

COURT OF APPEAL FOR ONTARIO

CITATION: 1388020 Ontario Corp. v. Machnowski, 2021 ONCA 806

DATE: 20211117

DOCKET: C69019

Doherty, Miller and Sossin JJ.A.

BETWEEN

1388020 Ontario Corp. and
Dr. Birinder Singh Ahluwalia

Plaintiffs (Appellants)

and

Zbigniew Machnowski, Photon Imaging Incorporated, Zenaida
Pornel Machnowski also known as Jenny Machnowski,
Cardiovascular Care Centre Inc. and David Ali

Defendants (Respondents)

AND BETWEEN

Zbigniew Machnowski and 1388020 Ontario Corp.

Plaintiffs (Appellant/Respondent)

and

Birinder Singh Ahluwalia, BSA Diagnostic Imaging Inc.,
and B.S.A. Diagnostic Imaging Inc.

Defendants (Appellant)

Paul J. Pape, for the appellants 1388020 Ontario Corp. and Dr. Birinder Singh Ahluwalia

David N. Delagran, for the respondents Zbigniew Machnowski, Photon Imaging Incorporated and Zenaida Pornel Machnowski

Heard: October 26, 2021 by video conference

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated December 20, 2020.

REASONS FOR DECISION

[1] The parties were business partners. A dispute between them led to litigation, followed by judicial mediation, and ultimately resolution by way of a settlement agreement. The minutes of settlement included a clause – Clause 4 – making the provision of settlement funds contingent on the respondent’s production of business records. The respondent, Mr. Manchowski, was required to deliver up to the accountants, Fuller Landau, “all books and records of 1388020 Ontario Corp. in their possession”. Both parties were to have an opportunity to discuss “the appropriateness of productions” with Fuller Landau, after which Fuller Landau was to advise the parties “if satisfied with” the production of records. After Fuller Landau advised that it was satisfied, the appellant Mr. Ahluwalia was to advance the agreed settlement funds. Clause 5 provided that any dispute arising out of the minutes was to be submitted to the judge who presided over the mediation for determination.

[2] There was a disagreement between the parties as to the sufficiency of the records produced by the respondent. The respondent’s position was that he satisfied his obligation under Clause 4 by producing all the financial statements and tax returns he had in his possession. The appellant argued this was not

sufficient, and demanded production of all supporting records as well. Although Fuller Landau initially agreed with the appellant on its understanding that the minutes of settlement required production of supporting records, it ultimately changed its position and confirmed to both sides that it was satisfied with what the respondent had produced.

[3] The appellant refused to advance the settlement funds on the basis that the productions were not sufficient, such that Fuller Landau could not be satisfied and was not satisfied with the production. The respondent brought a summary judgment motion to enforce the terms of settlement.

The decision below

[4] Clause 4 provides:

Mr. Machnowski shall direct Keith Pomianowski to deliver up to Fuller Landau all books and records of 1388020 Ontario Corp in their possession. Mr. Pomianowski shall notify 1388020 Ontario Corp and Mr. Ahluwalia and Mr. Machnowski of the date these books and records are delivered. Within 30 days thereof, Fuller Landau shall advise Mr. Machnowski and Mr. Ahluwalia if satisfied with that production of records, of which both parties have the opportunity to discuss with Fuller Landau as to appropriateness of productions, and Mr. Ahluwalia shall have 80 days from the date Fuller Landau's advice of satisfaction to all parties to deliver settlement funds to Beard Winter LLP, attn.: David Delagran, which funds shall be by certified cheque or bank draft.

[5] The motion judge rejected the appellant's position that Clause 4 required Fuller Landau to advise that it was satisfied with the respondent's production only

if the production included sufficient supporting documentation to establish the veracity of the financial statements and tax returns. Clause 4 did not compel a level of production needed to put Fuller Landau in a position “to verify the accuracy of past financial statements and tax returns.” Instead, Fuller Landau was to “review those documents [provided by the respondents] and advise if [it] believed anything was missing based on a ‘rough and ready glance’ and based on their experience as accountants.”

[6] The motion judge found that Fuller Landau had done this. After receiving initial production from Mr. Machnowski, Fuller Landau asked questions about potentially missing documents, Mr. Machnowski produced additional documents, and Fuller Landau advised that it was satisfied with the production. The motion judge granted summary judgment, enforcing the minutes of settlement.

Analysis

[7] The appellant did not take issue with the motion judge’s interpretation of Clause 4. The appellant argued instead that Fuller Landau had not complied with Clause 4 as understood by the motion judge. According to the appellant, Fuller Landau never expressed its satisfaction that the documents produced were sufficient to establish the veracity of the financial statements and tax returns, as the motion judge found Clause 4 required. Instead, it had merely expressed satisfaction that the respondent had produced the documents that he said he had in his possession.

[8] We do not agree. The motion judge made no error in finding that Fuller Landau “was ultimately satisfied with the production received”. The record amply supported that conclusion.

[9] On October 10, 2019, Fuller Landau emailed counsel for the appellant and advised that “(b)ased on Mr. Manchowski’s confirmation we are satisfied with the production of those records.” Counsel repeatedly pressed the issue with Fuller Landau, questioning how it could be satisfied with the production. Fuller Landau reiterated on October 11, 2019 that it believed that there are “no further documents available to deliver to our office”. It asked counsel to provide it with a detailed list of documents it believed were missing. The motion judge noted that there was no evidence of any reply to that request. Fuller Landau was not obligated to provide any further justification of its decision.

[10] The appellant also argues that the motion judge erred by not considering early correspondence which showed that Fuller Landau had initially taken the position that the minutes of settlement required the respondent to produce supporting documents.

[11] Fuller Landau’s initial interpretation of its role under the minutes of settlement is not dispositive of any issue. The motion judge did not err in not referring to this correspondence. As the motion judge noted, the minutes of settlement did not specify what criteria Fuller Landau should use to determine

whether production was satisfactory. Fuller Landau was entitled to reject its initial interpretation of the minutes of settlement as mistaken, as it evidently did.

[12] It is also significant that the appellant chose not to use the dispute resolution mechanism set out in Clause 5, which enabled either party to bring any dispute over the interpretation of the minutes of settlement to the judge who presided over the mediation. Instead of using this mechanism, the appellant simply refused to advance the settlement funds.

DISPOSITION

[13] The appeal is dismissed with the costs to the respondents in the amount of \$17,500 inclusive of HST and disbursements.

“Doherty J.A.”
“B.W. Miller J.A.”
“Sossin J.A.”