SUPREME COURT OF YUKON

Citation: *Calandra* v. *Henley, et al.,* 2008 YKSC 82

Date: 20081028
S.C. No. 07-A0159
Registry: Whitehorse

Between:

FRANCESCO CALANDRA and YVONNE FRADSHAM

Plaintiffs

And

WINSTON HENLEY, AIR RIDE MOBILE MOVING, and CATHY REHN

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Francesco Calandra	Counsel for himself and Yvonne Fradsham
James R. Tucker	Counsel for Henley and Air Ride
	No one representing Cathy Rehn

REASONS FOR JUDGMENT

INTRODUCTION

[1] There is an old saying that a lawyer who represents himself has a fool for a client. There is no doubt that Mr. Calandra is a well-schooled lawyer and could give himself legal advice. However, he was unable to be objective; one of the most important assets that a lawyer has to offer a client.

[2] This case is about a trailer that is on property purchased by Mr. Calandra.

THE FACTS

[3] It is fair to say that the real dispute in this matter is between Mr. Calandra and Mr. Henley. Yvonne Fradsham and Cathy Rehn had no interest in being part of the court action. To that extent, Ms. Fradsham and Ms. Rehn provided the most objective evidence, although all the parties were relatively forthright in their testimony.

[4] Ms. Fradsham owned an acreage south of Whitehorse (the "property"). She rented a portion of her property to Ms. Rehn, who owned a trailer. The trailer had a porch or "breeze way" and a large addition that Ms. Rehn had purchased from Ms. Fradsham and moved to the trailer location. Ms. Rehn paid a monthly rent of $300 until May 2006. In 2006 - 2007, Ms. Rehn moved to Whitehorse, leaving her husband to pay the rent. When her husband passed away, she wished to sell the trailer. Ms. Fradsham advised by way of a lawyer's letter that Ms. Rehn's husband was in arrears of rent in the sum of $4,500 as of July 31, 2007. Ms. Rehn did not feel she had any obligation to pay the arrears of rent. Ms. Fradsham, who was more interested in selling her property and leaving the Yukon, did not press the point.

[5] Ms. Rehn had purchased the trailer for $2,510 years before but believed the trailer to be worth $20,000 in 2007. Mr. Henley, who was in the business of buying and moving trailers, had advised her in the previous year that it would cost $10,000 to move the trailer into Whitehorse.

[6] In 2007, Ms. Rehn had discussions with Mr. Henley about his purchasing the trailer and addition. They agreed on a price of $5,000 on the understanding that Mr. Henley would incur a cost of $10,000 moving it off Ms. Fradsham's land and $5,000

cleaning up the property which had a collection of old cars and debris around the trailer and addition.

[7] Ms. Rehn also told Mr. Henley about the arrears of rent owed to Ms. Fradsham and said that he would have to discuss that with Ms. Fradsham.

[8] Mr. Henley met Ms. Fradsham in early October 2007. He asked if he could have two to three weeks to move the trailer and addition. He was aware of the rental arrears but he did not offer to pay and she did not claim the arrears of rent from him. Ms. Fradsham wanted to sell the property and was anxious to have the trailer and addition removed and the area cleaned up.

[9] Mr. Henley learned that he would not be able to move the trailer before winter as he had planned. He had a further discussion with Ms. Fradsham and she agreed that he would have until June 15, 2008, to remove the trailer and addition. This agreement was reduced to writing and signed by Mr. Henley and Ms. Fradsham on October 12, 2007. It said:

> This is concerning the double wide trailer belonging to Kathy Rains (sic) situated on the property owned by Yvonne Fradsham on the Alaska Hiway (sic) south of the Carcross Rd.
>
> I, Winston Henley of Air Ride Mobile Moving, am purchasing the double wide from Kathy Rains and wish to be granted until June 15th , 2008 to remove said trailer from property of Yvonne Fradsham.
>
> At no cost to Air Ride Mobile Moving for land use or land rental until June 15th, 2008.
>
> Thank you,

[10] Although the wording of the October 12, 2007 letter did not specifically indicate Ms. Fradsham's approval, I find as a fact that Mr. Henley and Ms. Fradsham knew

exactly what it meant; Ms. Fradsham agreed that Mr. Henley had until June 15, 2008, to remove the trailer and addition from her property and to clean up the site. He wanted to buy the trailer but could not do so without her agreement that he had until June 15, 2008 to remove it. She wanted the trailer removed so that she could sell her property.

[11] On October 15, 2007, Mr. Henley and Ms. Rehn signed a Bill of Sale transferring the trailer and addition to Mr. Henley for $5,000.

[12] At this point, Ms. Fradsham was actively engaged in selling the property. When Mr. Calandra viewed the property, she advised him that the trailer and addition had been purchased by Mr. Henley and that they would be removed and the site cleaned up. Ms. Fradsham signed a purchase and sale agreement with Mr. Calandra on October 17, 2007. There were no conditions in the purchase and sale agreement about the trailer and addition. Mr. Calandra closed the purchase on December 24, 2007. Mr. Calandra now represents Ms. Fradsham as legal counsel in this case and obviously makes no claim against her.

[13] Before closing his purchase of the property, Mr. Calandra called Mr. Henley. Mr. Calandra was advised by Mr. Henley that he had been given until June 15, 2008, to remove the trailer. Mr. Calandra offered to purchase the trailer for $5,000 plus an additional $1,000 for his troubles. Mr. Henley did not accept the offer.

[14] On January 7, 2008, Mr. Calandra wrote a letter to Mr. Henley on the letterhead of Mr. Calandra's Toronto law firm. In the letter, Mr. Calandra demanded that a metal chain that Mr. Henley placed across the access road to the trailer be removed immediately. Mr. Henley had apparently placed the chain so that there would be no damage done to the trailer. Mr. Henley removed it shortly after Mr. Calandra's request.

The chaining of the property was not a major issue as there was another access road into the property.

[15] The letter continued as follows:

> I understand that you purchased a trailer from the previous owner for $5,000.00, and she had agreed to allow you to keep it on the property until June 2008. Unfortunately, you had such agreement with the previous owner and I will need you to remove the trailer from my property on or before **January 15, 2008**. In the alternative, if you wish to keep the trailer on my property until June 2008, I will require you to pay a rental fee of $2,500.00 per month effective immediately. Also, I will need you to provide me with post-dated cheques to June 2008, which are to be payable to **F.A. CALANDRA,** each in the amount of $2,500.00, and payable on the first of each month.
>
> As indicated to you in our telephone conversation two months ago, if you are interested in selling the trailer, I would be willing to purchase it from you for $5,000.00.

[16] Mr. Henley had advised Mr. Calandra that he had an agreement in writing with Ms. Fradsham but he had not produced it.

[17] Mr. Calandra and Mr. Henley had a further telephone conversation in which Mr. Henley said he would sell the trailer for $50,000. Mr. Calandra, by his own admission, blew up at this point and sent a letter dated January 25, 2008, to confirm the following telephone conversation:

1. You acknowledged receipt of my letter dated January 7, 2008 and do not wish to pay the monthly rent I requested therein.

2. You have refused my offer to purchase the trailer for $5000, which is the amount you paid, and have told me that you want $50,000.

3. You have told me that you have a lawyer, though you refuse to provide me with a name or telephone number of such lawyer.

4. You have chained off access to approximately 30 acres of my property without my authorization or consent and that chain was only removed some time after I called you on January 23, 2008, though you did not remove it after receiving my letter of January 7, 2008.

5. I have now put a chain on my property and posted a DO NOT TRESPASS sign.

6. You have been informed that you are not to trespass and that you will be dealt with according to law should you do so.

7. I have taken pictures and have witnesses and evidence to be put before a court with respect to all of the above.

    a. I am no longer interested in purchasing the trailer on the land and I am hereby asserting a lien in the amount of $100 per day effective December 24, 2008 as against the trailer for storage costs. To date you owe me $3000 and that amount is increasing at the rate of $100 per day.

    b. I will be commencing legal action as against you for failure to pay rent/storage and will be taking possession of the trailer in lieu of rent. I will seek a court order to that effect in my claim against you. Effective immediately, I consider the trailer as being abandoned on my land. As I told you two (sic) over two months ago, any agreement with the previous owner with respect to allowing you until June of 2008 to move the trailer does not bind me and you will need to take up that issue with her.

    c. In order to remove the trailer from my property I will require payment of all storage costs and a security deposit of $10,000 which will be returned to you provided no damage is done to my property and all debris is cleaned from the site. Then I will make arrangements to let you on the property. You must contact me in writing with respect thereto.

[18] From this point on, the matter has been pursued in court and Mr. Henley has not been permitted to remove the trailer and addition; either before or after June 15, 2008.

In fact, Mr. Calandra has taken possession of the trailer and is now renting it to an employee.

ISSUES

[19] The issues are as follows:

1. Is the trailer sale from Ms. Rehn to Mr. Henley a fraudulent conveyance?
2. Is the letter of October 12, 2007, between Ms. Fradsham and Mr. Henley a lease and therefore binding upon Mr. Calandra?
3. Should Mr. Henley be permitted to remove the trailer and addition, and if so, under what terms and conditions?
4. Should Mr. Henley have special costs against Mr. Calandra?

ANALYSIS

Issue 1: Is the trailer sale from Ms. Rehn to Mr. Henley a fraudulent conveyance?

[20] There are two applicable provisions of the *Fraudulent Preferences and Conveyances Act*, R.S.Y. 2002, c. 95:

> Transfers injurious to creditors void
>
> **2** Subject to sections 7, 8, 9, and 10 every gift, conveyance, assignment or transfer, delivery over, or payment of goods, chattels, or effects or of bills, bonds, notes, or securities or of shares, dividends, premiums, or bonus in a bank, company, or corporation, or of any other property real or personal, made by a person at a time when they are in insolvent circumstances or is unable to pay their debts in full or know that they are on the eve of insolvency, with intent to defeat, hinder, delay, or prejudice their creditors or any one or more of them, is void as against the creditor or creditors injured, delayed, or prejudiced.
>
> …

> *Bona fide* transfers protected
>
> **7** Nothing in sections 2, 3, 4, 5, and 6 applies to a *bona fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, nor to a payment of money to a creditor, nor to a *bona fide* conveyance, assignment, transfer, or delivery over of any goods, securities, or property of any kind as above mentioned that is made in consideration of a present actual *bona fide* payment in money or by way of security for a present actual *bona fide* advance of money, or that is made in consideration of a present actual *bona fide* sale or delivery of goods or other property, provided that the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefore.

[21] I have concluded that the sale of the trailer is not a fraudulent conveyance. The claim is put forward by Mr. Calandra and is not pursued in any way by Ms. Fradsham, who is the apparent creditor of Ms. Rehn. Further, there is no evidence of insolvency or inability of Ms. Rehn to pay her debts, nor is there any evidence that she intended to defraud any creditor. She did not consider Ms. Fradsham to be her creditor and Ms. Fradsham was not pressing the issue with either Ms. Rehn or Mr. Henley.

[22] Even if it were a fraudulent conveyance, Mr. Henley is a *bona fide* purchaser.

Issue: 2: Is the letter of October 12, 2007, between Ms. Fradsham and Mr. Henley a lease and therefore binding upon Mr. Calandra?

[23] The law on this issue can be found in the case of *Pitt Air Ltd*. v. *Pitt Meadows Airport Society*, 2006 BCSC 1230, at para. 26, where Gropper J. quotes the following from Williams & Rhodes in *The Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988 – present) [looseleaf], at p. 3-4 as follows:

> To be valid an agreement for lease must show the parties, a description of the premises to be demised, the commencement and duration of the term, the rent, if any, and all material terms of the contract not incident to the

> relation of landlord and tenant, including any covenants or conditions, exceptions or reservations.

[24] In my view, the October 12, 2007 agreement and the evidence of the parties to the agreement confirms that Ms. Fradsham and Mr. Henley agreed that the trailer could remain on her property at no rental cost until June 15, 2008. It constitutes a valid lease between Ms. Fradsham and Mr. Henley, and they were clear that it applied to Ms. Rehn's trailer and addition which were on Ms. Fradsham's property. The consideration was that Mr. Henley would purchase, remove the trailer and clean up the property, which was a benefit to Ms. Fradsham in selling the property.

[25] By virtue of s. 67(d) of the *Land Titles Act*, R.S.Y. 2002, c. 130, the October 12, 2007 lease is binding upon Mr. Calandra. Section 67(d) states as follows:

> 67 The title to the land mentioned in any certificate of title granted under this Act is, by implication, and without any special mention in the certificate, unless the contrary is expressly declared, subject to
>
> …
>
> (d) any subsisting lease or agreement for a lease for a period not exceeding three years, if there is actual occupation of the land under the lease or agreement;

Issue 3: Should Mr. Henley be permitted to remove the trailer and addition, and if so, under what terms and conditions?

[26] The question of removing the trailer and addition is somewhat complex in that the conditions of leaving the rented area were never really addressed by Ms. Fradsham and Mr. Henley. From Mr. Henley's point of view, his obligation is to remove the buildings and restore the area they sat on.

[27] Mr. Calandra submits that the entire area is quite a mess, and if he is bound by the lease, Mr. Henley should be required to meet the obligation of a tenant under s. 76(2)(f) of the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131:

> 76(2)(f) to maintain the premises and any property rented with it in a reasonably clean condition;

[28] There was no evidence that the trailer and addition were not maintained, and in fact Mr. Calandra has converted them to his own use. However, there was little evidence to establish the extent and substance of the cleanup required, but I find that it is reasonable in these circumstances for Mr. Henley to level the ground after removing the buildings, remove any fuel lines, tanks and electronic wires and to clean up the cars and debris within a 100-foot radius of the trailer and addition.

[29] As both parties are concerned about the execution of this obligation, I order that it be overseen by an independent engineer from EBA Engineering who will be retained to do the following:

1. inspect the property on which the trailer and addition sit and the 100-foot radius with both Mr. Calandra and Mr. Henley present;
2. prepare a brief letter report outlining the proposed clean up with photographs and meet with me, Mr. Henley and Mr. Calandra in chambers to present his proposal;
3. upon completion of the removal of the trailer and addition and the cleanup to file a letter report to the Court and the parties confirming the completion or lack of completion;

[30] Upon receiving the report and hearing submissions, I will order the conditions of the cleanup.

[31] Since Mr. Calandra is insisting on cleanup conditions exceeding any obligation of Mr. Henley when Mr. Henley agreed to purchase the trailer and addition, Mr. Calandra shall retain and pay for the engineering services.

[32] I give leave to Mr. Calandra to further litigate any deficiencies in the cleanup and for Mr. Henley to claim occupation rent and damages or loss of profit he may have suffered as a result of being prevented from removing the trailer and addition on or before June 15, 2008, and for the delay between June 15, 2008, and June 15, 2009. The latter date of June 15, 2009, is the date at which I order Mr. Henley to have the trailer and addition removed and the property cleaned up.

Issue 4: Should Mr. Henley have special costs against Mr. Calandra?

[33] Counsel for Mr. Henley is seeking special costs in this matter. I have concluded that Mr. Henley has had substantial success in this action as Mr. Calandra effectively prevented Mr. Henley from living up to the terms of the lease agreement dated October 12, 2007.

[34] Special costs are the legal fees and disbursements that a lawyer renders their own client. I have previously set out the law on assessing special costs in the case of *Brosseuk* v. *Aurora Mines Inc.*, 2008 YKSC 18, particularly as to pre-litigation conduct, which here refers to the conduct of Mr. Calandra prior to his filing of the writ of summons in March 2008. The essence of special costs is that they are only appropriate when the conduct, either pre-litigation or during litigation, is “reprehensible” and warrants rebuke.

[35] In my view, the pre-litigation conduct of Mr. Calandra is reprehensible and warrants rebuke for the following reasons:

1. This court action is between Mr. Calandra and Mr. Henley. The inclusion of Ms. Fradsham and Ms. Rehn was instigated by Mr. Calandra. The evidence of Ms. Fradsham and Ms. Rehn confirmed that neither of them had any interest in pursuing the claims put forward by Mr. Calandra. They had long since moved on from the arrangements made in 2007. Their inclusion in the court action added to the cost and complexity of the court action.

2. Mr. Calandra's letters of January 7, 2008, and January 25, 2008, are highhanded and reprehensible given that he had full knowledge of the terms of the October 12, 2007 agreement between Mr. Henley and Ms. Fradsham. He acknowledged that he ultimately received a written copy from Mr. Henley's lawyer but he certainly knew the terms in November 2007 and had every opportunity to confirm them with Ms. Fradsham. He should have known that he was bound by those arrangements. If he had any claim, it would be against his purported client, Ms. Fradsham, and not Mr. Henley.

3. The actions of Mr. Calandra and his letters were motivated entirely by his desire to deny Mr. Henley of his ownership of the trailer and addition and his right to remove them pursuant to his lease until June 15, 2008.

[36] I want to be very clear that Mr. Calandra was professional and courteous in his court appearances before me. I have no concern about his conduct in court. However, as previously stated, his conduct towards Mr. Henley was outrageous and quite frankly would cause any citizen to think twice about asserting their rightful ownership of the

trailer and addition. The message to Mr. Henley could be none other than “transfer the trailer to me or you will get nothing without an expensive court fight.”

[37] I conclude that it is just and appropriate that Mr. Henley have special costs in the full amount of his lawyer’s fees and disbursements against Mr. Calandra including all pre-litigation advice.

[38] Gower J. had previously ordered costs thrown away to Mr. Calandra against Mr. Henley relating to a separate action commenced by Mr. Henley. I have reviewed Mr. Calandra’s bill of costs and heard submissions. I assess these costs in the lump sum of $1,000 to be set off against the special costs awarded to Mr. Henley.

[39] Counsel may speak to the Trial Coordinator to set a date for any matters arising.

SUMMARY

[40] I order the following:

1. The sale of the trailer and addition dated October 15, 2007, to Mr. Henley is valid and not a fraudulent conveyance;
2. The letter dated October 12, 2007, between Mr. Henley and Ms. Fradsham is a valid lease and binding upon Mr. Calandra;
3. Mr. Henley has until June 15, 2009, to remove the trailer and addition and perform the clean-up costs to be ordered;
4. Mr. Calandra shall retain an engineer from EBA Engineering Services to perform the following services:
    a) inspect the property on which the trailer and addition sit and the 100-foot radius with both Mr. Calandra and Mr. Henley present;

b) prepare a brief letter report outlining the proposed clean up with photographs and meet with me, Mr. Henley and Mr. Calandra in chambers to present his proposal;

c) upon completion of the removal of the trailer and addition and the cleanup to file a letter report to the Court and the parties confirming the completion or lack of completion;

5. Mr. Calandra has the further right to claim for any deficiencies in the removal of the trailer and addition including cleanup deficiencies;

6. Mr. Henley has the right to claim damages or loss of profit from being deprived of his right to the trailer and addition from January 25, 2008, to June 15, 2009.

7. Mr. Henley shall have special costs against Mr. Calandra for legal fees and disbursements incurred including pre-litigation services.

VEALE J.