NOVA SCOTIA COURT OF APPEAL
Citation: ***Bank of Nova Scotia v. A. MacKenzie's Auto Mart Inc.***,
2010 NSCA 81

Date: 20101021
Docket: CA 324501
Registry: Halifax

Between:

The Bank of Nova Scotia

Appellant

v.

A. MacKenzie's Auto Mart Incorporated, W. Keith MacKenzie, Aaron MacKenzie, Donna Blount, Steve Oldford, and Allan Kennedy

Respondents

Judges:	MacDonald, C.J.N.S.; Beveridge and Farrar, JJ.A.
Appeal Heard:	October 7, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Beveridge, J.A. concurring.
Counsel:	Stephen Kingston and Lauren Cicin, for the appellant Bruce T. MacIntosh, Q.C. and Sarah MacIntosh, for the respondent W. Keith MacKenzie respondents A. MacKenzie's Auto Mart Incorporated, Aaron MacKenzie, Donna Blount, Steve Oldford and Allan Kennedy not participating

Reasons for judgment:

[1] This is an appeal from the order of The Honourable Justice Cindy A. Bourgeois dated November 27, 2009 (decision reported at 2009 NSSC 293) dismissing The Bank of Nova Scotia's motion for summary judgment against W. Keith MacKenzie. Mr. MacKenzie is one of six named defendants in an action brought by the Bank. I will refer to him as the respondent and Mr. MacKenzie interchangeably. The other defendants were not part of the motion.

[2] For the reasons set out below I would dismiss the appeal with costs to the respondent.

Background

[3] The claim against Mr. MacKenzie arises as a result of a default by A. MacKenzie's Auto Mart Incorporated (Auto Mart), a used automobile dealership in Truro, Nova Scotia, on its borrowing obligations to the Bank.

[4] Auto Mart was operated by Aaron MacKenzie, the son of the respondent.

[5] The respondent was asked to, and agreed, to provide a personal guarantee in the amount of $250,000 to secure the debt of the business. The guarantee was executed on April 1st, 2002.

[6] Mr. MacKenzie acknowledges signing this guarantee. A second guarantee was allegedly executed by Mr. MacKenzie on December 17, 2004 in the amount of $300,000. Mr. MacKenzie denies ever executing the second guarantee.

[7] On the summary judgment motion, and in its statement of claim, the Bank sought recovery under the first guarantee.

[8] On its motion, the Bank relied on two affidavits of Lisa Harrison sworn on May 1st, 2009 and June 5th, 2009 . The affidavits set out the amount of the indebtedness, the types of indebtedness, the signed guarantee of Mr. MacKenzie and an excerpt from Mr. MacKenzie's discovery where he acknowledges signing the guarantee .

[9] In defending the motion, Mr. MacKenzie filed his own affidavit sworn to on May 21st, 2009. At the Chambers hearing the respondent also filed the discovery evidence of Kevin Bryden who, at the time the loan went into default in the summer of 2006, was in charge of the Auto Mart account.

[10] On the filing of the affidavit evidence of Mr. Bryden, the Bank filed its complete list of documents as an exhibit with the court, seemingly for the purpose of allowing the Chambers judge to identify the documents being referred to in Mr. Bryden's discovery transcript.

[11] In his defence (and in the affidavit filed on this motion), Mr. MacKenzie raises a number of issues relating to the Bank or its employees' conduct with respect to the Auto Mart account. These may be summarized as follows:

> a failure to keep Mr. MacKenzie informed with respect to the debt obligations of Auto Mart;
>
> varying the terms of the principal contract without the consent or authorization of Mr. MacKenzie (though not specifically pleaded, this appears to be the basis of his argument on novation in the respondent's factum);
>
> it accepted fraudulent or forged documents without proper inquiry or due diligence and contracted with persons on behalf of the company which the Bank knew or ought to have known did not have sufficient or any authority to bind the company;
>
> it failed, as a prudent lender, to properly monitor Auto Mart's activities.

[12] I pause here to comment that the arguments and issues raised on this appeal by the respondent are much broader than those raised in Mr. MacKenzie's defence or the issues argued before the Chambers judge. However, for reasons that will become apparent, it is not necessary to address the issues not pleaded nor argued before the Chambers judge in this decision.

[13] The Chambers judge rendered her decision on October 7, 2009 dismissing the application of the Bank.

[14] Following release of the decision a dispute arose over the form of the order. The Bank sought to have the issues to be determined at trial limited to three issues which may be summarized as follows:

1. Was the Bank aware that the indebtedness of Auto Mart was being increased due to fraudulent activities?

2. If so, did it fail to advise Mr. MacKenzie of such activities or fail to intervene to prevent an escalation of his liability?

3. Even if the answer to the first two issues is "yes", did the Bank enjoy immunity under the terms of the guarantee?

[15] The Chambers judge was not prepared to limit the issues in the manner suggested by the Bank and, by teleconference decision, dated November 20, 2009 dismissed the Bank's motion.

[16] Also in the teleconference decision on November 20th, 2009, the Chambers judge found that the Bank had expressly waived its right to further directions as contemplated by **Rule** 13.07(1). **Rule** 13.07(1) requires that a judge must, on the dismissal of a summary judgment, arrange to give directions unless all parties waive the requirement.

Issues

[17] The Bank raises the following issues on appeal which may be summarized as follows:

> whether the Chambers judge erred in finding that there was some evidence which may establish that the Bank was aware that Auto Mart's indebtedness was being increased by fraudulent activities on the part of Aaron MacKenzie

> whether the Chambers judge erred in finding that there was evidence the Bank failed to advise Mr. MacKenzie of the fraudulent activities or to intervene to prevent the activities from occurring;
>
> whether the Chambers judge failed in determining the question of law before her, particularly, whether the terms of the April 1st, 2002 guarantee afforded a complete protection to the Bank regardless of the factual circumstances;
>
> whether the Chambers judge erred in finding that the plaintiff had waived its right to directions pursuant to **Civil Procedure Rule** 13.07 and as a result failed to narrow the issues for trial.

I will address the alleged errors after discussing the standard of review.

Standard of Review

[18] The standard of review applicable to summary judgment motions is determined by whether the order is granted or not. In the present appeal, the motion was dismissed and, therefore, there was no terminating effect. Accordingly, we will not intervene unless some wrong principles of law were applied or a patent injustice would result (**AMCI Export Corp. v. Nova Scotia Power Inc.**, 2010 NSCA 41, ¶ 11).

[19] For the reasons which I will develop, I have concluded that the Chambers judge did not apply any wrong principle of law nor does a patent injustice result from the determinations which she made.

Analysis

Issue 1 **whether the Chambers judge erred in finding that there was evidence the Bank failed to advise Mr. MacKenzie of the fraudulent activities or to intervene to prevent the activities from occurring;**

Issue 2 **whether the Chambers judge erred in finding that there was evidence the Bank failed to advise Mr. MacKenzie of the**

fraudulent activities or to intervene to prevent the activities from occurring;

Issue 3 whether the Chambers judge failed in determining the question of law before her, particularly, whether the terms of the April 1st, 2002 guarantee afforded a complete protection to the Bank regardless of the factual circumstances;

[20] These issues all relate to alleged errors by the Chambers judge in failing to grant summary judgment. As a result, I will address them collectively.

[21] **AMCI Export Corp., supra**, makes clear that which is well-known; it is not the function of the Chambers judge on an application for summary judgment to determine matters of fact or mixed law and fact which are in dispute. Matters of controversy are to be left for resolution at trial (¶ 16 and ¶ 17).

[22] The operative portions of the Chambers judge's decision are not lengthy and I will reproduce them here:

> [21] In the present instance, I find that Mr. MacKenzie has "led trump". He has not merely raised an allegation of fraudulent activity, but has provided evidence which may at a full trial of the matter, establish that the Bank was aware that the indebtedness of A. MacKenzie's Auto Mart Incorporated was being increased due to fraudulent activities on the part of Aaron MacKenzie. There is further, evidence which may establish that the Bank failed to advise Mr. MacKenzie of such activities, or intervene to prevent an escalation of his liability under the guarantee.
>
> [22] If such is established to the satisfaction of the trial judge, then does the Bank enjoy immunity due to the Guarantee?
>
> [23] The question that remains, is whether the terms of the Guarantee signed by Mr. MacKenzie can be interpreted in such a manner that the Bank is contractually excused from protecting his equitable rights as a surety in these particular circumstances. I am satisfied that such a determination is not one to be made summarily, and that Mr. MacKenzie has raised an arguable issue to be tried. As such, the Bank's motion is dismissed.

[23] The Bank asserts that the Chambers judge erred in finding that there was evidence of fraudulent activity and that the Bank had failed to apprise Mr. MacKenzie of this fraudulent activity or failed to intervene.

[24] With respect, the Chambers judge committed no such error. Both the affidavit of Mr. MacKenzie and the evidence before the Chambers judge raised questionable conduct on the part of Aaron MacKenzie. Whether the Bank was aware of this conduct, whether it had a duty to intervene, whether the conduct was fraudulent, are all matters which form the factual matrix in which the legal issue needs to be determined. This is not a situation where there is a full factual record with no material facts in dispute. The activities of Aaron MacKenzie, the extent of those activities, the Bank's knowledge of those activities, whether it increased the indebtedness, what impact this would have on Mr. MacKenzie's obligations to the Bank are all matters which can only be determined after a full hearing at trial.

[25] It is only then that the trial judge will be in a position to address whether the terms of the guarantee can be interpreted to determine whether the Bank's actions or inactions (if any) fell within the exculpatory terms of the guarantee.

[26] The Chambers judge committed no error when she determined that these facts would have to be determined before the contractual rights and obligations under the guarantee could be addressed.

[27] The Bank has failed to establish that the Chambers judge applied a wrong principle of law or that a patent injustice would result.

[28] For these reasons I would dismiss the first three grounds of appeal.

Issue 4 Whether the Chambers judge erred in finding that the plaintiff had waived its right to directions pursuant to Civil Procedure Rule 13.07 and as a result failed to narrow the issues for trial

[29] The applicable provisions of **Rule** 13.07 are:

> 13.07 (1) A judge who dismisses a motion for summary judgment on evidence brought in an action must, as soon as is practical after the dismissal, arrange to give directions, unless all parties waive this requirement.

> (2) The judge may provide directions for the conduct of the proceeding, including directions that do any of the following:
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> ...
>
> (b) narrow the issues to be tried by identifying facts not in dispute;
>
> ,,,

[30] In her telephone conference decision the Chambers judge held:

> The plaintiff's application would have been dismissed. In this instance, dismissed without further direction is contemplated by **Rule** 13.07(1) given the plaintiff expressly waived same in its written submissions and the defendant explicitly doing so as well.

[31] It is clear from a review of the record, that the Bank did not expressly waive its right to directions. The Bank asks that we give direction limiting the claim against Mr. MacKenzie to the defences specified in the decision of the Chambers judge (see **supra**, ¶ 14). I am not prepared to do so.

[32] The Chambers judge was not prepared to limit the issues as the Bank was suggesting. In her teleconference decision she said:

> As I see it there is no explicit obligation either within the Rules or in case authorities that requires the defendant to raise every arguable issue for trial in response to the plaintiff's application for summary judgment or even most of the defendant's arguable issues for trial. To fend off an application he merely needs to raise one, notwithstanding some others may be known to him, or become apparent through the course of the litigation.

[33] As noted previously, there was a dispute with respect to the form of the order. Both the Bank and Mr. MacKenzie filed written briefs setting forth their positions. Of particular significance is the brief filed on behalf of the Bank which specifically referenced **Rule** 13.07 and asked that, in settling the order, the Chambers judge limit the issues. At the telephone conference on November 20th the trial judge gave her decision after consideration of the arguments of both parties. She concluded that the issues would not be narrowed and that all the defences by the defendant were "on the table".

[34] The Chambers judge's reference to the Bank expressly waiving its rights to directions, in this context, is more of a misstatement than it is an error of law. She had considered the Bank's request for directions, by way of the settling of the order, and decided that issue.

[35] To the extent that she committed any error, the error would have no practical implications in this particular circumstance. The issue has been decided.

[36] I am not prepared to interfere with the Chambers judge's discretion in declining to limit the issues.

Conclusion

[37] I would dismiss the appeal with costs to the respondent in the amount of $1,500 plus taxable disbursements, in any event of the cause.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Beveridge, J.A.