CITATION: Srajeldin v. Ramsumeer, 2015 ONSC 6697
DIVISIONAL COURT FILE NO.: DC-14-103-00
DATE: 20151127

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MOLLOY, HAMBLY and HACKLAND JJ.

BETWEEN:	
MANAR SRAJELDIN Plaintiff/Respondent	*Tamara Broder*, for the Appellants *George James*, for the Plaintiff/Respondent
– and –	
YOGANANDRAM RAMSUMEER and TORONTO TRANSIT COMMISSION, Defendants/Appellants	*William G. Scott,* for the Respondent Joseph Zayouna
– and –	
JOSEPH ZAYOUNA Respondent	**HEARD:** October 23, 2015 in Brampton

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] This is an appeal, with leave, from the interlocutory order of Price J. dated October 2, 2013, dismissing a motion for summary judgment to enforce a settlement. The motion involved an alleged settlement of a personal injury claim as set out in emails between the solicitor for the

plaintiff and a claims adjuster with the Toronto Transit Commission. The motion judge found that there was no settlement, and also that it would be unjust to enforce the purported settlement.

[2] I find that the motion judge erred in law and made factual findings unsupported by the evidence on matters of fundamental principle. These errors are palpable and overriding, such that the decision cannot stand. There was a clear and binding settlement and no basis for refusing to enforce it. My detailed reasons follow.

B. BACKGROUND FACTS

[3] The plaintiff, ManarSrajeldin, was injured in a motor vehicle accident involving a Toronto Transit Commission ("TTC") streetcar. She retained counsel, Joseph Zayouna, who commenced an action on her behalf seeking damages from the TTC and the driver of the streetcar.

[4] The TTC assigned the claim to one of its adjusters, Jennifer McIver, who entered into settlement discussions with the plaintiff's lawyer, Mr. Zayouna. Various offers and positions were passed back and forth. Ultimately, on February 3, 2012, Ms. McIver made an offer of $12,500 confirmed with an email that same day, in which she wrote:

> Hi Joseph, This will confirm our firm and final offer of $12,500.00 to your client in settlement of her tort. Please get back to me today . . .

[5] Approximately ten minutes later, Mr. Zayouna responded by email:

> Hi Jennifer, thanks again for all your help on this matter. I now have instructions to resolve this matter for $12,500 all inclusive. Please email me your release and I will have my client execute it.

[6] Although Ms. McIver sent the release, she did not hear back from Mr. Zayouna with the anticipated signed release and Notice of Discontinuance. After some correspondence back and forth, it became apparent that the release and Notice of Discontinuance would not be forthcoming.

[7] Meanwhile, Ms. Srajeldin dismissed Mr. Zayouna, hired another lawyer, and brought an action against Mr. Zayouna claiming damages with respect to his handling of this matter and two other claims.

[8] The TTC thereupon moved for judgment in accordance with the settlement agreed upon by Mr. Zayouna.

[9] Ms. Srajeldin resisted the motion and maintained she did not give instructions to Mr. Zayouna to accept the settlement. Mr. Zayouna filed an affidavit stating that he received the instructions from his client's father, as his client was a student in England at the time. He stated that he believed he had authority to settle the claim. Ms. Srajeldin's father filed an affidavit denying that he gave instructions to Mr. Zayouna.

[10] The TTC argued that a final settlement offer was accepted by Mr. Zayouna and is binding on his client. The TTC took the position that the dispute between the plaintiff and her counsel has nothing to do with them.

C. THE DECISION UNDER APPEAL

[11] The motion judge dismissed the defendants' motion and ordered costs of the motion, on a substantial indemnity basis, payable by Mr. Zayouna personally. The motion judge concluded that there was no settlement reached, and also appears to have concluded that it would be unjust to enforce the purported settlement.

[12] Based on the conflicting affidavits before him, the motion judge made a number of factual findings. Essentially, he rejected the evidence of Mr. Zayouna and accepted the evidence of Ms. Srajeldin and her father. He found as a fact that Mr. Zayouna did not have instructions to settle the claim for $12,500 and held that he falsely informed Ms. McIver that he had instructions.

[13] The motion judge held that Mr. Zayouna's email in response to Ms. McIver's offer was "ambiguous" because it was worded in the passive voice and did not disclose who gave the instructions to accept the TTC's offer. The motion judge also held that it was not reasonable for Ms. McIver to have believed that Mr. Zayouna had authority to settle his client's claims, particularly because he accepted the offer within ten minutes of receiving the email confirming it.

[14] Further, the motion judge held that "it was clear" from earlier communications from Mr. Zayouna in September and November, 2011 that Mr. Zayouna did not have authority to settle without explicit instructions from his client. In those communications, Mr. Zayouna had advised Ms. McIver that he would consult with his client regarding a prior settlement offer and then get back to her. This was part of the reason the motion judge found that Ms. McIver should have known that Mr. Zayouna did not have instructions to accept the February 3, 2012 offer, a mere ten minutes after her email had been sent.

[15] The motion judge concluded (at para. 30) that there was "never an agreement between Ms. Srajeldin and the TTC."

[16] However, the motion judge also considered case law dealing with the court's discretion not to enforce a settlement, even where one is found to exist. He determined that there was no evidence from either party as to the terms of the purported agreement being unconscionable or improvident. However, in balancing the prejudice that would result to each party from enforcing or not enforcing the settlement, he appears to have concluded that there would be prejudice to Ms. Srajeldin, although the nature of that prejudice is not identified. He noted that the parties' pre-settlement positions remained intact, the defendants would not be prejudiced (apart from losing the benefit of the settlement), and no third parties would be affected if the settlement is not enforced.

[17] He then went on to find (at para. 43) that "enforcing the purported settlement in the present case would result in clear injustice to Ms. Srajeldin." In discussing the nature of that injustice, the motion judge held at para. 44:

> The discretion that a court exercises in deciding whether to enforce a settlement is not dictated exclusively by the need for certainty in negotiations and clarity in the content of an offer or settlement. It is guided, in part, by the court's objective of encouraging settlement. Enforcing an agreement that was engineered by a lawyer who, to the knowledge of the other party, required his client's instructions and did not obtain them would inhibit litigants from entering into negotiations, through lawyers, to settle their claims.

[18] The motion judge concluded his reasons on the substance of the motion as follows, at para. 47:

> The message to be taken from the failure of the negotiations in the present case is that communications between counsel in settlement negotiations must be explicit and unambiguous. In circumstances where counsel have communicated, explicitly or implicitly, that they require their client's instructions before entering into an agreement, their correspondence aimed at achieving a settlement must be worded in such a way as to make it clear that it is the client who is making or accepting the Offer.

D. ANALYSIS

The Existence of a Settlement

[19] The motion judge's decision is inconsistent with well-established, binding authority and cannot stand. The motion judge erred in law and also made palpable and overriding errors in applying legal principles to the facts of the case before him.

[20] In response to a clear and unambiguous offer to settle for $12,500, a lawyer stated, "I now have instructions to resolve this matter for $12,500 all inclusive." That is a clear and unambiguous acceptance of the offer made. A contract was thereby formed. The motion judge's conclusion that the phrasing of the acceptance was ambiguous is unreasonable and unsustainable on the evidence.

[21] It is well-established in the case law that a lawyer has ostensible authority to effect a binding settlement on behalf of his client. Unless the opposing side has knowledge of some limitation on the solicitor's retainer, any settlement made by a lawyer will be binding on the client, regardless of any dispute between the lawyer and his own client as to the scope of the lawyer's instructions. This general principle was described by the Court of Appeal in *Scherer v. Paletta*[1] and has been applied by all levels of courts for decades. In that case, Evans J.A. held:

[1] *Scherer v. Paletta* [1966], 2 O.R. 524.

> A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

[22] In this case, the plaintiff was of full age and capacity and there was no doubt that she had retained Mr. Zayouna to represent her. The terms of the agreement accepted by Mr. Zayouna are also clear. Therefore the normal practice, as noted in *Scherer v. Paletta* is that the Court will not embark upon any inquiry as to the instructions passing from the client to the solicitor. It is unfortunate that the motion judge in this case did embark on the exercise of making findings of fact. This is particularly problematic given that he did so based solely on contested affidavit evidence, without the benefit of a full hearing, and doubly so in light of the lawsuit that had already been commenced by Ms. Srajeldin against Mr. Zayouna, in which these facts would be of central relevance.

[23] However, those factual determinations were made. Counsel for Mr. Zayouna advises that although Law Pro initially filed a Notice of Appeal on behalf of Mr. Zayouna, they later withdrew it. They are no longer seeking to disturb those findings of fact, nor do they take issue with the costs award made against Mr. Zayouna. Indeed, those costs have been paid.

[24] Therefore, for purposes of this appeal, the TTC accepts that Mr. Zayouna was acting without instructions. The question that remains on this appeal is whether there was any basis in the evidence for concluding that TTC's claims adjuster either knew, or ought to have known, that there was any issue as to Mr. Zayouna's authority to settle his client's claim. In my opinion, the motion judge's conclusion on this issue is without any evidentiary foundation and constitutes a palpable and overriding error.

[25] The motion judge relied upon the use of the passive voice by Mr. Zayouna and the fact that Mr. Zayouna accepted the offer within ten minutes of receiving the email as factors that should have caused the TTC claims adjuster to be concerned about whether Mr. Zayouna had authority to bind his client. The motion judge also noted that on previous occasions when settlement offers had been made, Mr. Zayouna had responded by saying he needed to get

instructions from his client. In my view, neither of these factors are at all unusual and do not provide any basis for the TTC adjuster to have been concerned.

[26] By passive voice, I presume the motion judge is referring to Mr. Zayouna using the words "I have instructions" as opposed to "My client has instructed me." In my view, both are perfectly normal constructions for a lawyer to use and neither is better than the other. The meaning of the words was clear. It is unreasonable to draw any inference from the type of verb used. Further, it is not reasonable to draw an inference, or even have a suspicion, that when a lawyer says "I have instructions" he is referring to anyone other than his own client. That is particularly so in this case when the very next sentence in Mr. Zayouna's email referred to having his client execute the release.

[27] In any event, it is not necessary for a lawyer to advise the other side that he has instructions to settle for the particular amount offered. It is open to the lawyer to simply make an offer or accept an offer. The lawyer's authority in that situation is understood, because the lawyer always has ostensible authority to act for his client, in the absence of some communicated limitation. In this case, Mr. Zayouna actually said he had instructions, which was more than he was required to say for the other side to understand that its offer had been accepted and would be binding on the plaintiff.

[28] There is also nothing unusual with a lawyer being able to obtain instructions within ten minutes, particularly in today's world of digital and cellphone technology. It was even possible, at least from the perspective of Ms. McIver, that Mr. Zayouna already had standing instructions by the time he received her email. The fact that he had previously not accepted an offer on the spot but rather said he would take it back to his client for instructions says nothing about any limitation on Mr. Zayouna's retainer. Many lawyers who have standing instructions will nevertheless want to present specific offers to their clients. Nothing should be read into that.

[29] Lawyers and other professionals in the litigation process are entitled to rely upon the word of another lawyer. They are not required to question the motives, nor the nature of the instructions or retainer, of the lawyer with whom they are dealing. Having been told by Mr. Zayouna that he had instructions to accept her offer, there was no basis whatsoever for Ms. McIver to make any inquiry about whether such instructions had actually been received and from whom. Indeed, for her to do so would be professionally offensive, as well as an invasion of solicitor and client privilege. If Mr. Zayouna was acting improperly, that was a matter between him and his client, and was not the concern of the TTC. There was nothing in any of the surrounding circumstances that can reasonably be construed as a basis to impute knowledge to Ms. McIver, nor even any basis for her to have any basis for concern.

[30] Even in the absence of an affidavit from Ms. McIver as to her understanding, there would be no basis for concluding that she could not have reasonably believed that Mr. Zayouna had instructions to accept her offer. However, Ms. McIver filed an affidavit in which she specifically states her belief that Mr. Zayouna advised his client of the $12,500 offer and that she accepted it. Her evidence was unchallenged. There is no basis for the motion judge to have rejected it. The motion judge drew an inference that Ms. McIver's belief was unreasonable. For the reasons

stated, that inference is without any support in the evidence or in the established case law. Further, it is a finding that impugns the integrity of the TTC's Claims Adjuster, Ms. McIver, and is most unjust.

[31] The motion judge's ruling is also inconsistent with the manner in which lawyers in Ontario do, and should, conduct themselves in negotiating settlements of civil actions. It sends the entirely wrong message to lawyers about their responsibilities in these situations. I agree that communications between counsel in settlement negotiations should be "explicit and unambiguous" as stated by the motion judge in para. 47 of his reasons. However, it is not the case that lawyers need to specify that they have explicit instructions, nor do they need to say how, or through whom, they are receiving their instructions. That is strictly a matter between the lawyer and his or her own client.

[32] I therefore find that a clear and unambiguous offer was made by the defendants, which was accepted in clear and unambiguous terms by the solicitor for the plaintiff. Even if that solicitor was acting without express instructions from his client, there was no evidence that the TTC's Claim Adjuster either knew, or could reasonably have known, that fact. Therefore, a settlement agreement was made.

Should the settlement be enforced?

[33] Even where a binding settlement agreement is reached between counsel, a court has discretion not to enforce it. The case law is clear, however, that this discretion should only be exercised in exceptional circumstances. As was stated by Misener J. in *Brzozowski v. O'Leary*[2] at para. 44(which was quoted by the motion judge in this case):

> Those judgments emphasize the judicial obligation to consider all of the circumstances of the case at hand, and to then decide whether it is fair to enforce the settlement. Although I risk unduly limiting my discretion by saying so, I think the right approach is to consider that a settlement effected pursuant to Rule 49 ought to be enforced, and so judgment ought to be granted, unless the offeror satisfies the judge that, in all the circumstances, enforcement would create a real risk of a clear injustice. It seems to me that that approach is required because it is good public policy to encourage settlement, and it would be quite inconsistent with that policy to decline enforcement unless a good reason for doing so is shown.

[34] There is no error in the motion judge's statement of the applicable law. However, he erred in his application of the law to the facts before him, and placed considerable emphasis on his findings of fact in respect of his determination that there was no settlement. Those findings infected and undermined his analysis of the enforceability of the settlement. After citing the passage from *Brzozowski* above, the motion judge noted that the need for certainty in

[2] *Brzozowski v. O'Leary*, 2004 ONSC 4805

negotiations is not the only relevant factor and that the court is guided in part by the objective of encouraging settlement. He then stated (at para. 44), "Enforcing an agreement that was engineered by a lawyer who, to the knowledge of the other party, required his client's instructions and did not obtain them would inhibit litigants from entering into negotiations, through lawyers, to settle their claims." Leaving aside the motion judge's observations about what would inhibit people to enter into settlement negotiations (which I do not necessarily accept), it is clear that his analysis on whether the agreement should be enforced is largely driven by his finding that the TTC Claims Adjuster knew Mr. Zayouna was acting without instructions. As previously stated, this is an unreasonable conclusion, unsupported by the evidence. It follows, that the basis for the motion judge's exercise of discretion is also unreliable.

[35] The motion judge placed considerable emphasis on *Milios v. Zagas*[3] and on a line of cases in the family law context which addressed ten factors to be taken into account in deciding whether to enforce a settlement.[4]

[36] The decision in *Milios v. Zagas* is distinguishable on its facts. This was not a situation in which a lawyer acted without instruction, but rather one in which there was a miscommunication by the client's wife to the lawyer such that the lawyer was operating under a mistaken belief as to his instructions. Further, the Court was influenced by the fact that the settlement represented a substantial compromise from the plaintiff's standpoint measured against the judgments he already held against the defendant. It cannot be taken as overruling the clear *dicta* in *Scherer v. Paletta* that the usual rule is to enforce a settlement negotiated by a lawyer without regard to whether he had instructions.[5]

[37] The ten questions posed in the family law cases, and which were considered by the motion judge, are as follows:

> 1. Whether the settlement is unconscionable and improvident.
>
> 2. Has the person resiling been subject to an inequality of bargaining power as explained in such cases as *Lloyd's Bank Ltd. v. Bundy,* [1974] 3 All E.R. 757 (Eng. C.A.) at 763 and 765.
>
> 3. Has a party failed to act in good faith.
>
> 4. Did counsel act without authority.
>
> 5. Are the terms of the agreement sufficiently clear that an attempt to enforce them will not spawn further litigation.
>
> 6. Does the agreement encompass most if not all of the issues in dispute.

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[3] *Milios v. Zagas* (1998), 38 O.R. (3d) 218 (C.A.).
[4] *Nigris v. Nigris,* [1999] O.J. No. 750, 44 R.F.L. (4th) 269; *Freake v. Freake*, 2007 NLUFC 25
[5] *Drozda v. Rubletz,* [2005] O.J. No. 1222 (S.C.J.)

7. Was the settlement negotiated with the parties physically in each other's presence.

8. What period of time has elapsed between the agreement and notification that a party is resiling.

9. At what stage in the litigation did the negotiations take place.

10. Has the other party suffered a disadvantage as a result of the agreement being abrogated.

[38] As noted by the motion judge, there was no evidence from either party as to the terms of the settlement being improvident or unconscionable (Question 1). The motion judge recognized that there was no inequality of bargaining power and held that no party acted in bad faith (Questions 2 and 3). He also held that the terms were sufficiently clear as to avoid future litigation and that the settlement dealt with all of the issues in dispute between the parties. (Questions 5 and 6). While the period of time that had elapsed before notification that the plaintiff was resiling may be the subject of some debate, it was not such a lengthy period as to weigh against the plaintiff. It is a neutral factor. (Question 8). Although the motion judge did not deal with Question 9, it should be noted that this was a settlement reached at an early stage in the litigation. It was being handled by the TTC Claims Adjuster before a statement of defence had even been filed, with a waiver of the time for filing the defence in place. No steps had been taken in the litigation. This is a factor favouring the position of the TTC as, in the absence of the settlement, they would be required to retain counsel to defend the lawsuit.

[39] Question 4 relates to whether the lawyer had instructions, which is a factor the motion judge noted in favour of not enforcing the settlement. Question 7 asks whether the parties were physically in each other's presence at the time of the settlement. In my view, this is an irrelevant consideration in this particular case, although it may well have considerable weight in the family law context in which it was applied. The motion judge applied this as a factor in favour of the plaintiff, noting that she was not present and that it was negotiated without consultation with her.

[40] The motion judge does not appear to have dealt directly with Question 10 (whether any party will be disadvantaged) except for the observation that no third parties would be affected and that the defendants will not be prejudiced, apart from losing the benefit of the settlement. The motion judge does not mention, and does not appear to have considered, the fact that the plaintiff had already started litigation against Mr. Zayouna in respect of this and two other claims. Law Pro was acting for Mr. Zayouna in this regard. Therefore, if Ms. Srajeldin was entitled to greater damages than the $12,500 settlement with the TTC, she had a remedy against Mr. Zayouna and would be made whole. It would just be a question of litigating that claim against her solicitor as opposed to against the TTC.

[41] In my view, the motion judge also minimized the prejudice to the TTC, as well as the public policy issues involved. The TTC settled this action in good faith and should be entitled to rely upon it, rather than being drawn into litigation. The public policy concerns are even more

pressing. Setting aside a settlement in circumstances where it was freely negotiated between two professionals would be highly unusual. To do so where there is no evidence of sharp practice or bad faith, no unequal bargaining power, and no suggestion that the settlement is unfair or improvident is, in my view, unprecedented. The only "injustice" to the plaintiff is that she must now litigate her claim against her former solicitor rather than the TTC. Given the very early stage of the litigation against the TTC, there is little to no prejudice in that regard.

[42] The motion judge's exercise of discretion was affected by his factual findings against the TTC's Claims Adjuster. This Court has therefore exercised its own discretion based on the evidence that was before the motion judge. In our view, this is not one of those rare or exceptional cases that warrants setting aside a settlement negotiated by a lawyer.

E. CONCLUSION AND ORDER

[43] In the result, the decision of the motion judge is set aside. Judgment shall issue in favour of the plaintiff in the amount of $12,500, inclusive of interest and costs. This is without prejudice to the rights of the plaintiff to seek any additional damages to which she might be entitled as against her own counsel, Mr. Zayouna, in the separate proceeding she has commenced.

[44] The successful appellants have very generously not sought costs against the respondent, Ms. Srajeldin. Mr. Zayouna also does not seek costs as against Ms. Srajeldin. The position she took on this motion might be an issue in the other litigation. We express no view on that. Our Order will simply be for judgment as indicated, with no order as to the costs of the appeal.

MOLLOY J.

HAMBLY J.

HACKLAND J.

Date: November 27, 2015

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Respondent

REASONS FOR JUDGMENT

Molloy, J.

Released: November 27, 2015