COURT OF APPEAL FOR ONTARIO

CITATION: ID Inc. v. Toronto Wholesale Produce Association, 2024 ONCA 948
DATE: 20241231
DOCKET: COA-23-CV-0997

Nordheimer, Copeland and Madsen JJ.A.

BETWEEN

ID Inc.

Plaintiff (Appellant)

and

Toronto Wholesale Produce Association and StrategyCorp.*

Defendants (Respondent*)

James Zibarras and Richard MacGregor, for the appellant

Robert Bell and Rebecca Shoom, for the respondent

Heard: December 2-3, 2024

On appeal from the amended judgment of Justice Loretta P. Merritt of the Superior Court of Justice, dated January 15, 2024, with reasons reported at 2023 ONSC 4770.

Nordheimer J.A.:

[1] ID Inc. appeals from the amended judgment of the trial judge that dismissed its claim against the respondent, StrategyCorp.[1] At the conclusion of the hearing, we dismissed the appeal with reasons to follow. I now provide those reasons.

[1] By way of clarification, the formal judgment was amended by the trial judge on January 15, 2024 to address the issue of the proper interest rate on the judgment as it applied to the other defendant. However, the reasons of the trial judge dealing with her conclusions on the claims advanced are dated August 25, 2023.

A. BACKGROUND

[2] The claim that gives rise to this appeal is part of a related claim advanced by ID Inc. against the other defendant, the Toronto Wholesale Produce Association (“TWPA”). The claim against the TWPA is the subject of a separate appeal and will be dealt with in separate reasons.

[3] The core claim involves the transformation of a billboard located on property owned by the Province of Ontario which houses the Ontario Food Terminal. The OFT is a food and produce hub covering approximately 40 acres (the “OFT property”) which can be seen from the Frederick G. Gardiner Expressway in Toronto. The Ontario Food Terminal Board ("OFTB") manages the OFT property. Wholesalers operate out of the OFT property selling fruits, vegetables, and flowers. The wholesalers belong to the TWPA, an Ontario corporation without share capital.

[4] There was a large, double-sided, traditional (or static) billboard sign on the OFT property, visible from the Gardiner Expressway. The TWPA owned the billboard. It had leased the small bit of land upon which the sign sits from the OFTB since 1997.

[5] ID Inc., through its principal, Paul Kenny, thought of converting the billboard from a traditional static sign to a digital sign. Digital signs generate significantly more advertising revenue than traditional billboard signs because they can

accommodate many advertisers with advertisements rotating every few seconds. Traffic exposure is the most important determinant of advertising revenue: the more people who will see the sign, the more advertisers will pay. Mr. Kenny described signs facing the Gardiner Expressway as the "holy grail" of advertising signs because the traffic counts on the Gardiner Expressway are among the highest in Canada.

[6] ID Inc. approached the TWPA in mid-2012 with the idea of transforming the billboard to a digital sign. Various discussions took place that I need not detail in these reasons. They will be dealt with in the companion appeal. It is sufficient to record the fact that StrategyCorp became involved in those discussions. StrategyCorp's involvement arose from the fact that it was already doing work for the TWPA in its capacity as a management, consulting, and government relations firm.

[7] The TWPA told ID Inc. that it wished to have StrategyCorp involved in the plan to transform the billboard. ID Inc. was not happy with this decision but acquiesced in it.

[8] ID Inc. had intended to, and did at one point, make an application to the City of Toronto for permission to transform the billboard to a digital sign. However, StrategyCorp determined that it might be possible to ask for provincial approval, not only to transform that billboard, but to add additional digital signs. Given its

greater potential, the decision was made to pursue the provincial approval route, rather than the municipal approval route.

[9] There is no dispute that StrategyCorp did not have any particular expertise in dealing with digital signs or in dealing with the City of Toronto with respect to such signs. StrategyCorp did, however, have expertise and connections with the Province.

[10] As the provincial approval route progressed, StrategyCorp decided that it should receive a portion of the advertising fees that would be generated by the digital signs. To that point, those fees were to be split between ID Inc. and the TWPA, although, as found by the trial judge, there was not yet a concluded agreement to that effect. StrategyCorp approached the TWPA with its request for a portion of the advertising fees, a “success fee”. The TWPA told StrategyCorp that it would not share any of its split of the advertising fees. Rather, the TWPA advised StrategyCorp that it should seek to obtain any such fees from the split of the advertising fees that was intended for ID Inc.

[11] StrategyCorp then approached ID Inc. about receiving some portion of its split of the advertising fees. This approach was not well received by ID Inc. Indeed, StrategyCorp’s request led to ongoing problems in the relationships between ID Inc. and StrategyCorp, and between ID Inc. and the TWPA.

[12] Eventually, ID Inc. agreed to give StrategyCorp a portion of its split of the advertising fees. This agreement was the subject of a Consulting Agreement entered into between ID Inc. and StrategyCorp dated December 19, 2013.

[13] As matters progressed, it was determined that there was no provincial route to the approval of the digital signs. A legal opinion had originally been given that the OFTB was a provincial Crown agency. If that had been the case, approval from the City of Toronto would not have been necessary. However, it later emerged that the OFTB was not, in fact, a provincial Crown agency. This fact was confirmed by a subsequent legal opinion obtained from a different law firm. As a result, there was no provincial approval route. The only approval route was the municipal one.

[14] By the time that this discovery was made, sometime in 2014, the relationship between ID Inc. and StrategyCorp, and between ID Inc. and the TWPA, had deteriorated. In early 2015, StrategyCorp decided to end the Consulting Agreement with ID Inc.

[15] On this issue, it is relevant to know that there was an initial agreement, dated March 28, 2013, between ID Inc. and the TWPA for the transformation of the single digital sign. That agreement (referred to throughout as the Sale and Maintenance Agreement or SMA) required ID Inc. to obtain a permit for the digital sign within 360 days.

[16] While StrategyCorp had decided to end the Consulting Agreement, it was concerned about any impact the existence of the SMA might have on that decision. StrategyCorp therefore inquired of the lawyer for the TWPA about the status of the SMA. The TWPA's lawyer told StrategyCorp that the SMA had expired in accordance with its terms as the 360-day period had passed without the sign permit being obtained.

[17] StrategyCorp then advised ID Inc., by letter dated January 21, 2015, that it considered the Consulting Agreement to be at an end because it was premised on the existence of the SMA and the SMA had expired. ID Inc. did not respond to the letter. StrategyCorp then sent an email to ID Inc. dated January 23, 2015, once again stating its understanding that the SMA had expired. No response was received to that email either.

[18] Eventually the TWPA agreed with a different company, a competitor of ID Inc., to undertake the transformation of the billboard to a digital sign. The TWPA applied for and received permission from the City of Toronto for the transformation.

[19] As a result, ID Inc. commenced this action against both the TWPA and StrategyCorp. At trial, it was successful, in part, in its claim against the TWPA but unsuccessful in its claim against StrategyCorp. Thus, this appeal.

B. ISSUES ON APPEAL

[20] ID Inc. argues that the motion judge made the following errors in her decision to dismiss ID Inc.'s claim against StrategyCorp:

(i) The trial judge gave inadequate reasons for dismissing its claim for intentional interference with economic relations and failed to apply the proper analysis for that claim;

(ii) The trial judge erred in finding that the Consulting Agreement was conditional on there being an agreement between ID Inc. and the TWPA;

(iii) The trial judge erred in finding that StrategyCorp had repudiated the Consulting Agreement and that ID Inc. had accepted that repudiation; and

(iv) The trial judge erred in finding that StrategyCorp did not breach its duty of good faith under the Consulting Agreement.

C. ANALYSIS

(a) Intentional interference with economic relations

[21] The trial judge set out the correct test for this tort. It has three requirements: first, the defendant must have intended to injure the plaintiff's economic interests; second, the interference must have been by illegal or unlawful means; and third, the plaintiff must have suffered economic harm or loss as a result: *Alleslev-Krofchak v. Valcom Limited*, 2010 ONCA 557, 322 D.L.R. (4th) 193, leave to appeal refused, [2010] S.C.C.A. No. 403.

[22] The trial judge then, with reference to the detailed facts she had already set out in her lengthy reasons, found that the first aspect of the test had not been met, that is, she found that StrategyCorp did not intend to injure ID Inc. She further found that any interference with ID Inc.'s economic interests was not the result of any unlawful means by StrategyCorp.

[23] ID Inc.'s foundation for this alleged tort is its contention that StrategyCorp involved itself in this process regarding the digital sign for the sole purpose of gaining for itself a portion of the advertising fees. ID Inc. contends that this was the sole reason for StrategyCorp pushing the provincial approval route, both because it knew nothing about the municipal approval route and because it could legally obtain fees for participating in lobbying efforts with the provincial government, whereas it was precluded from doing so with respect to the municipal approval route.

[24] The trial judge rejected this fundamental contention. She found that ID Inc., StrategyCorp, and the TWPA were all in favour of pursuing the provincial approval route, in part because it offered the opportunity for the creation of more than one digital sign and thus greater advertising fees. She found that ID Inc. was an active participant in this effort.

[25] On appeal, ID Inc. essentially challenges these factual findings. However, it fails to demonstrate any palpable and overriding error in those findings. ID Inc. attempts to avoid this result by submitting that the errors it identifies are errors of

law. That attempt fails. The quarrel that ID Inc. has with the trial judge's analysis and conclusion is entirely fact based. No error of law is shown by ID Inc.

[26] ID Inc. also submits, unfairly in my view, that the trial judge did not undertake any analysis on this issue. While her reasons were relatively brief on the subject, that fact fails to account for the detailed factual analysis that the trial judge had already undertaken, and which was critical to the analysis. The trial judge was not required to repeat that factual analysis when she came to deciding every issue with which she was faced.

[27] ID Inc. also fails to establish that StrategyCorp was negligent in the advice that it gave to the TWPA respecting the provincial route. It advances this contention as a foundation for its submission that StrategyCorp's interference in the digital sign transformation arose from unlawful means because it took everyone down the provincial approval route. As the trial judge found, all parties pursued the provincial route based on a legal opinion that had been obtained. It was only later discovered that the legal opinion was in error. That fact was not the fault of StrategyCorp, nor did it amount to any negligence on the part of StrategyCorp.

[28] ID Inc. has not shown any error in the trial judge's conclusion that the tort of intentional interference with economic relations was not made out.

(b) The Consulting Agreement

[29] ID Inc. also contends that StrategyCorp breached the non-competition clause in the Consulting Agreement. The trial judge concluded that the Consulting Agreement never came into effect by its terms because ID Inc. never entered into an agreement with the TWPA for the provision of advertising fees on any of the signs. The trial judge further found that, even if the Consulting Agreement had come into existence, StrategyCorp had repudiated that agreement and ID Inc. had accepted that repudiation.

[30] ID Inc. challenges both findings, once again asserting that they involve questions of law subject to the standard of review of correctness. Those challenges fail. On the first point, ID Inc. refers solely to paragraph one of the Consulting Agreement that deals with the term of the contract. However, in interpreting the Consulting Agreement, the trial judge rightly considered the entire agreement. When discussing the proper approach to the interpretation of a contract, Rothstein J. said in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47: “[A] decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.”

[31] Paragraph one of the Consulting Agreement does suggest, as submitted by ID Inc., that the agreement was for 120 months from its stated effective date of

December 19, 2013. However, paragraph three of the Consulting Agreement provides that no fees are payable until ID Inc. enters into a written agreement with the TWPA for the “supply, installation and selling of advertising time” on the signs. Further, paragraph six of the Consulting Agreement provides that ID Inc. could terminate the Consulting Agreement if it “no longer has the right to sell the advertising” on the signs.

[32] Considering all these provisions, the trial judge concluded that the Consulting Agreement did not come into effect until an agreement was signed between ID Inc. and the TWPA for the advertising fees. No such agreement was ever signed. That interpretation was open to the trial judge. The interpretation of a contract at first instance is subject to the palpable and overriding error test. No such error has been shown by ID Inc.

[33] ID Inc. challenges the trial judge’s finding that the entire Consulting Agreement was conditional on there being an agreement between ID Inc. and the TWPA to sell advertising. On ID Inc.’s interpretation, only the fee payable under the Consulting Agreement was subject to that condition. Yet this interpretation was expressly considered, and rejected, by the trial judge. ID Inc. has not demonstrated any error in her finding on this issue that would justify this court’s intervention. Moreover, ID Inc.’s proposed interpretation leads to the incongruous result that the Consulting Agreement would come into effect for certain purposes on one date

and for other purposes on another: see e.g., *McClelland & Stewart Ltd. v. Mutual Life*, [1981] 2 S.C.R. 6, at p. 19.

[34] In addition, the interpretation urged by ID Inc., which considers only paragraph one of the Consulting Agreement, could potentially result in a situation where StrategyCorp would be restricted from consulting on any other sign project along the Gardiner Expressway for any other company for a period of ten years while not receiving any fees from ID Inc. because it never entered into an agreement with the TWPA. Such an interpretation would amount to a commercial absurdity and ought to be avoided for that reason: *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434, at p. 440; *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24.

(c) Repudiation

[35] In the alternative to her finding that the Consulting Agreement never came into effect, the trial judge found that StrategyCorp had repudiated the Consulting Agreement by the letter and subsequent email it sent to ID Inc. in January 2015. The trial judge went on to cite the case law on when silence, in response to a repudiation, can constitute acceptance of that repudiation: *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561.

[36] ID Inc. did not respond to the January 2015 letter or the subsequent email. It did not do so then or at any time in the many months that followed. As set out in

the cases cited by the trial judge, acceptance of a repudiation can arise from the passage of time with no action by the other party: see, for example, *Brown v. Belleville*, at para. 47. Whether that passage of time amounts to an acceptance of the repudiation in any given case is a question of fact. The trial judge made that factual finding in this case and ID Inc. has failed to establish any palpable and overriding error in that finding.

(d) Good faith

[37] At trial, ID Inc. advanced four bases for asserting that StrategyCorp had breached its duty of good faith with respect to its conduct under the Consulting Agreement. ID Inc. now raises similar arguments on appeal. I would first note that it seems problematic to assert bad faith in the performance of a contract that the trial judge found never came into existence. In any event, as Cromwell J. observed in the leading case on the issue of good faith, *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 63: “That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.”

[38] The trial judge rejected each of the bases that ID Inc. advanced for this allegation of bad faith. She found that StrategyCorp was upfront about the problem that arose with the legal opinion, that it told ID Inc. there was a problem with the provincial approval route, and that it was clear and frank when it told ID Inc. that the Consulting Agreement was at an end.

[39] The trial judge also rejected ID Inc.'s contention that StrategyCorp and the TWPA "sidelined" ID Inc. Rather, she concluded that any exclusion of ID Inc. from meetings in the later portion of the events was done with the goal of avoiding conflict with ID Inc., a concern that reasonably arose from much of the conduct of Mr. Kenny, ID Inc.'s principal.

[40] Again, ID Inc. has failed to demonstrate any error of law or palpable and overriding error of fact in the trial judge's reasons on this issue.

D. CONCLUSION

[41] At their core, ID Inc.'s submissions amount to an attempt to have us substitute different factual findings regarding the actions of these parties over a period of more than three years. That is not the role of this court.

[42] It is for these reasons that the appeal was dismissed. StrategyCorp is entitled to its costs of the appeal, which we fix in the amount of $50,000, inclusive of disbursements and H.S.T.

Released: December 31, 2024 "I.N."

"I.V.B. Nordheimer J.A."
"I agree. J. Copeland J.A."
"I agree. L. Madsen J.A."