IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Smith v. Maritime Pro Stock Tour Ltd, 2007 NSSC 272

Date: 20070926
Docket: S.H. No. 284680
Registry: Halifax, NS

Between:

Wayne Smith

Plaintiff/Defendant
by Counterclaim

v.

Maritime Pro Stock Tour Limited, a body corporate

Defendant/Plaintiff
by Counterclaim

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: August 30th, 2007 in Halifax, Nova Scotia

Oral Decision: September 11th, 2007

Written Release of Decision: September 26th, 2007

Counsel: Blair H. Mitchell for the Plaintiff/Defendant by Counterclaim

David P. S. Farrar, Q.C. for the Defendant/Plaintiff by Counterclaim

By the Court:

[1] This is an application for an interlocutory injunction brought by Wayne Smith against Maritime Pro Stock Tour Limited.

[2] Mr. Wayne Smith is a professional stock car driver having been involved in the sport as a driver for approximately twenty years. According to Mr. Smith's evidence, he has met with some success in this sport. He is a former three-time Maritime Association of Stock Car Auto Racing champion and, according to his evidence, has a total of forty-one professional race wins. Since 2001, Mr. Smith has been a member of the Maritime Pro Stock Tour (hereinafter referred to as "the Tour") which is a Maritime stock car racing circuit managed by the Defendant.

[3] On June 9th, 2007, Mr. Smith participated in a race put on by the Tour at the Riverside Speedway which is located in Antigonish County, Nova Scotia. Mr. Smith placed second in this race which he says would earn him a "purse" of $1,200.00 together with other miscellaneous awards of another $175.00. In addition, a second place finish would earn he and his team 108 points in what is known as the CARQUEST Challenge. Drivers accumulate points over the course of the year and

the driver with the most points at the end of the racing season is awarded the CARQUEST Points Championship.

[4] Following Mr. Smith's second place finish on June 9th, 2007 race officials inspected Mr. Smith's vehicle and, in particular, the carburetor. Mr. Smith had purchased a new carburetor in 2006 to use in this year's racing season and the race in question was the first time that Mr. Smith had used this carburetor. The day following the race, the general manager of the Tour contacted Mr. Smith and informed him that the carburetor that he had used in the previous day's race had failed what is commonly known as a "no-go gauge test". This is a test whereby gauges are inserted into various parts of the carburetor. If the gauge passes through the carburetor in any location tested-the carburetor fails the test. In this case, Mr. Smith's carburetor failed the test in one of six locations on the carburetor that were tested. Mr. Smith was advised that as a result, he had been disqualified from the June 9th , 2007 race. This disqualification cost Mr. Smith and his team 108 points in the CARQUEST Challenge. As a result, Mr. Smith, who had been in first place in the said Challenge was moved to twenty-fifth place. In addition, he lost the "purse" which totalled $1,375.00.

[5] Mr. Smith protested the disqualification and met with the Tour officials in an attempt to resolve the matter. A resolution was not reached. On August 22nd, 2007, Mr. Smith commenced an action in the Supreme Court of Nova Scotia against the Tour claiming, *inter alia*, breach of contract and a breach of the principles of natural justice. Among Mr. Smith's complaints is the suggestion that the Tour did not provide him with a reasonable and fair opportunity to be heard in relation to the alleged breach of the rules relating to the carburetor as well as the penalty that was imposed upon him by the Tour. In Mr. Smith's Statement of Claim he seeks an Order declaring his disqualification as unlawful as well as an Order enjoining the Tour from awarding the CARQUEST Points Championship to any other person pending the lawful determination of this matter. Finally, he seeks special damages, costs and such further and other relief as the Court may see fit and just to grant.

[6] On August 23, 2007, Mr. Smith filed an Interlocutory Notice (Application Inter Partes) seeking an Order enjoining the Tour from making any award, official or unofficial, of the championship of the Maritime Pro Stock Car Tour for the 2007 season pending further Order of the Court. The evidence filed in relation to the application indicated that the CARQUEST Points Championship would be "unofficially" awarded (including the awarding of the Championship Cup) following

the final race of the season which was scheduled to occur on September 8th, 2007. The "official" award of the Championship is scheduled to take place at the Tour's annual dinner on October 28th, 2007.

[7] A Defence and Counterclaim was filed by the Tour on August 28th, 2007. In its defence the Tour says that the decision to disqualify the Plaintiff was made within the parameters of the Tour's rules and is not subject to appeal in this Court or in any other forum. In addition, the Defendant states that the Plaintiff's Statement of Claim discloses no reasonable cause of action. The Tour, as part of its defence, relies on an application/registration form signed by Mr. Smith on December 8th, 2006 which contains clauses which purport to release, on a full and final basis, all claims that Mr. Smith may have or may in the future have against any person(s), entities or organization(s) associated in any way with the Tour as a result of his participation in the Tour, due to any cause whatsoever including negligence, gross negligence, breach of contract or breach of any statutory or other duty of care. Further, the Tour relies on a clause of this document in which Mr. Smith agrees not to sue the Tour for any loss, injury, costs or damages of any form or type, howsoever caused, arising either directly or indirectly from his participation in any aspect(s) of the Tour. Further, the Defendant relies on a portion of this application/registration form in which it is stated

that the individual signing the form agrees to indemnify and to save and hold harmless the Tour from any litigation expense, legal fees, liability damage, award or cost of any form or type whatsoever which the Tour may incur due to any claim made against it by the individual signing the form whether the claim is based on the negligence or gross negligence of the Tour or otherwise. The exact wording of these clauses is contained in Exhibit "A" attached to the affidavit of Wayne Smith sworn to on the 21st day of August, 2007.

[8] The application for an injunction was heard before me in Chambers on August 30th, 2007. During the course of the hearing, I raised the issue of the timing of my decision. In particular, I suggested that if the CARQUEST Points Championship was going to be "unofficially" awarded at the end of the final race on September 8th, 2007, I would have to rearrange my schedule in order to ensure that my decision was rendered prior to that date. As a result of my comments, the Defendant agreed that there would be no official or unofficial announcement of the winner of this year's CARQUEST Points Championship prior to the rendering of my oral decision. This is of some significance as part of Mr. Smith's concern about the awarding of the Championship was that someone else would have the honour of "unofficially" receiving the Cup in front of the spectators at the conclusion of the race that evening.

That concern was no longer applicable once the Defendant agreed not to award the Cup at the conclusion of the September 8th, 2007 race.

[9] As indicated above, in this application Mr. Smith is requesting interlocutory injunctive relief. There does not appear to be a dispute between the parties concerning the test to be used by the Court on such an application. Counsel for both parties have referred the Court to the case of **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] S.C.J. No. 17 and the three-stage test set out therein. In particular, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy, pending a decision on the merits. I will turn first to the issue of whether there is a serious question to be tried in this case.

[10] Counsel for the Defendant has submitted two arguments in support of his suggestion that there is no serious question to be tried in this case. First, it is submitted that Mr. Smith has, through the application/registration form referred to previously, released the Tour from all liability in relation to this matter and has

"forgone" his right to sue as a condition of being permitted on the Tour. Secondly, the Defendant submits that the Applicant has not led any evidence to support the suggestion that Tour officials did not comply with the applicable Rules. It is suggested that failing any such breach, this Court has no jurisdiction to review the Tour's decision. Counsel for the Defendant has referred the Court to a number of cases in support of the suggestion that the application form signed by Mr. Smith on December 8, 2006 is enforceable and precludes the Plaintiff from bringing the action which was filed with this Court on August 22nd, 2007. In addition, Mr. Farrar has referred the Court to a number of decisions which deal with the reluctance of the Courts to interfere with the decisions of private organizations. At page 11 of the Defendant's pre-hearing memorandum, the submission is made that "a Court can only interfere if the private body's order or decision was made without jurisdiction (or was against the rules), or if it was in bad faith or contrary to the rules of natural justice."

[11] In response, the Applicant has referred the Court to a number of decisions in support of the argument that the clauses contained in the document signed by Mr. Smith on December 8th, 2006 are unenforceable and do not prevent the bringing of the Plaintiff's action. Further, the Applicant submits, *inter alia*, that the rules of

natural justice have been breached in this case and that this (amongst other things) warrants the Court's intervention.

[12] It is important to remember that at this early stage of the proceeding my role is not to conduct an extensive review into the merits of the case but, rather, is to determine whether there is a serious question to be tried. In **RJR-MacDonald Inc. v. Canada (Attorney General),** *supra*, the Supreme Court of Canada discussed the test to be applied when determining whether there is serious question to be tried. The Court stated at paragraph 44:

> "**44** Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a 'strong prima facie case' on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that 'the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried'. The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20."

[13] In that same decision the Court stated at paragraph 49 "What then are the indicators of 'a serious question to be tried'? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one ....."

[14] At paragraph 50 of the same decision it is stated:

> "**50** Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable."

[15] According to Mr. Smith's evidence, he takes the sport of stock car racing seriously. In his affidavit sworn to August 21st, 2007 he states that he and the members of his team have invested a great deal of work and effort to compete and excel in the Maritime Pro Stock Tour. Mr. Smith testified that he probably spends $50,000.00 to $60,000.00 per year participating in this sport. He submits, amongst other things, that the Tour breached the rules of natural justice when dealing with his disqualification from the June 9th, 2007 race. In particular, he suggests that he was not given an opportunity to meaningfully respond to the suggestion that his carburetor had failed to pass the Tour's requirements, nor was he given an opportunity to have input into the penalty that would be imposed upon him.

[16] I am satisfied that in the case at Bar, the application is neither vexatious nor frivolous and that there is a serious question to be tried. In my view, the submission of the Defendant that the application form signed by Mr. Smith precludes this action

is best dealt with after a trial where the full merits of the case can be considered by the Court. Mr. Smith has satisfied the first part of the three part test for the granting of an interlocutory injunction.

[17] That takes me to the issue of irreparable harm. The Applicant must satisfy the Court that he will suffer irreparable harm if this application is refused.

[18] In **RJR-MacDonald Inc. v. Canada (Attorney General)**, *supra*, the Supreme Court dealt with the issue of irreparable harm and stated at paragraph 59 that the term "irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[19] In the pre-hearing memorandum filed on behalf of the Applicant reference is made to the Applicant suffering reputational harm if this injunction is not granted. During the course of the hearing itself, Mr. Mitchell made reference to Mr. Smith receiving the Championship and an acknowledgement of the Championship in the "ordinary course of events". He submitted that the award should not be given to

someone else until the issue of Mr. Smith's disqualification has been determined. I will deal with each of these suggestions.

[20] Mr. Smith has already been disqualified from the June 9th, 2007 race. It is important to recognize that the injunction requested will not change that fact. Mr. Smith has not asked that the disqualification be lifted on an interim basis but, rather, he has requested that no one be awarded the Championship pending further Order of the Court. The granting of the injunction requested will not change the fact that Mr. Smith has been disqualified and, in my view, will not alter any reputational harm that may be caused by the disqualification itself.

[21] The granting of the injunction requested will also not alter the fact that Mr. Smith, if he is eventually determined to be the Champion, will not be receiving the Championship or an acknowledgement of the Championship in the "ordinary course of events" (as put by Mr. Mitchell). The granting of the injunction requested would insure that no one is awarded the Championship until further Order of the Court. However, it will not help to insure that Mr. Smith receives the Championship or an acknowledgement of the Championship in the ordinary course of events.

[22] At paragraph 40 of Mr. Smith's affidavit sworn to on the 21st day of August, 2007 he states:

> "If the award is made without the lawfulness of my own disqualification having been heard and determined it will require that someone else who is awarded the championship on September 8, be deprived of it in the event it should be found that I was disqualified unlawfully."

[23] No one has disputed the suggestion that if Mr. Smith is successful in his action the Championship title will revert to him. If this occurs, the denial of the title to him will be "cured".

[24] I appreciate that if the injunction requested by Mr. Smith is not granted - someone other than Mr. Smith will be named on the Tours website as the CARQUEST Points Champion and, in addition, someone else will be officially named as the Champion at the Tour's annual dinner in late October of this year. In my view, if Mr. Smith is successful in his action and he is subsequently determined to be the Champion because his disqualification is overturned, the Court can order the Tour to advertise such on its website and to re-award the trophy to Mr. Smith at another annual dinner. In this way, much of the harm complained of will be "cured".

[25] In any event, I am not satisfied that the fact that Mr. Smith's name will not be on the website tomorrow or the fact that he will not be handed the trophy at the dinner this coming October constitutes irreparable harm.

[26] As recognized by the Supreme Court of Canada, the term "irreparable" refers to the nature of the harm suffered rather than its magnitude. Nevertheless, the harm must be serious (see the comments of the Alberta Court of Appeal in the case of **Whitecourt Roman Catholic Separate School District No. 94 v. Alberta** (1995), 30 Alta. L.R. (3d) 225 at ¶ 32).

[27] In addition, the evidence of irreparable harm must be clear and non-speculative. In the case of **Mainil v. Canadian Wheat Board**, 2004 FC 1768 the Federal Court dealt with this issue. That case involved an application for judicial review in relation to an election for directors of the Canadian Wheat Board. As part of the proceeding, the Plaintiff brought an application for an injunction preventing the counting of ballots and the announcement of the election results pending a hearing of the application for judicial review. The Plaintiff submitted that he would be substantially prejudiced by the announcement of the results prior to his case being determined and that there

would be no way to remove the "taint" of the election. The Court rejected that argument and stated at paragraph 63:

> "63 The evidence in support of irreparable harm must be clear and non-speculative: *Nature Co. v. Sci-Tech Educational Inc.* (1992), 141 N.R. 363 (Fed. C.A.). There is no evidence to support Mr. Mainil's claim that he will be irreparably harmed by the announcement of the election results, beyond his bare assertion that this would be the case. I also note that a similar argument was rejected by the British Columbia Supreme Court in *Bob v. British Columbia*, 2002 BCSC 733 (B.C.S.C. [in Chambers])."

[28] In the case at Bar, Mr. Smith has not satisfied me that if this application is refused he will suffer irreparable harm. He has, in my view, failed the second part of the three part test set out in **RJR - MacDonald Inc. v. Canada (Attorney General)**, *supra*. In light of my finding in this regard it is unnecessary for me to deal with the issue of the balance of convenience.

[29] In light of my findings, Mr. Smith's application for an interlocutory injunction will be dismissed.

Deborah K. Smith
Associate Chief Justice