COURT OF APPEAL FOR ONTARIO

CITATION: Goberdhan v. Knights of Columbus, 2023 ONCA 327
DATE: 20230505
DOCKET: C70946

van Rensburg, Paciocco and Thorburn JJ.A.

BETWEEN

Neil Goberdhan

Respondent (Plaintiff)

and

Knights of Columbus

Appellant (Defendant)

Tudor Carsten and Giovanna Di Sauro, for the appellant

Joel P. McCoy, for the respondent

Heard: April 24, 2023

On appeal from the order of Justice David E. Harris of the Superior Court of Justice, dated June 27, 2022.

REASONS FOR DECISION

[1] This is an appeal from an order dismissing the appellants' motion for a stay of proceedings in favour of arbitration. At the end of the oral hearing, we dismissed the appeal. These are our reasons.

OVERVIEW

[2] The appellant Knights of Columbus ("Knights") is a fraternal benefit society that offers insurance products to its members. The respondent was a field agent who sold insurance through the Knights organization. The parties signed three field agent contracts: the first on April 17, 2011, when the respondent first started working as a field agent for Knights; the second on October 5, 2018; and the third on April 5, 2019. The respondent's field agency was terminated on April 30, 2019. In June 2020, he sued for wrongful dismissal asserting that he was entitled to severance pay and termination notice pay, based on his claim to be an employee of the appellant, as well as outstanding wages and commissions and punitive damages.

[3] The appellant filed a notice of intent to defend and then moved under r. 21.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 for an order to stay the wrongful dismissal action pursuant to s. 7(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 16. The appellant relied on mandatory arbitration clauses that were contained in the second and third contracts signed by the parties.

[4] The motion judge dismissed the motion. He concluded that: (1) the respondent was an employee, not an independent contractor; and (2) the second and third contracts were invalid for want of fresh consideration, as were the mandatory arbitration clauses contained within them.

ANALYSIS

[5] The appellant raised two issues on appeal: (1) whether the motion judge erred in concluding that there was no valid arbitration clause; and (2) whether the motion judge erred in making a decision on its stay motion, about whether the respondent was an employee. The respondent raised a preliminary issue, asserting that there is no right of appeal because of s. 7(6) of the *Arbitration Act*.

(1) Jurisdiction to hear the appeal

[6] The respondent relied on s. 7(6) of the *Arbitration Act* as foreclosing an appeal of the motion judge's decision. Section 7(6) states that "there is no appeal from the court's decision" on a motion to stay brought under section 7(1) of the Act. The respondent asserted that the appellant's motion was brought under s. 7(1) and that the motion judge, after determining that there was an absence of consideration for the agreements containing a mandatory arbitration clause, concluded that the arbitration agreements were invalid and dismissed the motion under s. 7(2). The respondent relied on a statement from the Supreme Court's decision in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 91:

> Given the absence of any qualifying language, s. 7(6) must be taken as referring to a "decision" made under any subsection contained in s. 7 [and] would include, for example, a decision to stay the proceeding under s. 7(1), a decision to refuse a stay under s. 7(2), or a decision to order a partial stay under s. 7(5).

[7] We did not give effect to this argument.

[8] The fact that the appellant brought its stay motion relying on the *Arbitration Act*, and that the motion judge's determination was that the arbitration agreement was "invalid" under s. 7(2), are not determinative. In *Huras v. Primerica* (2000), 137 O.A.C. 79 (C.A.), this court stated that, where a court finds that there is no arbitration clause (in that case because the clause was unconscionable), the *Arbitration Act* has no application, and the dispute lies beyond the scope of s. 7: at paras. 9-10. The court noted that "it follows that if the court has decided that the *Act* is not applicable, then the prohibition against an appeal in s. 7(6) is equally not applicable": at para. 10.

[9] The authority of Huras, and the jurisprudence that followed it, was recently confirmed by a five-judge panel of this court in *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612, at paras. 3-8. In that case, Jamal J.A. (as he then was) addressed and rejected the argument made here, that *Wellman* changed the law in respect of the scope and application of s. 7(6). He concluded that *Wellman* "did not disturb the *Huras* line of cases on the interpretation of s. 7(6)", and that "the *Huras* line of cases was correctly decided": at para. 6.

[10] In this case, the motion judge concluded that there was no consideration given for the two contracts containing arbitration clauses. In other words, there was

no subsequent contract, and there was no arbitration clause. As such, the *Arbitration Act*, including s. 7(6) that prohibits an appeal from a decision dismissing a motion to stay, has no application. For these reasons we dismissed the respondent's preliminary challenge to our jurisdiction to hear the appeal.

(2) Did the motion judge err in refusing to stay the action?

[11] The appellant argued that the motion judge erred in two ways when he refused to stay the action.

[12] First, the appellant asserted that the motion judge was required to grant a stay so long as it was "arguable" that the dispute fell within the scope of arbitral jurisdiction. It would then fall to the arbitrator to determine whether the arbitration clause applied. The appellant relied on *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, 475 D.L.R. (4th) 1, at para. 39, to argue that the determination of arbitral jurisdiction is a question for an arbitrator to make. The only exceptions are where the challenge to jurisdiction raises a pure question of law or questions of mixed fact and law requiring only superficial consideration of the evidentiary record: at para. 42. See also *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, at paras. 31-36 and *Irwin v. Protiviti*, 2022 ONCA 533, at paras. 10-11.

[13] We did not accept this submission.

[14] *Peace River* sets out a two-step process to be applied in determining whether court proceedings should be stayed in favour of arbitration. First, the party relying on an arbitration provision must establish the technical requirements for a mandatory stay of proceedings, including that there is an agreement to arbitrate: at para. 83. Then, a stay in favour of arbitration will follow unless the opposing party establishes one of the exceptions (in Ontario, under s. 7(2)): at paras. 79, 87-90.

[15] The court went on to note that a stay application should only be dismissed on the basis of a statutory exception in a "clear case", "for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator": at para. 89. See also *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), at para. 22.

[16] In our view this was a clear case where the motion judge was able to determine the question at issue – whether there was fresh consideration to support the contracts containing arbitration clauses – on the evidence before him. In this case, the motion judge was able to find on the evidence before him that there was no fresh consideration for the agreements containing an arbitration clause. This was not a proposition that was "merely arguable". Accordingly, we did not accept the appellant's first challenge to the motion judge's decision.

[17] Second, the appellant asserted that the motion judge's conclusion that the second and third contracts were void for want of fresh consideration was based on insufficient evidence, and that he wrongly focused on the appellant's failure to prove consideration rather than on whether the respondent had met his burden to prove that the arbitration agreement was invalid.

[18] We did not accept this argument.

[19] The respondent's evidence on the motion with respect to lack of consideration consisted of the following: at para. 2 of his affidavit, he stated that his contract was modified without consideration. At para. 4 he stated that the second contract materially modified the employment relationship by altering the severance/termination pay he would receive, altered the terms of employment for cause and inserted an arbitration agreement, and that he had no choice to sign if he wanted to continue his employment. The respondent stated at para. 7 that he did not receive any additional consideration for the modification of his contract beyond continued employment, and at para. 8 that he never received a promotion nor was provided with additional benefits after signing an agreement.

[20] The appellant submitted that these statements were insufficient in light of the changes to the contracts which themselves could constitute consideration, and that the respondent failed to meet his onus to explain why the various changes did not amount to fresh consideration.

[21] We did not agree. The respondent's statements were not bald or conclusory. They amounted to his evidence that the new contracts were not advantageous to him and that he had not received any benefit other than continued employment. The respondent's evidence was not challenged by cross-examination, nor did the appellant put forward any evidence that there had been fresh consideration for the new contracts. Instead, at the hearing of the motion the appellant pointed to the differences between the original contract and the later contracts, to argue that the changes constituted consideration. In particular, the appellant pointed to the addition of a provision for non-binding mediation and mandatory arbitration of disputes and the change from Connecticut to Ontario as the governing law.

[22] These arguments were addressed by the motion judge, who concluded that the mediation and arbitration clauses were not fresh consideration: giving up the right to trial by jury, to participate in a class action, and to institute a court action were a detriment to the respondent, and that the change of law could not be considered a benefit without evidence (on appeal the respondent correctly pointed out that to the extent he was an employee, Ontario law would prevail in any event: see *Employment Standards Act*, 2000, S.O. 2000, c. 41, s. 3(1)).

[23] The motion judge concluded that, on the evidence, the respondent "had no practical choice but to sign the new contracts if he wished to continue to work for the [appellant]." There was no error in his approach to and application of the

evidence in determining that the second and third contracts, and accordingly the arbitration clauses that they contained, were invalid for lack of fresh consideration.

(3) Did the motion judge err in concluding that the respondent was an employee?

[24] Finally, the appellant asserted that the motion judge erred in determining that the respondent was an employee and not an independent contractor. It submitted that this was not a question that was squarely before the motion judge and was not one to be determined on this record, and without a motion for summary judgment.

[25] The respondent pointed out that the appellant raised the question of his status in its notice of motion and affidavit evidence (asserting that he was an independent contractor in response to the statement of claim alleging that he was an employee), and that some of the cases relied on by the parties with respect to consideration for contract amendments were employment law cases. The respondent fairly acknowledged however that the motion judge's conclusion that he was an employee was not central or necessary to his decision to refuse a stay, which was based on the finding that there was no fresh consideration for the contracts containing the arbitration clause, and that the respondent had no choice but to sign the subsequent contracts if he wanted to continue working as a Knights field agent.

[26] The motion judge's finding that the respondent was an employee, which was made in the context of the stay motion, at the outset of proceedings and before a statement of defence had been delivered, is not a final determination of what is a central issue in these proceedings. It is open to the appellant to argue, on the basis of a full record – at trial or on a motion for summary judgment – that the respondent was an independent contractor. That is an issue in the action that remains to be determined in the court proceedings: *1476335 Ontario Inc. v. Frezza*, 2021 ONCA 822, at paras. 13-14.

DISPOSITION

[27] For these reasons we dismissed the preliminary objection based on jurisdiction, and the appeal proper. Costs to the respondent in the agreed and inclusive amount of $19,000.

"K. van Rensburg J.A."
"David M. Paciocco J.A."
"Thorburn J.A."