

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:)
)
IOSIF BALAGULA) *Laman Meshadiyeva*, for the
) Plaintiff/Respondent on Appeal
)
)
) Plaintiff)
Respondent on Appeal)
)
– and –)
)
)
ONTARIO CONSUMERS HOME) *P. Alex Rivard*, for the Defendant/Appellants
SERVICES) on Appeal
)
)
)
) Defendant)
Appellants on Appeal)
)
)
) **HEARD at Toronto:** September 13, 2018

CONWAY J. (Orally)

[1] Ontario Consumers Home Services Inc. (“**OCHS**”) appeals from the judgment of Deputy Judge Gannage dated October 19, 2017 granting judgment to the plaintiff Iosif Balagula for \$17,334.09, plus costs in the amount of \$2300.

[2] OCHS is in the business of renting HVAC equipment to consumers. Mr. Balagula and his wife were the co-owners of a home at 11 Swinton Avenue. On November 12, 2015, Mr. Balagula signed two contracts with OCHS for the installation and rental of a carbon filter and an air conditioner. He agreed to pay \$49.99 plus HST per month for the carbon filter and \$79.99 plus HST per month for the air conditioner. Both contracts were for a term of 120 months.

[3] The evidence was that Mr. Balagula and his wife sold the property in July 2016 and discovered that OCHS had placed two Notices of Security Interest on the property. The purchaser apparently did not want to assume the contracts. Mr. Balagula had no need for the equipment as he was moving to a condominium. In order to obtain a discharge of the

registrations from title and close the transaction, Mr. Balagula was required to pay \$17,334.09 to OCHS to buy-out the equipment, calculated as the outstanding balance for the remainder of the 120 month term of the contracts. He brought an action to recover that payment from OCHS.

[4] There were two witnesses who testified at the three day trial: Mr. Balagula's daughter and OCHS' processing manager Ms. Hashem. The trial judge found that despite Mr. Balagula's mental illness, he had the capacity to enter into the contracts. However, the trial judge found that although Mr. Balagula signed the contracts, he did not consent to the onerous terms of those contracts that were set out in small print on the back of the contracts. The judge found that the terms were unclear and confusing and did not make it clear that this was a "rent to own" contract. He found that the buyout formula was "far from clear". The trial judge found that these were consumer contracts of adhesion and that OCHS had failed to satisfy its legal obligation to bring to Mr. Balagula's attention the onerous terms of the contract, applying the principles set out in the leading case of *Tilden Rent-A-Car Co. v. Clendenning*, (1978), 18 O.R. (2d) 601 (C.A.).

[5] Specifically, he found that the terms permitting the company to register a lien on title and those that applied on the sale of the home (i.e. the purchaser must take over the contract or the customer must buy-out the equipment) were onerous terms that OCHS had not brought to Mr. Balagula's attention as required by *Tilden*. He concluded that the parties were not bound by those terms and that OCHS was required to return the \$17,334.09 to Mr. Balagula.

[6] The standard of review is set out in *Housen v. Nikolaisen*, [2002], 2 S.C.R. 235 at paras. 34-36. On questions of law, the standard of review is correctness. On questions of fact, it is palpable and overriding error. For issues involving questions of mixed fact and law, where there is an extricable legal principle, the standard is correctness and, where there is not, the standard is one of palpable and overriding error.

[7] OCHS admits that it does not review all of the terms and conditions with the consumer and it does not challenge the trial judge's factual finding to that effect. OCHS also does not take issue with the legal principles that the trial judge applied in this case. Its argument on appeal is that the trial judge erred in finding that the contractual terms in question were onerous. This is a question of fact or at most a question of mixed fact and law.

[8] OCHS submits that it was reasonable for it to register a lien against the property with respect to its equipment and to require the consumer to buy-out the balance of the term of the contract on a sale of the house. It argues that the consumer would or ought to have known that he would have to be responsible for the balance of the 120 month term if he sold the house.

[9] The evidence before the trial judge was that these were long term rental contracts, 10 years. If Mr. Balagula wanted to sell his house at any time during the 10 year term to a purchaser who did not want to assume the contracts, he was required to buy-out the balance of the term in order to remove the lien that OCHS registered against the house. He could not return the rental equipment to OCHS without making a large lump sum payment. He had to pay the entire balance owing for the 10 year term, regardless of how much time remained on that term

(in this case, approximately 9 years). The amount of the buyout was significant, in this case over \$17,000. Mr. Balagula's daughter testified that she was surprised to learn on closing about the registration of the lien on title and that the buyout was the only option available to Mr. Balagula if he wanted to discharge the lien and close the sale.

[10] The trial judge's finding that these were onerous terms and not those that a consumer might reasonably expect was a factual finding that was open to him on the record and reflects no palpable and overriding error. Further, he properly applied the legal principles in *Tilden* to conclude that OCHS failed in its obligation to bring these onerous contractual terms to the attention of Mr. Balagula.

[11] The appeal is dismissed.

[12] I have endorsed the Appeal Book and Compendium as follows: "For oral reasons delivered in court today, the appeal is dismissed. Costs payable by the appellant to the respondent in the amount of \$3,500, all inclusive."

CONWAY J.

Date of Reasons for Judgment: September 13, 2018

Date of Release: September 14, 2018

CITATION: Balagula v. Ontario Consumers Home Services, 2018 ONSC 5398
DIVISIONAL COURT FILE NO.: 681/17
DATE: 20180913

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

IOSIF BALAGULA

Plaintiff
Respondent on Appeal

– and –

ONTARIO CONSUMERS HOME SERVICES

Defendant
Appellants on Appeal

ORAL REASONS FOR JUDGMENT

CONWAY J.

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