Best v. Chankasingh, 2001 NWTSC 55

Date: 2001 07 24
Docket: S-001-CV2000 000140

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CHERYL BEST and 4652 N.W.T. LIMITED

Plaintiffs

- and -

953754 N.W.T. LTD., SATO CHANKASINGH
and SARAH CHANKASINGH

Defendants

AND BETWEEN:

953754 N.W.T. LTD., SATO CHANKASINGH
and SARAH CHANKASINGH

Plaintiffs by Counterclaim
(Defendants)

- and -

4652 N.W.T. LIMITED and CHERYL BEST

Defendants by Counterclaim
(Plaintiffs)

MEMORANDUM OF JUDGMENT

[1] This is an application for summary judgment by the Plaintiff 4652 N.W.T. Limited ("4652") against the Defendant 953754 N.W.T. Ltd. ("953754"). The test on such an application, as set out in *923087 N.W.T. Ltd. v. Anderson Mills Ltd.*, [1997] N.W.T.R. 212 (S.C.), is whether there is a genuine triable issue.

[2] 953754 is the operator of a Yellowknife restaurant known as the "Office Lounge". On July 21, 2000, 953754 and 4652 each signed a letter of understanding whereby 4652 would purchase the Office Lounge. One of the terms of the agreement was that 4652 would lend $70,000.00 to 953754 pursuant to the terms of a promissory note. The proceeds of the loan were to be used by 953754 (i) to pay out its shareholders loans and (ii) for the ongoing operation of 953754.

[3] On July 21, 2000, 953754 also executed a promissory note in favour of 4652, the terms of which included repayment of the $70,000.00 on demand by 4652 on or after September 30, 2000, which was the maturity date. The sum of $70,000.00 was advanced to 953754 on the date the note was signed.

[4] It is common ground that the two companies contemplated that if the transaction for the purchase of the Office Lounge completed, the $70,000.00 would be applied towards the purchase price.

[5] The $70,000.00 was deposited into the bank account of 953754 and the majority of its was paid out to that company's shareholders, the Defendants Sako and Sarah Chankasingh.

[6] As contemplated by the letter of understanding, the Plaintiff Cheryl Best, who is a director and the sole shareholder of 4652, began working as the general manager of the Office Lounge shortly after July 21 pursuant to an employment agreement she entered into with 953754.

[7] The purchase of the restaurant fell through and the parties have their own views as to why that happened. In late October 2000, 953754 resumed management of the Office Lounge and subsequently 4652 made demand for repayment of the $70,000.00. The money was not repaid and the Plaintiffs commenced this lawsuit, claiming the amount of $70,000.00 as owing on the promissory note and damages.

[8] The Defendants have filed a statement of defence and a counterclaim. The latter is based in part on allegations that the Plaintiffs made unauthorized expenditures and payments and failed to deposit certain monies in the account of 953754 while Ms. Best was acting as general manager of the restaurant.

[9] On this application for summary judgment, 4652 seeks judgment only for the amount owing on the promissory note. It argues that the note is a bill of exchange, that the parole evidence rule applies to exclude other evidence about the parties' intentions and that the counterclaim should not stand in the way of a grant of judgment for the amount represented by the note. It says that no stay of execution should be imposed on the judgment unless the money is paid into court.

[10] 953754 argues that the $70,000.00 was not advanced pursuant to the promissory note but was a nonrefundable deposit. Mr. Chankasingh characterizes it that way in his affidavit and he attaches a memorandum from Ms. Best to Mr. Chankasingh, dated October 23, 2000, in which she refers to the money as a deposit (although not a nonrefundable deposit). Therefore, the Defendants say, there was no consideration for the promissory note, which affords 953754 a defence to the action on the note: *Algoma Steelworkers Credit Union Ltd. v. Kennedy,* [1973] 1 O.R. 754 (Ont. Dist. Ct.). Extrinsic evidence is admissible to show absence of total failure of consideration in a suit between immediate parties: *Crawford and Falconbridge on Banking and Bills of Exchange*, 8th Edition, 1986, Canada Law Book Inc. p. 1653. The counterclaim is related to the same transaction as the promissory note and so, the Defendants say, the entire matter should go to trial. Alternatively, if summary judgment is granted, there should be a stay of execution without any terms until this matter is tried.

[11] In response to the Defendants' argument, the Plaintiffs framed the issue before me this way: it does not matter whether the $70,000.00 was a loan or a deposit. Even if it was a deposit, that is not inconsistent with the promissory note. The Plaintiffs say that the real issue is whether it was nonrefundable because it is only if the money was nonrefundable that it could be regarded as a payment not represented by the note. If there is no evidence that the money was nonrefundable, then the fact that 953754 got the money means there was consideration for the promissory note.

[12] There is no evidence before me of any agreement that the $70,000.00 was to be a nonrefundable deposit. In his affidavit, Mr. Chankasingh says that he wanted the deposit to be nonrefundable and that he would not have let Ms. Best go in and manage the restaurant had he not had the security of a nonrefundable deposit. In cross-examination on his affidavit, however, he said there were no discussions between the parties about this. Therefore, the evidence does not go further than indicating that Mr. Chankasingh wanted the money to be nonrefundable. There is no evidence that the

parties ever discussed, let alone agreed to, what would happen if the purchase of the Office Lounge did not go through.

[13] As to whether the $70,000.00 was a deposit or a loan, the letter of understanding refers to a loan and the promissory note appears to document the loan contemplated. However, as indicated above, there is a memorandum from Ms. Best to Mr. Chankasingh dated after the letter of understanding and promissory note, in which she consistently refers to the money as a deposit. Despite that, in her affidavit filed on this application, Ms. Best refers to the $70,000.00 as a loan and not a deposit.

[14] Mr. Chankasingh takes the position that it was a deposit and that he signed the promissory note at Ms. Best's insistence only because she said she needed it signed in order to obtain the balance of the purchase price.

[15] I do not agree with the Plaintiffs' submission that nonrefundability is the only issue. The making of a loan is a very different transaction from the giving of a deposit and no authority was offered to me for the proposition that so long as 953754 got money from 4652 in some fashion or for some purpose, that constitutes consideration for the note, which is really what the Plaintiffs are arguing.

[16] The parties give very different versions of this transaction, not only with respect to whether the $70,000.00 was a deposit or a loan, but also with respect to Ms. Best's part-time employment as general manager and whether she was to be paid $70,000.00 yearly for it as contemplated by the employment agreement or whether she had verbally agreed not to draw any salary and only wanted that figure in the agreement for purposes of obtaining financing, as alleged by Mr. Chankasingh.

[17] The claim on the promissory note is not the only claim advanced by the Plaintiffs. There is, for example, a claim by Ms. Best for damages of $70,000.00 for breach of the employment agreement and for damages in the same amount for interference with contractual relations, presumably based on the salary provided in that agreement. The trial on the Plaintiffs' claims and the Defendants' counterclaim will likely require that the trial judge make findings as to the terms of the transaction and may require that he or she characterize the $70,000.00 as a deposit or a loan and determine whether there was consideration for the promissory note. It will almost certainly require that the trial judge assess the credibility of Mr. Chankasingh and Ms. Best. Those are issues that should be left to the trial judge and not determined by me on a summary judgment application.

[18] In my view, a triable issue has been raised as to whether the $70,000.00 was a loan or a deposit and whether it was consideration for the promissory note. This also gives rise to an issue whether 4652 properly has a claim on the promissory note or simply for the return of the deposit. The claim put forward on this summary judgment application is on the promissory note. For the reasons given, this is not, in my view, an appropriate case in which to grant summary judgment. That being the case, I need not address the issues raised about equitable set-off as a defence. The application is accordingly dismissed.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT, this 24th day of July 2001

Counsel for the Plaintiffs: Garth Malakoe
Counsel for the Defendants: G. James Thorlakson

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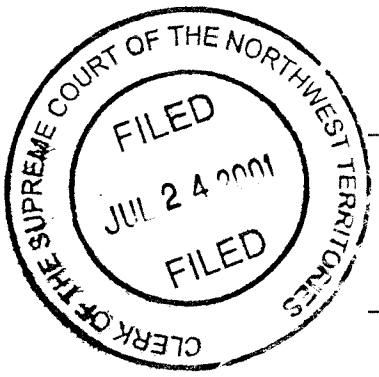

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER