

Docket: 2003-1572(EI)

BETWEEN:

GRACE CUFFARO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LUCY FONICIELLO, FRANK CUFFARO AND RINO NIGRO
o/a EYES BY DESIGN & DESIGNER ACCESSORIES,

Intervenors.

Appeal heard on common evidence with the appeal of *Grace Cuffaro*
(2003-1573(CPP)) on September 16, 2003 at St. Catharines, Ontario

Before: The Honourable W.E. MacLatchy, Deputy Judge

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: A'Amer Ather

Agent for the Intervenors: Rino Nigro

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario, this 26th day of November 2003.

"W.E. MacLatchy"

W.E. MacLatchy, D.J.

Citation: 2003TCC821

Date:20031126

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Intervenors.

REASONS FOR JUDGMENT

MacLatchy, D.J.

[1] These appeals were heard on common evidence at St. Catharines, Ontario, on September 16, 2003.

[2] The Appellant appealed a ruling to the Minister of National Revenue (the "Minister") for the determination of the question of whether or not she was employed in insurable and pensionable employment while engaged by Lucy Foniciello, Frank Cuffaro, Grace Cuffaro and Rino Nigro, Partners o/a Eyes By Design & Designer Accessories, the "Payer", during the period in question, from June 9 to September 14, 2002, within the meaning of the *Employment Insurance Act* (the "Act") and the *Canada Pension Plan* (the "Plan") respectively.

[3] By letter dated January 24, 2003, the Minister informed the Appellant and the Payer that it had been determined that the Appellant was not employed in insurable and pensionable employment during the period in question since she was one of the partners of the business and no contract of service existed between the parties, pursuant to paragraph 5(1)(a) of the *Act* and paragraph 6(1)(a) of the *Plan* respectively.

[4] Certain relevant facts were agreed to by all the parties, namely :

- (a) the Payer operated a retail outlet business in Niagara Falls, Ontario and was owned and operated by a four-way, equal partnership between the Appellant, Frank Cuffaro (the Appellant's husband), Rino Nigro (the Appellant's brother-in-law) and Lucy Foniciello;
- (b) the Payer's business was seasonal in nature;
- (c) all four partners signed a letter dated February 20, 2002 stating that Rino Nigro would take over the store and transfer title to a numbered company owned by him. Rino Nigro would assume all stock and liabilities and relieve Grace and Frank Cuffaro of all liabilities "provided I can pay all the bills" (my underlining), such assumption by Rino Nigro to take place in March, 2002, when the store would open. Further, that Grace could work as an employee of the numbered company owned by Rino Nigro. Rino Nigro was going to redo the lease of the premises for 10 years in the name of his numbered company in January, 2003. It is the interpretation of this letter that has set the parties at issue.

[5] The remaining assumptions of fact set out in paragraph 4 of the Reply to the Notice of Appeal were in dispute as follows:

- (e) and (f) the Appellant continued to have signing authority on the Payer's bank account during the period in question. The Appellant stated that she was a trusted employee of the Payer and had authority to perform banking functions including the signing of cheques for the Payer. The Minister indicated that this was not normal for an employee.
- (h) and (i) the Payer's line of credit was secured by a lien on the Appellant's and her husband's residence and could not be released until the line of credit was paid in full. The

Minister said this was not indicative of an employer/employee relationship.

[6] Evidence was given by the Appellant and Rino Nigro as intervenor. Both the Appellant and Rino Nigro agreed that the business was in financial trouble and that the Appellant wanted to be relieved of any further liability in the business. Their evidence was given in a straightforward and honest manner, incorrectly believing they had solved the question of limiting the liability of the Appellant and her husband by the letter dated February 20, 2002. The business, however, was not formally transferred till January, 2003. Up to that date, the Appellant and her husband remained responsible for the debts of the Payer including rent, utilities, payroll deductions and G.S.T. remittances, whether they thought they were or not. A debtor of the Payer could come against them at any time during 2002 and including the period in question. This again supports the Minister's assumption that no employee would assume that risk.

[7] The Appellant attempted to explain this error by stating there had not been enough time available to cause notice of the change of ownership to be completed. The Appellant had complete trust in Rino Nigro and stated he always had paid all his bills outstanding and would do so in the interim period. This appears to this Court to be quite naïve on her part and quite unrealistic if she believed she was but an employee.

[8] The Appellant also stated that she believed she was responsible through the year 2002 for some tax liability for that year. Her accountant told her otherwise but not until after the end of the business year 2002.

[9] The Appellant and Rino Nigro both stated that they were trying to cut their losses by signing the letter of February 20, 2002 and that they would have to work hard from the date of that letter to pay the outstanding accounts of the business. In any event, the Appellant knew that until the line of credit was paid in full would the lien on her home be removed.

[10] This Court has not been convinced by the Appellant or Rino Nigro that there existed the relationship of employer/employee or that there was an express or implied contract of service. The Appellant was caught in an unfortunate business relationship from which she was attempting to extricate herself. By referring to herself as an "employee" was not sufficient to create that type of relationship under those circumstances. She remained responsible for the debts of the business during the period in question. There was little, if any, control over her during the year

2002 and she continued her operation of the Payer as if she was still an owner of the Payer.

[11] The appeals are dismissed and the decision of the Minister is hereby confirmed.

Signed at Toronto, Ontario, this 26th day of November 2003.

"W.E. MacLatchy"

MacLatchy, D.J.

CITATION: 2003TCC821

COURT FILE NO.: 2003-1572(EI) and 2003-1573(CPP)

STYLE OF CAUSE: Grace Cuffaro & M.N.R. &
Lucy Foniciello, Frank Cuffaro and
Rino Nigro o/a Eyes by Design &
Designer Accessories

PLACE OF HEARING: St. Catharines, Ontario

DATE OF HEARING: September 16, 2003

REASONS FOR JUDGMENT BY: The Honourable W.E. MacLatchy,
Deputy Judge

DATE OF JUDGMENT: November 26, 2003

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: A'Amer Ather

Agent for the Intervenors: Rino Nigro

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada

For the Intervenors:

Name:

Firm: