CITATION: Pinsonneault v. Phair, 2024 ONSC 4582
COURT FILE NO.: CV-18-1598
DATE: 2024/08/19

2024 ONSC 4582 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: MICHEL PINSONNEAULT and LANDSVIEW FARMS 185 INC. Plaintiffs	Alexander Verrilli, for the Plaintiffs
– and – JOHN WILLIAM PHAIR a.k.a. BILL PHAIR, PHAIR SYSTEMS 2018 LTD. and PHAIR FARM AND BUILDING SYSTEMS LTD. Defendants	Thomas Masterson, for the Defendants
	HEARD: March 25, 2024

TRANQUILLI J.:

Overview

[1] The plaintiffs claim the defendants have improperly retained funds advanced to them by the plaintiffs for unperformed work. The plaintiffs contend this wrong was compounded by the personal defendants' subsequent breach of a settlement agreement made under the *Farm Debt Mediation Act* to repay that debt. The plaintiffs submit there is no genuine issue requiring trial and move for summary judgment awarding damages in unjust enrichment and/or pursuant to the terms of the settlement agreement.

[2] The defendants argue that summary judgment is inappropriate for four reasons: first, there was no debt owed to the plaintiffs under the agreement; second; the claim in unjust enrichment is statute-barred by the *Limitations Act, 2002*; third, there is no privity of contract between the plaintiffs and the corporate defendant Phair Systems 2018 Ltd.; and fourth, there are genuine issues requiring a trial regarding circumstances of the settlement and the personal defendant's appreciation of the terms and consequences of the agreement such that the court should exercise its discretion to not enforce the settlement.

[3] These reasons explain why summary judgment is granted in favour of the plaintiffs. The plaintiffs may be out of time for their claim in unjust enrichment, and that would be an issue requiring trial. However, in respect of the enforceability of the settlement agreement, there is no genuine issue requiring trial. The enforcement of the settlement agreement is not barred by the *Limitations Act, 2002*, and the personal defendants William and Shirley Phair are contractually obliged to make the payment.

Background

[4] The plaintiff Michel Pinsonneault is the president of Landsview Farms 1985 Inc. The farm cultivates and stores various grains. The defendants William "Bill" and Shirley Phair are the principals of Phair Farm and Building Systems Ltd. ("Phair Farm and Building") and Phair Systems 2018 Ltd. ("Phair Systems"). Phair Systems was incorporated after the material events in issue.

[5] In 2015, the plaintiffs retained Phair Farm and Building to renovate two grain bins and construct two new grain bins on the plaintiffs' farm. The plaintiffs contend they advanced funds totalling $273,54.10 to Phair Farm and Building, for the purchase of materials and equipment, over the course of this project. The plaintiffs canceled the balance of the contract after a grain bin collapse in July 2016. Liability for the bin collapse is not in issue in this litigation.

[6] The plaintiffs asked the defendants to return funds advanced for work not yet performed or for equipment and materials not yet provided. The defendants agreed but never provided an accounting, despite many promises, and never paid any sums towards the overpayment. The plaintiffs undertook their own accounting. They claim they are entitled to repayment of $136,908.82 excluding interest and taxes, representing the difference between the total funds advanced to the defendants and the work or materials and equipment received by the plaintiffs under the contract. The defendants have not presented any responding accounting to challenge that calculation.

[7] In or about March 2017, the personal defendants William and Shirley Phair presented a *Farm Debt Mediation Act* proposal to their creditors, including the plaintiffs. The defendants reported that their total liabilities approached $2,500,000 and were in various stages of delinquency. By this time, the outstanding balance owed to the plaintiffs was $145,885, plus interest.

[8] Under the FDMA Recovery Plan, the Phairs represented they owned all shares of Phair Farm and Building. The Plan stated the Phairs "personally guarantee liabilities of the corporation." The personal defendants proposed they would sell some real property with an estimated value of $3,800,000 to satisfy the debts owed to the creditors. The creditors, including the plaintiffs, accepted the arrangement "as is" (i.e., no negotiation or counteroffer) at the Farm Debt Mediation held on May 31, 2017. Under the terms of the mediated agreement, the defendants were to pay the outstanding balance of $145,885 to the plaintiffs by December 31, 2017. In exchange, the plaintiffs, like all creditors who were party to the agreement, agreed to forebear from enforcement of the debt and to stay

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any further interest from accruing on the debt for the next six months. The defendants sold the property, and proceeds from the sale were used to settle the debts with some creditors who were party to the agreement, but not with the plaintiffs.

[9] By statement of claim issued August 3, 2018, the plaintiffs seek recovery of the overpayment made to the defendants. The claim is presented as one of unjust enrichment, or breach of the *Farm Debt Mediation Act* agreement. The plaintiffs plead either that the limitation period for the unjust enrichment claim was stayed by the mediation process, or that the claim was commenced within two years of the date of acknowledgement of the debt in the settlement agreement.

[10] The defendant William Phair was examined for discovery in January 2023. His undertakings went unanswered for the next approximate 10 months. By order of Heeney J. dated December 15, 2023, the defendants were to satisfy undertakings within 30 days and to pay costs of $1,500. The defendants have not complied with that order, either by way of answering undertakings or paying costs. These undertakings pertain to the defendants' own accounting of the funds advanced to the plaintiffs, services or materials provided under the agreement, and particulars of the preparation of the Recovery Plan for the Farm Debt Mediation arrangement and settlement with some of the participating creditors.

Analysis

[11] The statement of claim and motion appear to seek judgment on both the unjust enrichment claim and enforcement of the settlement agreement. It was understood at the hearing that the plaintiffs seek relief on an alternative basis.

[12] The court's approach to this motion is informed by the well-established principles that govern summary judgment motions and need not be repeated in these reasons: *Hyrniak v. Mauldin*, 2014 SCC 7.

[13] The failure to satisfy undertakings poses a significant difficulty for the defendants in opposing this motion. These outstanding undertakings go to the core of the material issues between the parties.

[14] Furthermore, I am not persuaded that the plaintiffs' failure to cross-examine the defendant Mr. Phair on his affidavit in response to this motion is fatal to the plaintiffs' motion and the ability of the court to consider whether summary judgment is appropriate. Mr. Phair's affidavit baldly denies that there is a debt owing to the plaintiff, and claims that the defendant company performed the services in full.

[15] This assertion by Mr. Phair contradicts several admissions made on his examination for discovery, including: (i) that there are amounts owing to the plaintiffs; (ii) that he had not done an accounting because he had been "lazy"; (iii) that the personal defendants Bill and Shirley Phair signed the settlement agreement, with terms including that they would pay the corporate defendant's debt to the plaintiffs; and (iv) that the plaintiffs had not been repaid because he no longer had funds from the sale of the property.

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[16] Further, the undertakings remain unsatisfied, meaning the defendant is now in breach of a court order. Answers to those undertakings would have offered evidence relevant to assessing liability and the quantum of damages; however, no such evidence was offered and was conspicuous in its absence from the defendant's responding record to this motion.

[17] In all, the defendants have not put their best foot forward in responding to this motion.

Unjust Enrichment

[18] The plaintiffs have established a *prima facie* case for a claim in unjust enrichment. There is no evidence to contradict the plaintiffs' accounting of the funds advanced to the defendant, Phair Farm and Building, and for which no services or materials or equipment were received. The defendant's bald assertion that the agreement was performed and there are no funds owing is at odds with his admissions on his examination for discovery and is contradicted by the existence of the settlement agreement. The plaintiff did not receive the benefit of those services and materials for which the funds were advanced, and there is no juristic reason for the enrichment: *Moore v. Sweet*, 2018 SCC 52 at para. 37; *Espartel Investments Limited v. Metropolitan Toronto Condominium Corporation No. 993*, 2024 ONCA 18 at para. 37. The defendants have had ample opportunity to challenge the plaintiff's accounting with their own analysis, which was to have been done by undertaking, but have not done so.

[19] However, questions arise with the limitation period. The contract ended with the grain bin collapse in July 2016, and the plaintiffs prepared their own accounting of the overpayment in August 2016. The claim for unjust enrichment was not issued until August 3, 2018, just over two years after the contract ended. Although the plaintiffs may not have known the precise calculation of the overpayment, it is evident from the parties' communications as of July 2016 that the plaintiffs believed they had made an overpayment to the defendants and were entitled to repayment. It is unclear why the action does not include a claim for breach of contract and why this was presented only as an unjust enrichment claim. In any event, there is a line of cases that hold that equitable claims are subject to the *Limitations Act, 2002*. The doctrine of unjust enrichment was not developed as an alternative remedy in equity to one in contract. It is not to be used to avoid limitation periods. To allow for unjust enrichment where the claim is founded in breach of contract would be akin to eliminating a legislated limitation period for breach of contract: *Segnitz v. Royal & Sun Alliance Insurance Co*. of Canada, 2003 CanLII 49343 (ON SC).

[20] The plaintiffs submit that the limitation period is effectively "reset" by operation of s. 13 of the *Limitations Act, 2002*, when the personal defendants acknowledged the debt in the March 22, 2017 FDMA Recovery Plan sent to creditors. This would extend the limitation period to March 2019 and therefore not bar the unjust enrichment claim.

[21] However, s. 13 of the *Limitations Act, 2002* refers to an acknowledgement of a claim for a "liquidated debt" as having the effect of starting the limitation period on the date of the acknowledgement. As I will explain, I am satisfied the FDMA settlement agreement is

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enforceable; not as the unjust enrichment claim, but rather as an acknowledgement of a debt by the personal guarantors and agreement to pay same. Further, the acknowledgement is arguably not by the unjustly enriched corporation, Phair Farm and Building, but by its personal guarantors. Moreover, in my view, an unjust enrichment claim is not in the nature of a "liquidated debt," as is required for s. 13 to apply; rather, it is a claim for unliquidated damages. The fact that the plaintiffs can specify the amount claimed for unjust enrichment does not make it a liquidated debt: *Earth Boring Company Limited v. Groupe CRH Canada Inc*., 2021 ONSC 1920 at para. 34.

[22] The court cannot accordingly grant summary judgment on the unjust enrichment claim. It may be that there are circumstances surrounding the creditor arrangement that arguably tolled the limitation period, however the court heard no evidence or argument in that regard. There is a genuine issue requiring trial in respect of the unjust enrichment claim as against Phair Farm and Building.

Enforcement of Settlement Agreement

[23] However, the defendants are personally liable for the debt pursuant to the settlement achieved at the FDMA mediation on May 31, 2017. The claim for enforcement of the settlement agreement was issued within the limitation period.

[24] Settlements are subject to the basic principles of contract formation. A binding settlement is reached when the parties, measured objectively: a. had a mutual intention to create a legally binding contract; and b. reached agreement on all the essential terms of the settlement. The parties' conduct is viewed objectively in order to determine whether a contract was made. Subjective intentions and actual states of mind are not relevant or admissible. What is relevant is whether, in the eyes of a hypothetical honest and sensible businessperson, the parties appeared to have reached an agreement: *Stronach v Stronach*, 2023 ONSC 3817 at paras. 6 – 9.

[25] The FDMA settlement of May 31, 2017, sets out clear terms for payment of the debt, wherein the personal defendants represented that they personally guaranteed the corporation debts. The creditors, including the plaintiffs, would forebear enforcement of the debt and stay any further interest accruing for a period of six months, until December 31, 2017, in anticipation of property being sold by the defendants to satisfy the creditors. The plaintiffs' debt of $145,885 plus interest at 4% is clearly identified on the schedule of creditors that was prepared by the defendants. There is no dispute that this document is acknowledged by signature or initials of the parties. This settlement was clear, specific, and unequivocal.

[26] The defendant deposes to being in extremely stressful circumstances at the time of this agreement. In addition to the financial issues, the defendant Shirley Phair was seriously ill and undergoing treatment. Mr. Phair claims the arrangement was not effectively explained to him by his legal representative and that he and Ms. Phair had no appreciation that they would be personally guaranteeing the corporate debts. The defendants rely on *Srebot v. Srebot Farms*, 2011 ONSC 4512, affirmed at 2013 ONCA 84, and submit there

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is a genuine issue requiring trial, so the court can determine whether it should use its broad and complete discretion to enforce the settlement. A court retains discretion to not enforce a settlement that is unreasonable, unfair, would result in injustice, or where there is some other good reason for the court to exercise its discretion not to enforce it: *Srebot*, at paras. 72-73.

[27] I find this matter is distinguishable from the unusual set of circumstances that faced the court in *Srebot*. As noted in *Srebot*, although the decision not to enforce a settlement is discretionary and exercised on a case-by-case basis, it is only done rarely, and in the presence of compelling circumstances: *Srebot*, at para. 84. In *Srebot*, the plaintiff contended he did not understand that he was settling the action in its entirety at mediation. He thought he was only resolving an interim tax rectification issue, which was consistent with the tax liability created by his defendant brother when his brother structured a sale without consulting the plaintiff, and which had immediate and pressing financial consequences for the plaintiff. There were no minutes of settlement or other consent documentation signed at the mediation to demonstrate the plaintiff's awareness that this settlement was intended to resolve the entire action and not just the tax issues.

[28] I allow that the Phairs were likely undergoing personal stresses at the time of this creditor arrangement. However, I note it was the defendants themselves who proposed the creditor arrangement and its terms, including the personal guarantees, to the group of creditors. The defendants Willam and Shirley Phair signed the proposal and then attended the mediation with their counsel two months later. The creditors, including the plaintiffs, accepted the proposal, as prepared by or on behalf of the defendants, without any hard bargaining. There is no suggestion of unfair or unreasonable bargaining tactics by the plaintiffs, who were merely one of several creditors to whom the defendants presented the arrangement.

[29] The defendants were represented by counsel in preparing the proposal and at the mediation. Generally, settlements entered into with the assistance of counsel should be upheld except in the clearest of cases: *Donaghy v. Scotia Capital Inc.*, 2008 CanLII 16190 (ONSC) at para. 8.

[30] The defendants' position that the settlement is unenforceable is also at odds with the fact that the agreement was made with several creditors, some of whom did have their debts satisfied pursuant to the terms of the settlement. On his examination for discovery, Mr. Phair testified that he thought he had repaid those creditors with whom he was still doing business. Further particulars as to which creditors were or were not repaid according to the agreement were to have been satisfied by way of undertaking, which remains outstanding and in contravention of court order. There is no reasonable basis on which to entertain an argument to the effect that the agreement was enforceable as it relates to some creditors, but not as it relates to the plaintiffs. Certainly, no such justification in contract or equity was raised during argument. Moreover, the defendants have not provided the particulars of those debts that were satisfied.

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[31] It would result in an injustice if this agreement were not enforceable by these creditor plaintiffs but enforceable by other creditors. The plaintiffs agreed to forebear enforcement of the debt and stay further interest accruing in the expectation that the debt would be retired by the end of December 2017. It would appear the plaintiffs relied on this agreement to their detriment. The debt remains unpaid seven years later.

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Disposition

[32] Summary judgment shall therefore issue requiring the defendants William "Bill" Phair and Shirley Phair to pay the amount of $145,885.00 as well as pre-judgment interest at the rate of 4% per annum commencing January 1, 2018, pursuant to the terms of the 2017 settlement agreement. Post-judgment interest shall also be at the rate of 4% pursuant to the agreement.

[33] I make no finding that either of the corporate defendants are liable on this settlement agreement and did not understand the plaintiffs to be seeking this conclusion as it relates to the settlement. The agreement was as between the plaintiffs and the personal defendants. The plaintiffs explained that they named the 2018 corporate defendant in addition to the original corporate defendant out of caution given what remains unknown about the manner in which the defendants arranged their financial affairs, and what has happened to equipment purchased with funds from the advances made by the plaintiffs. Whether there is entitlement to a restitutionary remedy such as tracing, or whether there are other steps the plaintiffs will need to take to enforce this judgment, remain to be determined.

[34] If the parties are unable to resolve costs, the plaintiffs shall deliver their written submissions by September 16, 2024. The defendants shall deliver their written submissions by September 30, 2024. There is no right of reply without leave. Written submissions, excluding offers to settle, shall be limited to three pages.

Justice K. Tranquilli

Released: August 19, 2024

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Plaintiffs

– and –

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Defendants

REASONS ON SUMMARY JUDGMENT

Justice K. Tranquilli

Released: August 19, 2024