Hatfield v. Child, 2013 ONSC 7801 (CanLII)

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Legislation cited (available on CanLII)

- Courts of Justice Act, RSO 1990, c C.43 — 27

Decisions cited

- Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670 (CanLII)

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ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN: MARGARET HATFIELD Plaintiff/Appellant

AND: DONNA CHILD and ARTWORLD INC. doing business as ARTWORLD OF SHERWAY, Defendants/Respondents

BEFORE: M.A. SANDERSON J.

COUNSEL: *Jonathan J. Sommer* for the Plaintiff/Appellant
Brian G. Shiller for the Defendants/Respondents

E N D O R S E M E N T

Introduction

[1] This is an appeal by the appellant Hatfield from the decision of the Honourable Deputy Judge Paul Martial of the Toronto Small Claims Court ("the trial Judge") dated March 25, 2013.

[2] Hatfield, the plaintiff below, alleged in her action that the Respondents/Defendants ("the Defendants") had sold her a painting attributed to the artist Norval Morrisseau ("Morrisseau") that was a fake.

[3] The trial Judge ruled after a five day trial that Wheel of Life ("the painting") is an authentic Morrisseau and dismissed her claim.

Background Facts

[4] On February 26, 2005, Hatfield purchased Wheel of Life from the Defendant ArtWorld of Sherway for $10,350.

[5] In April of 2009 Hatfield learned that on September 24, 2004, the artist had signed a Statutory Declaration denouncing as fakes a number of paintings, including Wheel of Life.

[6] Assuming mistakenly that the gallery director of ArtWorld, Donna Child ("Child") had been aware of the Statutory Declaration at the time she had sold Wheel of Life to her, she contacted Ritchie Sinclair ("Sinclair").

[7] Hatfield did not contact Bremner and/or Mcleod, the authors of the two documents the Defendants had provided to her at the time of her purchase, purporting to authenticate and appraise Wheel of Life. The trial Judge found "essentially she relied on Robinson and Sinclair.

The Trial

[8] Counsel for Hatfield called three witnesses to give evidence at trial: Hatfield, Donald Robinson ("Robinson") and Sinclair.

[9] Counsel for the Defendants called seven witnesses: Child, McLeod, Wilfred Morrisseau, Dr. Singla, Cott and Goring.

The Appeal

[10] In argument on the appeal, counsel for the Appellant challenged the trial Judge's finding of fact and his legal conclusions.

Submissions on Errors of Fact

[11] At trial, the trial Judge sorted through much conflicting evidence.

[12] Counsel for Hatfield submitted that the trial Judge acted unfairly in accepting the evidence of the Defendants and rejecting the evidence of the Plaintiff.

[13] In my view there was ample evidence to support the trial Judge's finding that Morrisseau signed the back of Wheel of Life in black paint.

[14] Dr Singla provided a detailed report attesting to the authenticity of Morrisseau's signature on the back of Wheel of Life.

[15] In reaching his conclusion, it was open to the trial Judge to prefer the evidence of Dr Singla, an independent expert with a PHD in Forensic Science, a diploma in document examination and 30 years' experience in handwriting analysis, that it was highly probable that it

was Morrisseau's signature on the back of Wheel of Life, over the evidence of Robinson that Morrisseau almost never [signed his signature in English with brush and black paint]: "Not to my knowledge have I ever seen it."

[16] Counsel for Hatfield submitted the trial Judge acted unfairly and contrary to his own earlier ruling when he ruled that Robinson had no expertise in handwriting and that that ruling deprived Hatfield of the benefit of any expert evidence on the point. I disagree. The trial Judge did consider Robinson's evidence that Morrisseau did not sign his works in black paint but he preferred the evidence of Dr Singla, as he was entitled to do. In reaching his conclusion on Morrisseau's signature, he also relied on the evidence of fact witnesses Wilfred Morrisseau and Marlowe Goring, who said they had personally witnessed Morrisseau signing the backs of his works in black paint. He was entitled to accept that evidence on that point.

[17] The trial Judge was entitled to consider that in 1990 Robinson had personally purchased 28 Morrisseau paintings, believing they were genuine.

[18] Similarly, the trial Judge was entitled to reject the evidence of Sinclair and to conclude it was unsupported and unreliable. Sinclair could produce no documentary evidence to support his assertion that a well organized forgery ring painted the works auctioned by Khan Auctions.

[19] The trial Judge noted Sinclair gave evidence that he did not view the original paintings before condemning them as fakes.

[20] The trial Judge was entitled to consider and accept the evidence of Cott, an independent witness with no stake in the litigation, when rejecting the evidence of Sinclair.

[21] Therefore, I do not accept the submission of counsel for Hatfield that the trial Judge simply rejected the evidence of the Plaintiff in a wholesale manner.

[22] Further, in my view it was open to the trial Judge on the evidence to have "significant doubt" as to its reliability of Morrisseau's September 24, 2004 Statutory Declaration. It was open to the trial Judge not to place any weight on the letter from Morrisseau's doctor commenting on his health at the time he signed the Statutory Declaration. The authenticity of the doctor's letter was challenged at trial. Counsel for Hatfield did not call the doctor to give evidence at trial.

[23] There was evidence that Morrisseau painted more than 10,000 paintings over a career spanning more than 40 years and that Morrisseau struggled with chronic alcoholism and drug addiction over many years.

[24] Robinson gave evidence he had observed Morrisseau himself having difficulty telling whether or not his own painting was a fake.

[25] It was open to the trial Judge to accept White's evidence that he had researched 3 statutory declarations signed by Morrisseau and had concluded they were inconsistent with each other. Robinson had also agreed that Morrisseau was somewhat inconsistent in his identification of fakes. There was also evidence from Robinson, a witness called by counsel for Hatfield, that from 2003-2006 Morrisseau's health was poor. He agreed Morrisseau could have had memory problems.

[26] McLeod was called to defend his appraisal of Wheel of Life. It was open to the trial Judge to find on the evidence before him that McLeod was an authority on Morrisseau and his work, having dealt with his art for over 50 years, that Mcleod was a credible witness and that the

Defendants had acted reasonably in relying upon McLeod's appraisal of Wheel of Life at the time it was offered for sale to Hatfield.

[27] Before he signed the appraisal, McLeod had conducted an independent review, including speaking with members of Morrisseau's family, and had satisfied himself that Wheel of Life was genuine. He and White had had a forensic expert check the signature on the back. He had tracked Morrisseau to find out where he had been in February 1979 when Wheel of Life was painted.

[28] While I accept the submission of counsel for Hatfield that the trial Judge did not specifically mention the affidavit of Michele Vadas [who did not give evidence at trial], I find it was open to him to prefer the evidence of Dr. Singla, Wilfred Morrisseau and Goring over her evidence.

[29] While I accept the submission of counsel for Hatfield that at the beginning of his Reasons, the trial Judge erred in referring to Morrisseau having Altzheimer's, it is clear that he corrected his mistake later in his Reasons and repeatedly referred to Morrisseau's health condition as Parkinson's disease. While I accept that he may have also confused the evidence as to whether Robinson and McLeod were members of the Art Dealers of Canada, I am satisfied that neither inaccuracy affected his overall conclusions.

[30] The law is clear that factual findings of a trial Judge should not be overturned on appeal in the absence of palpable and overriding errors. *Housen v Mikolaisen*, [2002] S.C.R. 33.

[31] In my view, the trial Judge made no palpable and overriding error in his findings of fact.

Submissions on Errors of Law

[32] Counsel for the Appellant submitted that the trial Judge based his decision upon non-existent or inadmissible hearsay evidence.

[33] In considering this submission, I have noted that this is a Small Claims Court action. Section 27 of the *Courts of Justice Act* permits documentary and oral hearsay evidence in Small Claims Court trials. That said, I accept the submission of counsel for Hatfield that the Small Claims Court rule must be applied fairly and even handedly. Having reviewed the evidence and the findings forming the subject of his complaint, I have concluded that the trial Judge made no reversible legal error. I have noted generally that some evidence was given about documents that were not entered into evidence. At the same time, that evidence could have formed the basis for objections and cross-examination. In most instances, counsel did not object to the admission of the evidence about which he now complains.

[34] Having reviewed that evidence, I have concluded that the trial Judge did not place much weight on it in any event.

[35] Counsel for Hatfield also submitted the trial Judge relied on evidence that could only have been given by a qualified expert.

[36] I have rejected his submission that the trial Judge was precluded from relying on the evidence of Wilfred Morrisseau on the basis that he gave evidence that only an expert should have been allowed to give. In my view, he was a fact witness who could give important evidence based on his own personal observations. The trial Judge emphasized that evidence in his Reasons, not his evidence on matters arguably properly only within the purview of an expert witness.

[37] Counsel for Hatfield submitted the trial Judge also relied on evidence of McLeod that should only have been given by a qualified expert. I note that McLeod was called as a fact witness because he had prepared an appraisal that had been provided to Hatfield at the time of her purchase of Wheel of Life. His experience and knowledge of Morrisseau's work was relevant to the determination of the reasonableness of the Defendants' actions at the time of the sale. While McLeod did give evidence on the authenticity of Wheel of Life, I am satisfied that the critical evidence on which the trial Judge based his conclusion that Wheel of Life was authentic was the evidence of Dr. Singla [with whose expertise he was satisfied] and the two fact witnesses Wilfred Morrisseau and Goring. As noted earlier, on the properly admissible evidence, he was entitled to reach the conclusions he did and to reject the evidence of Robinson.

[38] The Appellant submitted that the trial Judge failed to provide adequate reasons.

[39] I disagree. He ordered a transcript and reviewed over 750 pages of evidence. He reviewed the exhibits, considered detailed written submissions of counsel and wrote 38 pages of Reasons that in my view sufficiently explained why he reached the conclusions that he did. He outlined why he had concluded (1) that Morrisseau had signed paintings in black acrylic paint; (2) that Morrisseaus's Statutory Declaration was unreliable; and (3) that the Defendants had acted reasonably at the time of the sale. His reasons permitted effective review. *Clifford v Ontario Municipal Employees Retirement System* 2009 ONCA 670 (CanLII), (2009) 98 O.R. (3d) 210 O.C.A. para 29.

[40] The Appellant submitted the trial Judge erred in law in failing to canvass the law related to cloud on title. In my view that was unnecessary in light of his factual finding that Wheel of Life was authentic. In any event, no authority was provided equating cloud on title with latent defect.

[41] Counsel for Hatfield submitted that despite the finding of authenticity, the trial judgment may not guarantee that the value of Wheel of Life would not have been affected by the existence of the Statutory Declaration about which the Defendants failed to advise Hatfield before she purchased Wheel of Life.

[42] On the evidence, at the time the Defendants sold Wheel of Life to Hatfield they were not aware of the existence of the Statutory Declaration dated September 24, 2004. Despite the information the Defendants did have at the time of the sale, there was evidence to support the trial Judge's finding that the Defendants acted reasonably at the time of the sale. There was no error of law in that regard and that ground of appeal must also fail.

[43] In summary, while the trial Judge made some minor errors of fact, he had a sufficient basis to reach the factual conclusions he did. He made no reversible error of law.

Disposition

[44] The appeal is therefore dismissed, with costs fixed at $7500.

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M.A. SANDERSON J.

Released: