NOVA SCOTIA COURT OF APPEAL
Citation: Newton v. Waterbury Newton, 2011 NSCA 34

Date: Decision Date 20110415
Docket: CA 338183
Registry: Halifax

Between:

Walter O. Newton

Appellant

v.

Waterbury Newton

Respondent

Judges:	MacDonald, C.J.N.S., Fichaud and Bryson, JJ.A.
Appeal Heard:	March 21, 2011, in Halifax, Nova Scotia
Held:	Leave for appeal is granted and appeal is dismissed with costs to the respondent, per reasons for judgment of Bryson, J.A., MacDonald, C.J.N.S. and Fichaud, J.A. concurring.
Counsel:	Jonathan Cuming, for the appellant Christopher W. Madill, for the respondent

Reasons for judgment:

[1] Walter Newton seeks leave to appeal and, if granted, appeals the decision of the Honourable Justice Arthur J. LeBlanc of September 30, 2010 in which Mr. Newton was refused a stay of proceedings (2010 NSSC 359). At the conclusion of the hearing, the parties were advised that leave to appeal would be granted but that the appeal would be dismissed, with reasons to follow. These are the reasons.

[2] On December 23, 1998, Mr. Newton and Waterbury Newton entered into a partnership agreement. Clause 25 of the agreement provided that all disputes between partners relating to the business of the partnership would be arbitrated under the *Arbitration Act*, R.S.N.S. 1989, c. 19. Section 7 of the *Act* says:

> 7 If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect to any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[3] On May 31, 2004 Mr. Newton withdrew from the partnership.

[4] In September of 2006 Waterbury Newton commenced these proceedings against a former client to recover fees and disbursements charged to their client by Mr. Newton while he was still a partner. Waterbury Newton amended the statement of claim on March 10, 2008 adding Mr. Newton as a defendant.

[5] On April 7, 2008 Mr. Newton filed a defence. After admitting certain uncontroversial facts, Mr. Newton denied the balance of the allegations in the statement of claim and specifically pleaded clause 25 of the partnership agreement. In seeking dismissal of the claim, Mr. Newton argued that the Supreme Court had no jurisdiction to determine the issues between the parties.

[6] Following the filing of his defence, Mr. Newton agreed to attend discoveries and to provide a list of documents. However, when he attended discoveries, he refused to answer any questions going to the merits of the claim, citing the arbitration clause in the partnership agreement. He did produce some documents. He agreed to produce others but did not.

[7] In March 2010 Waterbury Newton brought a motion to compel Mr. Newton to attend discovery and file an affidavit of documents. Shortly before that motion was to be heard, Mr. Newton filed a motion seeking a dismissal of this action for want of jurisdiction pursuant to *Rule* 4.07:

> **4.07** **(1)** A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
>
> **(2)** A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.
>
> **(3)** A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

[8] The Chambers judge defined the issue as whether Mr. Newton had attorned to the Court's jurisdiction. He found that he had. Moreover, he found that Mr. Newton had taken fresh steps to advance the proceeding by producing a list of documents and providing additional documents and agreeing to discovery dates. Mr. Newton's defence was not filed simply to avoid a default judgment. He did not confine his defence to a plea of want of jurisdiction, but denied the substance of the claim as well.

[9] Justice LeBlanc also concluded that *Rule* 4.07(3) assumes that a motion to dismiss must occur before the filing of a defence because it directs the judge to set a time for filing the defence if the motion fails.

[10] An appeal from an interlocutory and discretionary decision is only available if the Chambers judge applied a wrong principle of law or made a clearly erroneous finding of fact, or a failure to intervene would give rise to a patent

injustice: *Smith v. Attorney General (N.S.)*, 2004 NSCA 106, at para. 18; *A.B. v. Bragg Communications Inc.*, 2010 NSCA 70, at para. 33.

[11] In his factum, Mr. Newton argued that:

(a) Former *Civil Procedure Rule* 11.05 expressly forbade an application to set aside a claim once a defence had been filed. Since new *Rule* 4.07 is not so explicit, it should be interpreted more liberally;

(b) Mr. Newton's defence was not an attornment to the jurisdiction of the court within s. 7 of the *Arbitration Act* or in light of applicable case law, (*Navionics Inc. v. Flota Maritima Mexicana S.A.*, 1989 CarswellNat 141, 26 F.T.R. 148). He argues that he did not intend to forsake arbitration (again, relying on *Navionics*). Mr. Newton cites *Schulz v. Schulz*, 2007 NSSC 319 which found that attendance at a settlement conference was not attornment to jurisdiction.

[12] In my view, these arguments are not persuasive. Mr. Newton's defence was not confined to a plea of "no jurisdiction". He denied the substance of the claim as well. Nor, unlike *Navionics*, is there any evidence that he was filing to avoid default judgment. Moreover, he provided documents and attended a discovery (albeit he then asserted he had no obligation to answer questions). For more than two years, Mr. Newton did nothing to seek the stay that s. 7 of the *Arbitration Act* permits. And then he only did so when faced by a motion to produce documents and attend discoveries. In *Navionics*, the defendant was clearly trying to avoid default judgment and sought a stay within a few weeks of commencement of the action. Unlike *Schulz*, there is no evidence that Mr. Newton's attendance at discovery or provision of documents had anything to do with settlement.

[13] In his oral submissions, counsel for Mr. Newton argued that Justice LeBlanc erred by not using a prejudice test which he claimed was applied by Justice Goodfellow in *Canada (Attorney General) v. Marineserve.MG Inc.*, 2002 NSSC 147 (not a case cited to Justice LeBlanc).

[14] In *Marineserve*, the Court was interpreting s. 8 of the *Commercial Arbitration Act*, R.S., 1985, c.17 (2nd Supp.) which provides in part:

Arbitration Agreement and Substantive Claim before Court

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. ...

[15] In *Marineserve*, the Attorney General of Canada commenced proceedings on behalf of Transport Canada against Marineserve and Maritime Harbours Society in connection with the operation of the port at Digby. The Attorney General sought broad remedies, including injunctive relief, an accounting, reimbursement for monies it hadn't received, amongst others. Maritime Harbours filed a defence pleading a dispute resolution clause in the agreement between itself and Transport Canada which required adjudication of claims under the *Commercial Arbitration Act of Canada*. Maritime Harbours brought its application before Justice Goodfellow under former *Civil Procedure Rules* 14.25 and 37.10. *Rule* 14.25(d) allowed a court at any stage of a proceeding to grant a stay for an abuse of process. New *Rule* 4.07 is not so accommodating. It assumes that an applicant for a stay has not yet defended.

[16] Mr. Newton submitted that the facts in *Marineserve* were virtually indistinguishable from this case. Likewise, he argued that the Nova Scotia *Arbitration Act* and the *Commercial Arbitration Act* of Canada had similar language. In reply, Waterbury Newton argued that *Marineserve* can be distinguished on the following bases:

- In *Marineserve*, the delay in bringing an application was only six months whereas, in this case, Mr. Newton's delay was 26 months;

- In *Marineserve*, the court recognized that timeliness was an issue but was satisfied that Maritime Harbours raised the question of arbitration at an early stage;

- In *Marineserve*, Justice Goodfellow characterized the litigation as "not yet out of the starting gate";

- Unlike the applicant in *Marineserve*, Mr. Newton furthered the litigation process by agreeing to, and attending discoveries and providing documents;

- Section 7 of the Nova Scotia *Arbitration Act* is more specific than Section 8 of the Canadian *Commercial Arbitration Act*.

[17] I would add that Justice Goodfellow did not explicitly determine whether the applicant in *Marineserve* had attorned to the jurisdiction of the court.

[18] Counsel for Mr. Newton argued that Justice Goodfellow applied a prejudice test because in para. 24 of his decision he cited *Queensland Sugar Corp. v. Hanjin Jedda (The)*, [1995] B.C.J. No. 624 where the Court decided that a stay should not issue as it would then be prejudicial for the matter to be referred to arbitration when the litigation process had been well underway. Justice Goodfellow did not explicitly adopt this reasoning but arguably it is implicit in his determination that the litigation in *Marineserve* had not "progressed out of the starting gate". That was Justice Goodfellow's factual finding in the context of exercising his discretion. In contrast, Justice LeBlanc here found that Mr. Newton had filed a substantive defence and taken steps in the proceeding. The evidence supports these findings. Therefore, the remedy of a stay under s. 7 of the *Arbitration Act* was no longer available to Mr. Newton.

[19] In light of the foregoing, it is not necessary to decide whether there is a meaningful distinction between proceeding under Rule 4.07 for dismissal for want of jurisdiction or Rule 88.02 for abuse of process, which was the equivalent 1972 Rule (14.25(d)) invoked in *Marineserve*.

[20] Leave for appeal is granted but the appeal is dismissed with costs of $750, including disbursements, to the respondent, Waterbury Newton.

Bryson, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.