IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Wacky's Carpet & Floor Centre v. Joseph, 2006 NSSC 353

Date: 20061121
Docket: SH 263849A
Registry: Halifax

Between:

Wacky's Carpet & Floor Centre

Appellant

v.

Dr. Paul Joseph

Respondent

DECISION

Judge:	The Honourable Justice Frank C. Edwards
Heard:	November 21, 2006, in Halifax, Nova Scotia
Written Decision:	November 30, 2006
Counsel:	James D. MacNeil, for the appellant John D. MacIsaac, Q.C., for the respondent

By the Court: [Orally]

[1] This is an appeal from a decision by an Adjudicator of the Small Claims Court.

Facts:

[2] During the construction of Dr. Paul Joseph's ("Joseph") home by Paul Jollymore ("Jollymore") and his company Maritime Project Management Inc. ("Maritime"), Jollymore contracted for a certain amount of flooring material from the Appellant ("Wacky's") for use in the home of Joseph.

[3] Some of this flooring material had been selected by Joseph and his wife when they visited the Wacky's store with Jollymore. There was, however, no direct contact between Wacky's and Joseph or his wife, and the purchasing of all material was left up to Jollymore who dealt with Wacky's flooring manager. The goods were invoiced to Maritime and delivered and installed in the Joseph's home.

[4] Cheques to pay for the construction process and the services of subcontractors were provided by Joseph primarily to Jollymore, but also to others on Jollymore's instructions. Joseph signed cheques in blank, in the amount of

$60,000.00, $100,000.00, $85,000.00, $100,000.00, $170,000.00 and $45,000.00. Other cheques and cash were paid out to various parties and a total amount of approximately $638,600.00 were paid out by Joseph under the direction of Jollymore.

[5] However, during the construction process, it became apparent that some of the subcontractors were not paid by Jollymore or Maritime and Joseph did not receive a satisfactory explanation from Jollymore as to where the money went.

[6] Wacky, one of the subcontractors, was not paid for flooring materials amounting to a value of $18,601.55 that had been ordered from and provided by Wacky's for Joseph's home. Jollimore and Maritime declared bankruptcy and failed to complete their obligations under the oral contract with the Josephs. However, the flooring remained in the Joseph's home, yet Wacky's has not received compensation for the flooring.

[7] Wacky's commenced proceedings against Maritime, Jollymore and Joseph. As noted in Joseph's brief, at trial the issues were: 1) did Wacky's have a

contract with Maritime, Jollymore or Joseph; 2) were Jollymore or Maritime agents of Joseph; and was Joseph unjustly enriched by Wacky's?

[8] At the Small Claims trial heard January 17, 2006, Adjudicator David T. R. Parker held that there had been a contract between Joseph and Maritime, however, there had not been a contract between Wacky's and Joseph. It was further held that there was no unjust enrichment because there did not exist a special relationship between Wacky's and Joseph.

Issue:

[9] Is the remedy of unjust enrichment available to Wacky's?

Analysis:

[10] The Supreme Court of Canada has determined that a remedy would ensue where there was; (a) an unjust enrichment; (b) a corresponding deprivation, and (c) an absence of a juristic reason for enrichment. ***Pettkus v. Becker*** (1980) 2 S.C.R. 834. In his decision, the Adjudicator determined that all three criteria had been met.

[11] The Adjudicator determined, however, that there also had to be some nexus or special relationship between the parties. He wrote:

> The question then becomes, is there some nexus or special relationship between the parties. The only relationship the parties have with one another is that materials of the Claimant are in the Dr.'s home. The Defendant Dr. did not meet the Claimant, the Defendant Dr. did not ask the Claimant to sell him the materials, the Defendant Dr. took no charge over the laying of the floor in question here, the Defendant Dr. did not order the materials, materials and labour to install them in the home nor were they invoiced to the Defendant Dr. The Defendant Dr. did not expect to pay for the material as he paid the other named Defendant PJ or his Company for same. As it turned out, the Defendant PJ was a rogue in the sense he disappeared without meeting his obligations to the Claimant and Defendant Dr.

[12] The Adjudicator (and Joseph) rely upon the case of ***Nicholson v. St. Denis et.al.,*** (1975) 8 O.R. (2d) 315 (Ont.C.A.) as authority for the proposition that such a relationship is a pre-requisite to recovery. I agree with the Wacky's submission that ***Nicholson*** suggests simply that such relationships form a significant thread which runs through the jurisprudence, but not that there is an additional burden that must be met by a claimant. Here, the three criteria having been met, Wacky's is entitled to be paid. The law is not as clear as one would hope. MacKinnon JA stated:

> It is difficult to rationalize all of the authorities on restitution and it would serve no useful purpose to make that attempt. It can be said, however, that in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff – a benefit, be it said, that was not conferred 'officiously'. This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and secondly, either an express or implied request by the defendant for the benefit, or acquiescence in its performance.

[13] The Federal Court in **Robert McLaren, Garry Seeman and Donald Thompson v. The Queen,** [1984] 2 F.C. 899, subsequently determined the significance of a special relationship. As opined by Justice Muldoon in that case:

> What is that special relationship? It may be contractual, fiduciary or matrimonial. It may be a very casual arrangement, or an unenforceable contract. It seems to be the *sine qua non* of success, but it is not an inevitable guarantee of success. A special relationship is a factor in all but two of the cases, cited here by counsel in which the plaintiffs have succeeded. It is the essential nexus between the defendants' words and conduct, and the plaintiffs conferring of the benefit ..

[14] In The Law of Restitution, Looseleaf Edition, the authors, Peter D. Maddaugh and John D. McCamus, speak to this issue at page 33-18, where they note that:

> On this point the Court of appeal offers little guidance and appears to come perilously close to suggesting that, in the absence of such a relationship, coupled with either a request for or acquiescence in the receipt of the benefit, no recovery will be allowed. The adoption of such a view would mark a significant retreat from established principles of restitutionary liability.

[15] On balance, the presence of a special relationship will be persuasive but not necessarily conclusive in the fact-finder's analysis. The absence of a special relationship will not necessarily defeat a claim.

[16] Here, the facts do establish that there was a "casual arrangement" as contemplated by Justice Muldoon in **McLaren**, supra. In **Nicholson**, MacKinnon JA stated that for there to have been a special relationship the defendant must have had knowledge of the benefit, and he must have either requested it, or acquiesced to its performance. In that case the defendant, St. Denis, was unaware that the work had been performed, and so it was held that no special relationship existed. The same is not true in this case as Joseph was clearly aware that the work was being performed, and had in fact selected the flooring from Wacky's store.

Cross Appeal:

[17] The Adjudicator did find that the Small Claims Court has the equitable jurisdiction to determine unjust enrichment. I agree. [See ***Gaudet v. Prudential Assurance Co. et al***, [1988] N.S.J. No. 457; 88 N.S.R. (2d) 391; ***Credit Union Atlantic Ltd. v. MacLean***, [1996] N.S.J. No. 223; 152 N.S.R. (2d) 314; ***Magnum Contracting Ltd. v. DLG Contracting Ltd.***, [2004] N.J. No. 432 (NL. Prov. Crt.);

936464 Ontario Ltd. (c.o.b. Plumbhouse Plumbing & Heating) v. Mungo Bear Ltd., [2003] O.J. No. 3795. I therefore, dismiss the Respondent's cross-appeal on the jurisdictional issue.

[18] I am therefore, allowing the appeal. The Appellant is entitled to be paid $18,601.55 plus interest at the rate of 5% per annum from the date the invoice was presented to the Respondent. The Appellant is also entitled to its costs. Order accordingly.

J.