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COURT OF APPEAL FOR ONTARIO

CARTHY, CHARRON AND SHARPE JJ.A.

BETWEEN:

ESTATE OF DR. SAUL FOX, by its Executrix, IDA FOX, and IDA FOX in her capacity as a beneficiary of the estate of DR. SAUL FOX, and IDA FOX *Plaintiffs (Appellants)*

- and -

GREG STELMASZYK, the dental practice of DR. GREG STELMASZYK and MARY VIGLIONE *Defendants (Respondents)*

J. Gardner Hodder for the appellants
Mervyn D. Abramowitz for the respondents

Heard: May 28, 2003

On appeal from an order of Justice Alexandra Hoy of the Superior Court of Justice dated October 28, 2002, reported at (2002), 27 C.P.C. (5th) 189.

CARTHY J.A.:

[1] The appellants made a written offer to settle prior to trial. The trial proceeded before Rouleau J., who reserved judgment. The parties had further settlement discussions, which ended when the respondents accepted the earlier written offer. Rouleau J. then delivered judgment in favour of the appellants for an amount in excess of the accepted offer. Prior to that judgment, the respondents moved successfully before Hoy J. under rule 49.09 for an order enforcing the settlement. The appeal is against that order. The motions judge recounts the facts in detail as follows:

[2] In a letter dated September 12, 2002, five days before the scheduled trial date, counsel for the Plaintiffs wrote to counsel for the Defendants offering "to settle this matter for the all-inclusive sum of \$55,000." The letter provided that, "If a reasonable overall settlement cannot be achieved, then we will have no choice but to bring a motion at the commencement of trial seeking an adjournment so that proper evidence can be adduced at the trial with respect to damages; we would serve the motion material by close of September 16, 2002." The offer was not accepted and the matter was not settled before the scheduled commencement of trial on September 17, 2002. On September 17, 2002, the Plaintiffs brought a motion to adjourn the trial, which was dismissed. The matter was placed on the standby list, and the trial commenced on September 24 and concluded on Monday, September 30, 2002.

[3] On Sunday September 29, 2002, the parties conducted settlement discussions via telephone. The Defendants made an oral offer for \$40,000, all-inclusive, and the Plaintiffs countered with an oral offer for \$75,000, plus interest and costs. This oral offer was not accepted.

[4] Within an hour and a half of the conclusion of the trial of September 30, 2002, and before the presiding judge had issued his decision, the Defendants faxed a letter to counsel for the Plaintiffs accepting the Plaintiff's \$55,000 all-inclusive offer of September 12.

[2] The appellants conceded that the offer was subject to Rule 49, and that a written notice is required to withdraw an open-ended offer before it is accepted. It was argued that, pursuant to rule 49.04(3), the offer was deemed to be withdrawn when the time for acceptance expired, and that the time for acceptance was specified to expire when the motion for adjournment of the trial was served.

[3] Hoy J. properly rejected that argument, applying a decision of the Divisional Court in *Miller v. Parkway Rental Ltd.* (1997), 12 C.P.C. (4th) 303. In *Miller*, the court dealt with a settlement offer that contained the following statement: "We have been advised that if this settlement proposal is not accepted, then we are prepared to turn this matter over to defence." The Divisional Court concluded that the statement did not constitute an expiry provision, holding, at p. 305, that an effective expiry provision "must be clearly expressed as a time beyond which the offer can no longer be accepted and it must have a specified or ascertainable date."

[4] In the present case, the settlement offer provided that if a reasonable settlement could not be achieved, then a motion to adjourn the trial would be brought, and the motion material would be served by close of September 16, 2002. I agree with Hoy J. that this statement lacks the requisite clarity of an effective expiry provision. It does not state that the offer expires upon service of the motion material. Accordingly, this offer was open for acceptance on September 30. The settlement should be enforced unless a discretion is exercised in favour of the appellants under rule 49.09.

[5] It is in respect of the discretion that I part company with Hoy J. and with statements in *Miller* on the same subject.

[6] In *Miller*, A.G. Campbell J. stated at pp. 307-308:

Assuming on the basis of *Smith v. Robinson* [(1992), 7 O.R. (3d) 550 (Ont. Gen. Div.)] per *Ferrier J.* at p. 557 that the court "in given limited circumstances" retains under Rule 40.09(a) a discretion to refuse to grant judgment on an accepted offer, this is not one of those rare cases.

The defendant made a valid offer under Rule 49 that kept ticking away until it was accepted by the plaintiff. The fact that both parties ignored the ticking offer and tried to settle it on some other basis does not detract from its legal force or the power of the plaintiff to accept it. It would have been the easiest thing in the world for the defendant to specify in the letter of May 22 1991 that it was not a Rule 49 offer. It is for the defendant unfortunate, yet not unfair, to be visited with the ineluctable consequences of its Rule 49 offer.

To hold otherwise would interfere with the integrity of the Rule 49 regime, blur the bright line between offers which comply with Rule 49 and offers which do not, and produce uncertainty by encouraging settlement offers to be judged on the basis of collateral evidence rather than their clear terms.

[7] *Hoy J.* was clearly influenced away from her inclination favouring the appellants in the exercise of her discretion as evidenced by her own words:

[10] If this offer and acceptance were not in the context of Rule 49, and absent the decision in *Miller v. Parkway*, my decision would have been different. While the Defendants did not admit it, I suspect that they were aware that the Plaintiffs thought that the September 12 offer was no longer capable of acceptance when the Defendants accepted it.

[11] The Plaintiffs also asked that if I found that there was a settlement agreement, I exercise my discretion and decline to grant judgment in the terms of the accepted offer. In *Bailey v. Plaxton*, [2001] O.J. No. 1111 *Mesbur J.* outlined the limited circumstances where the Court has exercised its discretion and refused to enforce settlement agreements. This case, which involves an offer made and accepted within an 18-day period, albeit a costly 18-day period, does not in my view fall within those limited circumstances. Exercising my discretion in these circumstances would be tantamount to implying as a term of every settlement offer that it expires on the commencement of trial or other change in circumstances. Implying such a term would be contrary to both Rule 49.04(3) and *Miller v. Parkway Rental Ltd.* Accordingly, judgment is to issue to the Plaintiffs for \$55,000, all-inclusive.

[8] In my view, this was an error in law in that it amounts to a refusal to exercise a discretion by permitting the rules governing offers to settle to narrow or foreclose a departure from enforcement. There is no question that the integrity of the offer to settle process depends upon clarity and certainty in the application of Rule 49. That is why the offer in this case was held not to contain a specified time for acceptance. However, once Rule 49 has been held to apply to an offer and acceptance, the same strictures cannot govern the exercise of a discretion to enforce a settlement. Otherwise clarity and certainty would demand that there be no ambit for discretion.

[9] It should also be noted that the exercise of discretion to enforce a settlement under rule 49.09 is distinct from that under rule 49.10 in awarding costs under one scale or another. Circumstances might justify refusal to enforce a settlement at the instance of the defendant,

while the same or other considerations might justify a refusal to award the higher level of costs for a plaintiff's offer that is lower than the judgment. Neither ambit of discretion is dictated by the need for certainty and clarity in the content of the offer. The offer and acceptance have been tested under that standard, and it remains to assess the surrounding circumstances to decide upon the exercise of the particular discretion.

[10] Following the motion before Hoy J., the trial judge issued reasons granting the appellants judgment in the amount of \$84,675.50 together with pre and post-judgment interest. The record before this court does not indicate that costs have been adjudicated.

[11] In the exercise of discretion I would follow the course hinted at by Hoy J. I conclude that the court should exercise its discretion under rule 49.09(b) and direct that the proceedings should continue as if there had been no accepted offer to settle. My reasoning is that, while the appellants' trial lawyer should have been more careful, he clearly thought the written offer was off the table when he demanded a substantially higher settlement; just as clearly, the respondents' lawyer knew from the amount of the new offer that the appellants' lawyer had made that error. Further, it was unrealistic to conclude that the all inclusive written offer was meant to stand in the face of four days of accumulated trial costs. Respondents' counsel took advantage of appellants' counsel's mistake on the eve of a judicially considered assessment of entitlement. It does not satisfy my sense of justice to enforce the settlement in those circumstances. Equity favours the appellants.

[12] At the opening of trial, the appellants' motion for an adjournment was dismissed with costs fixed at \$2,500.00. Hoy J. absorbed that \$2,500.00 into the settlement that she enforced. Her order is set aside and this revives the \$2,500.00 cost order in favour of the respondents.

[13] There should be no costs of this appeal or of the motion before Hoy J. The appellants through their counsel were at fault in failing to withdraw the offer and should not be rewarded with a costs order. The costs of the action are left to be dealt with by Rouleau J.

[14] The respondents succeeded on the motion by the appellants at the opening of the appeal for leave to withdraw their concession that the September 12 offer was subject to Rule 49. The respondents are entitled to costs of that motion in the amount of \$2,500.00.

Released: June 30, 2003 "JJC"

"J.J. Carthy J.A."

"I agree Louise Charron J.A."

"I agree Robert Sharpe J.A."