CITATION: 2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc., 2011 ONSC 6852
COURT FILE NO.: CV-10-415291
DATE: 2011/11/18

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2130489 Ontario Inc., Jegatheeswaran Sivasothirajah and Thanusha Jegatheeswaran, Applicants

AND:

Philthy McNasty's (Enterprises) Inc., Philthy McNasty's Restaurants Inc. and Terry Tsianos, Respondents

BEFORE: Whitaker J.

COUNSEL: *David S. Altshuller*, for the Applicants

Gregory Govedaris, for the Respondents

HEARD: November 18, 2011

SUPPLEMENTARY ENDORSEMENT

[1] This is an application for the rescission of a franchise agreement under the *Arthur Wishart Act* (Franchise Disclosure), 2000, S.O.c.3 (the "Act").

[2] Amongst other defences, the respondents took the position that the application is barred by the *Limitations Act*, 2002 S.O. c. 24.

[3] The application was heard on September 26, 2011. I issued an endorsement dated October 11, 2011, allowing the rescission with other relief. I made a cost award in favour of the applicants.

[4] In my discussion of the *Limitations Act* issue, I stated that the application was commenced on November 9, 2009. Further, I noted that this date fell within a period of two years and 60 days of the execution of the franchise agreement on October 9, 2007.

[5] I dismissed the *Limitations Act* defence.

[6] On October 11, 2011, counsel for the respondents wrote to me indicating that the date of application was November 29, 2010 and not November 9, 2009 as I had indicated. Counsel asserted that I should apply this corrected date to conclude that the application is barred by the *Limitations Act*.

[7] I invited written submissions from the parties.

[8] It is agreed and undisputed that the application was in fact commenced on November 29, 2010 as asserted by the respondents.

[9] Following my review of written submissions provided, at my direction, the parties attended before me today, to make oral argument. In my invitation to hear oral submissions, I advised the parties to be prepared to argue the *Limitations Act* issue on a *de novo* basis.

[10] At the hearing today, I asked the parties to address three issues:

(a) whether I had the jurisdiction at this point to amend my endorsement of October 11, 2011;

(b) if so, what is the outcome given the alteration of the date of the application; and

(c) should I reconsider the cost award.

[11] The parties agree that I have a broad discretion to amend, alter and change my endorsement as an order has yet to be issued and entered (see *Montague et al. v. Bank of Nova Scotia* 69 O.R. (3d) 87, paragraph 34).

[12] As it is agreed that the correction of the date of application may alter the outcome, I am persuaded that it is appropriate to reconsider my discussion and treatment of the *Limitations Act* issue on a *de novo* basis.

[13] Paragraphs 29 to 32 of my endorsement of October 11, 2011 are removed and replaced with the following:

> 29. With respect to the *Limitations Act* argument, section 6(2) of the *Act* permits the franchisee to rescind the franchise agreement no later than two years after entering into the agreement, where as here, no disclosure has been provided.
>
> 30. Section 6(6) of the *Act* obliges the franchisor to meet its statutory obligations to the franchisee, within a period of 60 days following the effective date of rescission.
>
> 31. As the franchise agreement was rescinded on September 23, 2009, the franchisor had a further period of 60 days – to November 23, 2009 - in which to satisfy its obligations. Until the expiry of this 60 day period, the franchisee could not know with certainty whether the franchisor would comply with section 6(6).
>
> 32. On November 3, 2009, counsel for the respondents advised the applicants that the notice of rescission was disputed. It is fair to say that at this point, the applicants were on notice that the respondents were not prepared to satisfy their obligations on rescission.
>
> 33. I conclude that the claim was discovered on receipt of this letter from counsel. The two year limitation period for purposes of section 4 of the

Limitations Act began to run from November 3, 2009, ending on November 3, 2011.

34. As this application was commenced on November 29, 2010, it is not barred by the *Limitations Act*.

[14] Having considered the submissions of the parties as to costs, I am prepared to reconsider my award. The applicants are entitled to costs fixed at $22,000 inclusive of taxes and disbursements, payable forthwith. Paragraph 35 of my endorsement of October 11, 2011 is amended accordingly.

[15] Attached to this endorsement is a copy of the revised and amended endorsement of October 11, 2011.

[16] Order accordingly

Whitaker J.

Date: November 18, 2011

CITATION: 2130489 Ontario Inc. v. Philthy McNasty's (Enterprises) Inc., 2011 ONSC 5982
COURT FILE NO.: CV-10-415291
DATE: 20111011

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2130489 Ontario Inc., Jegatheeswaran Sivasothirajah and Thanusha Jegatheeswaran, Applicants

AND:

Philthy McNasty's (Enterprises) Inc., Philthy McNasty's Restaurants Inc. and Terry Tsianos, Respondents

BEFORE: Whitaker J.

COUNSEL: *David S. Altshuller*, for the Applicants

Gregory Govedaris, for the Respondents

HEARD: September 26, 2011

AMENDED ENDORSEMENT

[1] This is an application brought under Rule 14.05 (3) for declaratory and other relief. More particularly, the applicants seek the rescission of a franchise agreement, pursuant to the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. c.3 (the "Act").

[2] The applicant Thanusha Jegatheeswaran ("TJ") is the principal of the corporate applicant 2130489 Ontario Inc. ("213"). The applicant Jegatheeswaran Sivasothirajah ("JS") is the husband of TJ and former principal of 213.

[3] The respondent Terry Tsianos ("TT") is the principal of the corporate respondents Philthy McNasty's (Enterprises) Inc. ("PM") and Philthy McNasty's Restaurants Inc. ("PMR").

[4] The respondents take the position that this matter cannot be dealt with as an application due to the significant quantity of factual disputes. I am urged to convert the matter to an action.

[5] The respondents also maintain the matter is barred by the *Limitations Act*, 2002 S.O 2002, c.24. I am asked to dismiss the application on this basis.

[6] The applicants assert the application is not barred by the two year period set out in the *Limitations Act*. As an alternative, the applicants seek leave to convert the matter to an action if I conclude that it cannot proceed in whole or in part as an application.

[7] The issues in dispute are rather narrow. The dispute can be resolved as an application, based on material facts not contested.

[8] The central and critical issue between the parties is whether 213 was entitled to rescind a franchise agreement dated October 9, 2007.

[9] The following paragraphs 10 to 19 contain undisputed facts.

[10] In January of 2007, JS initially approached TT for the purposes of purchasing a franchise. The approach was made by way of intermediary, Stephen M. Murphy of Esbin Realty.

[11] On February 23, 2007, TT provided JS with a purported disclosure document.

[12] On March 15, 2007, JS incorporated 213. JS was the sole principal and director.

[13] On March 20, 2007 JS signed a franchise agreement on behalf of 213 and in his personal capacity as a guarantor.

[14] It became apparent to the parties that JS could not obtain a small business loan necessary for the enterprise. The parties shared the view that TJ would likely be eligible for a small business loan. The parties resolved for TJ to apply for a loan.

[15] On October 10, 2007, TJ received a small business loan. In October of 2007, TJ was made the sole director and principal of 213. At the same time, JS withdrew from his role as director and principal of 213.

[16] On October 9, 2007, TJ on behalf of 213 and in her personal capacity, and PM, signed a document entitled "Philthy McNasty's (Ontario) Franchise Agreement".

[17] At no time did the respondents provide 213 and/or TJ with a second disclosure document.

[18] On September 23, 2009 the applicants served the respondents with a Notice of Rescission, purporting to rescind the franchise agreement of October 9, 2007, and seeking payment pursuant to section 6(6) of the Act.

[19] The respondents disputed the Notice of Rescission and this application was commenced on November 29, 2009.

[20] The Act is regarded as consumer protection legislation and is to be read broadly and purposefully.

[21] The Act in section 1(b) defines "franchise agreement" expansively as "...any agreement that relates to a franchise between (a) a franchisor... and (b) a franchisee...".

[22] Section 5(1) of the Act obliges a franchisor to provide a disclosure document to the franchisee before the signing and/or payment of franchise fees. Section 5(4) of the Act and sections 3 and 4 of Ontario Regulation 581/00 under the Act, describe the necessary contents of a disclosure document.

[23] Section 6(2) of the Act provides that the franchisee may rescind the franchise agreement if the franchisor fails to provide the disclosure document. This rescission must occur no later than two years after entering into the franchise agreement.

[24] Under section 6(6) of the Act, upon rescission, the franchisor has a range of obligations designed to compensate the franchisee for damage or loss.

[25] In the present case, the respondents and TS entered into a franchise agreement following the provision by the respondents to TS of what was described as a disclosure document. This document failed to include some of the mandatory content as prescribed by section 5(4) of the Act and sections 3 and 4 of the Regulations. The missing content is set out in paragraphs 36 (i) to (viii) of the applicants' factum). The purported disclosure document is deficient and cannot be regarded as a disclosure document for purposes of the Act.

[26] Applying the very broad language of section 1 of the Act which defines the term "franchise agreement" I can come to no other conclusion than the document executed on October 9, 2007 must be a franchise agreement as that term is understood and described in the legislation. The document is an agreement between a franchisor (the respondents) and a franchisee (213) that relates to a franchise between them. These seem to be the three criteria which are to be used to identify a franchise agreement.

[27] As the document is a franchise agreement that was entered into voluntarily by the respondents, the disclosure document obligations under section 5.1 of the Act are triggered.

[28] I conclude that the responding parties failed to provide a disclosure document with respect to the franchise agreement entered into on October 9, 2007 and for this reason, 213 was entitled to issue a Notice of Rescission no later than October 9, 2009.

[29] With respect to the *Limitations Act* argument, section 6(2) of the *Act* permits the franchisee to rescind the franchise agreement no later than two years after entering into the agreement, where as here, no disclosure has been provided.

[30] Section 6(6) of the *Act* obliges the franchisor to meet its statutory obligations to the franchisee, within a period of 60 days following the effective date of rescission.

[31] As the franchise agreement was rescinded on September 23, 2009, the franchisor had a further period of 60 days – to November 23, 2009 - in which to satisfy its obligations. Until the expiry of this 60 day period, the franchisee could not know with certainty whether the franchisor would comply with section 6(6).

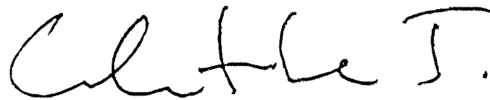
[32] On November 3, 2009, counsel for the respondents advised the applicants that the notice of rescission was disputed. It is fair to say that at this point, the applicants were on notice that the respondents were not prepared to satisfy their obligations on rescission.

[33] I conclude that the claim was discovered on receipt of this letter from counsel. The two year limitation period for purposes of section 4 of the *Limitation Act* began to run from November 3, 2009, ending on November 3, 2011.

[34] As this application was commenced on November 29, 2010, it is not barred by the *Limitations Act*.

[35] The applicants are entitled to costs fixed inclusive of taxes and disbursements of $22,000.00 payable forthwith.

[36] Order accordingly.



Whitaker J.

Date: October 11, 2011