

ONTARIO

SUPERIOR COURT OF JUSTICE

**BETWEEN:** )  
)  
Islam Al-Omani and Ibrahim Al-Omani, )  
through his Litigation Guardian, Isam Al- ) Alex Van Kralingen, for the Plaintiffs  
Omani )  
Plaintiffs )  
)  
- and - )  
)  
David Bird c.o.b. as Pinehurst School and ) Self-represented  
Pinehurst Corporation c.o.b. as Pinehurst )  
School )  
Defendants )  
) **HEARD:** October 1, 2015

REASONS

EDWARDS J.:

Overview

[1] This is a motion to enforce Minutes of Settlement as against the defendant, David Bird, personally. The issue raised by this motion raises the fundamental question as to whether or not Mr. Bird misled the plaintiff when he agreed to amend earlier Minutes of Settlement to remove any personal liability on the part of Mr. Bird.

The Facts

[2] The underlying action as between the plaintiffs and the defendants involves a claim by the plaintiffs to recover tuition fees that were paid to the Pinehurst School, which was a boarding school based in St. Catherines.

[3] On August 21, 2013, draft Minutes of Settlement were sent by counsel for the plaintiff via email to Mr. Bird, who was representing himself. He had also been appointed as the representative of the corporate defendant pursuant to an earlier court order. On August 25, 2013 Mr. Bird responded to plaintiffs' counsel by an email which states:

Your draft documents are approved by me, on behalf of *both Defendants* [Emphasis added]

- [4] The Minutes of Settlement, which Mr. Bird indicated he was approving on behalf of both defendants, called for a payment by the defendants by bank draft or certified cheque in the amount of \$22,500 by September 30, 2013. As well, the Minutes of Settlement provided in paragraph six:

The parties agree that these Minutes of Settlement may be executed in counterparts, and that executed copies may be delivered via facsimile transmission or electronically (sent as a .PDF file) will be treated as if they were original copies.

- [5] On September 17, 2013, plaintiffs' counsel confirmed by email with Mr. Bird that the plaintiffs had now approved the settlement documentation, and that "you can take steps to prepare the settlement funds".

- [6] The email of September 17, 2013 was received in Mr. Bird's email system, and was responded to by an out of office response which stated:

Thank you for your e-mail. Our staff and students are white water rafting and will return on September 23rd.

- [7] On September 19, 2013, counsel for the plaintiff forwarded executed settlement documentation to Mr. Bird via email, as contemplated by paragraph six of the draft Minutes of Settlement which had been approved earlier by Mr. Bird via his email of August 25, 2013.

- [8] The email of September 19, 2013 from plaintiffs' counsel was also responded to by Mr. Bird's email with an out of office reply, which again stated that he was out of the office white water rafting and would return on September 23, 2013.

- [9] Mr. Bird maintained in his oral submissions, as well as in an email dated October 2, 2013 to plaintiffs' counsel, that he did not receive the email of September 19, 2013 because he was white water rafting and he believed the email "...may have been received in the Junk Folder, which is automatically emptied weekly, and automatically replied to".

- [10] Regardless of whether the email of September 19, 2013 was received in the junk folder and therefore not received by him personally, the fact still remains that plaintiffs' counsel emailed Mr. Bird in a fashion that was contemplated by Minutes of Settlement that had been approved by Mr. Bird on August 25, 2013.

- [11] Further email communication took place between Mr. Bird and plaintiffs' counsel in late September and early October, which understandably reflected the frustration of the plaintiffs and plaintiffs' counsel in getting the settlement documentation finalized and fully executed.

- [12] On October 7, 2013 Mr. Bird faxed to plaintiffs' counsel revised Minutes of Settlement, which had inserted handwritten amendments requiring receipt of two original copies of the Minutes of Settlement. This addition was not contemplated in the original Minutes of Settlement that were approved by Mr. Bird on August 25, 2013.

- [13] On October 16, 2013, after a further email from plaintiffs' counsel, Mr. Bird responded by indicating that he was satisfied with receiving one original signed copy of the Minutes of Settlement, and then went on in his email to state:

I can also agree that funds will be payable within one month of receipt by me of that original copy, which I can retain. However, the Minutes of Settlement must also reflect that the payment and liability is by Pinehurst Corporation, *not by myself personally*... [Emphasis added]

- [14] Fundamentally, the email of Mr. Bird dated October 16, 2013 changed the Minutes of Settlement that he had approved some months previously, which did impose personal liability on him.
- [15] When Mr. Bird sent his email of October 16, 2013 to plaintiffs' counsel, there was no indication whatsoever that the corporate defendant would not be paying the \$22,500 within the one month period stipulated by Mr. Bird on October 15, 2013.
- [16] On November 25, 2013, plaintiffs' counsel sent a letter via email to Mr. Bird which confirmed that the Minutes of Settlement would be amended as requested by Mr. Bird, such that the liability for the payment contemplated by the Minutes of Settlement would be borne by the corporate defendant.
- [17] Between the timeframe when Mr. Bird corresponded with plaintiffs' counsel on October 16, 2013 stipulating that he would have no personal liability and the email correspondence of November 25, 2013, it is abundantly clear from the evidence that Mr. Bird, if he had not known as of October 16, 2013, certainly knew by late October or early November, 2013 that the corporate defendant was in financial difficulty. I say this because in Mr. Bird's affidavit sworn September 9, 2015, he states at paragraph 13:

...As a result, it became evident to me that the school could face a cash flow shortage in early November, 2013. In late October, 2013, I notified all of the owners, the first mortgagee, and the second mortgagee of this issue, and I advised them that a capital deposit of \$90,000 will be necessary to ensure the continued operation of the school. The owners, the first mortgagee, and the second mortgagee all refused to provide such a deposit. As a result, I determined that the corporation would be unable to operate beyond November 1<sup>st</sup>, 2013, and I would have no alternative but to close the school as of that same date, and to recommend sale of the corporation's assets to satisfy its debts.

- [18] At no time did Mr. Bird advise plaintiffs' counsel of this material change in circumstances.

**The Issue**

- [19] There are two issues raised by the plaintiffs' motion. The first is whether or not there was any consideration for the amendment to the Minutes of Settlement that had been approved by Mr. Bird in late August 2015. The second issue is whether or not the amended Minutes of Settlement, that removed any personal liability on the part of Mr. Bird, should be rescinded as a result of what is argued to have been a fraudulent misrepresentation by Mr. Bird.
- [20] In my view, there is no need to deal with the question of whether or not there was consideration for the amendment to the original Minutes of Settlement. I am satisfied based on the evidence, particularly Mr. Bird's own sworn evidence, that he was well aware of the financial predicament of the corporate defendant in October and November of 2013. Mr. Bird had a positive obligation to bring this to the attention of plaintiffs' counsel prior to the execution of the Minutes of Settlement. I am satisfied that if the plaintiffs had been advised of the financial situation of the corporate defendant, as evidenced in paragraph 13 of his Mr. Bird's affidavit quoted above, that the plaintiff would never have removed Mr. Bird's personal responsibility from the original Minutes of Settlement.
- [21] Even if the state of Mr. Bird's knowledge, which induced the plaintiffs to agree to the removal of his personal liability, was not influenced by any information that Mr. Bird had with respect to the possible insolvency of the corporate defendant, the fact remains that he did become aware of the true financial status of the corporate defendant prior to the execution of the amended Minutes of Settlement. In my view, his failure to supply that information to the plaintiff amounted to a dishonest and fraudulent misrepresentation on his part, entitling the plaintiffs to rescission of the amended Minutes of Settlement such that Mr. Bird was bound by the original Minutes of Settlement that he had agreed to in August of 2013.
- [22] Mr. Bird was the principal of the defendant school. He is clearly a well-educated individual. He is also a disbarred lawyer. This is not a case of innocent misrepresentation on the part of Mr. Bird. He clearly knew about information that should have been disclosed to the plaintiff. He chose not to disclose that information. Compliance with the original Minutes of Settlement is not an unfair result. Mr. Bird is the author of his own misfortune. The plaintiffs' motion is granted, and an order shall issue granting judgment to the plaintiffs in the amount of \$22,500 against David Bird c.o.b. as Pinehurst School, in accordance with the accepted Minutes of Settlement between the parties. The plaintiff shall also be entitled to their costs, which I am fixing in the amount of \$4,000 plus HST.



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Justice M.L. Edwards