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2010 CarswellMan 155

Moss Estate (Trustee of) v. Moss

KEITH G. COLLINS LTD., as Trustee of the Estate of Danny Moss, a Bankrupt (Plaintiff / Appellant) and  
DANNY MOSS and CARRIE MOSS (Defendants / Respondents)

CARRIE MOSS (Plaintiff / Respondent) and BMO NESBITT BURNS INC. (Defendant / Appellant)

Manitoba Court of Appeal

Holly C. Beard J.A., Michel A. Monnin J.A., and Richard J. Chartier J.A.

Heard: March 3, 2010

Judgment: April 29, 2010

Docket: AI 09-30-07200, AI 09-30-07202

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Proceedings: reversing *Moss Estate (Trustee of) v. Moss* (2009), 71 C.C.L.I. (4th) 53, [2009] 9 W.W.R. 117, 2009 MBQB 21, 2009 CarswellMan 57, 51 C.B.R. (5th) 250, (sub nom. *Moss (Bankrupt), Re*) 235 Man. R. (2d) 286 (Man. Q.B.)

Counsel: R.W. Schwartz, A. Thiessen for Appellant, Keith G. Collins Ltd.

D.J. Kroft, A.P. Loewen for Appellant, BMO Nesbitt Burns Inc.

J.E. Crane for Respondents, Danny and Carrie Moss

Subject: Insolvency; Property; Insurance; Estates and Trusts

Bankruptcy and insolvency --- Property of bankrupt — Miscellaneous issues

Following investigations by Canada Revenue Agency (CRA) dating back to late 1980s and early 1990s and subsequent audits, D and R were reassessed by CRA for income tax, penalties, and interest — They appealed assessments and appeals were heard and decided by Tax Court of Canada in 1999 — By then D filed assignment in bankruptcy and R made at least one of her two unsuccessful attempts to declare bankruptcy — D remained undischarged bankrupt — Trustee and bank brought actions asserting that life insurance proceeds from six policies of insurance on life of D's mother, E, that was paid to C as beneficiary following E's death, were property of D, and that amounts should be repaid to trustee for distribution to creditors — Trustee and bank alleged six change of beneficiary forms executed by E and forwarded to and acted upon by insurers following E's death were void and were not signed by E as required by law — Action was dismissed — Trustee and bank appealed — Appeal allowed — Trial judge's initial reasons clearly demonstrated that he failed to recognize fact that spe-

cific and key aspects of defence had been withdrawn — Material misapprehension of evidence was error which was palpable and overriding — In addition, judge rejected evidence before him and cloaked signing with authority based on general powers of attorney that D had — By relying on defence that was specifically abandoned, judge placed plaintiffs in untenable position of retaining onus to disprove theory that had been explicitly withdrawn.

Insurance --- Principles applicable to specific types of insurance — Beneficiaries under contracts of life insurance — Change of beneficiary — Mode of change

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#### **Cases considered by *Michel A. Monnin J.A.*:**

*Desharnais v. Toronto Dominion Bank* (2001), 2001 CarswellBC 2908, 2001 BCSC 1695, 42 E.T.R. (2d) 192 (B.C. S.C.) — referred to

*Moss Estate (Trustee of) v. Moss* (2009), 2009 CarswellMan 366, 2009 MBQB 197, 76 C.C.L.I. (4th) 126, 56 C.B.R. (5th) 116, [2009] 9 W.W.R. 156, (sub nom. *Moss (Bankrupt), Re*) 243 Man. R. (2d) 88 (Man. Q.B.) — referred to

*Prudential Insurance Co. of America v. Johnson* (1937), 176 So. 625 (U.S. La. Ct. App.) — considered

#### **Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 2.1 [en. 1997, c. 12, s. 2] — referred to

s. 67(1)(c) — referred to

s. 67(1)(d) — referred to

*Insurance Act*, R.S.M. 1987, c. I40

Generally — referred to

s. 148(1) "declaration" — referred to

s. 167(2) — referred to

APPEAL by plaintiffs from judgment reported at *Moss Estate (Trustee of) v. Moss* (2009), 71 C.C.L.I. (4th) 53, [2009] 9 W.W.R. 117, 2009 MBQB 21, 2009 CarswellMan 57, 51 C.B.R. (5th) 250, (sub nom. *Moss (Bankrupt), Re*) 235 Man. R. (2d) 286 (Man. Q.B.).

***Michel A. Monnin J.A.:***

1 These appeals deal with the validity of the execution of six notice of change of beneficiary forms (the forms) to life insurance policies.

2 The issue is whether the forms were validly executed by the insured, Eliza Moscovici (Eliza), the mother of the respondent Danny Moss (Danny) pursuant to *The Insurance Act*, C.C.S.M., c. I40 (the *Act*). At stake is whether the proceeds of the six underlying life insurance policies ought to have been paid to Danny's bankrupt estate instead of to the respondent Carrie Moss (Carrie), Danny's daughter who was named beneficiary under the policies pursuant to the directions contained in the forms.

3 These appeals are brought jointly by Keith G. Collins Ltd. (the Trustee), as trustee in bankruptcy for Danny's estate and BMO Nesbitt Burns Inc. (BMO) (collectively the appellants), the defendant in an action commenced by Danny and Carrie. While the matters started out as two separate proceedings, the parties eventually determined that the underlying issues were the same, so they were heard and determined together, with the Trustee and BMO advancing a joint position both at trial and on this appeal.

4 The Trustee and BMO both allege that the forms purportedly executed by Eliza and forwarded to and acted upon by the insurers following Eliza's death were/are "void *ab initio*" as they were not signed by Eliza as required by law.

5 At the heart of the appeals is the issue of whether the trial judge erred in concluding that the forms were validly executed by Danny alone, notwithstanding that Danny and his wife testified to the contrary and had withdrawn defences that could allow the trial judge to reach such a conclusion.

6 If successful, the appellants have sought a declaration that the monies paid to Carrie were the property of Danny pursuant to ss. 2.1 and 67(c) and (d) of the *Bankruptcy and Insolvency Act* (as they then read) and an order requiring Carrie, or any other person or entity having possession or control of any of these funds, to pay those funds to the Trustee, failing which Carrie and Danny be required to pay the equivalent thereof, plus interest, to the Trustee.

7 On April 26, 1996, approximately five months prior to Danny making an assignment in bankruptcy, the forms were executed or purportedly executed by or on behalf of Eliza, witnessed by Danny, and delivered to each of the insurers. These forms changed, or purported to change the beneficiary under each of the policies from Danny to Carrie, who was then 18 years of age. These forms were accepted and acted upon by the insurers who changed the beneficiary under each of the policies to Carrie in or about May 1996. When Eliza died in August 1999, Carrie applied for, and received payment of the \$700,000 of insurance proceeds.

8 The trial was heard in early 2007, and initial reasons for decision were issued on January 30, 2009. Following the release of those reasons, the appellants brought a motion for reconsideration on the basis that the judge had failed to consider or overlooked the fact that defences, on which he appeared to have based his decision to dismiss the appellants' claims, had been withdrawn. The judge dismissed the motion to reconsider and provided reasons to that effect on July 15, 2009.

9 At trial, both the Trustee and BMO asserted a common position; that the \$700,000 of life insurance proceeds from the six policies of insurance on the life of Eliza that were paid to Carrie as beneficiary following Eliza's death were the property of Danny and not Carrie. Accordingly, these amounts should be paid to the Trustee for distribution to creditors.

10 The respondents' answer to these allegations was that Eliza took out the policies of insurance, that she wanted and intended to change her beneficiary on the policies from Danny to Carrie, and in furtherance of these intentions and wishes designated Carrie as her beneficiary "on all of the above named policies of insurance and properly completed and/or instructed and/or authorized the forms and/or manner of completion" of the forms to give effect to her expressed wishes, intentions and instructions.

11 At trial, Danny and his wife testified that Eliza had signed the forms with Danny's physical assistance in that he supported her hand as she executed the documents.

12 As alternate pleas to the Trustee's statement of claim, the respondents maintained that at all material times Danny either had been instructed or authorized by Eliza to complete the forms or was the attorney for Eliza pursuant to properly executed powers of attorney and acting as such and duly authorized, had executed the forms in question pursuant to Eliza's instructions. In the result, the proceeds of the policies were and are the property of Carrie. Those pleas are reflected in paras. 5 and 8 of the statement of defence which provide:

These Defendants further say that Eliza Moscovici expressed from time to time her intentions and wishes to change her beneficiary on the above named policies from Daniel Moss to Carrie Moss and in furtherance of these intentions and wishes, on April 26, 1996 the said Eliza Moscovici designated as her beneficiary the Defendant Carrie Moss on all of the above named policies of insurance and properly completed and/or instructed and/or authorized the form and/or manner of completion of change of beneficiary forms to give effect to her expressed wishes, intentions and instructions.

In the alternative, these Defendants say that at all material times hereto the Defendant Daniel Moss was the attorney for Eliza Moscovici pursuant to a properly executed Power in that regard and acting as such and duly authorized, executed changes in beneficiary forms for the policies as named in paragraph 4 hereof pursuant to the instructions had and received from the said Eliza Moscovici.

13 However, and crucial to the disposition of this case, those alternate pleas were withdrawn during the course of discoveries and that withdrawal was confirmed before the judge during the course of the trial.

14 In his initial reasons, the judge set out the issues as he understood them ([2009 MBQB 21, 235 Man. R. \(2d\) 286](#) (Man. Q.B.) at paras. 21-23):

Based on the pleadings, evidence, and submissions of counsel, the central factual issues to be determined in these actions are:

1. Did Eliza personally sign all (or any) of the six "Notice of Change of Beneficiary" forms dated April 26, 1996, either without assistance or guided/assisted by Mr. Moss as testified to by Mr. and Mrs. Moss at trial?

In answering this question, there is absolutely no evidence (testimony or documents) to suggest that Eliza personally signed any of these forms without any assistance from anyone.

2. If, as the Trustee and BMO assert, Mr. Moss did not guide or assist Eliza's hand in affixing the signatures to each of these forms, did Mr. Moss sign Eliza's name to these forms?

The Trustee and BMO assert and have the onus of proving, on the civil standard of proof, that Eliza did not sign any of these forms and that Mr. Moss either forged (in the criminal sense) or, alternatively, having regard to the plea in para. 8 of the statement of defence filed in Docket No. BK 97-01-49147, was unauthorized to sign Eliza's name to these forms and did so in furtherance of his plan to defeat his legitimate creditors. ....

As I understand the position of the Trustee and BMO, whether the evidence establishes "forgery" (in the criminal sense) of Eliza's signature on these forms by Mr. Moss, *or* Eliza, either expressly or implicitly, authorized Mr. Moss to sign her name on her behalf to these forms (either in her presence or otherwise), any such signing by Mr. Moss (even if it was authorized by Eliza) is insufficient in law to validly change the name of a beneficiary in a life insurance policy having regard to the provisions of the **Insurance Act**, C.C.S.M., c. I-40 (the "**Insurance Act**"). ....

[underlining added]

15 The judge then made strong credibility findings against Danny and most, if not all, of the witnesses called on his behalf. He stated (at paras. 48-49):

When people engage in deception on a regular basis over long periods of time it is not always possible for everyone to keep their stories straight. This is the case with the Moss family and friends. As to the signing of the six Change of Beneficiary forms in April 1996, although Carrie's testimony and Susan Barron's ("Ms. Barron") testimony might be considered as supportive of the versions of Mr. Moss and Mrs. Moss, assuming that Eliza was either present when the six forms were signed or, alternatively, became aware that they had been signed or were going to be signed, I am satisfied they were not executed as Mr. and Mrs. Moss testified. ....

I am satisfied that Mr. and Mrs. Moss lied in their testimony as to how the signature "Eliza Moscovici" was placed on the six forms. I am equally satisfied from observing Mr. and Mrs. Moss, Carrie, and their supporting witnesses that the Moss family were and are prepared to say and do almost anything to preserve as much of their remaining assets as possible from their creditors. .... However, I simply do not believe that portion of Mrs. Moss's testimony at trial (or of her September 25, 2001 affidavit, *supra*) where she described the signing of these six forms and the "guiding" or "assisting" by Mr. Moss. This evidence is clearly refuted by the opinions of Ms. Ibrahim, Mr. Purdy, and to a significant extent by Mr. Hutsel. ....

16 The judge then came to the following conclusions (at paras. 60-61):

I would repeat my conclusions and references to the evidence as set out in paras. 56 and 57, *supra*. I am sat-

isfied by a totality of the evidence and on a civil standard of proof that when Mr. Moss signed Eliza's name to the six Change of Beneficiary forms in question, he was authorized by her to do so, impliedly, if not expressly, by virtue of the general power of attorney that he held from her at that time (Ex. 1, Vol. 1, Tab. 19), dated September 1, 1995. Moreover, as concluded by the opinions of Ms. Ibrahim and Mr. Purdy, which I accept, it is clear that Mr. Moss had been signing Eliza's name on numerous documents over the years. Most, if not all, of these signatures had legal significance and legal consequences. ....

I am satisfied that in applying for the insurance and in subsequently executing and delivering the Change of Beneficiary forms to the insurers, Mr. Moss was acting as Eliza's agent (even if I were to disregard the specific power of attorney which he held from and after September 21, 1995, supra). ....

[underlining added]

17 He then went on to find that the signing by Danny of the forms was not in breach of the *Act* and commented as follows on the case of *Prudential Insurance Co. of America v. Johnson*, 176 So. 625 (U.S. La. Ct. App. 1937), which the appellants were relying on to advance their position (at para. 68):

Of the authorities referred to by counsel for the Trustee and BMO, a decision of the Court of Appeal of Louisiana in *Prudential Insurance Co. of America v. Johnson et al.*, (1937), 176 So. 625 ... is most analogous to the situation before me. The court was dealing with the question of the validity of a change of beneficiary form and the issue was whether the insured had executed the form himself as several witnesses and the claimant testified. In that case, contrary to the testimony of several witnesses and the claimant, after hearing expert testimony regarding the signature and inspecting the signatures in question himself, the trial judge concluded "the man who wrote the signatures on the payrolls no more wrote the signature 'Isaac Johnson' on the change-of-beneficiary card than he wrote the Declaration of Independence". The Court of Appeal, in concluding that this particular document was not signed by the insured and, accordingly, was invalid, pointed out that any suggestion that someone else may have signed for the insured "was not pleaded, and, if well founded, would destroy completely the testimony of all of her (the applicant's) witnesses". These are not the facts before me. In these proceedings, from the outset of the litigation, Mr. Moss and Carrie, by virtue of para. 8 of their statement of defence dated September 9, 2002 and filed in Docket No. BK 97-01-49147 (p. 10 of the Amended Record), had always maintained the alternate "plea" to the effect that Mr. Moss was authorized to sign the forms in question. I am mindful of the fact that during the trial counsel for Mr. and Mrs. Moss (who was not the counsel who had prepared the statement of defence) had acknowledged (in urging me to accept the testimony of Mr. and Mrs. Moss as to the signing of the documents as being true) that the alternate plea was inconsistent with their testimony. However, in light of my conclusions as to the signing of the forms, the existence of a general power of attorney, and the totality of the relationship between Mr. Moss and Eliza, I accept, on balance, Mr. Moss's testimony on cross-examination to the effect that he had, or at least believed he had, authority to sign documents for Eliza. Even if one could accept that Eliza may not necessarily have known of the full particulars of all of the six insurance policies, there is clear evidence that she participated in the original applications, signed some of the documentation at that time, and attended for and participated in medical examinations necessary for some of the policies. As I initially pointed out, triers of fact may accept some but not all of the testimony of any particular witness. All testimony must be weighed against the totality of the evidence, including the documentary evidence and the testimony of all of the witnesses. I do not consider this to be a situation where, as in the *Prudential Insurance Co. of America v. Johnson* case, supra, the conclusion that Mr. Moss did not guide Eliza's hand in making these signatures and simply signed her name to the forms is not one which would "completely destroy" the testimony

of all of the witnesses. On balance, I am satisfied that this is a situation where Mr. Moss did have (and understood himself to have) sufficient authority to sign documents such as this for Eliza. In the end result, the claims of the Trustee and BMO for declarations of invalidity and a subsequent accounting are dismissed.

[underlining added]

18 The judge's reasons brought about a motion by the appellants that he reconsider his decision. The motion was brought, as noted in para. 6 of these reasons, on the basis that the reasons make no mention of the fact that the respondents abandoned the alternate defences. Quite to the contrary, the judge's reasons expressly rely on them. Therefore the appellants argued, the decision was based upon a clear mistake and/or fundamental misapprehension of the case before the court.

19 The appellants further argued that the respondents had repeatedly stated that their sole factual defence to the claims of the Trustee and BMO was that Eliza herself physically signed the forms with Danny's assistance in guiding her hand. Consistent with that fact, the respondents, by the discovery stage of these proceedings, had abandoned the alternate defences contained within paras. 5 and 8 of their statement of defence, which, as stated earlier, alleged that Eliza did not sign the forms, but rather, expressly or implicitly authorized Danny to sign them for her.

20 The appellants further argued on the reconsideration motion that as the alternate defences were not part of the respondents' case, the evidence adduced by the Trustee and BMO was designed solely to meet the only defence that was still before the court, specifically, that Eliza personally signed the forms with physical assistance by Danny.

21 In denying the motion for reconsideration, the trial judge confirmed his finding that Danny had executed the forms with the consent and authority of Eliza and then dealt with the issue of the withdrawn defences in the following terms (2009 MBQB 197, 243 Man. R. (2d) 88 (Man. Q.B.) at para. 13):

I respectfully disagree with the Trustee and BMO to the suggestion that the abandonment by Mr. Moss, Carrie Moss and their counsel of reliance on the "alternate defences" in the pleadings precludes this court from applying the law to the facts as I found them. To accept that the abandonment of alternative "positions" in a pleading amounts to, in effect, an admission of fact that the person who signed Eliza's name to the forms was committing a fraud on Eliza or the insurers is simply not correct. An abandonment of "alternate defences" in a pleading does not equate to an admission of fraudulent conduct with respect to the execution of the forms. The onus throughout lies on the Trustee and BMO to prove fraud in these unusual circumstances, even though they did not plead it. Simply proving that Eliza did not personally sign the forms is not sufficient to establish the cause of action and entitlement to the relief sought. It must be remembered that these insurance policies were Eliza's property and any change of beneficiary by her or on her behalf does not constitute a "preference" or a "fraudulent preference", as those terms are often used in bankruptcy law.

22 On appeal, the appellants basically reiterated the position that they took before the judge on the reconsideration motion. They allege that the judge erred in law in finding that the forms were valid in light of his findings that Eliza did not sign them, which was a finding that was contrary to the evidence of Danny and his wife and gave effect to the defences that had been withdrawn before trial. They also argued that the decision was contrary to the provisions of ss. 148(1) and 167(2) of the *Act*, and finally, that the judge further erred by taking the position that it was incumbent on the appellants to prove that the forms had been executed fraudulently. It should be noted that, while the trial judge referred to fraud, the appellants did not allege fraud in their pleadings.

23 The respondents argue that their position has always been that the forms were validly executed and, even if the judge chose not to believe Danny's evidence as to how such execution came about, he was nonetheless entitled to find, as he did, that the forms were executed in an otherwise acceptable manner. The respondents argue that the judge was entitled to find the facts as he found them to be and that he simply applied the law to his findings of fact.

24 The trial judge's initial reasons, in paras. 22, 60 and 68 ([2009 MBQB 21](#) (Man. Q.B.)), all quoted previously, clearly demonstrate that he failed to recognize the fact that specific and key aspects of the respondents' defence had been withdrawn. His material misapprehension of the evidence is an error which I consider to be palpable and overriding. I can only conclude that this fundamental omission on his part coloured and informed his ultimate finding and trial disposition, and his dismissal of the motion for reconsideration. Having come to the conclusion that the judge thus erred, his conclusions and disposition of the matter are not owed any deference by this court.

25 Notwithstanding the fact that the only evidence that the judge had before him of signing the forms was from Danny and his wife and was to the effect that he helped his mother sign them, the judge rejected this evidence and found that Danny himself had signed them. He did so because he found that Danny had, in the past, signed other documents for his mother. Then, notwithstanding the withdrawn defences, he cloaked this signing with authority based on the general powers of attorney that Danny held. That was also an error.

26 By arriving at findings that appear to rely on a defence that was specifically abandoned by the respondents, the judge places the appellants in the untenable position of retaining an onus to disprove a theory that had been explicitly withdrawn by the respondents.

27 Further, the trial judge's finding that Danny had Eliza's authority to sign the forms is flawed, firstly, because of the withdrawn defences and, secondly, because a general power of attorney, as conceded by the respondents themselves during the course of oral argument, is insufficient to vest the requisite authority to do so under the provisions of the *Act*. None of the powers of attorney that Danny held permitted the designation or the alteration of beneficiaries in a policy of insurance. See *Desharnais v. Toronto Dominion Bank*, [2001 BCSC 1695](#), [42 E.T.R. \(2d\) 192](#) (B.C. S.C.). The power must be a specific one and that is not the case here.

28 While the appellants pleaded that the forms were invalid under the provisions of the *Act*, the issues were narrowed by the withdrawal of the alternate pleas by the Mosses. Taking into account that fact, I come to the conclusion that the appellants have discharged the onus of proving their case, as there was no evidence accepted by the trial judge that the forms were signed by Eliza with Danny's assistance, and, in fact, the trial judge strongly rejected the evidence in that regard. This decision is amply supported by the evidence and was not challenged at the appeal.

29 Accordingly, I would allow the appeal and grant the declaration and relief being sought by the appellants

30 There were issues between the parties as to who should be awarded costs, and in what manner. On the basis of my disposition of the appeal, the appellants are entitled to their costs in this court. Because of the appellants' success, I would extend that award to the trial costs. I would not, however, acquiesce to the appellants' request that such costs be on a solicitor-client basis.

**Holly C. Beard J.A.:**

I agree.

***Richard J. Chartier J.A.:***

I agree.

*Appeal allowed.*

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