Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20101202

Docket: A-510-08

Citation: 2010 FCA 331

CORAM: **SHARLOW J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

HAMID BARADARAN and SHIVA KHODABAKHSH

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

and

VEGREVILLE HOTEL & INN LTD.

Respondent

Heard at Vancouver, British Columbia, on December 1, 2010.

Judgment delivered at Vancouver, British Columbia on December 2, 2010.

REASONS FOR JUDGMENT BY: . SHARLOW J.A.

CONCURRED IN BY: TRUDEL J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of a judgment of Justice Woods of the Tax Court of Canada (2008 TCC 503) in which she concluded that, from March 1 to October 28, 2006, the appellants Hamid Baradaran and his wife Shiva Khodabakhsh were independent contractors, not employees, when they worked at the Vegreville Garden Inn in Vegreville, Alberta, a hotel owned by the respondent

Vegreville Hotel & Inn Ltd. (“VH”). The appellants have appealed to this Court to seek a reversal of that decision.

[2] The appellants challenge a number of findings of fact by Justice Woods. The respondent VH defends her decision. The respondent Minister of National Revenue has appeared and submitted a memorandum of fact and law, but has taken no position on the merits.

[3] On an appeal from a judgment of the Tax Court after a trial, the task of this Court is to determine whether the judge made an error that would justify setting the judgment aside and replacing it with a different judgment. In making that determination, this Court must apply the standards of review established by the Supreme Court of Canada (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 25).

[4] A determination as to whether an individual is an employee or an independent contractor is a question of mixed fact and law. Therefore, unless it is established that the determination is fatally flawed by an extricable error of law (which the appellants do not allege), this Court can intervene only if the judge has made a palpable and overriding factual error (see, for example, *D.W. Thomas Holdings Inc. v. Minister of National Revenue*, 2009 FCA 371, at paragraph 3).

[5] An error is palpable if it is easily discerned and readily described. An error is overriding if it is important enough to affect the outcome of the case. On that standard of review, this Court cannot reverse the decision of Justice Woods merely because it might have reached a different conclusion

than she did. This Court can intervene only if it can fairly determine that Justice Woods could not reasonably have found the facts as she did based on the evidence presented to her.

[6] It is clear from the submissions of the appellants, who are self represented, that they are aware that the standard of review is palpable and overriding error.

[7] I turn now to consider whether this high standard of review is met. Before dealing with the submissions made by the appellants, I note that Justice Woods relied to a significant extent on a written contract between the parties, apparently written without legal assistance. She does not quote the contract in her reasons but it is included in the record. I summarize as follows the key terms of the contract:

(a) The contract uses the word “contractors” to refer to the appellants and the word “owners” to refer to Hamid Rahmanian and Rena Rahmanian, who owned VH.

(b) The owners were responsible for the renovation and major maintenance costs of the hotel.

(c) The owners were entitled to the income from video lottery terminals and all restaurant rent.

(d) Profit from the remainder of the hotel operation would be divided so that the appellants would receive 10% of any profit up to $50,000, 15% of any profit from $50,000 to

$100,000, 20% of any profit from $100,000 to $200,000, and 30% of any profit over $200,000, and the owners would receive the remainder.

(e) In addition to the profit share, the appellants would be paid $3000 per month including free accommodation as compensation for hotel and lounge responsibilities plus 200 hours per week of front desk duties. If the front desk duties were carried out by a third party, the cost would be the responsibility of the appellants.

(f) The contract could be terminated by either party on 60 days notice.

[8] No share of the profit became payable to the appellants under the contract because the hotel operations resulted in a loss of approximately $35,000 for the year ended August 31, 2006.

[9] Justice Woods considered the written contract to be a very important factor in this case. She concluded that nothing in the contract provided the appellants with a basis for concluding that they would be employees of VH. More importantly, she took the contract as evidence that both parties accepted, when the contract was entered into, that the appellants would be independent contractors and not employees. Justice Woods also noted that the appellants registered a business name for GST purposes, and that no source deductions were taken from the compensation paid to the appellants. In my view it was reasonably open to Justice Woods to conclude, as she did, that the evidence on these points favoured the conclusion that the appellants were independent contractors.

[10] Justice Woods went on, as required by the jurisprudence, to consider whether the arrangement as actually carried out reflected a true independent contractor relationship between the appellants and VH. In that part of her analysis, she considered the traditional factors from *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue – M.N.R.*, [1986] 3 F.C. 553 (C.A.) (although that case was not cited by either party or in the reasons for judgment). The grounds of appeal relate to her consideration of those factors.

[11] The appellants correctly point out that Justice Woods, in determining who effectively controlled the operation of the hotel, generally preferred the evidence of the appellant Mr. Baradaran over that of Mr. Rahmanian, who gave evidence for VH. She noted that Mr. Baradaran testified that Mr. Rahmanian had the ability to dictate how the hotel would be operated. Nevertheless, Justice Woods concluded that Mr. Baradaran was in effective control of the hotel business. The appellants submit that this conclusion is perverse, and that Justice Woods did not appreciate that the appellants acted always under Mr. Rahmanian's direction, with his permission, and under his direct scrutiny because of internet cameras on the premises.

[12] The record discloses that Justice Woods was confronted with conflicting evidence on the question of control of the hotel business. Although she noted weaknesses in the evidence of Mr. Rahmanian, and was aware of the evidence cited by Mr. Baradaran relating to the degree of control and scrutiny actually exercised by Mr. Rahmanian, she reasoned that his involvement was consistent with what would have been needed to protect VH's financial investment. She said that, on the basis of the evidence as a whole, the appellants had the authority to run the hotel as they saw

fit, with the exception of those financial matters. In my view, that conclusion was reasonably open to her on the evidence presented, and supports her finding that the appellants were independent contractors.

[13] The appellants submit that Justice Woods failed to appreciate that all of the tools of the hotel business were provided by VH and none were provided by the appellants except the occasional use of their own car to perform some work for the hotel.

[14] In determining whether a person is an employee or an independent contractor, the ownership of tools is a factor that may be given considerable weight in some circumstances, and very little in others. The evaluation of the weight to be given to that factor in a particular case is a factual question. The record is clear that the hotel and all of the assets within it were owned by VH, but there is no reason to presume that a person retained as an independent contractor to manage a hotel would necessarily require any tools apart from the hotel itself and its contents. In the circumstances of this case, Justice Woods was justified in giving the factor of the ownership of tools little weight. She concluded that the appellants were independent contractors even though they provided no tools. In my view, that factual conclusion was reasonably open to her on the evidence presented.

[15] The appellants submit that Justice Woods erred in her consideration of the factors of chance of profit and risk of loss. They argue that she disregarded the fact that the appellants were contractually entitled to share in the profits of the hotel, but they never did so because there were no hotel profits during the relevant period. And yet, they received their contractual entitlement of

$3,000 per month despite the fact that the hotel was operating at a loss. It is true that Justice Woods did not mention that there were no hotel profits to share, but that was not an error because that fact by itself is not relevant to the question of whether the appellants were employees or independent contractors. As to the other points, Justice Woods concluded that the entitlement of the appellants to a share of the profits was a neutral factor because employees may have the same entitlement. She also observed that the contract did entail a risk of loss because the appellants were responsible for labour costs if their duties were performed by third parties, and that this supported the conclusion that the appellants were independent contractors. Again, these factual conclusions were reasonably open to her on the evidence presented.

[16] In my view, this was a close case before Justice Woods in the sense that there was substantial evidence favouring the position of the appellants as well as substantial evidence favouring the position of the respondent VH. However, as explained above, this Court cannot reverse Justice Woods' decision merely because it might have decided the case differently than she did. Having concluded that all of her findings of fact were reasonably open to her, we are compelled to dismiss this appeal.

[17] For these reasons, and despite the well articulated submissions of Mr. Baradaran for the appellants, I would dismiss the appeal, in the circumstances without costs.

"K.Sharlow"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
David W. Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	HAMID BARADARAN, ET AL v. THE MINISTER OF NATIONAL REVENUE v. VEGREVILLE HOTEL & INN LTD.
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DATED:	December 2, 2010.

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