2014 ONSC 5407
Ontario Superior Court of Justice (Divisional Court)

Dhillon v. PM Management Systems Inc.

2014 CarswellOnt 12734, 2014 ONSC 5407, [2014] O.J. No. 4352, 244 A.C.W.S. (3d) 333

Varinder Dhillon, Plaintiff (Respondent) and PM Management Systems Inc., Defendant (Appellant)

Perell J.

Heard: September 17, 2014
Judgment: September 18, 2014
Docket: 474/13, SC-12-13018

Counsel: Raman Dhillon, for Plaintiff / Respondent
Brett D. Moldaver, for Defendant / Appellant

Subject: Civil Practice and Procedure; Contracts

Headnote

Contracts --- Discharge — Frustration — Miscellaneous

Plaintiff signed defendant's franchise agreement for specialty health services business, and paid initial franchise fee of $27,100.00 — Under franchise agreement, plaintiff was granted right and franchise to own and operate business at specified location — Defendant did not own business premises at specified location, and was unable to negotiate satisfactory lease with owner of property — After efforts to find another location for franchise failed, plaintiff unsuccessfully asked for return of his initial franchise fee — Deputy Judge granted plaintiff's claim for $25,000.00 for return of initial franchise fee plus costs of $1,800.00 — Deputy Judge interpreted franchise agreement and found that purpose of franchise agreement was to provide franchise at specified location, and that purpose of contract was frustrated — Defendant appealed — Appeal dismissed — Deputy Judge interpreted contract and concluded on facts that there had been uncontemplated event that fundamentally altered purpose of contract — Defendant had not shown that Deputy Judge made any error in law or made palpable or overriding error in his findings — Deputy Judge made no error in considering doctrine of frustration.

APPEAL by defendant from judgment granting plaintiff's claim for $25,000.00 for return of initial franchise fee plus costs of $1,800.00.

***Perell J.*:**

1 PM Management Systems Inc. appeals the judgment of Deputy Judge C.W. Kilian dated September 19, 2013 in which he granted Varinder Dhillon's claim for $25,000 for the return of an initial franchise fee plus costs of $1,800. For the reasons that follow, the appeal is dismissed with costs fixed at $5,000 on a partial indemnity basis, all inclusive.

2 On October 6, 2011, Mr. Dhillon, who is a real estate agent, signed PM Management Systems Inc.'s Franchise Agreement for a specialty health services business. Section 4.1 of the Agreement required Mr. Dhillon to pay an initial franchise fee of $27,100, which he paid. Section 4.1 stated:

> In consideration for the right to develop and operate one PHYSIOMED Business, the Franchisee agrees to pay to the Franchisor an initial franchise fee for the Franchisee's Territory payable as of the date of execution of this Agreement in the amount listed on and in accordance with the terms of the Addendum to this Agreement, attached hereto as Exhibit I. The Franchisee acknowledges and agrees that the initial franchise fee represents payment for the initial grant of the rights

to use the Marks and Licensed Methods, that the Franchisor has earned the initial franchise fee upon receipt thereof and that fee is under no circumstances refundable to the Franchisee after it is paid.

3 Under section 3.1 of the Franchise Agreement, Mr. Dhillon was granted the right and franchise to own and operate a PHYSIOMED Business at 20 Cottrelle Blvd., Brampton, Ontario. Under section 3.2 of the Franchise Agreement, Mr. Dhillon was granted an exclusive territory to operate the business at 20 Cottrelle Blvd.

4 PM Management did not, however, own business premises at 20 Cottrelle Blvd., and it was unable to negotiate a satisfactory lease with the owner of the property, which was not prepared to offer PM Management an exclusive-use clause for its business. The parties attempted without success to find a substitute property within the exclusive territory and even outside it.

5 After the efforts to find another location for the franchise failed and although the exclusive territory was still available for him, Mr. Dhillon asked for a return of his initial franchise fee. In effect, he asked for rescission of the agreement. The refund was refused, and Mr. Dhillon sued PM Management.

6 In his claim, Mr. Dhillon pleaded:

11. After some time, the Plaintiff was informed by [the Defendant] that they were unable to negotiate a lease agreement with the landlords due to his lease terms and no exclusivity for the Cottrelle location.

12. The Plaintiff was very surprised that this could not be done and no additional locations were provided as potential franchise sites by the Defendant's Area Developer, Anne.

13. In or about May of 2011, Paul Fleming ("Fleming"), Area Developer for the Toronto area suggested a site situated at the Westmall, Etobicoke, however the Plaintiff was again told that this location was not suitable due to non-exclusivity in the building.

14. At this time, it became clear to the Plaintiff that the Defendant could not fulfill their conditions as a part of the agreement, and accordingly (sic). The Plaintiff has on a number of occasions requested a refund of the franchise fee paid to the Defendant since they have not presented any additional sites wherein the Plaintiff could open a franchise.

7 The Deputy Judge interpreted the Franchise Agreement and found that the purpose of the Franchise Agreement was to provide a franchise at 20 Cottrelle Blvd. and that the purpose of the contract was frustrated.

8 The Deputy Judge found that in the circumstances of a frustrated contract, a refund of the initial franchise fee was not precluded by section 4.1 of the Franchise Agreement. He stated in his Reasons for Decision:

12. Section 4.1 of the Agreement states that the initial franchise fee is for the Franchisee's Territory and the right to use the Marks and Licensed Methods of the Franchisor. The Plaintiff was awarded a territory and therefore the obligation under the section is completed and the fee earned and non-refundable.

13. I cannot agree with this conclusion. The contract, after the index pages, states at the very beginning that the Plaintiff is located at 20 Cottrelle Blvd. Furthermore, s. 3.1 refers to the office location "set forth in Exhibit 1 attached." Exhibit 1, found at page 44, refers to the office location at 20 Cottrelle Blvd. Section 3.2 refers to the territory as set out in Exhibit 1, which shows the outline of the territory. It appears clear, as stated by the Plaintiff, that the agreement was for the franchise to be opened at Cottrelle Blvd., which the Defendant failed to provide by not approving the lease on advice of its agent Ted. While the conduct of the Defendant does not meet the criterion of unconscionable nor do I consider clause 4.1 a penalty, I do find that the conduct of the Defendant was such as to frustrate the contract. Furthermore, when the Plaintiff cannot get a location approved in the territory allotted to him, it has the same effect as if he was not awarded a territory and the Marks and Licensed Methods are of no use to the Plaintiff. As a result, the Defendant did not fulfill his obligation under s. 4.1 and has not earned the Initial Franchise Fee.

. . .

> 18. The Plaintiff has not received a franchise location where he could operate a franchise, he has not received any benefit from the agreement or the Defendant and is entitled to the return of the money paid to the Defendant to the limit of this court's jurisdiction.

9 PM Management submits that the Deputy Judge's finding of frustration was a palpable and overriding error of fact and that the Deputy Judge's interpretation of the Franchise Agreement and his conclusion that it had been frustrated were legal errors. Further, it submits that a finding of frustration was not open to the Deputy Judge because Mr. Dhillon had not pleaded a claim of frustration of contract.

10 I disagree with these submissions.

11 When an uncontemplated event or circumstance occurs after the signing of a contract that without default of either party makes the performance of the contract impossible or would make performance a radically different thing than what was promised or intended by the parties or that strikes at the root of the agreement, both parties may be discharged from further performance and moneys paid may be restored to the party who paid them. See: *Focal Properties Ltd. v. George Wimpey (Canada) Ltd.* (1975), 14 O.R. (2d) 295 (Ont. C.A.) aff'g. (1974), 6 O.R. (2d) 3 (Ont. H.C.), aff'd on other grounds (1977), [1978] 1 S.C.R. 2 (S.C.C.); *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* (1975), 9 O.R. (2d) 617 (Ont. C.A.); *Dinicola v. Huang & Danczkay Properties* (1996), 29 O.R. (3d) 161 (Ont. Gen. Div.); *Bothwell v. Murray*, [2002] O.J. No. 3091 (Ont. S.C.J.); *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (U.K. H.L.); *Frustrated Contracts Act*, R.S.O. 1990, c. F.34.

12 In *Focal Properties Ltd. v. George Wimpey (Canada) Ltd.*, *supra* Justice Houlden stated at p. 309:

> [T]he decision as to when the doctrine of frustration applies turns on the question: "is it reasonable to place the risk of non-performance in the events which have happened on one party or the other or neither?" If it is not reasonable to place the risk on either party, the contract is frustrated. If, however, it is reasonable to place the risk on a particular party, that party must perform and if he fails to do so, he will be liable in damages.

13 The doctrine of frustration is a flexible doctrine and is not restrictive to any formula and can be applied to all types of contracts including contracts involving the sale or leasing of land: *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, *supra*.

14 An event is not a frustrating event if it is foreseen or provided for in the contract or if the frustrating event was caused by the fault of a party to the contract: *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, *supra*; *Dinicola v. Huang & Danczkay Properties*, *supra*.

15 The standard of review for issues of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.).

16 The standard of review for findings of fact is that the findings ought not to be reversed unless it is established that the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, *supra*. The palpable and overriding error test is met if the findings are clearly wrong or can properly be characterized as unreasonable and unsupported by the evidence: *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.) at paras. 55-56.

17 The standard of review for findings of mixed fact and law is on a spectrum between correctness and palpable and overriding error: *Housen v. Nikolaisen*, *supra*. The interpretation of written contracts is an exercise involving a question of mixed fact and law and rarely a question of law; it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.).

18 In the case at bar, the Deputy Judge interpreted the contract and concluded on the facts that there had been an uncontemplated event that fundamentally altered the purpose of the contract. PM Management has not shown that the Deputy Judge made any error in law or made a palpable or overriding error in his findings.

19 In the case at bar, the Deputy Judge made no error in considering the doctrine of frustration.

20 It is not necessary for a pleader to put a legal name to the claim or defence or to plead a formula of legal elements: *Almas v. Spenceley*, [1972] 2 O.R. 429 (Ont. C.A.); *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764 (Ont. S.C.J.). Subrule 25.06(2), which is a partial codification of *Famous Players Canadian Corp. v. J.J. Turner & Sons Ltd.*, [1948] O.J. No. 69 (Ont. H.C.) states: "A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded."

21 In *936464 Ontario Ltd. v. Mungo Bear Ltd.* (2003), 74 O.R. (3d) 45 (Ont. Div. Ct.) Justice Heeney stated at para. 45:

> 45. ... The higher standards of pleading in the Superior Court are simply unworkable in the Small Claims Court, where litigants are routinely unrepresented, and where legal concepts such as the many varieties of causes of action are completely foreign to the parties. Essentially, the litigants present a set of facts to the deputy judge, and it is left to the deputy judge to determine the legal issues that emerge from those facts and bring his or her legal expertise to bear in resolving those issues.

22 See also: *Popular Shoe Store Ltd. v. Simoni*, [1998] N.J. No. 57 (Nfld. C.A.).

23 Accordingly, the appeal should be dismissed with costs fixed at $5,000 on a partial indemnity basis, all inclusive.

Appeal dismissed.

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