DEWMONT SECURITY LIMITED v. PAYAS

SUPREME COURT (Pizzarello, A.J.): June 5th, 1998

Bills of Exchange—promissory note—extrinsic evidence—inadmissible to explain circumstances surrounding issue of note—signatory personally liable, since note treated as cash

Bills of Exchange—promissory note—stay of execution—court may stay execution in exceptional circumstances if inequitable for payee to enforce judgment, e.g. subsequent agreement between parties or persons closely linked to suspend liability pending arbitration on issue of payment

The plaintiff brought an action to enforce payment under a series of promissory notes signed by the defendant.

The defendant was a director of a company which agreed to purchase a leasehold property from the plaintiff. The purchasing company agreed to make instalment payments including interest over a 12-month period and deposited with the plaintiff 12 promissory notes signed by the defendant as security for payment. Later, the calculations were shown to be inaccurate and the two companies decided jointly to revise them. They agreed that they would submit the matter to arbitration in the event of deadlock and signed an arbitration agreement providing that the purchasing company would have the right to refrain from honouring the promissory notes to the extent of the difference between the figure arrived at by each party.

The companies were unable to agree on the correct figure but instead of submitting the matter to arbitration, the plaintiff sued on the promissory notes.

It submitted that (a) the entire sale-purchase agreement had been on the basis that the defendant would be personally liable for any shortfall in payment; (b) the promissory notes clearly stated that the defendant and not his company was the guarantor of the transaction; and (c) in any event, no evidence of the circumstances surrounding the agreement was admissible, since the notes were to be treated as cash.

The defendant submitted in reply that (a) there had been no understanding that he would be personally responsible for his company's meeting its obligations under the sale-purchase contract; (b) the terms of the arbitration agreement showed that he had acted on behalf of the purchasing company as signatory of the promissory notes; and (c) the terms of original agreement had been overtaken by the arbitration agreement, under which the parties were obliged to submit the dispute for resolution in that way, pending which the debt represented by the notes was held in abeyance.

Held, giving judgment for the plaintiff but ordering a stay of execution:

(1) It was settled law that in an action to enforce payment under a bill of exchange or promissory note no extrinsic evidence was admissible as to the surrounding circumstances, since the bill or note was to be treated as cash. Accordingly, although the sale-purchase agreement was between the plaintiff and the defendant's company, the defendant was personally liable to honour the notes issued in his name, and judgment would be entered against him (page 336, lines 34–45; page 337, lines 15–22).

(2) However, since the subsequent arbitration agreement linked the payment dispute between the companies with the defendant's obligations under the promissory notes, the two matters had become inextricably mixed, and it would be inequitable for the plaintiff to enforce judgment on the notes before carrying out the agreement specifically made to resolve the dispute by arbitration. In exceptional circumstances such as these, the court had a discretion to stay execution of judgment pending the outcome of proceedings between the parties to the bill or note or persons closely linked with them which might resolve the issue of payment. Accordingly, provided that the defendant commenced arbitration proceedings within seven days, execution would be stayed until the completion of those proceedings (page 337, lines 24–42; page 338, line 12 – page 339, line 6).

C.C. Hernandez for the plaintiff;
The defendant appeared in person.

PIZZARELLO, A.J.: This action is one of three which raise similar issues. The facts are these: Detectives & Security International Ltd. entered into certain arrangements with Dewmont Security Ltd. The negotiations were carried out on the one part by Mr. R. Frankel, a director of the plaintiff company, and on the other by Mr. Hector Payas, a director of Detectives & Security International Ltd. As a result of the arrangements, on July 23rd, 1997 a calculation was made and a balance was struck whereby it was agreed that Detectives & Security International Ltd. would pay the plaintiff £60,000 with interest at 5%, repayments being set at £5,136.45 per month.

At the time the agreement was reached, the defendant signed a series of 12 promissory notes by which he promised to pay the plaintiff the sum of £5,136.45 per month, beginning on August 1st, 1997. The promissory notes were signed by Mr. Hector Payas in his own name and there was no indication on their face that he signed on behalf of Detectives & Security International Ltd.

It transpired shortly afterwards that the basis on which the calculations were made might not have been as accurate as it seemed on July 23rd, 1997 and the net result was that Mr. Payas and Mr. Frankel agreed that Detectives & Security International Ltd. and Dewmont Security Ltd.

would look at the matter to correct the figure, and Detectives and Security International Ltd. undertook to complete the work before three weeks from August 8th, 1997. In the case of deadlock, it was agreed to arbitrate the matter and they both signed an agreement on August 8th, 1997. At para. 3 of the arbitration agreement it is agreed that—

> "pending the completion of this work Dewmont Security Ltd. hereby irrevocably accepts that Detectives & Security International Ltd. will have the right to refrain from paying a number of promissory notes given to Dewmont Ltd. in this sale-purchase transaction, provided this amount is equal to the difference of the disputed deposit figure."

The sale-purchase transaction is the transaction which, as I have mentioned, crystallized on July 23rd, 1997.

It is part of the plaintiff's case that a lease which was part of the transaction was granted on the understanding that the defendant would provide the monetary shortfall on the lease himself personally. In his affidavit Mr. Frankel says:

> "It was only as a result of the defendant agreeing to be personally responsible for any shortfall in money, which in the event turned out to be £60,000, that I, as director of Leon House Properties Ltd., agreed to grant the said lease to the defendant's company."

Not so, says Mr. Hector Payas: the deal was always between Dewmont Security Ltd. and Detectives & Security International Ltd. Leon House Properties Ltd. had nothing much to do with this. Furthermore, it is not correct that he, in his personal capacity, agreed to be personally liable or responsible for any shortfall which may have been due by Detectives & Security International Ltd. As far as he was concerned, any guarantee could be covered by mortgaging the premises and Mr. Payas points to instructions he gave before July 23rd, 1997 to Mr. Pilley, a lawyer, that the "security against this arrangement is to be the vault itself" and believed Mr. Frankel well knew of this, as Mr. Pilley was Mr. Frankel's lawyer at the time. He conceded that the relationship between Pilley, Frankel and himself was rather uncertain.

On the face of it, the promissory notes are quite unambiguous in their terms and it seems to me that Mr. Payas is quite wrong to attempt to resolve the situation by attempting to bring any evidence in respect of the surrounding circumstances. The reason for this, of course, is that bills of sale and promissory notes are to be treated as cash and can only be set aside in the most exceptional circumstances. As I see it, there is here a set of promissory notes which have been issued on the same day that other transactions were clinched and it seems a perfectly proper inference to draw that the promissory notes were held in escrow by Dewmont Security Ltd. for the due payment by Detectives & Security International Ltd. in respect of which Mr. Hector Payas would become personally responsible as guarantor or surety.

However, that is not the end of the story. Mr. Hernandez submits that it is, since the action relies on the promissory note. What Mr. Payas says is that he at no time agreed to be personally liable and he draws attention to the letter Mr. Frankel wrote to Messrs. Isola & Isola, in which, he submits, Mr. Frankel suggests this to be the case for the first time. He alleges that this is an afterthought made up by Mr. Frankel after the issue of the writs and with the intent to shut him out. Furthermore, he draws attention to the fact that, although counsel for the plaintiff criticizes him for not defending on the grounds he puts forward in his affidavit and not counterclaiming, he could never defend or counterclaim against Dewmont Security Ltd. in any way other than by the defence that he has filed because he, Hector Payas, personally has no claim or counterclaim against Dewmont Security Ltd. since it was not he personally but Detectives & Security International Ltd. who entered into the transaction.

I do not think it is relevant to consider what Mr. Payas thought at the time, for the reasons I have set out above. The deal was struck between Detectives & Security International Ltd. and Dewmont Security Ltd. and it was plain on the face of the promissory notes that Mr. Payas signed as such. All the inferences suggest that he knew that he was signing in his personal capacity and I will not allow extrinsic evidence to be called. But that the matter was more muddied than appears at first sight seems to me to be obvious. First, because, as Mr. Payas suggests, the letter of Robert Frankel to his solicitors was written long after the events of July 23rd, 1997 and after the writs were issued. Secondly, and more importantly in my view, the arbitration agreement is significant in so far as Dewmont Security Ltd. is concerned in that it (i) links a dispute by Detectives & Security International Ltd. in respect of the amount of deposit with a right on the part of Detectives & Security International Ltd. to refrain from paying 12 promissory notes given to Dewmont Security Ltd. and goes on "provided the amount is equal to the difference of the disputed figure"—that last proviso, it seems clear to me, contemplates that a promissory note would not be payable if the amount found after investigation equalled or was more than the value of whatever number of promissory notes made up that sum—and (ii) links the promissory notes to Detectives & Security International Ltd.

Only if what Mr. Payas says is right could this be so and it seems to me that by the time the arbitration agreement was entered into (and that was only a couple of weeks after July 23rd, 1997) the parties had inextricably mixed Detectives & Security on the one hand and Mr. Hector Payas on the other, because the right given to Detectives & Security International Ltd. to refrain from paying the promissory notes cannot satisfactorily arise if Mr. Payas alone was personally responsible.

Under the arbitration agreement, Detectives & Security International Ltd. was given the task of completing the work of confirming what was the correct amount due. It had three weeks to do it and I am told that it did

so, but the parties are still at odds and two matters arise: (a) Detectives & Security International Ltd. refuses to pay more than what it states it owes (the equivalent roughly of five of the promissory notes to date unpaid) and of course so does Mr. Payas; and (b) the arbitration has not yet commenced. I do not know where the blame for this lies but it does not matter. Mr. Hernandez submits that the right to refrain exists only during the completion of the works to ascertain the amount due and under the agreement that stands for three weeks. I do not read the words "pending the completion of this work" so narrowly in the context in which they appear. That period must extend past those three weeks if the dispute is not resolved and thereafter up to the arbitrator's decision.

This aspect of the matter takes on, in my view, great significance because while the law is quite clear that in an action between parties to a bill of exchange in the ordinary way judgment should be given upon that bill of exchange as for cash and it is not to be held up by any counterclaim which the defendant may assert, even if the counterclaim relates to the specific subject-matter of a contract, it is nevertheless clear that the court has a discretion in the matter in the exercise of which it can grant a stay if it thinks fit. Of course, this is done only if there are exceptional circumstances and where there is an action between the immediate parties to a bill of exchange, because judgment should not be held up.

In the instant case it is an action between the immediate parties to a bill of exchange. The remit is, however, much wider because the case encompasses a relationship between one of the parties and another party which is closely linked with it, *i.e.* Detectives & Security International Ltd. as one entity and Hector Payas as a director of that company as another—and the plaintiff knew it. Furthermore, an arbitration agreement was entered into at a later date which affected their respective rights. It seems to me that the arbitration should move ahead, for if Detectives & Security International Ltd. is right about the amount due (even if only in part) an arbitration would resolve that and it may be, as Mr. Payas suggests, that the plaintiff would be wholly paid once seven payments have been made.

In my view, it will be inequitable for the plaintiff to sue on its judgment having regard to the fact that there is an agreement made after the promissory notes were executed to settle the exact amount that is due. It is also my view that judgment has to be entered against Mr. Payas on the claim because that is the legal position, but in the exercise of my discretion in the circumstances of this case I order a stay of execution on the three orders which fall to be made following this judgment and would suggest that in respect of the two outstanding promissory notes on which the plaintiff has not yet sought to bring action, the plaintiff should await the outcome of the arbitration before issuing writs in respect thereof. The stay will remain in place until the arbitration is completed. Naturally,

there has to be a time-limit within which that arbitration has to take place because I will not allow the defendant, in whose favour I am exercising equity, to drag his feet and escape his liability for any substantial length of time. The defendant must initiate proceedings for arbitration within seven days, failing which the stay will be lifted and the plaintiff may proceed to execution on the judgment.

Order accordingly.
