CITATION: 1470568 Ontario Limited (East Side Mario's) v. Prime Restaurants of Canada Inc., 2011 ONCA 9
DATE: 20110110
DOCKET: C51891

COURT OF APPEAL FOR ONTARIO

Weiler, Laskin and Goudge JJ.A.

BETWEEN

1470568 Ontario Limited carrying on business as East Side Mario’s

Respondent (Appellant)

And

Prime Restaurants of Canada Inc.

Applicant (Respondent)

Marc A. Munro, for the appellant

Domenico Magisano, for the respondent

John Russo, for the receiver

Heard: September 23, 2010

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice dated March 22, 2010.

Goudge J.A.:

INTRODUCTION

[1] The respondent is the Canadian franchisor of the "East Side Mario's" restaurant brand. The appellant is the franchisee of an East Side Mario's restaurant in Brampton Ontario.

[2] On the respondent's application, Justice Morawetz appointed a receiver of the appellant's business on March 22, 2010. The application judge held that it was just and convenient to do so because the appellant was not making the required franchise payments to the respondent or the required PST payments to the provincial government. He dismissed the appellant's arguments that the respondent had forgiven its material cumulative debt in letters of March 23, 2009 and November 23, 2009 and that alleged PST default could not be considered because it was not included in the respondent's notice of application.

[3] The appellant repeats these arguments in this court. For the reasons that follow I reject them, as the application judge did, and I would therefore dismiss the appeal.

THE FACTS

[4] In late 2005, the appellant took over an East Side Mario's restaurant in Brampton as a franchisee. The appellant's relationship with the respondent was governed by the Franchise Agreement and the Security Agreement between them. The Franchise Agreement required the appellant to remit franchise payments to the respondent made up

of royalty and service fees of 5% of gross revenues, and advertising contributions of a further 3% of gross revenues.

[5] From the beginning, the appellant did not comply with the payment obligations required by the Franchise Agreement. When negotiations to resolve this broke down, the respondent sent a notice of default to the appellant on January 18, 2010, setting out the amounts it said were owing for royalty and service fees and for advertising contributions. Then on February 10, 2010, it commenced this application pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") to have a receiver appointed. Among other things, its supporting affidavit material also disclosed a claim against the appellant by the provincial government for PST arrears of $101,541. On consent, an interim receiver was appointed on February 23, 2010, pending argument of the application itself. The report to the court of the interim receiver dated March 16, 2010 ascertained that the PST default in fact was $270,657.57.

[6] On March 22, 2010, on the return of the application, the appellant's position was that until the January 18, 2010 notice of default, the respondent had not claimed either royalties and services fees or advertising contributions from the time the appellant assumed the franchise, and further, that these had been expressly forgiven by the respondent in the letters of March 23 and November 23, 2009.

[7] The March 23, 2009 letter begins as follows:

> We outline below a plan that will assist you to keep your restaurant operational.

Current Debt

If we were to calculate your debt to Prime without any amendment to your Franchise Agreement, you would owe the following:

	Royalty and Service Fees *	**Advertising Fund Contributions ***	**Total ***
F '09 (Gross Revenue earned to 04 Jan 09)	$82,214.70	$49,328.82	$131,543.52
F '10 (Gross Revenue earned from 05 Jan 09 to 03 Jan 10)	$13,161.45	$7,896.87	$21,058.32
Grand Total			$152,601.84

* Plus GST

Although Prime is not obliged to do so, in view of your commitment to improve operations of your restaurant and cooperation with Prime, we hereby confirm that the foregoing debt of $152,601.84 is forgiven. Furthermore, in the interest of resolving the issues in your business, Prime is willing to extend concessions to you, subject to certain conditions, as described below.

[8] The letter then addressed certain conditions and obligations proposed for F ’10 (i.e. the fiscal year ending January 3, 2010), for F ’11, for franchise renewal and for lease assignment. It closed with a proposed release by the appellant from all claims against the respondent and a signature line for the appellant. The last paragraph of the letter reads:

> We trust you can see our sincere efforts to reduce your current financial and emotional burdens. If you agree, please sign (below) and return the enclosed duplicate copy of this letter by March 31, 2009.

[9] With one difference, the letter of November 23, 2009 is essentially identical, except that the closing sentence adds a deadline for signing and returning a copy of the letter,

without which "this proposal shall be null and void." Apart from this, the one difference between the two letters was the calculation of current debt which reads as follows:

	Royalty and Service Fees *	**Advertising Fund Contributions ***	**Total ***
F '09 (Gross Revenue earned to 04 Jan 09)	$82,214.70	$49,328.82	$131,543.52
F '10 (Gross Revenue earned from 05 Jan 09 to 15 Nov 09 -- $1,175,243)	$58,762.00	$35,257.00	$94,019.00
Grand Total			$225,562.52

* Plus GST

[10] Neither letter was ever signed and returned by the appellant.

THE DECISION APPEALED FROM

[11] The application judge dismissed the appellant's arguments. He found that the two letters relied on by the appellant did not constitute express forgiveness by the respondent. Rather, he held that they must be read in context, which made it clear that in both cases, the entire letter constituted an operating plan, as the introductory sentence says, and that since the plan was never accepted by the appellant, the forgiveness never came into effect. The application judge pointed out that if the appellant's interpretation were correct, the cumulative debt referred to in the November 23, 2009 letter would have reflected only the increase from March 23, 2009, and it does not.

[12] The application judge also relied on the report of the interim receiver which found that the provincial government had a deemed trust claim against the appellant of

$270,657.57 for failure to pay PST. This default was a breach of the Security Agreement binding the appellant.

[13] The application judge concluded as follows:

> In my view the Applicant has established that the Respondent is in breach of the Franchise Agreement in not making the required Franchise Payments and is also in breach of the Security Agreement with respect to the Franchise Payments and the PST payments.
>
> The position of the Applicant has been put at risk as a result of the failure of the Respondent to comply with the provisions of both the Franchise Agreement and the Security Agreement.
>
> An appointment of a receiver is, in my view, both just and convenient in the circumstances.

[14] Having reached this conclusion, it was not necessary for the application judge to determine whether the pre F ’09 or post January 5, 2009 debts owed by the appellant for royalty and service fees and advertising contributions, or its performance issues raised by the respondent, would be enough to justify the appointment of a receiver.

ANALYSIS

[15] In this court, the appellant reiterates its position that the letters of March 23 and November 23, 2009 constitute debt forgiveness by the respondent. It also makes three additional arguments in this court, none of which was raised at first instance:

(i) the application was advanced contrary to the *Rules of Civil Procedure*, leaving the application judge without jurisdiction to grant the relief sought;

(ii) the application judge erred and went beyond his jurisdictional authority by considering the PST default, since this was not a ground of relief sought in the notice of application;

(iii) the application judge erred in failing to find that the respondent had waived its rights to the outstanding debts and was thereby estopped from enforcing any rights to them.

I will deal with all four arguments in turn.

THE DEBT FORGIVENESS ISSUE

[16] For the reasons he gave, I agree with the application judge's reading of the letters of March 23 and November 23, 2009. Read as a whole, each letter contains the proposal of a plan to the appellant. The opening sentence of the letter says so explicitly. The last paragraph says so implicitly. Between the opening and the closing, the rest of the letter describes the proposal. By its terms it required the appellant to agree, and to sign and return a copy of the letter. Since that never happened, none of the proposed terms, including that concerning debt forgiveness, came into effect.

[17] The appellant's reading of these two letters is that each contains a stand alone forgiveness of the debt that is complete and binding on the respondent without the letter being signed and returned by the appellant.

[18] I do not agree. As the application judge observes, if this were so, forgiveness of the F '09 debt of $131,543.52 was accomplished by the March 23, 2009 letter. That debt

would not appear again as a debt to be forgiven in the November 23, 2009 letter. Yet it does.

[19] In my view this ground of appeal fails.

THE RULES OF CIVIL PROCEDURE ISSUE

[20] The appellant argues that the notice of application refers to Rule 14.05(3)(g), which permits an application for a receiver when that relief is ancillary to other relief being sought. This application is not that, and as a consequence, says the appellant, the motion judge lacked jurisdiction.

[21] However the notice is explicitly brought under the BIA. Section 243 of that Act permits a court to appoint a receiver on application. Rule 14.05(2) provides that a proceeding may be commenced by an application if a statute so authorizes. The BIA does so. Rule 3 of the rules under the BIA provides that the Ontario rules apply to the extent they do not conflict with the BIA rules and no such conflict is advanced here.

[22] I conclude that this proceeding was properly launched and I would reject this ground of appeal.

THE PST DEFAULT ISSUE

[23] The appellant argues that the notice of application does not raise an issue of any PST default by the appellant and says that it must do so in order to prevent surprise and unfair advantage.

[24] However, the respondent's affidavit supporting the application alleges just such a default. Moreover the interim receiver, appointed on consent, reported to the court on the default, as it was obliged to, and quantified it at a significantly higher amount than the supporting affidavit did.

[25] These circumstances do not permit the appellant to properly claim prejudice or surprise. They also provide an ample basis for the application judge to conclude that the appellant owed significant PST arrears to the provincial government and that this constituted a breach by the appellant of the Security Agreement.

[26] This ground of appeal fails.

THE WAIVER OR ESTOPPEL ISSUE

[27] Finally, the appellant argues that waiver and estoppel apply to prevent the respondent from relying on any outstanding debts owed to it by the appellant.

[28] Since this argument was not raised before the application judge, he did not make any findings of fact with this in mind. Nonetheless, given his reading of the letters of March 23 and November 23, 2009, with which I agree, it is clear that neither constitutes the respondent's unequivocal and conscious abandonment of its right to claim the debts, required for waiver, nor the representation that it would not do so, required for estoppel. Nor can I find anything else in the record that would serve this purpose. Finally, the appellant does not advance any resulting reliance or change of position that would be necessary for either concept to apply.

[29] This argument also fails.

[30] For these reasons, I would dismiss the appeal. In the circumstances I would order costs to the respondent fixed at $5,000 inclusive of disbursements and applicable taxes.

RELEASED: JAN 10 2011 (“K.M.W.”)

“S. T. Goudge J.A.”
“I agree. K. M. Weiler J.A.”
“I agree. J. I. Laskin J.A.”