Case Name:
Mohammed v. York Fire and Casualty Insurance Co.

Between
Jameel Mohammed, appellant, and
York Fire and Casualty Insurance Company, respondent

[2006] O.J. No. 547
Docket: C43374
Also reported at:
79 O.R. (3d) 354

Ontario Court of Appeal
Toronto, Ontario
E.A. Cronk, R.P. Armstrong and S.E. Lang JJ.A.

Heard: November 24, 2005.
Judgment: February 14, 2006.
(49 paras.)

Civil procedure — Settlements — Setting aside, grounds — Appeal by insured from decision reported at [2004] O.J. No. 3690 dismissed — No evidence that settlement was manifestly unfair or resulted from mistake.

Appeal by Mohammed from the dismissal of his motion to set aside minutes of settlement and a resulting consent order dismissing his action against the insurer. Mohammed brought an action against the insurer for losses incurred as a result of a fire at his property. The insurer claimed that Mohammed intentionally set the fire. In September 2001, Mohammed was convicted of arson and attempting to defraud the insurer. After a pre-trial of the action, Mohammed executed minutes of settlement that were prepared by his counsel. The consent order was obtained at the same time. In March 2003, Mohammed's convictions were overturned and the charges were ultimately withdrawn. Mohammed claimed that he did not authorize his counsel to settle and was unaware that the action had been settled. He alleged that he did not sign the minutes but a different document about his counsel's fees. The motions judge held that Mohammed failed to establish that he did not sign the minutes of settlement and there was no fraud or fresh evidence to justify setting aside the settlement. He also concluded that the parties had not entered into the settlement as a result of common mistake. Mohammed argued that the motions judge erred in finding that he agreed to the settlement; in failing to find that the parties entered into the settlement as a result of a common mistake as to the admissibility of the convictions; failed to give adequate weight to facts that arose after the settlement that were unavailable at the time of the settlement; and in failing to find that the settlement was unconscionable.

HELD: Appeal dismissed. As Mohammed did not deny that his lawyer signed the minutes of settlement or consented to the dismissal of his action, the settlement was

binding on Mohammed absent reasons to set it aside. There was no mistake that would warrant setting aside the settlement and the dismissal order. Both parties were aware of the convictions and would have reasonably assumed that the appeal was likely to be successful. New evidence that Mohammed succeeded in overcoming his criminal convictions fell short of meeting the onus required to set aside a settlement and consent dismissal. There was no evidence that the settlement was shocking, oppressive, or manifestly unfair. Mohammed failed to establish that the motions judge improperly exercised his discretion in refusing to set aside the minutes of settlement and the consent dismissal order.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 59.06, 59.06(2)(a)

Appeal From:

On appeal from the order of Justice H.J. Wilton-Siegel of the Superior Court of Justice dated August 23, 2004.

Counsel:

Brendan van Niejenhuis for the appellant

Ryan M. Naimark for the respondent

The judgment of the Court was delivered by

¶ 1 **S.E. LANG J.A.**:— The appellant, Jameel Mohammed, appeals the order of Justice Wilton-Siegel. That order dismissed the appellant's motion to set aside minutes of settlement, which resolved the issues between the parties, and a resulting consent order, which dismissed the appellant's action against the respondent without costs. For the reasons that follow, I conclude that the motion judge was correct to dismiss the appellant's motion. Accordingly, I would dismiss the appeal.

Chronology

¶ 2 In October 1998, the appellant sued his insurer, York Fire & Casualty Insurance Company (York), claiming payment under his fire insurance policy. That policy insured the appellant's Haliburton property, which was destroyed by fire in October 1997. York defended on the basis that the appellant had deliberately set fire to his property.

¶ 3 In December 1998, partly as a result of information from York, the appellant was charged with arson endangering life and with arson for a fraudulent purpose. After a seven-day trial, the appellant was convicted in September 2001. The appellant appealed. To obtain legal aid funding for his appeal, he sought an opinion on the merits of his

appeal from a senior criminal counsel. That letter provided particulars about the issues to be raised on the appeal and gave a persuasive opinion that the appeal had considerable merit.

¶ 4 After the convictions and before the appeal, the appellant's civil action was scheduled for trial. The appellant was represented on the civil matter by a senior experienced insurance counsel. At trial scheduling court on November 7, 2001, the appellant sought an adjournment of the civil trial pending his criminal appeal. The adjournment was refused.

¶ 5 On November 26, 2001, the parties appeared for trial. In raising preliminary issues, the appellant again requested an adjournment. In the alternative, he sought an order, which was resisted by York, that his criminal convictions be inadmissible in the civil trial. Also, as a preliminary matter, both counsel indicated to the trial judge that a further pre-trial would be helpful. The parties did not seek a ruling on the adjournment or on the admissibility of the convictions before proceeding to the pre-trial.

¶ 6 The trial judge heard argument on both the adjournment and the use to be made, if any, of the criminal convictions. On the admissibility of the criminal convictions, York's counsel presented the trial judge and the appellant's counsel with two authorities. York's counsel said that the authorities stood for the principle that, despite the pending appeal, the convictions were admissible as prima facie evidence that the appellant had intentionally caused the fire. He also argued that the convictions were a factor for the trial judge to consider along with all the other evidence.

¶ 7 Neither the appellant's lawyer nor the trial judge had the opportunity to read the two authorities at the time the motion was argued, although it appears that the appellant's counsel may have read them during a recess. When counsel returned to court, the appellant's counsel argued that even if the convictions might be admissible in another case, in this case the appellant had a persuasive opinion that there was merit to his appeal. In that circumstance, the admission of the convictions would give rise to a real danger of inconsistent verdicts.

¶ 8 A reading of the transcript indicates that the trial judge was alert to the relevant issues. After argument, the trial judge reserved her decision on both the adjournment and the admissibility of the convictions. She told counsel that she would review the authorities. Such a review may have led the trial judge to conclude that the convictions should be given little or no weight in the circumstances of this case or that, alternatively, the requested adjournment should be granted.

¶ 9 In the meantime, however, the parties proceeded to a pre-trial, which was conducted by the civil team leader. The appellant had three problems that affected his readiness for trial. First, he had no expert report on the cause of the fire to counter York's expert report that supported arson. Second, the appellant's lawyer had notified the appellant that he would seek to remove himself from the record unless appropriate arrangements were made for his retainer. Third, the appellant had the problem presented by his criminal convictions.

¶ 10 During the course of the pre-trial, the parties discussed the criminal convictions. On the facts underlying the convictions that were related to him, the pre-trial judge expressed the view that, even if the trial judge did not consider the criminal convictions, there appeared to be enough evidence about the fire that the appellant would have "a very difficult case"[1]. After meeting with both counsel, the pre-trial judge met alone with the appellant and his counsel.

¶ 11 After meeting with the pre-trial judge, counsel agreed to a settlement involving the dismissal of the appellant's action without costs, costs that would otherwise have been extensive. Counsel for York obtained instructions from his client to accept the settlement. Minutes of settlement were signed by both counsel and also, at least on their face, by the appellant. Counsel then attended before the trial judge who dismissed the action on consent without costs.

¶ 12 Sixteen months later, in March 2003, this court overturned the appellant's convictions. The trial judge's reasons in the criminal trial suggested that he treated his rejection of the appellant's evidence as positive evidence of guilt without any analysis of the Crown's evidence. This court ordered a new trial on two bases: the inadequacy of the trial judge's reasons and a failure by the trial judge to consider the evidence in accordance with *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

¶ 13 The appellant then moved in this proceeding to set aside the settlement and the consent order. His motion was adjourned pending the outcome of the criminal re-trial.

¶ 14 In January 2004, at the re-trial, the Crown withdrew the charges against the appellant. According to the appellant, the charges were withdrawn because there was no credible evidence to support a conviction. The appellant did not provide this court with a transcript of the re-trial or the reasons for the withdrawal.

¶ 15 The appellant's motion to set aside the settlement and the consent dismissal order was heard in June 2004 and dismissed in August 2004. This appeal followed.

The Motion Judge's Decision

¶ 16 The motion judge dismissed the motion because the appellant failed to establish that he did not sign the minutes of settlement and because there was no fraud or fresh evidence to justify setting aside the settlement. He also concluded that the parties had not entered into the settlement as a result of common mistake.

Analysis

¶ 17 In my view, the appellant's appeal cannot succeed. The appellant alleged four errors in the findings of the motion judge. First, the motion judge erred in finding that the appellant agreed to the settlement. Second, the motion judge erred in failing to find that

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[1] This court was not asked to consider the admissibility of this evidence in light of rule 50.03. Accordingly, these reasons are not to be taken as determining the issue of admissibility of pre-trial conference discussions.

the parties entered into the settlement as a result of a common mistake as to the admissibility of the convictions. Third, the motion judge failed to give adequate weight to facts that arose after the settlement that were unavailable at the time of the settlement and that warranted the setting aside of the settlement and consent order. Fourth, the settlement was unconscionable. I will address these issues in the order that they were argued.

(i) Was the appellant a party to the settlement?

¶ 18 On the first issue, the appellant denied that the signature on the minutes of settlement was his and accused the respondent's lawyer of forgery. The respondent's lawyer filed an affidavit in which he deposed that he both heard the appellant's counsel read the minutes of settlement to the appellant and that he saw the appellant sign that document. The motion judge found as a fact that the appellant had given instructions to his counsel to settle the case and had signed the minutes of settlement.

¶ 19 Even though the motion judge heard no oral evidence, his findings of fact are entitled to deference. There were significant issues surrounding the appellant's credibility. In my view, there was evidence on which the motion judge was entitled to conclude that a final settlement had been reached and agreed upon by the appellant.

¶ 20 In any event, irrespective of the conflicting evidence as to the appellant's signature, the appellant did not dispute his counsel's retainer. He did not deny that his lawyer signed the minutes of settlement or consented to the dismissal of his action without costs. In those circumstances, the settlement was binding on the appellant absent reason to set it aside[2]. I note that the appellant did not strenuously pursue either the challenge of his signature or the issue of his instructions to counsel in his argument on this appeal.

(ii) Was there a common mistake of fact or law?

¶ 21 A contract depends on an agreement between the parties as to the terms of the contract or as to the assumptions underlying the contract. In this case, the appellant argues that both parties mistakenly assumed that his convictions were admissible. In the face of such a mistake, argues the appellant, justice requires that the civil judgment be set aside.

¶ 22 I see no mistake that would warrant setting aside the settlement and the dismissal order. In this case, both parties were aware of the convictions. Given the letter of opinion, both parties would reasonably have assumed that the appeal was likely to be successful. Accordingly, there was no mistake on this issue. The only possible mistake was an error by York's counsel in his interpretation of the two authorities presented.

¶ 23 The appellant argues that York's mistaken interpretation of the authorities led to an adoption of that mistake by the appellant's counsel, the trial judge, and the pre-trial judge. This misinterpretation, he says, led the appellant to settle his action when he ought

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[2] See Scherer v. Paletta, [1966] 2 O.R. 524 (C.A.).

not to have done so. This argument fails for a number of reasons.

¶ 24 First, the respondent's interpretation of the authorities must be considered in its context of a legal argument made to the trial judge. In that argument, the respondent's counsel submitted that the convictions were admissible as prima facie evidence of arson. For this, he relied on two cases: *Persad v. State Farm Fire*, [1998] I.L.R. I-3582 (Ont. Gen. Div.) and *Ottenbrite v. State Farm and Casualty Co.,* [2001] I.L.R. I-4003 (Ont. S.C.J.).

¶ 25 In fact, Persad does stand for the principle advanced by the respondent. In that case, the trial judge, [1995] O.J. No. 1539, specifically relied on *Demeter v. British Pacific Life Insurance Company* (1984), 13 D.L.R. (4th) 318 (Ont. C.A.), aff'g (1983), 150 D.L.R. (3d) 249 (H.C.J.) for the principle that a criminal conviction is prima facie evidence of guilt, subject to certain rebuttal evidence. However, the trial judge in Persad went on to consider that, unlike in Demeter, the case before him involved a conviction that was under appeal. He said:

> Accordingly, it is my view that I should consider the evidence without regard to the fact of that conviction and, indeed, ignoring that conviction to determine whether or not the defence has been established on the balance of probabilities (at 5170).

¶ 26 The trial judge in Ottenbrite similarly relied on Demeter. He recognized the admissibility of a criminal conviction in a subsequent civil trial. As in Persad, the Ottenbrite trial judge nonetheless said that he would "consider the evidence without regard for the fact of those convictions and determine whether or not a defence [had] been established on a balance of probabilities" (para. 10).

¶ 27 In the result, in both cases and irrespective of the convictions, the defence proved arson on a balance of probabilities. Neither case stands authoritatively for the principle, as argued by the appellant, that a conviction pending appeal is inadmissible in a civil trial. That may have been the conclusion reached by the trial judge in this case if the appellant had awaited her ruling. It may also have been the conclusion of this court on any subsequent appeal. The appellant, however, chose neither to await the ruling nor to appeal its result. All that he had was the argument of counsel. In any event, there was no evidence that the appellant's counsel failed to read the authorities either in the earlier court recess or prior to the pre-trial. Moreover, in encouraging settlement, the pre-trial judge focussed on the facts surrounding the fire rather than on the convictions. Accordingly, in my view, there was no mistake of the nature necessary to set aside the settlement and the order.

¶ 28 Second, even if the respondent's statement of the law to the trial judge was a misinterpretation of the authorities (there was no suggestion of a deliberate misstatement), nothing turned on that error. This is so because the parties attended at the agreed-upon pre-trial subsequent to the motion. At the pre-trial, with the advice of counsel, the appellant decided to settle his action without the trial judge's ruling on the evidentiary issue or the adjournment. When they began the pre-trial, the parties knew

about the outstanding convictions, the pending appeal, and likely success of that appeal.

¶ 29 Third, even if the respondent's lawyer erred in his interpretation of the law before the trial judge, there is no evidence that the appellant, his counsel, or the pre-trial judge relied on that misinterpretation in arriving at the settlement. Indeed, and importantly, the only evidence of the discussion with the pre-trial judge was that, regardless of the convictions, the appellant had an uphill battle on the circumstances of the fire. Accordingly, it appears unlikely that the fact of the convictions drove the pre-trial judge's opinion of the merits of the civil case. There were other reasons why the appellant may have chosen to settle the case. In addition to the apparently adverse facts underlying the convictions, the appellant had no expert report and he had difficulty with the retainer for his counsel. Finally, he risked an adverse costs award in the event that his claim was unsuccessful. Even if any opinion given by the pre-trial judge is relevant or admissible[3], the appellant has failed to establish that the pre-trial judge erred in his consideration of the law.

¶ 30 Moreover, even if the pre-trial judge erred in his analysis of the law, in the circumstances of this case, that error could not form a ground to set aside the settlement or subsequent dismissal because the appellant relied on his own counsel for advice on whether the settlement was reasonable.

¶ 31 Finally, if the appellant's counsel erred on the law, and I say "if" because this is not clear on the record, and if that error caused the appellant to settle, then that is a matter between the appellant and his then counsel. It is not a matter between the appellant and York. York was not present when the appellant and his counsel met with the pre-trial judge and was not privy to the contents of their discussion or the various reasons that led the appellant to agree to the settlement.

¶ 32 Accordingly, the appellant's argument of common mistake fails.

(iii) Is there fresh evidence on which to set aside the settlement and order?

¶ 33 The appellant argues that his subsequent success in overturning his convictions constitutes fresh evidence that required the motion judge to exercise his equitable discretion to set aside the minutes of settlement and the consent order.

¶ 34 Minutes of settlement are a contract. A consent judgment is binding. Both are final, subject to reasons to set them aside. Finality is important in litigation. This is so for the sake of the parties who reached their bargain on the premise of an allocation of risk, and with an implicit understanding that they will accept the consequences of their settlement. Finality is also important for society at large, which recognizes the need to limit the burdens placed on justice resources by re-litigation, a limitation reflected in the doctrine of res judicata: See *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 165 D.L.R. (4th) 268 at paras. 15, 17, 18 (Ont. C.A.).

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[3] As I have said, the admissibility of the pre-trial conference discussions was not argued on this appeal.

¶ 35 For these reasons, the avenues to set aside a settlement and consent dismissal are restricted. Rule 59.06 sets out the procedure for setting aside such an order. It provides that a party may bring a motion in the original proceeding to "have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made".

¶ 36 However, this court has said that the rule, while providing an expeditious procedure to determine whether an order should be set aside, does not prescribe or delineate a particular test: Tsaoussis at para. 39. Rather, to succeed, "[t]he appellant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line" (para. 20).

¶ 37 This case is analogous to Tsaoussis, which also considered the consequences of a change in circumstances following a judgment. There, two years after a judgment approving the settlement of a minor's personal injury claim, a motion was brought on behalf of the minor to set aside the judgment on the basis that the child's injuries were more extensive than had been expected. The minor's motion was dismissed.

¶ 38 In Tsaoussis, this court confirmed the importance of finality in litigation at para. 20[4]:

> Attempts, whatever their form, to reopen matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of litigation.

¶ 39 In terms of rule 59.06(2)(a), the court in Tsaoussis stated at para. 44:

These and numerous other authorities (e.g. *Whitehall Development Corp. v. Walker*, (1977), 17 O.R. (2d) 241) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus [citations omitted].

¶ 40 In my view, in this case, new evidence that the appellant succeeded in overcoming his criminal convictions falls short of meeting the required onus. I say this

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[4] See also *Van Patter v. Tillsonburg District Memorial Hospital* (1999), 45 O.R. (3d) 223 at 230 (C.A.).

for several reasons.

¶ 41 First, at the time of the consent order, the appellant knew that he likely had a meritorious appeal. Thus, the ultimate result leading to the withdrawal of charges was within the appellant's expectations.

¶ 42 Second, that the charges against him were ultimately withdrawn is irrelevant. Even if the appellant had been acquitted of the charges, this would not have affected the civil trial. If the Crown had failed to prove arson on the criminal standard of proof, this does not mean that York would not have proven arson on the civil standard, even on the higher degree of scrutiny required to establish such conduct in a civil case. See *Tsalamatas v. Wawanesa Mutual Insurance Co.* (1982), 141 D.L.R. (3d) 322 (Ont. C.A.) at para. 6.

¶ 43 Third, the appellant was represented by experienced counsel and decided to take the advice of that counsel. His acceptance of that advice is understandable in the face of his other problems in the civil case with respect to an expert report and his counsel's retainer.

¶ 44 Fourth, after the settlement, the appellant took no steps to set it aside or take any other action for eighteen months. Since he knew that his criminal appeal was likely meritorious, his delay is not adequately explained.

¶ 45 Fifth, the appellant's delay inherently prejudices the insurer. With such a delay, it is presumed that there may be a loss of potential witnesses and that the memory of witnesses will be affected. In this case, that prejudice is exacerbated because the onus was on York to establish arson against the appellant. Finally, further prejudice in this case could arise because the civil matter would proceed to trial, at the earliest, ten years after the cause of action first arose.

(iv) Was the settlement unconscionable?

¶ 46 In oral argument, the appellant raised an issue about whether the settlement was unconscionable. Given the circumstances surrounding the settlement, and the apparent advantages of the settlement to the appellant at that time, there is no evidence to support a finding that the settlement was shocking, oppressive, or manifestly unfair. In my view, this argument cannot succeed.

¶ 47 For these reasons, the appellant has failed to meet the onus necessary to persuade me that the motion judge improperly exercised his discretion in refusing to set aside the minutes of settlement and the consent dismissal order.

Disposition

¶ 48 For these reasons, I would dismiss the appeal.

Costs

¶ 49 The costs of the appeal, the costs of the leave motion that were reserved to this panel, and the costs of the application below are fixed in the total amount of $15,000, inclusive of disbursements and Goods and Services Tax.

S.E. LANG J.A.
E.A. CRONK J.A. -- I agree.
R.P. ARMSTRONG J.A. -- I agree.