NOVA SCOTIA COURT OF APPEAL
Citation: ***Ristow v. National Bank Financial Ltd.***, 2010 NSCA 79

Date: 20101014
Docket: CA 323308
Registry: Halifax

Between:

Lutz Ristow

Appellant

v.

National Bank Financial Limited, Blois Colpitts, Dan Potter and Stewart McKelvey Stirling Scales

Respondents

Judges:	Saunders, Oland and Hamilton, JJ.A.
Appeal Heard:	October 5, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Oland and Hamilton, JJ.A. concurring.
Counsel:	W. Dale Dunlop, for the appellant David G. Coles, Q.C. and James A. Hodgson, for the respondent National Bank Financial Limited Scott Lucyk, for the respondent Blois Colpitts Albert A. Pelletier, for the respondent Stewart McKelvey Stirling Scales respondent Dan Potter not appearing

Reasons for judgment:

[1] After hearing full submissions from the parties we retired and then returned to court to announce our unanimous decision that the appeal was dismissed with costs to the respondents and reasons to follow. These are our reasons.

[2] In a decision now reported as 2009 NSSC 305, Nova Scotia Supreme Court Justice Suzanne M. Hood dismissed the appellant's motion for summary judgment which effectively sought to have him released in all the actions to which he is a party. In a subsequent decision now reported as 2010 NSSC 220, Hood, J. fixed costs and disbursements in favour of the respondents and ordered that they be payable forthwith.

[3] It would appear that this was the first case in which a motion for summary judgment was taken pursuant to **Civil Procedure Rule** 13.04 of the **Civil Procedure Rules**, (2009). In fact, an earlier motion under the (old) 1972 **Rules** was withdrawn, and the within proceeding commenced shortly after the new **Rules** came into effect on January 1, 2009.

[4] **CPR** 13.04 reads

> **Summary judgment on evidence**
>
> 13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[5] At the Chambers hearing, counsel for the appellant argued that these new provisions had changed the law concerning the requirements for summary judgment in Nova Scotia. Justice Hood rejected the appellant's submission finding, in effect, that while the words contained in **CPR** 13.04 were different and more explicit, nonetheless the test for summary judgment remained the same such that the leading jurisprudence on the subject, of longstanding authority in this Province, still applied.

[6] We agree.

[7] In a comprehensive analysis comprising some 51 pages, Justice Hood has painstakingly explained why this case is so obviously ill-suited for summary judgment. Her reasons are replete with examples of critical factual disputes, key credibility issues, and significant, unsettled questions of law which will require a full trial on the merits to resolve.

[8] We are entirely satisfied that Justice Hood properly addressed all of the appellant's procedural and evidentiary complaints.

[9] We see no error in Justice Hood's conclusion that the appellant had failed to satisfy the first step in the test for summary judgment by demonstrating that there were no legitimate, material issues of fact in dispute. Neither are we persuaded that Hood, J. erred in concluding that even if the appellant had satisfied the first step of the test, the motion for summary judgment was doomed to fail because the respondent National Bank Financial Ltd. had raised arguable issues to be tried. **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] S.C.J. No. 60(Q.L.); and **AMCI Export Corp v. Nova Scotia Power Inc.**, 2010 NSCA 41.

[10] In summary, the appellant has not persuaded us that Justice Hood applied wrong principles of law or that a patent injustice has occurred.

[11] As for costs, while the appellant does not challenge the amount of costs and disbursements awarded, he complains that Hood, J. erred in ordering that costs be

payable forthwith. The alleged "error" is never identified. With respect, there is no merit to the appellant's submission.

[12] The direction attached to the costs order was purely an exercise of discretion on the part of the judge who was intimately familiar with the history of these protracted proceedings. We are satisfied she exercised that discretion judicially. The summary judgment motion involved two days of argument, discovery examination of the appellant, and the review and assembly of hundreds of pages of documents. The motion was originally commenced under **Civil Procedure Rules**, (1972), later abandoned, and commenced anew under the **Civil Procedure Rules**, (2009). Lengthy affidavits were prepared in response to the original application, and were revised for submission on the subsequent motion. As noted earlier, Justice Hood exposed a host of critical issues of fact, credibility and law in dispute such that the appellant had not even met the first prong of the test for summary judgment. There was no evidence to suggest the appellant would be prejudiced by the obligation to pay costs immediately. In fact, the evidence before the Chambers judge was that the appellant has a net worth of approximately $75M Euros. Finally, there is nothing to suggest that Justice Hood's order will somehow delay or threaten the ongoing litigation.

[13] In conclusion, we see no reason to intervene. The appeal is without merit and is dismissed. Recognizing the more extensive role played by the respondent National Bank Financial Ltd. in resisting the motion for summary judgment than that taken by the other respondents Blois Colpitts and Stewart McKelvey Stirling Scales, we would award costs of $2,000 exclusive of disbursements (as agreed or taxed) to the respondent NBFL, and in addition costs of $750 exclusive of disbursements (as agreed or taxed) to each of Blois Colpitts and Stewart McKelvey Stirling Scales. The respondent Daniel Potter did not participate in this appeal.

Saunders, J.A.

Concurred in:
Oland, J.A.
Hamilton, J.A.