C.A. No. 134629

NOVA SCOTIA COURT OF APPEAL

Cite as: Levy v. Messom, 1997 NSCA 77

Hallett, Roscoe and Pugsley, JJ.A.

BETWEEN:

LAMONT LEVY and CHARLTON LEVY Harry W. How, C.C. Appellants - and - BOBBI RAE MESSOM and JUDGMENT RECOVERY (N.S.) LIMITED Respondents	for the Appellants John Kulik for the Respondent Judgment Recovery Ltd. Paul L. Walter for the Respondent Bobbi Rae Messom Appeal Heard: April 4, 1997 Judgment Delivered: April 17, 1997

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.: Roscoe and Pugsley, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a Consent Order for Judgment for $40,000 entered against the appellants.

The Facts

On December 9th, 1994, Lamont Levy, while driving his father's car, rear-ended a vehicle operated by Ms. Messom; she allegedly suffered soft tissue injuries in the neck area for which she was treated without much success over an extended period of time.

On March 7th, 1996, Ms. Messom commenced an action for damages against the appellants, who after being served with the originating notice, sought the advice of a solicitor, Mr. Derrick Kimball.

The appellants were uninsured; Mr. Kimball advised them that under the circumstances it might be better to have Judgment Recovery defend the action.

On March 26th, 1996, Mr. Kimball wrote Judgment Recovery forwarding the originating notice and statement of claim. He sent a copy of the letter to the appellant Charlton Levy.

On April 4th, 1996, Judgment Recovery acknowledged to Mr .Kimball, receipt of his letter, and advised Mr. Kimball: "We have opened a file and will hold it in abeyance until we receive notice of default from solicitor Paul Walter." This letter was signed by the manager of Judgment Recovery Gail LeBlanc. Paul Walter was Ms. Messom's solicitor.

Section 218 of the **Motor Vehicle Act**, 1989 R.S.N.S. c. 293 is relevant to the issues raised on this appeal. Therefore, I will set it out here so as to

explain what Ms LeBlanc was referring to in her letter of April 4th, 1996. Section 218 provides:

> "218 (1) Where in an action in any court in the Province for damages resulting from bodily injury to or the death of any person or damage to property, the defendant does not file a defence, Judgment Recovery (N.S.) Ltd. shall not be liable to pay any judgment entered by default unless notice of intention to enter judgment has been given to Judgment Recovery (N.S.) Ltd. and thirty days have elapsed after giving that notice.
>
> (2) When Judgment Recovery (N.S.) Ltd. receives notice under subsection (1), it may file a defence on behalf of and in the name of the defendant and may take any steps that the defendant might take in an action.
>
> (3) Where in an action in any court in the Province for damages resulting from bodily injury to or the death of any person or damage to property, the defendant files a defence but
>
> (a) the defendant does not appear in person or by counsel at the trial or on the assessment of damages;
>
> (b) the defendant is prepared to consent or to agree to the entry of judgment against him,
>
> Judgment Recovery (N.S.) Ltd. shall not be liable to pay any judgment entered by default or upon consent or agreement or damages assessed unless notice of intention to enter judgment or to assess damages, as the case may be, has been given to Judgment Recovery (N.S.) Ltd. and Judgment Recovery (N.S.) Ltd. has not within thirty days after giving of that notice applied to the court for leave to intervene in the action.
>
> (4) When Judgment Recovery (N.S.) Ltd. receives notice under subsection (3) it may, with leave of the court or a judge, intervene in the action and take on behalf of and in the name of the defendant any steps that a defendant might take in an action.
>
> (5) Where Judgment Recovery (N.S.) Ltd. files a defence pursuant to subsection (2), or intervenes in an action pursuant to subsection (4), it may, on behalf of and in the name of the defendant, whether or not the defendant is an infant, conduct the defence, consent to judgment in such

> amount as it considers proper, or do any other act that a defendant might do and all acts of Judgment Recovery (N.S.) Ltd. shall be deemed to be the acts of the defendant, provided, however, that where the defendant is an infant no judgment by consent shall be entered without the approval of the court or a judge thereof.
>
> (6) This Section shall apply to actions commenced on and after the first day of July, 1961, and Section 217 shall apply to actions commenced prior to the first day of July, 1961." (emphasis added)

Unless a plaintiff's counsel in a proceeding gives the notice required under s. 218(1), Judgment Recovery is not liable to pay a judgment entered by default.

On April 11th, 1996, Gail LeBlanc made the following relevant note to her file:

> "NOTE TO FILE
>
> April 11, 1996
>
> Messom v. Levy & Levy
>
> .....
>
> Received telephone call from Charlton Levy - owner of defendant vehicle inquiring whether or not we received letter from Derrick Kimball.
>
> He was undecided as to whether or not he wanted J.R. to handle - wanted to know how far we would go with our investigation and how much we would check to prove she was not injured. States the car was hardly damaged. I tried to explain the amount of damage usually did not have any bearing on the quantum awarded for a neck injury. He feels she is going to be looked for large dollars and he wanted to know whether or not he could do anything if he didn't agree to the amount. Told him once he leaves in the hands of J.R. we do everything we can to make sure the claim is just and fair and if necessary we do go to Trial but I tried to make it quite clear to him that we are not obliged to have him agree to any action we take whether it be in paying the claim or going to Trial.

> Wanted to know if we would do an investigation - told him we usually do and if statements were necessary they would be taken from his son since he was the driver.
>
> He left his home telephone number and hopes someone will contact him and/or his son 902-542-5573. Told him we were presently waiting Notice of Default before we would have a legal status in the matter.
>
> G. LeBlanc"

On June 6th, 1996, counsel for Ms. Messom advised Judgment Recovery that he intended to enter judgment in default of defence.

On June 17th, 1996, Judgment Recovery appointed an adjuster to investigate the circumstances surrounding the accident and the extent of Ms. Messom's injuries allegedly caused by the accident.

On the same date Judgment Recovery wrote Ms. Messom's counsel asking if he would be willing to negotiate a settlement once the investigation was completed.

On June 26th, 1996, Mr. Walter advised Ms. LeBlanc that he was agreeable to waiving the time for filing a defence so as to provide an opportunity to negotiate a settlement of Ms. Messom's claim.

During July and August, 1996, the adjuster conducted an investigation; this included taking a statement from Lamont Levy. The adjuster provided reports to Judgment Recovery. These included medical reports from doctors treating Ms. Messom; all such reports were reviewed by Judgment Recovery.

On September 27th, 1996, Ms. Messom's counsel advised Judgment Recovery that Ms. Messom was prepared to settle the claim for $84,861.

On October 23rd, 1996, Judgment Recovery and Mr. Walter reached a settlement at $40,000. On the same date, Judgment Recovery instructed Mr.

Chris Robinson of the law firm of McInnes, Cooper & Robertson to enter a defence and consent to judgment for an all inclusive amount of $40,000.

On November 4th, 1996 a defence was prepared but apparently due to an oversight was not filed on that date.

On November 6th, 1996, Justice Stewart signed a consent order for judgment against the appellants in the amount of $40,000.

On November 28th the defence was filed and the November 6th Order of Justice Stewart set aside due to the fact that the defence had not been filed, pursuant to s. 218(5) of the **Motor Vehicle Act**, prior to the signing of the consent order of November 6th, 1996.

On December 3rd, 1996, Justice Hall signed a consent order for judgment against the appellants in the amount of $40,000.

On December 16th, 1996, the solicitor for Judgment Recovery advised the appellants that Ms. Messom's action had been settled and that judgment had been entered against them for $40,000. He further advised the appellants that Judgment Recovery was looking to them to recover the $40,000.

Other than the discussion between Gail LeBlanc and Charlton Levy on April 11th, 1996, and the interview of Lamont Levy by the adjuster, the appellants were not involved in or advised of any course of action engaged in by Judgment Recovery prior to Judgment Recovery, on behalf of the appellants, settling Ms. Messom's claim for the amount of $40,000.

Grounds of Appeal and Relief Sought

The appeal from Justice Stewart's order of November 6th, 1996, and Justice Hall's order of December 3rd, 1996, as set out in the notice of appeal is based on the failure of Judgment Recovery or its solicitor to keep the appellants

advised of the settlement negotiations and for making what the appellants considered to be an imprudent settlement.

The appellants assert that the orders should be set aside because: (i) only the Court of Appeal can set aside an order of a trial judge (C.P.R. 62.23(1)(a)); (ii) that as the appellants/defendants did not consent to judgment nor appear in person in the proceedings, Judgment Recovery could not pay any judgment entered against the appellants (s. 218(3) of the **Motor Vehicle Act**); (iii) that the appellants were entitled to be properly consulted and notified by the solicitor for Judgment Recovery respecting the negotiation and settlement of the claim and were not so advised **(Civil Procedure Rule** 12.07, 12.08 and the **Handbook of Legal Ethics and Professional Conduct of the Nova Scotia Barristers' Society**); and (iv) that fundamental justice demands that the orders should not be allowed to stand (**Charter of Rights and Freedoms**, ss. 7 and 15).

In addition, the appellants applied for leave to file an April 3rd, 1997 affidavit of Charlton Levy in reply to the January 27th, 1997 affidavit of Gail LeBlanc which had been filed with this Court by Judgment Recovery on the appellants' application for an extension of time for filing a notice of appeal. Justice Freeman of this Court, sitting in Chambers, granted an order extending the time for filing the notice of appeal. Paragraph 3 of Justice Freeman's order of January 29th, 1997, provides:

> "That by agreement of counsel the appeal book shall consist not only of the Order appealed from and the pleadings and documentation preceding it but the affidavits filed in support of this Chambers application, including the affidavits of the appellant, Charlton Levy, and the said Harry W. How, sworn the 10th day of January, 1997, and the affidavit of Ms. Gail LeBlanc sworn the 22nd day of January, 1997."

The day before oral argument on this appeal counsel for the appellant

filed an affidavit of Charlton Levy in which Mr. Levy states:

> "1. In the Affidavit of Gail LeBlanc shown in Exhibit 3(c) in Appeal Book Part II although she refers to my telephone call early in April 1996 but does not mention that after she indicated Judgment Recovery (N.S.) Ltd. makes the decision I told her that if Judgment Recovery (N.S.) Ltd. wasn't going to thoroughly investigate the accident and the complaints of the Respondent Messom and keep me informed and fight for our interest, I wanted our own solicitor. I had told this to Kimball as well. After saying this I fully expected to be kept informed of any decisions by Judgment Recovery (N.S.) Ltd. affecting me and my son Lamont. I never heard anything further from Judgment Recovery (N.S.) Ltd. or anyone representing them until on December 18th, 1996 I received the letter from Mr. Robinson dated December 17th, 1996 shown in Exhibit 3(U) of the Appeal Book Part II."

The affidavit also makes reference to the fact that Ms. Messom had been in an accident which did $3,500 damage to her vehicle three weeks before the accident involving the appellants and that she had abdominal surgery shortly before the accident.

In oral argument on the hearing of the appeal, counsel for the appellants advised us that, as the LeBlanc affidavit of January 27th, 1997, had just been delivered the day before the application for the extension of time, Justice Freeman advised the appellants that they could file an affidavit in reply.

Counsel for the respondents did not oppose the filing of the affidavit. We have decided to admit the Charlton Levy affidavit of April 3rd, 1997.

The Appellants' Position

In short, the appellants assert that they were not properly represented by Judgment Recovery and/or McInnes, Cooper & Robertson in that they were not kept informed about negotiations or informed that Judgment Recovery

proposed to settle for $40,000 which, in their opinion, is excessive as they are of the view that Ms. Messom was not seriously injured. Counsel also argues that the appellants did not consent to the settlement or the order for judgment. Counsel for the appellant also argues that as a defence was not filed, Judgment Recovery was without authority to consent to the order signed by Justice Stewart. He further argues that Justice Hall, as a judge of the same court as Justice Stewart, did not have jurisdiction to set aside Justice Stewart's order.

The appellants seek an order setting aside the judgments and granting leave to file what the appellants say is a proper defence to Ms. Messom's action.

Judgment Recovery's Position

Judgment Recovery asserts: (i) that an appeal from a consent order is not the appropriate procedure for obtaining the relief sought by the appellants; (ii) that Judgment Recovery was authorized by s. 218(5) of the **Motor Vehicle Act** to consent to judgment on behalf of the appellants; and (iii) that the **Civil Procedure Rules** upon which the appellants rely and ss. 7 and 15 of the **Charter** have no application to the facts giving rise to this appeal.

Ms. Messom's Position

It was argued on behalf of Ms. Messom that the consent judgment and the payment to her of the $40,000 should stand irrespective of what disputes the appellants have with Judgment Recovery.

Disposition of the Appeal

I agree with counsel for Judgment Recovery that **Civil Procedure Rules** 12.07 and 12.08 have no application to the issues raised on this appeal as can be readily seen from a reading of the two **Rules**. **Rules** 12.07 and 12.08

state:

> "12.07. (1) In lieu of filing a defence or appearing on a hearing under an originating notice, a defendant may file and deliver a demand of notice.
>
> (2) Upon receipt of a demand of notice, the plaintiff may proceed as if the defendant had failed to file a defence or appear on the hearing except that,
>
> (a) the defendant, unless it is otherwise ordered, shall be entitled to receive notice of all subsequent steps taken in the proceeding against him; and
> (b) final judgment may only be obtained on notice to him.
>
> 12.08 Unless the court otherwise orders or a rule otherwise provides, a defendant who fails to defend, appear on the hearing under an originating notice, or deliver a demand of notice, shall not be entitled to receive notice of any subsequent steps taken in the proceeding against him, other than the assessment of damages when ten days notice thereof by ordinary mail shall be given to the defendant."
>
> **Rule** 62.23(1)(a) states:
>
> "62.23 (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court by the Judicature Act or any other enactment the Court may:
>
> (a) amend, set aside or discharge any judgment appealed from except one made in the exercise of such discretion as belongs to a judge;"

This **Rule** simply spells out that the Court of Appeal has power to set aside a judgment.

Counsel for the appellants argues that only the Court of Appeal can set aside a final order disposing of a proceeding. Therefore, he argues Justice Hall could not set aside Justice Stewart's order. I disagree.

The order of Justice Stewart merely reflected the settlement reached

by the parties. **Civil Procedure Rule** 15.07 provides:

> "15.07. Clerical mistakes in judgments or orders, or errors arising therein from any accidental mistake or omission, or an amendment to provide for any matter which should have but was not adjudicated upon, may at any time be corrected or granted by the court without appeal." (emphasis added)

It is abundantly clear that Judgment Recovery intended to file the defence as it was required to do by s. 218(5) of the **Motor Vehicle Act** before consenting to judgment. Prior to consenting to judgment, the defence was drafted by Mr. Robinson of McInnes, Cooper & Robertson and a copy sent to Mr. Walter on November 1st, 1996. The letter from Mr. Robinson to Mr. Walter stated:

> "Please be advised that we are the solicitors for Judgment Recovery (N.S.) Ltd. and as such your letter of September 27, 1996 and the Originating Notice (Action) and Statement of Claim issued by you has been referred to our attention.
>
> I am enclosing a copy of a Defence which is being filed on behalf of the Defendant. Kindly acknowledge receipt.
>
> I understand this action has now been settled for $40,000.00 all inclusive.
>
> In that regard enclosed herewith is an Order for Judgment duly consented to and Certificate of Judgment. Please take out the Order before a Judge (not the Prothonotary), having certified the Certificate of Judgment and return to us. We will then forward the remaining documents for execution by your Plaintiff.
>
> Payment will be made by issuing a cheque payable to the Plaintiff unless we receive a Direction to Pay in favour of your firm."

On November 6th, 1996, the consent order for judgment was signed by Justice Stewart.

On November 19th, 1996, Mr. Walter received a fax from McInnes,

Cooper & Robertson advising that the order was filed before the defence had been filed. Counsel for Judgment Recovery asked Mr. Walter to take steps to vacate the order which he did. He applied to Justice Hall explaining what happened. Justice Hall set aside the order of Justice Stewart and signed an order consented to by the solicitors for both Judgment Recovery and Ms. Messom ordering judgment against the appellants for $40,000.

The procedure followed by Judgment Recovery was within the scope of its authority conferred on it by s. 218(5) of the **Motor Vehicle Act**. The issuance of the order by Justice Stewart prior to the defence being filed resulted from an "accidental omission" to file the defence and falls within the purview of **Rule** 15.07. Therefore, with the consent of the parties, Justice Hall had the authority to set aside Justice Stewart's order and sign the consent order of December 3rd, 1996.

I agree with counsel for Judgment Recovery that the allegations made by the appellants with respect to Judgment Recovery's actions in consenting to judgment without consultation with them raise wide-ranging matters of evidence that can only be dealt with by way of an action and decided following a trial. It is not a matter that can be resolved by this Court on an appeal from a consent order.

In **Bank of Nova Scotia v. Golden Forest Holdings Ltd.** (1990), 98 N.S.R. (2d) 429 this Court had occasion to consider the power of a superior court to vary a consent order that gives effect to a settlement. We concluded that such an order could not be varied unless the settlement agreement itself could be varied. By implication we approved the following statement from **Chitel v. Rothbart et al.** (1987), 19 C.P.C. (2d) 48 (Ont. S.C.):

> "'A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. None of these grounds are present in the within case.'
>
> Although the limits of a superior court's power in the exercise of its inherent jurisdiction are not fully defined, there are nevertheless limits that have been established in certain areas and the power of a court to vary a consent order is one of them."

There are clear limitations on the inherent jurisdiction of the Supreme Court of Nova Scotia to set aside a consent order. But, more importantly, the Appeal Court is not the forum in which to set aside a consent order. As stated by the New Brunswick Court of Appeal in **Morency v. Charest** (1991), 84 D.L.R. (4th) 567, a consent order must be set aside, if it is to be set aside, in a new proceeding instituted for that purpose. Such a proceeding would be in the Supreme Court of Nova Scotia.

With respect to the **Charter** issues, Judgment Recovery is a company owned and funded by insurance companies. Therefore, by reason of the provisions of s. 32 of the **Canadian Charter of Rights and Freedoms**, it has no application to the facts giving rise to the appellants' claim.

I would dismiss the appeal with costs to Judgment Recovery and Ms. Messom in the amount of $500 each plus disbursements. Ms. Messom is entitled to her costs as she needed to be represented on the appeal as the appellants' sought to set aside the consent judgment which she obtained in good faith. Whatever the merits of the appellants' claim against Judgment Recovery, they have no claim against Ms. Messom.

If the appeal is dismissed, the appellants have asked this Court to stay

Judgment Recovery's right to execute on the judgment which had been assigned to Judgment Recovery by Ms. Messom upon payment of the $40,000. Counsel for the appellants has advised us that if the appeal is dismissed he intends to commence an action in the Supreme Court against Judgement Recovery and/or McInnes, Cooper & Robertson.

Although this Court has jurisdiction to issue a stay of execution pending the hearing of an appeal, it does not have jurisdiction to otherwise stay execution of a judgment. That jurisdiction is in the Supreme Court of Nova Scotia. Accordingly, this aspect of the relief sought by the appellants ought to be refused.

Hallett, J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.

C.A. No. 134629

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

LAMONT LEVY and CHARLTON LEVY

Appellants

- and -

BOBBI RAE MESSOM and RECOVERY (N.S.) LIMITED

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.