IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hapi Feet Promotions Inc. v. Martin, 2004 NSSC 198

Date: 20041007
Docket: 216199
Registry: Halifax

Between:

Hapi Feet Promotions Inc., Frank Leahy and Dawn Penelope Attis, Executrix of the Estate of Don Messer

Plaintiff/Respondent

v.

Barbara Martin and Grayec Management Incorporated

Defendant/Applicant

Judge:	The Honourable Justice Frank Edwards
Heard:	September 14, 2004, in Halifax, Nova Scotia
Counsel:	Christopher J. Forbes, for the plaintiff/respondent Jonathan T. Kenyon and Howard Knopf, for the defendant/applicant

By the Court:

[1] This is an application by the Defendants for an Order for summary judgement pursuant to CPR 13.01.

[2] ***History of Proceedings:*** On February 25, 2004, the Plaintiffs commenced an action for damages and injunctive relief as a result of concerts produced by the Defendant Grayec Management Inc. using the billing "memories of a Don Messer Jubilee performed by the Heritage Allstar Band" at various times. The Plaintiffs are of Dawn Penelope Attis, Executrix of the Estate of Don Messer ("Attis"), (the "Messer Estate"), as well as Frank Leahy ("Leahy") and Hapi Feet Promotions Inc. ("Hapi Feet"). Leahy and Hapi Feet claim against the Defendants with respect to rights in the name, image, reputation, likeness, and/or personality of Don Messer, which rights they claim to have received from the Messer Estate. Hapi Feet also makes claims in respect of certain registered trade-marks, its entitlement for which depend upon rights received from the Messer Estate. Attis is a daughter of Don Messer.

[3] The Defendants have defended this action on the basis that, among other things, Attis is not and has never been the Executrix of the Messer Estate and, as

such, has no right to bring this action on behalf of the Messer Estate and had no rights to confer upon Leahy or Hapi Feet. Therefore, the Defendants state that neither Leahy nor Hapi Feet can maintain any claim based upon any alleged rights acquired by them from Dawn Attis as purported Executrix of the Estate of Don Messer.

[4] The Defendants now apply for summary judgement on the basis that Attis is not the Executrix of the Messer Estate and accordingly is unable to maintain this action.

[5] ***The Law - Summary Judgement***: Until recently, the Civil Procedure Rules in Nova Scotia only permitted plaintiffs to apply for summary judgment. However, Rule 13.01 has been amended to allow any party to bring such an action. The Rule reads as follows:

> "Application for Summary Judgment
>
> 13.01 After the close of pleadings, any party may apply to the court for judgment on the ground that:
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> (a) There is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) There is no arguable issue to be tried with respect to the defence or any part thereof; or

> (c) The only arguable issue to be tried is as to the amount of any damages claimed.
>
> Disposal of Application
>
> 13.02 On the hearing of an application under Rule 13.01, the Court may on such terms as it thinks just,
>
> (b) Grant judgment for any party on the claim or an part thereof;
>
> . . .
>
> (j) Award costs;
>
> (k) Grant any other order or judgment as it thinks just."

[6] The amendment allowing defendants to apply for summary judgment was recently considered by the Nova Scotia Court of Appeal in ***United Golf Developments Limited v. Iskandar***, 2004 N.S.C.A. 35. Therein, Justice Roscoe affirmed the test for summary judgment in Nova Scotia as that established by the Supreme Court in ***Guarantee Co. of North America v. Gordon Capital Corp.*** [1999] 3 S.C.R 423. Justice Roscoe stated at paras. 8-10:

> "In the case under appeal, Justice Moir employed the same test stating it in the following terms:
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> > Carl B. Potter Limited [(1976), 15 N.S.R. (2d) H08 (C.A.)], Nova Scotia developed an approach to plaintiff's summary judgment applications by which the plaintiff was required to clearly prove the claim. Then the

> defendant was called upon to demonstrate a point reasonably to be presented in defence.
>
> In my opinion, it is not possible to appropriately mirror this approach in situations where the defendant applies for summary judgment. Rather, the approach suggested by the Supreme Court of Canada in the decisions of Guarantee Company of North America, at para. 27, at Hercules Management at para. 15 are of guidance at least in defendants' applications in this province.
>
> The Court will consider summary judgment only where the moving party establishes that 'there is no genuine issue of material fact requiring trial,' and that that threshold having been met by the applicant, the respondent fails to, 'establish his claim as being one with a real chance of success.'

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 [1999] 3 S.C.R. 423:

> 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. See Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 15; Dawson v. Rex Craft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68, Irving Ungerman Ltd. v. Galanis (1991) 4 O.R. (3d) 545 (C.A.) at pp. 550-51. Once the

> moving party has made this showing, the respondent must then ‘establish his claim as being one with a real chance of success’ (Hercules, supra at para. 15).
>
> The Rule now allows a defendant to bring the application. This rectifies those cases in which the courts were prevented from interfering where a plaintiff's claim disclosed a reasonable cause of action, but a defendant had what appeared to be a defence to which the plaintiff has no arguable response. For example, in Sherman v. Giles [1994] N.S.J. No. 572, there was probably a compelling defence of crown immunity.”

[7] Accordingly, the Defendants must show that there is no genuine issue of material fact requiring trial. Once established, the onus shifts to the Plaintiffs to establish their claim as being one with a real chance of success.

[8] ***Facts:*** On March 26, 1973 Don Messer died. The will of Don Messer dated May 13, 1964 ("Don Messer's Will") appointed Don Messer's wife Naomi Messer and Don Messer's son-in-law, Donald E. Hill, as Executors of the Messer Estate. On March 30, 1973 a grant of probate was issued to Naomi Messer and Donald E. Hill as Executors of the Messer Estate by the Probate Court of Nova Scotia. On August 20, 1974 a final passing of accounts for the Messer Estate was ordered by the Probate Court of Nova Scotia.

[9] The codicil to the will of Naomi Messer dated March 22, 1974 ("Naomi Messer's codicil") appointed Donald E. Hill and Attis as Executors of Naomi Messer's Estate. On January 10, 1976 Naomi Messer passed away. On January 31, 1976 a grant of probate was issued to Donald E. Hill and Attis as Executors of Naomi Messer's Estate by the Probate Court of Nova Scotia. On November 15, 1976 a final passing of accounts for Naomi Messer's Estate was ordered by the Probate Court of Nova Scotia. Donald E. Hill is alive and currently resides in Texas, USA.

[10] On June 1, 2000, Dawn Attis signed an Agreement with Hapi Feet on behalf of the Don Messer Estate. Ms. Attis purported to be the Executrix of the estate though in fact she was not. The Agreement conferred the rights to the name, image, likeness, etc., of Don Messer to Hapi Feet. The Plaintiff Leahy is the sole officer and director of Hapi Feet.

[11] There is no evidence that Attis did not genuinely believe that she had authority to bind the Messer estate. I heard this application in Halifax on September 14, 2004. By that time, as of September 7, 2004, Attis had been granted administration of the Don Messer estate. The only other persons entitled to apply

for administration, namely Donald Hill and Lorna (Messer) Hill (Attis' only surviving sibling) had each renounced their right to apply as of August 28, 2004.

[12] In addition, Donald Hill had provided a Certificate wherein he affirmed the terms of the June 1, 2000 Agreement. The Certificate is attached to a copy of the Agreement and each page is apparently initialled by Mr. Hill. The Certificate itself is undated but I attach no significance to that fact. The Certificate was forwarded to Mr. Hill by Counsel in anticipation of this hearing. It was returned to Counsel by courier on September 10, 2004. (See Affidavit of David G. Lewis).

[13] Clearly, the parties to the Agreement can agree that their contract can take effect or operate retroactively. [See for example paragraph 55 of ***Cooperative Fisheries Ltd. v. CIBC*** [1969] S.J. No. 143 (Sask Q.B.)] Attis now has the legal authority to do exactly that on behalf of the Dawn Messer Estate. The basis for the summary judgement application has disappeared.

[14] The application is dismissed.

[15] The Plaintiffs will have to amend the style of cause to show Attis as administrator of the Estate. I understand that they will also drop any claim for damages. During submissions, Counsel advised that the Plaintiffs now seek only injunctive relief to prevent any future actions by the Defendants.

[16] The Plaintiffs shall have costs in the event of $1,500.00 payable forthwith.

Order accordingly.

J.