CITATION: The Treaty Group Inc. (Leather Treaty) v.
Drake International Inc., 2007 ONCA 450
DATE: 20070625
DOCKET: C44744

COURT OF APPEAL FOR ONTARIO

WEILER, ROSENBERG and SIMMONS JJ.A.

BETWEEN:

THE TREATY GROUP INC. carrying on business as. LEATHER TREATY

(Plaintiff/Respondent,
Appellant by way of cross-appeal)

And

DRAKE INTERNATIONAL INC.

(Defendant/Appellant,
Respondent by way of cross-appeal)

Kimberly T. Morris, for the appellant (respondent by way of cross-appeal)

Susan J. Stamm, for the respondent (appellant by way of cross-appeal)

Heard: April 13, 2007

On appeal from the judgment of Justice Todd Ducharme of the Superior Court of Justice dated December 5, 2005.

WEILER J.A.:

BACKGROUND:

[1] Drake International Inc. (“Drake”), an employment placement agency, appeals the award of damages made against it to Leather Treaty, a manufacturer of leather bracelets, in the amount of $130,975.90.

[2] Drake placed Simpson, an administrative assistant whose tasks were to include bookkeeping, in the employ of the respondent, Leather Treaty, without checking her references. Simpson worked as a trusted employee for Leather Treaty for over two years. After she resigned, Leather Treaty discovered that Simpson had been defrauding it. Leather Treaty went to the police, who laid fraud charges against Simpson. In January 2001, Simpson was convicted. Leather Treaty also sued Simpson and her husband for fraud and obtained a civil judgment against them in February 2001. Simpson was found liable for $261,951.81 and her husband was found liable for one half of that amount.

[3] After obtaining judgment against Simpson and her husband, Leather Treaty sued Drake. The basis of the law suit, which alleged both breach of contract and tort, was that Drake failed to conduct reference checks on Simpson and did not check her background. Over Drake’s objections, the trial judge held that the judgment against Simpson and her husband did not bar Leather Treaty from seeking damages for the same loss from Drake because the causes of action were different. Drake was not being sued for fraud but for different torts, negligent misrepresentation contained in its fee schedule about the calibre of its service, negligence in failing to conduct reference checks, and for breach of contract.

[4] Although the trial judge found Drake liable for Leather Treaty’s loss, he held that Leather Treaty contributed to its own losses in that its failure to supervise Simpson facilitated the fraud. The trial judge reduced the damages by 50 per cent. While contributory negligence does not ordinarily reduce damages for breach of contract, the trial judge was of the opinion that the result should be the same whether Leather Treaty recovered in contract or tort. Consequently, he also apportioned the damages for breach of contract.

[5] With respect to the quantum of damages, the trial judge held that Drake was not liable for costs, such as the hiring of a forensic accountant, or for lost profits due to the time required to pursue civil remedies against Simpson.

[6] In the result, the trial judge awarded Leather Treaty damages of $131,662 or one half of the amount of which it was defrauded.

[7] Following the release of the trial judge’s judgment, counsel had a disagreement over its meaning and effect. Drake raised the issue of double recovery by Leather Treaty and sought clarification of the judgment from the trial judge. The positions of the parties are set out below:

a) Leather Treaty's position was that double recovery could be avoided by an undertaking by Leather Treaty not to enforce the portion of the judgment collected from Drake as against the Simpsons. This could be done by advising the Sheriff of satisfaction of that amount from other sources and directing the Sheriff not to enforce to that extent. This would enable Leather Treaty to continue to enforce the remainder of its principal and significant amounts of post-judgment interest as entitled under the Simpson judgment.

b) Drake's position was that the amounts already recovered by Leather Treaty ought to be subtracted from the judgment as against Drake. Its counsel wrote as follows: "The loss suffered by Leather Treaty was $261,951.81. Your Honour's finding was that Leather Treaty was 50 per cent responsible for this loss – $130,975.90. Permitting Leather Treaty to deduct the amount of the judgment awarded against Drake from the sums due and owing in the Simpson judgment would result in double recovery given the finding of contributory fault. Drake further submits that the sums collected to date by Leather Treaty from the Simpsons must first be applied to the damages portion of that judgment and not on account of aggravated damages or prejudgment interest."

[8] The trial judge responded as follows:

> Leather Treaty's position with respect to the undertaking is the correct one. The monies collected from the Simpsons are not to be deducted from the amount owed by Drake – this does not result in double recovery.

[9] The judgment incorporates the undertaking given as follows:

2. THIS COURT ORDERS AND ADJUDGES THAT in accordance with Leather Treaty's undertaking, the monies already collected and to be collected by Leather Treaty from Beverly and Robert Simpson in connection with court proceedings in Court File Number 98-CV-15760CM, are not to be deducted from the amount set out in paragraph 1 above.

ISSUES

[10] Drake appeals and raises 3 issues:

1. Did the trial judge err in finding that Leather Treaty could claim against Drake notwithstanding the judgment against Simpson?

2. Did the trial judge err in his finding on causation?

3. Did the trial judge err in his apportionment of damages to Drake?

[11] Leather Treaty cross-appeals the trial judge's finding that it was responsible for 50 per cent of its damages and submits that its contributory negligence should be capped at 25 per cent.

DECISION

[12] The trial judge gave very comprehensive reasons which are reported at (2005), 36 C.C.L.T. (3d) 265, 15 B.L.R. (4th) 83. He dealt with all of the issues raised on this appeal and the related jurisprudence in a very thorough manner. Inasmuch as I agree with his decision and the reasons he gave, I propose to deal with the issues raised on this appeal in a summary fashion.

1. Whether Leather Treaty was entitled to sue Drake notwithstanding its judgment against Simpson

[13] The trial judge found Drake and Simpson severally rather than jointly liable on the basis that Drake and the Simpsons were not acting in concert or in furtherance of a common purpose. In concluding that, subject to the rule barring double recovery, where a plaintiff elects to pursue a claim against one of severally liable defendants, there is no legal principle that holds that a plaintiff is precluded from pursuing a second action, the trial judge correctly relied on *Olsen v. Poirier et al.* (1978), 21 O.R. (2d) 642 at 650 (H.C.), aff'd (1980) 28 O.R. (2d) 744 (C.A.) and distinguished *Cuttell v. Bentz* (1985), 65 B.C.L.R. 273 (C.A.). It is not the *damage award* that amounts to satisfaction and bars a second action but the *recovery* by the plaintiff in the first action.

[14] Other jurisprudence relied on by Drake, such as *Westar Aluminum & Glass Ltd. v. Brenner* (1993), 17 C.P.C. (3d) 228 (Ont. Ct. Gen. Div.), relates only to the issue of suing alternatively liable parties on one contract or cause of action. Here, there were separate contracts between Leather Treaty and Drake and between Leather Treaty and the Simpsons.

[15] The trial judge correctly held that on the facts of this case there was no bar to Leather Treaty commencing an action, unless it had actually received the full amount of the loss, which it had not.

[16] I would also note that Drake suffered no prejudice by virtue of the fact that separate proceedings were taken. Drake is still entitled to claim over against the Simpsons for any amounts that it pays. The trial judge dealt with the duplication of court time and effort that resulted from Leather Treaty's decision not to sue all the parties at the same time by declining to award costs to Leather Treaty in separate reasons reported at (2006), 268 D.L.R. (4th) 756.

[17] In oral argument before us, Drake also sought to rely on a decision involving cause of action estoppel. However, cause of action estoppel was not pleaded, nor does the appellant meet the requirements for cause of action estoppel. The same causes of action are not raised, nor is there privity between the parties.

[18] Drake submits that because the result of the two actions is to give judgments to Leather Treaty for a total amount that is greater than 100 per cent of the damages, and this could not have happened had there been one action, Drake should not bear any liability or there will be the prospect of double recovery.

An analogous argument was made in *Tucker (Guardian ad Litem of) v. Asleson* (1993), 102 D.L.R. (4th) 518 (B.C.C.A.), in which the plaintiff sued the tortfeasor and the Crown, who were described as several concurrent tortfeasors. The Plaintiff then settled with the tortfeasor for one-third of the damages. The Crown took the position that by its settlement the plaintiff could only claim two-thirds of the damages against the Crown because the plaintiff had been paid in full for one-third of the loss. Southin J.A. rejected this argument. At p. 576 she held that each of several concurrent tortfeasors was liable for the whole of the loss, and that that right was independent of whether the injured person sued both tortfeasors in one action or a separate action. The tortfeasor who had settled was entitled to maintain an action for contribution from the other tortfeasor. Liability had not been apportioned in the first action because it was not necessary. In the action as between tortfeasors apportionment was necessary if the tortfeasor who had settled was to recover for amounts paid in excess of its liability.

[19] My conclusion in this regard is also consistent with the Ontario Law Reform Commission's conclusion in its *Report on Contribution Among Wrongdoers and Contributory Negligence* (Toronto: Ontario Ministry of the Attorney General, 1988) at 137-138:

> P's right to recover in full from D1 should never be prejudiced by the fact that there is another wrongdoer (D2) liable to P, even if P's contributory negligence vis-a-vis that person has reduced the amount that P can claim from D2. Nor should D2 be required to contribute a greater amount than that for which she was liable to P: any payments made by D1 to P that exceed this sum confer no benefit upon D2. Subject to this limitation, it is recommended that P's loss should be distributed between D1 and D2 without regard to the fact that D2 is liable to P for a lesser sum than D1.

[20] Drake submits that this second action is an abuse of process and that it is unfair for it to now be subject to paying the entire 50 per cent of the judgment for which it was

found liable because Simpson is insolvent. The short answer to this submission is that insolvency is not relevant to the allocation of fault. See *Renaissance Leisure Group Inc., c.o.b. Muskoka Sands Inn et al. v. Frazer* (2004), 242 D.L.R. (4th) 229 at para. 52 (Ont. C.A.). The action is not an abuse of process.

[21] Although it cites no authority in support of its submission, Drake claims that it is "unfair" for it to have to pay the full 50 per cent of the damages for which it was found liable. It submits that the amounts that Simpson has paid should be deducted from the total amount of damages awarded and that it should then have to pay 50 per cent of the remaining amount. This argument again confuses liability with recovery and I would not give effect to it. Drake is liable to Leather Treaty for the full 50 per cent of the damages and can claim over against Simpson for contribution and indemnity.

[22] The general rule respecting the date for the assessment of damages is also contrary to Drake's position. Almost invariably, the plaintiff is entitled to have his or her damages assessed at the date of the breach, not the date that judgment is obtained. A common example occurs where the value of the property of which the plaintiff has been deprived declines in value between the date of the wrong and the date of judgment. In this circumstance, the plaintiff is nevertheless entitled to damages at the date of the defendant's wrong. The same is generally true when the value of the property increases between the date of the wrong and the date of judgment. See S.M. Waddams, *The Law of Damages*, looseleaf (Aurora: Canada Law Book, 1991) at 1-28 – 1-30.

[23] In the case of breach of contract, the theory is that damages "crystallize" at the date of the breach. Waddams discusses two policy reasons for this approach. The first is that if the damage assessment is postponed to the date of judgment, one party will then have an incentive to delay the conduct of the action. The second is that the party committing the wrong should not, as a general rule, obtain the benefit of changes in value. This policy choice recognizes that in some cases the plaintiff may be overcompensated in the sense that the plaintiff may be made more than whole for the loss.

[24] In this case, the trial judge avoided the unfairness of overcompensation by making the order that he did. The trial judge correctly addressed the issue of double recovery by way of the undertaking that was given.

2. Did the trial judge err in his finding on causation?

[25] Drake submits that the trial judge made a palpable and overriding error when he found that Leather Treaty would not have hired Simpson if it had received the background information about her. Drake's position is that there was no evidence on this point before the trial judge and the evidence was that "fit" was the most important hiring criterion. Drake argues that Leather Treaty would have hired Simpson regardless of the

information Drake provided and, as a result, there is no causal connection between the loss and Drake's failure to perform reference checks.

[26] Leather Treaty did not only care about "fit". The evidence clearly indicates it wanted a competent employee. The reference in question that was not provided was extremely negative. The trial judge's inference that Leather Treaty would not have hired Simpson if it had been given this reference was a proper one. The trial judge committed no palpable and overriding error in finding that Drake's failure to check references before placing Simpson in Leather Treaty's employ caused or contributed to Leather Treaty's loss.

3. Did the trial judge err in his apportionment of Damages to Drake?

[27] The appellant submits that the trial judge's actual apportionment erred in attributing 50 per cent responsibility to Drake because 85 per cent ($225,109.02) of the loss could have been prevented if appropriate controls were in place.

[28] The appellant's argument is tantamount to the "last clear chance doctrine", where liability is apportioned to a much greater degree to the party who had the last opportunity to avoid the loss. This was rejected on two bases in *Snushall v. Fulsang* (2005), 78 O.R. (3d) 142 at para. 30 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 519. The first was that this approach looks only to the consequences of the plaintiff's conduct rather than the entirety of both parties' tortious acts. The second is that it fails to address tort law's primary objective of restoring the plaintiff to the position it would have enjoyed but for the negligence of the defendant. While the decision in *Snushall*, *supra*, relates to a motor vehicle accident in which the passenger failed to wear a seatbelt, the principles on which it is based are of general applicability. The more weight that is attached to Leather Treaty's contributory negligence, the more the assessment of Drake's negligence, which includes its moral and legal blameworthiness, is reduced.

[29] Finally, Drake's submission overlooks the very high standard of deference that is owed to a trial judge's apportionment of liability. A jury award assessing the degree of contributory negligence is to be approached in the same way as a jury verdict respecting damages generally. See *Snushall v. Fulsang*, *supra*, at paras. 19-22 (C.A.**).** The same level of deference is accorded when these determinations are made by a trial judge.

[30] Appellate courts will not interfere unless the verdict is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have arrived at that conclusion: *McCannell v. McLean*, [1937] S.C.R. 341; *Olmstead v. Vancouver-Fraser Park District*, [1975] 2 S.C.R. 831; *Ferenczy v. MCI Medical Clinics* (2005), 198 O.A.C. 254 (C.A.); *Snushall v. Fulsang*, *supra*. Drake has not satisfied me that that onus has been met here.

[31] Accordingly, for the reasons given I would dismiss the appeal.

Cross-Appeal

1. Did the trial judge err in his finding of contributory negligence?

[32] Leather Treaty submits that the trial judge's findings do not take into account the very different character of Drake's fault as compared to Leather Treaty's. Drake knew that it was sending Simpson into a start-up company that did not appear to be properly organized. These facts suggest that Drake's breach was the more serious of the two. Contributory negligence should be capped at 25 per cent because this case is analogous to *Snushall* in that the negligence of Leather Treaty has absolutely no connection to the fact of Drake's negligence.

[33] Again, I would hold that the high standard for revision of the trial judge's finding and apportionment has not been met. *Snushall* was a seatbelt defence case, which is a specialized area of law in which the range set for contributory negligence is now well-established. That is not the situation here. The trial judge here considered a number of decisions that determined contributory fault for negligent financial oversight, with a range of apportionment from 15 per cent to 50 per cent. I see no basis on which to interfere with his apportionment.

[34] I would dismiss the cross-appeal.

DISPOSITION

[35] For the reasons given I would dismiss both the appeal and the cross-appeal.

[36] The parties may make submissions as to costs. Counsel for Leather Treaty shall deliver a bill of costs together with any submissions, in writing, in support of any requested order for costs within seven (7) days of the release of the decision. Counsel for Drake may deliver a response, in writing, within fourteen (14) days of the release of the decision. Counsel for Leather Treaty may deliver a brief reply within seventeen (17) days of the release of the decision. The submissions of the parties should be delivered to the attention of the Senior Legal Officer of the court.

RELEASED: June 25, 2007 ("KMW")

"Karen M. Weiler J.A."
"I agree M. Rosenberg J.A."
"I agree Janet Simmons J.A."