COURT OF APPEAL FOR ONTARIO

CITATION: Haider v. Rizvi, 2023 ONCA 354
DATE: 20230518
DOCKET: COA-22-CV-0149

van Rensburg, Huscroft and George JJ.A.

BETWEEN

Zulfiqur Al Tanveer Haider

Plaintiff (Appellant)

and

Syed Aftab Hussain Rizvi

Defendant (Respondent)

Robert Trifts, for the appellant

Susan Zakaryan, for the respondent

Heard: March 22, 2023

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated August 25, 2022, with reasons reported at 2022 ONSC 4880.

van Rensburg J.A.:

INTRODUCTION

[1] The appellant appeals the order of the motion judge requiring him to "execute a standard form Full and Final Mutual Release, which releases all claims

arising out of the subject matter" of Actions CV-13-480703 and CV-16-547391 in the Superior Court (the "Actions") "and containing a clause, barring claims-over". The respondent's motion was brought in 2021 to enforce an obligation for the parties to exchange mutual releases under a settlement they had concluded in 2017 that was otherwise performed.

[2] The appellant contends that the motion judge erred: (1) in considering the motion under r. 49.09 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; (2) in refusing to give effect to his argument that a limitation period for enforcing the settlement had expired; and (3) in ordering the appellant to sign a standard form release containing a no claims over clause.

[3] I would allow the appeal only to the extent of providing direction as to the specific form of Full and Final Mutual Release that the appellant is required to execute.

FACTS

[4] The present litigation arose out of Minutes of Settlement dated December 11, 2017, that were signed by the appellant and the respondent and his wife, after the Actions were settled at a pretrial conference.

[5] Under the Minutes of Settlement, the respondent agreed to pay the appellant $900,000 in two instalment payments, and to provide as security for payment of the settlement funds an unconditional consent to judgment in the sum of $1.3

million plus interest at 20%, to be held in escrow, as well as a mortgage on a property. The Minutes of Settlement also provided for certain amounts received from third parties to be paid to the parties' jointly-owned corporation, Masdel Canada Inc., with the respondent's share to be paid to the appellant in satisfaction of the settlement payment, if necessary.

[6] Paragraph 11 of the Minutes of Settlement provided for the parties and the respondent's wife to enter into a Full and Final Mutual Release, to be held in escrow by the lawyers for the appellant, with a true copy of the release to be delivered to the respondent's lawyer upon payment of the settlement funds. The form and content of the release were not prescribed.

[7] The Minutes of Settlement attached as Schedule "A" an undertaking dated October 2, 2012 (the "Undertaking"), that the parties agreed would survive the settlement of the Actions, and which provides for the respondent to indemnify the appellant for various liabilities. Paragraph 13 of the Minutes of Settlement provided in respect of the Undertaking:

> The indemnities contained in Paragraph 2 of the attached (Schedule "A") undertaking shall survive these Minutes of Settlement and shall continue to have full force and effect notwithstanding the exchange of releases as contemplated by Paragraph 11 of these Minutes. The indemnities shall be deemed to include all personal guarantees given by the [appellant] to any third party in any way related to Masdel Canada Inc. or to [the respondent].

[8] By December 31, 2018, the respondent had paid the settlement funds. Two aspects of the settlement that are relevant to this appeal remained to be performed: the exchange of a Full and Final Mutual Release, and the consent dismissal of the Actions.

[9] In January 2019, counsel for the parties exchanged emails about the content of the Full and Final Mutual Release, and the respondent's counsel provided a draft form of release. The appellant's counsel objected to the release of unknown claims, and a clause prohibiting the parties from taking proceedings against any other person who could claim over for contribution or indemnity against a releasee (a "no claims over clause"). The appellant's counsel advised that the appellant was contemplating an action against other parties who could third party the respondent. Unfortunately, counsel for the respondent became ill in 2019 and passed away in 2020, without the terms of the release having been finalized.

[10] In February 2019, the appellant commenced a new action in the Superior Court against unrelated parties. The respondent was third partied in the new action. That action is apparently in abeyance pending the decision of this court.

[11] In November 2021, the respondent brought a motion in Action No. CV-13-480703 seeking: (1) a declaration that the parties had reached a settlement of the Actions; (2) an order requiring the appellant to enter into a Full and Final Mutual Release as contemplated by the Minutes of Settlement; and (3) an order and

declaration that the form of release sent to the appellant's counsel on January 25, 2019 met the requirements of a Full and Final Mutual Release contemplated by the Minutes of Settlement.

[12] The appellant opposed the motion, asserting that r. 49 of the *Rules of Civil Procedure*, which was referred to in the respondent's notice of motion, was not applicable; that the respondent was precluded from obtaining a release because a limitation period had expired; and that if the parties were required to sign a Full and Final Mutual Release, it should not contain certain wording that the respondent had included in the draft provided by his counsel, including the release of unknown claims and a no claims over clause.

THE MOTION JUDGE'S DECISION

[13] The motion judge began her reasons by setting out the relevant wording from the Minutes of Settlement. She adverted to the fact that the parties had not provided in their settlement for the content of the Full and Final Mutual Release, except that they had agreed that the obligations set out in the Undertaking would survive the release of claims: at paras. 4-5, 13.

[14] The motion judge agreed with the respondent that he was entitled to move to enforce the settlement under r. 49 because the action in which the settlement was reached had not yet been dismissed: at paras. 15, 17. She also rejected the appellant's limitation period argument, stating that the *Limitations Act, 2002*, S.O.

2002, c. 24, Sched. B, did not apply to motions under r. 49, but that if it did, the two-year limitation period did not begin to run until January 19, 2022, when the appellant indicated for the first time that he was not prepared to sign any release: at paras. 17-19.

[15] As for the content of the Full and Final Mutual Release, the motion judge concluded that, because the parties had not provided otherwise in their Minutes of Settlement, they should be required to sign a "standard form" release releasing all claims arising out of the subject matter of the Actions and containing a provision barring claims over: at para. 22. In this regard the motion judge referred with approval, at paras. 20-21, to *Terranata Winston Churchill Inc. v. Teti Transport Ltd*., *et al.*, 2020 ONSC 7577, 16 C.L.R. (5th) 315, in which Vella J. stated, at paras. 30-31, that where "the parties have agreed that a release will be executed, but the settlement agreement is silent on the content of the release, the court will imply that the parties agreed to sign a standard form general release consistent with the settlement – nothing more and nothing less", that "[t]he court will imply only those terms that are 'standard' or 'usual' as those terms have been interpreted in the jurisprudence", and at para. 53, that the "jurisprudence establishes that claims over clauses … are 'part of and parcel' of a standard full and final release".

[16] The motion judge ordered that the appellant sign a standard form Mutual Full and Final Release, releasing all claims arising out of the subject matter of the Actions and containing a provision barring claims over.

ISSUES

[17] The appellant raises essentially the same arguments on appeal that he advanced in the court below. He submits that the motion judge erred:

1. in determining the issues on a r. 49 motion, rather than requiring the respondent to bring a motion for summary judgment after commencing a new proceeding;
2. in failing to find that the respondent's claim for delivery of a Full and Final Mutual Release was statute-barred under the *Limitations Act*; and
3. in requiring the delivery of a Full and Final Mutual Release in a "standard form" and including a no claims over provision.

DISCUSSION

1. There was no reversible error caused by the procedural defect in the way the issue was brought before the court

[18] The appellant has demonstrated no reversible error in the motion judge's conclusion that the issue could be determined on the motion before her.

[19] Rule 49 applies to offers to settle. Rule 49.09 provides that where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or (b) continue the proceeding as if there had been no accepted offer to settle.

[20] In *Donaghy v. Scotia Capital Inc./Scotia Capitaux Inc.*, 2009 ONCA 40, 93 O.R. (3d) 776, leave to appeal refused, [2009] S.C.C.A. No. 92, this court observed that the respondent's reliance on r. 49.09 was in error because the parties' settlement occurred outside the scope of r. 49. The settlement did not arise out of an exchange of offers made pursuant to r. 49 and it had been entered into pre-litigation: at para. 15. This error, however, did not affect the merits of the motion in the court below or the appeal. As the court noted, since settlements are enforceable as contracts at common law, the motion to enforce the settlement was in effect a motion for summary judgment to dismiss the action on the basis of the settlement: at para. 16.

[21] In the present case, although the notice of motion relied on r. 49 and the motion judge described the motion as having been brought under that rule, r. 49 was not applicable. The settlement did not arise out of an exchange of offers made under r. 49. Rule 49.09 "is a procedural rule applicable to the acceptance and subsequent non-compliance with an offer to settle:" *Gianopoulos v. Olga Management Ltd.* (2006), 207 O.A.C. 58 (C.A.), at para. 3. It does not apply to non-compliance with a settlement agreement: *Vanderkop v. Manufacturers Life Insurance Company* (2005), 78 O.R. (3d) 276 (S.C.), at paras. 14-15, aff'd (2006), 40 C.C.L.I. (4th) 180 (Ont. C.A.). See also *1504641 Ontario Inc. et al. v. 2225902 Ontario Inc. et al.*, 2021 ONSC 2917, at paras. 3-4, 6, aff'd 2022 ONCA 175, at

para. 6, leave to appeal refused, [2023] S.C.C.A. No. 40189; *Dodla v. Dodla*, 2022 ONSC 5648, at paras. 14-15.

[22] However, it was appropriate for the respondent to bring the matter before the court by way of motion, when the Minutes of Settlement arose out of a settlement entered into after a pretrial conference, and the Actions had not yet been dismissed. The commencement of a fresh proceeding to enforce the settlement was unnecessary and would have been inappropriate: see e.g., Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 4th ed. (Toronto: LexisNexis, 2020), at pp. 729-730; *GMBR Capital Corp. v. Parmar*, 2021 ONSC 7798, at para. 25; *Donaghy*, at para. 11. As McEachern C.J.B.C. stated in *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 (B.C.C.A.), at p. 123, when the issue is not whether the parties concluded a settlement, but some step in its execution, “subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed”.

[23] The motion judge had jurisdiction to determine the motion and therefore did not err in hearing and deciding it. Although she stated that she was deciding the motion under r. 49.09, in essence she was deciding a motion to enforce a settlement that was reached in an action that had not yet been dismissed.

[24] Accordingly, I would reject this ground of appeal.

2. The appellant does not have a limitation period defence to the delivery of a release

[25] The appellant argues that the motion judge erred in refusing to dismiss the motion on the basis that the respondent's claim for a Full and Final Mutual Release was statute-barred. He contends that the claim for performance of the Minutes of Settlement was a new cause of action, that required the commencement of a new proceeding, or at least the amendment of pleadings in the existing action, which could not occur more than two years after the date of the settlement agreement.

[26] First, I note that the appellant has identified no error in the motion judge's conclusion that the respondent's claim arose only at the time that the appellant refused to deliver any release at all, and not at the time the Minutes of Settlement were signed or while the parties were in negotiations about the content of the release. On that factual finding, there was no question of the expiry of a limitation period.

[27] Second, and in any event, I see no basis for the appellant to rely on the expiry of a limitation period in this case. It is unnecessary to address whether and in what circumstances a limitation period might bar subsequent proceedings or claims to enforce aspects of a settlement agreement: in this case we are concerned only with the delivery of a release. As I have already noted, the delivery of a release was properly sought in the context of a motion in an ongoing action.

The respondent was not required to start a new action or to amend his pleadings to seek an order for an exchange of releases as part of the completion of the settlement.

[28] Even if no Full and Final Mutual Release had been delivered, the respondent was released by the terms of the Minutes of Settlement, subject only to the Undertaking. The settlement of a claim implies an obligation to furnish a release absent agreement to the contrary: *Hodaie v. RBC Dominion Securities*, 2012 ONCA 796, at para. 3; *Fieguth*, at pp. 121-122; *Bogue v. Bogue* (1999), 46 O.R. (3d) 1 (C.A.), at para. 13; *Umholtz v. Umholtz* (2004), 238 D.L.R. (4th) 736 (Ont. S.C.), at p. 738. So long as the settlement remains on foot, it will bar subsequent proceedings that fall within its terms. The absence of a signed release makes no practical difference to the finality of a settlement: see e.g., *Gedco Excavating Ltd. v. Aqua-Tech Dewatering Co*., [2014] O.J. No. 2513 (S.C.), at paras. 26-28.

[29] I would therefore reject this ground of appeal.

3. In this case the motion judge ought to have prescribed the specific form of release that was required to be exchanged

[30] I turn to the final issue: whether the motion judge erred in directing that the parties execute a “standard form Full and Final Mutual Release which releases all claims arising out of the subject matter of [the Actions], and containing a clause, barring claims-over”.

[31] The task confronting the motion judge was to determine what type of release should be signed. Where, as here, the form of release is not prescribed in the settlement agreement, the content and scope of the release depend on an interpretation of the settlement.

[32] Although the motion judge referred to *Terranata* as authority for the order she made, she did not apply the appropriate interpretive analysis that is set out by Vella J. in that decision. The motion judge referred to two passages from *Terranata* to conclude, without further analysis, that the appellant should be ordered to sign a "standard form Release" releasing all claims arising out of the subject matter of the Actions and containing a no claims over provision. By contrast, it is clear from Vella J.'s examination of the circumstances before her, including the settlement agreement and the actions that were settled, that her intention was not to default to a standard form of release, but to determine the objective intentions of the parties based on the settlement they had concluded.

[33] In *Terranata*, Vella J. considered a motion to enforce a settlement, where the issue, as in the present case, was the scope and form of the release agreed to be signed by the plaintiff in an action in favour of the settling defendants. The accepted offer to settle required a "full release" but was silent as to its terms. Vella J. accurately described her task: "to imply the terms of the release that are consistent with the settlement made by the parties": at para. 30. It is in this context that she stated, at para. 31, that the court will imply that the parties agreed to sign

a “standard form general release consistent with the settlement”, and that “the court would imply only those terms that are ‘standard’ or ‘usual’ as those terms have been interpreted in the jurisprudence.”

[34] Justice Vella went on to refer to the oft-cited decision of Chapnik J. in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.), aff’d [1995] O.J. No. 3773 (C.A.), in which she stated, at para. 24:

> It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, no party is bound to execute a complex or unusual form of release: although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice.

[35] Applying this test to the circumstances before her, Vella J. considered the express terms of the parties’ settlement agreement. She observed that the parties bargained for a “full” and not a “partial” release: at para. 36. She noted that the parties agreed to settle “this proceeding”, which she interpreted to mean the whole action, and because it was a “full release”, all matters as between the settling parties arising from the subject matter of the claims that were to be released: at paras. 37-39. In considering whether a no claims over clause should be included, she referred to the authorities and explained why such a clause was consistent with the purpose of the release: at paras. 42-56.

[36] In the present case, in the hearing before the motion judge, the appellant objected to the respondent’s proposed form of release, arguing that the scope of

the release was overbroad, because it would apply to claims he might have in the future against the respondent arising out of anything that was raised or could have been raised in the Actions, including damage and loss not now known or anticipated. He also objected to the inclusion in the release of a no claims over clause.

[37] Following the approach in *Terranata*, the motion judge ought to have considered these arguments in the context of the specific terms of the settlement the parties had reached, including the Actions that had been settled and the Undertaking that would survive the settlement. In the interest of clarity, it would have been helpful if she had reviewed and approved a particular version of a release (there were at least two in the materials), with any changes that were appropriate to reflect her interpretation of the Minutes of Settlement and its surrounding circumstances.

[38] In this regard, the panel asked the parties at the hearing of the appeal to provide the form of release that they believed the motion judge had approved, and the form of release that they were asking this court to approve, if we were to reject the appellant's first two grounds of appeal. Two things were apparent from their responses: first, the parties did not agree on what the "standard form" ordered by the motion judge should include; and second, they now agree on all of the terms of a Full and Final Mutual Release, except for whether there should be a no claims over clause, and whether such a clause should include an indemnity. The appellant

also seeks to add a specific reference to the Undertaking, and to attach the Undertaking to the release, which the respondent says is unnecessary, because it will survive the release in any event by operation of paragraph 13 of the settlement agreement.

[39] Each party provided two draft releases. The appellant provided two versions, both referring to and attaching the Undertaking. The appellant's preferred version does not have a no claims over clause. The appellant's second version contains a no claims over clause without an indemnity. The respondent provided a modified version of the release he had originally tendered, and a second release based on a LawPro release form, each containing a no claims over clause with an indemnity.

[40] After having conducted the necessary review in this case – based on the terms of the Minutes of Settlement, including the Undertaking that was to specifically survive the settlement and the pleadings in the Actions – I have concluded that it is appropriate that the Full and Final Mutual Release include a no claims over clause.

[41] As I interpret their settlement, the intention of the parties was that, in consideration of the payment of the settlement funds and the survival of the respondent's indemnities of the appellant for various matters provided by the Undertaking, the matters raised in the Actions could not be raised again. The settlement would be incomplete and ineffective if the appellant were to commence

proceedings against a third party arising out of matters covered by the release. Just as it is implicit in the conclusion of the settlement, and the provision of a release, that the releasees will not commence fresh proceedings against any releasor in respect of the matters covered by the release, it necessarily follows that the releasors will not sue another party in respect of such matters where the releasees could be drawn back into litigation.

[42] In sum, the wording and circumstances of the Minutes of Settlement make clear that, subject only to the various matters carved out of the release by the Undertaking, the parties were agreeing to extinguish each other's full underlying liability in relation to the subject matter of the settlement. A no claims over clause is a natural extension of their agreement and is consistent with the parties' goal of providing a full and final release.

[43] In the circumstances of this case, however, I see no basis for the inclusion of an indemnity for breach of the no claims over clause. While this would no doubt aid in the enforcement of the no claims over clause and an indemnity to support and enforce a no claims over clause is frequently included without objection in releases in completion of settlements, in this case, the parties bargained for certain indemnities to survive the settlement – those that are included specifically in the Undertaking. In my view, the indemnity wording proposed by the respondent to reinforce the no claims over clause goes beyond what the parties reasonably bargained for in this case.

[44] As such, I would approve the version of the Full and Final Release that contains a no claims over clause, and attaches a copy of the Undertaking, in the form submitted to the court by the appellant, and I would direct the appellant to sign and deliver to the respondent a copy of that release. As the parties acknowledged, the potential effect of the Minutes of Settlement and the Full and Final Mutual Release on the other proceedings commenced by the appellant will be determined, if necessary, in the other proceedings and is not engaged by this appeal.

DISPOSITION

[45] For these reasons I would allow the appeal only to the extent of substituting for para. 1 of the motion judge's order an order as set out in para. 44 above.

[46] I would award the respondent, who was largely successful in the appeal, costs in the agreed amount of $12,000, inclusive of disbursements and HST.

Released: May 18, 2023 "KMvR"

"K. van Rensburg J.A."
"I agree. Grant Huscroft J.A."
"I agree. J. George J.A."