

**CITATION:** Waters v. Furlong et. al., 2023 ONSC 3908  
**COURT FILE NO.:** CV-18-595443  
**DATE:** 20230704

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
MARK WATERS	)	
	)	<i>Jeffrey Radnoff</i> , for the Plaintiff
	)	Plaintiff
	)	
<b>– and –</b>	)	
	)	
RICHARD FURLONG and FURLONG	)	<i>John D. Campbell</i> , for the Defendants
COLLINS	)	
	)	
	)	Defendants
	)	
	)	
	)	<b>HEARD:</b> March 8-10, 2023

2023 ONSC 3908 (CanLII)

**REASONS FOR JUDGMENT**

**C.J. BROWN J.**

- [1] The plaintiff, Mark Waters, brings this action against the defendants, Richard Furlong and Furlong Collins, for breach of contract and solicitor negligence. The plaintiff alleges that the defendants failed to properly advise him of his tax liability arising from a forgiveness of indebtedness. At all material times, Mr. Furlong was the only lawyer in the firm of Furlong Collins. Thus, hereafter, I will refer to the named defendants as “the defendant”.
  
- [2] The plaintiff alleges that after he was terminated from his employment, he consulted the defendant with respect to an offer by his employer, Gemstar, to forgive his loan indebtedness to the employer. The plaintiff claims he was not properly advised regarding who would bear the income tax liability that would arise from the forgiveness of the loan indebtedness. It is the position of the plaintiff that he went to the defendant to obtain advice as to whether taxes would be paid by Mr. Waters’ employer pursuant to the termination documentation, and that Mr. Furlong advised that there would be no liability for the plaintiff on the loan forgiveness.
  
- [3] It is the position of the defendant that the plaintiff consulted the defendant with respect to the forgiveness of the loan and whether it would extinguish all outstanding debts owing to

the employer given the wording in the termination letter and that the plaintiff was properly advised by the defendant. It is the position of the defendant that he never advised the plaintiff, who was a certified public accountant (“CPA”), that no taxes would be payable on the debt forgiveness, nor that there was anything in the documentation which was provided to Mr. Furlong that would indicate that no taxes would be payable by the plaintiff. There was further nothing in the documentation that would indicate that taxes were payable by Gemstar.

- [4] It is the position of the defendant that the plaintiff never asked him whether he would have to pay taxes on the loan forgiveness. The defendant maintains that the plaintiff only consulted him concerning whether the vague language in the letter of termination would absolve him of all outstanding debts that he owed to Gemstar.

### **Background Facts**

- [5] The plaintiff, a CPA, had worked as the Chief Financial Officer (“CFO”) for Gemstar for approximately 11 years. At the time of his termination on January 7, 2016, he was the Vice President of Finance for Gemstar.
- [6] It appears that the plaintiff’s wife, Tammy Waters, also worked for Gemstar, cleaning the offices once a week on Sundays.
- [7] In 2012, the plaintiff was having personal financial difficulties, which he discussed with the owner and President of Gemstar, Frank Rossi. Mr. Rossi agreed to loan him \$125,000 in a demand loan with a low interest rate.
- [8] On January 7, 2016, the plaintiff was called into Mr. Rossi’s office and presented with a termination letter and a Release and Indemnity agreement (“Release and Indemnity”). The termination letter stated as follows:

This letter shall serve to confirm our recent discussion with respect to your continuing employment with Gemstar Canada Inc. (“Gemstar”). As a result of circumstances that have recently come to our attention and without going into specific detail in this letter, we have concluded that it is no longer in the best interest of Gemstar to continue the employment relationship with you. We would however prefer to resolve your departure amicably and not on a “for cause” basis.

Accordingly, the terms and conditions of your departure are as follows:

1. in consideration of your written resignation which you will proffer voluntarily and without any duress, Gemstar is prepared to forgive your indebtedness and that of Ms. Tammy Waters, and any outstanding interest and the requirement to reimburse Gemstar for any improper expenses put through the company for your personal benefit;

2. Tammy Waters will also resign her employment, such as it is, and similarly sign the attached Release and Indemnity.

We regret having had to take this measure but under the circumstances, Gemstar has no other alternative. It is our expectation that each of you will sign a Release and Indemnity after receiving independent legal advice should you decide to do so, and return them on a confidential basis to Mr. Frank Rossi by no later than January 21, 2016. Effective the date of this letter, you are not to attend at the offices of Gemstar and in the event that we are not able to resolve this matter amicably based on the terms contained herein, Gemstar reserves its right to pursue a just cause termination.

We look forward to receipt of the signed Release and Indemnity documents within the timeframe provided for you herein.

- [9] The Release and Indemnity was a standard release and indemnity, releasing the defendant and all affiliates from any and all claims which the plaintiff and his wife may have against the defendant.
- [10] The Release and Indemnity also included a clause in which the plaintiff agreed to indemnify and save the defendant harmless from any and all claims or demands under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).
- [11] Further, the Release provided that “[t]his Release shall not apply to any actions, causes of action, claims and demands which I may have relating to the failure or the refusal of the Releasees to comply with the terms of settlement as agreed upon”.
- [12] The plaintiff states that at the meeting, Mr. Rossi agreed to pay three months’ severance rather than one month and, because the loan forgiveness would be deemed taxable employment income, that Gemstar agreed to pay any income tax arising from the loan forgiveness. Mr. Rossi denies this. He stated that Mr. Waters asked for three months’ severance and Mr. Rossi advised the plaintiff that he would have to get back to Mr. Waters. In the end, he advised Mr. Waters that Gemstar would only agree to pay one month’s severance. He further contends that there was no discussion with respect to payment by Gemstar of income tax arising from the forgiveness of loans.
- [13] The plaintiff apparently attempted to speak with an employment lawyer, without success. He ultimately arranged to see Mr. Furlong, who had acted for him on several real estate transactions in the past.
- [14] They had what both men described as a short meeting of 15 to 20 minutes. There was no written or monetary retainer. The plaintiff showed Mr. Furlong the termination letter of January 7, 2016, as well as the Release and Indemnity documents. Following the consultation, the plaintiff and his wife, Tammy Waters, signed the Release and Indemnity, and returned them to Gemstar.

- [15] By April 2016, Mr. Waters was able to secure employment as the Vice President of Finance with Roto Mill, with a higher salary than he had received at Gemstar.
- [16] On October 3, 2017, the plaintiff received a notice of assessment from the Canada Revenue Agency (“CRA”) indicating that he had not declared all of his income received from Gemstar in 2016. The CRA assessed additional income tax owing of \$69,786.61.
- [17] Mr. Waters attempted to have Gemstar re-issue the T4As to split the deemed income from the forgiveness of the loans between himself and his wife, but without success.
- [18] He then commenced this action as against the lawyer, Mr. Furlong, for breach of contract and negligent advice.

### **Issue**

[19] The issue to be determined is as follows:

1. Whether the solicitor, Mr. Furlong, in giving advice to Mr. Waters, was in breach of contract or was in breach of a standard of care *vis-à-vis* Mr. Waters.

### **Evidence**

[20] Because much of this case depends on *viva voce* evidence, I will review the testimony of the witnesses in greater detail than I may have otherwise.

#### *The Plaintiff's Case*

##### Mark Waters

- [21] Mark Waters commenced employment with Gemstar in 2005 as the company controller and subsequently became Vice President of Finance. He reported to Mr. Rossi, the president and owner of the company.
- [22] He stated that in 2012, Mr. Rossi's partner left the business. Mr. Rossi brought his son in. Mr. Waters was to be offered a 20 percent equity position in the company, but that never came to pass. He stated that Mr. Rossi's son changed many things.
- [23] He stated that Mr. Rossi did not want him to leave. To entice him to stay, Mr. Rossi provided him with a \$125,000 demand loan at a low interest rate to do renovations on his home. The loan was secured by a promissory note signed by the plaintiff and his wife.
- [24] The plaintiff took stress leave in 2015 and returned to Gemstar at the beginning of 2016. On or about January 7, 2016, he was called into Mr. Rossi's office and told that he was being terminated. He was given the termination letter of January 7. He testified that Mr. Rossi stated that he would pay tax on the forgiven loan as it would be considered employment income and needed to be taxed at source. He further testified that Mr. Rossi agreed to pay two months' severance. He acknowledged that he received correspondence

from Gemstar on January 13, 2016 indicating that he would be given one month severance and spoke with Mr. Rossi who said that was the best they could do.

- [25] The plaintiff stated that he believed the phrase “improper expenses”, used in the January 7 termination letter, referred to materials that he took from the company. He testified that he took his annual bonuses by taking materials in kind such as countertops, granite tile, laminate flooring, stone cladding and decking, and stated that Mr. Rossi did that with everyone.
- [26] The plaintiff testified on cross-examination that he had been involved in most of the firings, dismissals and severance claims while at Gemstar and always encouraged the employee to obtain independent legal advice (“ILA”). He was familiar with the concept of mitigation.
- [27] He testified that he went to the meeting with Mr. Furlong concerned about tax liability, that Mr. Furlong never told him about tax liability with respect to the loan forgiveness and that if he had known that he would be responsible for taxes he would not have signed the Release and Indemnity. He conceded that he did not know what Mr. Furlong’s legal expertise was, but that Mr. Furlong had previously done real estate matters for him. He was satisfied with the work that Mr. Furlong had done for him in the area of real estate transactions and found him to be “absolutely honest and forthright”.
- [28] His wife also attended the meeting with Mr. Furlong, but did not say anything during the meeting.
- [29] He stated that he showed Mr. Furlong the termination letter of January 7, but does not recall Mr. Furlong asking about improper expenses or dismissal for cause. He testified that the conversation revolved around tax liability on the forgiveness of loans. Mr. Furlong inquired about the amount of the loan to be forgiven and he told him it was \$125,000. He did not tell Mr. Furlong about the additional \$11,130 for materials he had taken, although he thought he would possibly have to pay taxes on that amount.
- [30] He conceded that he went to Mr. Furlong because he was concerned that there were no amounts in the letter regarding the loan forgiveness.
- [31] He admitted in cross-examination that he knew, as a result of his training as a CPA, that if an employer forgave a debt to an employee with nothing else occurring, this was a taxable event for the employee. He conceded that it was possible that Mr. Furlong had indicated that the letter stated that Gemstar would forgive debts so that, if the plaintiff knew the amount of the debts, it was that amount that would be forgiven. Specifically, it would extinguish the \$125,000 debt.
- [32] He also conceded that he knew that income received by an employee was subject to tax, including taxable benefits. He conceded that he knew there was nothing in the documents that stated that Gemstar would pay the tax. However, he denied that Mr. Furlong told him that there was nothing in the documents that obliged Gemstar to pay tax on the loan forgiveness. He further denied that Mr. Furlong offered to contact Gemstar to try to have them revise the documents to state the amount of debt to be forgiven.

- [33] In cross-examination, he conceded that there was a clause in the Release and Indemnity agreement that made him responsible for paying taxes, and that there was nothing in the documentation that said Gemstar would pay for the taxes.
- [34] In cross-examination, he stated that he went to Mr. Furlong because he wanted to understand what his tax obligations would be based on the letter.
- [35] Following the meeting with Mr. Furlong, the plaintiff called Mr. Rossi and requested that he amend the settlement documents to put specific amounts in the letter, both grossed up to include the tax amount and personal expenses. He further requested a letter stating that the severance amount would be two months. Mr. Rossi indicated that he would contact his lawyer. He called back indicating that his lawyer recommended the documents not be changed. There was no discussion about paying taxes on the loan forgiveness.
- [36] The plaintiff conceded that it was apparent at that point that there would be no negotiation for a better deal; he had the best offer that he could negotiate. He had to decide to take the settlement offer or to leave it pursuant to the letter. If he brought a wrongful dismissal claim, he was aware that the damages would be whatever were the losses through the reasonable notice, that the \$125,000 loan would not be forgiven and that if he obtained a new job this would reduce any damages. He took the settlement and signed the severance documents.
- [37] He stated that his income was \$162,000, but that he income split with his wife who received \$39,000. There was no documentation produced to establish any of this.
- [38] He conceded in cross-examination that he knew he had the obligation to report to the CRA the employment benefit of the loan forgiveness, but did not include that in his 2016 income.
- [39] Upon receipt of the notice of assessment, he did not contact Mr. Furlong. He did not advise Mr. Furlong of the CRA assessment until the statement of claim was served.
- [40] After receiving the notice of assessment, he communicated with Mr. Rossi and indicated that the promissory note should have been split equally between himself and his wife, and requested that that be done. Mr. Rossi, after consultation with his financial controller, refused to split the loan forgiveness. Although the plaintiff had maintained throughout that Gemstar had agreed to pay the taxes, he did not raise this with Mr. Rossi. The plaintiff did not confront Mr. Rossi about this and did not state that Gemstar should have paid the tax.

#### Tammy Waters

- [41] Tammy Waters was a hairdresser and then became a cosmetologist. She now works in a spa as a receptionist. At Gemstar, she cleaned the offices once per week on Sundays.
- [42] She attended the meeting with her husband and Mr. Furlong on January 14, 2016. She said nothing at the meeting.

- [43] At the meeting, they discussed the termination letter. They went to Mr. Furlong to find out whether they had to pay taxes. Her husband asked him whether they had to pay taxes and he said no.
- [44] Ms. Waters had no legal or accounting training. Her husband does their income tax returns and she defers to him with respect to tax matters.
- [45] When she asked her husband about dismissal for cause, he told her that Gemstar thought he was stealing. When she asked what he was alleged to have stolen, he said it was about using his Visa or MasterCard at work and that he and others at work used it to fund materials. There was no discussion with the plaintiff before they saw Mr. Furlong regarding “improper expenses put through the company for your personal benefit”. She did not ask her husband if he thought the company had cause to dismiss him. In cross-examination, she said that her husband asked about whether they had to pay taxes on the loan, but she did not remember the specifics. Further, in cross-examination, she testified that her husband did not ask Mr. Furlong if the letter would extinguish the loan indebtedness.
- [46] After the meeting, she never thought further about it. Her husband never told her about the letter from the CRA or the notice of assessment. She stated that she first learned about it in approximately December 2017 and that her husband would have told her about the letter but would not have shown it to her as she is not an accountant. She did not think back about the meeting with Mr. Furlong. She probably spoke with her husband about the meeting with Mr. Furlong after he had to pay the taxes. She testified that her husband remembered the meeting with Mr. Furlong differently; he remembered certain bits and she remembered others.

*The Defendant's Case*

Richard Furlong

- [47] Richard Furlong was called to the Bar in 1974. He was a sole practitioner in 2016, practicing in the areas of corporate, commercial, land development, real estate (residential and commercial), estates and some wrongful dismissal. He did not practice in the areas of tax law or litigation. He was not an expert in employment law.
- [48] He had acted for the plaintiff on residential real estate matters through 2008.
- [49] On January 14, 2016, he met with the plaintiff and the plaintiff's wife at his law offices. He did not recall the wife being there until he saw the documentation that had been signed by them and witnessed by him. Ms. Waters did not say anything in the meeting, as Mr. Furlong, Mr. Waters and Ms. Waters all testified.
- [50] Mr. Furlong was not able to locate notes or a file and does not believe he opened a file. There was no written or monetary retainer and no account issued.
- [51] The meeting lasted approximately 15 to 20 minutes. The plaintiff showed him the termination letter of January 7, 2016. He was not shown the promissory note or any other

documentation. The plaintiff told Mr. Furlong that he was being dismissed and wanted to ensure that he did not have to repay some indebtedness. That was his concern.

- [52] He stated that he noted, in the Release and Indemnity, the amount of the loan forgiveness. He had mistakenly remembered a lesser amount in examination for discovery. However, he stated that there was no reason to believe that Mr. Waters gave him the wrong figures at the meeting. I accept that explanation.
- [53] He knew that the debt was outstanding and that nothing had been paid back on it.
- [54] Mr. Furlong asked about his dismissal but did not get much of an answer. It became clear to him that the plaintiff was interested in knowing he did not have to repay a debt. He was not interested in a wrongful dismissal suit.
- [55] Mr. Furlong asked about the cause of the dismissal but did not get a response; it was vague and evasive. He did not really get an answer.
- [56] As regards the indebtedness to the company, he told the plaintiff that forgiveness of indebtedness in an employment situation creates a tax liability. The plaintiff indicated that he was aware of that; he is an accountant. The plaintiff did not come to him for tax advice.
- [57] The indebtedness was from a loan, but Mr. Furlong could not get any information regarding items stated in the January 7 letter to have been wrongfully taken as expenses. He could get no information regarding “improper expenses put through the company for your personal benefit”. He felt as though the plaintiff was withholding information from him.
- [58] When Mr. Furlong asked what the potential for dismissal with cause was, the plaintiff stated that in his view it was just put in the letter, suggesting that there was no cause. That is how Mr. Furlong interpreted it.
- [59] As regards tax on forgiveness of the loan, the plaintiff indicated that he expected Gemstar would pay the taxes. Mr. Furlong advised the plaintiff that there was nothing in the documents given to him that obliged the employer to pay the taxes. He did not indicate that the employer would pay the taxes because it was clear on the face of the documents, clear to any lawyer, clear to any accountant and clear to anybody who read it that there was nothing about the employer paying the taxes in the termination letter. The only reference to taxes was the Release and Indemnity in which the plaintiff and his wife were to indemnify Gemstar for any taxes he owed to the CRA. Mr. Furlong offered to call or contact the employer to try to get the document revised but, to his surprise, the plaintiff said no, that he did not want Mr. Furlong to contact the employer.
- [60] The plaintiff then circled back to what appeared to be his main concern, namely that he did not want to pay the indebtedness to Gemstar and wanted to ensure that the loan forgiveness would cover him despite the fact that no amounts were stated in the termination letter. Mr. Furlong confirmed that, and the plaintiff and his wife then signed the Release.

[61] The purpose of the meeting was to find out whether the letter from Gemstar would relieve the plaintiff from repaying the loan indebtedness. He had been shown and had all the information necessary to advise the plaintiff in that regard. The plaintiff also told Mr. Furlong that he expected Gemstar to pay taxes on the settlement and Mr. Furlong told him that there was nothing in the documentation that said that. While he offered to contact the employer to get a standalone document or to otherwise revise the letter in that regard, the plaintiff did not want Mr. Furlong to contact the employer.

Frank Rossi

[62] Frank Rossi testified pursuant to a subpoena.

[63] He is the president of Gemstar, which he described as a subcontractor in hard finishes, doing high-end work involving marble, ceramic, terrazzo and hardwood. Gemstar both supplies and installs the hard finishes.

[64] As regards the \$125,000 loan, Mr. Rossi stated that the plaintiff approached him. The plaintiff advised Mr. Rossi that he was having financial difficulties and showed him his financial situation which they looked at carefully. Mr. Rossi presumes that this is how he came up with an amount of \$125,000. Mr. Rossi offered the plaintiff the loan to help for a period of time. He does not recall the term of the loan.

[65] The plaintiff was trying to make improvements to upgrade the value of his home in order to increase his mortgage. He was attempting to increase the value of the home to substantiate a larger debt. The home was his primary asset.

[66] The loan was made long before any suggestion of the plaintiff having an equity interest in Gemstar. It had no connection with the plaintiff's partner leaving the business. Nor was it made to encourage the plaintiff to stay with Gemstar. There was no enticement.

[67] Mr. Rossi made the decision to dismiss the plaintiff. He stated that he operates a lot on intuition. He is a big picture person, but not much on detail until things start going wrong; then he begins to look at the detail.

[68] There were little indications that made him feel that things were not going properly at the business. The plaintiff was stressed with something and had taken a stress leave. There was something that triggered Mr. Rossi to start asking questions and look around the accounting department, which he felt had gotten messy.

[69] He pulled the company Visa credit card files and went back one year. What he saw was very disappointing after all he had done for the plaintiff and his family. He found charges on company credit cards for the plaintiff's own personal expenses such as swimming pool expenses, cell phone charges for the United States where his daughter went to school, appliance charges and charges for skin work on the plaintiff's nose. They added up to hundreds of thousands of dollars. The plaintiff did not have Mr. Rossi's approval for those expenses, nor did he have approval to treat them as bonuses. He did have Mr. Rossi's approval for some decking material and stone cladding for the house. Mr. Rossi's

disappointment in the plaintiff turned to distrust and he had to terminate the situation because of the plaintiff's proximity to the company finances. He acted immediately with termination as soon as Mr. Waters returned to work.

- [70] Mr. Rossi had a meeting with the plaintiff and told him that he was being terminated. He provided him with the termination letter of January 7, 2016 and Releases and Indemnities.
- [71] The plaintiff was the CFO of Gemstar. He knew everything that went through, in and out of the company and knew very well what "for cause" meant. He didn't ask what the "for cause basis" referred to in the letter. Mr. Rossi thinks that he knew.
- [72] In the meeting, the plaintiff told Mr. Rossi that he could not afford to have no income; he needed some income. He asked whether Mr. Rossi could pay him three months on top of the settlement set forth in the letter. Mr. Rossi said he would get back to the plaintiff.
- [73] The letter indicated that Gemstar would forgive indebtedness, which Mr. Rossi thinks was intended to apply not only to the \$125,000 loan but also to the improper expenditures. There was no discussion about Gemstar paying taxes on the loan forgiveness. That was never raised. He thought that was clear in the letter. There was never a discussion regarding Gemstar paying taxes.
- [74] Mr. Rossi asked his legal advisor about three months' severance pay and was advised that Gemstar should pay one month. On that basis, the letter was prepared, which the plaintiff signed.
- [75] He does not recall any discussions about altering the wording of the settlement documents.
- [76] Mr. Rossi felt that the offer was very generous, given that he had cause for the termination. He thought that if this would help with the plaintiff's finances, he would just let it be and move on. If the plaintiff took issue with it, Mr. Rossi would just take the "just cause" route. He was not prepared to pay more to settle the matter.
- [77] Mr. Rossi stated that the plaintiff was a very smooth man, well spoken and convincing. Therefore, he did not believe that the plaintiff would have any difficulty finding another job.
- [78] Mr. Rossi recalled that the plaintiff called him in 2017 and asked details about the promissory note and splitting the loan between the plaintiff and his wife. Mr. Rossi told him to speak with the company controller, Brenda McCullen. Gemstar ultimately declined to reissue tax slips and to split the income between the plaintiff and his wife.

## **Credibility**

### *Mark Waters*

- [79] Mr. Waters appeared generally to be a self-confident, smooth witness. In certain sensitive, key areas in both examination in chief and cross-examination, his answers were vague and,

in some areas, evasive. His answers in critical areas regarding the alleged agreement with Mr. Rossi were inconsistent with his conduct.

- [80] For instance, he never questioned Mr. Rossi about Gemstar's not paying taxes arising from the forgiven loan, despite the fact that he alleged that Mr. Rossi had agreed that Gemstar would pay any taxes arising from the loan forgiveness. Further, despite the fact that he had been involved in most firings and dismissals at Gemstar while he worked there, and had been a CPA for some 20 years, he continually refrained from mentioning this, while allegedly seeking advice from the defendant regarding whether he would have to pay taxes. In cross-examination, his answers ultimately indicated that he knew more about the areas of dismissal/termination and employee taxable benefits than he testified in examination in chief.
- [81] His answers regarding the meeting with Mr. Furlong were often vague.
- [82] His answers throughout seemed to be self-serving.
- [83] I find Mr. Waters' evidence to be problematic as a result of the above. I do not find it to be credible or reliable. Where his evidence differs from that of the defendant, I prefer the evidence of the defendant except where I have indicated otherwise.

*Tammy Waters*

- [84] Ms. Waters knew very little about accounting, taxes, or things related to finance. She testified that she left all of this, including preparation of their income taxes, to her husband, the plaintiff. Further, she knew very little about the circumstances of her husband and his termination other than that he told her that the employer believed he was stealing and using company credit cards for improper purposes.
- [85] She testified that she attended at the meeting of her husband and Mr. Furlong but said nothing. She further testified that once the meeting was over, she did not think about it further.
- [86] She testified that she had spoken with her husband prior to the trial. Her evidence was essentially consistent with that of her husband's evidence. She appeared to be attempting to assist her husband. The evidence was self-serving. I do not place much weight on her evidence throughout.

*Richard Furlong*

- [87] I found Mr. Furlong's evidence to be straightforward and forthright. He was candid and admitted facts that were not always in his favour. He had good memory and recall of the event in question, namely the meeting with the plaintiff. Despite the absence of notes, I found Mr. Furlong's evidence and memory of events regarding critical and key matters to be sharp. His evidence remained consistent throughout examination in chief and in cross-examination; it was also consistent with the documentation.

[88] I do not place any adverse inference or weight on the fact that Mr. Furlong did not independently recall that Ms. Waters was also at the meeting. Mr. Furlong, Mr Waters and Ms. Waters all testified that she said nothing throughout the meeting.

[89] I found Mr. Furlong's evidence to be credible and reliable.

*Frank Rossi*

[90] I found the evidence of Mr. Rossi to be clear, straightforward and forthright. His evidence was consistent with the documentation and remained consistent through cross-examination. He was not argumentative or evasive.

[91] Mr. Rossi is a non-party in this action and has no interest in the outcome. He displayed no animus to Mr. Waters and, in my view, treated Mr. Waters fairly throughout.

[92] I found his evidence to be credible and reliable.

### **Analysis**

[93] I note that the issue of breach of contract was not argued in final submissions. Therefore, the only issue is whether there was a breach of the standard of care by Mr. Furlong.

[94] Based on all of the evidence adduced in this trial, I am satisfied that Mr. Waters met with Mr. Furlong with the intention of determining whether the termination letter of January 7, 2016 would relieve him from all indebtedness as against the employer, Gemstar. I am satisfied that he did not attend at the meeting with Mr. Furlong to determine whether there was any tax owing, as the documentation presented to Mr. Waters by Gemstar and shown to Mr. Furlong said nothing about Gemstar paying any taxes on behalf of Mr. Waters, and, the Release and Indemnity made Mr. Waters responsible for indemnifying Gemstar for any taxes owing. I will address this at greater length below.

[95] While Mr. Waters has not sued Gemstar and this is not an issue in this action, I am satisfied that Gemstar and Mr. Rossi never agreed with Mr. Waters to pay the taxes arising from the forgiveness of the loan. Nor did Gemstar or Mr. Rossi agree to pay Mr. Waters any more than one month severance pay.

[96] As regards this latter issue, Mr. Rossi indicated that he would consult with his legal counsel with respect to requests that Mr. Waters made and would get back to Mr. Waters. In the end, Mr. Rossi and Gemstar declined all requests raised by Mr. Waters. Further, after Mr. Waters was terminated and consulted Mr. Furlong, he did not want Mr. Furlong to contact Gemstar to request that Mr. Rossi change the termination letter, nor did he request a letter from Mr. Rossi confirming the alleged tax payment offer as he did for the extra severance request. Further, he did not request that Mr. Rossi change the settlement documents to indicate that Gemstar would pay taxes arising from the loan forgiveness. According to the evidence, the plaintiff did not indicate to the CRA that there was an agreement that his employer would pay the taxes owing. After the reassessment from the CRA, he never confronted Mr. Rossi to request that he honour his alleged agreement to pay the taxes. He

never made any written reference to any alleged agreement to pay the taxes. Nor did he ever sue Gemstar for the alleged failure to honour an agreement.

- [97] I prefer Mr. Rossi's testimony to that of Mr. Waters as regards these issues.
- [98] I do not find that Gemstar or Mr. Rossi agreed to be responsible for the taxes arising from the forgiven indebtedness.
- [99] As regards the issues in this action brought against Mr. Furlong, based on the evidence, both *viva voce* and documentary, I am not satisfied that Mr. Waters attended at the meeting with Mr. Furlong with the intention of obtaining advice as to whether the termination documentation made Gemstar responsible for the taxation arising from the loan forgiveness. Mr. Waters, a CPA, conceded that he knew that the loan forgiveness made the employee responsible for taxes arising therefrom, and also conceded that he knew the documentation did not contain any wording that would make Gemstar liable for the taxes.
- [100] I do not accept the evidence of Mr. Waters that he did not know that he would be liable for paying taxes on the loan forgiveness, and therefore was unable to make an informed decision whether to sign the Release and Indemnity. Mr. Waters is a CPA. He admitted that he knew that benefits such as an employee's loan forgiveness by an employer (as occurred in this case) gives rise to tax liability on the part of the employee. I do not find that it is consistent with his evidence, nor does it accord with professional or common sense, given his education and profession, that he did not know or understand that he would be liable for paying taxes on the loan forgiveness.
- [101] I accept the evidence of Mr. Furlong that Mr. Waters' concern was to ensure that the loan forgiveness was valid for all outstanding indebtedness despite the fact that there were no amounts stipulated in the termination letter. I further accept that he did not advise Mr. Waters that Gemstar would pay the taxes or would be responsible for paying the taxes. I accept his testimony that he read the documentation before him and there was no wording that would suggest that Gemstar would be liable for payment of the taxes arising from the loan forgiveness. I am satisfied that Mr. Furlong did not advise the plaintiff that Gemstar would pay the taxes arising from the loan forgiveness. While Mr. Waters' intent may have been to have Gemstar pay for said taxation, I find that there was no agreement by Gemstar to pay the taxes. The termination letter said nothing regarding Gemstar paying the taxation. The Release and Indemnity agreement indemnified Gemstar from paying any taxes and stated that Mr. Waters was responsible for any taxes.
- [102] I further reject the plaintiff's argument that he did not negotiate further with Gemstar to ensure that the taxes were included and to be paid by Gemstar given the advice of the defendant. As I have found, the plaintiff conceded that following his meeting with the defendant, he had a telephone call with Mr. Rossi. He requested of Mr. Rossi that a letter be written stipulating the amount of forgiveness of the loan, grossed up to include the tax amount and personal expenses such that the employer would cover any tax liability. He also requested an increase in the amount of severance. Mr. Rossi said he would consult with the legal counsel and call Mr. Waters back. He refused to change the termination

documents. The plaintiff conceded that it was apparent to him that he had the best offer he could negotiate. He decided to take it and, thereafter, provided the severance documents, signed, to Gemstar.

*The Standard of Care*

[103] The action against Mr. Furlong alleges that he was negligent *vis-à-vis* Mr. Waters.

[104] In order to establish negligence, the plaintiff must prove that: (i) the defendant owed the plaintiff a duty of care; (ii) the defendant breached the standard of care; (iii) the plaintiff suffered compensable damages; (iv) the damages were caused in fact by the defendant's breach and (v) the damages are not too remote in law.

[105] The standard of care is that of a reasonably competent lawyer in similar circumstances. The circumstances include the form and nature of the client's instructions: see *Parlanis v. Reybroek*, 2022 ONSC 5135, at paras. 71-73; *Yormak v. Ledroit et al.*, 2022 ONSC 4615, at paras. 204-208.

[106] The plaintiff alleges that the defendant failed to fulfil the following duties:

1. He had to ensure his advice was correct;
2. He had to ensure that his advice was communicated and properly understood by the client;
3. He had a duty of taking reasonable care to avoid and/or minimize all risks of harm to the client;
4. He had to give good advice, and to make the reasons for that advice sufficiently clear to enable the client to make an informed judgment; and
5. He was under an obligation to advise the plaintiff and his wife what instructions were required.

[107] The plaintiff alleges, *inter alia*, that the defendant was negligent in failing to open a file, take notes and send follow-up communication to the plaintiff. While that is undoubtedly good practice, a failure to do so does not constitute negligence or breach the standard of care. The question of whether a lawyer has met the standard of care is a factual determination based on what the lawyer was requested to do and what the lawyer did: see *614128 Ontario Ltd. v. Bianchi*, 2016 ONSC 2450, 64 C.L.R. (4th) 327, at para. 83.

[108] In this case, I find that Mr. Furlong was asked whether the termination letter and documentation were sufficient to expunge his indebtedness to his employer without specifying the amount of indebtedness. He properly and fully responded to the question asked, namely that the wording in the correspondence from Gemstar, terminating him, was sufficient to expunge the indebtedness.

- [109] The meeting was short as there were few documents brought by Mr. Waters to be reviewed by Mr. Furlong.
- [110] I find, based on all the evidence presented in this case, that Mr. Furlong provided correct advice with respect to the concern for which the plaintiff sought Mr. Furlong's advice: whether the wording of the termination letter would cover all of Mr. Waters' indebtedness to Gemstar and absolve him from all debts to Gemstar. I am satisfied that Mr. Furlong communicated his advice to Mr. Waters such that the client properly understood that advice and that he took reasonable care to avoid or minimize all risks of harm to the client by, *inter alia*, suggesting that Mr. Furlong contact Gemstar to amend the termination letter or write another letter specifying the specific amounts of indebtedness that would be forgiven, but was told by Mr. Waters that he did not want Mr. Furlong to contact Gemstar. He further made the reasons for that advice sufficiently clear so that the client could make an informed decision, which he did by refraining from having Mr. Furlong contact the employer directly. I am further satisfied that he went beyond the advice sought to indicate that the loans being forgiven would be treated by the CRA as taxable benefits, payable by the employee, Mr. Waters. Indeed, Mr. Waters indicated that he knew that. He was, of course, a CPA.
- [111] Further, while it is best practice to open a file, have the client sign a retainer agreement, keep notes of meetings, and provide a written report to the client, the failure to do so is not, in and of itself, negligence, nor does it indicate a breach of the standard of care.

#### *Compensable Damages*

- [112] I find that Mr. Waters did not suffer compensable damages. I have already found that Gemstar and Mr. Rossi did not agree to pay any taxes arising from the forgiven indebtedness. As a result, Mr. Waters cannot be compensated for any taxes which he had to pay, as there was no agreement or contract with Gemstar as regards Gemstar's payment of the taxes.
- [113] I note in this regard, as well, that the plaintiff did not adduce any evidence of alleged damages, nor did he provide this court with any evidence that could be used for calculation of such damages.

#### *Were Any Damages Suffered by the Plaintiff Caused by the Defendant's Alleged Breach of the Standard of Care*

- [114] I have already found that the defendant did not breach the standard of care, and that the plaintiff suffered no compensable damages.
- [115] The plaintiff stated that had he been told that he would have to pay taxes on forgiven indebtedness he would never have signed the Release and Indemnity, and thereby obtain a benefit that was lost due to the allegedly negligent advice: see *Parlanis*, at paras.108-117; *Yormak*, at paras. 210-212; *Maisonneuve et al. v. Langlois et al.*, 2021 ONSC 3587, at paras.19-21; *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 13; Stephen Grant, Linda

Rothstein & John Adair, *Lawyers' Professional Liability*, 4th ed. (Markham: LexisNexis, 2020), at pp. 248-255, 256-258.

- [116] In professional negligence actions, a client's assertion that he or she would have acted differently had they received proper advice should be viewed with skepticism. Such assertions should be assessed warily and with great caution. Such hindsight is opinion, not fact: see *Pilotte v. Gilbert*, 2016 ONSC 494, 27 C.C.L.I. (4th) 1, at paras. 341-343; *Lenz v. Broadhurst Main*, 2004 CanLII 5059 (Ont. S.C.), at paras. 102, 103, 107.
- [117] In this case, based on all the evidence, there were many reasons for the plaintiff to have accepted the settlement offer rather than not sign it. The forgiveness of the loans and the agreement to pay one month severance, without any requirement to account for mitigation income should he find a new job, were significant. His only other alternative to accepting the settlement was not to sign, as he readily conceded in his evidence. Once he had exhausted all attempts to have Mr. Rossi change the settlement documentation to include more severance and the payment of taxes by Gemstar, he had no viable alternative but to sign. The plaintiff's refusal to sign would have meant that he would not receive forgiveness of the loans and would have to pay them back, as well as pay the taxes arising therefrom. He would have no severance pay of one month. He would be faced with having to bring a wrongful dismissal claim, knowing the allegations he faced regarding improper expenses. He would also have to retain and pay a lawyer to represent him in the lawsuit.
- [118] Had he sued Gemstar and been able to prove that there was an agreement for Gemstar to pay the tax on the forgiven indebtedness, he would have been able to recover his losses from Gemstar and this action would not have been necessary. That was, of course, not done.

#### *Loss of Chance*

- [119] The plaintiff alleges that he lost the chance to sue Gemstar and/or take any steps to reduce and/or eliminate the tax liability.
- [120] To establish loss of chance, the plaintiff must prove on a balance of probabilities that the defendant's wrongful act caused him to lose a substantially real and significant chance to obtain a benefit. The action must be dismissed if the plaintiff fails at that first stage: see *Yormak*, at para. 214; *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544, 72 B.L.R. (5th) 177, at para. 278; *Lawyers' Professional Liability*, at pp. 227-235.
- [121] In this case, the plaintiff did not lose the chance to sue Gemstar as the Release did not bar such a claim. The Release stated, *inter alia*, as follows: "[n]otwithstanding the foregoing, this release shall not apply to any actions, causes of action, claims and demands which I may have relating to the failure or the refusal of the Releasees to comply with the terms of settlement as agreed upon". Had Mr. Waters been able to prove that Gemstar agreed to pay the tax, which he did not, then he would not have been barred by the said Release.

- [122] Further, the plaintiff did not lose the chance to pursue a wrongful dismissal claim, as he did not have a viable wrongful dismissal claim. Further, he had no damages, as he mitigated his losses by obtaining a new job at higher pay shortly after his termination.
- [123] Finally, he did not lose any realistic chance to negotiate a better deal as he confirmed in cross-examination that he knew that he had reached the end of the negotiations and would not be successful attempting to negotiate a better deal.
- [124] In the second stage of a loss of chance analysis, the court may assess damages for the value of the lost chance. The lost chance must be sufficiently real and significant to rise beyond mere speculation. The plaintiff must show that the lost chance had some practical value: see *Yormak*, at paras. 214, 295; *Trillium*, at paras. 278-279; *Folland v. Reardon* (2005), 74 O.R. (3d) 668 (C.A.), at paras. 73-74; *Lawyers' Professional Liability*, at pp. 227-235.
- [125] In this case, I do not find there to have been any prospect of negotiating a better settlement nor any prospect of a wrongful dismissal action resulting in recovery of damages to the plaintiff. I do not find the alleged “lost chance” to be real or to have any practical value.
- [126] The final question posed is whether the plaintiff seeks damages that are too remote in law. As indicated above, I find that there are no damages that would be available to him. Therefore, I need not answer this question further.

### **Conclusion**

- [127] I find that the plaintiff has failed to prove his allegations of breach of standard of care and breach of contract for all the foregoing reasons.
- [128] Accordingly, this action is dismissed.

### **Costs**

- [129] I strongly urge the parties to agree upon costs to be paid by the plaintiff to the defendant. In the event that they are unable to reach an agreement, they are to provide me with their bills of costs in no more than 3 pages each within 60 days of the release of this decision.

C.J. Brown J.

**Released:** July 4, 2023

**CITATION:** Waters v. Furlong et. al., 2023 ONSC 3908  
**COURT FILE NO.:** CV-18-595443  
**DATE:** 20230704

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

MARK WATERS

Plaintiff

– and –

RICHARD FURLONG and FURLONG COLLINS

Defendants

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**REASONS FOR JUDGMENT**

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C.J. Brown J.

**Released:** July 4, 2023