NOVA SCOTIA COURT OF APPEAL
Citation: Saulnier v. Bain, 2009 NSCA 51

Date: 20090522
Docket: CA 305172
Registry: Halifax

Between:

Paul S. Saulnier

Appellant

v.

Forrest Sandy Bain and Gail E. Bain

Respondents

Revised judgment: The docket number of the original judgment has been corrected according to the erratum dated **May 29, 2009**. The text of the erratum is appended to this decision.

Judges: Roscoe, Oland and Hamilton, JJ.A.

Appeal Heard: May 13, 2009, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Hamilton, J.A.; Roscoe and Oland, JJ.A. concurring.

Counsel: Louis A. d'Entremont, for the appellant
Andrew N. Montgomery, for the respondent

Reasons for judgment:

[1] The appellant, Paul S. Saulnier, appeals from the decision of Justice David MacAdam in chambers which struck out his 2008 action for trespass against the respondent, Forrest Sandy Bain. The trespass related to Mr. Bain cutting and removing trees from Mr. Saulnier's lands in 1999.

[2] Mr. Saulnier previously sued Mr. Bain for trespass relating to the same cutting and removal of trees in 1999. That action was heard and decided by the late Justice Hilroy S. Nathanson in a decision reported at 2006 NSSC 27; (2006), 240 N.S.R. (2d) 279. Justice Nathanson found that Mr. Saulnier owned the lands from which the trees had been cut and removed. He found that Mr. Bain had negligently, but not knowingly or fraudulently, trespassed on Mr. Saulnier's lands:

> 50 I find that Bain trespassed upon the yellow lot in the *bona fide* belief that he owned at least some of it. He was negligent in not ascertaining the title and the boundaries and blind to the possibility that Saulnier might have title. But it was not wilful or culpable trespass.

[3] Justice Nathanson had to determine whether Mr. Bain had acted negligently or fraudulently in order to quantify the damages to be awarded to Mr. Saulnier. The case law Justice Nathanson referred to in his decision indicated the quantum of damages would differ depending on whether there was an inadvertent trespass, a trespass under a *bona fide* belief in title or mere mistake as compared to a willful or fraudulent trespass. Having found Mr. Bain did not trespass willfully or fraudulently because he had a *bona fide* belief that he owned at least some of the lands affected, Justice Nathanson awarded general and special damages against Mr. Bain but refused to grant punitive damages. In refusing to grant punitive damages he said:

> 61 In my opinion, Bain was blind in ascertaining the ownership of the yellow lot. He had several opportunities to ascertain the ownership with certainty, but declined every opportunity. In doing so, he was irresponsible and negligent. But, I am unwilling to hold that he acted in a high-handed manner which would merit an award of punitive damages. I decline to award damages under this head.

[4] In his 2008 statement of claim, Mr. Saulnier referred to Justice Nathanson's judgment against Mr. Bain in his favour and indicated that the amount remains unpaid. Mr. Bain went bankrupt and obtained an absolute discharge in December

2007. Citing s. 178(1)(e) of the **Bankruptcy and Insolvency Act of Canada**, R.S.C. 1985, c. B-3. Mr. Saulnier claimed that his judgment against Mr. Bain survives Mr. Bain's bankruptcy and absolute discharge because his trespass was fraudulent.

[5] Mr. Bain successfully applied before Justice MacAdam to have Mr. Saulnier's 2008 statement of claim against him struck on the basis it was *res judicata*. It is that decision Mr. Saulnier appeals. At the conclusion of the hearing we indicated that the appeal was dismissed with reasons to follow. These are the reasons.

[6] The concept of *res judicata* was explained in **Hoque v. Montreal Trust Co. et al.** (1997), 162 N.S.R. (2d) 321, where Cromwell, J.A., as he then was, set out the relevant principles:

> [19] This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.
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> [20] *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in **Angle v. M.N.R.** (1974), 47 D.L.R. (3d) 544 at 555:
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> > ... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in **Hoysted et al. v. Federal Commissioner of Taxation** (1921), 29 C.L.R. 537 at pp. 560-1:
> >
> > > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

> [21] *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, **The Law of Evidence in Canada** (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
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> [22] It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which could have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.
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> ...
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> [37] Although many of these authorities cite with approval the broad language of **Henderson v. Henderson**, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[7] When an issue has been the subject of previous adjudication or when a party had the opportunity to raise an issue in a previous action and, in all the circumstances, should have raised that issue, it cannot be the subject of another action.

[8] Mr. Saulnier agreed that the nature of Mr. Bain’s trespass, whether negligent or fraudulent, was previously decided by Justice Nathanson. He argued the issue at

that time was with respect to damages not the survival of his judgment following bankruptcy, but agreed fraud for one purpose is fraud for the other.

[9] I am satisfied Mr. Saulnier's claim against Mr. Bain in his 2008 statement of claim is *res judicata* as it was previously decided by Justice Nathanson. He determined that Mr. Bain's trespass was not fraudulent because he had a *bona fide* belief that he owned at least some portion of the lands in question. Mr. Bain should not be twice vexed with the same claim.

[10] I would dismiss the appeal.

[11] Mr. Bain sought costs on a solicitor-client basis. There is nothing about this appeal that would support such an order for costs. Rather, I would order costs in the amount of $1,500 including disbursements to be paid by Mr. Saulnier to Mr. Bain.

Hamilton, J.A.

Concurring:

Roscoe, J.A.

Oland, J.A.

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Erratum:

[12] At the top of the decision, the Docket: CA 305122 should be replaced with Docket: CA 305172.