COURT OF APPEAL FOR ONTARIO

CITATION: Mitri v. 11054660 Canada Inc., 2023 ONCA 333
DATE: 20230510
DOCKET: COA-22-CV-0083 & COA-22-CV-0120

Feldman, Gillese and Huscroft JJ.A.

DOCKET: COA-22-CV-0083

BETWEEN

Andrew John James Mitri

Plaintiff (Respondent)

and

11054660 Canada Inc. operating as Canada Choice Supply, Terence Wallace also known as Terence David Wallace also known as Terry Wallace, Kambiz Salami also known as Kam Salami, Tahir Rhemtulla and Rongze Chai also known as Melinda Chai

Defendants (Appellant)

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Andrew John James Mitri

Plaintiff (Respondent)

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11054660 Canada Inc. operating as Canada Choice Supply, Terence Wallace also known as Terence David Wallace also known as Terry Wallace, Kambiz Salami also known as Kam Salami, Tahir Rhemtulla and Rongze Chai also known as Melinda Chai

Defendants (Appellants)

Ellen Snow and Camille Beaudoin, for the appellant Terence Wallace

Ran He, for the appellants 11054660 Canada Inc., Kambiz Salami, and Rongze Chai

Sean Zeitz and Cora Madden, for the respondent

Heard: April 17, 2023

On appeal from the judgment of Justice William Black of the Superior Court of Justice, dated August 15, 2022 and October 13, 2022.

REASONS FOR DECISION

[1] The appellants argue that the motion judge erred in granting summary judgment, permitting the respondent to recover on a loan of $460,000 on the basis that the loan was secured by a promissory note the appellants signed.

[2] The appellants argue that the motion judge erred in applying the test for summary judgment set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, in concluding that the promissory note was valid and enforceable. The appellants also argue that the motion judge erred in failing to apply the *Statute of Frauds*, R.S.O. 1990, c. S.19, and in finding that the interest rate was a valid and enforceable term of the promissory note.

[3] We do not accept any of these arguments. The appeal is dismissed for the reasons that follow.

Background

[4] The appellant Wallace, the appellants Salami and Chai (a married couple who were the owners and directors of the appellant Canada Choice Supply), and Rhemtulla developed a plan to purchase and sell medical-grade protective gowns during the COVID-19 pandemic. The group sought to raise approximately $2 million to purchase gowns from Salami and Chai's Chinese supplier on short notice.

[5] On May 29, 2020, the respondent Mitri (an old friend of Rhemtulla) provided a loan of $460,000 to Canada Choice Supply at Rhemtulla's request. The loan was to be repaid in full by August 29, 2020, and Mitri would be entitled to a 50% share of the gross profits from the sale of the medical gowns.

[6] The law firm Spadafora & Murphy LLP, a firm Wallace had used previously, was retained to assist with the transaction. The firm acted for all parties to the loan. Early in June 2020, the firm was instructed by Wallace to prepare a promissory note to secure Mitri's loan. The note, which specified that the appellants agreed to guarantee the payment of the principal and a share of the profits, was prepared and sent to the parties but only Rhemtulla signed it at that time.

[7] Later in June, the gowns arrived in Canada. They were of lower quality than Salami and Chai had represented and could not be sold for profit. Mitri's loan was not repaid by August 29, 2020, and on August 31, 2020 he sent a demand letter

seeking payment on the promissory note. Rhemtulla insisted to Mitri that the note had been fully executed by all the appellants, even though Mitri did not have a fully executed copy.

[8] In the months that followed, Mitri repeatedly contacted the appellants, demanding repayment of the loan. The appellants made partial repayments.

[9] Murphy emailed Wallace, Rhemtulla, and Salami in October 2020 in an effort to “get [the] file cleaned up” and prepare a report on the transaction. Murphy’s email of October 21, 2020 noted that she could not locate Chai’s email address, and asked Salami to respond on her behalf or forward the email to her. The email sought to clarify and gather the documentation related to the promissory note. Rhemtulla responded the next day with a signed copy, indicating that “I’m quite sure this was signed, but for your files, I’ve resigned”(sic). Upon receiving this response, Murphy sent another email asking Wallace and Salami to re-sign the promissory note or forward previously signed copies.

[10] In a further email exchange on October 26, 2020, which included Salami and Rhemtulla, Wallace emailed Murphy, asking whether everything was in order and directing her to “make sure this is completed by everyone”. Murphy replied that she needed confirmation “that the signature pages line up with the promissory notes previously sent”. Wallace responded: “Seems like it’s fine”. Several weeks later, Wallace followed up in an email sent to all appellants (including both Salami

and Chai), Spadafora, and Murphy, encouraging Salami and Chai to respond to Murphy's October 21, 2020 email in order to close the file and ensure that the lawyers get paid for their work. That message included a copy of Murphy's email.

[11] In October 2021, Mitri received a fully executed copy of the promissory note from Spadafora, as well as a reporting letter confirming the loan he had provided to Canada Choice Supply (as secured by the promissory note) and a trust ledger showing the law firm's receipt of the $460,000. Spadafora testified that this fully executed copy of the promissory note was put together based on her understanding of the October 2020 email exchange.

[12] Mitri brought a motion for summary judgment, seeking to recover, under the terms of the promissory note, the balance owing on the loan along with interest at the contracted rate of 20%.

The motion judge's decision

[13] The motion judge found that Spadafora reasonably understood the intention of each of the appellants to execute the promissory note. She had the authority to apply the appellants' electronic signatures (some of which she had received in connection with earlier loan documents) in accordance with those intentions – a convenience explained by the pandemic. The arrangements were made in haste and there were shortcomings in the diligence exhibited in documenting the scheme, but the motion judge found that the question of Spadafora's authority was

raised by the appellants as an after-the-fact attempt to create an issue requiring a trial. The motion judge found, further, that the appellants had acted as if the promissory note was binding, whether by confirming it or not denying their obligations under the note and acting in accordance with it when Mitri made repayment demands. These facts undermined Salami and Chai's claim not to have executed the promissory note and "Wallace's late-breaking inability to recall if he had done so". The provision of a fully executed copy of the promissory note by Spadafora to Mitri on October 28, 2021, after Spadafora had informed Mitri that she could no longer act on the parties' behalf, was simply a confirmation of what had already occurred and had been in place for many months.

[14] The motion judge concluded that the appellants could not rely on the *Statute of Frauds* because the parties' agreement did not lack written confirmation, albeit that the frenzied circumstances of the collection of signatures may have thwarted the effort to obtain all necessary signatures. He found that each of the appellants was aware of the loan, the promissory note, and the guarantees, and intended to be bound by their terms. Mitri did not initially pursue the debt through litigation because the appellants tacitly acknowledged the debt and made partial payment, which the motion judge described as incontrovertible evidence that the appellants knew of and intended to be bound by their obligation.

[15] Finally, the motion judge acknowledged that the scheme made little commercial sense, in that the appellants had agreed to give up 100% of the profits

to the different lenders, but this resulted from a lack of diligence by the appellants. It did not support the argument that no deal was made.

[16] Accordingly, the motion judge concluded that there was no genuine issue requiring a trial and granted Mitri summary judgment.

The motion judge did not err in granting summary judgment

[17] The motion judge declined to use the enhanced powers available under rr. 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, stating that he did not need them to conclude that there was no genuine issue requiring a trial. Alternatively, the motion judge stated that had it been necessary to resort to the enhanced powers, he would not have been "inclined to find credible the patent strategy employed by the defendants of 'lying in the weeds' and stringing Mitri along by creating the abiding impression that the defendants had acknowledged their debt". He set out a lengthy list of considerations that was based on all of the available evidence, finding that there was no question that:

- Mitri had advanced a loan of $460,000 in reliance on Rhemtulla's assurances on behalf of the appellants that he would be repaid quickly and be protected by a promissory note including guarantees;
- Wallace instructed Spadafora & Murphy LLP to prepare the promissory note, which the appellants understood Mitri required;

- The lawyers prepared the promissory note as instructed and reasonably applied the appellants' signatures in accordance with their intentions;
- The appellants had at all times acted as though they had a valid and subsisting obligation to Mitri;
- The appellants had made partial payment to Mitri;
- Wallace confirmed the existence of the obligations to Mitri in recorded telephone conversations;
- Rhemtulla's evidence confirmed these matters; and
- The concerns raised by the appellants were after-the-fact attempts to create triable issues.

[18] The appellants argue that the motion judge conflated the two-step analytical framework set out in *Hryniak*, making inferences he was not entitled to make and using enhanced fact-finding powers at the first step of the analysis rather than simply determining whether there was a genuine issue for trial based on the record alone.

[19] We are satisfied that the motion judge was entitled to make the findings he did based on the record before him. The reasons do not disclose any palpable and overriding errors. Based on these findings, it was open to the motion judge to conclude that there was no genuine issue for trial.

The *Statute of Frauds*

[20] The appellants repeat the argument that was made to and rejected by the motion judge. The motion judge found that this was not a case in which there was

no written documentation. We see no error in the motion judge's analysis. That is sufficient to dispose of the matter, and we need not consider the motion judge's alternative reasoning that, given the circumstances surrounding the transaction and subsequent events, the appellants were estopped from relying on the *Statute of Frauds* in any event.

The interest rate was valid and enforceable

[21] Finally, the appellants argue that the 20% interest rate is oppressive and should not be enforced.

[22] There is no merit to this submission. The interest rate was part of the parties' agreement and is the same rate that the appellants acknowledge they agreed to pay to other investors.

Conclusion

[23] The appeal is dismissed.

[24] In accordance with the terms of the promissory note, the respondent is entitled to costs on a substantial indemnity basis of $43,000, all inclusive.

"K. Feldman J.A."
"E.E. Gillese J.A."
"Grant Huscroft J.A."