

Date: 20000619
Docket: C.A. 160173

NOVA SCOTIA COURT OF APPEAL

[Cite as: Drysdale v. Sherwin-Williams Canada Inc., 2000 NSCA 80]

Glube, C.J.N.S.; Hallett and Bateman, JJ.A.

BETWEEN:

SHERWIN-WILLIAMS CANADA INC.

Appellant

- and -

GLORIA DRYSDALE

Respondent

REASONS FOR JUDGMENT

Counsel: William L. Ryan, Q.C. for the appellant
Bernadette Maxwell for the respondent

Appeal Heard: June 15, 2000

Judgment Delivered: June 19, 2000

THE COURT: Appeal allowed. Costs of \$1,000 plus disbursements to the appellant on the appeal of the counterclaim and costs and disbursements on the counterclaim at trial to be taxed, per reasons for judgment of Glube, C.J.N.S.; Hallett and Bateman, JJ.A. concurring.

GLUBE, C.J.N.S.:

[1] This is an appeal from the dismissal of the counterclaim.

[2] In January 1996, Gloria Drysdale, the plaintiff/respondent, arranged to sell Pratt & Lambert paint in Chester, Nova Scotia. In the spring of that year, Sherwin-Williams Canada Inc., the defendant/appellant, purchased Pratt & Lambert. Ms. Drysdale later closed her shop in Chester and sued Sherwin-Williams alleging negligent misrepresentation and breach of contract. There was no written contract.

[3] Sherwin-Williams denied the claim and counterclaimed for an amount owed for paint and materials supplied to Ms. Drysdale. In the defence to the counterclaim, Ms. Drysdale admitted owing \$6,544.76 as of May 6, 1998 plus accrued interest, but claimed that amount should be set-off against her claim. The defence to the counterclaim was amended with leave of the trial judge (over the objection of the defendant) on the opening day of the trial. The amended defence denied owing any amount but if any amounts were deemed owing, they should be set-off.

[4] The trial judge dismissed the plaintiff's action. That dismissal is not under appeal.

In dismissing the counterclaim, he said:

The Defendant counterclaims for \$6,544.76 for the unpaid balance of goods sold and delivered. The items making up the counterclaim are set out in a statement bearing the heading "C.B.D. Group Inc., Toronto". This may be a subsidiary of the Defendant, Sherwin-Williams. But, C.B.D. Group Inc. is not a party to this action and, therefore, it is not possible to make an award either in its favour or against it. The Defendant in this action is Sherwin-Williams Canada Inc.; the C.B.D. Group statement indicates that there is no evidentiary basis for the Defendant's counterclaim against the Plaintiff."

(Underlining added.)

[5] After receiving the decision, counsel for the appellant asked the trial judge to review the evidence concerning the counterclaim. The judge sent a letter to counsel confirming the dismissal of the counterclaim. He referred to the respondent's testimony at trial where she denied owing money to CBD Group or Sherwin-Williams and added that even if she had testified otherwise, her evidence was of "questionable weight" and that she seemed distracted and spoke without thinking. He also referred to the amended defence denying she owed any money. Although he referred to the testimony of Eugene Searle, the account executive of the appellant, which stated the amount was still in arrears, he went on to question again to whom the money was owed, stating, "CBD Group is a separate legal entity..." and said the evidence was "imprecise and unsatisfactory."

[6] The appellant states the issue on appeal as follows"

"... whether the Learned Trial Judge erred in dismissing the Appellant's Counterclaim against the Respondent on the basis that no evidentiary basis for the Counterclaim had been established at trial."

[7] We find the evidence is clear that Ms. Drysdale owed a debt in the amount stated. In the testimony of both Ms. Drysdale and Mr. Searle, each acknowledged a debt in the amount of \$6,544.76, plus accrued interest. Ms. Drysdale initially began making nine equal payments and then put a stop payment on the later cheques testifying that she did not "feel" or "believe" she owed anything because she had to close her business.

[8] Ms. Drysdale was making her payments to CBD Group. Paragraph 2 of the statement of claim states:

2. The defendant, Sherwin-Williams Canada Inc. is an extra-provincial company duly incorporated under the laws of Canada, carrying on business in Nova Scotia under the name CBD Group...

(Underlining added.)

In its defence the appellant admits paragraph 2 of the statement of claim.

[9] There was evidence that Ms. Drysdale received statements of her account from CBD Group and that she arranged to make the Sherwin-Williams payments on account through CBD Group.

[10] We find that the trial judge ignored conclusive and relevant evidence, misunderstood the evidence and drew erroneous conclusions and thus committed a palpable or overriding error. (**Toneguzzo-Norvell (Guardian *ad litem* of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114; (1994) 110 D.L.R. (4th) 289 at 292.)

[11] The appeal of the counterclaim is allowed. Ms. Drysdale owes Sherwin-Williams \$6,544.76, plus accrued interest at the rate of 1% per month from December 1, 1997. Costs are in the amount of \$1,000.00 plus disbursements, plus costs and disbursements to the appellant on the counterclaim at trial to be taxed.

Glube, C.J.N.S.

Concurred In:

Hallett, J.A.

Bateman, J.A.