SUPREME COURT OF NOVA SCOTIA
Citation: *Doucette v. Seymour*, 2017 NSSC 33

Date: 2017-02-08
Docket: Sydney No. 459308
Registry: Sydney

Between:

Karen Doucette, Priscilla Gould, Rita MacMullin, Neil MacMullin and Mathew Standing

Plaintiffs

v.

Kim Seymour and Darin Seymour

Defendants

LIBRARY HEADING

Judge:	The Honourable Justice Frank C. Edwards
Heard:	February 1, 2017, in Sydney, Nova Scotia
Final Written Submissions:	February 6, 2017
Subject:	CPR 42.11 – motion for an Order for the Preservation of Assets (Mareva Injunction). Real, implied or apparent authority of an agent.
Facts:	Defendant (Darin Seymour), one of five finalists in a Grand Prize ($100,000.00) draw. Darin had his spouse (Kim Seymour) attend the draw on his behalf to receive his prize. Prior to the draw, Kim allegedly agreed with other finalists to share the prize five ways no matter who won. Darin won. He claimed that Kim had no authority to agree to share his prize

with the other finalists.

Issues:

(1) Was there a serious question to be tried?

(2) Whether Kim had actual, implied or apparent authority to agree to share Darin's prize.

Result: Kim had no authority to contractually bind Darin to the sharing agreement. There was therefore no serious question to be tried. Motion dismissed and interim order vacated, costs awarded to Defendants.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

Cases Noticed:

RJR-MacDonald Inc. v. Canada (A.G.) [1994] 1 SCR 311

Gilbert v Barron [1958] O.J. No. 32

Horne v. Capital District Health Authority, 2005 NSSC 41

Ryan v Yakubou 2014 NSSC 54

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Counsel:	Christine Murray, for the Plaintiffs Candee McCarthy, for the Defendants

Introduction:

[1] This is a motion for an Order for the Preservation of Assets (CPR 42.11). On January 23, 2017, I issued an Interim Order to secure the $80,000.00 in question until this motion could be determined. I heard the present motion on February 1, 2017 and reserved decision. I invited counsel to make supplementary submissions on the agency issue no later than February 6, 2017.

[2] Two of the four Plaintiffs, namely Rita MacMullin and Matthew Standing, filed affidavits in support of the motion. Both Defendants, Kim and Darin Seymour filed affidavits opposing the motion. There was no cross examination of the affiants.

Background Facts:

[3] On January 6, 2017, the MacDonald Auto Group held a draw for its 50th Anniversary contest with a grand prize of $100,000.00. There were five finalists for the draw: Matthew Standing (*Standing)*; Pricilla Gould *(Gould)*; Rita MacMullin (*MacMullin*) representing herself and her husband, Neil MacMullin; Rita Doucette (*Doucette*), representing her mother Karen Doucette; and Kim Seymour (*Kim*) representing her husband Darin Seymour (*Darin*). All

were in attendance at the dealership approximately thirty minutes before the draw.

[4] The parties agree that Gould suggested to each of the others that they should all agree to split the Grand Prize so that each finalist would be guaranteed $20,000.00. The Plaintiffs say that all five agreed to this proposal. Kim says she never said yes to the agreement but did say words like “ok” or “I guess so” in order to avoid a confrontation with Gould. She says she did not wish to split the prize if she won.

[5] All five then went into a meeting room where they met with John Nash (*Nash*), the accountant for the MacDonald Group. Nash had each of the representative finalists sign a waiver to indicate they each represented a named finalist. At that time, and probably earlier, the Plaintiffs knew that Kim was representing her husband.

[6] The Plaintiffs say that in the meeting room they again confirmed their agreement to split the Grand Prize. Kim says that she did ask Nash if there would be five cheques issued but she did so only “…to see if the finalists intended for the money to be split before there was a winner declared…” (paragraph 44 affidavit). Nash explained that there would only be one cheque

but that there was no restriction on how the winner afterward disbursed the money.

[7] The five then returned to the showroom where the draw took place. Kim was the winner. There is disagreement about what occurred next. The Plaintiffs say that Kim took their names and addresses and promised to call them when she cashed the cheque. According to Kim, the others gave their contact information to salesperson Ryan Tobin who later gave it to Kim. Kim denies that she told the others she would contact them.

[8] The Plaintiffs say they tried unsuccessfully to contact Kim later that day. They then sought legal advice which resulted in the present motion.

Legal Framework and Competing Positions:

[9] In deciding whether or not to grant a preservation order, I must apply the following test:

1. Is there a serious question to be tried?

2. Will the Plaintiffs suffer irreparable harm without a preservation order?

3. Does the balance of convenience favour the issuance of a preservation order?

(See ***RJR-MacDonald Inc. v. Canada (A.G.)*** [1994] 1 SCR 311)

[10] 1. **Serious Question:** This hinges upon whether it is arguable that a valid, enforceable legal contract was entered into among the parties. Oral contracts can be legally enforceable. They are merely harder to prove than their written counterparts. Basic contract law requires that there be an offer, an acceptance, and consideration (something of value exchanged – mutual promises will do). (See ***Gilbert v Barron*** [1958] O.J. No. 32 at para. 12).

[11] Here it is alleged that the five finalists each offered to share the $100,000.00 equally with the four other finalists. By accepting the respective offers of their 4 colleagues each finalist agreed to receive $20,000.00. The consideration is that each party to the alleged contract gave up his or her chance to win the $100,000.00 in exchange for the assurance that each would obtain $20,000.00.

[12] The Plaintiffs' allege that there was a meeting of the minds, that is, all five agreed that everyone would get $20,000.00 irrespective of who was the named grand prize winner. They note that this consensus was confirmed when they went into the meeting room to meet with Mr. Nash, the accountant. The Plaintiffs argue they all understood that each of them was bound by the agreement.

[13] The Defendants' position is that there was never any real acceptance by Kim of the offer to split the $100,000.00. Kim denies that she ever made an unequivocal statement to either offer to share the prize or accept the offers by the others to do so. Kim insists that she never had any intention to be bound by such an agreement but was merely trying to be nonconfrontational. Kim says she felt pressured, that she was afraid of being yelled at or threatened if she did not agree. "I do not feel I had any choice than to agree with Ms. Gould's proposal…" (Affidavit, para. 62)

[14] The Defendants' main argument is that Kim never had any authority to bind her husband to the agreement and that the others should have known that. As previously noted Darin Seymour did nothing to give anyone the impression that he authorized his spouse to do anything more than receive his prize.

[15] The critical issue is the scope of authority of an agent. Kim attended the draw as her husband's agent. Darin insists that he never gave his wife authority to do anything other than pick up his cheque. Darin says he never would have agreed to give $80,000.00 of his winnings to strangers. Kim agrees that she never spoke to her husband about splitting the prize. She did not call Darin at work because she knew he was not allowed to have his phone on. (That day, Darin did leave his phone on but Kim did not know that).

[16] Rita Doucette was there as agent for her mother Karen Doucette. After she was approached by Gould, Rita Doucette did call her mother to ask whether she would be agreeable to splitting the $100,000.00. Rita MacMullin observed Rita Doucette make the call.

[17] Rita MacMullin attended the draw representing herself and also as agent for her husband, Neil. (They were joint finalists as they had purchased a vehicle together). MacMullin's affidavit is silent on whether or not she called her husband to secure his agreement to split the $100,000.00.

Analysis:

[18] This case turns on the agency issue. I will therefore not waste time dealing with the conflicting evidence regarding offer and acceptance. Kim, as Darin's agent, had no authority (actual, implied, or apparent) to commit Darin to share his Grand Prize of $100,000.00.

[19] Counsel argues that it is unclear whether Kim was representing Darin alone or both herself and Darin. I have re-read the affidavits and the transcript of the submissions made to me on February 1. The Seymours are uncontradicted when they say that Darin was the named finalist and Kim went to the draw on

his behalf alone. I am satisfied Kim was there solely as Darin's agent and the Plaintiffs knew, or ought to have known, that.

[20] No one (other than Gould) contemplated sharing the prize prior to their arrival at the dealership. Kim attended the draw on Darin's behalf solely to accept the prize if he was the winner. Every agent has ***implied*** authority to do everything necessary, and ordinarily incidental to carrying out her express authority. (Fridman, ***The Law of Agency*** 7th, p. 65). An example of an agent with implied authority would be a lawyer who has the implied authority to negotiate a settlement on behalf of her client. Making an agreement to give away 80% of a $100,000.00 prize is not in any way incidental to Kim's express authority to ***receive*** Darin's prize. Kim therefore had no implied authority to do so. One person (even a spouse) cannot make a decision like that for another person without that person's authorization.

[21] Kim did not consult Darin. The waiver signed by Kim for the dealership would in no way expand her authority to simply accept the prize. That waiver was for the dealership's benefit alone – it gives the dealership the legal authority to give the prize to Darin's agent. The dealership astutely further protected itself by making the cheque payable to both Kim and Darin.

[22] The makers of the agreement were all present in fairly close quarters. If they were paying attention they would know that Kim did not call Darin. I am satisfied the Seymours had no telephone contact prior to the draw. If Kim had called her husband, someone would probably have noticed. In their affidavits, the Seymours both deny any such contact. If there were any evidence to the contrary, I expect the Seymours would have been challenged with it. There is no suggestion by the Plaintiffs that Kim called Darin. I gave counsel the opportunity to cross examine the parties on their affidavits. Counsel declined. The Seymours' evidence denying telephone contact prior to the draw remains uncontradicted and unchallenged.

[23] The agreement was spawned in a highly charged atmosphere. It is understandable that the crucial issue of Darin's input simply got overlooked. There is no evidence that anyone even asked Kim whether she was sure her husband would go along with the deal.

[24] It is significant that Rita Doucette apparently realized she could not join the agreement without first calling the person she represented (her mother Karen Doucette). At least one of the other Plaintiffs, Rita MacMullin, was aware that Doucette had called her mother for that purpose. But no one focused upon what Darin's attitude might be. It is ironic that one of the persons, who needed to

call the person she represented, now says that Kim Seymour did not need to do so.

[25] It appears that the Plaintiffs may have assumed that because Kim was there for her husband, she could agree to the sharing deal on his behalf. That is an assumption they were not justified in making. It was simply not reasonable for the Plaintiffs to assume that Kim could commit Darin to the deal without specific authority from him. That would be a profound change in Kim's authority which cannot reasonably be linked to anything Darin said or did.

[26] The Plaintiffs argue that Kim had apparent or ostensible authority to bind Darin to the agreement. I disagree. Apparent or ostensible authority exists when the principal creates a situation where it is reasonable to infer and rely upon the apparent authority of the agent. (See Fridman, ***The Law of Agency***, 7th Ed., c. 6 – quoted in ***Horne v. Capital District Health Authority***, 2005 NSSC 41 at para. 28). It is not reasonable to make such an inference in this case. Darin Seymour did nothing to give anyone the impression that he authorized his spouse to do anything more than receive his prize.

[27] It is tempting to speculate upon what Darin's reaction might have been had he not been the winner. What if Kim had told him he had lost but she had made a deal requiring the winner to share? No doubt Darin would happily have accepted the $20,000.00. I suspect that Neil MacMullin is not now unhappy that Rita did not check with him (if that is the case). Had the MacMullin's won, I wonder whether Neil's reaction would now be any different than Darin's. Courts do not speculate on what might have been. I must deal with fact. The fact is that Darin won, he never agreed to share his prize, and he never authorized his wife to make such an agreement.

Conclusion:

[28] I conclude that the Plaintiffs' have no chance of convincing a Court that Darin Seymour is contractually bound to share his win with the Plaintiffs. Accordingly, the Plaintiffs have failed to demonstrate that there is a serious question to be tried. Having come to that conclusion, I need not consider the second and third branches of the test, namely, the issues of irreparable harm and balance of convenience.

[29] The granting of a preservation order is an extraordinary remedy which should be granted sparingly. (See for example, ***Ryan v Yakubou*** 2014 NSSC

54). I am satisfied that this is not a proper case for the issuance of such an order. I am therefore dismissing the motion with costs to the Defendants. The Interim Ex Parte Order dated January 23, 2017, is hereby vacated.

[30] Obviously, the Plaintiffs will be disappointed by this ruling which should cause them to abandon their claim. If that happens, the Plaintiffs might find consolation in considering the likely alternative: that the litigation goes the distance and they lose. In that case, they would face a costs award in favor of the Defendants. In other words, in addition to paying their own lawyer's bill, they would have to make a substantial contribution to that of the Seymours'.

[31] Litigation is very expensive. The successful party is entitled to costs. The Seymours successfully opposed this motion which consumed only one hour and twenty minutes of court time. But the motion also required Counsel to make three separate written submissions, January 23, February 1, February 6. The issues involved were important and possibly determinative. The Plaintiffs shall forthwith pay costs to the Defendants in the amount of $1200.00.

Order accordingly,

Edwards, J.