

Date: 20020920
Docket: CA 179487

NOVA SCOTIA COURT OF APPEAL

Citation: Ruiz v. Colby Physioclinic Ltd., 2002 NSCA 113]

Roscoe, Freeman and Cromwell, JJ.A.

BETWEEN:

PHILIP RUIZ

Appellant

- and -

COLBY PHYSIOCLINIC LIMITED,
MIKE SUTTON and ANNE NELSON

Respondents

REASONS FOR JUDGMENT

Counsel: W. Augustus Richardson and Jason P. Gavras
for the Appellant
G. Grant Machum and Lisa M. Gallivan
for the Respondent

Appeal Heard: September 20, 2002

Judgment Delivered: September 20, 2002

THE COURT: Leave to appeal is granted and the appeal is allowed with costs as per oral reasons for judgment of Roscoe, J.A.; Freeman and Cromwell, JJ.A., concurring.

ROSCOE, J.A.: (Orally)

[1] This is an application for leave to appeal and an appeal of a decision of Justice Glen McDougall who denied the appellant's application to change the venue from Halifax to Pictou. The appellant, Mr. Ruiz, is the defendant in an action commenced by his former employer for breach of fiduciary and contractual duties. Mr. Ruiz defended the claim, filed a counterclaim for defamation and interference with economic relations, and added two individuals as defendants in the counterclaim.

[2] The background facts are succinctly set out by the Chambers judge:

[1] Philip Ruiz ("Ruiz") was employed as a physiotherapist by Colby Physioclinic Limited ("Physioclinic"). He ran their Pictou clinic.

[2] By letter dated April 26, 2001, Ruiz gave notice to his employer of his resignation effective May 24, 2001. Physioclinic, for reasons that need not be mentioned here, terminated its contractual relationship with Ruiz on May 14, 2001.

[3] In addition, Physioclinic filed suit against Ruiz on May 15, 2001. This originating notice (action) and statement of claim was filed at Halifax, where Physioclinic had its head office.

[4] Ruiz filed a defence and counterclaim on June 8, 2001 and later an amended defence and counterclaim on June 18, 2001. The counterclaim added the names of two of the principals of Physioclinic personally as defendants. The additional defendants named in the counterclaim reside and/or work in Halifax.

[5] Ruiz now seeks an order for a change of venue under *Civil Procedure Rule* 28.02. He offers a number of factors that he contends would warrant a move from Halifax to Pictou, including:

1. The cause of the action arose in Pictou (paras 10-15, Ex. "A", Statement of Claim, *Ruiz Affidavit*);
2. The defendant resides in Pictou with his wife and two young daughters and is the sole provider for his young family (para 6, *Ruiz Affidavit*);
3. Both of the clinics involved in this action are located on main street in Pictou and are convenient for viewing (para 5, *Ruiz*

- Affidavit*);
4. The defendant intends to call most, if not all, of the approximately 25 patients that transferred from the Pictou Physioclinic to Back to Basics to give evidence in response to the plaintiff's allegation that they were solicited by the defendant. These patients live in Pictou County (para 11, *Ruiz Affidavit*; paras 10, 15(a) Statement of Claim, Ex. "A", *Ruiz Affidavit*);
 5. Some of the transfer patients suffer from multiple sclerosis and it would be difficult for them to travel to Halifax (para 7, *Ruiz Affidavit*);
 6. The defendant currently intends to call many, if not all, of the 7 - 10 doctors to whom the defendants by counterclaim sent letters to provide evidence in support of the defendants counterclaim for defamation (para 10, *Ruiz Affidavit*);
 7. The trial may be 2 - 3 weeks long and the defendant will have to close his clinic down if the trial is in Halifax which will leave his secretary and kinesiologist unemployed for that period of time (paras 13 - 14, *Ruiz Affidavit*);
 8. The plaintiff would not have to close any clinics down since the representatives of the plaintiff act in an administrative capacity and do not run clinics (paras 18 - 19, *Ruiz Affidavit*);
 9. The defendant also intends to call his bank manager and kinesiologist (both of whom were discovered by the plaintiff in New Glasgow) to provide evidence and they reside in Pictou County (para 7, *Ruiz Affidavit*);
 10. The current physiotherapist at the Pictou Physioclinic resides in New Glasgow and the defendant intends to call him as a witness (this would also work to the plaintiff's benefit) (para 12, *Ruiz Affidavit*);
 11. The expense of bringing all of these many witnesses and the doctors into Halifax to give evidence would be immense for the defendant and highly disruptive to the doctors, and their patients given the scheduling uncertainties at trial (paras 16 - 17, *Ruiz Affidavit*).

[6] Physioclinic opposes the change based on the following factors:

1. The plaintiff company's head office is in Halifax;
2. The president and sole owner of the plaintiff company, Michael Sutton, resides in Halifax;
3. The two individuals named as parties by Ruiz reside and work in Halifax;
4. All counsel involved in the matter reside in Halifax;
5. All applications to date have been heard in Halifax;
6. The defendant's employment contracts were completed in Halifax;
7. All of the management personnel employed by the plaintiff reside in Halifax;
8. All of the plaintiff's key witnesses reside in Halifax;
9. The action was commenced in Halifax;
10. All discovery examinations with the exception of brief examinations were held in Halifax.

[3] In his decision, the Chambers judge noted that the general rule is that the plaintiff determines the venue of a matter and in this case, the plaintiff had a logical basis for choosing Halifax. Relying on **Shortliffe's Grocery Ltd. v. Irving Oil Co.** (1973), 9 N.S.R. (2d) 629, he concluded that as the plaintiff had not acted capriciously in choosing the venue and the defendant had not satisfied him that the “great preponderance of convenience” warranted a change in venue, the application should be dismissed.

[4] On appeal, counsel for Mr. Ruiz advances two arguments apparently not made to the Chambers judge:

1. that since Mr. Ruiz is not only a defendant in the action but also a plaintiff by counterclaim, the high threshold of a “great preponderance of convenience” should not have been applied, but rather a test of simple balance of convenience, (see **Holmes v. Knight et al.**, [1942] O.W.N. 523 and **Allan v. Dynes**, [1952] O.W.N. 397); and,

2. that since Mr. Ruiz' action against the respondents is for defamation, it will be tried by a jury and he should therefore be entitled to have the issue of damage to his reputation tried by a jury in the community where his reputation has been established, (see **Newton v. Merritt et al.** (1991), 114 N.B.R. (2d) 249).

[5] After consideration of the submissions of counsel, we agree with the appellant that the Chambers judge erred in principle in not taking these two factors into account in the determination of whether it was just to grant the change of venue application. While the judge correctly noted that the general principle is that set out in **Shortliffe's Grocery Ltd. v Irving Oil, supra**, we think he erred by failing to give any weight to two relevant considerations in the circumstances of this case. Where the defendant commences an action by counterclaim, his choice of venue, if different from the plaintiff's, should also be accorded some weight in balancing the convenience of the matter. Furthermore, an action for defamation ordinarily should be tried by a jury in the community where the person claiming to be defamed resides and works. This error in principle requires the judge's order to be set aside and entitles us to make the order he should have made. When these two factors are added to the lists weighed by the Chambers judge, it is our view that the balance favours Mr. Ruiz and that the application for the change of venue ought to have been granted.

[6] Leave to appeal is granted and the appeal is accordingly allowed. The order dismissing the application is set aside and in its place an order shall issue changing the place of trial to Pictou. In view of the fact that the factors resulting in the appeal being allowed were apparently not fully argued before the Chambers judge, costs below and in this court, fixed in total at \$1,500.00, plus disbursements, will be costs in the cause of the counterclaim.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.