

NOVA SCOTIA COURT OF APPEAL
Citation: *Darde v. Morris Bureau*, 2013 NSCA 121

Date: 20131024
Docket: CA 410328
Registry: Halifax

Between:

Thierry Daniel Jean Paul Darde

Appellant

v.

Morris Bureau, Barristers and Solicitors

Respondent

Judges: Beveridge, Farrar and Bryson, JJ.A.

Appeal Heard: October 8, 2013, in Halifax, Nova Scotia

Held: Appeal dismissed per reasons for judgment of Farrar, J.A.;
Beveridge and Bryson, JJ.A. concurring.

Counsel: Appellant in person
Richard Bureau, for the respondent

Reasons for judgment:

[1] Morris Bureau represented the appellant in his divorce proceeding. What had originally been scheduled as a six-day trial turned into a 17-day trial. After the initial six days Morris Bureau asked for a further \$50,000 retainer to cover the legal fees that would be incurred in the continuation of the trial. Mr. Darde told the law firm he had arranged two lines of credit by credit card applications that he would draw on to pay the legal fees. He asked Morris Bureau to complete his divorce and receive payment of their legal fees at the end of the trial.

[2] The trial judge found that the representations made to Morris Bureau with respect to the two lines of credit were false and that Mr. Darde knew the statements were untrue.

[3] In the summer of 2009 Mr. Darde filed for bankruptcy and was subsequently discharged on March 30, 2011.

[4] Morris Bureau made an application pursuant to s. 178(1)(e) of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 asking that the amount owing to them by Mr. Darde should survive a discharge in bankruptcy and remain owing. The trial judge concluded that as a result of the false pretence and fraudulent misrepresentations made by Mr. Darde, Morris Bureau's account would survive the bankruptcy.

[5] Mr. Darde appeals. In his Amended Notice of Appeal he lists two grounds of appeal. They are:

1. The Learned Trial Judge erred in her application of the law regarding Fraudulent Misrepresentation; and
2. The Learned Trial Judge erred by failing to turn her mind to whether the reliance by Morris Bureau was reasonable in the circumstances.

[6] Mr. Darde was represented by counsel at the time of filing his Amended Notice of Appeal and on the filing of his factum. However, on September 19, 2013, Mr. Darde dismissed his counsel and at the time of the appeal hearing he was self-represented.

[7] The appellant's position is this the trial judge erred in failing to properly apply the law of fraudulent misrepresentation, in particular, she failed to turn her mind to the issue of reliance or if she did, the reliance by Morris Bureau on the fraudulent representations was unreasonable in the circumstances.

[8] The appellant says that the judge referenced the proper law on fraudulent misrepresentation set out in **Derry v. Peek** (1889), 14 App. Cas. 337, that is, to establish fraudulent misrepresentation the following must be shown:

1. the making of a representation;
2. the representation was false;
3. the representation was made knowingly; without belief in its truth, or recklessly indifferent whether it was true or false; and
4. the creditor relied on the representation and turned over property to the debtor.

[9] Mr. Darde does not challenge the trial judge's findings on the first three parts of the test. He says, however, she failed to turn her mind to the fourth part of the test; whether Morris Bureau relied on the fraudulent misrepresentation and, if so, was the reliance reasonable.

[10] The appellant's first argument is without merit. The trial judge's decision implicitly, if not explicitly found that Morris Bureau relied on the representation:

[23] I am satisfied on the evidence before me that Mr. Darde obtained legal services from Morris Bureau through false pretence and fraudulent misrepresentation knowing them to be untrue. His solicitors accepted his representation and continued to represent him for the balance of the divorce proceeding.

[11] Although the trial judge did not use the word "rely", this passage shows the trial judge turned her mind to the issue of reliance and found by continuing to represent Mr. Darde, Morris Bureau relied on the representation.

[12] The appellant's second argument, that the trial judge failed to find that the reliance by Morris Bureau was reasonable, also fails. There is no requirement that the reliance on the fraudulent misrepresentation must be objectively reasonable. The test articulated in **Derry v. Peek, supra** clearly asks whether the representee

relied on the misrepresentation. This does not take place in the abstract but rather is rooted in the actual behaviour of the representee. In this case, Morris Bureau continued to represent Mr. Darde in his divorce proceeding evidencing its reliance on the misrepresentation.

[13] The appellant relies on **Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)**, [1998] O.J. No. 2637(Q.L.)(Ont. Gen. Div.) as support for his argument that reliance must be reasonable. In particular, the appellant references ¶476 where Winkler, J. (as he then was) stated:

476 Proof of the element of reliance on a misrepresentation involves a two step test. The first is a factual test, namely, whether the plaintiff relied upon the representation in fact. The second limb of the test requires a determination by the court, on an objective basis, as to whether the reliance was reasonable. This second requirement was described in Allen M. Linden, *Canadian Tort Law*, 6th ed (Butterworths: Toronto, 1997) at 445-446:

Reliance not only must be proven in fact but also must be demonstrated to be reasonable. The second part of the fourth requirement, therefore, means that only those injuries resulting from reliance reasonably placed on a defendant will be compensable. It follows that, to the extent injuries were sustained as a result of unreasonable reliance, recovery may be barred. In most cases, however, a plaintiff will be barred from recovery only to the extent the reliance was unreasonable. The notion of unreasonableness here simply suggests a limit on the degree of reliance a given factual scenario may bear. It does not suggest that, if a plaintiff steps beyond that limit, all recovery must be lost.

Nevertheless, where the facts suggest that any reliance whatsoever is unreasonable, recovery is rightly barred.

[14] The paragraphs cited by the appellant in support of his argument that reliance must be reasonable fall within the court's discussion on negligent misrepresentation. The passage cited has no bearing on reliance in a claim of fraudulent misrepresentation.

[15] Winkler, J. went on to discuss fraudulent misrepresentation and found that the claim failed on the lack of deceitful intention; not on the issue of reliance (¶531 & 541).

[16] Mr. Darde also relies on a decision of the British Columbia Court of Appeal in **Kripps v. Touche Ross and Co.**, [1997] B.C.J. No. 968 (Q.L.). **Kripps** does not assist the appellant. In **Kripps**, the court was addressing reliance as a question of fact. At ¶88 the court held:

Reliance is a question of fact. Where such a finding is based upon oral testimony, the assessment of witnesses, and decisions on credibility, it is a question which should be answered by a trial judge. ...

[17] **Kripps** did not find that in a fraudulent misrepresentation case the reliance must be reasonable.

[18] The false statement made by the defendant need only be materially connected to the actions of the plaintiff that resulted in damage. In other words, were the misrepresentations made by Mr. Darde connected to the actions of Morris Bureau that resulted in them suffering damages? The trial judge found they were and made a finding of fact to that effect. Linda D. Rinaldi, *Remedies in Tort Law*, vol. 1, loose-leaf (consulted on October 15, 2013), (Toronto, Ont.: Carswell, 1987), explains the law where fraud or deceit is involved at p. 5-36:

§38 Materiality is a question of fact, and every case depends on its own particular circumstances. It is no defence that the plaintiff was negligent or foolish in relying on the misrepresentation.

...

§38.1 The test for materiality is a subjective one, that is, whether or not the representation was material as between the parties. The true question is not whether the representation would have caused a reasonable person to act, but whether it was a true inducement to the plaintiff.

[19] In conclusion, there is no requirement that the reliance by Morris Bureau, in these circumstances, be reasonable. The trial judge found the representations were made, they were false, and Morris Bureau relied on those representations in continuing to act for Mr. Darde and as a result suffered damages. In doing so she properly applied the law of fraudulent misrepresentation.

[20] I would dismiss this ground of appeal.

Fresh Evidence

[21] Mr. Darde sought to introduce four emails from Mr. Bureau dating from February 6, 2009 to April 16, 2009. He said the reason he wished to present these emails was to show that he did not make any of the representations alleged by Mr. Bureau contrary to the findings of by Robertson, J. that he had done so.

[22] At the hearing we dismissed the motion to introduce fresh evidence for a number of reasons:

1. Mr. Darde said he was in possession of the emails in January, 2013; yet he did not disclose the emails to Mr. Bureau until the appeal hearing. Nor did he give notice to Mr. Bureau he intended to make a fresh evidence application;
2. The evidence relates to the representations found to have been made by Mr. Darde which are not challenged on appeal. In fact, the appellant amended his notice of appeal on July 30, 2013 removing the grounds of appeal challenging the trial judge's finding that the representations were made;
3. The proposed fresh evidence did not comply with the criteria for admission of fresh evidence.

[23] For all of these reasons we dismissed Mr. Darde's motion to adduce fresh evidence.

[24] The appeal is dismissed with costs to the respondent in the amount of \$2,500.00 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Bryson, J.A.