99-CV-179166

ONTARIO
SUPERIOR COURT OF JUSTICE

CHARLES C. ROACH,

Plaintiff,

v.

ROBERT K. SAITO,

Defendant.

R E A S O N S F O R D E C I S I O N

BEFORE THE HONOURABLE MR. JUSTICE SOMERS
on June 15, 2004, at Toronto.

APPEARANCES:

K. Roach — Counsel for the Plaintiff

R. Naimark — Counsel for the Defendant.

Tuesday,
June 15, 2004.

. UPON COMMENCEMENT AT 10:00 A.M.

THE COURT: This action is concerned with a piece of sculpture known as "The Palm People" ("the sculpture"). It was ostensibly purchased by T. Kofi Hadjor from the artist on April 17th, 1989 for what was stated to be the intended price of $27,000.00. Approximately one year later, on June 4, 1990, Mr. Hadjor borrowed $14,000.00 at an interest rate of 15 per cent from the Defendant, Dr. Robert K. Saito. It was initially suggested that Mr. Hadjor turned over to Dr. Saito possess on of the sculpture as a form of security for this loan. Whatever agreement there might have been between them at this time was not in any way committed to writing..

As to the original agreement, between Mr. Hadjor and the artist, Jozef Reibesteijn, the invoice from the Artist 3370 Gallery in Cornwall, Ontario shows a total purchase price, including **tax**, .to be $27,000, and that there was a down payment of $4,000.00. Mr. Reibesteijn testified that a series of post-dated cheques was given by Mr. Hadjor at the time of the transaction to 'cover the balance. The $4,000.00 cheque did clear the bank, none of the other cheques did. Eventually Mr. Reibesteijn sued Mr. Hadjor on September 6th, 1991 and November 1st of that year, obtained

judgement for **$6,640.16,** together with **$212.38** cost costs. Off the record for a second.

O F F T H E R E C O R D

THE COURT: Correction, that should be **$26,640.16.** Nothing has been recovered by Mr. Reibesteijn on this judgement.

The apparent purchase of the sculpture may well have been a grand gesture on the part of Mr. Hadjor. On September **13, 1999,** he was charged with seven counts of fraud, most of which involved offenses committed back as early as 1995. At his trial he was convicted on five of the counts, and was sentenced to two years less a day concurrent on all counts. As well, from what is now known about Mr. Hadjor's activities and method of dealing he was ordered to make restitution to the victims on the five counts of which he was convicted, for a total of **$399,512.00.**

In addition to these problems, Mr. Hadjor was prosecuted under the rules of his profession by the Institute of Chartered Accountants. According to the complaint he would borrow money from his clients through companies owned and operated by him, ostensibly repaying the loans with post-dated cheques at high rates of interest. Usually the first of the series of cheques would be honoured and the balance would not. He was

found guilty, expelled from the Institute, and fined $30,000.00.

At the outset of his legal problems he consulted the Plaintiff, who is a barrister and solicitor licensed to carry on his profession in the Province of Ontario. Mr. Roach testified that his main area of concern was to attempt to persuade the Institute not to proceed with a discipline hearing while the criminal case was pending. As well he made some appearances in court for Mr. Hadjor. Initially, Mr. Roach had the reasonable expectation that Mr. Hadjor had some money or means at his disposal to pay his legal fees. Later it became clear to Mr. Roach that Mr. Hadjor had no money at his disposal to retire his legal obligations.

Mr. Roach carried on representing him, however, in the reasonable hope that the client would obtain legal aid financing. This was refused, although Mr. Hadjor assured Mr. Roach that he was going to appeal the decision denying him legal aid.

It became apparent to Mr. Roach that he was in danger of not having his fees paid. Mr. Hadjor suggested that he did have one item in his possession of some value, namely the sculpture, and suggested that he would assign his interest in it to Mr. Roach to cover his debt to him.

Accordingly on September 18th, 1998, he signed a document, which he then turned over to Mr. Roach. It read as follows:

Assignment.

'WHEREAS I, T. Kofi Hadjor is the owner of a certain work of art more particularly described in Schedule A attached hereto, and

WHEREAS I, T. Kofi Hadjor have retained ROACH, SCHWARTZ & ASSOCIATES, Barristers and Solicitor, to represent me before the Institute of Chartered Accountants of Ontario Discipline Committee, and

WHEREAS I, T. Kofi Hadjor have retained the said law firm of ROACH, SCHWARTZ & ASSOCIATES to represent me with respect to certain charges pending against me in the Superior Court of Justice for Ontario, and

WHEREAS I, T. Kofi Hadjor and CATS MANAGEMENT SERVICE INC. have retained the said law firm of Roach, Schwartz and Associates to act for me in certain matters pending in the Superior Court of Justice for Ontario, and

WHEREAS in consideration of the said law firm of ROACH, SCHWARTZ & ASSOCIATES having provided legal services to me and to CATS MANAGEMENT SERVICE INC.

I, have therefore assigned to CHARLES C. ROACH of ROACH, SCHWARTZ & ASSOCIATES, my title and interest all the rights of ownership of an item of art work now in the possession of Dr. Robert K. Saito of 2065

Finch Avenue West, suite **212,** in Toronto, Ontario, M3M 2V7.

I, HEREBY undertake that I have good right to assign the title to the said artwork and that I, or any and all persons claiming under me will execute such further assurances to the assignee CHARLES C. ROACH, his successors and assignees, as may be required.

IN WITNESS HERETO, I, T. Kofi Hadjor, the assignor hereto set my hand and seal on the 18th day of September, 1998.

SIGNED, SEALED AND DELIVERED in the presence of Joanne Anderson, 204 St. John's Road, Toronto, Ontario, M6P 1V4, as to the signature of T. Kofi Hadjor, and it is signed as well T. Kofi Hadjor and.CATS MANAGEMENT INC. for T.K. Hadjor. I have authority to bind the .Corporation"

Mr. Roach testified that he was aware that the sculpture was in the possession of another party as security for a loan, or as a subject of a pledge, and really made no further inquiries about it at that time. In fact, according to the evidence of Dr. Saito, which I accept, it had been in Dr. Saito's possession since June of **1.990** or **1991,** some seven or eight years earlier. I accept Dr. Saito's version as to how it came to be in his possession. He is a practising family

doctor and met Mr. Hadjor in **1989** or **1990.** He understood that Hadjor was a chartered accountant who handled the financial affairs of people primarily involved in the artistic world, and gave them financial advice. Hadjor called him in **1990** .or**1991** in June and suggested the two of them meet in Hadjor's office to discuss a business opportunity.

When Dr. Saito got there he was told by Hadjor that he had a client that needed an immediate .loanof **$14,000.00,** which in turn would make him eligible for some form of government grant. He was assured by Mr. Hadjor that he could make "a fast **$1,000.00**" by turning over a cheque for **$14,000** in exchange for one post-dated one day for **$15,000.** When this latter cheque was presented for payment, it was returned by the bank with the notation that the account upon which it was written was inactive and there were no funds in it.

Dr. Saito and his wife both made numerous attempts to get this cheque replaced with a good one. Every such attempt produced a number of elaborate excuses, some involving a niece who was injured in a car accident in Europe, and the like.

Dr. Saito testified that eventually wearying of this behaviour on Hadjor's part, he went to his office and walked in demanding payment. Mr. Hadjor told him that he had no money to make good on the cheque and Dr. Saito, who by this time was very annoyed,

picked up a television set which he said he would take as part payment.

Mr. Hadjor stopped him from going out, opened the filing draw, and showed him the sculpture which he said was made of pure whalebone. Dr. Saito took it and left. He said at the time he had the impression that Mr. Hadjor simply wanted to get rid of him. The circumstances,under which Mr. Hadjor came into possession of the sculpture were.not revealed to Dr. Saito, nor was the fact that the artist, Dr. Reibesteijn had obtained a substantial judgement against him for the balance'owing on the account.

Mr. Hadjor maintained that the sculpture was given as security or pledge to cover the amount owed or part of it to Dr. Saito. Dr. Saito's view is that he thought he was told at the' time that he could take the sculpture as part payment and that he considered that. it was his. This is by no means clear. However, from time to time after this incident Mr. Hadjor did make payments in lump amounts. This followed discussions between him and Mr. Salvatore Nasello, a chartered account who has acted on Dr. Saito's account for the last 25 years.

Mr. Nasello prepared a statement recording the payments and calculated on the basis that there had been some sort of agreement between Dr. Saito and Mr. Hadjor, that Mr. Hadjor would pay interest at 15 per cent per annum. Judging from the frequency

and amounts of the payments, it seems apparent that Hadjor was paying interest at that rate. I find as a fact that there was an agreement between the two that interest would be paid at **15** per cent from June 4, 1990. I further find as a fact that despite the unusual circumstances under which the statue came into the possession of Dr. Saito, there was an arrangement between them that the sculpture would be returned at some stage once the amount owing was paid off, and that it was in the meantime being held as a pledge.

On May 27th, 1999, Mr. Roach wrote to Dr. Saito as follows:

"Dear Dr. Saito: Re: T. Kofi Hadjor.
I act for Mr. T. Kofi Hadjor, who has retained me to seek compensation for the loss of his sculpture, "The Palm People". Mr. Hadjor has advised that you are holding this work of art to guarantee a repayment of a loan that you advanced to him in the amount of **$14,000.00** on June **4,** 1990, at 15 per cent interest.
As of July 15, 1997, the balance of the loan was $3,743.39. Mr. Hadjor has been attempting to pay this amount off and regain possession of his sculpture. He further advises that the sculpture, which is in your possession, was destroyed or damaged.
Mr. Hadjor is seeking the purchase price of the work of art which is valued at

$34,577.16.

I am forwarding herewith the following documents:

1. A Schedule of the balance of payment of the loan you made to Mr. Hadjor.
2. A copy of the original purchase invoice for the artwork and the valuation of the sculpture.

Will you please forward your payment in the amount of **$30,833.77** payable to **T.** Kofi Hadjor.

Yours very truly, Roach, Schwartz and Associates, Charles C. Roach".

The information in this letter is, of course, untrue. It is true that Mr. Roach had been retained by Mr. Hadjor, but that had to do with the criminal charges against him, and the proceedings broughtby the Institute of Chartered Accountants. Nor is it accurate to describe the advance of monies by Dr. Saito to Mr. Hadjor as a loan. What Dr. Saito gave to Mr. Hadjor wasa cheque in exchange for a cheque in an amount of **$1,000.00** greater than the one given by him. The fact that the cheque was not honoured does mean that Mr. Hadjor now owed **$14,000.00** to Dr. Saito, but certainly it does not appear to be a loan in that amount.

On August 5, **1999,** Mr. Roach wrote a second letter to Dr. Saito as follows:

Dear Dr. Saito: Re: T. Kofi Hadjor.

You have not replied to my letter dated May

27th, 1999, with enclosures. A copy of said letter is enclosed for your information. I am forwarding herewith an Assignment from Dr. T. Kofi Hadjor to myself. I intend to commence legal proceedings against you if you fail to respond to this letter within ten (10) days.
Yours very truly, Charles C. Roach".

That letter did not produce the desired result, and Mr. Roach launched this action on October 29, 1999.

It is accurate to say that the statue was seriously damaged. Dr. Saito said that because of its size it; stood on the floor of his home, and not on a table. Through misadventure it was knocked over by a nephew of his who was five or six years old at the time. No other particulars of the damage sustained and the cause of the damage were given in evidence.

Mr. Roach's claim appears to be.based on rights he feels accrued to him as a result of his being the assignee of Mr. Hadjor's "title and interest, all rights and ownership of" the sculpture. This, he claims, puts him in the same position as the Plaintiff vis-a-vis this item, and entitles him to sue for what he alleges to be the value of the sculpture.

He says this and claims that the sculpture has now appreciated, or would have appreciated to a value of $54,000.00. He also has a claim in negligence against Dr.

Saito for not taking appropriate steps to ensure that the sculpture was not damaged.

In my view it is important to determine first of all what is the nature of Mr. Roach's interest in the sculpture. The document pursuant to which he advances his claim and under which he asserts a right to bring it is titled, "Assignment". Paragraph 3 of the statement of claim reads, "The Plaintiff is the assignee of the ownership of the sculpture called 'The Palm People'", which has been in possession of the Defendant.

In my view no right to title in a piece of tangible property can be transferred by an Assignment. What can be transferred by way of an assignment is a chose in action, the right, for example, to call upon delivery of the item upon repayment of money owing on it.

It is true that a right of action, or of enforcement of an agreement can be assigned as a chose in action. However, as 'Simon Gleeson points out in his Personal Property Law **1997,** Sweet & 'Maxwell, page **123:**

> "At the heart of the law relating to an intangible property is the concept of assignment. Assignment is a term which is occasionally misused to cover transfers of chattels, but here it is applied only in a technical sense of a transfer of a right of action.
> Before the idea of transferability is brought into play the idea that a right

> of action is a species of property is not helpful, as a right is not a piece of property as between the parties thereto. If A has a contractual right to sue B, it is redundant to say that as between A and B, A has property in his right to sue B. The term 'property' in this sense means no more than a right which can be asserted against third parties."

Here no transfer of possession of the sculpture took place. As to Dr. Saito's title, his evidence to what, if anything, transpired between him and Mr. Hadjor at the time he took possession was very vague. It was obtained by Dr. Saito in the heat of the moment and while he claims he has stated that he took it "in part payment" it would seem that Mr. Hadjor regarded it as having been transferred to Dr. Saito to be held pending payment off of the outstanding loan between them.

This would appear to be substantiated by the fact that Mr. Hadjor subsequently made payments to Mr. Nasello to attempt to retire the debt by means of making periodic payments. I am of the opinion that as of September 18th, 1998, the day on which he signed the "assignment" to Mr. Roach, the only right Mr. Hadjor had was the entitlement to call for the delivery back to him of the sculpture upon retirement of the Hadjor/Saito

indebtedness.

It follows that Mr. Roach thereafter had obtained a right to call for delivery to him of the sculpture upon payment of the outstanding balance on that debt, but no more. This is subject to the provisions of Section 53(1) of the Conveyancing and Law Property Act, R.S.O. **1990**, c. C34. This section reads as follows:

> "Any absolute assignment made on or after the 31st day of December, 1897 by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would.have been entitled to receive or claim such debtor chose in action is effectual in law subject.to all equities that would have been entitled priority over the right of .the assignee if this section had not .been enacted, to pass or transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor".

Mr: Roach did in fact contact Dr. Saito

by letter dated May 27th, **1999**. He did not, however, represent himself as an assignee of any document, rather.he held himself out as counsel for Mr. Hadjor seeking to obtain the return of the sculpture. He sent a second letter dated August 5, **1999**, this time truthfully stating his capacity as assignee of the sculpture and disclosing the nature of his interest. This, as I have indicated, did not accurately state his interest. He was, in fact, the assignee of a right to reclaim the sculpture upon payment of the amount owing on the indebtedness.

Although Mr. Roach's claim is stated in the statement of claim to amount to approximately $48,000.00" he states in paragraph 6 of the statement of claim, "As of January **15**, 1997, the balance of the loan that is remaining unpaid was Three Thousand, Seven Hundred and Forth-Three Dollars .and Thirty-Mine Cents". No suggestion is made in his'correspondence that he was prepared to pay this amount in exchange for the return of the sculpture, nor was there ever any tender of any amount, thus while there is a notice of sorts given by Mr. Roach to Dr. Saito, it is defective in three particulars:

(a) It purports to be an assignment of tangible personal property, as well no Schedule A was attached to this, and the subject property is not identified;

(b) It fails to identify properly or at all that Mr. Roach was the assignee of the chose in action, and that that in turn was the basis on which his claim was brought; and

(c) It failed to offer to make payment of the overdue balance in return for delivery of the sculpture.

As to what constitutes a valid legal assignment perhaps the.best description is to be found in 1124980 Ontario Inc. and Liberty Mutual Insurance Company, a decision of the Ontario Superior Court of Justice reported at [2003] O.J. 1468, Decision of Madam Justice Epstein who says at paragraph 44:

"Accordingly for there to be a valid legal assignment under Section 53(1) of the CLPA four requirements must be met.

(a) there must be a dent or a chose.in action;

(b) the assignment must be absolute;

(c) the assignment must be written; and

(d) written notice of the assignment must be given to the debtor."

In my view the circumstances of the assignment to Mr. Roach required him to give a proper notice of that assignment to Dr. Saito. Failure to do so is, in my opinion, fatal to his claim.

During the course of the testimony Mr. Roach referred to his claim as a right of

subrogation. Subrogation is the equitable principle from which the person who pays the debt on behalf of someone else can seek restitution from the latter. That term does not apply to the circumstances of Mr. Roach's acquisition of whatever rights he had. The word was incorrectly used by Mr. Roach on Dr. Saito.

It is of no assistance to the Plaintiff to take the position that on his version of the facts as he understood them, there was no money owing, no debt to pay, and in fact there was money owing by Dr. Saito. Mr. Hadjor calculated the value of the sculpture as of the day of the trial by taking the price paid and using the increase in the consumer price index over the years thereby arriving at the present day value of that sum of money.

I reject this method as a recognized or logical means of determining the value of a piece of art. The evidence given by Mr. William Kime was of far more assistance in this regard. He has had,29 years of experience with Waddingtons, a well-known Canadian Auctioneer and Appraiser company, where he had headed up the decorative arts department and is one of that company's senior auctioneers. He concluded that the piece, in good condition, was worth no more than $300.00. Further at the time Mr. Roach received his "assignment" it was worthless because it was so seriously damaged.

As mentioned earlier a claim was also made by Mr. Roach for negligence alleged on his part for failing to keep the sculpture in a safe place. There was little evidence as to the manner in which it was damaged, other than it was knocked over by Dr. Saito's young nephew. The sculpture consisted of two slender, tall leaf-shaped figures resting on a marble base. The figures themselves were made of hydro stone, which in the opinion of Mr. Kime, made the entire piece less valuable than might be expected. Such was the shape and height of the piece that it would not likely be placed on a table.

I heard no evidence to suggest that placing a piece of this size and shape on the floor was intrinsically negligent. In any event, I am of the opinion that Mr. Roach's interest in the sculpture did not occur until after the damage was occasioned, and for that reason alone Dr. Saito owed no duty to Mr. Roach.

It follows from all of the foregoing in my view the claim fails. Accordingly,,the action is 'dismissed.

Mr. Naimark, what do you say about costs?

MR. NAIMARK: Yes, Your Honour, I did prepare a Bill of Costs. I didn't provide it to my friend because I didn't want to be presumptuous. I do have a copy and I also have submissions that I will make -- that I would like to make. I have some letters.