SUPREME COURT OF YUKON

Citation: *Janz v Whitehorse Wholesale Auto Centre Ltd.*, 2016 YKSC 27

Date: 20160621
S.C. No. 16-A0005
Registry: Whitehorse

Between:

MELODY TAMMY SIERRA JANZ

Plaintiff

And

WHITEHORSE WHOLESALE AUTO CENTRE LTD. and EDWIN WOLOSHYN

Defendants

Before Mr. Justice L. F. Gower

Appearances:

Melody Tammy Sierra Janz	Appearing on her own behalf
Edwin Woloshyn	Appearing on his own behalf and on behalf of Whitehorse Wholesale Auto Centre Ltd.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a dispute about whether two lease/purchase agreements regarding two Ford F350 trucks, entered into in May and August 2014 (the "lease agreements"), were subsequently varied by a conversation between the parties in April 2015. The purchaser is the plaintiff, Melody Janz ("Janz"), and the vendor is the defendant, Whitehorse Wholesale Auto Centre Ltd. ("Whitehorse Wholesale"). The second defendant is Edwin

Woloshyn ("Woloshyn"), who is the owner and sole director of Whitehorse Wholesale. All parties are self-represented.

[2] There is no dispute that Janz failed to make numerous payments under each of the lease agreements. However, she says that the conversation in April 2015 resulted in a further agreement between the parties, whereby Whitehorse Wholesale waived the necessity for Janz to make payments until either she returned to work or received settlement money from a personal injury lawsuit, whichever occurred first. I will refer to this as the contract variation issue. Woloshyn disputes making any such agreement or variation. Accordingly, because of Janz's defaults under the lease agreements, he seized one of the trucks on March 19, 2016 and the second on April 19, 2016.

[3] Janz filed a statement of claim seeking an order for the return of the trucks, as well as an interim injunction preventing their resale by Whitehorse Wholesale. On April 19, 2016, I made an order setting this matter down for trial. At that time I also granted an interim injunction preventing Whitehorse Wholesale from selling either truck until a further order of this Court following the trial.

[4] The trial took place on June 8, 2016 and effectively proceeded as a summary trial. I ordered that the respective affidavits filed by the parties before trial be made exhibits. Janz also testified, along with two additional witnesses for the plaintiff. Woloshyn was the only witness for the defendants.

[5] By the time of trial, Whitehorse Wholesale had filed a counterclaim for the unpaid lease payments, plus interest and other seizure related costs. Janz has filed a statement of defence to that counterclaim. However, at the trial on June 8, I indicated that I would have to decide the contract variation issue first, because it would only be if I

decide in favour of Whitehorse Wholesale on the point that the counterclaim would become relevant.[1]

FACTS

[6] Based upon the testimony of the parties and Janz's husband, Darren Lehune ("Lehune"), as well as the two affidavits from Janz, Woloshyn's affidavit, Lehune's affidavit, and the exhibits filed at the trial, I make the following findings of fact.

[7] On December 19, 2013, Janz had a slip and fall injury and broke her left foot. She retained legal counsel, Debra Fendick, to pursue a personal injury lawsuit against the owner or occupier of the property where the injury occurred.

[8] On May 8, 2014, Janz entered into a lease agreement with Whitehorse Wholesale for a black 2014 Ford F350. After trading in her 2012 Jeep for $29,000, Janz agreed to pay a further $55,776 for the truck by making monthly payments of $664 over 84 months. Woloshyn was aware of Janz's foot injury, the lawsuit and the fact that she was not working at the time.

[9] In June 2014, Janz received a letter from her doctor, Dr. Ikeji, that she was fit to return to her regular work as a class one truck driver.

[10] On August 29, 2014, Janz entered into a second lease agreement with Whitehorse Wholesale for a red 2015 Ford F350 with dual rear wheels. After making a $5,000 down payment, Janz agreed to pay a further $82,398.96, by making monthly payments of $980.94 over 84 months. She also agreed to pay $0.20 per kilometre for each kilometre in excess of 140,000 km over the term of the lease. Woloshyn was aware that Janz was still unemployed at that time.

[1] Janz also attempted to file her own counterclaim to the counterclaim of the defendants, however I ruled that this was improper as being contrary to the *Rules of Court* and that I would not consider it.

[11] On November 13, 2014, Janz returned to work as a class one truck driver with Procision Trucking and Mining in Fort Nelson, British Columbia, hauling gasoline from the Fort Nelson area to a gas plant near Fort St. John, British Columbia. She continued with that employment until January 10, 2015, when she was laid off due to a shortage of work. Procision failed to pay her for the period from January 2-10, 2015.

[12] Janz informed Woloshyn of this issue. Woloshyn responded with words to the effect of "Okay, get me what you can. Don't worry, something will work out". Woloshyn also inquired about the status of the lawsuit and how it was coming along. Janz informed him that she was waiting to see her doctor to see if a specialist was needed, and that her lawyer would not have any new information on the lawsuit until such time as the medical issue was resolved.

[13] For the 2014 Ford, Janz made four consecutive payments of $665 per month from June up to and including September 2014. She then missed two consecutive payments due in October and November 2014. Janz next made a payment of $665 in December 2014, but missed every consecutive month following until making another payment in November 2015. She then failed to make any further payments up to and including the date of trial.

[14] For the 2015 Ford, Janz made a payment of $985 in September 2014. She then missed her payments due in October and November, until making another payment of $985 in December 2014. Once again, Janz missed her payments due for January, February and March 2015, until making a payment of $985 in April 2015. She then failed to make any further payments up to and including the date of trial.

[15] Around the end of April 2015, Janz saw a new doctor, Dr. Kwong, who recommended an appointment with a specialist, Dr. Penner, coming from Vancouver to Whitehorse in May 2015 to discuss possible surgery to her foot. Dr. Kwong said that Janz was not allowed to return to work until after she met with Dr. Penner. After this appointment with Dr. Kwong, while travelling in a truck with her then-fiancée, Mr. Lehune[2], Janz telephoned Woloshyn using the truck's Bluetooth phone system and notified him that she had been ordered off work until after seeing the specialist. This is the conversation at issue in this trial.

[16] Janz testified that Woloshyn responded to this information with words to the effect of "Okay, I'll work with you until you get back to work or until your lawsuit claims settlement comes through, whichever occurs first". In her second affidavit, Janz deposed that she also asked Woloshyn if he wanted one or both of the trucks back, because she was not able to work and was not sure how long it would be before she could go back to work to continue to make payments. She further deposed that Woloshyn quickly responded with "No, I do not want the trucks back, I'm sure we can work out some sort of arrangement on payments". In addition, Janz deposed that she agreed with Woloshyn's instruction to keep him posted and "in the loop" on her medical, financial and legal situation. Finally, she deposed that she asked Woloshyn if they needed to write something up and he said that there was "No need to waste paper".

[17] For reasons which follow, I generally accept this evidence as establishing the nature of the conversation.

[2] The couple were married on August 21, 2015.

[18] When Woloshyn was cross-examined by Janz, he did not remember having a conversation with her about returning the two trucks. However, he did not say the conversation did not occur.

[19] Because the conversation took place over the Bluetooth phone system in the truck in which Janz and Lehune were travelling, Lehune could hear both Janz and Woloshyn. Lehune deposed in his affidavit that Janz asked Woloshyn if he would wait for payments on the trucks until she was able to return to work or her settlement was reached. He further deposed that Woloshyn agreed to wait for payment, but that Janz was to "keep him in the loop" on her medical situation and with respect to the status of her lawsuit. Lehune also deposed that Janz asked Woloshyn if he was going to write a letter to her concerning this new arrangement and Woloshyn's response was "Why waste paper? I call the shots around here, no need".

[20] Lehune's testimony was slightly different from his affidavit, but was nevertheless generally consistent. He stated that Janz wanted to make sure that she could continue the agreement she had made with Whitehorse Wholesale or, alternatively, return the trucks. Lehune testified that Woloshyn had no qualms about Janz keeping possession of the trucks and paying him outright from the settlement anticipated from the lawsuit. He stated that there was conversation about Janz being ordered off work. Lehune testified that when Janz offered to return the trucks, Woloshyn replied with words to the effect of "No, don't worry about it, we have an agreement". He further stated that the nature of the conversation was that Woloshyn was going to wait either for Janz to receive money from the lawsuit settlement or for her to return to work, and that the two would keep in touch regarding the progress of either contingency.

[21] On May 5, 2015, Janz had her appointment with the specialist, Dr. Penner, in Whitehorse. Dr. Penner wrote Janz a note saying "She is to be off work due to left foot injury until recovery from foot surgery is complete".

[22] Janz remained off work throughout the summer of 2015 and, as I indicated above, she made no further payments on either truck over that time.

[23] On September 30, 2015, Janz had the surgery on her foot. Shortly after that, she telephoned Woloshyn to inform him of the surgery and Woloshyn requested that Janz provide a letter from Debra Fendrick regarding the status of the lawsuit.

[24] On November 10, 2015, Debra Fendrick provided a letter to Whitehorse Wholesale stating the following:

> We are writing this letter at Melody Janz's request.
>
> Ms. Janz is our client with respect to serious injuries she sustained in a slip and fall in December of 2013. Her injuries have required surgery and prevented her from working and earning an income.
>
> I trust that you will make the necessary arrangements with Ms. Janz so that her vehicle is not repossessed for failure to make payment instalments on her lease arrangements while she is recovering from her injuries.

[25] Woloshyn did not contact Janz regarding this letter until early March 2016, when he indicated that he wanted a more detailed and irrevocable assurance from Fendrick regarding the payment of the anticipated settlement funds towards the arrears on the lease agreements. Janz indicated that Fendrick was away from Whitehorse until mid-April 2016, and that she would not be able to respond to Woloshyn's request until Ms. Fendrick's return.

[26] As stated above, Woloshyn personally seized the 2014 Ford on March 19, 2016[3], and instructed the deputy sheriff to seize the 2015 Ford after the court appearance before me on April 19, 2016.

ANALYSIS

[27] Absent the conversation between the parties at the end of April 2015, there is no question that Whitehorse Wholesale has the legal authority under para. 16 in each of the lease agreements to seize the trucks in the event that the purchaser fails to make the monthly payments due. That paragraph states:

> (16) Default: If the Lessee fails to make any payment under this Lease when it is due, or if the Lessee fails to keep any other agreement in this Lease, the Lessor may terminate this Lease and take back the Vehicle. The Lessor may go on the Lessee's property to retake the Vehicle...

[28] What then was the nature and legal impact of the April 2015 conversation?

[29] As I indicated earlier, I generally accept Janz's evidence establishing the nature of the conversation between her and Woloshyn around the end of April 2015. I do so for three principal reasons:

1) Although Woloshyn denied making such an agreement with Janz, he did not deny that portion of the conversation where Janz offered to return the two trucks. Rather, he testified that he did not remember that portion of the conversation, but not that the conversation did not occur;
2) Janz's evidence is substantially corroborated by Lehune. Although Lehune candidly admitted that he had difficulty remembering dates and other details, I generally found him to be a credible witness, if not always reliable; and

[3] Whitehorse Wholesale had this vehicle re-seized by a Deputy Sheriff on April 18, 2016.

3) Woloshyn's conduct, on behalf of Whitehorse Wholesale, in failing to make any demand for payment, or any threat to repossess under either of the lease agreements, until finally taking action on March 19, 2016, is entirely consistent with Janz's assertion that he indicated he was not interested in taking possession of the trucks at the end of April 2015, and was still hopeful that his company would be paid out from Janz's personal injury settlement, or that Janz would recommence making monthly payments once she returned to work.

[30] That said, I do accept Woloshyn's evidence that he was always interested in finding a way to extract some cash from Janz. During virtually all of his conversations with her, he specifically mentioned that the company needed money from her to make good on the arrears.

[31] In any event, the more important question is what the legal effect of the April 2015 conversation is.

[32] Janz relies upon an Ontario Supreme Court case entitled *In the Matter of: The Mining Act before the Mining and Land Commissioner*, (1978) 20 O.R. (2d) 593, in support of her argument that Whitehorse Wholesale ought to be prevented from repossessing the trucks by way of the doctrine of promissory estoppel. This doctrine was summarized by Grange J. at para.13, quoting from the English case of *Hughes v. Metropolitan Railway*:

> It is my view that the doctrine to be applied whether it be called waiver or promissory estoppel or variation of the contract or simply binding promises, stems from the words of Lord Cairns in *Hughes v. Metropolitan Railway. Co.* (1877), 2 App. Cas. 439 at p. 448:
>
> > It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results--

> > certain penalties or legal forfeiture--afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.
>
> That principle was accepted by the Supreme Court of Canada in *Conwest Exploration Co. Ltd. et al. v. Letain*, [1964] S.C.R. 20 at p. 28, [41 D.L.R. (2d) 198 at p. 206,] and in numerous other Canadian cases. In *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130, Denning, J., traced the principle first to justify an oral variation of a written contract including one required to be in writing to a representation without consideration and to a representation not just of an existing fact but to one as to the future. The essential features are an unambiguous representation which was intended to be acted upon and indeed was acted upon. The present rule is now expressed by Snell in his work [Snell's Principles of] on Equity, 27th ed. (1973), p. 563, as follows:
>
> > Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. (my emphasis)

[33] The requirement that the promisee suffer a loss or detriment of some kind as a result of the promise is confirmed in the text, *Canadian Contract Law* (3rd ed.), by Angela Swan and Jakub Adamski (Markham: Lexis Nexis, 2012), at 2.199:

> > For a particular example of reliance to be entitled to protection, there must be (1) an act or statement by the representor [promisor]; (2) reasonable reliance by the representee [promisee] on what the other did or said; and (3 a loss or detriment of some kind suffered by the representee…

[34] I conclude that promissory estoppel does not apply in this case because, firstly, the statements and representations made by Woloshyn in the conversation of April 2015 were ambiguous, uncertain and unenforceable. At that time, Janz did not know for certain whether she would be able to return to her employment as a class one truck driver following her anticipated surgery. In addition, there was no certainty that she would in fact receive a settlement from her personal injury lawsuit and, even to the extent that that was a probability, there was no guarantee that the amount she would receive would be sufficient to satisfy the arrears on both of the lease agreements. If I were to accept Janz's position on the impact of the April 2015 conversation, the result could be that she might be able to continue to use the trucks indefinitely without making any payments. That is an absurd result.

[35] Secondly, because of my conclusion immediately above, it was unreasonable of Janz to rely upon these statements and representations by Woloshyn.

[36] Finally, Janz did not rely upon Woloshyn's statements and representations to her "detriment". On the contrary, she benefited by continuing to be able to use each of the trucks while not making any further payments, at least until the initial seizure on March 19, 2016.

[37] The case of *Dytkowski v Blasiak Trucking Ltd.*, 1999 CarswellBC 465 (S.C.), is very much on point. There, the plaintiff was a driver for the defendant, a small trucking company. The plaintiff signed a conditional sale contract to purchase a truck of the defendant's that he had been driving for three years. The plaintiff said that the defendant wrongfully seized the truck the following year and sought damages for its wrongful seizure. The defendant counterclaimed for the cost of repairs that it said arose

from the plaintiff's negligent operation of the vehicle. The plaintiff argued that the agreement for the sale of the truck was made orally, however there was also a written and signed conditional sale contract.

[38] Ralph J., of the British Columbia Supreme Court, concluded that the defendant was entitled to seize the vehicle under the conditional sale contract. Although the plaintiff, like Janz in the case at bar, asserted the defence of promissory estoppel because the defendant had waived the requirement for the plaintiff to make payments on numerous occasions, this was dismissed by Ralph J. as follows:

> 38 Under paragraph 13 of the conditional sale contract the Seller was entitled to take possession of the vehicle if the Buyer failed to make any payment. The plaintiff says that, while he had failed to make payments when due, the defendant had stated on numerous occasions that the plaintiff did not need to keep the monthly payments current at all times. The plaintiff says he relied on that "representation" and as a result the defendant was estopped from seizing the vehicle.
>
> 39 The defendant denies making any such representation…
>
> 40 In *John Burrows Ltd. v. Subsurface Surveys Ltd. and Murdoch Surveys Ltd.* and *G. Murdoch Whitcomb*, [1968] S.C.R. 607 (S.C.C.) Ritchie J. considered this aspect of equitable estoppel at page 615:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that <u>there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations</u>.
> >
> > <u>It is not enough to show that one party has taken advantage of indulgences granted to him by the other</u> for

> if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.
>
> 41 … [I]t is my view that what the defendant did in this case was to grant the plaintiff an "indulgence" on more than one occasion to defer his monthly payments when due. That indulgence did not estop the defendant from exercising its rights under the contract to seize the vehicle in the manner in which it did in this case.
>
> **…**
>
> 43 It is my conclusion that the defendant was entitled to seize the vehicle on April 3, 1993, and that it acted within the scope of its contractual rights in doing so. (my emphasis)

CONCLUSION

[39] For these reasons, Janz's claim is dismissed and the interim injunction is terminated. I will remain seized of this matter in the event that Whitehorse Wholesale chooses to pursue its counterclaim. Any determination on court costs should await the outcome of the counterclaim.

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GOWER J.