Court File No.: SC-17-148-00

ONTARIO
SUPERIOR COURT OF JUSTICE
TORONTO SMALL CLAIMS COURT

BETWEEN:

SETTLEMENT LENDERS INC.

Plaintiff/ Moving Party

-and-

JAFARI & ASSOCIATES PROFESSIONAL CORPORATION and SHAWN JAFARI

Defendants/ Respondents

J PRATTAS DJ

Motion Heard: July 11, 2017
Endorsement Released: August 8, 2017

Persons appearing:
David A. Schatzker, Counsel for the plaintiff
Kerry Javadi, paralegal for the defendants

ENDORSEMENT ON A MOTION

[1] **J PRATTAS DJ** – Can an alleged subsequent direction override a previous irrevocable direction which a paralegal has acknowledged and undertaken to comply with?

[2] That is the essential question to be determined in this motion brought by the plaintiff Settlement Lenders Inc. (the "plaintiff" or "SLI") pursuant to Rule 12.02 (1) and (2) to strike the Defence as disclosing no reasonable defence. Counsel for the plaintiff submitted there are no material facts in dispute.

[3] Though the defendants opposed the motion, they filed no material. They were content to rely solely on their Defence.

Background facts

[4] The plaintiff is an Alberta corporation carrying on business as a financial services company.

[5] The defendants Shawn Jafari ("Shawn") and Jafari & Associates Professional Corporation (the corporation to be called "JAPC", and Shawn and JAPC collectively "Jafari") are a paralegal practising in Toronto and his professional corporation respectively.

[6] Jafari acted for a client named Kofi Boakye ("Boakye") in the recovery of accident benefits arising from injuries suffered in a motor vehicle accident that occurred on March 17, 201 (the "AB Claim").

[7] While represented by Jafari, Boakye entered into an agreement with the plaintiff on October 11, 2012 (though the documents described below were actually signed October 17, 2012), pursuant to which Boakye:

(a) Borrowed the sum of $3,750.00 from SLI;

(b) Signed a promissory note to repay the $3,750 borrowed, along with interest at 19.95% per annum for the first year and 29.95% per annum in any subsequent years (collectively referred to as the "Indebtedness"), with such sums becoming due and payable on the date of the resolution of the AB Claim or upon demand after one year;

(c) Signed an Irrevocable Assignment of Proceeds (the "Assignment") assigning sufficient amount of the AB Claim proceeds to SLI to pay the Indebtedness; and

(d) Irrevocably directed Jafari "or any other counsel that acts on my behalf hereafter in connection with the [AB Claim] to forward payment of an amount equal to the amount borrowed, directly to [SLI]…" from any funds recovered in the AB Claim to discharge Boakye's Indebtedness to SLI (the "Irrevocable Direction").

[8] Both Shawn (personally) and JAPC signed an Acknowledgment of Assignment (the "Acknowledgement") regarding the Assignment and the Irrevocable Direction. Though the Acknowledgment is dated February 15, 2012 and the defendants have pleaded that they signed it on this date, it could not be so as the Acknowledgement mentions the Assignment dated October 11, 2012.

[9] The Acknowledgement provided, among other things:

> We, Jafari & Associates Professional Corporation (the "Firm") and Shawn Jafari:
>
> (a) Confirm the Client's signature on the Assignment […]
>
> (b) Acknowledge receipt of the Assignment, and upon any partial or full payment (each, a "Receipt") made in connection with the [AB] Claim, undertake to confirm with [SLI] the total amount of the then indebtedness of the [Boakye] to [SLI] (the "Total Indebtedness") and from the monies received in connection with the [AB Claim], undertake to forward the Total Indebtedness (or so much thereof as such Receipt may allow) directly to [SLI], after deduction only of legal fees, litigation costs and disbursements incurred in connection with prosecution of the [AB Claim], but no other matter, and in any event prior to any payment to [Boakye] or anyone acting on behalf of the [Boakye], and I further undertake to follow such process for each Receipt until the Total Indebtedness has been satisfied in full. [...]

[Emphasis supplied by plaintiff in materials filed. The undertaking by Jafari in the Acknowledgment shall be referred to as the "Undertaking"].

(g) Acknowledge that a trust relationship exists between [Boakye] and [SLI], and that each Receipt is impressed with a trust in favour of [SLI], and is subject to the specific terms and conditions on that trust, as set out in the Assignment.

[10] In or about 2015, Jafari settled the AB Claim and received funds in trust on behalf of Boakye (the "Funds").

[11] In a letter dated March 2, 2015 (the "Letter Direction"), Boakye wrote to Jafari as follows:

> I write you today to ask if you can cease the payment to Settlement Lenders so I can personally pay them in a relative time period most efficient to me. They will be payed [sic] in a 2 month period, so if it is possible I am instructing you upon deliverance of the cheque to deduct your firm's percentage and applicable taxes. Thank you kindly. [emphasis added]

[12] A copy of the Letter Direction was sent to SLI by email of September 9, 2016.

[13] After deducting their fees and disbursements, Jafari disbursed the remaining Funds to Boakye pursuant to the Letter Direction.

The Plaintiff's Claim

[14] Even though the loan was for the amount of $3,750, the plaintiff is claiming the sum of $10,937.89 to be paid by the defendants for breach of trust and failing to comply with the Assignment, the Irrevocable Direction and the Acknowledgment which Jafari undertook to do to the defendants.

Analysis

[15] For the purposes of this motion I have assumed that there are no material facts in dispute. The only issue to be determined is whether, having signed the Acknowledgment and the Undertaking, Jafari raises any legally tenable defences in their Defence. In my view they have not.

[16] If Jafari are bound by the Acknowledgment and the Undertaking that they signed, then, there is no reasonable defence disclosed. If, on the other hand, Jafari are not bound by the Acknowledgment and the Undertaking, then, a reasonable defence is raised and the matter may proceed to trial on the merits.

[17] Regardless of whether Jafari are bound by the Irrevocable Direction or not, for the reasons that follow, I conclude that once Jafari signed the Acknowledgment and the Undertaking, Jafari became bound and answerable to SLI.

[18] It is well settled law that by the Assignment SLI effectively stepped into the shoes of Boakye and acquired all the rights of the assignor and the assignee took the assignment subject to all defences.

[19] In this case, it is clear that the Assignment created a legal and equitable interest in the Funds in favour of SLI and it was not open to Jafari to accept any subsequent instructions that disregarded that interest. If Jafari had any doubts upon receiving the Letter Direction, it was incumbent upon them to have discussed this matter and have reached an agreement with SLI before they dealt with the Funds. Failing any agreement as to the Funds, Jafari should have interpleaded by paying the money into court. It was not open to Jafari to unilaterally decide that they were bound by the Letter Direction and disregard their Acknowledgment and Undertaking.

[20] By signing the Acknowledgment, it is equally clear that Jafari knew of the Irrevocable Direction and they specifically agreed to abide by it. In fact, Jafari additionally undertook explicitly to pay the Indebtedness directly to SLI from the Funds. The duty of Jafari was clear -- they could not release the Funds to Boakye without the consent of SLI.

[21] In reviewing the Letter Direction, it is obvious to me that it was not a clear, unambiguous and unequivocal direction to release funds to Boakye without regard to the loan documents – as Jafari submitted. It was more in the nature of an inquiry by Boakye of Jafari to see if it was possible to release the Funds: "I write … to ask if you can cease the payment to [SLI]" and "… if it is possible I am instructing you…" [emphasis added].

[22] Far from Boakye demanding unreservedly and unequivocally that the funds be paid to him – no matter what -- he was only asking for such money to be paid to him, if that could be done without any impediment or without violating any of the relevant obligations that had been undertaken by Boakye and Jafari to SLI. At best, it was a conditional direction – if it could be done, without SLI consent.

[23] Even if the Letter Direction was crystal clear that Boakye was seeking the Funds without resort to any of the loan documents, including the Acknowledgment and the Undertaking – as Jafari insisted -- Jafari had a problem.

[24] Upon receipt of the Letter Direction Jafari had to have addressed the issue whether they could release the Funds without consent and without impunity or liability to SLI. In the light of them having signed the Acknowledgment and the Undertaking, a reasonable paralegal would have been, at a minimum, hesitant -- if not completely refusing -- to releasing the Funds without the consent of SLI. When Jafari proceeded to release the Funds without such consent, they did so at their peril.

[25] In addition, releasing the Funds directly to Boakye is not what Boakye had agreed with SLI and Jafari were fully aware of that. With the Letter Direction Boakye attempted to unilaterally alter the terms of his loan agreement with SLI, all to the knowledge of Jafari. By paying the Funds to Boakye, Jafari inappropriately assisted Boakye to alter the loan terms – something that Jafari could not do – without the consent of SLI.

[26] By paying the Funds to Boakye, not only did Jafati inappropriately assist Boakye to alter the loan terms, but Jafari themselves also unilaterally altered the terms of their Acknowledgment and especially their Undertaking – something Jaffari could not do without the consent of SLI -- where they had explicitly undertaken to pay the Indebtedness directly to SLI from the Funds.

[27] Jafari raised several defences including the following:

(a) Jafari is not personally liable on his own undertaking because he practiced through a professional corporation (Defence para. 4);
(b) The Assignment was frustrated by the [Second] Direction (Defence para. 12);
(c) At no time did [Boakye] provide Jafari with a direction wherein the funds would be payable to SLI (Defence para. 13);
(d) Jafari did not receive a financial benefit as a result of the release of funds (Defence para. 14);
(e) The contract for repayment was between SLI and Boakye and Jafari were not privy to same (Defence para. 15); and
(f) Releasing the Funds to SLI in the face of the [Second] Direction by Boakye would amount to a breach of Boakye's professional obligations (Defence para. 16).

[28] I will briefly address them.

[29] Since both Shawn and JAPC signed the Acknowledgment and the Undertaking they are both severally and jointly bound and liable to SLI.

[30] In my view, there was no frustration of contract created by the Letter Direction as alleged by the defendants. To the extent that any ambiguity arose as to the proper course of action that Jafari should have followed, they could have obtained the consent of SLI or, failing that, they should have interpleaded.

[31] By signing the Acknowledgment and the Undertaking Jafari agreed to pay the Indebtedness directly to SLI from the Funds. Strictly speaking there was no need for a further direction to be addressed to them. Jafari were fully aware of the arrangement and they accepted and agreed to it in writing.

[32] The pleadings that Jafari did not receive any financial benefit or that the loan agreement was between SLI and Broake are irrelevant.

[33] Jafari received the Funds in trust. Having signed the Acknowledgment and Undertaking they knew pursuant to paragraph (g) that the Funds were impressed with a trust in favour of SLI and Jafari should not have acted unilaterally in dispersing those funds. Jafari also knew of the loan arrangement between Boakye and SLI.

[34] Contrary to what Jafari pleads about a breach of their professional obligations under the Law Society *Paralegal Rules of Conduct* had they released the Funds to SLI, Rule 2.02 provides as follows:

(1) A paralegal shall fulfill every undertaking given and shall not give an undertaking that cannot be fulfilled.
(2) Except in exceptional circumstances, a paralegal shall give his or her undertaking in writing or confirm it in writing as soon as practicable after giving it.
(3) Unless clearly stated in the undertaking, a paralegal's undertaking is a personal promise and it is his or her personal responsibility.
(4) A paralegal shall honour every trust condition once accepted.

[emphasis added]

[35] Therefore, even under these *Rules*, Jafari were obligated to fulfill their Undertaking. If they felt they were in any conflict between their Undertaking and the Letter Direction, they should have obtained the consent of SLI before releasing the Funds to Boakye or they should have interpleaded.

[36] Counsel for the plaintiff submitted several cases regarding the law on irrevocable directions by third parties. In view of my conclusion that Jafari breached their obligations pursuant to their Acknowledgment and Undertaking, I do not find it necessary to discuss the Irrevocable Direction issue any further.

[37] For all these reasons, I conclude that Jafari breached their trust obligations, their Acknowledgment and their Undertaking by disbursing the Funds to Boakye without the consent of SLI and are therefore jointly and severally liable to SLI.

Disposition

[38] In the result, no reasonable defence is disclosed with regards to liability and the motion is granted and the Defence is struck to this extent.

[39] However, in view of the discrepancy of the amount of $10,937.89 claimed and the amount of the loan being $3,750 and no one informing the court of the amount of the Funds received from the AB Claim, I order as follows:

(a) That, if the parties are unable to agree on the quantum, this matter shall proceed to trial to determine the quantum only, upon payment of the prescribed fee; and
(b) That, to the extent necessary the Defence relating to the quantum is preserved and the defendants may appear in the usual manner if they are so advised to challenge the quantum accordingly.

Authorities submitted – Appendix 1 attached

[40] The plaintiff referred me to the following cases which I have reviewed and considered: *Bitz, Szemenyei, Ferguson & MacKenzie v. Cami Automotive Inc.,* 1997 CarswellOnt 2309 (SCJ); *Re/Max Garden City Realty Inc. v. 828294 Ontario Inc.* (1992), 8 O. R. (3d) 787 (OCJ Gen. Div.); *Lucas v. Python*, 2013 ONSC 2799, 2013 CarswellOnt 5839 (S.C.J.); *Nib-Wing Construction Co. v. LeBrun Northern Contracting Ltd.,* 1998 CarswellOnt 3728 (OCJ Gen.Div.); *Naylor Group Inc. v. Ellis-Don Construction Ltd.,* 2001CarswellOnt 3340 (S.C.C.).

Costs

[41] Costs are discretionary to the motions judge. Taking all matters into consideration, in exercising my discretion, in the circumstances of this case I find that the amount of $500 in costs to be paid by the defendants to the plaintiff is fair and appropriate, and I so order.

[42] If necessary, including if there were any offers to settle pursuant to the Rules, the parties may write to the court office to arrange for an appointment to appear before me for any issues relating to costs within ten days of the release of this Endorsement, failing which my costs order of $500 shall stand.

J PRATTAS DJ