CITATION: Terra Nova Systems Inc. v. R&M United Trade and Network Inc.,
2010 ONCA 490
DATE: 20100709
DOCKET: C50085

COURT OF APPEAL FOR ONTARIO

2010 ONCA 490 (CanLII)

MacPherson, Cronk and Karakatsanis JJ.A.

BETWEEN

Terra Nova Systems Inc.

Plaintiff (Appellant)

and

R&M United Trade and Network Inc., Marc Poirier and Reza Amirshaghagi,
RPM International Trade Sales Group a Division of 1369577 Ontario Inc.,
Mark Gold and Pini Avital

Defendants (Respondents)

Christopher J. Haber, for the appellant

Michael R. Kestenberg, for the respondents

Heard: July 7, 2010

On appeal from the judgment of Justice K. M. van Rensburg of the Superior Court of Justice, dated January 30, 2009.

ENDORSEMENT

[1] The appellant, Terra Nova Systems Inc. ("Terra Nova"), appeals from the trial judgment dismissing its action against the respondent, R&M United Trade and Network

Inc. (“R&M”), for damages arising from breach of contract and against the remaining respondents for damages arising from negligent misrepresentations relating to the sale of goods.

[2] Terra Nova purchased clothing and other items from R&M for resale in the United Kingdom by a company known as Global Sales Limited (“Global”). Most of the goods were sourced by R&M from the respondent, RPM International Trade Sales Group, a Division of 1369577 Ontario Inc. (“RPM”).

[3] The trial judge held that R&M breached its contract for the sale of goods to Terra Nova and that, subject to proof of damages, RPM would be liable to Terra Nova for negligent misrepresentations. However, the trial judge also concluded that the losses arising from these respondents’ wrongful conduct were those of Global, rather than Terra Nova. As a result, Terra Nova had failed to establish a claim for any damages.

[4] The trial judge also held that Terra Nova’s motion, brought during closing submissions at trial, to amend its pleading to add Global as a plaintiff in the action would substantially alter the nature of the case after the completion of the trial and prejudice the respondents.

[5] Accordingly, the trial judge denied Terra Nova’s joinder motion and dismissed the action.

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[6] Terra Nova argues that the trial judge erred: (1) by failing to award damages in its favour, (2) by denying judgment to Terra Nova on the basis of the failure to include Global in the action as a party plaintiff, and (3) by failing to grant judgment in its favour against the individual respondents.

[7] We reject these arguments.

[8] The trial judge's factual findings are fatal to Terra Nova's attack on the trial judgment. In particular, the trial judge's finding that the losses in question were those of Global, rather than those of Terra Nova, was amply supported by the record. The evidence at trial established that Terra Nova purchased the goods in question from R&M and then sold the goods to Global, invoicing Global for the sales; the goods were inspected in England, warehoused and offered for sale by Global; the bills of lading associated with the goods identified Global as consignee; the inventory was carried on Global's financial books of record; and Global incurred the transportation and storage costs associated with the goods.

[9] On these facts, which are not challenged before this court, we agree with the trial judge that any damages arising from the defective merchandise were sustained by Global, not Terra Nova.

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[10] Although there is overlap in the shareholdings in Global and Terra Nova, Global is nonetheless an independent legal entity, separate and apart from Terra Nova and Terra Nova's principal. As the trial judge observed in her reasons, at para. 85:

> The fact that [the principal of Terra Nova] may have been the source of capital for both companies does not overcome the obstacle that the only plaintiff in these proceedings is Terra Nova. Global's losses are not Terra Nova's damages simply because the two companies have a common shareholder and source of capital.

[11] Terra Nova sold the goods in question to Global. In so doing, Terra Nova transferred to Global both the benefits and detriments of the goods originally acquired from R&M. The only financial evidence adduced at trial in support of the damages claim related to Global. In all these circumstances, Global alone had recourse against the respondents in respect of defects in the goods acquired.

[12] Nor can the trial judge be faulted for denying Terra Nova's joinder motion. Simply put, although Terra Nova had numerous earlier opportunities to seek to join Global in the action, it failed to do so until after the close of the evidentiary phase of the trial. It was open to the trial judge at that time, in the exercise of her discretion, to refuse to add Global as a plaintiff. Indeed, we agree with the trial judge that to permit the requested joinder at that late stage would have been unfair and irreparably prejudicial to the respondents.

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[13] The question of Global's status as a necessary party was a live issue before and throughout the trial. Terra Nova elected not to seek leave to amend its statement of claim to add Global as a plaintiff until after all the evidence at trial had been tendered, thus rendering unavailable the usual remedies for alleviating prejudice. It made that election at its peril and cannot be heard to now complain of the consequences of its decision.

[14] Finally, we see no basis on which to interfere with the trial judge's finding that an award of damages in Terra Nova's favour could not be made against the individual respondents in their personal capacities. The trial judge's finding that Terra Nova failed to establish that it sustained any damages is dispositive of this issue, as it is with respect to Terra Nova's claims for damages against the corporate respondents.

[15] In the end, therefore, while Terra Nova succeeded at trial on liability issues, its damages case was fatally flawed.

[16] For the reasons given, the appeal is dismissed. The respondents are entitled to their costs of the appeal, fixed in the total amount of $8,500.

"J.C. MacPherson J.A."
"E.A. Cronk J.A."
"Karakatsanis J.A."

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