

April 5, 2016

This is an appeal by the Defendants from the judgment of Deputy Judge McNeely dated July 7, 2015, where she ordered the Defendants to pay the Plaintiffs \$16,850.00 plus interest. In their factum, the Defendants raised two grounds of appeal:

1. The Deputy Judge made a palpable and overriding error in finding that the mortgage agreement was signed by Mr. Bell and, in fact, in not finding that Mr. Bell's signature on the agreement was a forgery. On appeal, the Defendants abandoned this ground as argued in their factum, but instead submitted that the trial judge erred when she failed to deal with the fact in her reasons that Mr. Redley, who was also a party to the contract, witnessed Mr. Bell's signature. According to the Defendants, it is a well-known principle of contract law that one party to a contract cannot witness the signature of another party to the contract.

No legal authority was advanced for this proposition. Aside from the fact that it was not an argument raised in the Defendants' factum, it is also an argument that has no merit. The trial judge accepted Mr. Redley's evidence that Mr. Bell had signed the contract. Mr. Redley was there when it was signed; Mr. Redley testified that he witnessed Mr. Bell's signature at the office of Mr. Bell's lawyer, in the presence of the lawyer and assistant. The lawyers kept the original and the assistant emailed a copy of the signature page to Mr. Redley. In view of this evidence (which the trial judge accepted and which was not contradicted by any evidence from Mr. Bell's lawyer or the lawyer's assistant) there can be no suggestion that the trial judge made a palpable and overriding error when she found that Mr. Bell did sign the mortgage contract and the amendment thereto.

2. The second ground of appeal argued in the factum is that the trial judge incorrectly failed to find that the Plaintiffs had breached the contract because, under the contract, funds were to be advanced by May 17, 2013 and they were not. The problem with this argument is that the trial judge found that subsequent to the execution of the original commitment letter, Mr. Bell requested changes to the deal that the Plaintiffs kindly accepted. As a result, an amending agreement was executed on May 23, 2013, changing the closing to May 24, 2013. This time, Mr. Bell's signature was witnessed by his own lawyer. Given the amending agreement, there can be no argument that the Plaintiffs breached the contract by not closing by May 17, 2013.

During oral argument, counsel for the Defendants also raised other arguments that were not advanced in his factum.

He stated that the trial judge erred in finding that the Plaintiffs were ready, able and willing to close simply on the basis of Mr. Redley's evidence that this was the case. According to Defendant's counsel, the trial judge erred in not requiring Mr. Redley to "show her the money" by producing corroborative evidence that the money was actually there.

There is no merit to this submission. Mr. Redley testified as to the arrangements he had made to make the money available for closing and the trial judge, as she was entitled to, accepted his evidence.

The Defendants' counsel made a similar submission about Mr. Redley's evidence that Mr. Bell "walked away from the deal". He argued that that evidence required corroboration before it could be accepted by the trial judge. Again, I disagree with the proposition that corroboration was required but, in this case, Mr. Salmon, the Defendants' witness at trial, also testified that Mr. Bell chose to find financing somewhere else.

Finally, Defendants' counsel chose to reargue the position taken at trial concerning when the Plaintiffs were entitled to payment – was it when the mortgage commitment was accepted or when the funds were advanced? This argument was not raised in their factum and as with other arguments that were not raised in the Defendants' factum, should be dismissed on this basis alone. However, in any event, I find not merit to the argument. The Supreme Court of Canada [Sattva] recently found that questions of contract interpretation are questions of mixed fact and law. The trial judge made no reversible error in her interpretation of the contract between the parties.

For these reasons, the appeal is dismissed. The Plaintiffs are entitled to their costs of this appeal on a partial indemnity basis, which I fix in the amount of \$6,500.00, all inclusive.

Sachs, J.

PAUL REDDY, et al
Plaintiff (Respondent)

-and-

THE ESTATE HERBERT M. BELL, ET. AL.
Defendants (Appellant)

Court File No.: 500-15

April 5, 2016.

This is an appeal by the Defendants from the
Judgment of Deputy Judge McNeely dated
July 7, 2015, where he ordered the Defendants
to pay the Plaintiff \$16,850.00 plus interest.
It is the factum the Defendants raised
two grounds of appeal:

1) The Deputy Judge made a

palpable and overriding error in finding
that the mortgage agreement was voided
by Mr. Bell and, in effect, in finding
that Mr. Bell's signature on the agreement
was also void. On appeal the Defendants
challenged this ground as argued in
their factum, but in fact submitted
that the trial judge erred when she failed

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
Proceeding commenced in Toronto

APPEAL BOOK AND COMPENDIUM

KAZEMBE & ASSOCIATES

Barristers and Solicitors
2801 Keele Street
Unit 104
Toronto, Ontario
M3M 2G6

COURTNEY A. KAZEMBE (37465C)

courtney@kazembelaw.com

ANOSHAN AHANGAMA (67083N)

anoshan@kazembelaw.com

Tel: 416-633-8311

Fax: 416-633-7679

Lawyers for the Appellants

(2)

to deal with the fact in her reasons that Mr. Redley, who was also a party to the contract, witnessed Mr. Bell's signature. According to the Defendants, it is a well known principle of contract law that one party to a contract cannot witness the signature of another party to the contract.

No ~~support~~ legal authority was advanced for this proposition. Aside from the fact that it was not among among raised in the Defendants' factum, it does not even argue that it has no merit. The trial judge accepted Mr. Redley's evidence that Mr. Bell had signed the contract. Mr. Redley was there when it was signed; Mr. Redley testified that he witnessed Mr. Bell's signature at the office of Mr. Bell's lawyer, in the presence of the lawyer's assistant. The lawyer kept the original + the assistant emailed a copy of the signature page to Mr. Redley. In view of this evidence (which the trial judge accepted & which was not contradicted by any evidence from Mr. Bell's lawyer or the lawyer's assistant) there can be no

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suggestion that the trial judge made a palpable and overriding error when he found that Mr. Bell did sign the mortgage contract and the demand note ~~thereby~~ therefor.

(E) The central ground of appeal ~~is~~ argued in the factum is that the trial judge ~~incorrectly found that he~~ failed to find that the Plaintiff had breached the contract because under the contract funds were to be advanced by May 17, 2013 and they were not. The problem with this argument is that the trial judge found that subsequent to the execution of the original commitment letter, Mr. Bell requested changes to the deal that the Plaintiff (Clement) accepted. As a result an amending agreement was executed ^{changing the date to May 24, 2013} on May 23, 2013. ^{at the time}, Mr. Bell's signature was witnessed by his own lawyer. Given the amending agreement, there can be no argument that the Plaintiff breached the contract by not closing by May 17, 2013.

THE ESTATE HERBERT M. BELL, ET. AL.

Defendants (Appellant)

-and-

PAUL REDLY, et al
Plaintiff (Respondent)

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
Proceeding commenced in Toronto

CERTIFICATE OF COMPLETENESS

KAZEMBE & ASSOCIATES

Barristers and Solicitors

2801 Keele Street

Unit 104

Toronto, Ontario

M3M 2G6

COURTNEY A. KAZEMBE (37465C)

courtney@kazembelaw.com

ANOSHAN AHANGAMA (67083N)

anoshan@kazembelaw.com

Tel: 416-633-8311

Fax: 416-633-7679

Lawyers for the Appellants

(4)

During oral argument the counsel for
The Defendants also raised other arguments
that were not advanced in his factum.

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th...

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A There is no merit to this submission. Mr. Redley testified as to the arrangements he had made to make the money available for closing and the trial judge, ~~as~~ ⁱⁿ his evidence, was entitled to, accept ~~that submission~~ ^{his evidence}.

The Defendants' counsel made a similar admission about Mr. Redley's evidence that Mr. Bell "walked away from the deal." He argued that that evidence required corroboration before it could be accepted by the trial judge. Again I disagree ~~that~~ with the proposition that corroboration was required but, in this case, Mr. Salmon, the Defendants' witness at trial, also testified that Mr. Bell chose to find financing somewhere else.

D Finally, Defendants' counsel chose to reargue the position taken at trial concerning when the Plaintiffs were entitled to payment - was it when the mortgage commitment was accepted or was it when funds were advanced?

(6)

This argument was not raised in their factum and as with the other arguments that were not raised in the Defendants' factum should be dismissed on this basis alone. However, ~~in~~ in any event, I find no merit to the argument. The Supreme Court of Canada has recently found that questions of contract interpretation are questions of mixed fact + law. McNeil J. made ^{reversible} no error in her interpretation of the contract between the parties.

For those reasons the appeal is dismissed. The Plaintiffs are entitled to their costs of this appeal on a partial indemnity basis, which I fix in the amount of \$6500.00, all inclusive.

Judge J.