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Keshavjee v. Altavac Manufacturing Inc.

Sadruddin Keshavjee (Appellant / Plaintiff) and Altavac Manufacturing Inc., Jane Doe and John Doe
(Respondents / Defendants)

Alberta Court of Appeal

C. Fraser C.J.A., J. Côté J.A., and J. Watson J.A.

Heard: November 7, 2006

Judgment: November 7, 2006

Docket: Calgary Appeal 0501-0181-AC

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Counsel: G.L. Lacourciere for Appellant

D.P. **Castle** for Respondent, Altavac Manufacturing Inc.

Subject: Civil Practice and Procedure; Family; Contracts

Civil practice and procedure --- Actions — Extinction of right of action — Release and satisfaction

In matrimonial settlement agreement — Husband and wife entered into settlement agreement regarding matrimonial property — Agreement transferred corporation to wife, with no ability of husband to claim increased value of corporation occurring after date of settlement agreement ("settlement date") — Husband allegedly entered into oral contract with wife and corporation to provide services to corporation ("contract") — Husband alleged that contract was entered into before settlement date, but that much of service was provided afterwards — Wife denied existence of contract — Wife explained that cheques issued to husband were product of his bullying and threats, and not of contract or services — Husband's action against corporation for services rendered was dismissed by chambers judge on summary judgment — Husband appealed — Appeal allowed; action discontinued — Chambers judge erred in concluding that it was plain and obvious that settlement agreement obviated husband's ability to sue corporation for services rendered after settlement date — If contract existed and was carried out for benefit of corporation after settlement date, it was not plain and obvious that husband was stopped from claiming — It was not plain and obvious that husband could not validly contract with corporation separately from separation agreement — If wife's allegations of being bullied and threatened were accepted, trial judge would have to consider implications for existence of contract — Chambers judge could not resolve factual disputes between parties on basis of competing affidavits — Husband's counsel subsequently requested order that action be discontinued and wife's counsel agreed.

Family law --- Domestic contracts and settlements — Effect of contract — Miscellaneous issues

Effect of release — Husband and wife entered into settlement agreement regarding matrimonial property — Agreement transferred corporation to wife, with no ability of husband to claim increased value of corporation occurring after date of settlement agreement ("settlement date") — Husband allegedly entered into oral contract with wife and corporation to provide services to corporation ("contract") — Husband alleged that contract was entered into before settlement date, but that much of service was provided afterwards — Wife denied existence of contract — Wife explained that cheques issued to husband were product of his bullying and threats, and not of any contract or services — Husband's action against corporation for services rendered was dismissed by chambers judge on summary judgment — Husband appealed — Appeal allowed; action discontinued — Chambers judge erred in concluding that it was plain and obvious that settlement agreement obviated husband's ability to sue corporation for services rendered after settlement date — If contract existed and was carried out for benefit of corporation after settlement date, it was not plain and obvious that husband was stopped from claiming — It was not plain and obvious that husband could not validly contract with corporation separately from separation agreement — If wife's allegations of being bullied and threatened were accepted, trial judge would have to consider implications for existence of contract — Chambers judge could not resolve factual disputes between parties on basis of competing affidavits — Husband's counsel subsequently requested order that action be discontinued and wife's counsel agreed.

A husband and his wife entered into a settlement agreement regarding their matrimonial property. The settlement agreement transferred a corporation to the wife, with no ability of her husband to claim any increased value of the corporation occurring after the date of the settlement agreement ("settlement date").

The husband alleged that he entered into an oral contract with his wife and the corporation to provide services to the corporation ("the contract"). The husband alleged that the contract was entered into before the settlement date, but that much of the service was provided afterwards. The wife denied the existence of the contract. She alleged that cheques that she issued to her husband were a product of his bullying and threats, and not of any contract or services.

The husband's action against the corporation for services rendered was dismissed by a chambers judge on summary judgment. The husband appealed.

Held: The appeal was allowed; the action was discontinued at the request of the husband's counsel, with the agreement of the wife's counsel.

Per Watson J.A. (Côté J.A. concurring): The chambers judge erred in concluding that it was plain and obvious that the settlement agreement obviated the husband's ability to sue the corporation for services rendered after the settlement date.

If the contract existed and was carried out for the benefit of the corporation after the settlement date, it was not plain and obvious that the husband was stopped from claiming. It was not plain and obvious that the husband could not validly contract with the corporation separately from the separation agreement.

If the wife's allegations of being bullied and threatened were accepted, the trial judge would have to consider the implications for the existence of the contract. The chambers judge could not properly resolve the factual disputes between the parties on the basis of competing affidavits.

Per Fraser C.J.A. (dissenting): The appeal should have been dismissed.

Given the terms and conditions of the settlement agreement, the action was bound to fail. Clause 33 of the settlement agreement made it clear that the shares of the corporation were transferred to the wife free of any "claims" that her husband might bring. When read in context of the rest of the settlement agreement, it was plain that those "claims" necessarily included any claims that the husband might bring against the corporation directly as opposed to his wife personally.

Other clauses in the settlement agreement bolstered this conclusion. In particular, another clause provided that the settlement agreement was to be a complete settlement of each party's respective claims to the property of the other. That property included the shares in the corporation transferred to the wife under the settlement agreement. There was also a very broad release clause which constituted an absolute bar to any actions that might be brought by the husband against the corporation.

The settlement agreement was a complete defence to any action by the husband regardless of whether the contract predated or postdated the settlement agreement. The settlement agreement stated that it replaced any other agreements between the parties dealing with matrimonial property. If the contract predated the settlement agreement, it was therefore superseded. The settlement agreement also stated that it could only be amended in writing after the parties received independent legal advice. If the contract postdated the settlement agreement, a claim would therefore be barred because the required amendment had not been concluded.

APPEAL by husband from summary judgment dismissing his action against corporation owned by wife.

J. Watson J.A.:

1 The appellant, Sadruddin Keshavjee, challenges a ruling by the chambers judge granting summary judgment dismissing the appellant's suit against the respondents' corporation. The test for summary judgment is often said to be whether it is plain and obvious that the suit has no reasonable prospect of success, though other similar expressions are often used.

2 Having regard to the fact that the consequence of summary judgment dismissing a suit is termination of the proceedings, a test for review of the grant of summary judgment doing so is whether or not the chambers judge erred in law. In this case, the chambers judge held that the appellant's suit was barred as against the corporation because the appellant had come to a settlement of certain matrimonial property claims as between himself and his wife. As a result of that settlement agreement dated June 18, 2003, she came to be the sole proprietor of that corporation.

3 The corporation was not a party to that Settlement Agreement as such. The Settlement Agreement contained language intended to finalize the distribution of interests in the corporation by transferring it entirely to the wife and with no ability of the appellant to claim any increased value of the corporation that might follow after the date of the Settlement Agreement. Other corporations were also dealt with in a similar manner by the Agreement, albeit the appellant received control of those.

4 The present suit by the appellant concerned what he said was an oral contract between himself and the corporation and his wife under which he would provide services to the corporation over a time period of a year, and he would be paid by the corporation. That oral agreement was said to have been reached in May, 2003, but much of the activity said by the appellant to have been in furtherance of that contract occurred after the Settle-

ment Agreement was concluded.

5 The appellant offered not only his own affidavit, but those of three other persons as evidence of the existence of that contract. Two of them gave evidence of the performance of work for the corporation by the appellant under the contract. The wife denied the existence of any such contract. She also offered explanations for her having issued cheques to the appellant (some of which she later stopped payment upon), after the day of the Settlement Agreement, that is to say in August, 2003 or later. The appellant claimed the cheques were further evidence of the existence of the oral contract. She asserted that she had been bullied and threatened by the appellant despite the Settlement Agreement, and that the cheques were solely the product of that, and not of any contract or work thereunder.

6 It is noteworthy that the wife also explained that she had been forced to submit documents to Revenue Canada as to at least some of the money paid to the appellant, describing it as being employment income and not the result of extortion.

7 The chambers judge opined that the Settlement Agreement finalized all claims and potential claims by the appellant against the corporation. The chambers judge appears to have regarded the date of the alleged oral agreement, i.e. prior to the Settlement Agreement, as a dominant factor in deciding that the oral agreement was overcome by the Settlement Agreement. As a consequence, he regarded the appellant as having bargained away any right to sue the corporation for any reason.

8 In the majority's view, the chambers judge was in error to conclude that it was plain and obvious that the Settlement Agreement obviated the appellant's ability to sue the corporation for services rendered to the corporation after the date of the Settlement Agreement. If the oral contract of service existed, and assuming that contract was carried out in significant regards to the benefit of the corporation after the coming into effect of the Settlement Agreement, it was not plain and obvious that the appellant was stopped by the Settlement Agreement from claiming either under the alleged oral contract or on some other basis to be paid by the corporation for some services. It was not plain and obvious to the majority that the property transfer clause in the Settlement Agreement, read in light of its own terms and other clauses of the Agreement, barred the suit in this instance.

9 We say nothing about the effect of the Settlement Agreement or any of its terms if considered in light of a trial. We say only that it is not plain and obvious that the appellant could not validly contract with the corporation separately from the Settlement Agreement reached between the appellant and his wife. If the wife's position as to being bullied and threatened by the appellant is accepted after trial, the trial judge would have to consider the implications of such circumstances on the existence of the contract and its factual and legal effect. However, the affidavits before the chambers judge make clear that there were serious factual disputes between the appellant and his wife, and between the appellant's other witnesses and his wife. The chambers judge could not properly resolve those factual disputes on the basis of competing affidavits.

10 Under the circumstances, the majority would allow the appeal and return the matter to the Court of Queens' Bench for trial on the merits.

C. Fraser C.J.A.:

11 The chambers judge found that Clause 33 of the Settlement Agreement precluded Mr. Keshavjee's claim. He granted summary judgment dismissing the claim with solicitor and client costs. The issue before us is wheth-

er the chambers judge erred in holding that there is no genuine issue to be tried.

12 The test for summary judgment is that it must be plain and obvious that the action cannot succeed or that the action is bound to fail. In my view, given the terms and conditions of the Settlement Agreement, this action is bound to fail. Several Clauses of that Settlement Agreement make it clear that Mr. Keshavjee transferred to his wife a number of assets including the shares of the respondent, Altavac Manufacturing Inc., on the basis that they were to be free and clear from any and all "claims" he might bring. That is the import of Clause 33. It is plain from that Clause, read in context with all of the other Clauses of the Settlement Agreement, that those "claims" necessarily included any "claims" that Mr. Keshavjee might subsequently bring against Altavac directly as opposed to Mrs. Keshavjee personally. To allow Mr. Keshavjee to advance a claim against Altavac itself would render nugatory Mr. Keshavjee's undertaking to transfer the shares in Altavac to Mrs. Keshavjee free from any and all claims.

13 A number of other Clauses in the Settlement Agreement bolster this conclusion and preclude any successful action by Mr. Keshavjee against Altavac. In particular, Clause 51 expressly provides that the Settlement Agreement is to be a complete, final and effective settlement of each party's respective claims in and to the property of the other and a full relinquishment of all rights, interests and claims which either party may otherwise have upon the property of the other. That property includes the shares in Altavac transferred to Mrs. Keshavjee under the terms of the Settlement Agreement. To permit Mr. Keshavjee to sue Altavac directly would contradict the terms of Clause 51. The terms of the Settlement Agreement bind.

14 In addition, there is a very broad release contained in Clause 43. Under this provision, each party gives up any claim at law and in equity that either may have to the property of the other now and in the future. This Clause also makes it clear that the release contained therein applies to any action that might be brought at a future date based on any rights that might be acquired after the date of execution of the Separation Agreement at law or in equity and whether in trust, *quantum meruit* or unjust enrichment. Clause 43 therefore constitutes a complete and absolute bar to any actions that might be brought by Mr. Keshavjee against Altavac.

15 In the result, even assuming Mr. Keshavjee had concluded a separate oral contract with Altavac, his claim is bound to fail. One of two possibilities exists. Under the first possibility, the oral contract by Mr. Keshavjee to provide services to Altavac predated the Settlement Agreement. However, the Settlement Agreement makes it clear in Clause 58 that it replaces any other written or oral agreements between the parties dealing with the matrimonial property. In fact, the allegation in the statement of claim is that there was an oral contract then in existence. If that were so, then that "oral contract" has been superceded by the Settlement Agreement in accordance with the express provisions of Clause 58. Alternatively, if Mr. Keshavjee now submits that the alleged "oral contract" postdated the execution of the Settlement Agreement, that claim is also barred by the Settlement Agreement because of Clause 59. Clause 59 bars the existence of the claim because it makes it clear that the Settlement Agreement can only be changed by the parties in writing with independent legal advice concerning the changes by both of the parties agreeing to those changes, and by each party's lawyer witnessing those changes. No such amending agreement has ever been concluded.

16 Therefore, in my view, the chambers judge was correct in holding that the Settlement Agreement was a complete defence to any action that might be advanced by Mr. Keshavjee against Altavac based on an alleged oral contract regardless of whether that oral contract predated or postdated the date of the Separation Agreement.

17 For these reasons, I would have dismissed the appeal.

[Discussion]

18 Mr. Keshavjee's counsel has requested that the panel order that the subject action by Mr. Keshavjee be discontinued without costs to either party. Mrs. Keshavjee's counsel is in agreement with that proposal. This being so, we so order.

Order accordingly.

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