SUPREME COURT OF NOVA SCOTIA
Citation: Gilbert v. Marynowski, 2015 NSSC 6

Date: 2015-01-07
Docket: Hfx No. 429077 and Hfx No. 434549
Registry: Halifax

Between:

Robin Gilbert and Dianne Gilbert

Applicants

v.

Bohdan Marynowski and Emily Marynowski

Respondents

Bohdan Marynowski and Emily Marynowski

Applicants

v.

Jan Malone, Bryant Realty Atlantic, Patrick I. Cassidy, Q.C., and Cassidy Nearing Berryman

Respondents

Judge: The Honourable Justice James L. Chipman

Heard: January 7, 2015, in Halifax, Nova Scotia

Counsel: Ezra B. van Gelder and Justin Morrison, articled clerk, for Bohdan Marynowski and Emily Marynowski, Applicants on this Motion
Mark T. Knox, Q.C., for Robin Gilbert and Dianne Gilbert, Respondents on this Motion
Ian R. Dunbar, for Jan Malone and Bryant Realty Atlantic
Augustus M. Richardson, Q.C., for Patrick I. Cassidy, Q.C. and Cassidy Nearing Berryman

By the Court:

Introduction

[1] This motion concerns two applications made by Bohdan Marynowski and Emily Marynowski (whom I will now collectively refer to as the "Marynowskis" or "applicants"). A history of the filings is of assistance in setting the stage:

> Hfx No. 420977
>
> July 4, 2014
>
> Robin Gilbert and Dianne Gilbert (the "Gilberts") filed their Notice of Application in Court along with their counsel's affidavit. The Gilberts named the Marynowskis as respondents and applied for an order requiring payment of funds owed due to the alleged failure of the Marynowskis to purchase the Gilberts' condominium unit.
>
> July 30, 2014
>
> The parties counsel participate in a Motion for Directions before Justice Wood. In a letter addressed to Mr. Knox and the Marynowskis' then lawyer, Wood J sets out 11 deadlines including the February 3-5, 2015 hearing of application in Court.
>
> August 8, 2014
>
> The Marynowskis file their Notice of Contest stating, for a number of reasons, that the application should be dismissed.
>
> September 30, 2014
>
> The Marynowskis file their affidavits.
>
> December 5, 2014
>
> The Marynowskis file a Notice of New Counsel switching from Michael P. Scott of Patterson Law to Ezra B. van Gelder of Cox & Palmer.

Hfx No. 434549

December 17, 2014

The Marynowskis file a Notice of Application in Court naming Jan Malone, Bryant Realty Atlantic ("Malone and Bryant Realty"), Patrick I. Cassidy, Q.C., and Cassidy Nearing Berryman ("Cassidy and CNB") as respondents. They seek an order against the respondents holding them jointly and severally liable to the Marynowskis for any damages, interest, or costs which the Marynowskis are ordered to pay in Hfx No. 429077. Filed with the Notice is Mr. van Gelder's affidavit.

The Marynowskis file a Notice of Motion directing that Hfx Nos. 434549 and 429077 be consolidated. With this Notice is another affidavit of Mr. van Gelder and a proposed order.

Hfx No. 429077

December 18, 2014

The Marynowskis file a Notice of Motion identical to the one they file on the same date in Hfx No. 434549, except that it also seeks to adjourn the hearing scheduled for February 3-5, 2015. Filed with the Notice is an affidavit of Mr. van Gelder which is very similar to the one filed on the same day in Hfx No. 434549. As well, there is a proposed order like the one proposed in the other application.

December 22, 2014

The Marynowskis file their brief and book of authorities.

December 24, 2014

The Gilberts file their main application brief, their affidavits, the affidavit of Gail Morris and R. James Filliter, along with a May 27, 2014 appraisal of the condominium prepared by N. Wayne Sajko.

December 29, 2014

Cassidy and CNB file a Notice of Contest and brief.

December 30, 2014

The Gilberts file their brief and book of authorities with respect to the Marynowskis' application.

January 5, 2015

Malone and Bryant Realty file their submission.

Background

[2] In the context of the above filings, the Marynowskis seek to adjourn the hearing of the Gilbert application scheduled for the first week in February, and to consolidate the applications. The background facts are really not in dispute and may be distilled, as follows:

a) the Marynowskis as purchasers entered into an Agreement of Purchase and Sale ("APS") of the condominium with the Gilberts as vendors in May 2013;

b) the real estate agent for the Marynowskis was Malone of Bryant Realty;

c) the closing was set for the end of August, 2013;

d) Cassidy and his firm CNB were retained by the Marynowskis to act for them with respect to their purchase of the Gilberts' condominium;

e) the Marynowskis subsequently terminated the APS and refused to close;

f) the Marynowskis say that they were entitled to terminate because, they say, there was an implied term of the APS that the APS was subject to their being able to sell their existing properties in order to finance their purchase of the Gilberts' condominium;

g) discoveries of Dr. Bohdan Marynowski and Ms. Gilbert took place on November 3, 2014;

h) counsel for the Marynowskis has deposed that it was only after these discoveries that a possible claim against Malone, Bryant Realty, Cassidy and CNB was recognized;

i) the claim asserted by the Marynowskis against Cassidy and Malone is, essentially, that they failed to advise the Marynowskis that they should have made their commitment to purchase conditional upon their ability to sell their properties in order to finance the purchase; and

j) the alleged discovery of this potential claim led to the Marynowskis changing counsel and commencing their application against Malone, Bryant Realty, Cassidy and CNB.

Positions of the Parties

Marynowskis

[3] The applicants say that neither disclosure nor discoveries are complete. They note that the Gilberts' lawyer has asked to discover Ms. Marynowski and requested a copy of Malone's file, which has not yet been produced. The Marynowskis state they require discovery of all of the Gilberts' affiants. On balance, they say that taken on its own, the Gilbert application is not yet ready for a hearing.

[4] Additionally, the Marynowskis submit that the applications should be consolidated and heard together. They assert that the applications involve the same transaction, parties and in many respects, the same evidence. They point out that the damages sought in each application are identical. They say that if the matters proceed separately, then either the Marynowskis will be forced to justify any damage award against them to recover against the respondents in the Marynowski application, or those same respondents may be found liable to pay damages they will have not had an opportunity to contest.

[5] Finally, the Marynowskis point out that the Gilberts' expert report is not in compliance with Rule 55.

Gilberts

[6] The Gilberts take issue with the assertion that disclosure and discoveries are incomplete. For example, they point out that they may decide not to conduct a discovery of Ms. Marynowski. As for the notion that others need to be discovered, the Gilberts say that Mr. van Gelder has never (previously) indicated a wish to discover the Gilberts' affiants. As for any production issues – including the production of Ms. Malone's file – the Gilberts point out the issue of disclosure is one created by the Marynowskis as they are the ones who have not produced the requested materials.

[7] As for the notion that expert N. Wayne Sajko's report is not Rule 55 compliant, they say that they will soon acquire the requisite certificate to ensure the report complies with the rule.

[8] In the main, the Gilberts says their matter is ready to be heard. They urge the court to disallow the adjournment and consolidation.

Cassidy and CNB

[9] These respondents support the Marynowskis' motion but seek costs against them. They submit that there is a clear overlap in the facts and issues raised in the two applications. They further submit that Cassidy has a clear interest in – and may be affected by – the decision of the Court with respect to damages in the Gilbert application. Since the Marynowskis seek contribution and indemnity against Cassidy for any damages awarded against them in favour of the Gilberts, these respondents submit that justice and fairness to Cassidy require his participation in the Gilbert application.

[10] Cassidy and CNB note that they have not had disclosure or discovery of the Gilberts and the Marynowskis and none of this can be accomplished prior to the scheduled hearing dates. They go on to point out that any adjournment does not prejudice the Gilberts. In this regard they note the condominium remains unsold; meaning that the bulk of the Gilberts' damages (being the difference between the APS price and the eventual resale price) has yet to crystalize.

[11] Finally, Cassidy and CNB say that costs should be awarded against the Marynowskis because when the Gilberts commenced their application they should have included all of the parties.

Malone and Bryant Realty

[12] These respondents adopt the position of Cassidy and CNB.

Analysis and Disposition

Adjournment

[13] Having reviewed the materials on file, I am of the emphatic view that this matter is not ready to be heard on February 3, 4 and 5, 2015. Earlier I made reference to Justice Wood's July 31, 2014 letter. In this letter (referring to the Marynowskis as the "Respondents" and the Gilberts as the "Applicants") he confirmed the 11 deadlines emerging from the July 30 motion for directions, as follows:

1. August 8, 2014 – Respondents' notice of contest to be filed and served.
2. August 22, 2014 – Parties to exchange affidavits disclosing documents.
3. August 29, 2014 – Applicants' affidavits including expert reports.
4. September 30, 2014 – Respondents' affidavits (not including expert reports).
5. October 14, 2014 – Applicants' rebuttal affidavits (if any).
6. October 30, 2014 – Respondents' expert reports.
7. November 28, 2014 – Applicants' rebuttal expert reports (if any) and deadline for completion of discovery examinations.
8. December 30, 2014 – Applicants' pre-hearing brief.
9. January 12, 2015 – Respondents' pre-hearing brief.
10. January 26, 2015 – Applicants' reply brief (if any).
11. February 3, 4 and 5, 2015 – Hearing of application in court.

[14] With respect to no. 3, the Gilberts provided their affidavits and expert report to opposing counsel by August 29, 2014. They provided the affidavit of their real estate agent to counsel on September 9, 2014. Their lawyer's affidavit was not provided until December 8, 2014. It was not until Christmas Eve that all four affidavits were filed with the Court. Furthermore, Mr. Sajko's report is not in compliance with Rule 55 and his *curriculum vitae* has not been provided.

[15] With respect to no. 7, if the Gilberts wished to discover Ms. Marynowski, this should have been completed on or before November 28, 2014. As for any production issues, they should have long ago been sorted out and if there had been a problem, an application or appearance day notice could have been set.

[16] Whereas the Gilberts say the matter is ready to be heard, I cannot agree. The key affidavit of their lawyer was provided over three months late. For this reason alone, it is reasonable to conclude that the November 24 discoveries are incomplete. On balance, I do not regard the Gilbert case as "virtually ready for trial" as was the situation before Saunders J (as he then was) in *Stone v. Raniere* (1992), 117 NSR (2d) 194 (see page 6).

[17] In *Darlington v. Moore*, 2012 NSCA 68 para 35, Farrar JA described the law governing adjournments as follows:

> There are many considerations relevant to the granting or refusing of an adjournment, but they all flow from one principle. I would adopt the following statement of the British Columbia Court of Appeal in *Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 at p.84 which I think succinctly and accurately summarizes it:
>
> > … The settled principle is that the interests of justice must govern whether to grant an adjournment. The interests of justice always require a balancing of interests of the plaintiff and the defendant.
>
> (emphasis added)

[18] In *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105, Fichaud JA described the Civil Procedure Rule provisions on adjournments in applications at paras 6 and 7:

> Rule 4.20(3) prescribes the three factors that a judge must consider on an application for an adjournment heard, as was this one, after the finish date:
>
> > 4.20…
> >
> > (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:
> >
> > (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
> >
> > (b) the prejudice to the other parties, if they lose the trial dates;
> >
> > (c) the prejudice to the public, if trials are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.
>
> The judge (¶ 8) correctly cited *Rule* 4.20(3) as stating "the factors a judge must consider in dealing with a request for an adjournment after the finish

> date". He also (¶ 9) cited Justice Cromwell's statement from *Moore* (¶ 35) that "the interests of justice always require a balancing of interests of the plaintiff and defendant". The judge properly moved to identify and then balance the three factors listed in *Rule* 4.20(3).
> (emphasis added)

[19] Having considered the authority from our Court of Appeal, I have balanced the interests of the parties and determined that an adjournment is in the interests of justice.

Consolidation

[20] Our Civil Procedure Rules do not provide a mechanism for respondents to start third party proceedings within the same application. Instead, a respondent seeking claim against a third party must commence a separate application and then move for a consolidation. As Bryson J (as he then was) stated in *Citibank Canada v. Begg*, 2010 NSSC 56, at para 25:

> … There is no clear provision in *Rule* 5 for cross-claims and third party claims. … Under Rule 5.16 a judge may order two or more applications to be heard together. If Maritime Travel wishes to bring claims against Mr. Begg and others, it can do so and then apply to consolidate or have the claims heard together. …

[21] The *Judicature Act* RSNS 1989, c 240 s.41 recognizes that all matters in dispute between two or more relevant parties ought to be determined in a single proceeding:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> (…)
>
> (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so

> in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matter avoided.
>
> (emphasis added)

[22] The Civil Procedure Rules complement the *Judicature Act* by providing guidance on when consolidation should be granted. Civil Procedure Rules 5.20 and 37.02 state:

> **Consolidation and Severance**
>
> 5.20 A judge may order two or more applications be heard together, a claim in an application be heard separately from another, or the claim against one respondent be heard separately from another respondent.
>
> **Consolidation of Proceedings**
>
> 37.02 A judge may order consolidation of proceedings if the proceedings to be consolidated are of the same kind, that is to say, actions, applications, applications for judicial review, or appeals, and one of the following conditions is met:
>
> a) a common question of law or fact arises in the proceedings;
>
> b) a same ground of judicial review or appeal is advanced in the applications for judicial review or appeals and the ground involves the same or similar decision-makers;
>
> c) claims, grounds, or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;
>
> d) consolidation is, otherwise, in the interests of the parties.

[23] Rule 5.20 is identical to what was Rule 5.16. Rule 37.02 is very similar to the previous Rule 39.02. Accordingly, older case law considering the earlier rules is of application.

[24] In *Jeffrie v. Hendriksen*, 2011 NSSC 351, Justice Rosinski dealt with a request to consolidate two applications. He noted that a contested consolidation motion requires the Court to compare the expected consequences should the matters proceed separately. At para 5 he enumerated the relevant factors the Court must consider and I have borne these factors in mind in coming to my decision.

[25] Of particular application here are these factors (adapted from Rosinski J's list):

1) The general convenience and expense;

2) How far the applications have progressed to date;

3) Whether the parties in each case have different lawyers;

4) Applications should not be consolidated where matters relevant in one application have arisen subsequent to the commencement of the other, and the applications have proceeded to a considerable extent;

5) Whether consolidation is otherwise proper, the fact that on discovery, questions would be objectionable in one application which might be privileged in the other is not a sufficient reason for refusing an order for consolidation; and

6) The risk that separate proceedings may cause there to be significant inconsistent findings or outcomes, although such a result is not inevitable in any particular motion for consolidation.

[26] Consolidation is usually the result when two or more proceedings are "inextricably intertwined" (see *Metro Credit Union Ltd. v. McInnis*, (2002), 219 Nfld & PEIR 229 (PEI SC) at para 15, cited in *MacNutt v. Nova Scotia (Attorney General)*, 2005 NSSC 337).

[27] In my view, the Gilbert and Marynowski applications are inextricably intertwined. Although liability issues may differ, the evidence on quantum of damages is identical. Both applications arise from the same transaction. Furthermore, I am cognizant of the potential impact of allowing the Gilbert

application to proceed first, without the involvement of the other respondents. This concern is effectively articulated by Mr. Richardson in his brief at para 7:

> It is further submitted that the respondent Patrick Cassidy, Q.C. has a clear interest in – and may be affected by – the decision of this Court with respect to damages in the Gilbert Application. The Marynowskis seek contribution and indemnity against Mr. Cassidy for any damages awarded against them in favour of the Gilberts. That being the case it is submitted that justice and fairness to Mr. Cassidy require his participation in the Gilbert Application. However, he has not had disclosure or discovery of the Gilberts or, all the more importantly, of the Marynowskis. None of this can be accomplished prior to February 2015.

[28] In all of the circumstances, I am satisfied that Hfx Nos. 429077 and 434594 warrant consolidation.

Costs

[29] The Marynowskis are successful in their application. Normally, costs flow to the successful party. In these circumstances, however, I decline to award costs in favour of the Marynowskis. In this regard, in the summer of 2014 I believe the Marynowskis possessed the knowledge they say they became aware of post the November 3, 2014 discoveries. There is nothing about the discovery of Dr. Marynowski and Ms. Gilbert that can reasonably be said to have informed the Marynowskis of their now claims against the other parties. During the July 30, 2014 Motion for Directions, Justice Wood asked the question:

> Are there interested parties who are not parties and, if so, should the motion be adjourned until they are made parties?

[30] When this question was asked counsel for the (then) parties were in attendance in Court. The answer recorded to the question by Justice Wood (the form is in the court file) was "No". Given what I have reviewed in the context of this application, it seems to me that this question ought to have been answered "Yes". In any event, had the Marynowskis' claims been brought to the Court's attention at the time of the Motion for Directions, these applications would not have been necessary. In the circumstances, I am exercising my discretion to award costs against the Marynowskis in favour of these respondents, as follows:

1) Jan Malone, Bryant Realty Atlantic - $250 plus applicable disbursements; and

2) Patrick I. Cassidy, Q.C. and Cassidy Nearing Berryman - $500 plus applicable disbursements.

[31] The above differentiation is based upon more extensive briefing received on behalf of Cassidy and Cassidy Nearing Berryman.

[32] I will ask counsel to consult and then set down an early date for a fresh Motion for Directions. Once the date has been determined I will invite Mr. van Gelder to prepare and circulate the appropriate order.

Chipman, J.