CITATION: Al-Omani et al. v. Bird et al, 2016 ONSC 5779
OSHAWA DIVISIONAL COURT FILE NO.: DC-15-0878-0000
DATE: 20160915

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: Isam Al-Omani and Ibrahim Al-Omani, through his litigation guardian, Isam Al-Omani, Plaintiffs (Respondents)

AND:

David Bird c.o.b. as Pinehurst School and Pinehurst Corporation c.o.b. Pinehurst School, Defendants (Appellant)

BEFORE: Molloy, C. Horkins, Howard JJ.

COUNSEL: David Bird, appearing in person

Alex Van Kralingen and Mark Repath, for the Respondents

HEARD: September 13, 2016, in Oshawa

ENDORSEMENT

HOWARD J.

Overview

[1] This appeal arises out of an action commenced by the plaintiffs for, *inter alia*, the recovery of tuition fees paid to the defendant Pinehurst Corporation c.o.b. Pinehurst School ("Pinehurst"), a boarding school that was based in St. Catherines but is no longer operational.

[2] The parties attended a pretrial conference on June 4, 2013, before Master Brott, following which the matter was settled for the amount of $22,500, payable on or before September 30, 2013, pending the parties' agreement on the language of the settlement documentation.

[3] The parties agreed upon minutes of settlement, which contemplated that liability for payment of the $22,500 would be borne by both Pinehurst and Mr. Bird. Subsequently, the defendants sought to re-open negotiations and insisted on amendments to the original minutes of settlement, which, significantly, removed the personal liability of Mr. Bird. As the time for payment of the settlement funds as contemplated by the original minutes of settlement had come and gone, and no payment was forthcoming from the defendants, the plaintiffs ultimately agreed to the demanded amendments to the minutes. However, the

defendants failed to make payment in accordance with the amended minutes, and Pinehurst then closed operations because of its strained financial difficulties.

[4] The plaintiffs ultimately brought a motion for judgment in accordance with the original minutes of settlement, which was heard before Edwards J. on October 1, 2015. For reasons released October 6, 2015, the motion judge granted judgment in favour of the plaintiffs in accordance with the original accepted minutes of settlement, finding that Mr. Bird had misled the plaintiffs when he extracted an agreement from the plaintiffs to amend the original minutes so as to remove his personal liability.

[5] The defendants now appeal the decision of Edwards J. to this court.

[6] At the conclusion of the argument on behalf of the appellants, we advised the parties that the appeal would be dismissed, with written reasons to follow. These are the reasons.

Factual Background and Decision of the Motion Judge

[7] There is little disagreement between the parties on the actual underlying events in question, although there is some disagreement on the characterization to be given to some of the events.

[8] Mr. Bird was representing himself in this matter. Further, pursuant to a previous court order, Mr. Bird had been given leave to represent the defendant corporation ("Pinehurst"). That said, in argument before us, Mr. Bird indicated that he was making submissions on his own behalf only.

[9] Further to the settlement at the pretrial in June 2013, counsel for the plaintiff prepared draft minutes of settlement and a full and final release and sent them to Mr. Bird, by email dated August 21, 2013, for approval. Counsel advised Mr. Bird that his clients, the plaintiffs, were then out of the country on vacation but that he expected to obtain their instructions to approve the draft minutes presently.

[10] On August 25, 2013, Mr. Bird responded to plaintiffs' counsel by email stating, "[y]our draft documents are approved by me, on behalf of both Defendants."

[11] The approved minutes of settlement required payment by the defendants in the amount of $22,500 by September 30, 2013, by either bank draft or certified cheque.

[12] Paragraph 6 of the approved minutes of settlement permitted the execution of the minutes of settlement in counterparts and the delivery of the executed minutes by fax or in electronic format, as follows:

> 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.

[13] On September 17, 2013, counsel for the plaintiffs emailed Mr. Bird to confirm that the plaintiffs had approved the settlement documentation, and that "you can take steps to prepare the settlement funds." Accordingly, as of September 17, 2013, the minutes of settlement, which Mr. Bird had approved on behalf of the defendants on August 25, 2013, were then agreed to by all parties.

[14] Counsel's email of September 17, 2013, was received in Mr. Bird's email system, which then generated an automatic out-of-office response, stating "[t]hank you for your email. Our staff and students are white water rafting and will return on September 23rd."

[15] The plaintiffs executed the settlement documentation, and the executed documentation was forwarded to Mr. Bird by email from plaintiffs' counsel on September 19, 2013. The delivery of the executed documentation by email was consistent with para. 6 of the minutes of settlement, which Mr. Bird had approved on August 25, 2013.

[16] In response to the email from plaintiffs' counsel in September 19, 2013, Mr. Bird's email system generated another automated out-of-office response, again advising that he was out of the office white water rafting and would return on September 23, 2013.

[17] On the motion before Edwards J., Mr. Bird took the position that he did not receive counsel's emails of September 17 and 19, 2013, and suggested that they "may have been received in the Junk Folder, which is automatically emptied weekly, and automatically replied to."

[18] The motion judge found little significance in Mr. Bird's position, observing in para. 10 of his reasons that, regardless of whether counsel's emails were diverted to Mr. Bird's junk folder and, as such, 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."

[19] In argument before us, Mr. Bird conceded that by the time counsel for the plaintiffs confirmed, on September 17th, that the plaintiffs had executed the settlement documentation that Mr. Bird had approved on August 25th, Mr. Bird had become personally concerned that Pinehurst may not have sufficient financial resources to be able to pay the settlement moneys.

[20] Mr. Bird further conceded in argument before us that, while Pinehurst did have sufficient funds in its bank account in or about August 2013 in order to satisfy the settlement obligation, by the first week of October those funds were no longer in Pinehurst's account.

[21] In any event, the payment of $22,500 that was required to be made by the defendants by September 30, 2013, was not in fact paid. Counsel for the plaintiffs sent several emails to Mr. Bird to follow-up regarding the payment. There was a protracted email exchange between the parties.

[22] Mr. Bird attempted to suggest in argument before us that it was the plaintiffs who "re-opened" the negotiations surrounding the minutes of settlement. That is manifestly not the case.

[23] By email dated October 2, 2013 – and despite the express language of para. 6 of the minutes of settlement, which permitted the delivery of electronic copies – Mr. Bird advised plaintiffs' counsel that he required "two original signed copies of the Minutes of Settlement and Full and Final Release, then I will arrange for the overdraft necessary to fund the settlement."

[24] On October 7, 2013, Mr. Bird faxed plaintiffs' counsel with revised minutes of settlement that purported to amend the minutes in various respects, including, to require receipt of two original signed copies of the minutes of settlement, to change the deadline for delivery of the funds from September 30, 2013, to "forthwith after receipt of two original copies of these Minutes of Settlement, signed, and an approved overdraft," and to change the term providing that the minutes of settlement may be executed in counterparts.

[25] By email dated October 16, 2013, Mr. Bird relented on his previous insistence on receiving two original signed copies of the minutes of settlement, now apparently being content to receive just one original copy, but demanded that the minutes of settlement be amended to reflect that the payment and liability be borne by Pinehurst only and not by himself personally, in the following terms:

> 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.

[26] The motion judge observed, in para. 14 of his reasons, that "[f]undamentally, 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."

[27] I would also observe that, by his own admission, as of a month before he sent his October 16th email demanding that he be relieved of personal liability, Mr. Bird had become personally concerned that Pinehurst may not be able to fund the settlement. Moreover, he knew as of the first week of October – two weeks before he sent his email – that Pinehurst no longer had the funds in its account to fund the settlement.

[28] Plaintiffs' counsel did not immediately respond to Mr. Bird's October 16th email. On November 25, 2013, counsel advised Mr. Bird that the plaintiffs had agreed to his proposed amendments to the original minutes of settlement.

[29] However, no payment was ever made because, unbeknownst to the plaintiffs, but known by Mr. Bird by at least the end of October 2013, Pinehurst was in significant financial difficulty. Indeed, by the end of October 2013, Pinehurst had closed operations because of its financial predicament.

[30] The motion judge made the following significant findings, in paras. 15, 17, and 18 of his reasons, as follows:

> When Mr. Bird sent his email on 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.
>
> 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 1st, 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.
>
> At no time did Mr. Bird advise plaintiffs' counsel of this material change in circumstances.

[31] The motion judge went on to find that he was satisfied based on the evidence, "particularly Mr. Bird's own sworn evidence," that Mr. Bird was well aware of the financial difficulties of the defendant corporation by October and November 2013; that Mr. Bird had a positive obligation to bring this to the attention of plaintiffs' counsel prior to the execution of the amended minutes of settlement, and that had the plaintiffs been advised of the financial predicament facing the corporate defendant, the plaintiffs would never have agreed to relieve Mr. Bird of personal responsibility for the payment.

[32] The motion judge found that Mr. Bird's failure to supply information concerning the true financial status of Pinehurst to the plaintiffs prior to the execution of the amended minutes of settlement amounted to a dishonest and fraudulent misrepresentation, entitling the plaintiffs to rescission of the amended minutes of settlement, with the result that Mr. Bird was bound by the original minutes of settlement that he had approved on August 25, 2013.

Standard of Review

[33] It is trite law that the factual findings made by the judge at first instance should not be overturned unless the appellant demonstrates "palpable and overriding error": *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 5, 6, 10, and 29-20. As the Supreme Court of Canada said in *Housen*, that is a "stringent standard," requiring an appellate court to afford the trial judge a "high degree of deference."

[34] Further, a question of mixed fact and law is also subject to the deferential "palpable and overriding error" standard, subject to the limited exception of whether an extricable error of pure law can be identified: *Housen*, at para. 8.

Issues

[35] The issues raised on this appeal are:

a. did the motion judge err in finding that Mr. Bird's failure to disclose the true financial status of Pinehurst prior to the plaintiffs' approval of the amended minutes of settlement on November 25, 2013, amounted to a dishonest and fraudulent misrepresentation;

b. did the motion judge err in finding that the dishonest and fraudulent misrepresentation entitled the plaintiffs to rescission of the amended minutes of settlement of November 25, 2013;

c. did the motion judge err in finding that Mr. Bird is bound by the original minutes of settlement that he had approved on August 25, 2013;

d. did the motion judge, having granted rescission of the amended minutes of settlement, err in not ordering that the matter proceed to trial; and

e. whether the plaintiffs are barred from the relief they sought before the motion judge by reason of the consent judgment that the plaintiffs obtained on February 18, 2014, against Pinehurst.

Analysis

Did the motion judge err in finding dishonest and fraudulent misrepresentation?

[36] I find no merit in the appellants' challenge to the motion judge's findings and conclusion that Mr. Bird's failure to provide the plaintiffs with the relevant information concerning the financial uncertainty of the corporate defendant before they executed the amended minutes of settlement and his representation that the settlement funds would be paid within a month amounted to a dishonest and fraudulent misrepresentation. There was evidence before the motion judge upon which he could base his findings and conclusions. Indeed, the critical findings made by the motion judge were based on Mr. Bird's own evidence. The appellants have not demonstrated that the judge's factual findings were infected with palpable and overriding error, requiring an appellate court to intervene.

[37] In particular, the evidence of Mr. Bird is that as a result of the refusal of the owners of Pinehurst, the first mortgagee, and the second mortgagee to provide an additional capital injection of $90,000, Mr. Bird "determined that the corporation would be unable to operate beyond November 1st, 2013." It is plain that Mr. Bird must have come to that determination prior to November 1st, i.e., by late October 2013, at the very latest. Indeed, Mr. Bird conceded same in argument before us.

[38] Even if he did not know of the corporation's financial difficulties as of October 16, 2013, when he proposed that the amended minutes of settlement remove his own personal liability and represented that the funds would be paid within one month, it is clear that he was possessed of the relevant knowledge by late October 2013, and certainly well in advance of the letter from plaintiffs' counsel on November 25, 2013, by which the plaintiffs reluctantly accepted Mr. Bird's proposed amendments.

[39] Further, even if Mr. Bird did not possess the relevant information at the time he made the representations on October 16, 2013, it is also clear that, when he did come to his determination by late October, he failed to provide the additional information to the plaintiffs in order to correct the misconception they would have had based on what was represented to them on October 16th. As the motion judge correctly found, in para. 18 of his reasons, "[a]t no time did Mr. Bird advise plaintiffs' counsel of this material change in circumstances."

[40] I agree with the submissions of the respondents that even if a statement was true when made but "subsequently became untrue through a change which was known to the maker of the statement but not revealed by him to the representee, a dishonest failure to report the change may amount to fraud": *Meridian Credit Union Ltd. v. Baig*, 2014 ONSC 4717, 16 C.B.R. (6th) 291 (S.C.J.), at para. 26. In my view, Mr. Bird's failure to correct the earlier statement that the plaintiffs would receive payment within the short period of a month amounted to a dishonest and fraudulent misrepresentation.

Did the motion judge err in granting rescission of the amended minutes of settlement of November 25, 2013?

[41] I also find no error in the motion judge's conclusion that, the amended minutes of settlement having been induced by fraudulent misrepresentation, rescission was available to the court as a remedy. Equitable rescission involves a restoration of the parties to their original positions. "It means rescission *ab initio* and has retrospective effect. ... Equitable rescission enables a court, when it determines that the contract should not be allowed to stand, to order adjustments so as to approximate *restitution in integrum*": *Ormond v. Richmond Square Development Corp.* [2001] O.J. No. 4165, 47 R.P.R. (3d) 316 (S.C.J.), at paras. 29-31 per Gillese J.

[42] Accordingly, I find no error in the motion judge's conclusion that, given the dishonest and fraudulent misrepresentation by Mr. Bird, the plaintiffs were entitled to rescission of the amended minutes of settlement, and the parties should be restored to their original positions, that is, that both parties were bound by the original minutes of settlement, which Mr. Bird approved on August 25, 2013, and the plaintiffs accepted as of

September 17, 2013. In my view, the decision of the motion judge is properly grounded in the law of equitable rescission.

Did the motion judge err in finding that the defendants are bound by the original minutes of settlement approved August 25, 2013?

[43] I agree with the conclusion of the motion judge that there is no merit in the argument of the appellant that because the original minutes of settlement were never executed, the defendants should not be bound by them.

[44] It is to be remembered that plaintiffs' counsel forwarded the unsigned draft minutes of settlement to Mr. Bird by email dated August 21, 2013. In response, on August 25, 2013, Mr. Bird responded by email, stating that the plaintiffs' "draft documents are approved by me, on behalf of both defendants." In other words, the defendants thereby agreed to the terms of the minutes of settlement as set out in the unsigned draft. On September 17, 2013, plaintiffs' counsel confirmed that his clients had also accepted those same terms, and he forwarded an executed version of the original minutes of settlement, signed by the plaintiffs.

[45] It is clear that, although the defendants had not actually executed the original minutes of settlement as of September 17, 2013, there was as of that date agreement on all of the terms of the minutes of settlement. It is clear that, as a matter of normal business practice, parties may express their agreement through an exchange of correspondence and in today's business world that exchange is often if not usually communicated through email and .PDF scanned documents. Our Court of Appeal has long recognized such patterns of normal business practice, as is clear from its decision in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97, 1991 CarswellOnt 836 (C.A.), at para. 20:

> The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

[46] Mr. Bird submits that the decision of the New South Wales Court of Appeal in *Pavlovic v. Universal Music Australia Pty Limited*, [2015] NSWCA 313, is authority for his proposition that because he had not actually executed the original minutes of settlement, he is not bound by them. I do not believe a close reading of the *Pavlovic* decision supports Mr. Bird's interpretation but, in any event, to the extent that the New South Wales Court of Appeal departs from our Court of Appeal's decision in *Bawitko*, I decline to follow *Pavlovic*.

[47] In short, the motion judge correctly determined that the original minutes of settlement represent a valid and binding contract even in the absence of executed original minutes of settlement signed by the defendants.

Did the motion judge err in not ordering the matter proceed to trial?

[48] In my view, there is no merit to Mr. Bird's submission that, having found that the plaintiffs were entitled to rescission of the amended minutes of settlement, the motion judge should have ordered the matter proceed to trial so that he could "have his day in court" to contest his personal liability.

[49] The motion judge committed no error in entertaining and disposing of this matter by way of the plaintiffs' motion for judgment in accordance with the minutes of settlement. The amount in question here involves the relatively modest sum of $22,500. The motion judge was well able to determine the issues based on the affidavit evidence before him. There was no genuine issue that required a trial in this matter. In the circumstances of this case, the process afforded by the plaintiffs' motion for judgment in accordance with the minutes of settlement allowed the motion judge to make the necessary findings of fact, allowed the motion judge to apply the law to the facts, and is a proportionate, expeditious, and less expensive means to achieve a just result: *Hyrniak v. Mauldin*, [2014] 1 S.C.R. 87, at paras. 47 and 49.

[50] Moreover, I note that para. 18 of Mr. Bird's factum would appear to concede the applicability of summary judgment principles on motions to enforce a settlement. That is consistent with the Court of Appeal's decision in *Olivieri v. Sherman*, 2009 ONCA 772, 99 C.P.C. (6th) 220, at paras. 24-28.

Were the plaintiffs barred from relief against Mr. Bird by reason of the consent judgment against Pinehurst dated February 18, 2014?

[51] On motion before Douglas J., the plaintiffs obtained, on consent, a judgment dated February 18, 2014, against Pinehurst for payment of $22,500, together with costs of the motion in the amount of $1,141.65.

[52] In argument before us Mr. Bird took the position that the plaintiffs are barred from the relief they sought against him before the motion judge by reason of the consent judgment obtained on February 18, 2014, against Pinehurst.

[53] I give no weight to this argument.

[54] First, I note that Mr. Bird did not raise this argument before the motion judge. Appeal courts are reluctant to allow an appellant to raise a new argument that was not raised before the judge whose order is under appeal.

[55] Second, Mr. Bird did not raise the argument in either his notice of appeal or his factum on the appeal. The plaintiffs were thus deprived of the opportunity to address the point in their factum and responding materials.

[56] In any event, the consent judgment obtained against Pinehurst does not preclude the plaintiffs from seeking relief against Mr. Bird personally in accordance with the original minutes of settlement. Indeed, in email correspondence between plaintiffs' counsel and Mr. Bird dated February 11, 2013, in which Mr. Bird consented to the judgement against Pinehurst on behalf of both defendants, counsel for the plaintiffs made it clear that he was specifically leaving open the ability to pursue Mr. Bird for judgment against him personally. In order to resolve the upcoming motion, counsel for the plaintiffs expressly proposed the consent judgment against Pinehurst only and that "we also agree, on consent, to adjourn the portion of the motion dedicated to the prospect of a personal judgment against you, to a date which will allow you to submit responding materials and where we can organize more time to argue the motion." Mr. Bird agreed to the proposal. The balance of the motion for relief against Mr. Bird was thus adjourned and, ultimately, came on for hearing before Edwards J. In the circumstances, there is no merit to Mr. Bird's objection.

Conclusion

[57] For these reasons, the appeal is dismissed with costs fixed in the amount of $7,500, payable by Mr. Bird to the plaintiffs forthwith.

Howard J.

Molloy J.

C. Horkins J.

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Plaintiffs (Respondents)

-and-

David Birch c.o.b. as Pinehurst School and Pinehurst Corporation c.o.b. Pinehurst School,

Defendants (Appellant)

ENDORSEMENT

Released: September 15, 2016