CITATION: Kings Auto Ltd. v. Torstar Corporation, 2018 ONSC 2451
COURT FILE NO.: CV-16-551919CP
DATE: 20180418

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KINGS AUTO LTD. and SAPNA INC., Plaintiffs

AND:

TORSTAR CORPORATION, TORONTO STAR NEWSPAPERS LTD., METROLAND MEDIA GROUP LTD., AUTOCATCH.COM INC., DIGITAL AUTO VENTURES PARTNERSHIPS, LUCIEN NEACSU, MARK ALBERT, IAN OLIVER, ASHLEY WILSON, JOHN MERRIFIELD, 1005199 B.C. LTD. OPERATING AS CANADA DRIVES, 1005199 B.C. LTD. OPERATING AS GDC AUTO and CODY GREEN, Defendants

BEFORE: Justice Glustein

COUNSEL: *Theodore P. Charney and Tina Q. Yang*, for the Plaintiffs

Ryder Gilliland and Jessica Lam, for the Defendants Torstar Corporation, Toronto Star Newspapers Ltd., Metroland Media Group Ltd., Autocatch.com Inc., Digital Auto Ventures Partnership, Lucien Neacsu, Mark Albert, Ian Oliver, Ashley Wilson and John Merrifield

Craig T. Lockwood, for the Defendants 1005199 B.C. Ltd. o/a Canada Drives and o/a GDC Auto and Cody Green

HEARD: April 17, 2018

REASONS FOR DECISION

Nature of motion and overview

[1] The plaintiffs Kings Auto Ltd. and Sapna Inc. (collectively, the "Plaintiffs") bring this motion pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the "*CPA*") on consent to certify the action against the defendants for settlement purposes. On consent, the balance of the relief sought in the notice of motion is adjourned.

[2] At the hearing, I ordered that the action be certified on a preliminary basis, as against the defendant Digital Auto Ventures Partnership ("DAV") and the defendant 1005199 B.C. Ltd. ("1005199"), which operates business as "Canada Drives" and "GDC Auto", for settlement purposes, subject to the terms and conditions contained in the Minutes of

Settlement dated January 2, 2018 (the "Settlement Agreement"). I granted that relief, with reasons to follow. I set out my reasons below.

Nature of the action

[3] This action arises out of digital advertising on the websites Autocatch.com ("Autocatch") and Wheels.ca ("Wheels"). The Plaintiffs' uncontested evidence is that:

(i) The Plaintiffs are two used car dealerships located in Scarborough, Ontario;

(ii) Used-car dealerships wishing to advertise on Autocatch and/or Wheels must purchase advertisements from DAV by entering into an automatically renewable standard form contract;

(iii) There have been two forms of the contract – one in use between 2012 and 2014, and one in use from 2014 to present;

(iv) The Plaintiffs entered into digital advertising contracts with DAV for advertising on Autocatch and/or Wheels;

(v) On Autocatch/Wheels advertisements, customers who are interested in a vehicle are presented with a contact form where they may submit their contact information to express their interest in a specific vehicle. The contact information and preferred vehicle is referred to by the Plaintiffs as a "lead", which the Plaintiffs submit forms part of the value of the online advertisements;

(vi) Autocatch/Wheels advertisements frequently contain a "Finance" link which encourages prospective customers to click if they require financing (the "Financing Link"). The Plaintiffs describe this Financing Link as an "embedded" link because of the perceived placement of the Financing Link within the body of the advertisement itself, rather than appearing visibly outside the advertisement. I use this description of "embedded" in these reasons, without making any factual finding on the issue;

(vii) On April 30, 2013, DAV entered into an advertising agreement with 1005199. Under that agreement, the parties agreed that Financing Links directing prospective customers to Canada Drives would be placed on all Autocatch/Wheels advertisements, with two exceptions: where the advertising dealer requested that the Financing Link be removed or where the dealer already had its own link for financing;

(viii) Therefore, commencing on or about April 30, 2013, for advertising dealers not falling within one of the two exceptions, their Autocatch/Wheels advertisements contained Financing Links which, when clicked, directed prospective customers to the Canada Drives website;

(ix) There is an interstitial page letting prospective customers know that they are leaving the Autocatch/Wheels website. Once a prospective customer is redirected to the Canada Drives website, they are invited to complete a form and are told "Congratulations! You qualify for pre-approval in [whatever province was submitted]"; and

(x) The advertising dealers were not informed that DAV had entered into a contract with 1005119 and that "embedded" Financial Links directing prospective customers to Canada Drives would be placed on the dealers' Autocatch/Wheels advertisements.

[4] The Plaintiffs allege the following:

(i) 1005119 was not a vehicle financing company but rather was in the business of generating and selling prospective customer leads;

(ii) The form on the Canada Drives website was not a credit application form, but rather a form to obtain contact information to generate and sell prospective leads; and

(iii) The effect of the Financial Link was that (a) prospective customers who were interested in financing provided their contact information to 1005119, rather than to the advertising dealerships; and (b) 1005119 then sold those leads to other dealerships.

[5] The Plaintiffs name two groups of defendants. They refer to a first group of defendants as the "Torstar Defendants", which include Autocatch, Wheels, and DAV. The Torstar Defendants also include (i) Toronto Star Newspapers Ltd. and Metroland Media Group Ltd. ("Metroland"), who the Plaintiffs allege were the partners of DAV, (ii) the parent company Torstar Corporation, and (iii) the individual defendants who the plaintiffs allege are currently or formerly employed by Metroland or DAV (Mark Albert, John Merrifield, Lucien Neacsu, Ian Oliver, and Ashley Wilson).

[6] The Plaintiffs name a second group of defendants referred to as the "Canada Drives Defendants", which include 1005199 and Cody Green, alleged to be the founder and Chief Executive Officer of 1005119.

[7] The Plaintiffs allege that the diversion of leads from prospective customers who are interested in financing caused them considerable damage because (i) a significant portion of used vehicle purchasers require financing and (ii) facilitating financing generates profit for dealerships.

The Plaintiffs' claims

[8] In their Amended Statement of Claim, the Plaintiffs plead (i) as against the Torstar Defendants, breach of contract, breach of the *Competition Act*, R.S.C. 1985, c. C-34,

negligence, conspiracy, and passing off, and (ii) as against the Canada Drives Defendants, the tort of inducing breach of contract.

[9] For the purposes of this motion, the Plaintiffs only advance two claims: (i) breach of contract as against DAV and (ii) inducing breach of contract as against 1005199.

Mediation and proposed settlement

[10] Following mediation in the fall of 2017, the parties reached a proposed settlement, with executed Minutes of Settlement dated January 2, 2018 (previously defined as the "Settlement Agreement").

[11] Pursuant to the Settlement Agreement, the defendants will pay $1 million to the Plaintiffs in exchange for a full and final release of all claims arising out of the Financing Links.

Analysis

[12] The issue on this motion is whether the Plaintiffs have met the test under the *CPA* to have this action certified as a class proceeding for the purpose of settlement.

a) The applicable law

[13] The *CPA* is remedial legislation. It is to be given a generous, broad, liberal and purposive interpretation to promote the goals of class proceedings, *i.e.* judicial economy, access to justice and behaviour modification (*Hollick v. Toronto (City)*, 2001 SCC 68 ("*Hollick*"), at para. 15; *Cloud v. Canada (AG)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 37).

[14] An order certifying a class proceeding is not a determination of the merits of the proceeding (s. 5(5) of the *CPA*).

[15] The court is required to certify the action as a class proceeding where the following five-part test in s. 5(1) of the *CPA* is met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;

(c) the claims of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for resolution of the common issues; and,

(e) there is a representative plaintiff who,

(i) would fairly and adequately represent the interest of the class;

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interest of other class members.

[16] Under s. 5(1)(a), the court applies the same standard of proof as on a motion to strike a cause of action. The facts as pleaded are assumed to be true and the requirement is satisfied unless it is plain and obvious that the plaintiff's claim cannot succeed (*Hollick*, at paras. 16, 25).

[17] For the remaining certification requirements, the plaintiff must establish "a minimum evidential basis for a certification order" by "show[ing] some basis in fact for each of the certification requirements" (*Hollick*, at paras. 24-25).

[18] The court must be satisfied that all of the requirements for certification are met, even when certification is sought for the purposes of settlement. However, compliance is not as strictly required given the different circumstances associated with actions which have reached settlement (*Corless v. KPMG LLP*, [2008] O.J. No. 3092 (SCJ), at para. 30), and principally because the manageability of the proceeding is not at issue (*Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128, at para. 14).

[19] On the present motion, I am satisfied that all of the criteria for certification have been met.

b) The pleadings disclose a cause of action (s. 5(1)(a))

[20] In determining whether a pleading discloses a cause of action: (i) no evidence is admissible to assess the cause of action; (ii) all pleaded allegations of fact are accepted as proven, unless they are patently ridiculous or incapable of proof; (iii) the novelty of the cause of action will not militate against sustaining the plaintiff's claim; (iv) matters of law which are not fully settled by the jurisprudence must be permitted to proceed; and (v) the court's power to refuse to certify on this ground is exercised "only in the clearest of cases" (*Perrenoud v. eHealth Ontario*, 2012 ONSC 6704, at paras. 54-59).

[21] A court may consider documents referred to in the pleading, such as a contract, to determine if the pleading discloses a cause of action (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 58).

[22] As I discuss above, for the purposes of this certification motion, the Plaintiffs rely on two causes of action: (i) breach of contract as against DAV and (ii) inducing breach of contract as against 1005119. I address these claims below.

1. Breach of contract as against DAV

[23] The Plaintiffs plead that they entered into contracts with DAV with implied terms that (i) the space in the purchased advertisements was exclusively for the use of the advertiser; and (ii) the prospective customer leads would not be redirected to a third party.

[24] The Plaintiffs further plead that these implied terms were breached by DAV when it placed the "embedded" Financing Links and redirected leads to Canada Drives, causing damages to the Plaintiffs and other class members.

[25] Consequently, the Plaintiffs have pleaded the required elements of a breach of contract claim against DAV: (i) the existence and terms of the contract, (ii) the alleged breach of contract, and (iii) damages flowing from the alleged breach.

2. Inducing breach of contract as against 1005119

[26] The required elements to plead a claim of inducing breach of contract are: (i) the plaintiff had a valid and enforceable contract with the third party; (ii) the defendant was aware of the existence of this contract; (iii) the defendant intended to and did procure the breach of the contract; and (iv) as a result of the breach, the plaintiff suffered damages (*Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, at para. 26).

[27] At paragraphs 85-87 of the Amended Statement of Claim, the Plaintiffs plead that (i) 1005119 was aware that the Plaintiffs and each of the class members had an advertising contract with DAV which contained the implied terms discussed above; (ii) 1005119 nevertheless entered into a contract with DAV; (iii) 1005119 intended to and did cause DAV to breach its advertising contracts with the Plaintiffs and the class members; and (iv) the Plaintiffs and the class members suffered damages as a result.

[28] Consequently, the Plaintiffs have pleaded the requisite elements of the cause of action of inducing breach of contract as against 1005119.

c) There is an identifiable class (s. 5(1)(b))

[29] The class definition must identify all those who may have a claim, who will be bound by the result of the litigation, and who are entitled to notice. The class must be defined by objective criteria without reference to the merits of the action. It cannot be unlimited (*Hollick*, at para. 17; *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), at para. 10).

[30] In the action, the Plaintiffs seek to act on behalf of the following class:

> [A]ll automotive dealerships in Canada who purchased advertising inventory listings on AutoCatch.com and/or Wheels.ca which included links to the Canada Drives website related to financing applications perceived to be within the body

of the advertisement as opposed to visibly outside the advertisement, between April 30, 2013, and the date of the certification order.

[31] The above definition is objective and does not depend on the merits of the claim or the outcome of the litigation. DAV has records that make class membership readily and objectively ascertainable.

[32] There is a rational connection between the Plaintiffs' proposed class definition and the proposed common issues (*Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 38). The proposed class is not overly broad or overly narrow (*Hollick*, at para. 21) since it is confined to those dealerships who purchased advertising inventory listings on Autocatch/Wheels after the DAV/1005119 relationship began and who therefore had "embedded" Financing Links on their advertisements for some period of time.

[33] Accordingly, the class definition satisfies s. 5(1)(b) of the *CPA*.

d) The claims raise common issues (s. 5(1)(c))

[34] The common issues proposed to be certified on consent are:

(i) Did Digital Auto Ventures Partnership enter into advertising contracts with Class Members during the class period?

(ii) Did Digital Auto Ventures Partnership breach its contracts with the Class Members?

(iii) Did 1005119 induce breach of contract between Digital Auto Ventures and the Class Members?

[35] The proposed common issues are "necessary to the resolution of each class member's claim" and a "substantial ingredient" of those claims (*Hollick*, at para. 18). The Plaintiffs have provided "some basis of fact" (*Hollick*, at para. 25) for these proposed common issues in their certification motion record.

[36] The first and second of the proposed common issues relate to the breach of contract claim, and are based on evidence that DAV contracted with dealerships to provide advertising services by standard form contracts.

[37] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 ("*Ledcor*"), Wagner J. (as he then was) confirmed the following principles concerning standard form contracts (*Ledcor*, at paras. 27-32):

(i) The factual matrix in which a contract was formed is less relevant than for individual contracts;

(ii) There are usually no surrounding circumstances relating to negotiation; and

(iii) The purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates may play a role in the interpretation process but those considerations are generally not fact specific.

[38] Courts have frequently certified common issues based on a standard form contract. In *Wellman v. TELUS Communications Co.*, 2014 ONSC 3318 ("*Wellman*"), Conway J. held (at para. 58):

> In a class action, contracts may be interpreted on a common basis where there is a common standard contract and where the external context is common or typical across the members of the class: *De Wolf v. Bell ExpressVu Inc.* (2008), 58 C.P.C. (6th) 110 at para. 32. See also: *Lam v. University of British Columbia*, 2010 BCCA 325 at paras. 58-59; *Anderson v. Bell Mobility Inc.*, 2010 NWTSC 65 at paras. 44-48; *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916 at paras. 71-73.

[39] I adopt the above approach in *Wellman*, which is consistent with *Ledcor*, and certify the proposed common issues with respect to breach of contract.

[40] As for the proposed common issue regarding inducing breach of contract, the Plaintiffs led evidence that 1005119 entered into an advertising agreement with DAV to place Financing Links on all effected advertisements.

[41] The determination of whether 1005119 committed the tort of inducing breach of contract is central to the claims of each class member. Further, as with breach of contract, the factual issues involved in that determination relate to 1005119's knowledge and conduct, and do not depend on the individual circumstances of each class member.

[42] Consequently, I certify the proposed common issue with respect to inducing breach of contract.

e) A class proceeding is the preferable procedure (s. 5(1)(d))

[43] A class proceeding is the preferable procedure for the resolution of the common issues in this action. It is a fair, efficient and manageable method for advancing the class members' claims, and is preferable to other means of resolving the class members' claims (*Hollick*, at paras. 27-31).

[44] In considering preferability, a court "is to adopt a practical cost-benefit approach … to consider the impact of a class proceeding on class members, the defendants, and the court" (*AIC Limited v. Fischer*, 2013 SCC 69, at para. 21).

[45] The plaintiffs adduced evidence that the potential recovery for any class member would not justify the time and expense of prosecuting an individual claim.

[46] Further, "where there is a cause of action, an identifiable class, common issues, and a settlement, there is a strong basis for concluding that a class proceeding is the preferable

procedure because certification would serve the primary purposes of the *Class Proceedings Act, 1992*; namely, access to justice, behavioural modification, and judicial economy" (*Krajewski v. TNOW Entertainment Group, Inc.,* 2012 ONSC 3908, at para. 32).

[47] Consequently, I find that this requirement under s. 5(1)(d) of the *CPA* has been met.

f) There is an adequate representative plaintiff (s. 5(1)(e))

[48] The proposed representative plaintiffs will fairly and adequately represent the class. They both purchased advertising inventory listing on Autocatch/Wheels, which included "embedded" Financing Links directing prospective customers to Canada Drives, during the class period.

[49] Further, the affidavit evidence of the proposed representative plaintiffs demonstrates that they can instruct counsel, are familiar with the substance of the issues in the action, understand that they are to consider and act in the best interests of the class, have reviewed and approved of the proposed settlement, and are committed to participating actively in the settlement approval process.

[50] Finally, the proposed representative plaintiffs do not have a conflict of interest with other class members on the common issues, as the settlement of the action would resolve their claims as much as it would the other class members' claims.

[51] Consequently, I find that this requirement under s. 5(1)(e) of the *CPA* has been met.

g) Conclusion on certification issues

[52] For the above reasons, I grant the order as per my endorsement on April 17, 2018.

GLUSTEIN J.

Date: 20180418