2014 ONSC 5126
Ontario Superior Court of Justice

Ziomek v. Miokovic

2014 CarswellOnt 12550, 2014 ONSC 5126, 244 A.C.W.S. (3d) 505

Henry Peter Ziomek, Plaintiff/Responding Party and Christine Miokovic, Defendant/Moving Party

Trimble J.

Heard: August 13, 2014
Judgment: September 11, 2014
Docket: CV-12-3063-ES

Counsel: John Lockhart, for Plaintiff / Responding Party
Kimberly Whaley, Heather Hogan, for Defendant / Moving Party

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Estates and trusts --- Trusts — Constructive trust — Secret trusts

Father of parties died — Plaintiff received nothing under father's will — Plaintiff claimed father set up secret trust obliging estate to provide plaintiff with payment equivalent to 40% of estate's value — Plaintiff asserted in alternative that there was promissory note that obliged payment — Defendant brought motion for summary judgment — Motion granted; action dismissed — There was no secret trust — Plaintiff did not lead evidence that there was issue requiring trial — Plaintiff's evidence on father's intention was vague and he had no other evidence to prove father intended to create secret trust giving plaintiff 40% of estate — Promissory note did not assist plaintiff because it was silent as to father's wish — Plaintiff conceded that only cause of action he was advancing was secret trust, but in any event there was no evidence that plaintiff provided consideration for promissory note.

Table of Authorities

Cases considered by *Trimble J.*:

Bogatyreva v. Ricky3 Holdings Ltd. (2014), 2014 CarswellOnt 7866, 2014 ONSC 3516 (Ont. S.C.J.) — considered

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, 71 O.R. (3d) 291 (Ont. C.A.) — followed

Boyce v. Toronto Police Services Board (2012), 2012 CarswellOnt 4146, 2012 ONCA 230 (Ont. C.A.) — referred to

Champoise v. Champoise-Prost Estate (2000), 140 B.C.A.C. 112, 229 W.A.C. 112, 33 E.T.R. (2d) 213, [2000] B.C.T.C. 12, 2000 CarswellBC 1405, 77 B.C.L.R. (3d) 228, 2000 BCCA 426 (B.C. C.A.) — followed

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — followed

Cotnam v. National Capital Commission (2014), 2014 CarswellOnt 10149, 2014 ONSC 3614 (Ont. Div. Ct.) — considered

Hayman v. Nicoll (1944), [1944] S.C.R. 253, [1944] 3 D.L.R. 551, 1944 CarswellNS 29 (S.C.C.) — referred to

Jankowski v. Pelek Estate (1995), 1995 CarswellMan 447, [1996] 2 W.W.R. 457, 10 E.T.R. (2d) 117, 131 D.L.R. (4th) 717, 107 Man. R. (2d) 167, 109 W.A.C. 167 (Man. C.A.) — referred to

Moss v. Cooper (1861), 70 E.R. 782, 1 John. & H. 352 — referred to

Pizza Pizza Ltd. v. Gillespie (1990), 1990 CarswellOnt 408, 75 O.R. (2d) 225, 33 C.P.R. (3d) 515, 45 C.P.C. (2d) 168 (Ont. S.C.J.) — referred to

Stever v. Rainbow International Carpet Dyeing & Cleaning Co. (2013), 2013 ONSC 4054, 2013 CarswellOnt 7960 (Ont. S.C.J.) — referred to

Sweda Farms Ltd. v. Egg Farmers of Ontario (2014), 2014 ONSC 1200, 2014 CarswellOnt 2149 (Ont. S.C.J.) — followed

Toronto Dominion Bank v. Schrage (2009), 15 P.P.S.A.C. (3d) 202, 2009 CarswellOnt 5157, 64 B.L.R. (4th) 277 (Ont. S.C.J.) — referred to

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1996), 28 O.R. (3d) 423, 2 O.T.C. 146, 1996 CarswellOnt 1699 (Ont. Gen. Div.) — referred to

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1997), 1997 CarswellOnt 3496 (Ont. C.A.) — referred to

Waschkowski v. Hopkinson Estate (2000), 44 C.P.C. (4th) 42, 32 E.T.R. (2d) 308, 47 O.R. (3d) 370, 2000 CarswellOnt 470, 184 D.L.R. (4th) 281, 129 O.A.C. 287 (Ont. C.A.) — considered

1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 43 R.P.R. (2d) 161, 16 C.E.L.R. (N.S.) 1, 77 O.A.C. 196, 1995 CarswellOnt 63, 21 O.R. (3d) 547 (Ont. C.A.) — referred to

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

Trustee Act, R.S.O. 1990, c. T.23
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

R. 24.01 — considered

R. 57 — considered

R. 76 — considered

MOTION by defendant for summary judgment in action concerning estate.

***Trimble J.*:**

Background

1 Bronislaw Ziomek, father to both parties, died on March 1, 2007, leaving an estate worth approximately $173,000. He left a Will dated October 26, 2004 in which he left 20 percent of his estate to Lily and Christine Ziomek, and 80 percent to Christine Miokovic, Henry Ziomek received nothing.

2 In this Simplified Procedure action, Ziomek claims that on October 27, 2004, Bronislaw set up a secret trust by which Miokovic, as Estate Trustee under the will, was obliged to provide to Ziomek, following Bronislaw's death, a payment equivalent to 40 percent of the estate's value, or approximately $69,200. Alternately, Ziomek, in his Statement of Claim, appears to allege (it is not entirely clear) that a promissory note dated October 27, 2004 obliges Miokovic to make the payment.

The Motion

3 In this motion, Miokovic seeks Summary Judgment on the basis that a) there is no promissory note or that any claim under the note is statute barred, and b) that Ziomek has not made his case for a secret trust.

The Result

4 I allow the Defendants' motion and dismiss the action. I find that in this case, I can do justice between the parties based on the extensive record before me. Ziomek has failed to put its best foot forward and show that the issue of whether there is a secret trust is one that requires a trial. On the basis of the record before me, I find that there is no secret trust and the action should be dismissed.

The Issues

5 This action raises the following issues:

1) Is this an appropriate case for Summary Judgment, and is there an issue requiring a trial?

2) Is there a secret trust?

3) Is the promissory note enforceable?

Issue 1: Is this an appropriate case for Summary Judgment and is there an issue requiring a trial?

6 In my view, this is an appropriate case to be determined by Summary Judgment. On the record before me, I can have a full appreciation of the issues in the action and, based on the evidence submitted, I find there is no need to resort to the powers under Rule 20.04(2.1 and 2.2).

7 Corbett J., in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (Ont. S.C.J.), provided a useful summary of the new approach to be taken to Summary Judgment motions, set out by the Supreme Court of Canada in *Combined Air Mechanical Services Inc. v. Flesch* [2014 CarswellOnt 640 (S.C.C.)] [hereinafter Hryniak], He said at paras. 33 and 34:

> 33. As I read Hryniak, the court on a motion for summary judgment should undertake the following analysis:
>
> (1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
>
> (2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
>
> (3) If the court cannot grant judgment on the motion, the court should:
>
> (a) Decide those issues that can be decided in accordance with the principles described in (2), above;
>
> (b) Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
>
> (c) In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.
>
> 34. The Supreme Court is clear in rejecting the traditional trial as the measure of when a judge may obtain a "full appreciation" of a case necessary to grant judgment. Obviously greater procedural rigour should bring with it a greater immersion in a case, and consequently a more profound understanding of it. But the test is now whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured.

8 *Combined Air Mechanical Services Inc. v. Flesch* does not change earlier law that the Court will assume that the parties have advanced their best case and that the record contains all the evidence that the parties will respectively present at trial. The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing. (See *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. S.C.J.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), aff'd [1997] O.J. No. 3754 (Ont. C.A.).

9 Is the approach to Summary Judgment different in Simplified Rules cases?

10 It is, although the extent to which Summary Judgment under the Simplified Rules is different depends on the facts of the case, For example, Gray J., in *Bogatyreva v. Ricky3 Holdings Ltd.*, 2014 ONSC 3516 (Ont. S.C.J.), said that under the *Hryniak* test for Summary Judgment, it is important that the judge must be able to make the necessary findings of fact based on the record before him or her. Rule 76, however, puts limitations on the parties' ability to provide relevant evidence on the motion, depending on when the motion is brought. In the case before Gray J., the motion was brought before affidavits of documents had been exchanged and examinations for discovery had been conducted. Further, Rule 76 prohibits cross-examination on affidavits. In light of these factors, Gray J., held that by operation of the Rule, combined with the timing of the motion, the responding party was prevented from putting its best foot forward at the motion. He held that the motion was premature. The parties should have the ability to exchange affidavits of documents and conduct examinations for discovery.

11 The Divisional Court took a more liberal approach than Gray J., in *Cotnam v. National Capital Commission*, 2014 ONSC 3614 (Ont. Div. Ct.), decided only two weeks after Gray J.'s decision in *Bogatyreva*. In *Cotnam*, the issue was whether the

plaintiff waived his right of action when he fell on a recreational trail in the NCC's jurisdiction. The motions judge dismissed the NCC's application for Summary Judgment, holding that while Rule 76 did not preclude Summary Judgment motions, they are rare in Simplified Rules cases, and not when there is a question of fact in issue.

12 The Divisional Court commented at para. 10 that this was not consistent with the Court of Appeal's decision in *Combined Air* (the controlling case at the time the motion was heard). It then applied the *Hryniak* test, and granted Summary Judgment. In light of the respondent's failure to lead evidence that the NCC did, or omitted to do, something it should have realized was likely to cause injury, or acted in reckless disregard to the presence of users of the path, the motion had to be granted. Implicitly, the Divisional Court held that the *Hryniak* test applied to Rule 76 cases, as did the older law requiring the parties to put their best foot forward.

13 What about this case?

14 Applying the approach mandated by *Hryniak*, and based only on the evidence in the motion record, and without using the fact-finding powers provided by rules 20.04(2.1) and (2.2), I am satisfied that a fair and just appreciation of the case and a fair and just result can be achieved on the record, as provided, and that there is no genuine issue requiring trial. In making this finding, I am cognizant of the proportionality taking this matter to trial. 40 percent of the value of the estate is approximately $69,000, a sum that counsel agree is far less than the amounts spent by the parties in the action, thus far.

15 In argument, both parties acknowledged that affidavits of documents had been served by February, 2013. Ziomek argues, however, that Examinations have not been held. Since credibility is crucial, Ziomek argues, it would be unfair to allow the Summary Judgment motion to go forward until after Examinations are held. While this is often the case (see Morgan J.'s decision in *Stever v. Rainbow International Carpet Dyeing & Cleaning Co.*, 2013 ONSC 4054 (Ont. S.C.J.)), on the facts of this case, that the examinations for discovery have not been completed lies at Ziomek's feet for the most part. On June 17, 2013, Miokovic's lawyer asked for dates for examinations for discovery, proposing that they be conducted in Toronto, On June 19, Miokovic's lawyer, after discussing the matter with Ziomek's lawyer, suggested dates for Discovery of September 18, 25 and 27, subject to Ziomek's availability, which were to be held in Toronto. On June 24, Ziomek's lawyer agreed to September 27, with examinations to be held in Mississauga. On June 26, Miokovic's lawyer served a Notice of Examination for September 27, to be held in Toronto. On June 28, Ziomek's counsel responded by saying that if Ziomek's examination was not in Mississauga, the parties could examine Miokovic in Toronto and Ziomek's in Texas, where he lived.

16 On September 10, 2013, Ziomek's lawyer wrote to say that he had started a new job and could not attend the examinations for September 27, Ziomek's affidavit essentially parrots what is in the letter from his lawyer. He does not say when he started his new job and when he was told of his new employer's prohibition from taking time off within the first 60 days of his employment. He does not say whether he asked for the time off and was denied it, or whether he did not raise the issue having heard of the firm's policy. His evidence is less than satisfactory as to his reason for cancelling.

17 On October 1, Ziomek's lawyer advised that Ziomek would be available for examinations on December 13. In light of the history of the action, on November 15, Miokovic's lawyer asked for and received confirmation that the examinations would go ahead. On December 13, Miokovic's lawyer attended for the examinations to find out that they were cancelled by Ziomek. The email confirmation of the cancellation was not sent until 11:19 a.m. on December 13, although it was received much earlier by the reporter. The fax copy of the letter advising Miokovic's lawyer of the cancellation was sent at 10:51 p.m. on December 12.

18 Ziomek says that the week of the December 13 examinations was exceptionally cold and that he was required to tend to machinery at his work place and could not travel. The employer's email indicates that Ziomek was needed at work on the week of December 9 to 15. Based on the employer's confirmation, I cannot accept Ziomek's evidence that he was only advised on December 12 that he could not travel that day to Toronto as he was needed at work. The employer says that he was needed that week, and therefore, must have been told of his travel restriction not later than December 9.

19 Setting aside the issue of setting up the examinations, there is no suggestion of what sorts of evidence that is obtainable only through examinations for discovery that is not otherwise obtainable.

Issue 2: Is there a secret trust?

20 The parties agree that in order for there to be an enforceable secret trust, the person asserting the secret trust must prove the following:

a) Bronislaw's (the settlor's) intention to create a trust;

b) That Bronislaw communicated this intention to Miokovic (the trustee);

c) Miokovic's acceptance of the trust; and

d) Certainty of the trust's terms and objects,

See *Jankowski v. Pelek Estate* (1995), [1996] 2 W.W.R. 457 (Man. C.A.), at para 50 December 9.

21 Communication of the settlor's intention to the trustee is key (see Waters, Donovan. *Waters Law of Trusts in Canada*, (4th ed., Toronto: Thompson Reuters, 2012) p. 288). Specific evidence must be advanced of such communication, although acceptance may be inferred by conduct (see Waters, supra, at p. 288 and *Moss v. Cooper* (1861), 1 John. & H. 352, 70 E.R. 782 at 789).

22 In *Champoise v. Champoise-Prost Estate*, [2000] B.C.J. No. 1364 (B.C. C.A.), one of the most recent statements of the law of secret trusts, the B.C. Court of Appeal restated the criteria listed above, but found that the evidence of the trust's beneficiary, alone, as to the creation of the trust was not enough to uphold the trust. If the beneficiary of the trust seeks to rely on a will (or, by extension another document) to establish the secret trust, s/he must clearly establish the trust (see *Hayman v. Nicoll*, [1944] S.C.R. 253 (S.C.C.)).

23 **Ziomek** concedes that Bronislaw's will does not create the secret trust. **Ziomek** says that the evidence concerning the creation of the trust is found in a) **Ziomek's** evidence, b) the promissory note signed the day after the will was executed, and c) the evidence of Norm Pascoal.

24 In my view, Summary Judgment should issue on this subject. **Ziomek** has failed to prove, or lead evidence that there is an issue requiring a trial; namely, that Bronislaw clearly communicated to Miokovic his desire to create the secret trust.

25 As a matter of evidence, **Ziomek** has not put his best foot forward. He says that he, Miokovic, Pascoal and his father all gathered at Pascoal's home on October 27, 2004 "for the sole purpose of signing the promissory note", and that "My father clearly stated his intentions with regards to the promissory note to Christine prior to Christine signing the note."

26 **Ziomek's** evidence on his father's intention is vague. He leads no other evidence to prove that Bronislaw intended to create the secret trust giving **Ziomek** 40 percent of Bronislaw's estate. I cannot rely on **Ziomek's** his own vague, self-interested, uncorroborated evidence (see *Champoise*, supra).

27 The promissory note does not assist **Ziomek**. On its face the promissory note merely evidences Miokovic's promise to pay **Ziomek** 40 percent of the value of Bronislaw's estate from her 80 percent, It is silent as to whether this was Bronislaw's wish.

28 Pascoal's "evidence" does not assist **Ziomek**, Pascoal witnessed the promissory note. **Ziomek** attached to his affidavit as exhibit "B" a signed statement by Pascoal. That statement does not say anything about what Bronislaw intended or that he clearly communicated his intention to Miokovic on October 27, 2004, or at any other time, His statement only deals with the issue of the signing of the promissory note.

29 In any event, **Ziomek** cannot rely on Pascoal's statement, It is attached to an affidavit, and is not proper evidence, A party in bringing or resisting a motion for Summary Judgment must put forward the evidence that it would lead at trial. Putting forward an opinion or set of facts contained in a statement attached to an affidavit is inappropriate. The statement is not sworn

evidence and therefore inadmissible (see *Toronto Dominion Bank v. Schrage*, [2009] O.J. No. 3636 (Ont. S.C.J.)). As Strathy J. (as he then was) put it at para. 38, "*This is not a mere formality. On a motion for Summary Judgment, the court is entitled to insist on sworn evidence, and in the case of experts, that the evidence be given by the expert and not filtered through the hearsay evidence of the party*."

30 Pascoal's statement fits within Strathy J.'s dicta, and there is no compelling reason given to make an exception to the best evidence rule. **Ziomek's** counsel confirmed in argument that Pascoal is Still alive and (to their knowledge) well, yet he did not provide an affidavit.

31 **Ziomek** says that because his and Miokovic's credibility is in issue, discovery is necessary. That may be, but **Ziomek's** obligation is to advance all of his evidence on the subject of the secret trust, by properly sworn evidence, thereby putting the credibility squarely before the Court. He has not done this. It is not open to him to say that the evidence will come at trial, or that it may be made clear by examination for discovery (see *Toronto Dominion*, supra, para. 38). On a Summary Judgment motion, **Ziomek** is obligated to present all of the evidence that would be presented if the action went to trial (see *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.)). In neither his affidavit nor the statement from Pascoal (were it admissible) does **Ziomek** give clear evidence as to Bronislaw's intention to create the secret trust, nor that it was communicated to Miokovic.

32 In any event, an oral examination would not assist in elucidating further information from Pascoal, since **Ziomek**, not Pascoal, is the party being examined. Evidence about what Pascoal heard or did, would still be hearsay as it would be reported by **Ziomek**.

Issue #3: Is the promissory note enforceable?

33 At the argument of the Summary Judgment motion, **Ziomek** conceded that the only cause of action he advances is the secret trust. He said he was not advancing any cause of action based on enforcing the promissory note.

34 Notwithstanding this admission, had the issue of enforcement of the promissory note been a live issue at the motion, I would have granted Summary Judgment on that issue. There is no evidence that **Ziomek** provided consideration to Miokovic for the promissory note.

35 Based on the foregoing, I hold that I am able to do justice between the parties on the record as presented. I find that **Ziomek** has not discharged his burden to lead properly sworn evidence to show that there is an issue that requires a trial with respect to the creation of the secret trust. He has not led evidence that shows that Bronislaw had the clear intention to create a secret trust whereby Miokovic would give **Ziomek** 40 percent of the value of Bronislaw's estate, payable from her share of the estate, and that Bronislaw made this intention clear to Miokovic.

36 Miokovic advanced two other basis for the dismissal of the action: delay under Rule 24.01, and the expiry of the two-year limitation period. I reject these. Rule 24.01 and the cases thereunder require that the delay be contumelious. There is no evidence that it was contumelious. Likewise, there is no prejudice proved other than the expiry of the limitation.

37 Miokovic takes the position that the limitation is two years under the *Trustee Act*, and that discoverability does not apply (see *Waschkowski v. Hopkinson Estate*, [2000] O.J. No. 470 (Ont. C.A.)). The case against Miokovic in regards to the secret trust is one of breach of fiduciary duty she owes **Ziomek** as a trustee, and therefore not covered by the rationale in *Waschkowski*, which limited itself to claims in tort, Therefore, discoverability applies, and there is an issue as to discoverability insofar as **Ziomek** is concerned.

38 Further, since the action is in part for a declaration regarding the existence of the secret trust, those claims are not subject to the *Limitations Act*, SO 2002 (see *Boyce v. Toronto Police Services Board*, [2012] O.J. No. 1531 (Ont. C.A.)).

Costs

39 The parties provided their cost submissions.

40 The Defendant, having succeeded on the motion in having the action dismissed, is entitled to her costs of the motion and the action. She seeks costs and disbursements of over $55,000, over $19,000 of which pertain solely to the motion, **Ziomek**, were he successful, sought costs of the motion of almost $11,000.

41 Given that **Ziomek's** claim is for approximately $69,200, and the claim is brought in Simplified Procedure, the costs must bear some proportionality to the case, and be fair and reasonable for the unsuccessful party to pay (see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.)).

42 In this case, there is no doubt that **Ziomek** played 'hardball' that required greater effort from the Defendant than was required. Much of the effort, however, as shown by the motion record, was caused by both counsels' verbose and positional correspondence.

43 Considering all the factors set out in Rule 57 and by the Court of Appeal in *Boucher*, a fair, reasonable and proportional award of costs in this matter is $21,421.58, comprising fees in the action of $15,000, HST on fees of $1,950, disbursements of $1,790,55, HST on disbursements of $181,03, plus an additional $2500, all inclusive, for arguing the motion.

Motion granted; action dismissed.