SUPREME COURT OF NOVA SCOTIA
Citation: Langthorne v. Humphreys, 2011 NSSC 44

Date: 20110202
Docket: Hfx No. 245880
Registry: Halifax

Between:

Ronald Troy Langthorne

Plaintiff

v.

Blayne Gordon Humphreys

Defendant

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	January 28, 2011, in Halifax, Nova Scotia
Counsel:	Ronald Troy Langthorne, self represented Christa M. Brothers, for the Defendant

By the Court:

Introduction

[1] The pleadings reveal that Mr. Langthorne alleged that on June 25, 2003, Mr. Langthorne was driving his 1992 Ford Crown Victoria in HRM, when while properly stopped behind another vehicle awaiting the opportunity to make a left turn from Montague Road, his car was violently struck by a 1980 Jeep CJ driven by Mr. Humphreys. This collision caused serious physical injuries to Mr. Langthorne.

[2] From the documents on file I conclude that on May 3, 2005 Mr. Langthorne, through his counsel Derek M. Land of Blackburn English, filed an Originating Notice (Action) against Mr. Humphreys.

[3] On June 16, 2005 counsel of Stewart McKelvey Stirling Scales filed a Defence on behalf of Mr. Humphreys.

[4] By September 20, 2010 Mr. Robert Dickson, Q.C. of Boyne Clarke, who became counsel of record as of March 25, 2008, and Ms. Christa Brothers of Stewart McKelvey, had communicated in writing to each other as counsel for the parties that they had reached a full and final settlement of all outstanding claims in this proceeding.

[5] However, Mr. Langthorne refused to sign the Release forwarded by the Defendant's counsel, and refused to acknowledge that a settlement had been reached.

[6] Mr. Langthorne advised Mr. Dickson of his reasons and Mr. Dickson is of the view that he can no longer represent Mr. Langthorne given the breakdown of their solicitor-client relationship.

[7] Mr. Langthorne's position is that Mr. Dickson did not have his express authorization to settle the claim. Mr. Humphreys' position is that Mr. Langthorne changed his mind after a binding settlement agreement was reached.

History of the Proceeding

[8] This set of circumstances caused the Defendant to make a Motion filed December 6, 2010 pursuant to Civil Procedure rule 10.04 for an:

> Order declaring that an Agreement was made in settlement of the within proceeding and enforcing that Agreement...

[9] This motion was set for hearing January 13, 2011 at 11:00 a.m. It was supported by the affidavit of Robert Dickson, Q.C sworn December 6, 2010 and the affidavit of Christa Brothers sworn December 6, 2010. Also enclosed was a draft order for signature.

[10] All these documents, as well as the Defendant's brief, were delivered to Mr. Langthorne on December 13, 2010 by personal service.

[11] On December 23, 2010 Mr. Langthorne was delivered, by registered mail, a court stamped Notice of Motion with the January 13, 2011 11:00 a.m. time of hearing included therein.

[12] On December 27, 2010 Mr. Langthorne was delivered, by personal service, a court stamped Notice of Motion with the January 13, 2011 at 11:00 a.m. time of hearing included therein.

[13] On January 13, 2011 Mr. Langthorne was present in Court as was Mr. Dickson, Ms. Brothers and Matthew Pierce.

[14] I explained the expected process and the options to Mr. Langthorne. In my view Mr. Langthorne could profit from further legal advice and after reminding him of this, I repeated that he could have any new counsel attend at the next hearing if he wished to argue his position.

[15] The clerk provided him with the information and telephone number from the public website for the Legal Information Society of Nova Scotia as Mr. Langthorne indicated he did not have the financial means to hire new counsel.

[16] The matter was adjourned to January 28, 2011 at 1:30 p.m for hearing.

[17] On January 28, 2011 the matter proceeded to hearing. Mr. Langthorne remained self represented. Mr. Dickson and Ms. Brothers both were cross-examined on their affidavits.

[18] Mr. Langthorne also testified.

[19] No exhibits were tendered. The affidavits of Ms. Brothers and Mr. Dickson are part of the record. I reserved my decision. These are my reasons for granting the motion.

Legal Issues

[20] Has the Defendant established that he is entitled to have the Court declare that there is a binding, final and full settlement of Mr. Langthorne's claims herein?

Position of the Parties

1. Defendant/Humphreys

[21] The Defendant argues that Mr. Dickson, by operation of the law of agency, was fully authorized to agree to a settlement on behalf of Mr. Langthorne.

[22] They say even if he did not have actual authority to agree to a settlement, he had implied, usual or apparent authority, and that that authority is sufficient to bind Mr. Langthorne in the circumstances of this case, if I find a valid enforceable contract or settlement agreement was reached between Mr. Dickson, as Mr. Langthorne's agent, and Ms. Brothers.

2. Mr. Langthorne

[23] Mr. Langthorne argues that:

(1) He did not authorize Mr. Dickson to accept any offer or make any counter offer on his behalf at any time;

(2) He should not be forced to be subject to a settlement agreement or contract that he did not expressly authorize.

Relevant Law

[24] A settlement agreement is a form of contract. See Scaravelli J. In **Gunvaldsen-Klaasen v. Bulpitt** 2009 NSSC 66 at paras. 31-32. Therefore one must examine whether a contract was made between the parties applying the law of contract.

[25] To form a binding contract the parties privy thereto must agree on all the essential terms of the contract. Essential terms may be implied rather than expressed, but courts are reluctant to imply the existence of essential terms of a contact - Roscoe JA at para. 47 **Sinanan v. Woodyer** (1994), 176 N.S.R. (2d) 201 (CA).

[26] Even if a binding contract otherwise seems to exist, if an agent/lawyer who agreed to the contract on behalf of a client, did not have either actual authority or implied or usual authority, or apparent authority, then the client is not bound by his agent's unauthorized actions.

[27] The focus thus turns to what is "actual", "implied", "usual" authority and "apparent" authority?

[28] In The Law of Agency (7th edition 1996, Butterworths Toronto Ontario) Fridman defines "actual authority" as:

> ...the authority which in fact the agent has been given by the principal under the agreement or contract which has been made between them, or by virtue of subsequent ratification... p. 62

[29] "Implied authority" is a factual matter, and depends on a consideration of what authority a reasonable observer expects an agent would have in the circumstances.

[30] That is, an agent may be deemed to have actual authority to do everything necessary to achieve a purpose that the principal expressly authorized the agent to undertake.

[31] Lastly, Fridman in the Law of Agency notes:

> 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. p. 63

[32] There is a further category called "apparent authority" which is based on the legal doctrine of estoppel. Fridman states at p. 123:

> 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 Added*

[33] In **Scherer v. Paletta**, [1966] 2 O.R. 524 at paras. 7-11 per Evans JA, the Ont. CA stated:

> 7. In the present case, the fact of the retainer is not in issue but there is a dispute as to whether it was a qualified retainer. It is admitted that negotiations for settlement were concluded on the terms agreed to by both counsel and there is no evidence that the settlement is unreasonable, collusive or fraudulent.
>
> 8. The question for determination is whether the defendant is entitled to enforce by way of a judgment the settlement agreed to by counsel for the plaintiff, in view of the dispute as to the limitation of the retainer of which he was unaware. The issue as to whether the retainer was or was not qualified is not before this Court for consideration.
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> 9 *Bowstead on Agency*, 12th ed., pp. 65-6, reviews the scope of the implied authority of a solicitor and counsel and states that the relationship of a solicitor to his client is in general one of agent to principal.
>
> 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.

[34] **Scherer** has been cited by our courts with approval: Begg v. East Hants (1986), 75 N.S.R. (2d) 431 (CA); Rother v. Rother 2004 NSSC 161 - para 13.

[35] In summary, if I conclude that Mr. Dickson had express, implied or usual authority, or even "apparent authority" to settle the Plaintiff's claim herein as he did, then the Plaintiff is bound by those actions of Mr. Dickson, absent any supervening considerations such as evidence of duress, unconscionability, undue

influence or mistake on an essential term of the settlement. Regarding claims of unconscionability see **Grant v. Jovic** 2005 AB QB 323.

The Evidence Presented

Defendant's Evidence

[36] The Defendant presented two affidavits - those of the counsel who negotiated the settlement: Robert Dickson, Q.C. and Ms. Brothers.

[37] Their affidavits collectively set out the unfolding negotiation and settlement reached. Mr. Dickson's affidavit sets out when/how he communicated with Mr. Langthorne, and what were Mr. Langthorne's instructions to him. These latter contacts were documented by Mr. Dickson in memos to the file which are attached to his affidavit.

[38] Both Mr. Dickson and Ms. Brothers were cross-examined by Mr. Langthorne. The cross-examination, in my view, did not establish any inconsistencies in the evidence of either witness. In fact the cross-examination shed further emphasis on what took place between the counsel and between Mr. Dickson and Mr. Langthorne. What it revealed or reiterated in particular is that: Mr. Langthorne placed no restrictions on Mr. Dickson's authority to negotiate on his behalf, and none were therefore communicated to Ms. Brothers. Moreover on September 9, 2010 Mr. Langthorne expressly authorized Mr. Dickson to counter offer $350,000.00 as full and final settlement. On September 9th Mr. Langthorne not only authorized the $350,000.00 counter offer, but also that he wished a structured settlement (option"A" of the four proposals Mr. Dickson had presented to him that day). On September 20th Mr. Langthorne advised Mr. Dickson that he did not want a structured settlement but rather a lump sum of $350,000.00. The Defendant agreed to this on September 20, 2010.

Plaintiff's evidence - Mr. Langthorne

[39] Mr. Langthorne testified that:

1. He was present during the September 8, 2010 settlement conference held at the Law Courts in Halifax with Mr. Dickson, Ms. Brothers, and another person he was told is a Judge or Justice of the Peace. He claimed to be unaware of the purpose of the meeting;

2. That day an offer of $320,000.00, open until September 10, 2010, was made by the Defendant;

3. He attended September 9th at Mr. Dickson's office at Mr. Dickson's request and although they discussed at least four structured settlement options, he told Mr. Dickson: "This is not enough money - I need a bigger settlement";

4. He understood that the Defendant's offer of $320,000.00 was only open until September 10th (the "cut off date"), and that he could not understand why Mr. Dickson was still discussing possible settlement scenarios with him after the "cut off date" the passing of which he believed meant the matter would be going to trial;

5. He not once authorized Mr. Dickson to settle this matter; moreover he was not once interested in settling nor did he indicate his acceptance of any offers;

6. He "wanted my day in court" as this way in his opinion was the only way he would receive a fair compensation/award;

7. He not once indicated to Mr. Dickson that he wanted the money offered by the Defendant as a lump sum;

8. He at no time told Mr. Dickson that he did not want Mr. Dickson to represent him regarding a possible settlement.

Legal Analysis and Findings of Fact

[40] I find Mr. Dickson's evidence to be credible. I have no doubt as to the reliability of his evidence, nor do I have any hesitation in accepting that his evidence is truthful.

[41] I make this finding not because he is a lawyer of many years experience. I rest my conclusion on the manner in which his evidence was presented, the apparent care with which his documentation was maintained, and the extent to which his evidence is corroborated by that of Ms. Brothers, who I similarly find credible.

[42] I observe that, although Mr. Dickson may profit as legal counsel to Mr. Langthorne indirectly once a settlement is reached, and a lump sum of money is available to pay his legal fees, Mr. Dickson's contingency retainer was agreed to by the client, and I have absolutely no basis to believe that Mr. Dickson would settle this case without a *bona fide* belief that he had authority to do so from his client, and without having fully informed his client and getting the necessary instructions to do so.

[43] My conclusion in this respect means that I do not accept the material parts of Mr. Langthorne's evidence. Let me explain why that is.

[44] I had the opportunity to observe Mr. Langthorne's conduct and demeanour in court on January 13 and 28, 2011 for a combined period of approximately 2 ½ hours.

[45] He was prone to speaking out of turn, often about his personal circumstances and using profane, rude and insulting language. He raised his voice on numerous occasions and to a point that I infer his underlying anger.

[46] He repeatedly accused counsel of "railroading" him, lying to him, and putting their interests ahead of his; all without a shred of evidence other than his testimony.

[47] Mr. Langthorne has had the affidavits of counsel, and knew their evidence since December 13, 2010. In spite of this awareness Mr. Langthorne came to court without any evidence to the contrary. His testimony is full of general, confusing answers to the specific questions he was asked. He told his "side of the story" in an equally generalized manner and was not forthcoming in his testimony. This may (in part) be due to a lack of clear memory since he had no documentation or other basis to help him recall dates, and what happened in detail on any specific

date. I find his evidence not reliable, questionably truthful, and therefore not credible on most material aspects.

[48] Mr. Dickson and Ms. Brothers' evidence is well documented/corroborated and internally and externally consistent. Their demeanour as witnesses was appropriate. Their responses to cross-examination were measured, thoughtful and directed to answering the questions.

[49] Therefore I am satisfied on a balance of probabilities that it is more likely than not that:

1. Mr. Dickson, pursuant to the terms of a contingency fee agreement between Mr. Langthorne and Boyne Clarke, was authorized to negotiate and settle the Plaintiff's action for such sums as he deemed proper subject to the Plaintiff's approval of the dollar amount of settlement;

2. After a settlement conference on March 5, 2010 with Justice Glen G. McDougall, trial dates were set for 11 days in January 2012; furthermore, that a settlement conference was held September 8, 2010 with Justice Robert W. Wright;

3. At that conference, which was attended by Mr. Langthorne and Mr. Dickson, an offer of $320,000.00 was made by the Defendant. I note $20,000.00 had previously been paid to the Plaintiff in amounts over January 2009, October 2008 and December 2005;

4. On September 9, 2010 Mr. Dickson met at his office with Mr. Langthorne, who selected a preferred payment means - a structured annuity for the $320,000.00 offer;

5. On September 10, 2010 Mr. Langthorne by telephone instructed Mr. Dickson "to offer to settle the within proceeding for the all inclusive sum of $350,000.00 and that if the Defendant did not agree to a settlement in that amount, to accept the previous offer made on September 8, 2010" which was $320,000.00;

6. Mr. Dickson at that time committed these instructions to writing in a memo to file as shown as Exhibit A to his affidavit;

7. Mr. Langthorne did not indicate any restrictions or qualifications on Mr. Dickson's authority to settle for $350,000.00, therefore Mr. Dickson did not convey any restrictions on the counter offer to Ms. Brothers;

8. Ms. Brothers accepted the $350,000.00 counter offer on behalf of the Defendant on September 20, 2010 - see Exhibit B to Mr. Dickson's affidavit. See exhibits A, B and C to Ms. Brother's affidavit.

9. On September 20th after being advised that a settlement was reached, the Plaintiff instructed Mr. Dickson that he wanted a lump sum payment of the balance of his settlement rather than an annuity - see Exhibit C to Mr. Dickson's affidavit. See Exhibit B to Ms. Brothers' affidavit;

10. Mr. Dickson so advised Ms. Brothers, who forwarded a Release and Consent Order to Mr. Dickson;

11. Ms. Brothers forwarded the settlement funds, which Mr. Dickson received September 28, 2010. On that day when meeting with Mr. Langthorne Mr. Dickson was informed that Mr. Langthorne "had changed his mind, did not want to settle the claim and that he would not sign the Release." - para 13 of Mr. Dickson's affidavit;

12. On October 1, 2010 Mr. Dickson confirmed to Ms. Brothers that his position was that they have reached a binding settlement on September 20, 2010 - Exhibit F of Mr. Dickson's affidavit and Exhibit E of Ms. Brother's affidavit;

13. Mr. Dickson had numerous meetings and contact with Mr. Langthorne throughout the month of October 2010, but Mr. Langthorne has refused to sign the Release forwarded by Ms. Brothers;

14. I am firmly convinced that the Plaintiff's and Defendant's counsel herein agreed to **all essential terms** respecting the settlement of the claims by Mr. Langthorne herein on September 20, 2010 **and** that those terms are reflected in their essence in the Full and Final Release attached as Exhibit C to Ms. Brothers' affidavit.

[50] I should note here that Mr. Langthorne is not objecting to the form or content of the Release - his position is that there is no contract because he did not

expressly authorize his agent Mr. Dickson to counter offer $350,000.000 therefore he is not obliged to sign any Release.

[51] I do not find his refusal to be a repudiation of the Agreement.

[52] I find that the execution of a Release was **not** a condition precedent to a settlement, but rather was an implied, but **not essential** term of the settlement agreement.

[53] A useful discussion of the law surrounding the execution of releases is contained in: **Fieguth v. Acklands Ltd.** (1989), 59 D.L.R. (4th) 114 (BCCA); **Browne v. McNeilly** (1999), 41 C.P.C. (4th) 330; **Sinanan v. Woodyer** (1999), 176 N.S.R. (2d) 201 (CA); **Sommers v. Poirier** 2008 NSSC 342 .

[54] Alternately, if the failure by Mr. Langthorne constitutes a repudiation of the contract, the Defendants have satisfied me that they have decided to treat the contract as continuing, by affirming it through their words and actions.

Conclusion

[55] I find myself completely satisfied that there was a valid and enforceable settlement agreement between the parties herein. I also find myself completely satisfied that Mr. Langthorne authorized Mr. Dickson to counter offer $350,000.00 and agreed to accept that lump sum as full and final settlement. In light of Mr. Langthorne's refusal to execute the release to the satisfaction of the Defendant, I conclude that this is an appropriate case in which to grant the motion pursuant to Civil Procedure Rule 10.04 and I order:

1. By declaration of this Honourable Court that a settlement was reached between the parties herein on September 20, 2010 on the following terms:

    (i) that the Defendant shall pay (in addition to $20,000.00 already paid) the all inclusive sum of $350,000.00 to the Plaintiff; and

2. I further declare that, it was an implied, but non-essential, term of the settlement agreement reached between the parties that the Plaintiff shall release the Defendant from all claims and all damages, interest and costs arising therefrom, relating to a motor vehicle accident which occurred on June 25, 2003 forthwith

after receipt of the monies payable by the Defendant a Full and Final Release and a Consent Order of Dismissal; and

3. I further declare that in spite of the failure by Mr. Langthorne to execute a Full and Final Release and a Consent Order of Dismissal, he is hereby deemed to have done so; and

4. I further declare that the Plaintiff's counsel shall be entitled to treat the monies received from the Defendant herein as being paid pursuant to the settlement agreement and as full and final settlement of the proceeding.

Costs

[56] Costs of this motion which necessitated two appearances are assessed at $1,000.00 payable by the Plaintiff forthwith.

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Rosinski J.