NOVA SCOTIA COURT OF APPEAL
Citation: ***Frothingham v. Perez***, 2011 NSCA 59

Date: 20110614
Docket: CA 329647
Registry: Halifax

Between:

Dr. Elizabeth Frothingham

Appellant

v.

R. Charles Perez and Wickwire Holm

Respondents

Revised decision:	The text of the original decision has been corrected according to the erratum dated June 28, 2011. The text of the erratum is appended to this decision.
Judges:	Saunders, Fichaud and Farrar, JJ.A.
Appeal Heard:	April 14, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Saunders and Fichaud, JJ.A. concurring.
Counsel:	appellant, in person Ann E. Smith and Tiffany Robertson, Articled Clerk, for the respondents

Reasons for judgment:

[1] The appellant, Dr. Elizabeth Frothingham, appeals from the order of the Honourable Justice Gregory M. Warner dated April 15th, 2010, where, on a motion for summary judgment, he dismissed her action against the respondents R. Charles Perez and the law firm Wickwire Holm. She alleges the Chambers judge erred in granting the motion. She further seeks to introduce fresh evidence on this appeal.

[2] For the reasons which I will now develop, I would dismiss both the application to introduce fresh evidence and the appeal.

Background

[3] In order to address the issues on appeal it is necessary to set out the factual background in some detail.

[4] The events that give rise to Dr. Frothingham's action in professional negligence against Mr. Perez, a lawyer, and his law firm, Wickwire Holm started on September 14, 2007, when Dr. Frothingham called Wickwire Holm and left a message for Mr. Perez that she had received an offer on property which she owned in Liscomb, Nova Scotia. At this time Dr. Frothingham was living in Hutchinson, Kansas, USA

[5] On September 16, 2007, Mr. Perez received a letter from Dr. Frothingham enclosing a document entitled "Terms of Sale" and a "Limited Power of Attorney". In that letter she advises Mr. Perez that she will be in Halifax by October 7, 2007.

[6] Mr. Perez received a second faxed letter from Dr. Frothingham on September 16, 2007. In that letter, she advised Mr. Perez that she needed money to pay off some credit card and loan debts but that the sale was not a "live-or-die situation" for her. She also advises him that she was free to fly to Halifax on or about October 7, 2007. Finally, in concluding her correspondence Dr. Frothingham says "Perhaps this whole transaction should just wait until my arrival".

[7] Also, on September 18, 2007, Mr. Perez faxed a letter to Dr. Frothingham advising that the Liscomb property would have to be migrated to the

computer-based registration system and that that process would take between one and two weeks to complete. He attached a draft agreement of purchase and sale he had received from the dual agency real estate agent dated September 16, 2007 with a closing date of October 15, 2007. Mr. Perez requested that Dr. Frothingham advise whether she wished to use the services of Wickwire Holm on the property transaction.

[8] On September 19, 2007, Mr. Perez received a fax from Dr. Frothingham responding to various points he had made in his faxed correspondence to her the previous day and stating that "I do not wish to sign any documents until you are ready to assist me." The letter attached a copy of the September 16, 2007 draft agreement of purchase and sale which had been revised, including, by adding after the closing date of October 15, 2007, the words, "or later, depending on travel pace of Seller". On the signature line for the seller, rather than signing the agreement, Dr. Frothingham wrote , "wait for R. Charles Perez".

[9] On October 1, 2007, Mr. Perez received a fax from Dr. Frothingham advising that she was at a hotel in Sault Ste. Marie. Mr. Perez sent faxed correspondence to Dr. Frothingham on October 2nd, 2007, at the hotel which advised that "It is imperative that we speak as soon as possible to discuss this transaction", that "[t]he agreement of purchase and sale on this transaction has not yet been finalized", "nor has it been signed" and that "[t]he limited power of attorney that you provided me only authorizes me to sign documents. I would not make decisions for you. After reviewing all of our correspondence and materials, it is not clear to me that you have even decided to proceed with this transaction on the basis of the purchase price".

[10] On October 9, 2007, Mr. Perez received a fax from Dr. Frothingham which stated, "Please postpone closing until October 17 (Wednesday). I will telephone you on the 16th...".

[11] On October 15, 2007, Mr. Perez faxed a revised agreement of purchase and sale, which he had received from the real estate agent. The revised agreement had a closing date of November 1, 2007.

[12] Dr. Frothingham signed the agreement of purchase and sale and returned it to Mr. Perez by fax the same day (October 15, 2007). This was the first time Mr. Perez had a signed agreement of purchase and sale in his possession.

[13] On October 22, 2007, Mr. Perez met with Dr. Frothingham at his office in Halifax. Dr. Frothingham signed the documents required for the migration of the Liscomb property as well as the warranty deed and HST certificate. Mr. Perez suggested that the closing date be extended.

[14] On November 1 & 2, 2007, Mr. Perez wrote to Mr. Stevenson, who was the purchasers lawyer, referring to their telephone conversation that morning, stating that Dr. Frothingham had confirmed a revised closing date of November 9, 2007, and suggesting that since the potential buyers were unavailable "next week", that the closing take place on November 13 or 14. Mr. Perez stated that he would confirm this after speaking with his client on Monday and that should the migration be completed before the 13th or 14th, that they would try to close earlier. Mr. Stevenson advised the following day that those terms were acceptable to his clients.

[15] On November 5, 2007, Mr. Perez sent faxed correspondence to the Royal Bank of Canada with respect to an unreleased mortgage on the Liscomb property which his title search had disclosed.

[16] On November 13, 2007, Dr. Frothingham sent a faxed letter to Mr. Perez at 2:32 a.m. from the Comfort Inn, Truro, with a cover page advising that it was important to "read right away" and raising issues in the attached letter concerning the method of payment of the sale proceeds to her, confidentiality and the "as is" condition of the property.

[17] Also, on November 13, 2007, in a fax received at Mr. Perez' office at 4:55 a.m., Dr. Frothingham stated that she was severing all her ties with Mr. Perez and Wickwire Holm. She requested that Mr. Perez send his bill to Carole Gartside, another lawyer, and that any further correspondence and inquiries be put to Ms. Gartside.

[18] On November 13, 2007, Mr. Perez sent faxed correspondence to Ms. Gartside advising of the termination of his retainer with Dr. Frothingham, stating

that the closing had been nominally scheduled for November 13, but that confirmation of the release of the mortgage from the Royal Bank had not yet been received. Mr. Perez enclosed a draft Confirmatory Deed.

[19] On November 14, 2007, Mr. Perez received faxed correspondence from Mr. Stevenson advising that his client, the potential buyer, "has been ready, willing and able to close the purchase" of the Liscomb property once it had been migrated and would still be willing to close provided that the closing was before 5:00 p.m. on November 14, 2007.

[20] On November 15, 2007, Mr. Perez received a copy of the mortgage release from the Royal Bank of Canada and faxed it to Ms. Gartside.

[21] On November 16, 2007, Ms. Gartside writes to Mr. Perez and states:

> I did meet with Ms. Frothingham this morning, and I did review the Confirmatory Deed with her, however Ms. Frothingham advised me that she is not willing to go ahead with this property transaction, for a number of reasons. ...
>
> Ms. Frothingham was not willing to sign the Confirmatory Deed at this time, and I therefore consider my brief involvement in this matter to be at an end.

[22] This was Mr. Perez's last involvement with the transaction.

[23] By Notice of Action dated January 7, 2009, and amended July 29, 2009, Dr. Frothingham commenced action against Mr. Perez and Wickwire Holm for professional negligence in their representation of her on the sale of the Liscomb property.

Issues

[24] The issues raised by Dr. Frothingham in her Notice of Appeal and factum can be succinctly summarized as follows:

1. Whether Dr. Frothingham's motion for the admission of fresh evidence should be allowed;

2. Did the Chambers judge err in granting summary judgment to Mr. Perez and Wickwire Holm; and

3. Did the Chambers judge err in awarding costs to the respondents.

[25] I will address the fresh evidence motion, first, after reviewing the standard of review.

Standard of Review

[26] The Chambers judge's decision had a final or terminating effect on the allegations against the respondents, such that the standard of review is whether there arose an error of law resulting in an injustice. An error of law that affects the result constitutes an injustice. **AMCI Export Corp. v. Nova Scotia Power Inc.**, 2010 NSCA 41, ¶ 10 and **Turner v. Halifax (Regional Municipality)**, 2009 NSCA 106, ¶ 14.

[27] On the issue of the costs award, the standard of review is well known. We will not interfere unless the Chambers judge erred in principle or the decision is so clearly wrong as to amount to a manifest injustice.

1. Whether Dr. Frothingham's motion for the admission of fresh evidence should be allowed

[28] Dr. Frothingham seeks the admission of one document, a letter which she refers to as the "Ross letter" dated July 29, 2000. The "Ross letter" is a 19-page letter from Dr. Frothingham to David Ross and Angela Carr at Enterprise Recovery Systems in Oak Brook, Illinois. Dr. Frothingham says in her factum she wrote the letter in the "hope of gaining forgiveness of my law student loan in the amount of $60,000. It outlines physical conditions that, subject to extraordinary neglect, brought me within 8 months of my possible death in 1998". No explanation is given by her why or how the letter may bear on any issue in the summary judgment motion or on this appeal.

[29] The test for admission of fresh evidence in this Court was addressed in **Nova Scotia Barristers' Society v. Harris**, 2004 NSCA 143, where Justice Hamilton addressed the four-part test for admitting fresh evidence on appeal:

105 With respect to the first two affidavits, the test for the admission of fresh evidence on appeal was set out by the Supreme Court of Canada in **Palmer v. The Queen**, [1980] 1 S.C.R. 759 at page 775:

> Parliament has given the Court of Appeal a broad discretion in s. 610(1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them -- see for example *Regina v. Stewart* (1972), 8 C.C.C. (2d) 137 (B.C.C.A.); *Regina v. Foster* (1977), 8 A.R. 1 (Alta. C.A.); *Regina v. McDonald* [1970] 3 C.C.C. 426 (Ont. C.A.); *Regina v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.). From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[30] Dr. Frothingham's fresh evidence application must fail for the following reasons:

1. The letter is dated approximately eight years before Dr. Frothingham commenced her action in Nova Scotia. There is nothing before us which would explain why Dr. Frothingham, if she thought it was

important in defence of the motion before Justice Warner, could not, with due diligence, have put the letter into evidence.

2. Further, and perhaps more importantly, the test for introduction of fresh evidence requires that it "must bear upon a potentially decisive issue". There is nothing in the letter which would suggest that it would in any way bear upon the Chambers judge's decision to grant summary judgment.

3. Finally, the contents of the letter are not relevant to any issue that was before the Chambers judge nor is it relevant to any issue on the merits of this appeal.

[31] For these reasons, Dr. Frothingham's application for the introduction of fresh evidence is dismissed.

2. Did the Chambers judge err in granting summary judgment to Mr. Perez and Wickwire Holm?

[32] The prerequisites for summary judgment to dismiss an action are -- first, that the applying defendant shows that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success (**Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at para. 27).

[33] The trial judge concluded:

> So the bottom line is that I am prepared to dismiss the action on summary judgment pursuant to Civil Procedure Rule 13.04.
>
> On the basis of the analysis set out by the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital*, which has been adopted by the Nova Scotia Supreme Court under a predecessor section to 13.04 in *United Gulf Developments v. Iskandar* and *Eikelenboom v. Holstein Canada* and probably innumerable other cases, I'm satisfied that the Applicant has shown that there is no genuine issue of material fact requiring trial.
>
> And I am further satisfied that the Respondent, who then had an onus to establish that their claim was one with a real chance of success, has not addressed the

> material facts, or at least the element of the material facts that are required to be established to establish her claim in such a way that she has a real chance of success.
>
> So, I grant the order. ...

[34] The Chambers judge correctly cited the test. Therefore, the question becomes whether he properly applied it.

[35] The trial judge did a thorough review of the 45-page statement of claim filed by Dr. Frothingham against Mr. Perez and the law firm. He notes that the document itself is almost "incoherent" but in giving Dr. Frothingham the benefit of the doubt concludes that the claim against the respondents was for professional negligence arising out of the retainer by Dr. Frothingham of Wickwire Holm to act for her in the sale of the Liscomb property. The Chambers judge then sets out, in considerable detail, the necessary elements of an action in negligence against Mr. Perez and Wickwire Holm and, in summary, says:

1. It was acknowledged by Mr. Perez and Wickwire Holm that they owed a duty of care to Dr. Frothingham so it was not necessary for the parties to address this issue on the summary judgment motion.

2. The duty of care does not guarantee a result between the law firm and Dr. Frothingham. The standard of care is to act reasonably in the performance of the services. It was necessary for Dr. Frothingham, once Mr. Perez and Wickwire Holm established there was no material issue of fact for trial, to raise a genuine issue for trial that the standard of care was breached.

3. Even if it was shown that there was a genuine issue for trial that Mr. Perez and Wickwire Holm breached the standard of care, it was incumbent upon her to show some evidence, again to raise a genuine issue for trial, that the breach of the standard of care caused the failure of the property transaction.

4. Finally, there would have to be some evidence of the failure of the property transaction causing a loss to Dr. Frothingham.

[36] With this backdrop, the Chambers judge set out to analyze the evidence before him.

[37] The Chambers judge found that the uncontested factual evidence before him showed that Dr. Frothingham first signed an agreement of purchase and sale on October 15, 2007 and that she terminated Mr. Perez's retainer on November 13, 2007 when the purchaser was still prepared to close the transaction. The Chambers judge also found that undisputed evidence was that Dr. Frothingham "made the determination, separate and apart from Mr. Perez's involvement, not to close the transaction ...".

[38] On these facts, the trial judge found Mr. Perez and Wickwire Holm had met the threshold test for the application of the rule by putting forward an evidentiary basis for their position that there was no genuine issue of material fact requiring trial.

[39] He then turned his mind to whether Dr. Frothingham had an evidentiary foundation for her case so the court could determine there was a genuine issue of fact or mixed fact and law for trial. Roscoe, J.A. of this Court addressed this part of the summary judgment analysis in **MacNeil v. Bethune**, 2006 NSCA 21:

> [33] Of course, at the second step of the test, there is an evidential burden on the responding party to put its best foot forward or risk losing. I agree with the statement in **Marco, supra**:
>
> > 76. . . 7. If the applying party satisfies the threshold test for the application of the rule by putting forward an evidentiary basis for his or her position, the responding party then has an evidentiary burden to demonstrate that there is a genuine issue for trial. This cannot be accomplished by showing an issue raised by the pleadings. The argument on a Rule 17A application takes place at a level below the pleadings within the forums of evidence and legal argument. The responding party must therefore "put his best foot forward" since failure to do so may lead the court to conclude that there is in fact no genuine issue for trial. The responding party should therefore set out in affidavits, or answers given on interrogatories or oral discoveries, an evidentiary foundation for his or her case so

> that the court can see that there is a genuine issue of fact or law that is joined and has to be resolved before the court can make an ultimate determination on the merits.
>
> (Emphasis added)

[40] Although Justice Roscoe refers to "genuine issue of fact or law", the words must be read in context, because simply raising an issue of law will not be sufficient to innoculate a case from summary judgment. In **Gilbert v. Giffin**, 2010 NSCA 95, we held:

> [22] Neither complexity, novelty, controversy nor contentiousness will exclude a case from a summary judgment motion where there are no material facts in dispute.

(See also **Bank of Nova Scotia v. A. MacKenzie's Automart Inc.**, 2010 NSCA 81 at ¶ 21)

[41] To successfully resist the motion for summary judgment it was incumbent upon the appellant to show that there was a genuine issue of fact or mixed law and fact for trial. In other words, Dr. Frothingham had the burden of showing that her claim had a real chance of success (**Guarantee Co. of North America, supra**).

[42] The Chambers judge, again, reviewed in detail the evidence before him with respect to any genuine issue involving the breach of the standard of care by Mr. Perez or Wickwire Holm and concluded that Dr. Frothingham had not met that burden.

[43] In making that determination he did not commit any error. The evidence does not raise a genuine issue with respect to a breach of the standard of care on behalf of Mr. Perez. To the contrary, the evidence on the motion discloses a solicitor who was diligent and responsive to his client in every step of the transaction.

[44] Dr. Frothingham did not identify the acts which she alleged gave rise to the breach of the standard of care nor did she identify any breach which caused the transaction to fail to close. I am aware of Dr. Frothingham's assertion that Mr. Perez "required" her to drive from the United States for the purposes of closing this transaction when she says that was not necessary. She also asserts that he lied

in his cross-examination and that his credibility was in question. However, these bald assertions do not give rise to credibility issues, an issue of fact or an issue of mixed fact and law. There is absolutely no evidence to suggest any of the alleged improper activity on the part of Mr. Perez, identified by Ms. Frothingham, raised a genuine issue for trial on a breach of the standard of care or the failure of the transaction.

[45] Dr. Frothingham says the Chambers judge erred in making findings of credibility, which is not the function of a Chambers judge on summary judgment. I disagree. The Chambers judge did not make findings of credibility, as alleged by Dr. Frothingham. It was simply not necessary for him to do so to decide the motion. The credibility issues identified had nothing to do with the legal issues to be determined at trial.

[46] Although Dr. Frothingham's responding burden on the application was not a heavy one, it is one which she had not met on the evidence before the Chambers judge.

[47] After a careful review of the record and being satisfied that the Chambers judge committed no error in dismissing the appellant's action on a motion for summary judgment, I would dismiss the appeal.

2. Did the trial judge err in awarding costs to the respondents?

[48] The respondents were the successful litigants on the motion. Generally, costs will be awarded to the successful party. Why this is so was addressed by Saunders, J. (as he then was) in **Landymore v. Hardy** (1992), 112 N.S.R. (2d) 410:

> **[17]** Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. ...

[49] As set out under the standard of review, we will not interfere with the Chambers judge's discretion in awarding costs unless he erred in principle or a

manifest injustice would result. In this case the Chambers judge granted costs to the successful party and, in doing so, he properly exercised his discretion. I would dismiss this ground of appeal.

Costs of this Appeal

[50] Dr. Frothingham has been unsuccessful in this appeal. As a result, the respondents shall be entitled to costs of this appeal in the amount of $1,000.00 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.

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Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Saunders and Fichaud, JJ.A. concurring.
Counsel:	appellant, in person Ann E. Smith and Tiffany Robertson, Articled Clerk, for the respondents

Erratum:

[51] Paragraph [44], first sentence, add the words “fail to” before the word “close” in the third line.