**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Keating Construction Company v. Ross,* 2015 NSSC 173

**Date:** 2015-06-15
**Docket:** *Syd* No. 428098
**Registry:** Sydney

**Between:**

Keating Construction Company Limited

*Applicant*

v.

Peter Noel Ross and Karen Lynn Porter a.k.a. Karen Lynn Crouse

*Respondent*

| | |
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| **Judge:** | The Honourable Justice Robin C. Gogan |
| **Heard:** | June 3, 2015, in Sydney, Nova Scotia |
| **Written Decision:** | June 15, 2015 |
| **Counsel:** | Hugh R. McLeod, for the Applicant<br>Ian Parker, for the Respondents |

**By the Court:**

**Introduction**

[1] The Applicant, Keating Construction Company Limited ("**Keating**") is a construction contracting business. Keating did work for the Respondents ("**Ross and Crouse**") on a property that they hoped to utilize for a commercial purpose ("**the Esplanade**"). The relationship between the parties deteriorated. Keating quit the job and liened the property. The development of the Esplanade fell behind schedule.

[2] On July 28, 2011, the parties met and signed a Memorandum of Agreement (the "**MOA**"). It contained an agreement to pay outstanding amounts for labor and materials as well as payment terms. It provided that Keating would discharge the Builder's Lien on the property. The parties conducted themselves as if their dispute was resolved. Keating discharged the lien. Ross and Crouse paid suppliers and began making payments to Keating.

[3] By 2014, Keating came to the view that Ross and Crouse were non-compliant with the payment terms of the MOA. He filed a Notice of Action. Ross and Crouse defended and commenced a counterclaim against Keating. Keating

now seeks relief by way of Summary Judgment on Evidence. Ross and Crouse seek additional disclosure from Keating. This is a decision on both matters before the Court.

[4] For the reasons that follow, I grant Keating's application for summary judgment.

**Background**

**(a) The Evidence**

[5] This proceeding involves a construction project gone wrong. The parties began a working relationship with a discreet project to renovate a carriage house. Ross and Crouse hired Keating to carry out the renovation and the parties signed an Agreement respecting that renovation on November 5, 2009.

[6] Subsequently, the parties continued to work together to renovate the main building on the property which is a century old home. Ross and Crouse hoped to turn the home into a small boutique hotel. The parties signed a Memorandum of Understanding ("**MOU**") respecting this project on June 10, 2010.

[7] Trouble ensues as the project proceeds. In July of 2010, Keating says that he can no longer finance the project. The parties come to terms to keep the project

going including that Ross and Crouse will make progress payments. But the project falls behind the schedule imposed by Ross and Crouse. There are other problems including unhappy, unpaid suppliers.

[8] Keating quits the project on April 19, 2011. On June 16, 2011, one of the building supply stores files a lien claim against Ross and Crouse and Keating. On June 17, 2011, Keating also claims a lien (the "**Keating Lien**") of which Ross and Crouse are unaware until July 4, 2011. Ross and Crouse borrow money to pay out the first lien. They obtain legal advice respecting the options for lifting the Keating Lien and decide that they have no option but to negotiate with Keating.

[9] The parties met on July 28, 2011. They negotiate a settlement. The terms are incorporated into the MOA which is signed that day. The full MOA is reproduced as follows:

Agreement to make final payments in full for work conducted under the
**Memorandum of Agreement**
and additional work at 571 Esplanade, Sydney, Nova Scotia
As agreed to by:
**Allan Keating and Michael Keating of Keating Construction Ltd.**
and
**Peter Ross and Karen Ross, owners of 571 Esplanade.**

**Peter Ross and Karen Crouse agree to**:

Pay outstanding balances to Keating suppliers for materials purchased and used for the renovation at 571 Esplanade. Those suppliers and amounts:

| | |
|---|---|
| • Central Supplies | $22, 606.17 |
| • Value Check Flooring | $2,806.68 |
| • Acadia Drywall | $11,933.09 |
| **Total** | **$37, 345.94** |

**Note regarding Acadia Drywall**: Keating Construction has paid a portion of the balance to Acadia Drywall. Allan Keating will provide us with proof of those payments. Ross and Crouse will pay directly to Keating Construction the amount of money Keating has already paid against the outstanding balance to Acadia Drywall.

Ross and Crouse agree to pay Keating a total of **$42,000.00** (taxes included) for all outstanding labour charges.

That $42,000.00 will be paid in monthly installments of $1000.00 a month, starting 01 September 2011 and continuing until the entire balance is paid. Ross and Crouse commit to paying larger installments of the entire amount sooner, if they are in a position to do so.

If Ross and Crouse are unable to make a full monthly installment on the first of the month, they will give Keating as much notice as possible and pay what they can for that month.

**Allan Keating and Michael Keating agree that**:

- They will accept payment to the suppliers ($37,345.94) and the payment for labour ($42,000.00) as payment in full for all work done for Ross and Crouse.
- They will immediately lift the lien on 28 July 2011 that Keating Construction has registered against Ross, Crouse and the property at 571 Esplanade.
- They agree that they will not by any action or inaction cause a lien to be placed against Ross, Crouse or the property at 571 Esplanade again.

**Agreed to day: 29 July 2011**

(signed by all parties – signature lines omitted)

[10] The Keating Lien was discharged the following day, July 29, 2011.

[11] Ross and Crouse commenced monthly payments on the MOA with a payment of $200.00 on September 1, 2011. Monthly payments of various amounts not exceeding $250.00 were made until May of 2014 when Keating commenced this proceeding. Most payments were $100.00. No payment was made for the month of December, 2012 and no payment has been made since May 7, 2014. Ross and Crouse explained the payments by saying that they needed to prioritize

payment of outstanding supplier accounts and that they didn't have the forecast revenue stream to make larger payments.

**(b) The Pleadings**

[12] Keating commenced his claim against Ross and Crouse on June 4, 2014. He alleged breach of contract and bad faith in that Ross and Crouse had never paid the $1000.00 per month contemplated by the MOA dated July 28, 2011. Keating claimed special damages and costs.

[13] Ross and Crouse filed a Notice of Defence and Counterclaim on June 23, 2014. Simply put, the defence alleged compliance with the MOA. They stated that they had acted "in good faith and have always followed the provisions of the Memorandum of Agreement". There was no claim of duress or request to set aside the MOA in the defence. The counterclaim however alleges against Keating a series of intentional and negligent conduct going back to the time of the original carriage house project. Further, Ross and Crouse allege that the Keating Lien for outstanding labour costs was "unjustified" and asked that the MOA be cancelled as they "were forced to sign under duress".

**Issues**

[14] There are 2 issues for determination between the parties:

(a) Should an Order for Summary Judgment be granted against Ross and Crouse? and

(b) Should an Order for Disclosure issue against Keating?

**Position of the Parties**

*Keating*

[15] Keating argues that he is entitled to summary judgment on his claim against Ross and Crouse. He says that the MOA was a settlement of the dispute between the parties and contains clear terms. He says that Ross and Crouse acted in bad faith, essentially defeating the reasonable expectations he had from the settlement. Keating says that there are no material disputed facts and that I am in as good a position as a trial judge to determine the matter. Implicitly, he is of the view that Ross and Crouse cannot show any chance of success at trial. Keating asks for damages for breach of contract in an amount equal to the balance owing which he says is $38, 250.00.

[16] Keating defends the disclosure motion on the basis that the documentation has either been provided or is not relevant.

*Peter Ross and Karen Crouse*

[17] Ross and Crouse made alternative arguments in response to the summary judgment application. Their main position was that the MOA should be set aside given the duress they were under at the time it was signed. This duress relates to the lien placed by Keating. Given this submission, the Court noted that the defence filed by Ross and Crouse did not raise the issue of duress. The response was that it was alluded to in the counterclaim and evidence and that the pleadings could be amended. In the alternative, Ross and Crouse say that they are in compliance with the payment terms of the MOA.

[18] As a preliminary point, it was noted that materials filed by the parties did not reference or rely upon recent decisions on the subject of summary judgment. There was reference to ***Civil Procedure Rule 13.04***. In preparation for the hearing, the parties were urged to review the decisions of the Nova Scotia Court of Appeal in ***Burton Canada Company v. Coady***, 2013 NSCA 95 and ***Blunden Construction Limited v. Fougere***, 2014 NSCA 52 as well as ***Sorensen v. Investor's Group***

***Financial Services Inc.***, 2014 NSSC 398. Notwithstanding, the parties submissions maintained the nature of trial submissions and not those directed at a determination of summary judgment application.

[19] Given the substance of Keating's claim and the content of his pleadings, the Court raised the relief available under ***Civil Procedure Rule 10.04***. Keating moved to amend his motion to include relief under ***Rule 10.04***. After preliminary submissions from counsel, the motion to amend was denied without prejudice to bring it subsequently pending the outcome of the present application.

**Analysis**

***Summary Judgment***

***(a) The Law***

[20] The main issue for determination is Keating's request for Summary Judgment on Evidence. This relief is requested pursuant to ***Civil Procedure Rule Rule 13.04***:

> **Summary judgment on evidence**
>
> **13.04**(1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favor of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

[21] The purpose and objective of summary judgment is to end claims or defences that have no real prospect of success. ***Civil Procedure Rule 13.04*** and the current law on its interpretation provide the substantive and procedural method of achieving that goal. It has been said that the applicable principles are not complicated and are intended to support a quick and effective outcome. Notwithstanding, these applications tend to have a complex presentation from litigants eager to achieve an efficient outcome or desperately trying to avoid it.

[22] The proper approach to Summary Judgment has been well canvassed by our Court of Appeal. The analytical framework to be applied was detailed by Saunders, J.A. in ***Burton***, *supra*, which remains the leading authority. The reasons of Justice Saunders affirmed the test set out by the Supreme Court of Canada in the

seminal case of ***Guarantee Co. North America v. Gordon Capital Corporation***, 3 S.C.R. 423 at para. 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper consideration for consideration for the court…Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success". (citations omitted)

[23] The bar is high for those seeking the relief of summary judgment. The moving party bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring a trial". Each side is expected to put its "best foot forward" with respect to the existence or non-existence of material issues to be tried. If there are any material facts in dispute, it is fatal to the relief sought and a trial is required.

[24] Saunders, J. A. summarizes the analytical framework in ***Burton***, supra, at paras 42 – 44:

> [42] At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing that there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is <u>not</u> – as the judge put it here – to see if the undisputed facts…give rise to a genuine issue for trial". That is a misstatement of the test established in **Guarantee**. Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source)

> whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects of success of the respondent's position be gauged other than by examining it along with the strengths of the of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?
>
> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgement motion, one would never need a trial.
>
> [44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based in hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question: Is there a reasonable prospect for success on the undisputed facts? The answer would be yes.

[25] Before concluding his analysis of the proper approach, Justice Saunders provided a helpful summary of the law at para. 87 of his reasons. This summary emphasizes the 2 stage approach to the analysis. It further highlights, *inter alia*, the requirement for evidence at either stage. Finally, direction is given that such applications are not the appropriate forum "to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts….or to weigh the evidence or evaluate credibility".

[26] Subsequent to the decision in ***Burton***, the Supreme Court of Canada delivered judgment and directions on the topic of summary judgment in ***Hryniak v. Mauldin***, 2014 SCC 7. The guidance provided by the Supreme Court of Canada was recognized by Saunders, J.A. in ***Blunden Construction Ltd. v. Fougere***, 2014 NSCA 52 at para. 7:

> [7] We recognize of course the guidance provided by Justice Karakatsanis in her reasons concerning the importance of interpreting summary judgment rules "broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of claims." She spoke of the values and principles that underlie our civil justice system and raised a clarion call for a shift in culture to provide alternative adjudicative measures to the conventional trial model; and invoke procedures which will provide access to justice that is simplified, proportionate, less expensive, just and fair. A process for summary judgment is one such measure designed to streamline technical and often cumbersome rules, and enable judges to dispose of appropriate cases summarily.

[27] More recently, Muise, J. dealt with a request for summary judgment in ***Sorensen v. Investors Group Financial Services Inc.***, 2014 NSSC 398. In his decision, Justice Muise adopts the reasons of Forgeron J. at paras 19-20 of ***Armoyen v. Armoyen***, 2014 NSSC 174 and relies on the decision of our Court of Appeal in ***Blunden***, *supra*. He then concludes:

> [16] Therefore, in Nova Scotia, the summary judgment test and framework as outlined in ***Coady v. Burton***, applied with a broad interpretation of Rule 13 so as to promote fair access to justice, including the proportionality principles underlying it. That does not extend to weighing evidence and assessing credibility. However, as noted at paragraph 28 of ***Coady v. Burton***, quoting with

> approval paragraph 11 of ***Canada v. Lameman***, it does include making inferences of fact strongly supported by the undisputed facts before the court.

[28] The law applicable to summary judgment is well settled at this point. Counsel and litigants would be well served to frame their positions on such applications with reference to the 2 stage analysis repeatedly set out by our Court of Appeal.

***(b) Determination***

***Stage 1 – Are there any material facts in dispute?***

[29] In making this assessment, I am mindful of the direction from our Court of Appeal as to the basis for this analysis. Summary judgment applications are not the place for determinations on disputed facts. What is contemplated is the application of the law to undisputed facts. Justice Fichaud put it this way in ***2420188 Nova Scotia Ltd. v. Hiltz***, 2011 NSCA 74 (CanLII) at paras 24 – 26:

> [24] To summarize these authorities, Stage 1 requires the motions judge to ask whether there is a disputed issue of material fact. If the answer is Yes, the judge should dismiss the application for summary judgment, without engaging Stage 2's assessment of the merits….
>
> [25] Further, whether there is a disputed issue of material fact involves a comparison of both parties' evidence and positions. A dispute by definition engages more than one party…

> [26] Mr. Alex's submission assumes that Stage 1 assesses the strength of the moving party's case in isolation, then Stage 2 assesses the strength of the Responding party's case. This misunderstands the test. Stage 1 assesses whether there is a dispute of fact between the parties. Then Stage 2, if it is engaged, assesses the relative merit of the parties' positions.
>
> [27] The disputed fact under Stage 1 must be "material" ie. essential to the claim or defence. A dispute over an incidental fact will not derail a summary judgment motion at Stage 1.

[30] From Keating's perspective, this proceeding is essentially a claim for breach of contract which should be determined with reference to the claim and defence. The Court is not being asked to dismiss Ross and Crouse's counterclaim. This is somewhat curious as such a restricted assessment of the pleadings raises only issues relating to whether there was compliance with the payment terms of the MOA. Keating says that the payments made by Ross and Crouse are not what was reasonably contemplated. Ross and Crouse say that they are complying with the strict wording of the MOA (or that they did comply until Keating commenced this proceeding).

[31] However, the counterclaim filed by Ross and Crouse raises the issue of duress in formation of the MOA and asks that the MOA be "cancelled" for this reason. Ross and Crouse say that they were under duress as a result of the lien placed by Keating which was "unjustified". The balance of the counterclaim asserts claims that go to deficiencies and consequent damages relating to the

construction work done by Keating going back to the beginning of the parties commercial relationship.

[32] In assessing how to proceed, I recognize that Ross and Crouse drafted their own pleadings. They are not perfect. Taken as a whole, their pleadings identify all of the issues between the parties, including the issue of duress. In their oral submissions, and with the benefit of counsel for the hearing, Ross and Crouse emphasized that there main defence was duress and they wished to pursue that defence. The defence of compliance was characterized as an alternative position.

[33] In the end, I conclude that I must consider on this application that the pleadings (as a whole) raise the defence of duress. It would seem artificial to proceed otherwise and would, in my view, fail to properly consider and dispose of the application for summary judgment. That said, the defence of duress must have some evidentiary foundation. It must be more than an allegation. It is from this evidentiary perspective that the parties are obligated to "put their best foot forward".

***The Claim of Duress***

[34] Duress is a coercion of will so as to vitiate consent. If established, the contract will be unenforceable against those so coerced.

[35] In advancing a claim for duress, Ross and Crouse rely on ***Hickey's Building Supplies Limited v. Sheppard***, 2014 NLCA. That case involved a variation to an existing contract and adopted the test for duress set out by the New Brunswick Court of Appeal in ***Greater Fredericton Airport Authority v. NAV Canada***, 2008 BNCA 28 at paras 25-26:

> [25] My review of the authorities leads me to the conclusion that a finding of economic duress is dependant initially on 2 conditions precedent:
>
> > (i) the contractual variation must be extracted by pressure in the form of a demand or threat;
> >
> > (ii) the exercise of pressure must be such that the coerced party has no practical alternative but to comply with the demand or threat.
>
> [26] If these 2 conditions are met, the focus shifts to whether the party consented to the contract variation. The factors to be considered are (i) whether the promise was supported by consideration (ii) whether the coerced party protested the variation or executed it on a "without prejudice basis" and (iii) [if not,] whether the coerced party took steps to disavow the variation on a timely basis.

[36] I further note the following comments respecting acquiescence:

> [59] The law is clear that a promisor who, for example, sits back and waits several years before challenging the enforceability of the variation will be deemed guilty of acquiescence and though the plea of economic duress may have been made out, it will fail on this ground. This is what happened in *Stott v. Merit Investment Corporation*. Although the Court of Appeal found the agreement was entered into under economic duress, the failure of the defendant promisor to disavow himself of the agreement until several years after it was signed was fatal to his defence. Once again, it is important to note that the law will reject a plea of economic duress where commercial parties make deliberate decisions that they later regret. In "Economic Duress in Contract: Departure, Detour or Dead-End?", Professor Ogilvie expresses this accurately at p. 204:

> The [cases] demonstrate that parties who voluntarily negotiate agreements that they believe to be advantageous cannot subsequently rely on economic duress to avoid those agreements. … [E]conomic duress does not function to relieve parties from commercial bargains subsequently perceived or experienced to be burdensome.

[37] The test in ***Greater Fredericton Airport Authority*** has been adopted or referenced by the Courts of Appeal in several other jurisdictions. In Nova Scotia, it was adopted in ***Belliveau v. Belliveau***, 2011 NSSC 397, a case in which Duncan J. noted that "commercial pressure" was not sufficient to establish duress.

[38] I have carefully examined the affidavits filed by the parties to determine whether the allegations of duress are supported by evidence and determine whether the material facts are disputed. There are, in effect, two parts to this allegation; first that the builder's lien was "illegal" or "unjustified" and second that its existence resulted in pressure constituting duress in the negotiation of the MOA.

[39] Ross and Crouse say that the parties entered into the MOU on June 10, 2010. By July 14, 2010, Keating is no longer in a financial position to finance the project and he informs Ross and Crouse that he is quitting. The parties come to an oral agreement that allows the project to proceed with Keating as the contractor. Ross and Crouse agreed to make payments to Keating to keep him on the project.

Keating disputes the terms on which he agreed to proceed with work but I find this dispute immaterial.

[40] Ross and Crouse then say that there are regular requests for money from Keating while the project continues to lag behind schedule. There are other issues detailed in the evidence. The relationship deteriorates. On April 19, 2011, Keating requests further payment. Ross and Crouse object and say there will be no further payment until the job is finished or there is a new agreement. Keating quits.

[41] On June 16, 2011, one of the building suppliers to the project places a lien. Notice is given to Ross and Crouse. On June 17, 2011, Keating places a lien against the property in the amount of $99,499.95. Ross and Crouse are not aware of the Keating Lien until July 4, 2011. In the meantime, Ross and Crouse pay out the previous lien.

[42] On July 8, 2011, Keating requests a meeting with Ross and Crouse to discuss a payment plan. On July 11, 2011, Ross and Crouse request a final invoice and invite Keating to "propose a solution". On July 26, 2011, Keating contacts Ross and Crouse and says that he will have to enforce the lien if further payments aren't made.

[43] Ross and Crouse obtain legal advice respecting the Keating lien on July 27, 2011. Ross and Crouse "come away from this meeting with no option but to negotiate with AllanK under duress". The same day, Keating proposes a meeting to negotiate a settlement. The parties agree to meet the following day. Keating agrees to bring the project invoices with him.

[44] The parties meet and come to an agreement on July 28, 2011. Keating provides the invoices as requested. Ross and Crouse draft the MOA and after "numerous edits" demanded by Keating, all of the parties sign the MOA. The MOA provides for a total amount owing to Keating and suppliers and includes a payment plan for the balance owing to Keating. The Keating lien is discharged the following day.

[45] On August 25, 2011, Ross and Crouse once again seek legal advice. They are of the view that they were forced into the MOA. They have a lawyer offer Keating $10,000.00. The offer is rejected. Ross and Crouse begin making payments in September 2011 as contemplated in the MOA.

[46] Subsequently, the business started by Ross and Crouse does not deliver the revenue contemplated by their business plan. They carry out their obligation to pay suppliers but they only make modest monthly payments to Keating. They

never make a monthly payment of $1,000.00. Most monthly payments are in the amount of $100.00. When Keating requests increased payments, Ross and Crouse assure him that they will pay the debt under the MOA in full.

[47] Keating's evidence does not dispute the material aspects of the foregoing sequence of events. Keating adds however, that his calculation of the amount owed to his company for labor costs prior to the MOA was $57, 284.36. This amount excluded amounts due to suppliers. His credit with suppliers became exhausted and he liened the property. In this context, he agreed to accept $42,000.00 plus payments to suppliers under the MOA. He felt that this concession would "resolve any outstanding issues or complaints" and ensure that he was "paid $1000.00 per month which is a sum that I could accept".

[48] In my view, the foregoing evidence does not support the allegation that the Keating lien was "illegal" or "unjustified". This is a bare assertion without any foundation in the evidence. It will not be given further consideration.

[49] However, there is evidence offered which supports that the Keating lien resulted in pressure on Ross and Crouse to negotiate a resolution with Keating. Keating does not dispute these facts. Nor is it disputed that Ross and Crouse made monthly payments they felt were in compliance with the MOA from September,

2011 until May, 2014 (with the exception of December 2012). Their payments stopped when Keating commenced his claim.

[50] The first mention of duress is made by Ross and Crouse in their counterclaim on June 23, 2014, almost 3 years after the MOA was signed. It is acknowledged that Ross and Crouse met with a lawyer on August 25, 2011 and subsequently made a "without prejudice" settlement offer to Keating which was not accepted. The offer to Keating contained no explanation of the basis for the proposal and no allegation of duress. Ross and Crouse subsequently paid suppliers and made monthly payments to Keating for almost 3 years; steps they viewed to be taken in compliance with the MOA.

[51] In the end I find that all of the material facts supporting the claim of duress are undisputed. As to whether this claim has a real chance of success – this will be dealt in the reasons that follow.

***The Breach of Contract Claim***

[52] There is no dispute that the parties signed the MOA on July 28, 2011 or that they both subsequently took steps to comply with its terms. It is uncontested that Keating discharged the lien and that Ross and Crouse paid supplier accounts and

made monthly payments against the total balance owing to Keating for labour in the amount of $42,000.00.

[53] There is no allegation that any part of the MOA was unclear or vague or now requires interpretation.

[54] The payments made by Ross and Crouse to Keating under the MOA are the outstanding issue. Do the payments made constitute compliance with the contract or breach of contract? Keating claims that the consistently minimal payments towards the balance owing constitute a breach of the duty to perform the terms of the contract in good faith and an abuse of the discretionary payment terms contained in the MOA.

[55] Keating relies on the decision of Kelly J. in ***Dudka v. Smilestone***, 1994 CanLii 4325 (NSSC). That case involved a contractual dispute that raised the issue of the scope of discretionary power granted to one of the parties by agreement. Justice Kelly cited ***Gateway Realty Ltd v. Arton Holdings Ltd. and LaHave Developments Ltd. (No. 3)***, 1991 CanLii 2707 (NSSC), affirmed on appeal at 1992 CanLii 2620 (NSCA) and ***McKinley Motors Ltd. v. Honda Canada Inc.***, 1989 CanLii 4918 (NLSCTD) and concluded:

> The common core of all of these examples is that if one party had explicitly reserved in the contract the "right" to exercise its discretion, even when such

> phrases as "its sole discretion" are used, the courts have held that this does not mean absolute discretion, but that the discretion must be exercised reasonably, honestly, and in good faith, and further that the assessment of such discretionary power should be an objective one.
>
> A party breaches its obligation to act in good faith if, without reasonable justification, the party acts in relation to the contract in a manner which substantially nullifies the bargained for benefits or defeats legitimate expectations of the other party…..

[56] Broadly speaking, the law of contract has recognized a duty of good faith in the exercise of contractual discretion. However, the scope of such a duty remained unclear.

[57] The state of the law of contractual good faith was considerably clarified by the decision of the Supreme Court of Canada in ***Bhasin v. Hrynew***, 2014 SCC 71. In that case, Cromwell, J.A. referred to the reasons of Kelly J. in ***Gateway Realty***, *supra*, and to authorities generally which recognize a duty of good faith performance where one party exercises a discretionary power under contract. Justice Cromwell went further however, taking steps to make the law more coherent and just. He said at paras 33 and 34:

> [33] …The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

> [34] In my view, ….doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

[58] Justice Cromwell summarized the new principles at para. 93:

> [93] A summary of the principles is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[59] Returning to the present case, the essence of the dispute is whether Ross and Crouse breached the duty of good faith performance by making consistently minimal payments defeating Keating's reasonable expectations.

[60] In the context of the claim being advanced and the applicable law, it is my view that there are no material facts in dispute. The parties do not dispute that they signed an MOA and do not assert misunderstanding or lack of consensus about its terms. There is no question raised about Keating's compliance with the MOA.

The issue relates only to Ross and Crouse's compliance with the MOA's payment terms. There is no factual dispute about the extent of the payments made or whether they comply with the strict words of the MOA.

[61] Rather, the question is whether Ross and Crouse's payments constitute a breach of the contract. I am satisfied that Keating has met the first stage of the test on this issue, having established that there are no material or genuine facts in dispute requiring trial.

[62] The real issue here is whether the defences raised by Ross and Crouse have a real chance of success.

***Stage 2 – Does the defence have a real chance of success?***

[63] A party will establish a real chance of success, if they show a prospect rooted in evidence, not in "hunch, hope, or speculation". This stage of analysis requires an assessment of the relative merits of the parties' positions.

[64] Accordingly, what remains is a determination as to whether the defences raised by Ross and Crouse have a real chance of success.

***Duress***

[65] I am of the view that Ross and Crouse have not established that their claim of duress has any real chance of success.

[66] Having reviewed the evidence and considered the positions of the parties, I have no doubt that Ross and Crouse felt pressure and specifically financial pressure at the time that they entered the MOA. The liens placed against their property as they struggled to complete their project presented very real problems for them. They believed that they were unable to get bank financing without clearing the liens and they felt that they could not pay the liens without getting some kind of financing. The question is whether the pressure created by this situation amounts to duress and forestalls the enforcement of the MOA.

[67] Before analyzing this further, I note the applicant's evidence that he too was under pressure at the time of the MOA. His evidence supports that his credit was exhausted, his ongoing business viability was in jeopardy for a number of reasons and he needed to get his suppliers paid. Significantly, he too had a lien placed against him respecting this project and unpaid accounts for building supplies. He needed to get these accounts satisfied in order to carry on with his business. Clearly, there was pressure on both sides of this transaction. In this respect, the

MOA was analogous to a settlement in the face of litigation. Such settlements are clearly made under the pressure of litigation. They are however binding on the basis that both parties gave up the right to pursue their respective claims.

[68] Applying the reasoning in ***Greater Fredericton Airport Authority***, *supra*, I note first of all that the case deals with variation of a contract without fresh consideration. That scenario is not an all fours with the present case. Further, I note the comments of Robertson, J. A. at para. 58 as follows:

> [58] …If the variation is supported by fresh consideration, and there has been no protest, one has to seriously question the validity of the plea of economic duress. While the failure to agree under protest is not fatal to a successful plea of economic duress, the plea may become unavailable with the passage of time, whether or not the contractual variation was supported by consideration. In the absence of a promise made under protest, the law insists that the victim take reasonable steps to repudiate or disaffirm the promise as soon as practicable. Generally, this will occur after the pressure dissipates, which is usually once the threat of breaching the contract has lost its pervasive force. If money has been paid under the variation and the coercer has performed his or her part of the bargain as outlines in the underlying contract, then the victim should act responsibly in seeking recovery.

[69] Turning to the facts in the present case, I am prepared to accept that Ross and Crouse felt pressure to negotiate with Keating given the Keating lien and Keating's refusal to work without a payment plan. I further accept that they felt that there was no alternative but to negotiate. I do however, find that the evidence falls far short of establishing that their only alternative was to conclude the MOA

with Keating. There was no evidence to suggest that Ross and Crouse would have entered into the MOA if they felt that its terms didn't represent a satisfactory resolution of the outstanding issues. Put another way, there is no evidence that Ross and Keating felt that any of the MOA terms were unfair but that they nonetheless felt compelled to conclude the bargain. Finally, I am of the view that the pressure felt by the parties was not duress, but rather the commercial pressure that exists in such kinds of relationships.

[70] If I am wrong about my assessment of the preconditions, it is my view that the real barrier to the possibility of success for Ross and Crouse are the issues of consent and acquiescence. In saying this, I have considered the material undisputed facts arising from the evidence as to the parties' conduct after the MOA was concluded.

[71] I note that the MOA was concluded between the parties on July 28, 2011. As noted above, Keating discharged his lien the following day. This cleared a path for Ross and Crouse to proceed with their project. They remortgaged their property on August 18, 2011 and they obtained a final occupancy permit on August 30, 2011. They used the financing proceeds to pay off supplier accounts as they were obligated to do under the MOA.

[72] I further note that by the end of August 2011, Ross and Crouse remained unhappy with the MOA negotiated under pressure. They sought legal advice and made a lump sum settlement offer to Keating. The settlement offer did not communicate duress or disavow the MOA for any reason. When the offer was rejected, Ross and Crouse began monthly payments which they believed were in compliance with the MOA.

[73] Ross and Crouse continued to make nominal monthly payments until they were served with Keating's Notice of Action. The last payment they made was $100.00 on May 7, 2014. When Keating protested the consistently low monthly payments, Ross and Crouse pleaded compliance with the MOA and provided assurances that Keating would be paid in full. This conduct continued for almost 3 years. It is a reasonable inference from the evidence that this conduct would have continued indefinitely but for Keating's claim of breach of contract.

[74] In the end, I conclude that the post MOA conduct of Ross and Crouse constitutes both consent and acquiescence. There was no attempt to protest the terms of the MOA until action was commenced against them almost 3 years after the MOA and after both parties had performed obligations in compliance with the MOA and abandoned other avenues for relief.

[75] Accordingly, I am not satisfied that the claim of duress has any reasonable prospect of success.

***The defence of compliance***

[76] In the alternative, Ross and Crouse assert that no action for breach of contract can succeed against them as they are in compliance with the terms of the MOA.

[77] Likewise, I find this plea to have no reasonable chance of success.

[78] There is no dispute that the payment terms of the MOA allow for discretion on the part of payors, Ross and Crouse. A fair reading of the payment terms of the MOA provides that Keating expected payments on the outstanding balance in the amount of $1000.00 per month commencing September 1, 2011. Nonetheless, the MOA permitted that larger payments and smaller payments would be acceptable. In the case of smaller payments, the MOA provided:

> If Ross and Crouse are unable to make a full monthly installment on the first of the month, they will give Keating as much notice as possible and pay what they can for that month.

[79] Ross and Crouse never made monthly payments of more than $1000.00 per month. In fact, not once did they make the contemplated monthly payment of

$1000.00. They made only nominal payments saying that, in hindsight, they couldn't afford the contemplated payment and in any event, they preferred to prioritize other payments over their obligations in the MOA. Keating asserts that this is not what he reasonably contemplated as performance of the bargain the parties had agreed upon. I agree.

[80] The law requires that the exercise of contractual discretion be carried out in good faith. The evidence supports that Ross and Crouse were angry at Keating and felt that they had been pressured into the MOA. Their post MOA income did not meet with their expectations. They candidly advised Keating that they had consciously decided to prioritize other financial obligations and in keeping with their priorities, they could not afford to pay the contemplated monthly payments under the MOA. I conclude that they made these decisions without reference to the good faith obligation upon them and contrary to Keating's reasonable expectations.

[81] After reviewing the evidence and with reference to the material undisputed facts, I am of the view that Ross and Crouse's claim of compliance with the MOA has no reasonable prospect of success at trial.

[82] I am granting the applicant's claim for summary judgment on evidence. The Plaintiff shall have judgment for the balance owing under the MOA in the undisputed amount of $38, 250.00.

[83] Before concluding the matter of summary judgment, I note that the counterclaim filed by Ross and Crouse remains outstanding. I was not asked to deal with the counterclaim and I have not done so. I have not heard submissions as to the scope of the MOA and whether it was intended to settle some or all of the issues raised in the counterclaim. In the circumstances, I find it appropriate to stay enforcement of the judgment herein until such time as the counterclaim has been resolved or until there is a further order of this court. Reference is made to ***Civil Procedure Rule 13.06(2)***.

***Disclosure***

[84] I am satisfied under ***Civil Procedure Rule 50.02(2)*** that ***Rule 57*** applies to this action and that reference to ***Rule 58.03*** is also appropriate. The parties shall contact scheduling within 30 days to schedule a case conference/early Date Assignment Conference. During this conference, I would anticipate discussions, *inter alia*, on the issue of economical disclosure. I reserve a formal decision on disclosure pending the outcome of that conference.

**Conclusion**

[85] The plaintiff shall have summary judgment on its claim against the defendants. The judgment shall be stayed until the resolution of the counterclaim in this proceeding.

[86] The applicant is successful and is entitled to costs. Failing agreement, the parties shall have cost submissions filed within 30 days.

[87] If the parties consent to a settlement conference on the outstanding issues, I will hear from them at any time available.

Gogan, J.