IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Sommers v. Poirier*, 2008 NSSC 342

Date: 20081120
Docket: SH 273509
Registry: Halifax

Between:

Joye Sommers

Plaintiff/Respondent

and

Darren Poirier

Defendant/Applicant

Judge:	Justice M. Heather Robertson
Heard:	July 10, 2008, in Halifax, Nova Scotia
Written Decision:	November 20, 2008
Counsel:	Barry J. Mason, for the plaintiff/respondent
	David P.S. Farrar, Q.C. and Christopher W. Madill, for the defendant/applicant

Robertson, J.:

[1] The applicant seeks summary judgment pursuant to *Rule* 13.01(a) *Nova Scotia Civil Procedures Rule* to enforce a settlement agreement entered into by the applicant and Richard Murtha, the then solicitor for the respondent Joye Sommers.

[2] Ms. Sommers engaged Mr. Murtha to act on her behalf in an automobile accident claim, where liability was not at issue, but merely the quantum of damages for the injuries she sustained.

[3] By affidavit evidence Ms. Sommers advises the Court that she did not have any knowledge or agree to the terms of settlement arrived at on her behalf by Mr. Murtha and further never received any of the $19,500 that was paid to him in Trust by the applicant. Mr. Murtha has since been disbarred by the Nova Scotia Barristers' Society.

[4] She resists the application for summary judgment and asks the Court not to condone the actions of her solicitor by enforcing the settlement agreement.

[5] There was a contingency agreement in place between Mr. Murtha and Ms. Sommers. Paragraph 6 of the agreement stated:

> ... In the event that the Law Firm is able to bring this matter to a resolution by way of fault or liability (or a percentage thereof) to benefit the Client(s), it is understood by the parties hereto that no offer of settlement shall be binding upon the Client(s) without written consent in the form of a Release. No settlement proposal prepared by the Law Firm will be submitted to a third party without first having been reviewed and approved by the Client(s).

[6] The sole issue before the Court is whether the settlement reached between Mr. Murtha and the defendant insurance company is binding on the plaintiff Ms. Sommers.

[7] The requirements for summary judgment are well-established law in the Province of Nova Scotia, including *Binder v. Royal Bank*, 2003 CarswellNS 309; *United Gulf Developments Ltd. v. Iskander*, 2004 CarswellNS 67; and *Selig v. Cook's Oil Co.*, 2004 CarswellNS 328; which adopted the five propositions set

forth in *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.*, 2000 CarswellAlta. 892 at para [21]:

> [21] (1) It is not open to a Respondent on a summary judgment application to argue that a triable issue exists based on facts or evidence not currently available but which may emerge at discovery or trial.
>
> [23] (2) Where an Applicant has shown there are no facts in issue for trial, it is incumbent upon the Respondent to adduce evidence that it has a reasonable chance of success at trial.
>
> (3) It is not sufficient for a Respondent who resists summary judgment to present only bare allegations of fact; the Respondent must present evidence which lends some support to the claims it advances.
>
> [26] (4) It is appropriate to summarily dismiss a Third Party action for indemnity where the evidence shows no claims are advanced in the Plaintiff's pleadings which give rise to an obligation to indemnify.
>
> (5) The summary judgement application may be made at any time. There is no need for an Applicant on a summary judgment application to await the outcome of examinations for discovery before applying for and obtaining a judgment.

[8] The applicant argues that Mr. Murtha had actual or in the alternative apparent, implied or usual authority to the settle the plaintiff's claim, relying on the well-established principles of agency law.

[9] They offer Mr. Batten's affidavit evidence in support of their position and in particular Exhibit "C" to the affidavit, R.A. Murtha's letter dated January 2003 to Pembridge Insurance, informing of their retainer to act on behalf of Ms. Sommers, Exhibit "P" his letter of June 15, 2004 setting forth Ms. Sommers' settlement demands and the conclusion of the settlement by presentation of Pembridge's cheque to R.A. Murtha and Associates in the amount of $19,500. Mr. Batten says in his affidavit evidence that the respondent vested in Mr. Murtha the express authority to settle her claim and did not communicate to the applicant any restrictions to his authority.

[10] The applicant also points out that there are good public policy reasons which favour a determination that a client will be bound to the agreements reached by

their solicitor unless a limitation on the solicitor's authority has been clearly communicated to the opposing party.

[11] Mr. Mason counsel for the respondent urges the Court to consider the second of the two lines of authorities dealing with situations where legal counsel have settled claims on behalf of their clients without their client's consent as articulated in *Campbell v. James*, [1984] 41 C.P.C. 51, (Ont. Co. Ct.).

[12] In *Campbell v. James*, 1984 CarswellOnt 338, the Court provided an outline of the two lines of cases dealing in situations where legal counsel have settled claims on behalf of their clients, without their client's consent. At paragraph 21 of the Court's decision the Court stated as follows:

> "...An explanation of thinking of these two lines of cases is set out in the dissenting judgment of Galligan J. in *Fabian v. Bud Mervyn Const. Ltd.* (1982), 35 O.R. (2d) 132, at 144-45, 23 C.P.C. 140, 127 D.L.R. (3d) 119 (Div. Ct.):
>
> > There are two different lines of cases which deal with compromises effected by counsel against the will of his client. The two lines of authority are summarized in the recent judgment of Macfarlane J. in the British Columbia Supreme Court in the case of *Bank of Montreal v. Arvee Cedar Mills Ltd.*, [1979] 1 W.W.R. 219, 9 C.P.C. 249, 93 D.L.R. (3d) 58.
>
> The first of those lines of cases holds that the compromise will be enforced if the compromise does not require Court intervention or if it has already been embodied in a court order or judgment before the client raises his objection. It seems to me that the cases referred to by the respondents are all cases within that first line of cases. Those authorities are *Scherer v. Paletta*, [1966] 2 O.R. 524, 57 D.L.R. (2d) 532 (C.A.); *Thomson v. Gough* (1977), 17 O.R. (2d) 420, 5 C.P.C. 43, 80 D.L.R. (3d) 598 (H.C.); *Propp v. Fleming (*1968), 64 W.W.R. 13, 67 D.L.R. (2d) 630 (B.C. C.A.); *Thomasone v, Drennan* (1977) 2 C.P.C. 189 (Ont. H.C.); *Bandag Inc. v. Vulcan Equipment Co.*, [1977] 2 F.C. 397, 32 C.P.R. (2d) 1.
>
> The second line of cases holds that when court intervention is necessary to bring about an important term of the settlement the court will not lend its authority to enforce an agreement entered into by mistake. Included in this line of authority are such cases as *Holt v. Jesse* (1876), 3 Ch. D. 177; *Neale v. Gordon Lennox*, [1902] A.C. 465, [1900-3] *All E.R. Rep. 622 (H.L.)* and *Shepherd v. Robinson*, [1919] 1 K.B. 474.

[13] The respondent urges the Court to consider and be persuaded by the following authorities.

[14] In *Courtenay Lumber v. Webster*, 1984 CarswellBC 280, a solicitor suspended from practice deceived his client by entering into a consent judgment without his client's knowledge. The Court agreed that the Court should not support orders of judgments obtained in a deceitful manner, in circumstances where there would be minimal prejudice in setting aside the consent order.

[15] In *Chomik v. Chomik*, 1986 CarswellAlta 107, a family proceeding, the Court set aside a settlement made by the solicitors, refusing a summary judgment, where the evidence before the Court demonstrated that the settlement did not reflect the intentions of the parties.

[16] In *Thibodeau v. BCR Medical Clinic*, 2001 CarswellNB 186, similarly the Court did not lend its authority to support a settlement agreement in a personal injuries case as the settlement clearly did not reflect the intention of one of the parties. The application was made pursuant to a specific *Civil Procedure Rule* respecting enforcement of settlement agreements arrived at by counsel.

[17] *Rector v. Central Guarantee Trust*, 1992 CarswellNB 74, dealt with a urea formaldehyde foam insulation issue arising out of an agreement of purchase and sale, where the Court did not sanction a settlement agreement made by two lawyers, in circumstances where the plaintiff refused the settlement terms.

[18] In *Hawitt v. Campbell*, 1983 CarswellBC 199, a personal injuries action, the Court determined it need not sanction a settlement agreement entered into between solicitors. A stay of proceedings may be refused if: 1) there was a limitation on the solicitor's instructions known to the opposite party; 2) the solicitor misapprehended his client's instructions or the facts and this misapprehension would result in injustice or make it unreasonable or unfair to enforce the settlement; 3) there was fraud or collusion; 4) there was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement. As the solicitor was under a misapprehension as to the real facts, and the result may have been unfair to the plaintiff, in that the amount of the settlement might well have been inordinately low, it was appropriate to deny a stay of proceedings.

[19] I find that Mr. Murtha had the authority to conclude this settlement, and that the limitation on this authority contained in the contingency agreement with his client was never communicated to the applicant.

[20] I am persuaded by the first line of cases referenced in *Campbell v. James, supra*. The laws of agreeing apply this is a situation where the matter was settled, and funds paid out, pursuant to Mr. Murtha's authority to act on behalf of this client.

[21] Indeed I agree with the applicant that there are good public policy reasons why settlement negotiations once concluded should be enforced by the court.

[22] The respondent is not left without remedies, in light of her disbarred counsel's failure to consult with her on the settlement he achieved. However, the applicant should not be prejudiced for having relied on the actual or usual authority of a solicitor in negotiating a final settlement agreement.

[23] The leading case to apply agency principles to settlement negotiations is *Scherer v. Paletta*, 1966 CarswellOnt 119, follows the first line of reasoning referenced in *Campbell*, *supra.* Evans, J. stated in *Scherer*:

> 10 The authority of a solicitor arises from his retainer and as far as his client is concerned it is confined to transacting the business to which the retainer extends and is subject to the restrictions set out in the retainer. The same situation, however, does not exist with respect to others with whom the solicitor may deal. The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party. A client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and

> duties. The scope of authority is, therefore, largely governed by the class of agent employed provided that he is acting within the limit of his ordinary avocation or by relation of the agent to the principal or by the customs of the particular trade or profession.
>
> 11 A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

[24] In *Law of Agency*, 7th ed. (Toronto: Buttersworth, 1996) G.H.L. Fridman, at p. 63 wrote:

> ...the agent's actual authority may include what is often called his *usual* or *customary* authority. This is the authority which an agent in the trade, business, profession, or place in which the particular agent is being employed would usually, normally, or customarily possess, unless something was expressly said by the principal to contradict it. It is the authority which persons dealing with the agent, with the knowledge of the trade, etc. would expect him to have. [Emphasis in the original]

[25] Fridman also writes at p. 123 that:

> *Apparent* authority... is the authority which, as a result of the operation of the legal doctrine of estoppel, the agent is considered as possessing, in view of the way a reasonable third party would understand the conduct or statements of the principal and the agent. [...] The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract. [Emphasis in the original]

[26] Following *Scherer, supra*, in *Jimenez v. Markel Insurance Co. of Canada*, 2000 CarswellOnt 2034, C. Campbell, J. considered whether or not to bind a client to a settlement which had been rejected shortly after the conclusion of the negotiations. In this case, the solicitor for the plaintiffs failed to communicate the rejection to the defendant within the period of time required by the *Insurance Act*, R.S.O. 1990, c. 18, Justice C. Campbell found that although the client rejected the settlement, the defendant must be able to rely on the provisions of the *Act* and the common law agency.

> [37] Unfortunate as it may be, I have concluded on the facts of this case that the settlement at which the Plaintiffs were present, concluded by the solicitor on their behalf, is binding upon them, as no communication reached the insurer within the appropriate time rescinding that settlement, notwithstanding that the Plaintiffs communicated rescission to their then-counsel. If the Plaintiffs have a remedy, it would appear as against their solicitor and not the insurer.
>
> ...
>
> [39] With the above type of exception, which does not arise on the material in this case, the general policy rationale should prevail as set out by Borins J. in *Belanger v. Southwestern Insulation Contractors Ltd.* (1993), 16 O.R. (3d) 457 (Ont. Gen. Div.), at 470:
>
> > If litigants were not bound by settlements made by their lawyers acting within the scope of their actual or apparent authority, the legal profession could not function as there could never be certainty that a settlement reached by their lawyers was final and unimpeachable.

[27] And in *Martin v. Busenius* (1999), 239 A.R. 334, [1999] A.J. No. 139 (Alta. Q.B.), Justice Veit held:

> 24 Lawyers are agents for their clients. When lawyers speak, they speak on behalf of their clients. When they agree, they agree on behalf of their clients. The Justice system would fall apart if these basic principles did not apply. These standards are not Draconian: a client can sue a lawyer who abuses the agency relationship between them.

[28] I am also of the view that the failure to execute the release form is not fatal to this application as I accept that a final agreement had been reached and was

binding on the respondent. *Fieguth v. Acklands Ltd.*, 1989 CarswellBC 88 and *Browne v. McNeilly*, 1999 CarswellOnt 1598 and varied in 2000 CarswellOnt 1765.

[29] Lastly, in my view s. 131 of the *Insurance Act* cannot be relied on to suggest that applicant is released from all claims made by the plaintiff against the defendant, by virtue of their payment of $19,500 to R.A. Murtha and Associates. This section of the *Insurance Act* is clearly meant to release the insurer "to the extent of the payment" made.

[30] The respondent is bound by the settlement made not by operation of s. 131 of the *Act*, but by the law of agency.

[31] The applicant has made its case that there is no arguable issue to be tried in respect of the claim.

[32] The applicant shall have summary judgement pursuant to *Rule* 13.01 of the *Nova Scotia Civil Procedure Rules*.

Justice M. Heather Robertson