NOVA SCOTIA COURT OF APPEAL

Citation: *Gates Estate v. Pirate's Lure Beverage Room*, 2004 NSCA36

Date: 20040302
Docket: CA 205008
Registry: Halifax

Between:

Estate of Hedley Harry Gates, by Sharon Darlene Gates, Administratrix, Sharon Darlene Gates, and Kendall David Gates, an infant, by Sharon Darlene Gates, his Parent/Guardian

Appellants

v.

Pirate's Lure Beverage Room, a registered partnership/business name, 1882201 Nova Scotia Limited, a body corporate, Robert J. Wentzell and James "Jim" Sampson

Respondents

Judges: Saunders, Oland, Hamilton, JJ.A.

Appeal Heard: January 23, 2004, in Halifax, Nova Scotia

Held: Appeal allowed, with costs of $1,500 plus disbursements payable by the appellants to the respondents as per reasons for judgment of Hamilton, J.A., Saunders and Oland, JJ.A. concurring.

Counsel: Ann E. Smith, for the appellants
Philip M. Chapman, for the respondents

Reasons for judgment:

[1] This is an appeal from the July 28, 2003 order of Chief Justice Joseph P. Kennedy of the Supreme Court, ("the Chambers judge"), dismissing the appellants' application to set aside an interlocutory order granted by Justice Margaret J. Stewart on June 27, 2002. The June 27, 2002 order was drafted by counsel for the respondents, Mr. Chapman, and agreed to by the former counsel for the appellants, ("the former counsel"), when he was faced with the respondents' court application for production of documents. The order required the appellants to produce specified documents to the respondents within 30 days of the date of the order, in default of which "the action of the plaintiffs (appellants) shall be dismissed without costs." Not all of the documents were produced within the time period specified in the order and in October, 2002 the respondents took the position the action stood dismissed although they never applied for or obtained an order dismissing the action.

FACTS

[2] The appellants are the plaintiffs in the action and the respondents are the defendants. Hedley Harry Gates, the husband of the appellant Sharon Gates and the father of the appellant Kendall David Gates, died as a result of injuries he received in a single vehicle accident at Chester Basin, Lunenburg County, on August 27, 2000.

[3] Ms. Gates retained the former counsel in September, 2000 to act on behalf of the estate of her late husband, on her own behalf, and on behalf of her infant son. He commenced an action against the respondents in February, 2001. The action alleges that the respondents were negligent and thereby caused or contributed to the death of Hedley Harry Gates by contributing to his drunkenness on the evening that he died, and by failing to prevent him from driving his motor vehicle after leaving the premises.

[4] About the middle of May, 2001 Mr. Chapman provided the former counsel with a copy of the defence and requested production of documents. A further letter requesting discovery was sent to the former counsel in November, 2001.

[5] Discovery examinations were scheduled for January 28 and 29, 2002. By letter dated January 4, 2002, Mr. Chapman requested the former counsel to forward the appellants' list of documents prior to the discovery examinations. A full copy of all family physicians' files, employment records, income tax returns for both Mr. and Mrs. Gates, and a copy of the medical examiner's report, or a completed authorization form to obtain same, were also requested.

[6] By letter dated January 21, 2002, Mr. Chapman wrote to the former counsel advising that if he did not receive the requested documentation by January 23, 2002, he would cancel the discovery examinations and make a chambers application for production.

[7] On January 22, 2002, the former counsel wrote to Ms. Gates and advised her of the documents being sought by the respondents and wrote to Mr. Chapman and advised him that he was not ready to proceed with discoveries on January 28 and 29, 2002.

[8] As a result of meeting with her former counsel on January 31, 2002, Ms. Gates agreed to provide him with the required income tax returns, which she did, and instructed him to obtain the remaining documents on her behalf. Unknown to Ms. Gates, her former counsel did not take any steps to obtain the remaining documents.

[9] On June 6, 2002 Mr. Chapman commenced the application that gave rise to the Order. The application was set down for hearing on June 27, 2002. On June 26, 2002, the former counsel wrote to Mr. Chapman advising that the appellants would consent to the order for production of documents proposed by the respondent, provided the costs sought by them were deleted. On June 27, 2002, Justice Stewart signed the order in the form to which the former counsel had agreed.

[10] The consent order provided:

> IT IS HEREBY ORDERED that:
>
> (1) The plaintiffs shall file the plaintiffs' List of Documents pursuant to R. 20.01 of the Nova Scotia *Civil Procedure Rules* in this action against the

> defendants within 30 days of the date of this Order, which List of Documents shall include:
>
> (a) A full copy of the family physicians' files for the deceased;
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> (b) Employment records of the deceased, including documentation of earnings, performance, and disciplinary history;
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> (c) Income tax returns for both Hedley Harry Gates and Darlene Sharon Gates, for a period of three years prior to the accident, forward; and
>
> (d) A copy of the medical examiner's report for Hedley Harry Gates, showing cause of death, etc.
>
> (2) If the plaintiffs fail to file the plaintiffs' List of Documents in this action against the defendants within 30 days of this Order, the action of the plaintiffs shall be dismissed without costs;
>
> (Underlining mine)

[11] The former counsel did not advise Ms. Gates of the application for production or the order. She was completely unaware of them or their terms. Consequently she gave no instructions to him concerning them. The respondents were not aware that Ms. Gates had not done so.

[12] On August 6, 2002 the former counsel filed the appellants' list of documents. The copy of the list faxed to the respondents did not contain either the family physicians' files for the deceased or the employment records of the deceased as required by the order. By letter dated October 8, 2002, Mr. Chapman wrote to the former counsel advising:

> . . . Given the current status of this matter and the Order of Justice Stewart, I will now consider this action at being at an end and will close my file. I would suggest that you contact the Barristers' Society to report a possible claim against you by your client.

[13] The Nova Scotia Barristers' Liability Claims Fund engaged counsel to review the matter and on November 21, 2002, she provided Mr. Chapman with the remaining documents, completing the production of documents required by the order.

[14] On May 22, 2003 an interlocutory application was made on behalf of the appellants seeking to have the Order set aside pursuant to **Civil Procedure Rule 15.08** and/or the inherent jurisdiction of the court. They did not make an application under **Rule 3.03** for an extension of the time period provided for in the order, which may have been the preferable procedure.

[15] The issues before the Chambers judge were whether he had jurisdiction to set aside the order, and if he did, whether he should exercise his discretion. Noting the inequities that would result, the Chambers judge nonetheless decided that he lacked jurisdiction to set aside the order relying on this court's decision in **Golden Forest Holdings Ltd. v. The Bank of Nova Scotia**, (1990), 98 N.S.R. (2d) 429 (NSCA), and dismissed the application.

ISSUES

[16] Did the Chambers judge err in deciding he lacked jurisdiction to set aside the consent order, and if so, did he err in not exercising his discretion to set it aside?

ANALYSIS

[17] Appellants' counsel argued the Chambers judge erred in deciding he did not have jurisdiction to set aside the order, because of the evidence before him that was not before Justice Stewart; namely, that the appellants were not aware of and did not instruct counsel to agree to the order. She argued that the Chambers judge had jurisdiction to set aside the order because it was not a consent order disposing of the case on its merits.

[18] In the alternative, appellants' counsel argued the Chambers judge erred by not extending the time period for filing the documents provided for in the order pursuant to **Rule 3.03**, although there was no application before him seeking such an extension.

[19] Appellants' counsel also argued that the Chambers judge erred in not exercising his discretion to set aside the order because: the evidence of the former counsel and Ms. Gates, indicates Ms. Gates did not instruct her former counsel to agree to the order; the documents to be produced were in the hands of third parties and not under the control of the appellants; and if the order is not set aside it will result in the appellants' action being dismissed after only 17 months and one application to court for production. She also pointed out that there was no evidence of prejudice to the respondents and that they had all of the documents within four months of the time specified in the order.

[20] Mr. Chapman argued that the Chambers judge did not err in following **Golden Forest** and deciding that he had no jurisdiction to set aside the order because it was a consent order. He argued that the fact Ms. Gates had not instructed the former counsel to consent was irrelevant given her counsel's apparent authority to consent on her behalf in the absence of an indication to the contrary. He argued the former counsel's authority to bind his client went beyond consent orders settling the claim. He argued that **Rule 3.03** is not applicable in this appeal because the appellants' did not make an application pursuant to that rule and it was not argued before the Chambers judge.

[21] Mr. Chapman also argued that even if the Chambers judge did have jurisdiction to set aside the order, he did not err in declining to exercise it. He argued that just because the order prejudices the appellants is not a reason to set it aside. He argued negligence by the former counsel is not a reason to set the order aside.

[22] The appellants have persuaded me that the Chambers judge erred in dismissing their application to set aside the order.

[23] I am satisfied the law concerning consent orders referred to in **Golden Forest** does not apply to the type of order at issue in this appeal. Beginning at paragraph 10 of **Golden Forest** Hallett, J.A., states:

> 10. However, unlike the vast majority of actions for foreclosure and sale, this action was defended. Subsequently, the action was settled upon terms which included the unusual provision for twelve newspaper advertisements of the sale rather than the customary three. The consent order was presented to Madam Justice Roscoe incorporating the advertising requirements agreed to by the

parties. The fact that it was a consent order following a settlement is a very material fact that has led me to conclude that Mr. Justice Tidman did not have the power under the Court's inherent jurisdiction to vary the order of Roscoe, J., as it gave effect to a settlement reached by the parties. The appellant was entitled to have the advertising agreed upon for the sale of this somewhat unique property. The Court does not have the power to vary a consent order that gives effect to a settlement unless the settlement agreement itself could be varied. This point was dealt with by the Ontario Court of Appeal in Monarch Construction Ltd. v. Buildevco Ltd. et al. (l988), 26 C.P.C. (2d) l64. The Court stated at pp. l65-l66:

"A consent judgment is final and binding and can only be amended when it does not express the real intention of the parties or where there is fraud. In other words, a consent judgment can only be rectified on the same grounds on which a contract can be rectified. Here, there was no allegation of fraud and, in our opinion, there was no basis on the material before the Local Judge on which she was entitled to grant rectification. The contract is unambiguous on its face; on the motion of Monarch, it was incorporated in a consent judgment and should be performed in accordance with its terms."

11.In Chitel v. Rothbart et al. (l987), l9 C.P.C. (2d) 48 (Ont.S.C.) a similar statement was made at p. 52:

"A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. None of these grounds are present in the within case."

12.Although the limits of a Superior Court's power in the exercise of its inherent jurisdiction are not fully defined, there are nevertheless limits that have been established in certain areas and the power of a Court to vary a consent order is one of them.

13.Applying even the broadest of tests, it would not be just or equitable in this case to vary the order of Roscoe, J., as the appellant did not get the advertising it bargained for and there is no way to determine that the appellant was not prejudiced by the failure to comply with the advertising requirements of the order. Furthermore, even if one were to consider there was substantial compliance, there would be no way of compensating the plaintiff in damages for the failure to have performed the agreement as incorporated into the consent order.

(Emphasis mine)

[24] As can be seen from the above quote, the consent order considered in **Golden Forest** was an interlocutory order for foreclosure and sale, the terms of which were negotiated by the parties after a defence to the foreclosure action was filed. The Supreme Court granted a consent order which provided for twelve advertisements of the sheriff's sale, rather than the usual three. Following an application by the respondent after the newspaper failed to insert one of the advertisements, it subsequently varied that order by reducing the number of advertisements to eleven. The appellant appealed successfully to this Court. This Court held that while the Supreme Court normally had jurisdiction to vary this type of order as part of its inherent jurisdiction to control its own processes, it had no such jurisdiction where the order was a consent order unless there were grounds for varying the agreement itself.

[25] The cases relied on in **Golden Forest** to support the principle that consent orders cannot be varied unless the underlying agreement itself can be varied, also dealt with consent orders where the merits of the case were resolved: **Monarch Construction Ltd. v. Buildevco Ltd. et al.** (1988), 26 C.P.C. (2d) l64 and **Chitel v. Rothbart et al.** (1987), 19 C.P.C. (2d) 48 (Ont. S.C.). A consent order settling the case on its merits was also at issue in **Scherer v. Paletta** (1966) 57 D.L.R. (2d) 532 (Ont. C.A.).

[26] The fact that the law relied on in **Golden Forest** was dealing with consent orders settling substantive issues between the litigants was noted in **van de Wiel** (2002), 208 N.S.R. (2d) 221 (NSSC), ¶ 6, and by this court in **Goodwin v. Rodgerson**, (2002), 210 N.S.R. (2d) 42 (NSCA):

> ¶ 9 In Bank of Nova Scotia v. Golden Forest Holdings Ltd., supra relied on by the chambers judge and the respondents, this Court determined that an order to which counsel for the parties had consented as to substance could not be set aside. It incorporated a settlement. Hallett, J. A., for the Court stated at para 9:
>
> [9] Apart from those matters covered by rules l5.07 and l5.08, the inherent jurisdiction of judges of the Supreme Court of Nova Scotia does not extend to varying "final" orders of the court disposing of a proceeding unless the order does not express the true intent of the court's decision. If it were otherwise, there would not be the certainty or finality to court orders that the judicial process requires. ...
>
> The respondents take comfort in this passage because the order of the deputy prothonotary was a "final order". It is clear however that the court in the Golden

> Forest case was referring to final orders disposing of the case on its merits in a decision in which the substantive rights and obligations of the parties were considered and determined. The order in that case could not be set aside because it was a consent order which can only be varied in special circumstances not present there.
>
> (Emphasis mine)

[27] Reference to fact situations in which courts have varied consent orders settling the merits of the case is found in Vol. 37 of Halsbury's *Laws of England*, 4th ed., (London: Butterworths, 1979) ¶ 1210:

> A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority. A compromise in ratification of a contract which is incapable of being ratified is not enforceable; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent is give effectually.

[28] I am conscious of the importance of consent orders in resolving substantive issues in litigation and the reliance rightfully placed upon such orders by litigants and their counsel. However, the rationale for courts not varying this type of consent order is that these orders give effect to agreements reached by the parties after negotiations which may include the litigants compromising their strict legal rights and obligations in order to finally resolve the dispute between themselves. Once the court exercises its discretion and accepts their agreement by granting a consent order, the negotiated terms and the finality the parties sought by their agreement should be respected. For a court to vary the terms of a consent order giving effect to such a negotiated contract may alter the parties' agreement in a way they would never have agreed to settle for. This is not to say that there will never be a situation where it will be just and equitable to set aside a consent order giving effect to a negotiated settlement.

[29] The order in this appeal is of a different nature. This type of order is used to ensure the carriage of an action proceeds as it should. In this case the order was an attempt to ensure timely documentary disclosure. The involvement of the court in varying this type of order does not carry the same risk of undoing a negotiated agreement of the parties. With interlocutory orders such as this dealing with the litigation process, there is residual discretion to grant relief against dismissal of the action or striking of the defences, in other words to relieve against the sanction provided for failure to comply.

[30] While the issue dealt with in **Siebe Gorman & Co. Ltd. v. Pneupac Ltd.**, [1982] 1 All E.R. 377 (C.A.) was not on all fours with this case (it dealt with the jurisdiction of the court to extend the time provided for in an order to give further discovery of documents within a period of ten days, in default of which the plaintiff's claim was to be struck out), the comments of Lord Denning MR are instructive:

> We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v. Nicholson* [1942] 2 All E.R. 315 at 317, [1942] KB 321 at 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?
>
> . . .
>
> I cannot put any such interpretation on the order which was drawn up in this case. It often happens in the Bear Garden that one solicitor or legal executive says to the other: 'Give me ten days.' The other agrees. They go in before the master. They say: 'We have agreed the order'. The master initials it. It is said to be 'by consent'. But there is no real contract. All that happens is that the master makes an order without any objection being made to it. It seems to me that is exactly what happened here. The solicitors for the plaintiffs were saying: 'We do not object to the order. Give us the extra ten days from the time of inspection, and

> that is good enough.' It seems to me quite impossible in this case to infer any contract from the fact that the order was drawn up as 'by consent'.

[31] The comments of Templeman LJ. are also instructive:

> . . . By the summons dated 18 December 1980 the defendants sought an order that the plaintiffs give further discovery within ten days after the date of the order and a provision in the order provided that in default of complying the plaintiffs' claim against the defendants be struck out. The service of this summons was not an offer and was not intended to create or result in a contractual relationship. The summons constituted a demand and a threat. The threat could only be made effective subject to the power of the court under RSC Ord 3, r 5 and under its inherent jurisdiction at any one or more times to extend the plaintiffs' time for compliance. If the plaintiffs had written back to the defendants announcing that they would consent to the order sought by the defendants, the announcement would not and could not have constituted acceptance of a non-existent offer or be capable of creating a contractual relationship. The announcement would have been no more than the intimation of an intention on the part of the plaintiffs not to argue against the grant of the relief sought by the defendants but to submit to an order in the terms of the summons. If, for example, the plaintiffs had subsequently before the hearing of the summons written again to the defendants, saying that they had just seen counsel and had been advised to withdraw their consent and intended on the hearing to oppose the grant of the relief sought by the summons, it seems to me unarguable that the plaintiffs would have thereby repudiated any contract. If the defendants were then embarrassed by a late change of mind on the part of the plaintiffs, they might have bee entitled to some favourable adjournment of the summons and they might have been entitled to some favourable order as to costs; but that would not have prevented the plaintiffs from changing their minds.
>
> (Emphasis mine)

[32] The difference in the nature of 'consent orders', some settling the merits of an action after negotiations and others settling pre-trial procedures, is alluded to in at the end of ¶ 14 of **Atkins v. Holubeshen** (1984), 43 C.P.C. 166 (Ont. H.C.):

> . . . The agreement can in no sense be regarded as a compromise of the action as it did not purport to dispose of the issues in the action on the basis of any substantive resolution.

[33] In **Atkins** the plaintiff's solicitor gave undertakings at an examination for discovery and agreed that if he failed to fulfill them within a specified time the defendants could apply ex parte to have the action dismissed. The undertakings were not fulfilled and the action was dismissed. The plaintiff knew nothing of her counsel's agreement or the default provision and found out two years later that her action had been dismissed. The court set aside the order dismissing the action so that the action could proceed to trial.

[34] I am satisfied the Chambers judge had inherent jurisdiction to set aside the consent order at issue in this appeal for as stated by this court in ¶ 10 of **Golden Forest**, the Supreme Court would normally have inherent jurisdiction to vary an interlocutory order of this kind:

> . . . Therefore, prior to sale, the Court has jurisdiction to amend or vary its order respecting the advertising requirements in a proper case. This power exists because of the Court's inherent jurisdiction to control its own processes.

[35] Paragraph 8 of **Golden Forest** provides the following with respect to the court's inherent jurisdiction:

> 8. In *Halsbury's Laws of England*, 4th ed., vol. 37 (l982), at p. 23, the inherent jurisdiction of the Court is described as follows:
>
> > In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[36] Being satisfied the Chambers judge had jurisdiction to set aside the order, I then considered if he erred in not exercising his discretion in favour of setting it aside. Since the Chambers judge decided he did not have jurisdiction, he did not turn his mind to whether he should set aside the order. I am satisfied this was an error. His decision suggests that if he had turned his mind to it he may have set it aside:

> p.11 . . . There's no argument but that the plaintiffs in this matter have been victimized by the process, and that point is obviously and well made by the applicants in relation to - - when they seek that this court intervene.
>
> p.24 . . . This is surely the case that it would seem to be inequitable to allow that order to stand. ... I repeat that I am fully aware of the inequitable situation that the plaintiffs find themselves in, and I gather they will pursue other remedies, . . .

[37] The object of the Chambers judge's discretion is to do justice between the parties.

[38] In light of the evidence before him I am satisfied the Chambers judge erred in not exercising his discretion to set aside the order. The evidence indicates Ms. Gates did not instruct her former counsel to agree to the order, a fact taken into account in **Scherer v. Paletta**; the documents that had to be produced were not under the control of the appellants or its counsel; Ms. Gates was acting in a fiduciary duty with respect to her son and perhaps her husband's estate, a fact considered in **Pereira v. Beanlands**, [1996] 3 All E.R. 528; and if the order was not set aside it would result in the appellants' action being dismissed after only 17 months and one application to court for production, a fact considered in **Lownes v. Babcock Power Limited**, [1998] EWCA Civ 211 (C.A.). The prejudice to the appellants would be great, while there was no prejudice to the respondents except the passage of four months. There is no indication the appellants or their counsel intentionally flouted the order, a fact given significant weight in **Hytech Information Systems Ltd. v. Coventry City Council**, [1966] 1 W.L.R. 1666 (Eng. and Wales C.A.).

[39] This case is a reminder of the need for judges granting interlocutory orders to ensure they are clear in providing that in the event of default, the other party can move for an order dismissing the action or appeal, so that the matter can be assessed by the same or another judge before the action or appeal is dismissed.

[40] Accordingly I would allow the appeal, and set aside the order of Stewart, J., with the result the action will continue. I would nevertheless award costs payable by the appellants to the respondents in the amount of $1,500 plus disbursements

because without the failure of appellants' former counsel to comply with the June 27 order this issue would not have arisen.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.