

CITATION: Ceballos v. Pearl Hospitality Inc., 2020 ONSC 769

COURT FILE NO.: CV-19-00613274-000

DATE: 20200205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Danilo Ceballos and Emelin Ceballos, Plaintiffs/Responding Parties/Moving Parties

AND:

Pearl Hospitality Inc. and Mortgage Centre Canada, Defendants/Moving Parties/Responding Parties

BEFORE: B.A. Allen J.

COUNSEL: *Danilo Ceballos and Emelin Ceballos*, self-represented
Joga Chahal, for the Defendant Pearl Hospitality Inc.
Sienna Molu, for the Defendant Canada Mortgage Centre

HEARD: February 3, 2020

ENDORSEMENT

BACKGROUND

[1] The plaintiffs, Danilo Ceballos and Emelin Ceballos bring an action against the defendant Pearl Hospitality Inc. (“Pearl”) and Mortgage Centre Canada (“MCC”) for breach of contract, fraudulent misrepresentation and seeks general, aggravated, special, exemplary and punitive damages totaling \$400,000.00. The plaintiffs also seeks a discharge of a second mortgage on their home. The narrow focus of the claim against both defendants for the purposes of this motion is in relation to an arrangement the plaintiffs made with Shepherd Lewis, a mortgage broker with the mortgage brokerage firm, MCC.

[2] In October 2017, the plaintiffs sought the assistance of Mr. Lewis to obtain a mortgage on their home at 33 Hucknall Rd in Toronto (“the property”). Mr. Lewis was a mortgage broker who was engaged with MCC in arranging mortgages at the relevant time. Mr. Lewis assisted the plaintiffs in obtaining a second mortgage in the amount of \$200,000 for a term of one year (“the Mortgage”). After the mortgage commitment was executed it was discovered that Ms. Ceballos had an outstanding writ of judgment against her. A General Security Agreement (“the GSA”) was entered into on December 14, 2017 which stipulated that Pearl would advance \$210,000.00 with a \$10,000.00 interest hold back to secure indebtedness and liabilities of Mrs. Ceballos.

[3] The mortgage payments were to commence on December 14, 2017 and continue on the 14th of every month. The plaintiffs made the first eight payments then ceased to pay after August 14, 2018. On November 20, 2018 Pearl issued a Notice of Sale which was served on the plaintiffs. The plaintiffs issued a statement of claim on January 25, 2019. On December 9, 2019, Pearl

sought a writ of possession of the property which was granted by Dow, J. ordering the plaintiffs to pay Pearl \$232,459.80. That judgment is under appeal by the plaintiffs.

THE ISSUE

[4] The plaintiffs have taken no issue with the terms and conditions of the Mortgage and the GSA or the conduct of employees of MCC or Pearl. What the plaintiffs allege is that Mr. Lewis promised them a reimbursement of the \$5,000.00 the brokerage fee Mr. Lewis charged in relation to obtaining the Mortgage. The plaintiffs claim they entered into an agreement with Mr. Lewis that he would return the funds to assist them with litigation costs in relation to an unrelated matter. Mr. Lewis never paid the \$5,000.00 which the plaintiffs claim they relied on to their detriment. The plaintiffs assert that Pearl and MCC as principals of Mr. Lewis are liable for Mr. Lewis' breach of the agreement.

[5] MCC and Pearl deny the plaintiffs' claims. MCC contends that Mr. Lewis acted as an independent contractor and the plaintiffs entered into a personal arrangement with him unrelated to the Mortgage. For those reasons, it is MCC's and Pearl's position that they are not liable to the plaintiffs for the alleged conduct of an independent contractor. Pearl and MCC contend they had no involvement with the agreement with the plaintiffs and no knowledge of the arrangement until months after the agreement was purportedly entered into. Pearl's and MCC's positions are that the plaintiffs have failed to raise a valid claim against them.

[6] MCC brings a motion under Rule 20.04(2.1) of the *Rules of Civil Procedure* for summary judgment against the plaintiffs on the basis that the claim raises no genuine issues requiring a trial.

[7] Pearl brings a motion under s. 21.01(1)(b) to strike the claim without leave to amend on the basis that the claim raises no reasonable cause of action against Pearl and has no chance of success at trial. Pearl also submits under Rule 21.01(3) that the claim is frivolous, vexatious and an abuse of process and under Rule 25.11(d) that the claim is scandalous, frivolous or vexatious. In terms of Pearl's motion, I find it sufficient to make a determination only under Rule 21.01(1)(b).

[8] The plaintiffs bring a cross-motion for summary judgment against the defendants under Rule 20.04. Though it is not entirely clear the motion appears to be in relation to the judgment for possession of the property which matter is not before this court and is currently under appeal by the plaintiffs. The motion also raises the issue of MCC's and Pearl's liability under the agreement.

THE LAW

Summary Judgment

[9] The question to be addressed on a summary judgment is whether there is a genuine issue requiring a trial. The question is whether some or all of the issues can be disposed of without the need for a lengthy and costly trial. The law governing summary judgment motions is well-known.

[10] The court is entitled to assume the parties have advanced their best case and put forward the best evidence on which they will rely to support their case: [*Byfield v. Toronto Dominion Bank*, 2102 ONCA 49, at para. 10, (Ont. C.A.)]. The responding party must put their best foot forward or risk losing and having summary judgment awarded against them.

The evidentiary burden is on the responding party to present affidavit material or other evidence to support their allegations or denials in their pleading. Absent of this evidence, an adverse inference can be drawn.

[*Royal Bank of Canada v. Biddell, et al*, 2015 ONSC, at para. 37, (Ont. S.C.J.)]

[11] The responding party must adduce evidence of material facts that require a trial to assess credibility, weigh evidence and draw factual inferences. The responding party has the onus to satisfy the court there are material facts to be tried and must demonstrate there is a real chance of success at a trial.

[12] The enhanced powers granted to motions judges on summary judgment motions under Rule 20.04(2.1) allow the motion judge to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence in reaching his or her decision on the merits of the motion.

[13] *Hryniak v. Mauldin* offers insight into the benefits of this power. The court held that such a proceeding allows the judge to arrive at a fair and just adjudication on the merits. The court observed that in the appropriate case this will avoid longer, more complex trials without compromising the fairness of the procedure: [*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 63, (S.C.C.)]. The rules on summary judgment motion must be read broadly, favouring proportionality and fair access to affordable, timely and just adjudication of claims: [*Hryniak v. Mauldin*, at para. 5].

[14] MCC submits that the plaintiffs cannot establish liability against them as there is no basis on which vicarious liability can be established for the acts of Mr. Lewis in relation to the agreement with the plaintiffs. For that reason, in MCC's submission, this is a proper case for summary judgment and a dismissal of the action against them.

Striking Pleadings

[15] The principles governing striking pleadings are well known.

- the allegations of fact must be accepted as proven unless patently ridiculous or incapable of proof;
- the moving party must show it is "plain and obvious", and beyond doubt the plaintiff cannot succeed;
- the statement of claim must be read generously, allowing for inadequacies due to drafting deficiencies; and

[16] *Toronto-Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417 at 419 (Gen. Div.); *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 978-980; *Web Offset Publication Ltd. v. Victory* (1999), 43 O.R. (3d) 802 at 803 (C.A.), leave to appeal ref'd [1999] S.C.C.A No. 460].

[17] Rule 21.01(1)(b) allows a pleading to be struck where it is plain and obvious, assuming the facts pleaded to be true, there is no reasonable cause of action or has no reasonable prospect of

success. Failure to raise a cause of action can occur if the claim is found to be legally insufficient either because: (a) it does not give rise to a recognized cause of action or; (b) it fails to plead the necessary legal elements of an otherwise recognized cause of action: [*Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331, at paras. 18-19, (Ont. S.C.J.)].

[18] Under Rule 21.01(2) no evidence is permitted on a Rule 21.01(1)(b) motion. The onus rests with the plaintiff to clearly plead the facts it is relying on to establish its claim. A minimum level of material fact must be pleaded and failing that the appropriate remedy is to strike the pleading. There is a more stringent rule that applies to allegations sounding in fraud. Rule 25.06(8) provides that such pleadings shall contain full particulars and shall not be alleged without a factual basis, that if true, could support a finding of fraud.

[19] Pleadings in damages must be pleaded in particularity and present a factual nexus that links the defendant to the loss claimed. The cause of action cannot succeed if the claim does not show the impugned conduct caused the loss or injury: [*Farrell v. The General of the Salvation Army, et al.*, 2011 ONSC, at para. 33, (Ont. S.C.J.)].

[20] The court's authority to strike a claim has been called "a valuable housekeeping measure" that is essential to effective and fair litigation by "weeding out" hopeless claims." [*Powell v. Shirley*, 2016 ONSC 3577, at para. 35, (Ont. S.C.J.)].

THE PARTIES' POSITIONS

Conclusion on Mortgage Centre Canada's Motion

[21] The plaintiffs' claim breach of contract and fraudulent misrepresentation and seek amounts under several heads of damages.

[22] There is a question as to whether there was an agreement between Mr. Lewis and the plaintiffs and beyond that whether if there was an agreement, Mr. Lewis had the authority to bind MCC.

[23] It appears from the record that Mr. Lewis promised the plaintiffs to return all or part of the brokerage fee on the Mortgage on what appeared to be a compassionate basis to assist them with personal litigation costs on an unrelated matter. The plaintiffs filed unsworn exhibits. Among those exhibits was a number of email communications between Mr. Ceballos and Mr. Lewis in which it appears Mr. Lewis stated an intention to repay the \$5,000.00 or a lesser amount to the plaintiffs. The amount was not definite. There was no definite date set for the payment. In the end a payment was not made.

[24] Even if I accept that the plaintiffs had an agreement with Mr. Lewis this does not automatically establish the liability of MCC. MCC submits that Mr. Lewis was an independent contractor of MCC who lacked the authority to bind MCC. MCC asserts, and Mr. Lewis attested to the fact, that the agreement between himself and the plaintiffs was a personal one and had nothing to do with the Mortgage on which he acted as a broker. His intention was to do a personal favour for the plaintiffs for which he did not intend to or seek authorization to bind MCC.

[25] MCC did not learn of the arrangement until May 2018 when the plaintiffs wrote to MCC and complained about Mr. Lewis not reimbursing the funds. The plaintiffs do not allege any problems with the term of the Mortgage or the GSA. They do not allege any wrong doing by any employees of MCC. They do not claim that MCC was a party to the agreement. The plaintiffs contend that Mr. Lewis acted as an agent of MCC when he made the promise to the plaintiffs and as such MCC is vicariously liable for Mr. Lewis' breach of the agreement.

[26] MCC asserts that it is contrary to the law governing mortgage brokerage for a broker to act on behalf of the brokerage without being authorized to do so by the brokerage. MCC cites legislation that prohibits a broker authorized to deal or trade in mortgages on behalf of a brokerage from omitting to do or doing anything that might reasonably result in the brokerage contravening or failing to comply with the governing legislation. MCC asserts that it would not have authorized Mr. Lewis to bind MCC to the promise since offering a personal rebate is a contravention of the legislation: [*Mortgage Brokerages Lenders and Administrators Act*, 2006, c.29, O. Reg 187/08, s. 3].

[27] Vicarious liability of a company for the wrongful acts of its agents can only be established if the agent had either actual or ostensible authority to bind the company. Ostensible or apparent authority can exist when the company allows its agents to act in some way in the conduct of the company's business with other persons thereby representing that the agent has the authority: [*67112 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 S.C.C. 59 (S.C.C.) and *Bazley v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.)].

[28] MCC points out, and I agree, that the plaintiffs have adduced no evidence that Mr. Lewis had actual or ostensible authority to bind MCC to the personal arrangement between them and Mr. Lewis.

[29] Nor, as MCC contends, did the plaintiffs allege or bring evidence to show that Mr. Lewis held himself out to have the authority to bind MCC. As noted earlier, Mr. Lewis' evidence is that the discussions about the payment were as between himself and the plaintiffs and did not involve MCC.

[30] Where there is a question as to whether a person engaged in acts on behalf of a company there is often a further consideration as to whether that person acted within the scope of their duty as an employee. As a general rule an employer is vicariously liable for the wrongful acts of an employee committed in the course of that person's employment. An employer is generally not liable for a wrongful act committed by an independent contractor.

[31] MCC asserts that Mr. Lewis was an independent contractor pursuant to an independent contractor agreement and therefore was not in an employee/employer relationship. MCC points out that even were Mr. Lewis found to be an employee of MCC, they contend that Mr. Lewis acted beyond the scope of his employment when he made a personal commitment to reimburse the funds.

[32] If the plaintiffs could show that MCC authorized the agreement MCC could be found vicariously liable. If the plaintiffs could show that the unauthorized acts are closely connected to acts authorized by the employer, in order for the employers to be found liable the employment context such as the duties of the employee must have created a significant opportunity for the

employee to commit the wrongful act. The concern is that this would result in the heightened risk that the wrongful act would occur: [*Bazley v. Curry*, at para. 6].

[33] MCC argues, and I agree, that Mr. Lewis was acting outside of the scope of his authority as a mortgage agent when he entered into the personal agreement with the plaintiffs. I find Mr. Lewis' personal promise to reimburse money to help the plaintiffs with a personal legal problem was neither authorized nor closely connected to the authorized acts in his role as a mortgage broker. Any reliance by the plaintiffs on the promise was reliance on Mr. Lewis and not MCC.

[34] I find the plaintiffs have established no cause of action against MCC. On the evidence before the court, there is no genuine issue requiring a trial in relation to the agreement the plaintiffs made with Mr. Lewis. It would not be fair or in the interests of the administration of justice to proceed to trial.

Conclusion on Pearl Hospitality's Motion

[35] Pearl seeks the claim against them to be struck without leave to amend. Pearl claims under Rule 21.01(1)(b) (no reasonable cause of action), Rule 21.01(3)(d) (frivolous, vexatious, abuse of process) and Rule 25.11(d) (scandalous, frivolous or vexatious). As noted earlier, I find I only need decide this motion under Rule 21.01(1)(b).

[36] The plaintiffs make the same claims against Pearl as they make against MCC in breach of contract, fraudulent misrepresentation and various types of damages. Pearl contends that it is clear from the face of the statement of claim that the plaintiffs do not particularize any claim against Pearl. There is one paragraph in the claim, paragraph 34, where the plaintiffs seek a total discharge on the Mortgage and compensation in the amount of \$200,000.00. As stated earlier, the matter of the default and judgment on the mortgage is not before the court on this motion.

[37] Pearl argues, and I agree, that as required by Rule 21.01(1)(b), based on accepting the truth of the facts as pleaded, no reasonable cause of action against Pearl emerges from the pleadings. A plaintiff is required to plead a minimum level of material facts to support a pleading. The plaintiffs have pleaded no material facts to support any of their claims and for that reason the pleadings must be struck.

[38] Further, the plaintiffs have made a serious allegation in fraudulent misrepresentation. As noted above, there is a more stringent rule that governs pleadings in fraud. Rule 25.06(8) requires full particulars to be pleaded with claims such as fraudulent misrepresentation. The plaintiffs are in complete non-compliance with that Rule.

[39] Similar to MCC, Pearl points out that the plaintiffs do not allege that Pearl was involved in the agreement made between themselves and Mr. Lewis. Pearl only learned of the agreement when Pearl was served with the statement of claim in January 2019. The plaintiffs at no time raised any issues about the Mortgage or the GSA or the terms and made no complaints about any representatives of Pearl.

[40] As noted above, the *Aristocrat* case held that a claim can be found to be legally deficient if it does not give rise to a recognized cause of action, or if it fails to plead the necessary legal elements of an otherwise recognized cause of action. I find the second *Aristocrat* factor more

appropriately applies to the claim before the court. The plaintiffs have failed to plead the essential legal elements of any of the claims against Pearl.

[41] This is a case in which the claims against Pearl ought to be struck without leave to amend. The plaintiffs filed with their materials an amended statement of claim which is not before this court as the plaintiffs have not brought a motion to amend. I mention the amended claim only to make the point that even if the plaintiffs were given the opportunity to amend, the plaintiffs would not be able to improve their claim because there remains in the amended statement of claim no foundation for the claims.

Damage Claims against Mortgage Centre Canada and Pearl Hospitality

[42] The plaintiffs make bald claims for a variety of damages which they do not particularize in relation to any claims against either MCC or Pearl. In addition, the \$400,000.00 amount sought is exorbitantly out of proportion to the \$5,000.00 loss the plaintiffs claim. The damages claims cannot stand as against MCC and Pearl.

Conclusion on the Plaintiffs' Cross-Motion for Summary Judgment

[43] The plaintiffs appear to seek summary judgment in relation to the default on the Mortgage and the judgment for possession and liability on the agreement. The plaintiffs have made no valid claims against either MCC or Pearl and as such summary judgment cannot lie against either party. There is no genuine issue requiring a trial and the cross-motion is dismissed.

COSTS

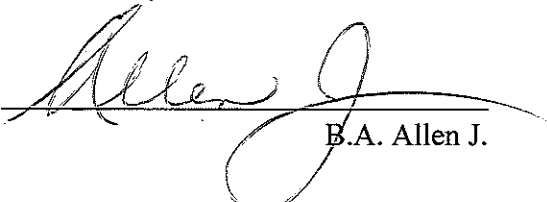
[44] Pearl and MCC submitted costs outlines. I reviewed the costs outlines and heard submissions on costs from all parties. I fix Pearl's costs at \$7,500.00 inclusive of interest and disbursements. I fix MCC's costs at \$5,000.00 inclusive of interest and disbursements. Costs shall be paid by the plaintiffs within 30 days of this Order.

DISPOSITION

[45] I grant Mortgage Centre Canada's motion for summary judgment and dismiss the action as against them.

[46] I grant Pearl Hospitality Inc.'s motion to strike Danilo Ceballos' and Emilen Ceballos' claim in its entirety without leave to amend and dismiss the action against them.

[47] I dismiss Danilo Ceballos' and Emilen Ceballos' cross-motion for summary judgment against Mortgage Centre Canada and Pearl Hospitality Inc.


B.A. Allen J.

Date: February 5, 2020