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Magnotta v. Yu: Navigating the Intricacies of Rule 49 Settlement Offers

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Although the vast majority of cases settle, Rule 49 of the Ontario *Rules of Civil Procedure*[1] contains nuances that can trip up even the most experienced litigator. In this article, we will focus on three such nuances, two of which were highlighted by the Ontario Court of Appeal's decision in *Magnotta v. Yu*:[2]

1. Judges have discretion and can refuse to enforce settlement agreements created when parties accept settlement offers;
2. Rule 49 offers can be accepted at any time unless they are withdrawn or expire; and
3. Plaintiffs are entitled to costs unless Rule 49 offers explicitly provide otherwise.

The Story

In 2017, Yu entered into an agreement of purchase and sale for a property owned by the Magnottas. The sale did not close after a dispute about whether valid building permits had been obtained for past renovations on the property. The Magnottas began a proceeding against Yu.

In May 2019, the parties exchanged offers to settle. The case did not settle and, shortly thereafter, Yu switched counsel.

After the change of counsel, in July 2019, the Magnottas accepted Yu's May 2019 offer to settle. Yu's new counsel did not know that the May 2019 offer had been made and took the position that the offer was no longer open for acceptance. The Magnottas brought a motion under Rule 49.09(a) to enforce a settlement based on their acceptance of the May 2019 offer.

The motion judge found the May 2019 offer was valid and held that it would be inappropriate in the circumstances of the case to exercise his discretion not to enforce a settlement based on the acceptance of that offer. His decision was upheld by Court of Appeal.

Rule 49.09(a): Judicial Discretion Exists in Enforcing Settlements

Rule 49.09(a) is permissive, not prescriptive. When a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may bring a motion for a judgment in the terms of the accepted offer, which the judge *may* grant. This rule provides judicial

[1] R.R.O. 1990, Reg. 194.
[2] 2021 ONCA 185 [*Magnotta*].

discretion, and the court may choose not to enforce a settlement flowing from acceptance of a valid Rule 49 offer.

That discretion is governed by a basic principle: A court will not enforce a Rule 49 settlement if it is not in the interests of justice to do so. The Court of Appeal in *Magnotta* emphasized that evaluating the interests of justice is a contextual inquiry which the motion judge is best placed to undertake. In determining whether an injustice would result if a settlement is or is not enforced, the relevant factors will depend on case.[3] A deferential approach should be given to the motion judge's decision based on her review of the evidentiary record and findings of fact.[4]

There are two circumstances in which courts have consistently found that enforcing Rule 49 settlements would not be in the interests of justice. First, judges typically decline to enforce settlements where one party takes advantage of the other party's mistake.[5] Courts will consider whether a party or their counsel are aware of the mistake and knowingly capitalize on the error.[6]

However, not all mistakes will give rise to circumstances where a court finds it contrary to the interests of justice to enforce a valid settlement. In *Magnotta*, the Court of Appeal accepted the motion judge's finding of fact that, as far as the Magnottas' counsel was aware, Yu's counsel had the full file for over a month before the Magnottas accepted the May 2019 offer. As such, the Magnottas did not take advantage of a mistake by accepting an offer of which Yu's new counsel was unaware.[7] When taking over an ongoing case, counsel should take steps to identify all outstanding offers to settle, even ones the client may consider to be stale.

Second, courts have found that enforcing Rule 49 settlements where there is evidence of duress or unconscionability would not be in the interests of justice. Courts will consider evidence of economic duress, fraud, coercion or exploitation.[8] In the case of self-represented litigants, courts will also taken into account a lack of opportunity to obtain independent legal advice.[9]

As a best practice, counsel should consider how a court will view the process through which a Rule 49 settlement was reached. Particularly in the context of high pressure negotiations and when dealing with self-represented litigants, counsel must take care to avoid tactics that may support a court refusing to enforce a settlement.

Rule 49.04: Settlement Offers are Outstanding Unless Expired or Withdrawn

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[3] *Ibid.* at para. 38.

[4] *Ibid.* at para. 29.

[5] See, for example, *Fox Estate v. Stelmaszyk* (2003), 65 O.R. (3d) 846 (Ont. C.A.) [*Fox Estate*]; and *Milios v. Zagas* (1998) 38 O.R. (3d) 218 (Ont. C.A.).

[6] See *Fox Estate* (2003), 65 O.R. (3d) 846 (Ont. C.A.) at para. 11.

[7] *Magnotta, supra* note 2 at para. 40.

[8] See *Royal Bank v. Central Canadian Industrial Inc.* [2003] O.J. No. 5251 (Ont. C.A.) [*Royal Bank*]; [2000] O.J. No. 4583 (Ont. S.C.J.).

[9] *Ibid.* at para. 12.

The dispute in *Magnotta* could have been avoided had counsel sent a letter withdrawing the May 2019 offer or, more generally, all offers to settle outstanding when the file was transferred. Pursuant to Rule 49.04, an offer is capable of being accepted unless it is withdrawn in writing or contains a time limit after which it expires. If an offer is not withdrawn, that offer remains open for acceptance even if it has been rejected.[10] Similarly, where an offer to settle is met with a counteroffer, the original offer remains open for acceptance if it is not withdrawn.[11] As a result, it is a best practice to prioritize understanding what offers to settle have been made before counsel serves a notice of change of lawyer and, in some complicated matters with large files to review, it may make sense to send a written withdrawal of all outstanding offers to avoid any surprises.

Magnotta offers insight into practical steps that counsel can take to ensure their clients are not bound by outdated yet still open settlement offers. If there has been a development in the case that fundamentally changes the nature of their settlement offer, counsel should be prompt in sending a written withdrawal of the offer. Finally, when making a subsequent Rule 49 offer, counsel should clarify whether previous Rule 49 offers remain open for acceptance.

Rule 49.07(5): Plaintiffs Have Default Entitlement to Costs

Although not at issue in *Magnotta*, Rule 49.07(5) contains similar nuances to the two issues described above which, if overlooked, may fundamentally alter the nature of the settlement between the parties. Where a Rule 49 offer does not provide for costs, Rule 49.07(5) states that the plaintiff is entitled to costs, and sets out the framework for how costs are assessed.

The language of the offer must be clear and precise to ensure that it supersedes the plaintiff's default entitlement to costs. The Ontario Court of Appeal has held that an offer to settle "in full and complete satisfaction of the plaintiff's claim" is exclusive of costs, and the plaintiff was entitled to costs pursuant to Rule 49.07(5).[12] Where the terms of the offer state "costs to be assessed or agreed upon", courts have typically awarded costs to the date the offer was served, in accordance with Rule 49.07(5).[13]

Clients often think about offers to settle in terms of the all-in amount they will be required to pay or will receive. Rule 49.07(5) can alter the bargain that clients think they are offering to make, and does so in the plaintiff's favour. Parties should be alive to this Rule when making a

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[10] *York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.*, (1989) 70 O.R. (2d) 317 (Ont. C.A.) at para. 10.

[11] *Roma Construction (Niagara) Ltd. v. Dykstra Bros. Roofing (1992) Ltd.*, [2008] O.J. No. 2755 (Ont. S.C.J.) at para. 17.

[12] See *Puri Consulting Ltd. v Kim Orr Barristers PC*, 2015 ONCA 727 at paras. 24, 34.

[13] See, for example, *Milancovic v Le* (2015), 125 OR 3d 758 (Ont. S.C.J.) at paras. 7, 9-10; *Rosero v Hunag* (1999), 44 OR (3d) 669 (Ont. S.C.J.) at paras. 8-10. Note that under Rule 49.07(5), costs are assessed to the date the plaintiff was served with the offer where an offer was made by the defendant. Where an offer was made by the plaintiff, costs are assessed to the date the notice of acceptance was served.

Rule 49 offer and include in the offer a clear statement about the client's intention with respect to costs.

Conclusion

The Court of Appeal's decision in *Magnotta* reminds us that Rule 49 settlement offers are not straightforward and can contain traps for the unwary. First, as a result of the judicial discretion embedded in Rule 49.09(a), not all Rule 49 settlements are enforced. Second, outstanding offers continue to be open for acceptance unless they contain an expiry date or are explicitly withdrawn. Third, plaintiffs are entitled to costs unless the language of the offer states otherwise. Counsel must approach all stages of the settlement process with the goal of ensuring that any settlement offer will ultimately be enforced by the courts and, if so, will accurately reflect their client's intentions.