

Case Name:

Canadian Flexi Drills Inc. v. Smith

Between

Canadian Flexi Drills Inc., Wallach Manufacturing Inc.,
395 Steelcase Road Limited and 1106883 Ontario Limited,
Leslie Wallach, Joshua Wallach, Jesse Wallach, Aaron
Wallach and Felleesha Hosein, appellants, and
John H. Smith, respondent

[2004] O.J. No. 658

Court File No. 431/03 and 432/03

**Ontario Superior Court of Justice
Divisional Court
Then, Caputo and Swinton JJ.**

Heard: January 21, 2004.

Oral judgment: January 21, 2004.

Released: February 13, 2004.

(11 paras.)

Restitution — Benefit acquired from the plaintiff — Mistake — Goods or money transferred by mistake — Money — Mistake of fact.

Appeal by Canadian Flexi-Drills from the dismissal of its action against Smith to recover an overpayment of \$15,380. Smith provided bookkeeping services to Canadian. He claimed that he made an agreement with the principal of Canadian to increase his hourly rate from \$20 to \$30. The principal died three months later. The increase took effect after his death. The trial judge found that no agreement had been made. The principal's wife took over the business after his death. She testified that her husband told her that the hourly rate was \$20, and that he had never told her about an increase. The action was dismissed because the judge was not satisfied that the conditions for restitutionary relief based on mistake of fact were satisfied. He found that the wife did not testify that she was misled by Smith's invoices or made a mistake when she signed a cheque to pay him.

HELD: Appeal allowed. The judgment was set aside. Smith was ordered to repay \$15,380 to Canadian. The evidence was clear that the wife believed that the applicable rate was \$20. Any carelessness on her part was irrelevant. There was no evidence that the conditions for restitutionary relief were not satisfied. Once the judge found there was no agreement, Smith had no moral or equitable right to retain the overpayment.

Counsel:

Messod Boussidan, for the appellants.
John W. Findlay, for the respondent.

The judgment of the Court was delivered by

1 **THEN J.** (orally):— The appellant seeks to recover \$15,380, representing an overpayment of \$10 per hour charged by the respondent bookkeeper for services rendered to the appellant.

2 The respondent in its pleadings justified the increase of rates from \$20 to \$30 per hour on the basis of an agreement with the husband, Mr. Wallach who was the principal of the appellant some three months prior to his sudden death. The increase took place immediately after Mr. Wallach's death.

3 The trial judge found as a fact that no agreement had been entered into. The wife, Mrs. Wallach who took over the business after her husband's death testified that prior to his death she had been told by her husband that the rate was \$20 per hour and had not been notified by him prior to his death of any change. She also testified that she had not been notified by the respondent at any time of any change in the hourly rate. The respondent, in his evidence, confirmed that he did not notify Mrs. Wallach of the change.

4 The trial Judge correctly set out the conditions that must be met before restitutionary relief based on mistake of fact may be granted as follows:

(i) the mistake must have been an honest one, namely, there must have been genuine belief on the part of the payer that certain facts existed which did not exist;

(ii) the mistake must have been between the payer and the recipient, that is, the recipient must have been in some way a party to the mistake either inducing it or being responsible for it or connected with it;

(iii) the facts as believed must have imposed the legal equitable or moral obligation to make the payment; and

(iv) the recipient must have no legal, equitable or moral right to retain the money as against the payer.

5 The trial Judge found that these conditions were not satisfied without specifically addressing the conditions. At paragraph 21 of his Reasons for Judgment, the trial Judge found:

"Leslie Wallach did not testify that she was misled by the invoices or made a mistake when she signed a cheque to pay an invoice. She simply said that she paid no attention."

6 In our view, if this consideration was pertinent to the first condition, that is the honesty or genuineness of the mistake, the trial Judge made both a factual and legal error in so finding. The evidence is clear on this record that at all times the wife believed that the rate was \$20.00 per hour and further the law is clear that any carelessness on her part is irrelevant. (See *Mobil Oil Canada, Ltd. v. Storthoaks (Rural Municipality)* [1976] 2 S.C.R. 147 where at pp. 156-157, Justice Martland, speaking for the unanimous Court

quotes the passage from Kelly v. Solari with approval).

7 We agree with the appellant that there is no evidence on this record to support any finding that the four conditions had not been met. Counsel for the respondent has conceded in this Court that estoppel does not apply. He however relies upon condition #4 outlined above in para 4.

8 In our view, once the trial Judge found that there was no agreement, any reliance on a legal right is untenable. Further, there can be no equitable or moral right based on estoppel as that defence was not pleaded or relied on in this Court. There is in our view no other moral or equitable right to justify the retention of the \$15,380 received by the respondent from the overbilling. We would accordingly allow the appeal and order that the \$15,380 be returned to the appellant.

9 We order that \$15,380 plus pre-judgment interest be returned to the appellant. We also award costs of the action in the amount of \$15,000 all inclusive, representing legal fees plus GST plus disbursements. Costs of the appeal to the appellant fixed in the amount of \$6,000 all inclusive.

10 In awarding costs of the action to the appellant in the amount of \$15,000 all inclusive, we have taken into account the submissions of both counsel as to whether that amount should be adjusted to reflect the costs of counsel for Mr. Smith and that of Mr. Smith himself spent in preparation for the defence of the defamation action. Having regard to all of the circumstances, we are not prepared to modify our Order.

11 The Order of Pitt J. with respect to costs is vacated as is paragraph 2 of the Order of September 12, 2002.

THEN J.

CAPUTO J.

SWINTON J.

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