IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Elite Trucking Ltd. v. Johnson 2005 NSSC 254

Date: 20050810
Docket: SH 245853
Registry: Halifax

Between:

Elite Trucking Limited

Plaintiff

v.

Shawn David Johnson

Defendant

DECISION

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	August 10, 2005, in Halifax, Nova Scotia
Oral Decision:	August 10, 2005
Written Decision:	September 13, 2005
Counsel:	Charles D. Lienaux, Plaintiff Colin Bryson, Defendant

[1] This is an application made on behalf of the defendant, Shawn David Johnson for an order striking the Statement of Claim of the plaintiff, Elite Trucking Limited, pursuant to ***Civil Procedure Rule 14.25(1)(d)*****.** In the alternative, the applicant seeks Summary Judgment dismissing the plaintiff's claim pursuant to ***Civil Procedure Rule** 1**3.01(a)***.

[2] The facts are set out in the submissions of the applicant and respondent. Briefly, Elite commenced an action against Irving, carrying on business as Kent Building Supplies, for damages. Before the trial proceeded Irving Oil Limited, admitted liability for special damages plus interest but denied general damages. The general damages claim was tried before a judge and jury and the jury awarded a sum for general damages plus costs.

[3] Elite alleged that in September 2000 it retained a contractor to install a new roof at its business premises and contracted for the materials to be supplied by Kent. Elite dealt with the present defendant, Shawn David Johnson, who was a building material salesman for Kent. Elite alleged in the initial action that it paid Kent in advance for the roofing materials by way of $5,000.00 (Five Thousand Dollars) in cash delivered to Mr. Johnson and the balance owing by VISA. Irving denied that it had a

contract with Elite for the delivery of $5,000.00 (Five Thousand Dollars) worth of materials and took the position that Elite authorized Johnson to give this money to the roofing contractor expecting the roofing contractor to purchase materials. The materials were not ordered by the roofing contractor. Damage resulted.

[4] In this action, Elite is suing Johnson for the costs it incurred in the Irving action. Johnson was not joined in the initial Irving action. The Statements of Claim are quite similar in both actions except in the present action there are additional allegations to support the claim for costs.

RELEVANT LAW

ISSUE #1 - Should this court grant Summary Judgment to the applicant?

[5] Civil Procedure Rule 13.01 states as follows:

> 13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof.

[6] The law in relation to an application for summary judgment has been considered on numerous occasions in this province and the test

was set out in *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267 (N.S.C.A), wherein the mortgagee brought a motion for summary judgment in a foreclosure action. The court stated, commencing at para.15:

> The principles that govern Oceanus' application for summary judgment were stated by MacDonald, J.A. in *Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532 (C.A.) at 537 as follows:
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> > Rule 13 has it antecedents in Order 14 of the English Supreme Court Rules. As stated in the *Supreme Court Practice* (1976), Vol. 1, p. 136, the purpose of O.14 is to enable the plaintiff to obtain summary judgment without trial **if he can prove his claim clearly, and if the defendant is unable to set up a *bona fide* defence, or raise an issue against the claim which ought to be tried...**
>
> All that was required of the Saunders to defeat the applications was to raise an arguable issue to be tried. The burden is not a heavy one.

[7] In Nova Scotia, ***Civil Procedure Rule 13.01*** has been amended to allow the Defendant to bring an application for summary judgment.

[8] The amended Rule was considered by Moir, J., in *Binder v. Royal Bank,* 2003 N.S.S.C. 174 (S.C.), in which the court discussed the appropriate test applicable to a defendant bringing an application for summary

judgment against the plaintiff. The court discussed the test set out by the Supreme Court of Canada in *Guarantee Company of North America v. Gordon Capital Corp.* (1999), 178 D.L.R. (4th) 1 (S.C.C.) wherein it was stated, 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 question for consideration by the court...[citations omitted]. Once the moving party has made this showing, the respondent them must "**establish his claim as being one with a real chance of success"** [Hercules, supre, at para. 15]. [emphasis added]

[9] Our Court of Appeal in *United Gulf Developments v. Iskandar* (2004), 222 N.S.R. (2d) 137 (C.A.) stated at paragraph 9:

> I agree with Justice Moir that it is not possible to mirror the usual test for a plaintiff on a summary judgment application where a defendant brings the motion. I agree as well, that there is no appreciable difference between the standard of no genuine issue, and no arguable issue. I concur with the Chambers judge that the appropriate test where a *defendant* brings an application for summary judgment in Nova Scotia is the test as set out in *Guarantee Co. of North America v. Gordon Capital Corp.,* [1993] 3 S.C.R. 423 (S.C.C.):
>
> > 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 a trial, and therefore summary judgment is a proper question for consideration by the court...

[10] The applicant has the burden to show that there is no genuine issue of material fact requiring trial.

[11] The applicant suggests:

1. Elite's claim against Johnson is based upon the same grounds as the claim against Irving except for an additional claim for costs incurred in the previous action. The applicant seek to preclude this claim by Section 3(b) of the *Tortfeasers Act*, which limits Elite's claim against Johnston to the damages awarded in the Irving action. The applicant suggest that as the damages in the Irving action have been paid in full Elite cannot have any further claim against Johnson for damages (costs) in this action.

2. Secondly, the applicant suggests that Elite's claim is for costs incurred for prosecuting a legal action. The applicant argues such claims can only be made in the action being prosecuted and not in another action.

[12] The issue is whether the damage claim for costs incurred in the previous Irving action is precluded by s. 3(b) of the *Tortfeasors Act* which limits Elite's claim against Johnson to the damages awarded in the Irving action.

Section 3(b) of the *Tortfeasors Act* states as follows:

> 3 Where damage is suffered by any person as a result of a tort, whether a crime or not,
>
> (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage, whether as joint tortfeasors or otherwise, the sums recoverable under the judgments given in those action by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the judge presiding at the trial or the court on appeal is of the opinion that there was reasonable ground for bringing the action;

[13] Johnson and Irving were joint tortfeasors, being liable for the same wrongful act of Johnson's. Irving's liability was vicarious. The respondent suggests that s. 3 of the *Tortfeasors Act* does not apply because this action is a different cause of action seeking recovery of different damages. With respect I disagree. The damage claim for

costs incurred in the Irving action now being maintained by Elite, is precluded by s. 3(b) of the *Tortfeasor Act*.

[14] The present claim by Elite flows from the cause of action that arose in the so called “Irving action”.

[15] The Statement of Claim in this action is virtually identical to the Irving action except for some minor wording changes and new pleadings to the effect that Johnson ought to have known that Elite would sue Irving thus setting up the cause of action.

[16] Elite’s position is based on the premise that there is a new cause of action which, in my view, is not the case.

[17] The breach appears to have arisen when Johnson turned over Five Thousand Dollars ($5,000.00) paid to him by Elite to a roofing contractor which, in turn, gave rise to the cause of action in the Irving proceeding for which Elite was successful.

[18] To support its argument the respondent cites several cases where costs were ultimately recovered in a later action, in the form of damages: *Hammond & Co. v. Bussey* (1887), 20 Q.B.D. 79 (C.A.); *The Solway Prince* (1914), 30 T.L.R. 56 (Admiralty Div.); and *Halifax Insurance Co. v. Matheson Engineering et al.* (1995), 143 N.S.R. (2d)

161 (S.C.). In *Bussey*, Lord Esher held that it was reasonably foreseeable that the purchaser of the bad coal would be sued by the sub-purchasers, and therefore the costs to the plaintiff of defending that action could be recovered as damages (p. 93). The report of *The Solway Prince* refers to *Agius v. Great Western Colliery Company* (1899), 1 Q.B. 413, where the result was similar to that in *Bussey*: the plaintiff, a coal merchant, had been unable to supply a shipowner with coal as per their contract, due to the failure of the defendant colliery to supply the coal in time. In the later action, the plaintiff was entitled to recover from the defendant, as damages, the amount of costs he reasonably incurred in defending the first action. Finally, *Matheson Engineering* involved the insurer's claim on account of the failure of an engineer to meet the standard of care he owned the insurer in producing an expert report, leading the insurer to incur costs in defending an action by the insured. None of these cases cited by the applicant involved joint tortfeasors. In each case the plaintiff sought to recover (as damages) costs it incurred in conducting a proceeding to which the defendant had no direct connection. Also, in each case except for *Solway Prince*, the plaintiff had incurred the costs in question

as the defendant in another proceeding. I am not satisfied that these cases support the respondent's position. In effect the respondent is attempting to pursue costs from a joint tortfeasor under the guise of damages. To allow such an action would encourage a multiplicity of actions and possibly, inconsistent results.

[19] I am satisfied that there is no arguable case to be tried and that due to the applicability of the *Tortfeasors Act* the respondents have no real chance of success and I therefore dismiss this action pursuant to ***Civil Procedure Rule 13.01(a)***.

[20] In the event that I am wrong in my conclusion as to the applicability of the *Tortfeasors Act* I also find that the action brought by Elite against Johnson is *res judicata.*

[21] The respondent seeks his costs from the previous Irving action by way of an action for damages in this proceeding.

[22] As explained in *Owen Bird v. Nanaimo Shipyards Ltd.* (1996 Carswell B.C. 2742):

> If North Pacific had proceeded against Owen Bird by Writ of Summons or originating application, the claim made would have been for an injunction, and possibly damages. The **legal** fees **incurred** bringing on such an action or originating application could only be characterized as **costs** and a subsequent **action** could not be commenced to claim the **legal** fees and disbursements **incurred** by North Pacific as a

> **separate** cause of **action.** Otherwise, in any claim for breach of contract the successful plaintiff could bring subsequent action claiming the legal expenses of the first action as further damages for the breach. Such a claim would of course be *res judicata*. I think that in such a circumstance the costs arising in such an action are not damages flowing from the breach of the contract but rather costs given in pursuing a remedy for the breach. If for example, the claim had been made by North Pacific and acceded to, by Owen Bird, there would be no costs incurred even though there had been a breach of the contract of retainer. It is the litigation from which the legal expenses flow not the breach of the contract of retainer. I think it can be considered as a question of causation.

[23] This decision suggests that a plaintiff ought not to be able pursue costs of a previous action in the guise of damages in a later action and that such a claim is *res judicata*.

[24] The respondent argues that the requirements of *res judicata* are not met. Where the technical requirements of *res judicata* are not met the court may still find an action amounts to an abuse of process by re-litigation which is closely related to cause of action estoppel.

[25] The doctrine is discussed in detail in *Toronto (City) v. Canadian Union of Public Employees (CUPE), Local 79,* [2003] 3 S.C.R. 77. Arbour J. Said, “[t]he attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while

offering the discretion to prevent re-litigation, essentially for the purpose of preserving the integrity of the court's process..."

[26] In *Morellato v. Wood* (1999), 175 D.L.R. (4th) 753 (Ont. S.C.J.) the plaintiff had retained the defendant architect to draft plans for a renovation, which were subsequently carried out by a contractor. In the course of the work, it was necessary to modify the plans. Subsequently the municipality notified the plaintiff that the renovation did not correspond to the plans or to the building code, and the plaintiff hired a building inspector to assess the deficiency, leading to further renovations. The plaintiff obtained judgment in an action against the contractor for the cost of the further renovations. The architect was neither a party nor a witness in this first action. The plaintiff then began a second action against the architect, seeking damages for breach of contract and negligence. The deficiencies for which he sought damages had all be identified by the inspector before the first action.

In its discussion of *res judicata* the Court pointed out that "[c]ause of action estoppel applies not only to points on which the Court has pronounced, but to every point which properly belonged to the subject

of the litigation.' The Court went on to discuss the application of the doctrine of abuse of process in circumstances which otherwise might suggest *res judicata:*

> 31 The Court has an inherent jurisdiction to dismiss or stay any proceedings which it determines to be an abuse of process. In *Reddy v. Oshawa Flying Club* [(1992), 11 C.P.C. (3d) 154 (Ont. Ct. (Gen. Div.)], it is stated at p. 161:
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> > The doctrine of abuse of process is somewhat similar to the doctrine of *res judicata* in that it also seeks to prevent a multiplicity of proceedings or the re-litigation of an issue determined in earlier proceedings or which might have been raised in earlier proceedings but the party now raising the issue before the Court chose not to do so.
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> 32 In *Donmor Industries Ltd. v. Kremlin-Canada Inc.* (1991), 6 O.R. (3d) 501 (Gen. Div.), it was held at p. 503 that although the case was not necessarily
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> > . . .a matter of *res judicata* in the strict sense of the usual test for *res judicata*. . . it is an attempt to re-open indirectly what the Court has already dealt with, once and for all, in the disposition of the first action.
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> The Court concluded at p. 506 that:
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> > . . . these plaintiffs are abusing the court process in attempting to put forward again issues which were either raised in the first action or which were known to them and left unraised at the time of the first action. To allow them to do so is to

> permit a duplication of proceedings with the inherent danger of conflicting findings of fact on identical issues.

33 See also *Baziuk v. B.D.O. Dunwoody Ward Malette* (1997), 13 C.P.C. (4th) 156 (Ont. Ct. (Gen. Div.)), in which the plaintiff's claim was dismissed as an abuse of process, based upon cause of action estoppel.

The Court was satisfied that "[a]ll of the necessary material facts were known to the plaintiff in December 1987 when, with reasonable diligence, he could have made a decision as to whether or not to sue the architect, Wood, a decision that he decided to forgo." The plaintiff's assertion that he was unaware of the deviation in the plans until the trial of the prior action could not "survive the good, hard look at the facts." The Court granted summary judgment on the primary basis that the action was statute-barred, but held that, in the alternative,

> all of the issues in the herein cause of action were either dealt with in the prior action or were known to the plaintiffs and left unraised at the time of the prior action. The plaintiffs had sufficient facts in December 1987 to allege negligence against the defendant, Wood. Accordingly, it would be an abuse of process to allow the plaintiffs to re-litigate the issues and thereby duplicate the proceedings. The herein action is therefore, in the alternative, dismissed as an abuse of process on the basis of cause of action estoppel.

This decision was affirmed by endorsement by the Ontario Court of Appeal 187 D.L.R. (4th) 760 (Ont. C.A.):

[27] The respondent's, manner of proceeding amounts to an abuse of process. The issue is certainly one that could have been raised in the prior proceeding, as it involves a new defendant whose alleged liability arises out of precisely the same facts and arguably the same cause of action. Johnson could have been joined as a party and these costs claimed in that action. The solicitor for Elite claims that he did not do so as a matter of trial tactics fully intending to bring this action. This proceeding, by the plaintiff Elite's own admission, is essentially an attempt to obtain a re-litigation of the issue of costs to obtain a more favourable result than he could get in the prior proceeding. In any event, there was nothing to prevent the respondent from seeking damages against Johnson for causing them to become involved in the litigation in the prior Irving action. The plaintiff was aware of and pleaded virtually all of the facts that would give rise to that claim other than the precise amount of the so called damages which was not known until the court gave its decision on costs. The respondent's solicitor was

very clear that he never sought or expected solicitor and client costs in the Irving action but knew that there would be a shortfall between the costs recovered and the actual costs as between he and his client. As a result the respondent's solicitor indicated that for tactical reasons he chose not to join Johnson but to sue him directly for damages in this present action.

[28] For these additional reasons, I allow the application pursuant to s.13.01(a) of the Civil Procedure Rules dismissing the respondents claim.

[29] I will hear the parties as to costs.

Pickup, J.