CITATION: Serbcan Inc. v. National Trust Company, 2019 ONSC 1842
COURT FILE NO.: C-4884-99
DATE: 2019-04-26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Serbcan Inc., Bowgray Investments, Bonik Incorporated, 1277897 Ontario Limited, Bokrica Inc. and Bozidar Nikolic	)	Roger Horst, for the Plaintiffs/Responding Parties
Plaintiffs/Responding Parties	)	
– and –	)	
National Trust Company and Bank of Nova Scotia	)	Brendan Wong, for the Defendant/Moving Party, National Trust Company and Bank of Nova Scotia
Defendants/Moving Parties	)	
	)	**HEARD:** January 21, 2019

DECISION ON MOTION

CORNELL, J.

Introduction

[1] At the risk of understatement, there has been considerable delay in these proceedings given that they were commenced some twenty years ago. The action should have been dismissed by the registrar pursuant to clause 2 of r. 48.14(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as the matter has not been restored to the trial list or otherwise terminated by any means by the second anniversary of being struck from the trial list, an event that occurred in April of 2007. As such administrative dismissal did not take place, it was necessary to consider the motion on the merits.

[2] The motion was brought by the defendants for an order pursuant to r. 49.09(a) to enforce an alleged settlement. In accordance with the reasons that follow, the motion is dismissed.

Background

Litigation Background

[3] The plaintiffs comprise five corporations and Bozidar Nikolic ("Nikolic"). The Bank of Nova Scotia is the successor to National Trust Company ("Bank").

[4] The plaintiffs were involved in land development in Sudbury. The Bank had provided financing to Serbcan Inc. between 1990 and 1999.

[5] A dispute arose in connection with such financing. In May of 1999, the plaintiffs commenced an application against the defendants and Grant Thornton Limited. In October of 1999, the plaintiffs brought an action against the defendants wherein the relief requested was similar to the relief sought in the application.

[6] In January of 2000, an order was obtained that consolidated the application and the action and provided that they be tried together.

[7] A third action was initiated by the Bank against Nikolic, Svetlana Nikolic and Bokrica Inc. This action was in connection with an effort by the Bank to enforce a guaranty against those defendants.

[8] A fourth action was initiated by the defendants against some of the plaintiffs in connection with power of sale proceedings that had been brought by the defendants regarding land that has been referred to as the Lasalle property.

[9] After the consolidation order had been issued, two court orders were made in connection with the application that required the plaintiffs to post security for costs in amounts of $70,000 and $74,967, respectively. Those amounts continue to stand to the credit of the application.

[10] This action was twice set down for trial, but never proceeded. On the second occasion, the parties agreed to resolve the matter by way of various orders on consent. Gauthier J. made an endorsement that contained the following orders:

> a) The action/application as against Grant Thornton Limited shown as a party in the Notice of Application issued on May 28/99, in court file No. 8456 is dismissed, w/o costs;
>
> b) The actions before me will be arbitrated, together with two other related proceedings: the outstanding National Trust Guarantee action and the power of sale proceeding regarding the LaSalle property;
>
> c) The costs of the arbitration have been agreed to be borne "up front" ie in the first instance, by the Defendant National Trust;
>
> d) The security for costs in the proceedings before me will remain in court and will stand as security in the arbitration;

e) There will be full rights of appeal;

f) The parties will select the arbitrator and will schedule the arbitration as soon as schedules permit;

g) The parties agree that this will constitute the submission to arbitration;

h) The proceedings before me (court files No.8456 and 4838) are struck from the list and will be finally adjudicated by way of the arbitration.

[11] The arbitration never occurred.

Efforts to Settle

[12] Ronald Moldaver was counsel for the plaintiffs at the relevant time. On December 12, 2017, counsel for the Bank, Mr. Sclisizzi, sent an email to Mr. Moldaver to make an offer to settle. That email reads:

> Ron,
>
> In an effort to finally settle this matter Scotiabank is willing to give up its claim to parts of the funds in court as a security for costs and offers to settle the action and counterclaim on the following terms:
>
> 1. The funds in court as security for costs will be paid out of court to Serbcan.
>
> 2. Scotiabank will discharge its mortgages on the LaSalle property.
>
> 3. The action and counterclaim will be dismissed without costs.
>
> 4. The parties will execute mutual full and final releases containing confidentially provisions, such releases to be in a form satisfactory to counsel for all parties.
>
> This offer to settle is open for acceptance for 7 days from the date hereof and expires at 5:00 p.m. on December 19, 2017.

[13] On December 14, 2017, Mr. Nikolic advised counsel for the Bank by way of fax that he had received a copy of the proposal to settle from Mr. Moldaver and that Mr. Moldaver was no longer acting for the plaintiffs. Mr. Nikolic stated:

> "Would you be kind enough to prepare all needed documents in order that we can finally conclude this issue and provide copies for signature?"

[14] After receiving the fax from Mr. Nikolic, Mr. Sclisizzi sent the following email to Mr. Nikolic:

> "I acknowledge receiving your fax dated December 14, 2017 (attached) and I confirm the parties have agreed to settle the action and counterclaim on the terms set out in my email to Mr. Moldaver sent on December 12, 2017."

[15] Mr. Sclisizzi also informed Mr. Nikolic that he would prepare the necessary documents. He further advised that since the *Rules of Civil Procedure* do not permit corporations to be represented by non-lawyers, it would more efficient to retain Mr. Moldaver as counsel to complete this settlement.

[16] Mr. Sclisizzi prepared the consents and draft orders for the payment out of court for the Serbcan parties, dismissing the application in court file number A-8456-99, and dismissing the action in court file number C-4884-99. He also prepared a draft mutual release whereby The Bank of Nova Scotia and the plaintiffs would release each other. Mr. Sclisizzi provided Mr. Nikolic with copies of these draft documents by way of email on January 15, 2018.

[17] On January 18, 2018, Mr. Nikolic wrote to Mr. Sclisizzi confirming that he had received the draft documents. Mr. Nikolic also advised that he had met with a lawyer who suggested that there should be minutes of settlement and that the draft order should be amended to have the funds currently standing in court to be paid out to Bonik Inc. In addition, Mr. Nikolic requested a provision in the order that the mortgages be discharged after a certain number of days from date of the order. After receiving this amended documentation Mr. Nikolic said that he would file a change of solicitor.

[18] On January 19, 2018, Mr. Sclisizzi spoke with George Florentis, a lawyer who had been consulted by Mr. Nikolic.

[19] On January 20, 2018, Mr. Nikolic advised Mr. Sclisizzi by way of fax that no settlement agreement had been reached. In his view, the documents circulated in January 15, 2018 were only for "negotiation purposes". Mr. Nikolic then reverted to an earlier settlement position whereby he required the Bank to pay an additional sum of $200,000 in addition to the requirement that all of the security for costs paid into court be paid to Bonik Inc.

Issues

[20] This motion raises the following issues:

a) Was a binding settlement agreement reached between the parties on December 14, 2017?

b) If a settlement has been established, should the court exercise its discretion to enforce the settlement and grant judgment?

Analysis

[21] The test to be applied under a r. 49.09 motion was set out in *Dick v. Marek* (2009), 72 C.P.C. (6th) 374 (Ont. S.C.J.), at paras. 65-66:

> The first step is to consider whether an agreement to settle was reached, treating the motion like a Rule 20 motion for summary judgment. If there are material issues of fact or genuine issues of credibility in dispute regarding whether (i) the parties intended to create a legally binding contract or (ii) there was an agreement on all essential terms of the settlement, the court must refuse to grant judgment.
>
> If the court finds that an agreement to settle was reached, it must then consider whether, on all of the evidence, the agreement should be enforced. On this second step, a Rule 20 approach is not applied; a broader approach, taking into account evidence not relevant on a Rule 20 inquiry is applied.

[22] In *Milos v. Zagas* (1998), 38 O.R. (3d) 218 (C.A.), Osborn J.A., states, at paras. 19 and 21:

> In determining whether to enforce a settlement under R. 49.09 all of the relevant facts disclosed by the evidence must be taken into account... In this case, I think the motions judged erred in over-emphasizing some facts and in failing to consider others, including prejudice. The motions judge made no reference to the issue of prejudice in her reasons.
>
> In addition to over-emphasizing the fact that the plaintiff's acceptance was clear and under-emphasizing the evidence of mistake, I think that the motions judge erred by not taking into account manifestly important factors.

Lack of Clarity

[23] Mr. Sclisizzi's email referred to an offer to "settle the action and counterclaim". As previously mentioned, there was not one, but three actions. There is no reference to the application. There was no counterclaim.

[24] The settlement offer contemplated the completion of "mutual full and final releases containing confidentiality provisions, such releases to be in a form satisfactory to counsel for all parties". No draft of the confidentiality provisions or releases were provided at any time.

Lack of Authority

[25] The motion material asserts that Mr. Nikolic is the principal of all of the plaintiff corporations and has been involved with this litigation since its inception in 1999. Although an argument can be made that Mr. Nikolic can speak on behalf of himself as a named plaintiff, there

is nothing to suggest that Mr. Nikolic had the apparent, let alone the actual, authority to bind the plaintiffs to a settlement. There was no information before me to identify Mr. Nikolic as an officer, director or shareholder in any of the corporations.

[26] Svetlana Nikolic is a defendant in the guarantee action brought by the Bank. There is nothing to suggest that Mr. Nikolic had authority to bind her to this settlement if in fact it was the intention of the Bank to also settle the guarantee action.

[27] As previously mentioned, the offer to settle refers to the "action and counterclaim". That would suggest that it was the intention of the Bank to only settle this action. On the other hand, the two orders for security for costs were made in connection with the application. Despite the fact that there is no mention of the application in the offer to settle, the offer to settle contemplates the amounts that had been paid into court as security for costs to be paid out to Serbcan as part of the settlement. This further highlights the lack of clarity involved in the settlement proposal.

Corporate Representation

[28] Rule 15.01(2) of the *Rules of Civil Procedure* provides "A party to a proceeding that is a corporation shall be represented by a lawyer, except with leave of the court".

[29] The Bank argues that Mr. Nikolic had authority to bind the corporations. I reject this argument for the reasons previously expressed.

[30] The Bank's position is further undermined by the fact that Mr. Sclisizzi was aware of the fact that the corporations needed to be represented by a lawyer and suggested that Mr. Moldaver be used for this purpose. The fact of the matter is that Mr. Moldaver was never involved in these proceedings after his initial receipt of the offer to settle, yet he continued to be the solicitor of record throughout.

Breach of the Rules of Professional Conduct

[31] This brings me to the next point.

[32] The offer to settle was sent by Mr. Sclisizzi to Mr. Moldaver who represented the plaintiffs.

[33] Rule 7.2-6 of the *Rules of Professional Conduct* of the Law Society of Ontario states:

> If a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner:
>
> a) approach or communicate or deal with the person on the matter; or
>
> b) attempt to negotiate or compromise the matter directly with the person.

[34] It is not disputed that after Mr. Sclisizzi sent the offer to settle to Mr. Moldaver, Mr. Nikolic contacted Mr. Sclisizzi directly. As previously mentioned, Mr. Nikolic indicated he would be

making arrangements to end Mr. Moldaver's representation. In view of the rule that has been referred to, Mr. Sclisizzi should simply have advised Mr. Nikolic that he was not in a position to deal with him directly until such time that as Mr. Moldaver was no longer the solicitor of record. Instead, Mr. Sclisizzi chose to engage directly with Mr. Nikolic over an extended period of time in an effort to bring matters to a conclusion. It was improper of Mr. Sclisizzi to do so.

[35] There is American precedent that indicates that a court will not enforce an agreement made in violation of an equivalent rule of professional conduct: see *Evans v. Professional Transportation Inc.* 2014 WL 1908808 (United States District Court, E.D. Tennessee).

[36] In *Hearst (Town) v. Ontario North East District School Board*, [2000] O.J. No. 3419, Hennessy J. stated at paragraph 53:

> Most importantly, I am cognizant of the fact that the Rules of Professional Conduct are created by the Law Society to ensure ethical conduct of members of the profession. The Court does not act in a supervisory capacity over lawyers. Thus, the only basis for Court intervention must come from a need to ensure the proper conduct of the proceedings in so far as the rights of the parties may be affected (*Transamerica Life Insurance Co. of Canada v. Seward* (1997), 33 O.R. (3d) 604 (Ont. Gen. Div.)

[37] In this case, it cannot be said that there was "proper conduct" in these proceedings given Mr. Sclisizzi's direct dealings with Mr. Nikolic. Going further, it is clear that the rights of the plaintiff corporations and Mr. Nikolic's wife were to be affected by the efforts of Mr. Sclisizzi to bring about a comprehensive settlement as a result of his direct dealings with Mr. Nikolic, if that was his intention.

[38] In order "to ensure proper conduct of the proceedings insofar the rights of the parties may be affected," it was necessary that; 1) Mr. Sclisizzi not deal directly with Mr. Nikolic when there was a solicitor of record; 2) the corporations be represented by a solicitor; 3) Svetlana Nikolic's interests in the guarantee action be properly addressed by her or her solicitor if she is represented by one and if the settlement was intended to include a resolution of the guarantee action.

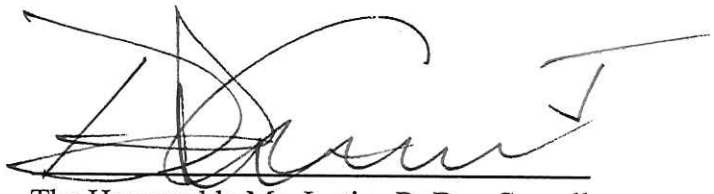
Conclusion

[39] According to the *Zagas* decision, I must take all of the relevant facts disclosed by the evidence into account in determining whether or not to enforce a settlement under r. 49.09. When I do take all of the relevant facts into consideration, I am of the opinion that no valid and enforceable settlement had been reached. In my view, there are material issues in dispute and a failure to establish an agreement on all of the essential terms of the purported settlement.

[40] If I am wrong in reaching this conclusion, then it is my opinion based upon all of the evidence before me that this is a situation where the court should exercise its discretion not to enforce the settlement. Accordingly, this motion is dismissed.

Costs

[41] If the parties are unable to agree upon costs, they may provide written submissions. The plaintiffs may make cost submissions not to exceed two pages plus supporting documentation within 14 days of the release of these reasons. The defendants shall have 14 days to respond, such submissions not to exceed two pages plus supporting documentation. There shall be no right of reply. If cost submissions are not received within the specified timeframes, it shall be conclusively determined that the parties have resolved the issue of costs.



The Honourable Mr. Justice R. Dan Cornell

Released: April 26, 2019

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