Applecrest Investments Ltd. v. Guardian Insurance Co.

Between

Applecrest Investments Limited

Plaintiff

and

Guardian Insurance Company, Toronto Masonry (1986) Limited

and

Maz-Con Construction Ltd.

Defendants

[1992] O.J. No. 1060
13 C.P.C. (3d) 394
33 A.C.W.S. (3d) 950
Action No. 36973/89
Ontario Court of Justice - General Division
Toronto, Ontario
Rosenberg J.
Heard: May 7, 1992
Judgment: May 25, 1992

Michael A. Cohen, for the Applicant/Defendant, Toronto Masonry (1986) Limited.
Kevin Dolan, for the Respondent/Plaintiff, Applecrest Investments Ltd.
A. Peter Trebuss, for the Respondent/Defendant, Guardian Insurance Company.
E.J. Battiston, for the Respondent/Defendant, Maz-Con Construction Ltd.

ROSENBERG J.:--

NATURE OF PROCEEDINGS

The defendant Toronto Masonry (1986) Limited moved for:

a) an order staying the entry of my judgment dated January 30, 1992;

b) an order setting aside the said judgment;

c) an order directing a new trial if necessary; and

d) an order suspending the operation of the judgment dated January 30, 1992.

The grounds for the said motion were:

a) that there is good reason to believe that a fraud has been practised upon the Court;

b) there is good reason to believe that evidence material to the Courts' decision was perjured;

c) the fraud was not known to the defendant, Toronto Masonry (1986) Limited, at the time of the trial;

d) the defendant, Toronto Masonry (1986) Limited has acted with dispatch;

e) fresh evidence has been discovered that could not reasonably have been obtained before trial;

f) said evidence would probably have changed the result at trial;

THE TRIAL

The plaintiff Applecrest was constructing a large industrial condominium when one of the masonry walls collapsed during a windstorm. The plaintiff was insured against loss by windstorm with the defendant Guardian. However, it was Guardian's position that an exception in the policy applied. That exception provided that the coverage did not include damage due to faulty or negligent workmanship. The defendant Toronto Masonry was in the process of putting up the wall when it collapsed. It was acknowledged that Toronto Masonry's responsibility included properly supporting the wall under construction against possible collapse in a windstorm or otherwise. The defendant Maz-Con was the project manager on behalf of the plaintiff. At the trial the defendant Toronto Masonry alleged that someone had interfered with a number of its supports on the wall and that therefore it was not responsible for the collapse. I found that they had not established such a position as they had no direct evidence with regard to the removal of the supports and in fact much of the evidence tended to negate their allegations that some supports had been removed.

I was particularly impressed at the trial by the evidence of John Mazoka, a principal of Maz-Con, who had a log showing all of the work done at various times on the project. I commended Mazoka in my reasons for being straightforward and objective in his testimony substantiated as it was by the log book. It was to a large extent as a result of his testimony that I negated the allegations of the defendant Toronto Masonry that someone had removed some of their supports.

Primarily as a result of my view of the testimony of John Mazoka and the lack of evidence by Toronto Masonry supporting their contention that someone had removed

some of their supports, I dismissed the action against Guardian and Maz-Con and found Toronto Masonry liable not only to the plaintiff but to the other defendants for costs.

NATURE OF THE NEW EVIDENCE

The new evidence is that of Peter Hughston by affidavit and cross-examination who alleges that he was the person who actually removed the supports on the instructions of John Mazoka. There is much of his testimony that has the ring of authenticity. He seems to know a great deal about the construction project as well as the fact that the plaintiff originally thought that the damage was covered by insurance.

The evidence of Joseph Dirocco, the President of Toronto Masonry, was that he was from the commencement of the lawsuit trying to locate a witness who might have knowledge of the issues in the lawsuit. He was so concerned about the question of someone removing some of the supports that he continued even after my decision to seek a witness to substantiate his allegations that some of the supports had been removed. He finally was advised to contact the Union and through the Union he was put in touch with Mr. Hughston. This evidence can be subjected to testing with the Union representative and others. Mr. Hughston's evidence can also be subjected to testing with records of his then employer at the time of the alleged removal of the supports, namely Cobra-Drain Corporation.

THE LAW

The test to set aside a judgment obtained after trial on the grounds that new evidence has been discovered was set out in Varette v. Sainsbury, [1928] S.C.R. 72 at p. 76.

- A new trial applied for on the ground that new evidence has been discovered since the trial should be granted only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and is such that if adduced it would be practically conclusive.

Mr. Battiston on behalf of the defendant Maz-Con argues that the applicable principle is further defined by Montgomery J. in Rosenberg et al. v. Geist et al. (1984), 48 O.R. (2d) at p. 373 wherein Montgomery J. stated at p. 374:

- A judgment or order cannot be set aside on the ground of a matter arising subsequent to the making of the judgment or order, unless it can be proved that the evidence relied upon could not have been discovered by the party complaining.

In my view however the words "could not have been discovered by the party complaining" are subject to the qualifying words in the Varette decision, supra, namely could not have been discovered "by reasonable diligence".

Mr. Battiston also argued that the request to the Union could have been made before trial and the fact that Mr. Hughston was a witness to the alleged moving of the supports

could have been known before trial had Mr. Dirocco thought to contact the Union earlier. This criticism of Mr. Dirocco is easily made with hindsight. When someone has solved a problem one can look at the solution and say that the solution could have been arrived at earlier. However, there is from Mr. Dirocco's affidavit and the cross-examination of Mr. Dirocco no suggestion that he was not using reasonable diligence in looking for a witness. The fact that the approach that he eventually adopted did not occur to him earlier may well be as a result of his not being a professional detective or even someone with legal training. There is no suggestion, however, that he was not using his best efforts at all times and if he lacked some skill in his search or failed to employ a detective, I am not prepared to say that in a situation such as the present one, where it appears that one witness or the other is guilty of perjury, that the trial should not be reopened on the grounds that he has not exercised reasonable diligence.

The principles to be considered in such a motion to set aside a judgment already entered were thoroughly canvassed by Osborne J. (as he then was) in the case of International Corona Resources Ltd. v. LAC Minerals Ltd.; McKinnon et al., Intervenors (1988), 66 O.R. (2d) 610. In that case the decision had not only been entered but had been appealed to the Ontario Court of Appeal and was awaiting hearing by the Supreme Court of Canada. Osborne J. had heard viva voce evidence on the motion and after a careful review of the authorities found that the following propositions apply:

1) The fraud alleged must be proved on a reasonable balance of probability. The more serious the fraud alleged, the more cogent the evidence going to establish it will have to be to meet the civil onus of proof. The reasonable balance of probability is not an inflexible standard of proof.
2) The proved fraud must be material, that is, it must go to the foundation of the case.
3) The evidence of fraud must not have been known at the time of trial to the party seeking to rely upon it on a motion to set aside a trial judgment.
4) The unsuccessful trial party is exposed to a test of due or reasonable diligence. This is clear from cases such as, MacDonald v. Pier, supra, [[1923] 1 D.L.R. 670; Johnston v. Barkley, supra, [(1905], 10 O.L.R. 724 (Div.Ct.) and Industrial Development Bank v. Bertolo, supra [[1970] 3 O.R. 697]. In my view, the onus is on the moving party to establish due diligence. Evidence cannot be stockpiled during the litigation process to be taken from inventory after an unsuccessful trial or appeal: see Becker Milk Co. Ltd. v. Consumers' Gas Co. (1974), 2 O.R. (2d) 554 at p. 558, 43 D.L.R. (3d) 498 at p. 502 (C.A.).
5) If the fraud alleged is that of a non-party, and if the successful party at trial is not connected with the fraud alleged, the tests to which I have referred must be more

stringent than for the fraud of a party. It is not, however, necessary for me to set out the added burden to be placed upon a moving party seeking a new trial in the face of the fraud of a non-party, as I have concluded that LAC has not established a right to success when its case is measured against the standards imposed in cases involving fraud of a party.

6) The test imposed upon the unsuccessful trial party to obtain relevant evidence that is, evidence going to establish fraud - with due diligence, is objective. The questions to be asked are: what did the moving party know, and what ought the moving party to have known?

7) Delay will defeat a motion to set aside a trial judgment under rule 59.06. I refer in this regard to cases where the evidentiary burden has been met and the due diligence test passed, but where there is unreasonable delay in bringing or pursuing the motion to set aside. Johnston v. Barkley, supra, is ample authority for the proposition above referred to.

8) Relief under rule 59.06 is discretionary. The conduct of the moving party is relevant.

9) At the end of the day, the central question to be answered is as stated in Wentworth v. Rogers (No. 5), supra, [(1986), 6 N.S.W.L.R. 534 (C.A.)] at p. 538:

10) ... it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment.

In the case of Industrial Development Bank v. Bertolo et al., [1970] 3 O.R. 697 Schroeder J.A. said at p. 700:

- There is authority for the proposition that in cases of fraud the rule requiring that fresh evidence be conclusive is not applied with the same degree of strictness as in other cases if it appears that the judgment was affected by the fraud alleged.

The cases referred to, supra, all dealt with judgments that had not only been entered but in the Corona v. LAC case, supra, actually been subjected to the appeal process. In the case of Scott et al. v. Cook et al., [1970] 2 O.R. 769, Grant J. stated at p. 773:

- On an application to the trial Judge to receive further evidence after reasons for judgment have been delivered but before entry of judgment, he is not restrained by the strict rule that prevails on an application to the Court of Appeal for a new trial. In Bauz v. Registrar of Motor Vehicles, [1950] O.W.N. 386, at p. 386-7, Wells J., as he then was, adopted a requirement of admission, namely, "that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment". (Emphasis added).

In Clayton v. British American Securities Ltd. et al., [1935] 1 D.L.R. 432, Macdonald J.A. referring to an application where the judgment had not been entered stated at p. 440-1:

- ... It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's process would likely result. Without that power however injustice might occur.

In the case of Castlerigg Investments v. Lam and Lam Skin Care Products Ltd. (1991), 2 O.R. (3d) 216, Dennis Lane J. carefully reviewed all of the authorities with regard to the principle above recited in the Clayton case which he described as follows:

- The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.

Dennis Lane J. was also dealing with a judgment that had not been entered.

DECISION

In the circumstances of this case the judgment not having been entered it is in my view appropriate that the entry of the judgment be stayed and that a continuation of the trial be ordered in order to allow Mr. Hughston to testify and the other parties to the action to adduce such evidence as they deem appropriate to respond to his evidence.

It appears to me that the evidence of Mazoka and that of Hughston cannot both stand. To put it more bluntly one of them is lying. If the evidence of Hughston is accepted, it would almost certainly affect the result of the trial. Accordingly, I exercise my discretion in an attempt to see that "a miscarriage of justice does not occur". A date for the continuation of the trial will have to be arranged.

ROSENBERG J.