

Indexed as:

Simon Estate v. Astas Commerce Inc.

Between

The Estate of Allan Jack Simon, deceased, and Edith Simon,
Litigation Administrator on behalf of the Estate of Allan Jack
Simon, plaintiffs, and
Astas Commerce Inc. and Angelo Rapanos, defendants

[2001] O.J. No. 4137

Court File No. 98-CV-146372

Ontario Superior Court of Justice Day J.

Heard: April 17-25, 2001.

Judgment: October 24, 2001.

(24 paras.)

Negotiable instruments — Promissory notes — Requirements of promissory note — Delivery — Defences.

Action by the Simon Estate against Astas Commerce for payment on a promissory note. Simon sold a property in France to Rapanos, the owner of Astas, which paid part of the purchase price with a promissory note for \$585,000. Rapanos claimed that the note was never delivered, but was sent by fax. He also claimed that the note did not represent the balance of the purchase price, which had been paid in full. He claimed that he issued the promissory note to Simon so that Simon could obtain a loan by fraudulently indicating to his bankers that he was a creditor on the promissory note.

HELD: Action allowed. The Simon Estate was awarded the full amount of the note, plus interest in accordance with the terms of the note. Rapanos's suggestion that the note was issued for a fraudulent purpose was outrageous. The fact that the note was not physically delivered did not preclude it from constituting evidence of the debt owed by Astas. It was sent for a purpose, and the only legitimate purpose was as partial consideration for the sale of the French property.

Statutes, Regulations and Rules Cited:

Bills of Exchange Act.

Counsel:

Kevin Sherkin, for the plaintiffs.

Steven H. Goldman, for the defendants.

1 **DAY J.:**— The plaintiff, Mr. Allan Jack Simon ("Mr. Simon"), was a Canadian citizen residing in Arizona. He died between the issuance of the statement of claim and the commencement of trial.

2 The plaintiff was the owner of a residential home located at Cannes, France (the "Cannes Property"). Mr. Simon sold the Cannes Property to 161 Boulevard de Roquebiliere, a real estate company in France, named after the address of the subject property, wholly owned by the defendant Angelo Rapanos ("Mr. Rapanos") and his wife.

3 The plaintiff is suing Astas Commerce Inc. ("Astas") an Ontario company, part of the Astas Group of Companies, on a Promissory Note in the principal amount of U.S. \$585,000 dated 13 January 1998, payable in the amount of \$50,000 on 30 January 1998, and \$535,000 on 31 December 1998, bearing interest at 5% per annum (the "Promissory Note").

4 Mr. Rapanos is the controlling shareholder and moving force of Astas. It is the plaintiffs' position that the Promissory Note represents the balance of the purchase price from the purchaser of the Cannes Property. It is Mr. Rapanos' position that the Promissory Note was never delivered; rather it was sent by a fax copy. Mr. Rapanos states that the Promissory Note does not represent the balance of the purchase price, as the purchase price has been paid in full. Rather, it had to do with business dealings entirely independent of the sale of the Cannes Property, although sent concurrent with the sale.

5 The defendant, Mr. Rapanos, in his evidence said that Mr. Simon needed money and was seeking a loan from Mr. Rapanos. Instead of lending money to the plaintiff, the fax copy of the Promissory Note was provided as something that the plaintiff could show his bankers to indicate that there was money owing to him in order to induce them to advance money to him. Simply put, the defendant, Mr. Rapanos, gave evidence that he falsified information sent to the plaintiff so as to allow the plaintiff to present that false information to his bankers in order to induce his bankers to lend him money. I find that evidence from a sophisticated businessman with world experience to be preposterous and outrageous.

6 Much is made by the defence of a budding business relationship between Astas and Mr. Simon at and about the date of the Promissory Note. Mr. Simon was "appointed" Vice Chairman of European Operations (Exhibit 1, Tabs 10, 11 and 12). The evidence indicates that it was little, if anything, more than a title in anticipation that Mr. Simon might be able to deliver some serious international discount transactions and to perhaps give him some credibility in his efforts.

7 Owing to the death of the plaintiff, his lawyer in the transaction, Mr. Jean Francois Rycx, ("Mr. Rycx") journeyed to Canada to give evidence. Save for plane fare, he provided for his own expenses. Mr. Rycx's evidence was that he discussed the

Promissory Note with each of Mr. Simon and Mr. Rapanos and each had told him that it represented the balance of the purchase price for the Cannes Property. The court relies heavily on this piece of evidence.

8 Mr. Rycx informed the court that Mr. Rapanos had complained about him to the Bar Association in Marseilles, which Mr. Rycx interpreted as Mr. Rapanos attempting to dissuade him from giving evidence at this trial.

9 The defence relied on a purchase proposal for the Cannes Property prepaid by Mr. Rapanos for 1160665 Ontario Inc. at French Francs 2 million, dated 13 January 1998 (Exhibit 2, Tab I) which was signed by Mr. Rapanos and Mr. Simon.

10 Reference is made to the post-closing letter from Mr. Rycx on behalf of Mr. Simon to Mr. Rapanos dated 10 March 1998 (Exhibit 2, Tab P) which states in part:

The price was fixed to 5 million French Francs.

This price has been settled first through the payment directly made by you to the notary and second, through the promissory note which was paid to Mister Simon outside of the sight of the notary before the signature of the final deeds.

11 There is no return correspondence from Mr. Rapanos to contradict. The evidence was confusing in respect of how much of the transactions could be disclosed before the notary in France, however, this was Mr. Rycx's explanation of the purpose for the Promissory Note in the transaction.

12 Of interest is a letter of Mr. Rycx to Mr. Sherkin dated 14 April 1998 (Exhibit 1, Tab 53). It is brief and reads as follows:

Dear Mr. Sherkin,

I am the solicitor that handled the sale of Mr. and Mrs. A. SIMON'S home in Cannes, FRANCE.

The property was sold to a Real Estate Company controlled by Angelo RAPANOS, Chairman.

The final settlement issued to Mr. Allan J. SIMON was a promissory note emitted by ASTAS GROUP OF COMPANIES (controlled by Mister RAPANOS) in the amount of \$585,000 (US funds) with only one payment of \$50,000 (US funds) on January 30th, 1998 and one payment of \$535,000 (US funds) on December 30th, 1998 plus 5% interest.

Mr. A. SIMON has stated to me that Mr. A. RAPANOS has not made the first payment of \$50,000 (US funds) as of the above date, which puts the promissory note in default.

Best regards,

In his viva voce evidence, Mr. Rycx attested to the veracity of the contents of the letter.

13 The sale agreement translated into English, taken from Exhibit 6, clearly states under the heading "Price", that:

"The subject sale is hereby consented and approved in consideration of the final price inclusive of all taxes of 5,000,000 Francs."

That clearly puts to rest the defendants' allegation at paragraph 10 of the Amended

Statement of Defence that the sale agreement provided for "the purchase price of 2,000,000 FF."

14 I must address two assertions from the defendants' side that the purchase price has been paid in full. The first is a letter from Mr. Rycx to Mr. Sherkin dated 19 April 1998 (Exhibit 1, Tab 55) at paragraph 4, on the second page, where he states:

I have been informed by [M]ister Simon that the full price of the house (after payment of Mister Simon's creditors in France) had already been paid.

15 The second is an assertion in a fax signed by Mr. Simon dated January 28, 1998 (Exhibit 8, Tab 14) which says in the fifth paragraph,

"The agreed price of the sale is 5,000,000 French Francs (taxes not included)."

Two paragraphs down he states,

"The balance of the price has already been paid to me by the buyer out of the office of a Notary".

However, the following paragraph is most telling, as follows:

"Consequently, I declare that no registration nor any mortgage nor collateral is required on the house for my benefit at the date of the execution of the deeds."

I take from this last quotation that no mortgage or collateral is required which would be entirely consistent with him having been paid in full by way of front-end cash coupled with the Promissory Note.

16 I refer also to the fax of Mr. Rycx to Mr. Rapanos dated 30 January 1998 (Exhibit 1, Tab 29) where he states under Article VI:

"As you know no registration of any collateral or mortgage is required by Mister Simon.

The whole price has already been paid by you to him."

Again, consistent with earlier comment, the "whole price" in the context of both those sentences would indicate that the cash payment up front together with the Promissory Note would preclude any collateral or mortgage.

17 Referring to the deed of sale under heading "PRICE", that section reads entirely as follows:

The sale is consented to and approved based on a price inclusive of all taxes of 5,000,000 Francs.

This sum has been paid in cash by the purchaser as follows:

by way of 2,740,000 Francs directly before this date to the Vendor, outside of the accounting of the undersigned notary, and by way of 2,260,000 Francs this day as evidenced by the accounting of the undersigned notary to the Vendor who recognizes the payment and issues receipt. Therefore the amount has been paid in full. [emphasis added]

18 It is noted that the 2,740,000 Francs paid directly before the date of the deed to the

vendor is reflected in the deed. Note that the deed is dated February 13, 1998; note that the Promissory Note dated January 13, 1998, being before the date the deed, is consistent with the language of the deed as being part of the consideration in the transaction.

19 I find the evidence of Mr. Gary Owen to be of no assistance. He said that he drew the Promissory Note. He said he was in discussion with the parties in respect of the sale transaction. He said that he attended at the subject property with Mr. Rapanos, that it was in a state of serious disrepair and that he had made arrangements for an evaluator to come from Marseilles to Cannes. None of this evidence contributes to anything that I can find of use in these findings.

20 I simply do not believe the evidence of Mr. Rapanos as to the purpose for the Promissory Note. He invites the court to accept his evidence that it was issued for a fraudulent purpose which, as said earlier, I find to be outrageous. I find it to be entirely consistent with the plaintiffs' position that it formed part of the consideration for the sale of the Cannes Property. The fact that the Promissory Note was not physically delivered as contemplated under the Bills of Exchange Act, does not preclude it from evidence of the debt owing by the defendant, Astas, in all the circumstances of this case. It was sent to the plaintiff for a purpose, and the only legitimate purpose that I can conclude, is that it was sent as consideration in part for the sale of the Cannes Property.

21 In this trial no effort was made by the defence to distinguish between and separate Astas from Mr. Rapanos who was its controlling shareholder and moving force.

22 Accordingly, judgment is to issue against Astas for the Canadian equivalent of the full amount of the Promissory Note, plus interest at 5%, in accordance with its terms, as evidence of part consideration for the purchase of the Cannes Property.

23 As the entire transaction was engineered with respect to the purchasers' side by Mr. Rapanos, and as the subject property is indisputably for the personal use of himself and his wife, being held by the numbered company owned by them both, judgment shall also issue against him in the same amount.

24 If the parties are unable to come to terms as to costs, I will be available to make a determination by appointment in chambers.

DAY J.

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