASONS FOR DECISION

[1] The appellants, Rajeev Gulati and ISH Financial Services Ltd., appeal a judgment made on summary judgment requiring them to pay \$174,500 to the respondent, Sangeeta Tiwari. After hearing the appellants' submissions, the panel dismissed the appeal with reasons to follow. These are the reasons.

[2] In 2016, Ms. Tiwari made a deposit to buy a property in Brantford, Ontario. When the building was completed in 2018, Ms. Tiwari was not able to get a mortgage from a lending institution to close the purchase. Instead, she borrowed \$270,000 from several family members and friends. She then paid the full purchase price without a mortgage.

[3] After the transaction closed, Ms. Tiwari was able to obtain a mortgage for \$270,000 from Desjardins Financial which she intended to use to pay back her family and friends. Ms. Tiwari says that, based on advice she and her husband received from Mr. Gulati, she believed that she could only get a mortgage from a financial institution if it was for the purpose of paying out another mortgage. On that basis, she signed an authorization prepared by Mr. Gulati directing that Desjardins Financial pay the \$270,000 to ISH Financial, which was described as a “creditor” with which she had a mortgage.

[4] There was no dispute between the parties that ISH Financial never lent \$270,000 to Ms. Tiwari. After receiving the funds, ISH Financial distributed \$95,500 dollars to some of the family and friends who had lent money to Ms. Tiwari. However, Mr. Gulati and ISH Financial refused to return the rest of the money to Ms. Tiwari.

[5] Ms. Tiwari commenced an action against the appellants and brought a motion for summary judgment. The motion judge granted summary judgment,

finding that Mr. Gulati and ISH Financial had no legal basis for retaining the \$174,500 they had not distributed. In making this finding, the motion judge rejected the appellants' position that the \$95,500 they distributed consisted of charitable donations and that the \$174,500 balance was disbursed to a third party, Sanjeev Leekha of Annie Financial, to pay off a loan Ms. Tiwari's husband had obtained from this third party.

[6] The appellants submit that the motion judge erred in improperly relying on hearsay evidence. They point to Ms. Tiwari's cross-examination to argue that the discussions about the transactions at issue occurred between Mr. Gulati and Ms. Tiwari's husband, and that she therefore had no firsthand knowledge of those discussions. They also argue that the motion judge improperly relied on text messages between Mr. Gulati and Ms. Tiwari's husband that were attached to Ms. Tiwari's affidavit. We do not agree.

[7] The motion judge did not improperly rely on hearsay evidence in concluding that Mr. Gulati and ISH Financial were not entitled to keep the \$174,500. In her affidavit, Ms. Tiwari recounted Mr. Gulati's advice about how she could obtain a loan from a financial institution and that it was this advice that led her to having the \$270,000 obtained from Desjardins Financial disbursed to ISH Financial. In cross-examination, while Ms. Tiwari admitted that these discussions took place between Mr. Gulati and her husband, it was unclear the extent to which she was present when at least some of these discussions took place. In any event, this was

not improper hearsay evidence. In her affidavit, Ms. Tiwari was simply recounting what Mr. Gulati told her and her husband, and not relying on this evidence for its truth on the motion. Further, it was open to Mr. Gulati to counter Ms. Tiwari's evidence in an affidavit or to seek to examine Ms. Tiwari's husband as a witness on the motion. Notably, in the transcript of Ms. Tiwari's cross-examination, counsel for Ms. Tiwari offered more than once to make Ms. Tiwari's husband available for examination. Finally, we note that there is nothing improper *per se* in relying on information and belief on a motion for summary judgment: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 20.02(1).

[8] In addition, the text messages are not hearsay evidence. They qualify as admissions by Mr. Gulati and the appellants never challenged their authenticity.

[9] More importantly, what Ms. Tiwari says Mr. Gulati told her has little bearing on the motion judge's decision. The issue between the parties was whether Mr. Gulati and ISH Financial were unjustly enriched. In finding that they were not entitled to keep the funds, the motion judge did not rely on what Ms. Tiwari said Mr. Gulati told her, but on other evidence, including documentary evidence. There was no dispute that Mr. Gulati and ISH Financial did not lend any money to Ms. Tiwari. Therefore, in order to resist Ms. Tiwari's claim, they would have to demonstrate some legal or factual basis for not returning the funds. The motion judge found that there was no basis for several reasons. First, she relied on a document prepared by Mr. Gulati that confirmed that \$95,500 was disbursed to

Ms. Tiwari's family and friends, and that these funds were therefore not used as charitable donations. Second, she found that Mr. Gulati appeared to acknowledge the debt in his text messages with Ms. Tiwari's husband. Finally, she found that there would be no proper basis for Mr. Gulati or ISH Financial to disburse the funds to a third party for the purpose of paying a debt owed by Ms. Tiwari's husband because the funds were Ms. Tiwari's and not her husband's.

[10] On the motion for summary judgment, the appellants had an obligation to put their best foot forward: *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at para. 26, aff'd 2014 ONCA 878, leave to appeal refused, [2015] S.C.C.A. No. 97. As found by the motion judge, they failed to do so. We agree with the motion judge that this was an appropriate case for summary judgment.

[11] The appeal is dismissed. We award costs in the amount of \$7,500 inclusive of disbursements and HST to Ms. Tiwari.

"L.B. Roberts J.A."
"I.V.B. Nordheimer J.A."
"L. Favreau J.A."