C.A. No. 115689

NOVA SCOTIA COURT OF APPEAL
Cite as: White v. Wearing,1995 NSCA 128

Clarke, C.J.N.S.; Hallett and Bateman, JJ.A.

BETWEEN:

ERIC WHITE	)	G. F. Philip Romney
	)	for the Appellant
Appellant	)	
- and -	)	
	)	James P. Boudreau
	)	for the Respondents
THOMAS WEARING and RENE WEARING	)	
	)	
Respondents	)	Appeal Heard:
	)	June 9, 1995
	)	
	)	Judgment Delivered:
	)	June 9, 1995

THE COURT: Appeal dismissed from refusal to strike pleadings (C.P.R. 14.25), per oral reasons for judgment of Clarke, C.J.N.S., Hallett and Bateman, JJ.A. concurring.

C.A. No. 115689

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ERIC WHITE	)	
	)	
Appellant	)	
- and -	)	R E A S O N S
FOR		
	)	JUDGMENT
BY:		
THOMAS WEARING	)	
and RENE WEARING	)	
	)	CLARKE, C.J.N.S.
	)	(Orally)
Respondents	)	
	)	
	)	
	)	
	)	
	)	

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

This is an appeal from the March 29, 1995 decision of Justice Carver whereby he refused the application of the appellant to strike the respondents' originating notice and statement of claim pursuant to Civil Procedure Rule 14.25.

During protracted litigation arising from a contract by which the appellant built a house for the respondents, the appellant at one time filed a claim for mechanics' lien and later applied for an attachment order under Civil Procedure Rule 49. On each occasion he filed affidavits in support.

On November 30, 1994, long after the dispute over the performance of the construction contract had been resolved by a decision of the Supreme Court, the respondents started an action in tort against the appellant for abuse of process alleging that the appellant had sworn affidavits which contained false information and which resulted in loss to the respondents.

Based on the pleadings before the court, which Justice Carver assumed to be true, he found that on their face they disclosed a cause of action. Proof is another matter. That is for a trial on the tort of abuse of process (See **Guilford Industries Ltd. v. Hankinson Management Services Ltd. et al**, [1974] 1 W.W.R. 141 at pp. 148, 149).

The respondents' claim is not ***res judicata*** nor does issue estoppel apply as the veracity of the affidavits was not in issue at the trial arising from the action in contract. Justice Carver stated, "I find these alleged matters have not been adjudicated upon, nor did they have to be joined in a previous action". It cannot be said that the claim is frivolous.

In the recent decision of this court in **Sherman v. Giles** (1994), 137 N.S.R. (2d) 52, Justice Roscoe reviewed the law applicable to such a matter as this. She

observed that at such a preliminary stage in the proceeding it is not for the Court to try the merits of the case based upon affidavits, (p. 57). She also observed that pleadings should not be struck where a claim in law is shown even though its success may appear improbable.

In our opinion Justice Carver in dismissing the application followed these propositions. In exercising his discretion to refuse to strike the statement of claim, the chambers judge made no serious errors in law nor does the refusal result in a manifest injustice to the appellant. (See **ACA Cooperative Associates Ltd. v. Associated Freezers of Canada Inc. et al.** (1989), 95 N.S.R. (2d) 35).

Therefore this Court will not interfere.

The appeal is dismissed with costs in the cause which we fix at $500.00, including disbursements.

C.J.N.S.

Concurred in:

Hallett, J.

Bateman, J.