

CITATION: MHR Board Game Design Inc. v. Canadian Broadcasting Corporation, 2013
ONSC 4457
COURT FILE NO.: CV-12-452064
DATE: 20130628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MHR Board Game Design Inc. and Marc Ribeiro, Plaintiffs

AND:

Canadian Broadcasting Corporation, Defendant

BEFORE: Aston J.

COUNSEL: *Marc Ribeiro*, personally and for the Plaintiff MHR Board Game Design Inc.

Andrea Govsalves, for the Defendant

HEARD: April 16, 2013

ENDORSEMENT

[1] The plaintiffs participated in a recording of the Canadian Broadcasting Corporation (“CBC”) program “Dragons Den” to present a business proposal and for the chance to receive investment financing for a board game. Mr. Ribeiro is the president, sole shareholder and directing mind of the corporate plaintiff.

[2] The defendant brings this motion for summary judgment to dismiss the claims of the plaintiffs on the basis that the Consent and Release signed by Mr. Ribeiro on behalf of the plaintiffs expressly waives the causes of action alleged in this proceeding. The Consent and Release, found at Tabs 2B and 2D of the Motion Record, was signed by Mr. Ribeiro on two occasions, April 2, 2011 and May 27, 2011.

[3] The essence of the plaintiffs’ claims are that the short segment of the original recording that was broadcast is not only a “complete misrepresentation” of the original recording, but that the defendant’s conduct amounted to “gross and reckless negligence, intentional misconduct, malice and bad faith”. The plaintiffs have sued the defendant for breach of contract, defamation, breach of duty of care, and injurious falsehood.

[4] Mr. Ribeiro alleges that the specific conduct involved in this case is not within the exoneration clauses of the Consent and Release or alternatively, that it would be unconscionable or contrary to public policy to enforce its terms. He recognizes that the Consent and Release affords a very broad editing discretion to the defendant but submits that, because the Release is

so broad in its terms, the exercise of such editing discretion engages a corresponding implied duty to do so reasonably and in good faith.

[5] In determining whether there is any genuine issue requiring a trial of the plaintiffs' claims, there are three issues to address:

- (i) Does the Consent and Release effectively bar each and every claim in the Statement of Claim?
- (ii) If so, would it be unconscionable or contrary to public policy to enforce the Consent and Release? And
- (iii) Are the provisions in the Consent and Release exonerating the defendant vitiated by a breach of contract by the CBC itself, specifically a breach of an implied duty not to act recklessly, maliciously or in bad faith?

[6] A threshold consideration on a Rule 20 motion is whether the "full appreciation test" has been met. Mr. Ribeiro admits that the extensive evidence on this motion shows the nature of the alleged misrepresentation of the Dragons' reaction to his sales pitch on the program. However, he submits that "a trial would be useful to appreciate its full extent". I disagree. I am satisfied that the evidence presented on this motion affords the Court the "full appreciation" required to make dispositive findings.

[7] The evidence includes video recordings and transcripts of both the recorded presentation to the Dragons and the shorter segment that was broadcast. The circumstances of the execution of the Consent and Release are not in dispute. Mr. Ribeiro is himself a lawyer. He does not dispute the fact that he had ample opportunity to read and consider the Consent and Release before signing it. That document speaks for itself. There are no material facts in dispute except those to be drawn inferentially.

Does the Consent and Release effectively bar each and every claim in the Statement of Claim?

[8] The parties agree the starting point is the interpretation of the contract and that the proper approach to contract interpretation is to determine the intent of the parties objectively by reference to the words they used in their contract, read in light of the surrounding circumstances.

[9] Mr. Ribeiro contends that in the case of any contractual ambiguity, the *contra proferentem* principle dictates that the contractual clauses in issue be interpreted against the author of the clause, in this case the CBC. This rule of interpretation has been held to be particularly important when dealing with a clause seeking to exclude liability, so that a clause excluding liability must be interpreted even more narrowly. I accept that legal principle but not its application to the facts of this case. The clauses in the contract relied upon by the defendant are clear and unambiguous. The express terms provide exceptionally broad protection for the CBC against any liability to a participant on the program. That protection is not hidden in fine print. It is crystal clear.

[10] I do not accept Mr. Ribeiro's submission that the failure to specifically use the word "negligence" in the exclusion of liability clause allows him to advance a claim framed in negligence. The broad language of the Consent and Release is clearly intended to cover all causes of action and it would be robbed of its effect if it did not cover negligence.

[11] The Consent and Release is also an absolute defence to an action for defamation (or "injurious falsehood") by its express terms. It is hard to imagine any stronger language than the words found in paragraphs 9 and 27 of the Consent and Release. Mr. Ribeiro specifically acknowledged that his "appearance, depiction and/or portrayal" in the program "may be disparaging, defamatory, embarrassing or of an otherwise unfavourable nature which may expose [him] to public ridicule, humiliation or condemnation". I reject the suggestion Mr. Ribeiro was only giving the Dragons themselves carte blanche in their comments. The Consent and Release expressly includes the Producer of the program and a long list of other "Released Parties". Mr. Ribeiro acknowledged that the program as aired would be edited in the "sole discretion" of the Producer. He must have understood the release extended beyond the comments of the Dragons.

[12] I find that the Consent and Release by its express and unambiguous terms releases the defendant from every claim identified in the Statement of Claim.

[13] Since the Consent and Release is a complete bar to the claims, this action should only proceed if it would be unconscionable or contrary to public policy to enforce the contract or if the defendant itself breached the contract.

Would it be unconscionable or contrary to public policy to enforce the Consent and Release?

[14] There are no material facts in this case that would distinguish it from the case of *Turmel v. CBC (Dragons Den)*, 2011 ONCA 519 in which the Court of Appeal found that a similar Consent and Release, executed in similar circumstances to this case, was not unconscionable.

[15] Nor has Mr. Ribeiro demonstrated how the enforcement of the contract would be contrary to public policy. He acknowledges that the Dragons Den program is oriented to entertainment, not public education. There is no evidence supporting an allegation of public harm.

Are the provisions in the Consent and Release exonerating the defendant vitiated by its own breach of the contract, specifically an implied duty of good faith?

[16] The plaintiffs' breach of contract claim focuses on the way in which the defendant edited his sales pitch in the segment that was broadcast. However, paragraphs 5 and 9 of the Consent clearly provide that the CBC has the sole discretion to edit, cut, alter, rearrange or revise the sales pitch for broadcasting. The plaintiffs do not claim that the defendant breached any express terms of the Consent and Release, but rather rely on an "implied duty of good faith" when exercising its editing discretion.

[17] Mr. Ribeiro submits that paragraph 29 of the Consent and Release specifically contemplates the possibility that a participant in the program can bring an action for breach of contract, though the “sole remedy shall be the right to recover monetary damages with respect to any such breach”.

[18] However, the evidence fails to establish any breach of the contract by the defendant. First, even assuming an implied duty can be read into the contract, it is not self evident that the broadcast segment actually constituted a misrepresentation of Mr. Ribeiro’s sales pitch. Though the Dragons expressed interest in the game itself and enjoyed playing it, it was at the same time clear that they were unwilling to invest in its commercial viability. Second, even assuming that the broadcast segment somehow distorted the nature of what transpired during the sales pitch, there is no evidence whatsoever to support Mr. Ribeiro’s allegation that the editing was done maliciously or recklessly. In the final analysis there is simply no evidence to support the bald allegation of a lack of good faith in the editing exercise.

Conclusion

[19] The motion for summary judgment is therefore granted and the action is dismissed. The plaintiffs are to pay costs, fixed at \$7,500 all inclusive, as requested.

Aston J.

Date: June 28, 2013