

COURT OF APPEAL FOR ONTARIO

CITATION: Bennington Financial Corp. v. Medcap Real Estate Holdings Inc.,
2024 ONCA 90

DATE: 20240207

DOCKET: COA-23-CV-0683 & COA-23-CV-0691

Benotto, Roberts and Sossin JJ.A.

DOCKET: COA-23-CV-0683

BETWEEN

Bennington Financial Corp.
(formerly Equirex Leasing Corp.)

Plaintiff/Responding Party
(Respondent)

and

Medcap Real Estate Holdings Inc.

Defendant/Moving Party
(Appellant)

DOCKET: COA-23-CV-0691

AND BETWEEN

Heffner Investments Limited

Plaintiff/Responding Party
(Respondent)

and

Medcap Real Estate Holdings Inc.

Defendant/Moving Party
(Appellant)

F. Scott Turton, for the appellant Medcap Real Estate Holdings Inc.

Ivan Lavrence, for the respondent Bennington Financial Corp. (Formerly Equirex Leasing Corp.)

Darrell N. Hawreliak, for the respondent Heffner Investments Limited

Heard: February 1, 2024

On appeal from the orders of Justice Michael Bordin of the Superior Court of Justice dated May 9, 2023, with reasons reported at 2023 ONSC 2742.

REASONS FOR DECISION

[1] The appellant, Medcap Real Estate Holdings Inc. (“Medcap”) brought motions to stay or dismiss the actions against it by the respondents, Heffner Investments Limited (“Heffner”) and Bennington Financial Corp. (“Bennington”), for breach of the immediate disclosure rule by which settlement agreements that fundamentally change the landscape of the litigation must be immediately disclosed. The motions were heard together and dismissed with one set of reasons in May 2023. Medcap’s appeals from the dismissal of the motions were heard together and we provide one set of reasons disposing of them.

[2] In the litigation underlying its motion on appeal, Bennington alleges that it leased fitness equipment and made advances to a fitness club chain owned and operated by Mr. Cardillo called Premier Fitness (“Premier”). Mr. Cardillo is also the sole officer and director of Medcap. Bennington asserts that by 2017, Premier and Medcap had defaulted under the leases and collateral mortgages. In 2017,

Bennington commenced a number of lawsuits against Medcap, Premier, and other related entities.

[3] Heffner alleges that it leased equipment and advanced loans with a collateral mortgage to Medcap. After alleged defaults, Heffner commenced its action against Medcap in 2019.

[4] Medcap owns a property at 653 Upper Wentworth Road in Hamilton, Ontario (“Wentworth”). The property has five mortgages registered on title. The second mortgage is held by Heffner and its fifth mortgage is held by Bennington. A third-party creditor holds third and fourth mortgages. Medcap disputes the validity of the mortgages.

[5] In 2014, Heffner and the third-party creditor signed a Loan and Priorities Agreement (the “Priorities Agreement”) in which they agreed to share any recovery from the Wentworth mortgages equally until the secured amounts were paid in full. Medcap was a signatory to the Priorities Agreement. The Priorities Agreement also provided that if Medcap failed to pay the whole amount, then the shortfall would be shared between the parties to the agreement.

[6] In March 2020, to avoid a tax sale of the Wentworth property, Heffner, Bennington, and the third-party creditor jointly paid the accumulated tax arrears. The transfer of the tax lien was registered on title to the Wentworth property. Soon

after, creditors, including Bennington and another Heffner entity, jointly commenced a bankruptcy application against Medcap.

[7] In March 2021, Heffner began negotiating a settlement with Medcap and sought permission from Medcap to inform Bennington. Medcap refused. Heffner advised Medcap that it would not proceed with settlement discussions. Medcap's position is that acceptable terms of settlement were reached with Bennington, but Bennington said that there could be no settlement with Bennington unless there was also a settlement with Heffner and the third-party creditor.

[8] After learning of this arrangement, Medcap brought motions to stay or dismiss the actions against it by Heffner and Bennington for breach of the immediate disclosure rule.

[9] The motion judge found that there was a verbal agreement between Heffner, Bennington, and a third-party creditor. Primarily on the cross-examination of an affiant from Bennington, the motion judge found that the agreement required any settlement between a party and Medcap to include all the respondents and a third-party creditor. The agreement was reached no later than March 2021.

[10] After canvassing the applicable case law, the motion judge found that the agreement did not need to be immediately disclosed. He emphasized that there was no adversarial orientation between Bennington, Heffner, and the third party which was altered by their oral agreement. He concluded that, "[t]he Agreement

did not entirely change the landscape of the litigation in a way that significantly altered the adversarial relationship among the parties or the dynamics of the litigation.”

[11] Additionally, the motion judge found that the agreement did not require the respondents to cooperate or assist each other beyond what would have occurred in the ordinary course of the litigation. The motion judge found that on the facts, it was not unfair for Medcap to have to negotiate with the creditors together, rather than individually, and that this did not impact the integrity of the court process or mislead the court as to the adversity of the parties.

[12] The sole issue before the court on this appeal is: Did the motion judge err in finding that the agreement between the respondents did not need to be disclosed under the immediate disclosure rule?

[13] The disclosure rule has applied since at least the 1993 decision in *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 (Gen. Div.). In *Pettey*, the impugned Mary Carter agreement had to be disclosed because it significantly shifted the litigation landscape: at pp. 737-38. Specifically, the contracting defendant guaranteed the plaintiff a certain monetary recovery and the exposure of that defendant was “capped” at that amount; the contracting defendant remained in the lawsuit; and the contracting defendant's liability was decreased in direct proportion to the increase in the non-contracting defendant's liability: *Pettey*, at pp. 730-32;

see also *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, at n. 1.

[14] Disclosure is required when an agreement has the effect of changing the adversarial position of the parties to litigation into a co-operative one. In such circumstances, as this court stated in *Handley*, at para. 39, disclosure is required to “maintain the fairness of the litigation process”: citing *Moore v. Bertuzzi*, 2012 ONSC 3248, 110 O.R. (3d) 611, at paras. 75-79.

[15] Rather than requiring disclosure of agreements that fundamentally or entirely change the litigation landscape, the appellant argues that “agreements that fetter, clog, or frustrate, settlement must be disclosed.” Expanding the rule to settlement contexts of the kind at issue in this litigation would represent a dramatic and unwarranted expansion of the properly narrow rule. As the motion judge put it: “In short, Medcap wants to settle the claims its way and it wants the court to take its side. In my view, it is not appropriate to tread on the discretionary and strategic decisions that parties may make toward settling their litigation.”

[16] The motion judge reviewed the principles underlying the immediate disclosure rule as set out in *CHU de Québec-Université Laval v. Tree of Knowledge International Corp.*, 2022 ONCA 467, 162 O.R. (3d) 514, at para. 55, and *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234, 166 O.R. (3d) 131, at para. 46. The motion judge relied on the statement of the threshold by

Feldman J.A. in *Crestwood Preparatory College Inc. v. Smith*, 2022 ONCA 743, at para. 57, that in order to trigger the rule, an agreement must have had the effect of “changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation.” As earlier noted, the motion judge found that it did not.

[17] The motion judge found that the shared strategy adopted by the respondents constituted an oral agreement. Given the subsequent findings of the motion judge, it is not necessary to consider the correctness of that characterization and we expressly refrain from doing so. Those subsequent findings include that the agreement did not alter the litigation landscape because the agreement did not require the respondents to support one another in their respective proceedings, the respondents were not adverse to one another, and the agreement did not change the litigation between the respondents and the appellant. These findings are entitled to deference, and we see no palpable and overriding error which would warrant appellate intervention.

[18] In summary, we see no error in the motion judge’s formulation of the rule, or in his application of the rule in light of his findings.

[19] For these reasons, the appeals are dismissed.

[20] The respondents are entitled to costs, but not in the amount sought by Bennington. Having reviewed its Bill of Costs, we are satisfied that the costs

agreed to by the appellant and Heffner of \$6,000 are appropriate for each of the respondents. Therefore, costs are awarded in the amount of \$6,000, all-inclusive, from the appellant to each of the respondents, for a total of \$12,000.

“M.L. Benotto J.A.”

“L.B. Roberts J.A.”

“L. Sossin J.A.”