SCAM 352416

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Fadelle v. Hoeg, 2012 NSSM 31

BETWEEN

Tamala Jane Fadelle **CLAIMANT**

-and-

Cecil Hoeg and Darren Bishop **DEFENDANTS**

SCAM 352417

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

BETWEEN

Tamala Jane Fadelle **CLAIMANT**

-and-

Pam Hoeg and Terry Hoeg **DEFENDANTS**

SCAM 352418

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

BETWEEN

Tamala Jane Fadelle **CLAIMANT**

-and-

Richard Hurley and Darren Bishop **DEFENDANTS**

Heard: July 23, 2012
Decision: August 7, 2012

Adjudicator: David TR Parker

Counsel: **Wynn W. Meldrum** represented the claimant
Brian S. Creighton represented the defendants, Pam Hoeg, Terry Hoeg, Cecil Hoeg and Richard Hurley
Joshua J. Santimaw represented the defendant Darren Bishop

DECISION and ORDER

This matter came before the Small Claims Court in Amherst Nova Scotia. The parties suggested that that the three claims should be consolidated and heard the same time as provided under the Small Claims Court Act.

The matter is really fairly simple in that the facts are straightforward. The claimant paid out debts of Pam Hoeg[“Pam”] and Terry Hoeg [“Terry”] to Citi Financial in the amount of $26,212.95 on September 13,2007. In this Small Claims Court action claim number 352417, the claimant reduced that amount to $25,000.00 to fit within the monetary jurisdiction of the Small Claims Court

The claimant also paid out a debt of Cecil Hoeg [“Cecil”] in the amount of $5,005.00 at the same time as the above-referenced debt.

Further the claimant paid out the debt of Richard Hurley [“Richard”] in the amount of $11,262.72 at the same time as the above referenced debts.

The total amount of the debts paid out by the claimant to Citi Financial on September 13, 2007 was $41,981.43

Cecil and Richard had taken out loans with Citi Financial to assist Pam and Terry, in particular Pam, due to their financial situation. The arrangement that was worked out between the parties was that Pam and Terry would pay off the loans of Cecil and Richard as Pam Terry would actually be receiving those funds on those particular loans.

The defendant Darren Bishop was an employee of Citi Financial. The claimant in her pleadings claimed that "when the claimant told Darren Bishop, that she was paying off the account for Pam and Terry to help them out of their financial trouble, she was told by the defendant, Darren Bishop that to help them she should pay off the accounts of Cecil and Richard as well."

The claimant went on to state in her pleadings "that the advice given by the defendant Darren Bishop was made for the sole purpose of getting a dead account of his paid. Darren Bishop gave advice and direction that he knew or should have known would result in a financial loss to the claimant." Further "that the defendant Darren Bishop is financially responsible for the loss suffered by the claimant as result of his service advice."

The defendant Darren Bishop was given strict instructions by his supervisor not to talk to the claimant when she came into the office on September 13, 2007. When she paid the $41,981.43 representing the loans of Pam and Terry, Cecil and Richard, Darren Bishop did not speak to the claimant.

Analysis:

There is a history behind the above related facts of this case. The claimant is a pharmacist and has a Master of Business Administration. Pam went to work for the claimant as a housecleaner and took care of the claimant's children. Eventually the claimant purchased property from Pam and Terry. The property contained an old home which was torn down with the help of Pam and Terry and Pam's son Richard. The claimant started a new business located on the property she purchased. The name of the business was TJ MacKinnon Pharmacy Incorporated. The claimant hired Pam to work as a technician in the pharmacy in May of 2006. During that time Pam worked in the pharmacy, which was really owned by the claimant, Pam was paid in addition to her salary, additional monies from time to time to help Pam and her husband Terry out of various financial problems that arose. These amounts would include monies to stop foreclosure on Pam in Terry's home. That amount came to $3777.72. The claimant also paid monies for Terry's insurance and other amounts were paid to Pam and Terry which ended up amounting to several thousand dollars. There was one amount, $2600.00, during this time that the claimant assisted the defendants when the claimant insisted that Pam start paying back that amount. Payments to pay off the $2600.00 were paid out of Pam's salary. There were 16 payments of $100 each that came out of Pam's paychecks. As it turned out the claimant forgave the remaining amount outstanding.

The defendants, Pam and Terry referred to the claimant as their guardian angel. Terry said in his testimony who would believe that someone could be this nice.

On August 17, 2007 the claimant paid Citi Financial $1289.51 on the account of Pam and Terry and $710.49 on the account of Cecil to bring them up-to-date

On September 13, 2007 the claimant attended the offices of Citi Financial paid out the outstanding amount on Pam in Terry's loan of $26,212.95 to close out that account. The account of Cecil was also paid off in the amount of $4,508.86 as well as Richard’s account of $11,262.72. As indicated earlier this amounted to a total payment of $41,981.43 which in this case was directly from the claimant's bank account.

All other amounts paid by the claimant for the benefit of Pam and Terry and Richard came from the account of TJ MacKinnon Pharmacy Inc. Some of these payments had notations such as employee benefits, Johnson's Insurance, labor and loans.

The claimant in her testimony told the court that she did not believe that Citi Financial should be contacting the defendant Pam in her workplace all the time.

She said that Pam would be crying and upset when this happened and this bothered the claimant. Pam gave different evidence that she did not cry and that Citi Financial did not phone her that often at her workplace. Darren Bishop gave evidence that he may have called her once or twice at her workplace.

The claimant in her testimony stated that she paid off $41,000.00 so that Pam and Terry would not owe any money to Citi Financial. From her discussions with Pam, the claimant believed there was about $21,000.00 owing by Pam and Terry to Citi Financial. However when she arrived at the offices of Citi Financial on September 13, 2007 she said she was told that they owed over $41,000.00.

The claimant stated that she told Pam and Terry they were going to have to pay back the $41,000.00 when they sold their home. Later in cross examination the claimant said Pam asked her if she would consider paying the $21,000.00 and Pam would downsize and sell her home and pay the claimant back with the equity.

The branch manager of Citi Financial, Peggy Hopkins-Sinco gave evidence that on August 17, 2007 the claimant arrived at the branch office and said she wanted to pay off these two accounts and she gave the branch manager the numbers of those accounts. As it turns out those accounts were for Pam and Terry and also payment on Cecil's account. Ms. Hopkins-Sinco said that she talked to the claimant when she arrived at the branch on September 13, 2007 and that she was told by the claimant that she wanted to pay Pam and Terry's accounts. Ms. Hopkins-Sinco asked her if she wanted to pay all the accounts Pam and Terry were paying.

Darren Bishop was in the office on September 13, 2007 and he was familiar with all the accounts. He said he was instructed not to talk to the claimant and he said he never had contact with the claimant until May of 2011. He said on cross examination by Mr. Meldrum, solicitor for the claimant, that the claimant said she wanted to pay off the debts Terry and Pam were making payments on.

Alicia Clark was the number one cashier at the Citi Financial branch and she also dealt with the matter when the claimant arrived at the office on September 13, 2007. She said she wanted to pay off the amounts that Pam was responsible to pay. Alicia Clark said she went to Darren Bishop and asked him which accounts.

Citi Financial accepted the cheque of $41,991.43 from Tamala Richard [The Claimant]. The cheque referenced "employee benefits" and under that "TJ MacKinnon Pharm Inc."

The claimant was then provided with three payment receipts by Citi Financial. One payment receipt was for Pam and Terry in the amount of $26,212.95, the second payment receipt was for Cecil in the amount of $4,505.86 and the third payment receipt was for Richard C Hurley in the amount of $11,262.72.

The defendants Pam and Terry both said in their testimony that the claimant was very excited when she saw them and held up her arms waving the receipts and said "I did it I did it you don't have to worry about these no more".

First issue:

1. Was this a gift of the claimant? More particular was it a gift to Pam and/or Terry and/or Cecil and/or Richard?

There are number of factors to be considered in law on whether it is gift or loan. Some of comments from various cases on the subject are the following:

Noriah v. Omar, [1929] A.C. 127, Lord Hailsham, L.C., at pp. 132-133 stated:

"The principles upon which this case falls to be decided have been the subject of a series of decisions in [*page132] the English Court of Chancery; and it was not disputed between the parties that the principles of English law must be applied. The question to be decided is stated in the judgment of Cotton, L.J., in the well known case of *Allcard v. Skinner* as follows:

'The question is: Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the court, enabled the donor afterwards to set the gift aside?

These decisions may be divided into two classes:

first, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose;

secondly, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by

the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.'"

BELLEGARDE, MURDOCK and MURDOCK v. MURDOCK and MURDOCK
[1978] N.S.J. No. 508(NSCA)

With respect to undue influence the trial judge referred to the judgment of Lindley, L.J., in *Allcard v. Skinner* (1887), 36 Ch. D 145. Lindley, L.J., distinguished the two classes of undue influence. In referring to the class of cases where the presumption of undue influence arose he said (p.181):

"The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made."

and at pp.182-183:

"The principle must be examined. What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set [*page386] aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. ***Huguenin v. Basely*** is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

As no Court has ever attempted to define fraud so no Court has ever attempted to define undue influence, which includes one of its many varieties. The undue influence which Courts of Equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence. But the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence; and the Courts have done this on the avowed ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and, failing that proof, have set aside gifts otherwise unimpeachable ...."

28 The trial judge made the factual determination that this matter fell within the second classification of undue influence cases referred to by Lindley, L.J. in Allcard and that the appellants had not rebutted the resulting presumption of undue influence."

MacDonald v. Wood [2011] N.S.J. No. 295

"This legal result did not necessarily apply where the parties were unmarried, but for many decades this was the prevailing understanding. That changed, however, in 2007 when the Supreme Court of Canada issued its decision in ***Pecore v. Pecore*** [2007] 1 S.C.R. 795. That decision abolished the presumption of advancement in the case of adult children, and reverted to the principle that -- in the absence of clear evidence otherwise -- money advanced is subject to a "presumption of resulting trust." What this means in ordinary language, is that the law will presume that money advanced remains the parents' money (whether as a loan or a direct interest in the property acquired) and the onus is on the other party to prove that it was a gift.

11 In other words, the tables are turned and the presumption operates opposite to the way it used to until Pecore. This is actually more consistent with the way the law was in the 19th and early 20th Centuries, where it was often observed that the law did not favour gifts.

12 Applying that law to the current case, the onus is on the Defendant to prove that the money was a gift. While the evidence of a loan is less than compelling, the evidence of a gift is even thinner than that. With the onus of proof being on the Defendant to prove that it is a gift, it is an onus that he cannot hope to meet.

13 Another way of looking at this situation is through the concept of unjust enrichment. The law asks whether or not the Defendant would be unjustly enriched were he allowed to retain the money. On this test, as well, the Defendant comes out on the losing end. He cannot justly retain this money."

Driscoll v. Fennell [2009] N.S.J. No. 150

"…***Wiens v. Wiens*** (1991) 31 R.F.L. (3d) 265, which deal with factors to determine if advances made by parents should be characterized as loans. A number of factors articulated in that case are obvious in determining whether it is a loan or not. Such factors would be:

> 1) Whether there are any contemporaneous documents evidencing a loan;
>
> 2) Whether the manner for repayment is specified;
>
> 3) Whether there is security held for the loan
>
> 4) Whether there are advances to one child and not others or advances of unequal amounts to various children;
>
> 5) Whether there has been a demand for payment before separation of the parties;
>
> 6) Whether there has been any partial repayment;
>
> 7) Whether there was any expectation, or likelihood of repayment.

These points are in my view not all inclusive but are at best a guide. They do not consider the opposite side of the ledger as to whether an advance is a gift. Consideration must be given to;

- - what is the intention of the person making the advance;
- - what are the circumstances existing at the time of the advance; and

- - what are the circumstances at the time the issue becomes forward for a court determination."

There are a number of tangible principles that are discussed throughout these cases. Some of these were:

- Was there any influence over the donor by the donee?
- Was it proven that the gift was a spontaneous act of the donor acting under circumstances which enabled the donor to exercise an independent will and which justify the court in holding that the gift was result of the free exercise of the donor's will?;
- Courts of Equity had never overturned gifts on the ground of the folly, imprudence or want of foresight on the part of donors;
- The undue influence which Courts of Equity endeavor to defeat is the undue influence of one person over another not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence.
- The onus is on the donee to prove that it was a gift. The law does not favor gifts.
- Characteristics of the loan such as documentary evidence, manner repayment, security advanced, demand for payment, any partial payments and expectation or likelihood of repayment should be considered.
- What is the intention of the person making the advance;
- when the circumstances existing at the time of the advance and the circumstances at the time the issue is brought forward in a court action

The payment by the claimant on the three debts was made on September 13, 2007. There had been no payments made to the claimant in an effort to reimburse the claimant by any of the related defendants at any time. Nor were there any demand for repayment. Pam continued to work with the claimant until there was a falling out in August of 2010. The Small Claims Court claims were commenced in July of 2011. There has been no contact at any time between the claimant and Cecil and the claimant and Richard. Pam said in her testimony that she wanted to give the money back and told the claimant take money off her paychecks. There was no effort on the part of the claimant or the defendant Pam to pay this money back. Terry said in his testimony that Pam talked about paying all the money back. According to Terry's testimony the claimant said she didn't want to hear about it. He said the first time he heard about paying the money back were rumors that were going around the village, that the claimant was coming after her[Pam].

As the claimant's solicitor said in effect, who would ever believe that someone would pay out $41,991.43 without expecting to have it paid back. Possibly the larger percentage of the population would accept this analysis in terms of the value received.

The difficulty I have in making a final decision in this case is: was it the intention of the claimant to also paid out loans of Cecil and Richard. These amounts were co-mingled with the accounts of Pam and Terry when the claimant paid out the loans to Citi Financial. It may not have been her intention at the end of the day. However the issue is: what was your intention at the time when paying out the loans including those of Richard and Cecil? The claimant was well aware that the money she was paying out exceeded the amount she thought was owed by some $20,000.00. The claimant had made previous payments on loans of Pam and Terry and also of Cecil to bring the loans of up to date. If there was any evidence of Pam or any of the others influencing the claimant to make payments on her or their behalf or anyone else's behalf it certainly was not evident in any of the testimony from any of the parties. If there was any evidence of fraud or a scam or a scheme I would have no hesitation whatsoever to say this was simply not a gift. The evidence that I have before this court can lead to only one conclusion that the claimant did not intend money paid out to Citi Financial to be loan to Pam, Terry, Cecil or Richard. This court must follow the law in this area and fortunately the principles enunciated or articulated by the various courts of the common law system are logical and make sense.

Because the relationship turned sour, as it were, between the claimant and defendant does not cause a gift to become a loan. What is necessary to look at is what are the circumstances and expectations of the parties when this payment was made by the claimant to Citi Financial. As indicated earlier: It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with.…

Second Issue:

The next issue deals with the advice given to the claimant that would result in a financial loss to the claimant.

The claim is that Darren Bishop gave the claimant advised that he would know or should have known would result in a financial loss to the claimant and that this advice was self-serving.

With respect to Darren Bishop there is no evidence that he provided any advice to the claimant to pay any accounts. He never even talked to the claimant. There is no evidence that any advice was given to the claimant by Citi financial employees that was incorrect. They told the claimant that the loans Pam and Terry were paying on amounted to over $41,000.00. It is not incumbent upon Citi financial to go into the details of the loans. They simply provide the information they were requested to provide. The claimant on making those payments knew that it exceeded Pam and Terry's loan amount by some $20,000.00. The claimant knew that part of that $41,000.00 went to pay down the debts of Cecil

and Richard. At the end of the day she was, at that time, excited about paying off these amounts and to take the burden off the shoulders of Terry and Pam.

Therefore it is Ordered That each claim, **SCAM 352416, SCAM 352417 and SCAM 352418** by the claimant against each the defendants is dismissed with no order as to costs.

Dated at Amherst August 30, 2012