2008 CarswellOnt 6916
Ontario Superior Court of Justice

Nestlé Canada Inc. v. Kossatz

2008 CarswellOnt 6916, 173 A.C.W.S. (3d) 100

Nestlé Canada Inc. v. Anne Kossatz , WILLIAMS SHAVINGS LIMITED, MED-RX, MED-RX LTD. and DARRYL B. WILLIAMS (a.k.a. brent w. douglas)

Harvison Young J.

Heard: July 17-September 12, 2008
Judgment: November 20, 2008
Docket: 06-CV-320551-PD2

Counsel: Shawn M. Philbert for Plaintiff by Counterclaim
Bradley E. Berg, Shashu Clacken for Defendants by Counterclaim
Darryl B. Williams for himself

Subject: Civil Practice and Procedure; Employment; Public; Torts; Contracts; Corporate and Commercial

Table of Authorities

Cases considered by *Harvison Young J.*:

Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd. (2000), 2000 CarswellAlta 1460, 2000 ABQB 929, 12 C.P.R. (4th) 503, 87 Alta. L.R. (3d) 366, [2001] 4 W.W.R. 256 (Alta. Q.B.) — referred to

Frame v. Smith (1987), 1987 CarswellOnt 969, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347 (S.C.C.) — referred to

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International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — referred to

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Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20.04(2) — referred to

***Harvison Young J.*:**

1 The Plaintiff, Nestlé Canada Ltd. (Nestlé) brings this motion for summary judgment against the defendants, Anne Kossatz, Williams Shavings Limited ("WSL"), MED-Rx, ("Sole Proprietorship") and MED-Rx Ltd. ("Ltd.") (taken together, "MED-Rx"), and Darryl Williams (a.k.a. Brent Douglas).

2 Nestlé's claim arises out of allegations that Ms. Kossatz, while employed by Nestlé, processed a number of fraudulent invoices, in the amount of $422,499.00, which had been issued by Mr. Williams and/or MED-Rx.

3 The background facts may be summarized as follows. Ms. Kossatz was hired by Nestlé in October 2004 as a corporate insights manager. Her duties included contracting with marketing research companies. The Plaintiff alleges that she quickly implemented an invoicing scheme that essentially defrauded Nestlé of approximately $422,500 before hastily resigning as the scheme was on the verge of being discovered in April 2006. The heart of this alleged scheme involved contracting with Darryl Williams for market research services under the name of MED-Rx. Mr. Williams is Ms. Kossatz's former husband with whom she appears to continue a business and some sort of personal relationship. Ms. Kossatz listed him as her beneficiary on her benefits enrollment forms when she began working for Nestlé.

4 For the purposes related to the contracts with Nestlé which Ms. Kossatz approved, however, Darryl Williams always used the name Brent Douglas. Ms. Kossatz admitted that she never disclosed the fact that Brent Douglas was Darryl Williams or that she had any sort of personal relationship with Brent Douglas. During the period from October 2004 until March 2006, Williams/Douglas and his company rendered twenty-three invoices to Nestlé for a total of approximately $600,000, all of which were processed for payment by Ms. Kossatz. All of the invoices were rendered under the alias "Brent Douglas". Nestlé is not taking issue with nine of these invoices with respect to which it seems that there was proper approval and for which services were delivered.

5 This action centers on the remaining fourteen invoices which, Nestlé alleges, were never approved, for which services were never provided and which were all processed for payment by Ms. Kossatz. Nestlé claims damages on the basis of breach of contract and unjust enrichment; and, in the alternative, misappropriation and conversion; deceit and fraudulent misrepresentation; breach of trust and fiduciary duty; or civil conspiracy. Nestlé also claims punitive damages, a tracing order and related relief.

6 As against MED-Rx and Mr. Williams, Nestlé claims similar relief but does not allege breach of fiduciary duty.

7 The defendant Anne Kossatz is represented by Mr. Philbert. Until February, 2008, he represented all of the defendants. Darryl Williams (a.k.a. Brent Douglas). MED-Rx served a Notice of Intent to act in person at that time. At this point, only Ms. Kossatz is represented. Neither Mr. Williams nor MED-Rx have appeared before this court.

8 Ms. Kossatz admits that she processed all fourteen invoices for payment, that all were paid, and that they were paid to MED-Rx, which was, at least at some point, registered as her sole proprietorship. She does not, however, admit that they were fraudulent, although her explanation has varied. In her Amended Statement of Defence March 22, 2007, she has taken the position that these invoices were for work that had been approved by at least two of the Plaintiff's senior executives, under purchase authorizations, contracts, or proposals negotiated by Ms. Kossatz, and signed off on

by Ms. Molenda, a senior executive of the Plaintiff and Ms. Kossatz's immediate superior. In support of this position, she relies on a three-year service agreement, which she claims was negotiated between Nestlé and MED-Rx, under which the fourteen invoices were issued with the work to be performed sometime in the future.

9 The Plaintiff points, however, to a different position that Ms. Kossatz took in an affidavit sworn April 21, 2008, on the eve of the original return date for this motion. In that affidavit, she took the position that all the work was done and the services performed and that, for that reason, MED-Rx and Darryl Williams were entitled to be paid.

10 Nestlé takes the position that no work was completed on these fourteen invoices and that there is no plausible basis for saying that it was. It also takes the position that the three year service agreement relied on by Ms. Kossatz is not authentic and that there was no such agreement. It points out that this alleged agreement appeared only by letter on May 1, 2006, in the course of the investigations that followed Ms. Kossatz's resignation and was not mentioned by the defendants before then. Further, the alleged agreement was signed by Darryl Williams, not Brent Douglas.

11 On April 13, 2006, Ms. Kossatz's supervisor, Susan Molenda, noticed a suspicious invoice, dated March 28, 2006, on the computer printer she and Ms. Kossatz shared and asked her about it. Ms. Kossatz did not give a plausible explanation for it. She resigned without notice a few days later, citing only "reasons that are my own." She has commenced an action by counterclaim against Nestlé and Susan Molenda seeking damages in the amounts of $2,300,000 for loss of salary and pension benefits; $1,200,000 for emotional suffering and constructive dismissal; and punitive damages in the amount of $1,000,000; along with costs and pre-and-post-judgment interest.

12 Nestlé asserts that the combination of admissions, lack of credibility of Ms. Kossatz and the absence of plausible explanation for a number of elements of the relationship between Ms. Kossatz and Mr. Williams, including the fact that while his name was Darryl Williams he always used the name Brent Douglas in relation to Nestlé, along with the fact that Ms. Kossatz (admittedly) never disclosed her present or past relationship with Mr. Williams or her links with his companies to Nestlé, amount to a very strong case for the Plaintiff such that there is no genuine issue for trial on any of the causes of action. Nestlé argues that this was a sophisticated scheme and that the validity of some, mostly earlier, invoices, helped to pave the way for the fraudulent ones. Mr. Berg for Nestlé argued persuasively that the combination of the admissions made by Ms. Kossatz and the lack of credibility of the explanations that she has offered relating to the fourteen invoices in issue amount to a very strong case that has not been answered, such that there is no genuine issue for trial.

13 The Respondent's position may be summarized as follows. Summary judgment cannot issue where there are material facts in dispute. Each cause of action claimed by the Applicant relies on material fact or facts that are in issue. The central issue to all the causes of action pleaded is whether the invoices were valid or not. Central to the Respondent's position is the fact that the Applicant chose not to dispute nine invoices of the defendants, and that the distinction between valid and invalid invoices was admitted by the Applicant to be "muddy." Further, those causes of action that allege misconduct in the nature of fraud must be made out against a higher burden of proof than that generally required for summary judgment. Mr. Philbert also emphasized during his submissions that Mr. Berg, in cross-examining Ms. Kossatz on her affidavit, had not asked her any questions about the invoices.

14 The starting point in any motion for summary judgment is Rule 20.04(2):

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or a defence, the court shall grant summary judgment accordingly.

15 In *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, 61 O.R. (3d) 786, [2002] O.J. No. 3891 (Ont. C.A.) [cited to O.R.] at para. 23, Laskin J.A. wrote as follows:

> In *High-Tech Group Inc. v. Sears Canada* (2001), 52 O.R. (3d) 97 (C.A.), after discussing the previous Rule 20 case law, Morden J.A. set out these two principles at 104-105:

> This court and the Supreme Court of Canada have wrestled with different formulations of the summary judgment test under Rule 20. But two principles have consistently been applied. First, the moving party has the burden of showing that the claim or defence does not raise a genuine issue for trial. But, second, because of rule 20.04(1), the responding party ordinarily has an evidentiary burden to put forward some evidence in support of its position — it "must lead trump or risk losing."These two Ontario decisions, *Dawson* more fully than *Irving Ungerman*, make it clear that: (1) the legal or persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial before summary judgment can be granted (this is what rule 20.04(2) says); and (2), by reason of rule 20.04(1), there is an evidential burden, or something akin to an evidential burden (because the motions judge does not find facts), on the responding party to respond with evidence setting out "specific facts showing that there is a genuine issue for trial". Failure of the responding party to tender evidence does not automatically result in summary judgment. The "evidential burden" is described by this court (Catzman, Austin, and Borins JJ.A.) in *Lang v. Kligerman*, [1988] O.J. No. 3708in paras. 8 and 9 and by the High Court (Griffiths J.) in *Kaighin Capital Inc. v. Canadian National Sportsmen's Show* (1987), 58 O.R. (2d) 790 at p. 792, 17 C.P.C. (2d) 59.
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> The short point is that the motions judge, having considered all of the evidence and the parties' submissions on it, must be satisfied that there is no genuine issue for trial before he or she may grant summary judgment. This is the legal burden resting on the moving party and it never shifts. I do not think that *Guarantee Co. of North America* intended to detract from this. [Footnotes omitted.]

16 In my view, and with some regret, I conclude that the Applicant has not met the burden of showing that the Respondent does not raise a genuine issue for trial, despite the significant circumstantial evidence that it has led indicating that some fraud was committed by the defendants.

17 First of all, while Ms. Kossatz admits a number of facts from which inferences of fraudulent conduct might be drawn, such as the fact that she did not disclose her knowledge that Mr. Douglas and Mr. Williams were the same person, or the existence or nature of her personal relationship with him including the fact that they had been married, she denies that the invoices were invalid. It is true that she has said both that the work was done (in her affidavit) and that the invoices were valid pursuant to the alleged three year service agreement, and Nestlé relies on this as evidence of an absence of a plausible explanation. Nestlé does not challenge the validity, as indicated above, of nine of the twenty-three invoices from MED-Rx/Brent Douglas.

18 It is clear that some work was done by MED-Rx. Nestlé alleges that fourteen of the invoices were not valid, but it is difficult to establish from the record exactly what the criteria of validity or invalidity was. For instance, while the Applicant asks the court to find that one of the invoices, invoice 14, is invalid on the basis that it is billed to a Project Approval number ("PA") used for advertising tracking by an unrelated supplier (Milward Brown), one of the invoices not contested by the Applicant, invoice 8, is also billed to an unrelated supplier (Acnielson Market Track and Homescan). In short, the circumstances surrounding the fourteen invoices and how they differ from the other nine in terms of their alleged invalidity is not clear on the record. These are material facts central to the fraud claim. While it is true that courts may make inferences, the issues at the heart of this case are the validity of these fourteen invoices. The factual issues relating to the inferences to be drawn are complicated in light of the fact that some of the invoices are not challenged. Some work was done. This requires, in my view, a much closer look at each individual invoice than can be effected in the course of a summary judgment motion.

19 Second, as a matter of law, I am unable to conclude that Ms. Kossatz is a fiduciary within the meaning of the term given her position (see *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at para. 60, Wilson J., *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at para. 32, *Sanford Evans List Brokerage v. Trauzzi*, [2000] O.J. No. 1394, 50 C.C.E.L. (2d) 105 (Ont. S.C.J.) [cited to O.J.] at para. 34, *Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd.*, 87 Alta. L.R. (3d) 366, 2000 ABQB 929 (Alta. Q.B.), at para. 39-44). Accordingly, there is no

basis for ordering the restitution of the value of the invoices paid on the basis of a breach of fiduciary duty, even if Nestlé establishes that Ms. Kossatz was enriched by such amounts (which I am unable to find on the record at this point).

20 Third, there is, in my view, a genuine issue for trial as to whether Ms. Kossatz was enriched by the amounts claimed, or by any portion of these amounts. She appears to have given contradictory evidence about her involvement in MED-Rx. It seems clear on the evidence that she is involved and that she has not been truthful or forthright on the subject at all times. This, however, does not permit the court to infer that she has received or been enriched by the amount claimed at the stage of a motion for summary judgment.

21 Fourth, while Ms. Kossatz might well have violated the terms of her employment contract or a duty of fidelity, Nestlé has not met its onus of establishing the nexus between such breaches (such as failing to disclose the relationship between her and Mr. Williams or MED/RX) and the amounts of the fourteen invoices which it claims as losses.

22 Fifth, in relation to the employment contract, there is a genuine issue as to the precise terms of the employment contract in light of the fact that the written contract was not signed until February 13, 2006, some time after a number of the impugned invoices were processed.

23 Sixth, as far as Mr. Williams and MED-Rx are concerned, it is clear that they received the funds but as far as these defendants are concerned, their liability, at least with respect to the claims of deceit and fraudulent misrepresentation, also turns to a large extent on the legitimacy of the particular invoices.

24 Seventh, this case centres on the allegation of fraud and deceit. As Cullity J. held in *Kanematsu (Canada) Inc. v. Canada Import Sales*, 1999 CarswellOnt 2736, [1999] O.J. No. 3270 (Ont. S.C.J.) at para. 32, allegations of fraud involving personal dishonesty are very serious and the requirement that the moving party put its best foot forward is especially relevant. The evidence adduced on this motion by Nestlé is largely circumstantial and would require the court not only to weigh the evidence given by Ms. Kossatz on her cross examination but to draw a number of relatively complex inferences. The issue of the validity of the fourteen invoices is central to this case. It is clear from the record that the invoices, and the precise process for their approval and payment, varied to some extent. In some cases they appear to be quite similar to those which Nestlé is not challenging in this action. I cannot conclude that there is no genuine issue for trial relating to the validity of any of the invoices.

25 Eighth, Ms. Kossatz relies in part on an alleged three year service agreement which Nestlé claims has been fabricated by the defendants. Nestlé submits that Ms. Kossatz would not have had the authority to enter into the contract on behalf of Nestlé, and that such term contracts are dealt with differently than under the PA system referred to above. Mr. Philbert, for Ms. Kossatz countered that Nestlé has not put forth an evidentiary record on which to base a conclusion that a different protocol would be followed for longer term contracts, and alternatively, that her lack of authority to enter into the contract would undermine the Plaintiffs position that Ms. Kossatz is a fiduciary, On the evidence before me I am unable to conclude one way or the other. This is a material fact which is in issue.

26 Nestlé emphasized the well-known adage from *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.), that "a respondent on a motion for summary judgment must lead trump or risk losing" in support of its argument that the motion should be allowed. As against Ms. Kossatz, it argues, she has made implausible or contradictory statements. As against Mr. Williams and MED-Rx, they have filed no evidence on the motion (other than adopting the evidence filed on behalf of Ms. Kossatz) and simply made bald assertions denying the allegations of fraud. It is important to note, however, that as the Ontario Court of Appeal held in *Hi-Tech Group Inc. v. Sears Canada Inc.* [2001 CarswellOnt 9 (Ont. C.A.)], *supra*, failure of the responding party to tender evidence does not automatically result in summary judgment. The motions judge has to be satisfied that there is no genuine issue for trial, the onus to prove that lies with the moving party and never shifts (see *Ontario Jockey Club*). Nestlé has not met this burden.

27 For these reasons, I would deny the Applicant's motion. If the parties are unable to agree as to costs, I may be spoken to.

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