

SUPREME COURT OF NOVA SCOTIA

Citation: *Fraser v. 3102602 Nova Scotia Ltd.*, 2015 NSSC 207

Date: 2015-07-15

Docket: *Syd* No. 413151

Registry: Sydney

Between:

Paul Fraser

Plaintiff

v.

3102602 Nova Scotia Limited, a body corporate

Defendant

Judge: The Honourable Justice Robin C. Gogan

Heard: April 14, 2015, in Sydney, Nova Scotia

Written Decision: July 16, 2015

Counsel: Duncan MacEachern, for the Plaintiff
Brian Awad, for the Defendant

By the Court:

Introduction

[1] This is a motion for Summary Judgment on Evidence. It involves a dispute over ownership of a snow crab quota allocation (the “**disputed quota**”).

[2] In May of 2010, Paul Fraser (“**Fraser**”) transferred his snow crab quota allocation from the existing license holder to a new license holder. In the end, the quota was transferred to 3102602 Nova Scotia Limited (“**3102602**”). Fraser says this is not what he intended. Notwithstanding, in 2010, Fraser received what he thought was compensation for the disputed quota. He did not receive any compensation for 2011 or subsequent years. 3102602 says that the disputed quota is owned by Roddie Jeffrie (“**Jeffrie**”) and not Fraser. On this basis, it owes nothing to Fraser and will not transfer the disputed quota.

[3] One of the main issues in this proceeding relates to the actions of a third party, Anthony Hendrickson (“**Hendrickson**”). There is however, no direct evidence from Hendrickson on this motion.

Background

(a) The Pleadings

[4] Fraser filed a Notice of Action and Statement of Claim against 3102602 on March 8, 2013. He alleges that he is the beneficial owner of the disputed quota that was transferred from 3102135 Nova Scotia Limited to 3102602 on August 26, 2010. The transfer of the disputed quota from one company to another was effected by Fisheries and Oceans Canada following an established procedure. Following this procedure, Fraser executed a Snow Crab Permanent Quota Transfer Application in May of 2010. He did not fill out the portion of the form designating the transferee. He alleges an intention to transfer his quota to a numbered company known as the Big Bras D'Or group. The Big Bras D'Or group had some form of commercial relationship with Three Ports Fisheries Limited, ("**Three Ports**") a company in which Hendrickson and Jeffrie were then shareholders.

[5] Fraser subsequently learned that the disputed quota had been transferred to the license held by 3102602. He says that it was his reasonable expectation that the quota would be fished by the new license holder and that he would be compensated on a timely basis as the beneficial owner. He claims he has not been

paid for the 2011 season or any season since. He also alleges that 3102602 has not responded to his requests to transfer the disputed quota to another license holder.

[6] Fraser says that the actions of 3102602 constitute conversion and fraud and breach of fiduciary obligations. He seeks damages and declaratory relief requiring the disputed quota to be transferred to a license holder designated by him.

[7] 3102602 filed a Statement of Defence on April 22, 2013. It says that it has no knowledge of any arrangements between Fraser and Hendrickson. It says that it did not pay compensation to Fraser at any time since acquiring the disputed quota. It denies that Fraser is or ever was a shareholder. It further says that it acquired the quota in good faith as a *bona fide* purchaser and is now legal and beneficial owner of the disputed quota. At all times, it dealt with Hendrickson respecting the sale and transfer of the quota and relied upon Hendrickson's assurances that he had the authority to conduct the sale and transfer.

[8] 3102602 asks that Fraser's claim be dismissed.

(b) The Evidence

[9] The evidence advanced on this motion consisted of a total of 3 witnesses. The applicant relied upon the affidavits of Fraser and Claire MacDonald. 3102602 relied upon Jeffrie's affidavit. Both Fraser and Jeffrie were cross-examined.

Claire MacDonald

[10] Claire MacDonald is a manager with Fisheries and Oceans Canada. She is responsible for snow crab quota allocation within Nova Scotia. She provided background to the system of snow crab quota allocation and confirmed that since 2005 Fraser had a snow crab allocation and that he was entitled to the benefits and profits from his quota by virtue of his share in the corporation known as 3102135 Nova Scotia Limited. This company possessed snow crab license number 152704.

[11] Claire MacDonald further confirmed that Fraser's snow crab allocation was transferred to 3102602 effective October 19, 2011. 3102602 is the owner of snow crab license number 152711. Jeffrie is the president of 3102602. It was the evidence of Claire MacDonald that "our records reveal the beneficial owner of this snow crab quota is the core fisher, being the Plaintiff, Paul Fraser". Furthermore, "Fisheries and Oceans has not received copies of any documentation which would

suggest Mr. Fraser has sold his quota allocation or otherwise disposed of the allocation to another full time core fisherman”.

Paul Fraser

[12] Fraser provided evidence that he signed a Snow Crab Permanent Transfer Application in May of 2010. It was his intention to transfer, not sell, his snow crab allocation from one company to another. At the time, his quota was held by 2102135 Nova Scotia Limited and permission for the transfer was required by the company's recognized officer, Perry LeBlanc. Perry LeBlanc provided his permission for the transfer as required. The evidence established that LeBlanc took the form and delivered it to someone at Three Ports.

[13] On August 10, 2010, Fraser received a payment from Three Ports in the amount of \$10,100.00. Fraser believed this payment to represent compensation for the fishing of his snow crab quota in 2010. This was the only payment that he received.

[14] Fraser denies any sale of his snow crab allocation to 3102602. He denies the existence of any Purchase and Sale Agreement. When he asked Hendrickson about his compensation in 2011, he was told it was being held up by Jeffrie. Fraser says

that he has asked Jeffrie for compensation and for permission to further transfer his allocation to another company but neither was provided.

[15] Fraser provided the entire discovery transcript from the discovery examination of November 7, 2013 and relied upon it saying that it “will reveal that the corporate defendant has no defence to the action which I have initiated”. The discovery transcript did not live up to this proposition. It contained frequent references to documents that were not before the Court. In the end, it was largely unhelpful to the disposition of this motion.

Roderick Jeffrie

[16] Jeffrie is the president of 3102602. He was formerly a shareholder in Three Ports. It was his evidence that he received the disputed allocation from Hendrickson in 2010 as part of a settlement of his interest in Three Ports. He stated that he and Hendrickson had been shareholders in Three Ports and the relationship deteriorated. Hendrickson transferred a crab quota allocation to him as a partial payment for Jeffrie’s interest in that company. In support of this contention, Jeffrie offered affidavits from a number of individuals involved in the dispute with Three Ports. I further note the recent decision of the Nova Scotia Court of Appeal in *Jeffrie v. Hendrickson*, 2015 NSCA 49 which deals with this

collateral dispute. The decision references an oral agreement in which Hendrickson was to transfer a crab quota allocation to Jeffrie.

[17] Jeffrie says he believed that the crab quota he received belonged to Hendrickson. It was his evidence that Hendrickson had conducted the transaction involving Fraser. He subsequently learned that Fraser claimed the disputed allocation. He denied that Fraser had ever been a shareholder in 3102602.

Issue

[18] Should summary judgment be granted against the 3102602?

Position of the Parties

Paul Fraser

[19] Fraser says that he is entitled to summary judgment against 3102602. He says that it is undisputed that 3102602 is holding his allocation and refusing to compensate him or transfer it as requested. Fraser relies upon the evidence of Claire MacDonald in support of his position and says that this evidence is “determinative”.

[20] In response to Jeffrie's claim of outright ownership of the allocation, Fraser says that Jeffrie must show proof of ownership and he has offered no evidence to verify ownership.

3102602 Nova Scotia Limited

[21] Jeffrie says that he is a *bona fide* purchaser for value without notice. In his written submissions, he takes the position that the summary judgment must be denied given that there are material facts in dispute. At paragraph 50 of his submission, he summarizes his position on this point as follows:

50. The positions of the parties in this matter – as indicated by the pleadings and the affidavits filed on this motion – show that there are a number of fundamental disputes of material fact in this matter:

Did Jeffrie acquire the Disputed QA in the course of the transaction involving the sale of his interest in Three Ports?

In the course of that acquisition, did Jeffrie provide consideration in return for the Disputed QA?

Did Jeffrie believe that Three Ports or Hendrickson could sell the Disputed QA?

Did Jeffrie otherwise act in good faith?

Respectfully, it is submitted that the existence of the above-noted questions of fact render it impossible for this court to grant this motion: the case fails to pass the first stage of the summary-judgment analysis.

[22] What follows is an analysis that examines whether summary judgment on evidence is appropriate in the circumstances of this particular case.

Analysis

The Law

[23] The law on summary judgment in Nova Scotia is now well settled. I recently had occasion to summarize the applicable principles in *Keating v. Ross and Crouse*, 2015 NSSC 173 at paras 20-28. I repeat the summary here for convenience:

[20] ... This relief is requested pursuant to *Civil Procedure 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 as 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 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 not – 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 provides 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 motions appears 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.

Determination

Stage 1 – Are there material facts in dispute?

[24] In any claim for summary judgment, the moving party has the burden of satisfying the court, first and foremost, that there are no disputed material facts requiring trial to resolve. The onus is on Fraser in the present case. It is my view that this burden has not been discharged.

[25] Fraser's main claim is one of conversion. The disputed allocation was transferred to 3102602 and he has not been compensated since 2010. He has asked 3102602 to transfer the allocation to another company. Jeffrie, on behalf of 3102602, refuses to cooperate with the transfer request. It is at the point of refusal to transfer that Fraser says conversion has occurred.

[26] Fraser says that his burden is satisfied on the evidence of Claire MacDonald. Claire MacDonald's evidence establishes that Fraser's allocation was transferred to 3102602. I agree with Fraser that for the purpose of this application, the transfer of the allocation from point A to point B is not disputed. Nor is it disputed that 3102602 has not transferred the allocation from its possession and control as requested. As I interpret the argument advanced by Fraser, the foregoing facts are

all of the material facts in the proceeding. Given that these facts are undisputed, summary judgment is available and appropriate.

[27] Having reviewed the pleadings in this proceeding, I cannot agree that such a narrow view of the material facts is appropriate. In so concluding, I note that Fraser has not attempted to identify the material facts which support his claim of conversion in a manner consistent with the law of conversion. Fridman, in *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at pp.135-136 sets out the basis for a claim of conversion:

Conversion consists in a wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner. It is an intentional exercise of control over a chattel which seriously interferes with the right of another to control it. There must be a voluntary act in relation to another's goods amounting to a usurpation of the owner's proprietary or possessory rights in them. Before a person can be found responsible for conversion, the court must be satisfied that he either knowingly or carelessly, without ascertaining or attempting to ascertain who the true owner of the property was, took possession of goods and exercised some dominion over them....Succinctly put, conversion is "a positive wrongful act or dealing with the goods in a manner, and with an intention inconsistent with the owner's rights."

Such statements indicate the essential features of the tort of conversion to be: (i) a wrongful act; (ii) involving a chattel; (iii) consisting of handling, disposing or destruction of the chattel; (iv) with the intention or effect of denying or negating the title of another to such chattel...

[28] As to defences to a claim of conversion, Fridman has this to say at p. 150:

In addition to the common law qualifications of the principles of *nemo dat*, under various statutes, one who is not an owner may be able to pass good title, and

therefore, immunity from liability for conversion upon a person who is a bona fide purchaser for value without notice of the transferor's lack of title or authority to sell or otherwise dispose of the goods. Such exceptions arise under the Sale of Goods Act, the Factors Act, the Conditional Sales Act, Bill of Sales Act, or more recently in some provinces, the Personal Property Security Act....The purpose of such legislation is to provide protection for certain classes or purchasers, or pledgees of goods where the strict view of the common law would lead to an injustice or would interfere unduly with the smooth conduct of commercial transactions.

[29] It is undisputed in this case that what was Fraser's crab quota allocation is now held by 3102602. What is disputed is the basis upon which the transfer took place, what role, if any, Hendrickson played in the transfer, and whether Fraser remains the true owner of the crab quota or whether Jeffrie at some point in the transaction became a *bona fide* purchaser for value without notice. If Jeffrie is the owner of the disputed allocation, 3102602 has not converted Fraser's asset.

[30] The essence of conversion is the exercise of control over property for which a party has no right of ownership or possession. In order to succeed on this application, the question of ownership of the disputed crab allocation must be determined. Any facts relevant to the issue of ownership in this proceeding will be material facts. Fraser claims that he is the undisputed owner based principally on his own evidence, and the documentation of the Department of Fisheries and Oceans.

[31] 3102602 clearly disputes this view of the ownership of the disputed quota. It takes the position that Jeffrie or his nominee have ownership by way of a transaction conducted by Hendrickson. This transaction took place in the context of the buyout of Jeffrie's shares in Three Ports. 3102602 offered evidence in support of its position. All of the evidence offered at this point supports that there are material facts in dispute as to ownership of the disputed quota.

[32] Given that there exists a material dispute of fact in this proceeding, I need not consider stage 2 of the analysis which is whether the defence offered is one with a chance of success. For a stage 2 assessment to proceed, there must be no material dispute of fact. Summary judgment is not appropriate. A trial is required to resolve this dispute.

Conclusion

[33] Fraser's motion for summary judgment is dismissed.

[34] Reference is made to the reasons of Saunders, J.A. in *Fougere v. Blunden Construction*, *supra*, and in particular to those comments at paras 19 and 20 of the decision. Counsel are asked to advise in writing of their position in relation to the directions mandated by *Civil Procedure Rule 13.07* on or before July 27, 2015.

[35] 3102602 has been successful on the motion and is entitled to costs. If the parties cannot agree on costs, written submissions shall be filed on or before July 27, 2015.

[36] Order accordingly.

Gogan, J.