Court of Queen's Bench of Alberta

Citation: Callahan v. MacDonald, 2009 ABQB 681

Date: 20091120
Docket: 0101 01170
Registry: Calgary

Between:

Janis Callahan

Plaintiff

- and -

Thomas D. MacDonald

Defendant

Memorandum of Decision
of the
Honourable Mr. Justice T.F. McMahon

Introduction

[1] The Plaintiff, Janis Callahan, sues the Defendant, Thomas D. MacDonald, for the return of $103,200.00 U.S. given by her to him between May 14, 1998 and September 28, 1999, with interest. The claim is framed in a debt, negligent misrepresentation, unjust enrichment, breach of fiduciary duty and fraud.

[2] Because the Defendant declared bankruptcy in October 2001, not long after this action began, only the claim in fraud is now advanced.

Facts

[3] The parties met through an internet dating service in February 1998. The Plaintiff was then 38 years old and the Defendant was 43 years of age. The Plaintiff lived in San Francisco, California and the Defendant lived in Calgary, Alberta. The Plaintiff was then a senior sales manager with AT&T earning more than $100,000.00 U.S. annually. She had degrees in

journalism and English. She had been married from 1994 to 1996. She was financially secure with investments and savings as well as a half-interest in a condominium in New York. She had no debts.

[4] The Defendant had a limited post-secondary education. He had worked in the Northwest Territories with a co-operative and then in Red Deer, Alberta for an engineering firm. When he moved to Calgary, he became employed in the oil and gas industry, and later with a merchant bank. He sold his interest in the merchant bank and began to operate independently trying to put corporate acquisitions together for interested parties. He was a self-described mergers and acquisitions consultant. He would be paid a percentage of the value of the transaction, if and when it closed.

[5] The evidence is that during the time relevant to this case, he had no income. The Defendant had been married twice and had alternate week custody of two teenage sons. He lived in a condominium which he rented for $2,100.00 a month and he paid child support of $1,000.00 a month.

[6] After some preliminaries via the Internet and by telephone, the Defendant sent the Plaintiff a ticket for her to fly to Calgary for a weekend in March 1998. That was followed in April with the Defendant travelling to San Diego, California where the Plaintiff joined him and his sons for a vacation. The relationship began to blossom.

[7] By May 1998, the Defendant knew what the Plaintiff was earning and that she had stock worth about $100,000.00 as well as $13,000.00 in a savings account.

[8] It is common ground that on May 14, 1998, the Plaintiff couriered a cheque payable to the Defendant for $13,000.00 U.S. That was in response to an email at 10:15 a.m. on the same day from the Defendant to the Plaintiff saying:

> The guys and I came gy [sic] a deal that we can flip and make some quick money on. Do ya [sic] want in?

[9] There appears then to have been some telephone discussions because at 11:30 a.m., the Defendant emailed the Plaintiff again:

> I just thought you could make a few bucks along side us, use it as walking around money for when you get here. I cannot say too much, as I am just putting some cash in with the boys and I never ask questions (security stuff). But your right. I'll leave it with you, if you want to, if not that's fine too.

[10] The Defendant admits that the money went directly into his personal bank account and was used to pay down his line of credit and credit card debt with his bank. That credit line had been used before May 1998 to cover the Defendant's personal expenses.

[11] By July 1998, the Plaintiff had left her job in California and moved to Calgary to reside with the Defendant. She had intended to leave her job in any event.

[12] On August 25, 1998, by a cheque that shows her residence at the Defendant's Calgary address, she gave the Defendant $23,200.00 U.S. She said it was to pay for research into the possible acquisition of a "Trader Joe's" food store franchise. That possibility was the subject of emails on May 27, 1998 which the Defendant described as a "money printer". His pitch included this message:

> Well, I have been kinda savin this, butt you should know your about to own all the Trader Joe's in Canada. Am I a nut or what?

[13] The Defendant, on the other hand, said this money was "her contribution to our relationship". That became a mantra which he repeated frequently throughout his testimony.

[14] This money, like the May 14 cheque, went directly into his bank account and paid down his various debts. A portion of those debts were the Plaintiff's benefit since she was now living and travelling with him. Most, however, benefited the Defendant and his sons.

[15] On October 22, 1998, the Plaintiff gave the Defendant a cheque for $25,000.00 U.S. It too went into his bank account and was spent in the same way as the previous money. The Plaintiff says she gave him this money for another investment that he was to make for her. Once again, she was denied particulars because it was "secret". Again, the Defendant's explanation was that this money was another "contribution to our relationship".

[16] On November 19, 1998, the Plaintiff gave to the Defendant yet another cheque this time for $32,000.00 U.S. She says it was again for a secret deal in which she could invest. Because she had no cash available, she turned to her investments. The Defendant made a list of her stockholdings and their current lower values. He recommended that she sell some and give the money to him. Again, she had no particulars of the investment because of its secrecy. She did as he recommended. The Defendant's answer to this money was the same – "her contribution to our relationship". The money again went into the Defendant's bank account and was spent.

[17] In December 1998, the Defendant presented the Plaintiff with an engagement ring. No wedding date was agreed upon.

[18] The parties made and continued to make several trips to California during which time they went house shopping. The Plaintiff was anxious to return to the U.S. The Defendant said the house shopping was "entertainment" only, but given the involvement of a realtor and the number of times they went looking for houses, I find it unlikely that he made that admission to the Plaintiff. There is no evidence that he had any financial ability at the time to buy the kind of home they were viewing.

[19] In early 1999, the Plaintiff discovered that she was pregnant. It was her evidence that this discovery along with the fact that they had not married, had not purchased a home, that she had no health coverage in Canada and could not work here all led to a decision by her to return alone to California.

[20] It was her evidence that at that time she demanded the return of her money and was told she would need a lawyer to get it.

[21] At trial, the Defendant admitted that conversation. He went further and quoted the Plaintiff as saying that she wasn't leaving until she got her money back. That statement led the Defendant to retain a lawyer to write to the Plaintiff in May 1999 demanding she leave or face eviction. She left.

[22] By August 1999, after some discussions had occurred, the Plaintiff returned to Calgary for an attempt at reconciliation. They resumed co-habitation and went so far as to look at property on which to build a house in north-west Calgary.

[23] They found a lot and the Plaintiff provided the Defendant with a cheque for $10,000.00 on September 28, 1999 for the purpose of buying that lot. That money went again directly into the Defendant's bank account and was spent. No offer was ever made for the lot. It was the Defendant's evidence that he decided he should be careful about buying the lot with the Plaintiff. He did not offer to return the money nor did he have any memory of their discussing his use of the money for expenses.

[24] In December 1999, the relationship came to an end and the Plaintiff returned to California.

Analysis

[25] The classic definitions of fraud cite two essential elements: dishonesty, and deprivation. A false representation of fact, made with knowledge of its falsehood, or recklessly without belief in its truth, and made with the intent that the other party should act upon it, with the result that the other party does act upon it, is fraud. ***R. v. Kirkwood***, 5 C.C.C. (3d) 393 amd ***Parna v. G. & S. Properties Ltd.*** [1971] S.C.R. 306.

[26] As well as by overt words or conduct, fraud can be accomplished by concealment of that which should be disclosed and which is intended to and does deceive to another's detriment. ***Massey v. Brost***, 1996 CarswellAlta 388 at para. 52.

[27] It is abundantly clear from the evidence that the Plaintiff's first cheque for $13,000.00 was induced by false representation of fact by the Defendant. Fortunately, the Plaintiff has the emails from the Defendant from May 14 that directly support her testimony to that effect. There is no evidence of a deal, or a flip, offered by the Defendant to explain his email representations. There is no evidence that he put in cash as he represented or even that he had cash available to put in.

[28] I conclude that this “deal” was a complete fabrication designed to induce the Plaintiff to send him some money. He refused to give the Plaintiff details, claiming secrecy, and gave no evidence at trial of any particular deal he could put her money into.

[29] The fact that this money went into his personal account and was used almost immediately to cover his debts is also persuasive evidence of the falsity of his representations and his fraudulent intent.

[30] Had there been a deal which simply did not materialize, one would expect the money to be returned rather than spent. In that context, it is material that at this early date, theirs was still a long-distance relationship in its formative stages. There was thus no ability for the Defendant to raise the “it was her contribution to our relationship” defence.

[31] As to the next three payments of $23,200.00, $25,000.00 and $32,000.00 while they lived together, I do not believe the Defendant when he characterizes those as her contribution to their relationship. There is no way to rationalize the timing of the payments nor the large amounts with on-going household expenses.

[32] These sums nearly depleted her savings. That she would agree to spend that money on household and travel bills for the Defendant and his sons is simply not credible. She was a single woman in a foreign land away from friends and family and without an ability to earn income. It is not credible that she would knowingly see her savings dissipated on living expenses in the hands of her companion who himself had no other income and no significant assets.

[33] It is credible that she could be persuaded to give her savings to the person she lived with to invest and multiply, as he said he could at the outset in May of 1998.

[34] Had she intended these funds to pay for daily expenses, it is reasonable to infer she would have retained the money in her own account and paid bills directly or put them into a joint account in order to have some control. The fact that neither occurred suggests the money was not intended for household expenses.

[35] The table had been set in May 1998. The Defendant described himself as a mergers and acquisitions consultant able to find and do deals, to put his own cash into deals and to generate “quick money”. During the course of the relationship, his willingness to house shop in California with a realtor created a false impression of a man with the means to close a deal. His later apparent willingness to buy a lot in Calgary and build a house left the same impression. Yet he generated not a dollar of his own during the time of this relationship.

[36] The Defendant gathered in the final $10,000.00 with a false representation that he would use it for a down-payment on the lot. Instead it was spent on his bills.

[37] The Plaintiff relied on all these representations and to her obvious detriment.

[38] The Defendant had a history of this kind of activity. He had met at least two other women via the Internet from whom he obtained $25,000.00 in one case and $16,200.00 in the other. It was his evidence that he had repaid those sums.

[39] The Plaintiff cites ***Zhou v. Wang*** 2004 CarswellBC 1830 as an example of a false representation made within a domestic relationship. At para. 74, the Court said:

> Regardless of whether the misrepresentation is made in a romantic relationship or not, it remains a question of fact in any case whether a misrepresentation was a material inducement relied upon by the representee.

[40] The existence of a domestic relationship between the payor and the payee may make it more difficult to ascertain the deception but once the evidence satisfies the trier of fact on that issue, as here, then the domestic context is not relevant.

[41] I conclude that the Plaintiff is entitled to the damages claimed in the sum of $103,200.00 U.S.

Currency Conversion

[42] An issue arises as to the date when the conversion from U.S. dollars to Canadian dollars should be made. The parties agree that if the exchange rate on the date each cheque was written was used then the Canadian dollar equivalent to $103,200.00 U.S. is $158,056.94.

[43] If the exchange rate used is as at the eve of trial, then the Canadian dollar equivalent is $108,662.37.

[44] Counsel have referred me to ***Stevenson Estate v. Siewert*** 2001 ABCA 180. There the plaintiff obtained judgment against the defendant for the wrongful conversion of $100,000.00 U.S. The value of the Canadian dollar had fallen as against the U.S. dollar significantly between the date of the breach and the date of judgment. As a result, had conversion been ordered as at the date of the breach, the plaintiff would not have been made whole. At para. 15, the Court concluded:

> The Court's task is to select the most fair and equitable fo the two possible conversion dates. It cannot be expected that either of these will allow perfect justice to be rendered. Given this, if any equities must fall unequally on the parties, they should fall more heavily on the wrongdoer than on the victim.

That principle is no doubt sound in the circumstances of that case. I must however bear in mind another principle – that the victim of a tort should be returned to the same position as if the tort had not occurred – a principle also recognized in the above case at para. 12. Here the conversion date at the date of trial will – on the assumption that judgment is paid without delay – yield $103,200.00 U.S. to the Plaintiff and so restore her to her original position.

[45] The most fair and equitable conversion date would be at the date of collection of this judgment, but I see no practical way to accomplish that.

[46] Accordingly the Plaintiff will have judgment for the sum of $108,662.37.

Interest

[47] During the course of this litigation, an Order was made that the Plaintiff would not, if successful, be entitled to interest for the period from March 15, 2004 to February 4, 2007. Subject to that Order, the Plaintiff is entitled to interest in accordance with the *Judgment Interest Act* RSA 2000, Ch. J-1 calculated from the date of each payment.

Costs

[48] The Plaintiff is entitled to costs. Counsel may apply to settle quantum if agreement cannot be reached.

Heard on the 16th day of November, 2009.
Dated at the City of Calgary, Alberta this 20th day of November, 2009.

T.F. McMahon
J.C.Q.B.A.

Appearances:

David M. Pick
SCOTT HALL LLP
for the Plaintiff

J. David D. Steele
BENNETT JONES
for the Defendant