

Clavel c. Productions Musicales Donald K. Donald Inc.

Cour d'appel du Québec
District de Montréal
Les juges Vallerand, Rothman et Mailhot

18 mai 1994

Wilfred S. Kravitz et Howard S. Ginsberg (Pollack, Machlovitch), pour l'Appelante.
Robin St-Arnaud (Lazarus, Charbonneau), pour l'Intimée.
Jean M. Beauregard et Nabil-Kamel-Toueg (Beauregard, Ferland), pour la
Demanderesse principale.
(Gingras, Ouellet), pour la Défenderesse principale.
François Gingras (Kaufman, Respitz), pour les Défendeurs en garantie.

¶ 1 LA COUR:— Statuant sur l'appel d'un jugement de la Cour supérieure, district de Montréal, prononcé le 15 décembre 1993 par l'honorable juge Gilles Hébert, renvoyant avec dépens une requête pour rejet de l'action en garantie;

¶ 2 Après étude du dossier, audition et délibéré;

¶ 3 Pour les motifs exprimés à l'opinion de M. le juge Rothman, déposée avec le présent jugement, auxquels souscrivent Monsieur le juge Vallerand et Madame la juge Mailhot:

¶ 4 REJETTE l'appel avec dépens.

¶ 5 OPINION OF ROTHMAN J.A.:— Guns N'Roses Missouri Storm Inc. ("Guns N'Roses") appeals a judgment of the Superior Court dismissing its Motion, under Art. 165(4) C.P.C., to dismiss an action in warranty taken against it by Productions Musicales Donald K. Donald Inc. ("Donald K. Donald").

¶ 6 The central question in this appeal is whether a valid arbitration clause contained in the contract between Guns N'Roses and Donald K. Donald deprived the Superior Court of Quebec of jurisdiction to hear and decide an incidental warranty action instituted by Donald K. Donald against Guns N'Roses following a claim against Donald K. Donald by a third party in a principal action.

BACKGROUND FACTS

¶ 7 Donald K. Donald is an impresario and producer in Montreal. Guns N'Roses is a group of musical artists and singers located in California. On August 8, 1992, Donald K. Donald presented a large concert at the Olympic Stadium in Montreal featuring Guns N'Roses and a number of other musical groups. The concert was supposed to last for over 7 hours. There were some 54,000 people in attendance. The concert was abruptly and prematurely brought to an end, well before it was half completed, allegedly by the conduct of Axl Rose, the lead singer of Guns N'Roses.

THE PRINCIPAL ACTION

¶ 8 In the principal action, the principal plaintiff Maryse Clavel was authorized to institute a class action suit against Donald K. Donald and La Régie des Installations Olympiques ("R.I.O.") to obtain reimbursement, on her own behalf and on behalf of the other ticket-holders who attended the concert, of a proportion of the price of the ticket (\$23.67).

¶ 9 In her action, Ms. Clavel alleges, in substance, that the concert was precipitously and prematurely ended by the conduct and words of Axl Rose, the lead singer of Guns N'Roses, who shouted to the crowd:

"...F... you all... You will be refunded for that. We're out of here!"

THE WARRANTY ACTION

¶ 10 In the warranty action, Donald K. Donald alleges the class action suit against it for recovery of the prejudice suffered by the ticket-holders, equivalent to 2/3 the price of their tickets. Donald K. Donald further alleges a contract dated June 13, 1992 under which Guns N'Roses undertook to perform live, on stage, at the Olympic Stadium concert on August 8, 1992.

¶ 11 Donald K. Donald contends that, under the contract, Guns N'Roses was the sole, true and only party responsible for the content and/or length of its performances. It is therefore the sole, true and only party responsible for any damages suffered by the ticket-holders.

¶ 12 In the conclusion of the warranty action, Donald K. Donald asks that Guns N'Roses and Axl Rose be ordered to intervene in the principal action to take up its defence and that they be condemned to pay the amount of any condemnation in the principal action.

¶ 13 On the institution of the warranty action, Guns N'Roses presented an exception to dismiss under Art. 165(4) C.C.P. urging that the Superior Court of Quebec had no jurisdiction to hear the warranty action against it, by reason of a valid arbitration clause ("clause compromissoire") in its contract with Donald K. Donald, which provides:

"Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in accordance with the rules and regulations then obtaining of the American Arbitration Association governing three-member panels. The parties hereto agree to be bound by the award of such arbitration and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof."

¶ 14 The Superior Court dismissed the exception to dismiss the action, concluding that, under Art. 71 C.C.P., the Superior Court had jurisdiction to hear the warranty proceedings against Guns N'Roses.

ANALYSIS

¶ 15 With respect, that I do not share the view expressed in the two Superior Court decisions cited and relied upon by the judge in first instance to the effect that arbitration clauses of this kind constitute exceptional agreements and that they should be strictly construed. On the contrary, with the judgment of the Supreme Court of Canada in *Zodiak International v. Polish People's Republic* ([1983] 1 S.C.R. 529) and the judgment of our Court in *Condominiums Mont Saint-Sauveur Inc. v. Les Constructions Serge Sauvé Ltée* (1990 R.J.Q. 2783 (C.A.)), these agreements should receive a broad and liberal interpretation. As Mr. Justice Monet observed in the *Condominiums Mont Saint-Sauveur* case (*supra*):

"... Aussi, une interprétation large et libérale s'impose en la matière, comme l'enseigne le professeur Brierley. C'est pourquoi il faut être sur ses gardes lorsqu'on consulte la jurisprudence antérieure à la réforme. Par exemple, est maintenant tout à fait dépassé ce passage, valable en son temps, qu'on trouve dans un arrêt unanime de 1979:

La clause compromissoire constitue une dérogation au recours aux tribunaux de droit commun; aussi quant à sa portée et, partant, quant à la compétence du Conseil d'arbitrage telle clause doit être interprétée étroitement."

(See also: John Brierley, *Une loi nouvelle pour le Québec en matière d'arbitrage*, [1987] 47 R. du B. 259; Thuilleaux, *L'arbitrage commercial au Québec - Droit interne, droit international privé*, 1991, Éditions Yvon Blais, Cowansville)

¶ 16 Arbitration clauses of this kind should therefore be approached positively and purposefully, and they should be interpreted so as to give them the effect the legislature (Art. 1926.1 et seq. C.C.; Art. 940 et seq. C.C.P.) and the parties intended.

¶ 17 The only real issue is whether the arbitration clause, fairly interpreted, can be applied in this case so as to deprive the Superior Court of jurisdiction to hear the warranty action. The appeal, in my view, raises several questions in that regard:

1. Does the arbitration clause apply to a dispute of the kind that presented itself in this case?

2. Does the clause apply where the claim is initiated, not by one of the parties, but by a third party?

3. Does the clause apply in the framework of a warranty action so as to deprive the Superior Court of jurisdiction under Art. 216 C.C.P. and Art. 71 C.C.P.?

¶ 18 The first question really is whether the parties to the contract would have intended that the arbitration clause cover this kind of dispute at all.

¶ 19 The terms of the arbitration clause are, of course, very broad, covering:

"Any claim or dispute arising out of or relating to this agreement or the breach thereof shall be settled by arbitration..."

¶ 20 The dispute or claim asserted in the warranty proceedings, however, may well go beyond the ordinary kind of dispute arising out of an agreement or the breach thereof. Taking the allegations of the warranty action to be true, as we must in these proceedings, the conduct of the lead singer of Guns N'Roses would appear to have been a wilful, gross and reckless act, deliberately calculated to bring to a premature end a concert attended by 54,000 people. Could the parties have intended the arbitration clause to cover the deliberate and gratuitous sabotage of the concert? There may, perhaps, be some doubt that the dispute relates to the performance or interpretation of the contract or even to a breach of the contract in the usual sense. (Art. 1020 C.C.L.C.)

¶ 21 On the other hand, arbitrators have the power to decide their own competence (Art. 943 C.C.P.), subject, thereafter, to possible review by the Court (Art. 943.1 C.C.P.). It would therefore be for the arbitrators to decide, in the first instance, whether the arbitration clause covered the dispute and whether they had jurisdiction to hear it.

¶ 22 For that reason, I would, at this stage, assume without deciding, that the arbitration clause is applicable. Given my opinion on the third question, as set out below, this does not, in any event, affect the conclusion to which I have come on the outcome of this appeal.

¶ 23 On the second question, I do not see why an arbitration clause agreed upon by two parties should necessarily become inapplicable merely because the dispute also involves a third party or third parties. In the Mont Saint-Sauveur case (*supra*), for example, the arbitration clause had formed part of a contract between a builder and an owner contemplating the construction of a condominium project. The owner then sued the builder and the architect. The presence in the dispute of the third party architect was held not to prevent the application of the arbitration clause which the builder and the owner had agreed upon.

¶ 24 I do not believe that the presence of a third party in the dispute, or even the fact that a third party has initiated proceedings, should, in itself, render the arbitration clause inapplicable and deprive the parties of a forum for the settlement of their disputes which they have chosen in their contract. It is not difficult to imagine any number of commercial disputes where it would be entirely appropriate to proceed to arbitration under the arbitration clause agreed upon between two parties notwithstanding a claim against one of the parties by a third party.

¶ 25 That brings us to the third question - the applicability of the arbitration clause in the context of warranty proceedings.

¶ 26 Articles 216 and 71 C.C.P. provide:

"216. Any party to a case may implead a third party whose presence is necessary to permit a complete solution of the question involved in the action, or against whom he claims to exercise a recourse in warranty."

"71. The incidental action in warranty must be taken before the court in which the principal action is pending."

¶ 27 Counsel for Donald K. Donald contends that the arbitration clause does not apply in a case where it has been sued by a third party for acts which were the sole responsibility of Guns N'Roses and where it wishes to exercise warranty proceedings to have Guns N'Roses take up its defence and indemnify it in the event of a condemnation in the principal action.

¶ 28 He relies on the judgment of the Supreme Court in *A S G Industries Inc. v. Corporation Superseal* ([1983] 1 S.C.R. 781).

¶ 29 At page 783, Mr. Justice Chouinard stated:

"In private international law, it is well established that the international jurisdiction of the courts is defined by extension of the rules of domestic territorial jurisdiction."

¶ 30 At page 785, he concluded:

"Article 71 C.C.P. provides that an incidental action in warranty must be taken before the court in which the principal action is pending. Applying the principles stated above, this rule of domestic territorial jurisdiction must be extended to the international situation. It accordingly follows that art. 71 applies to appellant's case, and that the incidental action in warranty brought against it must be brought in the Superior Court for the district of Quebec, where the principal action is pending."

¶ 31 It should be underlined, however, that in the *A S G Industries* case, the Court was not concerned with an arbitration clause. The issue was whether Art. 71 C.C.P. applied to a foreign corporation, where the warranty action was served on it outside of Quebec, when it had no domicile, residence, place of business or assets in Quebec, in a word, where the courts of Quebec would not normally have had jurisdiction to hear an action against the foreign corporation. The Supreme Court held that, under Art. 71, the warranty action could nonetheless be brought against the foreign corporation in Quebec where the principal action was pending.

¶ 32 Arguing by analogy, counsel for Donald K. Donald submits that since the principal action is pending before the Superior Court of Quebec and since it wishes to exercise a claim in warranty against Guns N'Roses, then its warranty action must, under Art. 71 C.C.P., be heard before the same court. The argument, I believe, is a serious one.

¶ 33 In the *A S G Industries* case (*supra*), as here, the Superior Court of Quebec would not normally have had jurisdiction to hear any claim against the foreign corporation. It acquired jurisdiction solely by reason of the existence of a claim in warranty because Art. 71 C.C.P. requires that the incidental action in warranty must be taken before the Court in which the principal action is pending.

¶ 34 The purpose of Art. 71 C.C.P. is to enable the principal action and the warranty action to be tried together and to be decided in the same judgment (Art. 222 C.C.P.) so as to permit a complete solution to the problem.

¶ 35 In the present case, similarly, the Superior Court of Quebec would not normally have had jurisdiction to decide a dispute under the contract between Donald K. Donald and Guns N'Roses, by reason of the arbitration clause. Although the reason for the absence of jurisdiction may not be the same as the reason in the A S G Industries case (supra), I find it difficult to see how the result or the reasoning can be any different.

¶ 36 In both cases, the Superior Court would ordinarily have lacked jurisdiction. In both cases, there was an action in warranty asserted against a party who would not normally have been subject to the jurisdiction of the Superior Court. In A S G Industries, the Supreme Court held that notwithstanding the absence of jurisdiction, normally, Art. 71 C.C.P. conferred jurisdiction on the Court by reason of the fact that the principal action was pending before the Court here and the defendant in the principal action had a claim in warranty to exercise.

¶ 37 I would apply the principles decided in the A S G Industries case and hold that the Superior Court of Quebec has jurisdiction to hear the action in warranty in this case.

¶ 38 I do not wish to suggest that the mere initiation of a suit by a third party will permit a party to an arbitration clause to defeat the purpose and intention of the clause by exercising warranty proceedings. There will doubtless be cases where the parties should be referred to arbitration, notwithstanding the existence of a suit by a third party. Much will depend on the nature of the claims and the circumstances of each case.

¶ 39 But in this case, taking the facts alleged to be true, the sole reason for the premature collapse of the concert, and the near riot that followed it, was the conduct of the lead singer of Guns N'Roses. The whole cause of action alleged in the principal action was the misconduct of Axl Rose that took place in the Guns N'Roses performance. The sole issue in the warranty action, as in the principal action, is the misconduct that took place during the Guns N'Roses performance. It would seem manifestly unfair to compel Donald K. Donald to face alone a refund claim before the Superior Court on behalf of 54,000 ticket-holders when Guns N'Roses was the sole cause of the claim.

¶ 40 To deprive Donald K. Donald of its right of exercising warranty proceedings in this case would be to deprive it of a complete solution to the question involved in the principal action (Art. 216 C.C.P.) and it would also deprive it of its normal right to have both actions heard jointly and decided by the same judgment (Art. 222 C.C.C.P.). This reasoning applies here as it did in A S G Industries (supra>)

¶ 41 Conceivably, there may be difficulties, at a later stage, in rendering the judgment in the warranty action executory. But that is not the problem at this stage. Our only concern is whether the Court here has jurisdiction to hear the warranty proceedings under Art. 71 C.C.P. (A S G Industries, supra, page 792). I conclude that it has.

¶ 42 I would dismiss the appeal with costs.