SUPREME COURT OF NOVA SCOTIA
Citation: *Moore v. Catholic Episcopal Corporation*, 2015 NSSC 308

Date: 20150624
Docket: *Syd*, No. 379320
Registry: Sydney

Between:

Mary Rose Moore, Robert Moore, Natashia McSween, Ronnie McSween, Mary Julia Mason, Mary T. Mason, Louise MacNeil, Laurie Moore, Gail Kezel, Frances Tait, Derrick Petrie, Amy Billard, Kevi McNamara, Scott MacDonald, David Fraser, William Fraser, Wayne MacDonald, Maureen MacDonald, Sheila Coish

Plaintiffs

v.

Catholic Episcopal Corporation

Defendant

Judge:	The Honourable Justice John D. Murphy
Heard:	May 15, 2015, in Sydney, Nova Scotia
Written Decision:	October 29, 2015 *{Oral decision rendered June 24, 2015}*
Counsel:	Nash T. Brogan and Tj McKeough, for the plaintiffs Bruce T. MacIntosh, Q.C., for the defendant

By the Court:

INTRODUCTION

[1] This proceeding arises from a dispute between the plaintiffs, parishioners of St. Leonard's Roman Catholic Parish (which includes the former St. Agnes Parish), and the defendant, the Catholic Episcopal Corporation of Antigonish (CECA) respecting Sangaree Island, a recreational property in the Mira River, Cape Breton (the Property).

[2] In 2010 the defendant initiated sale of the Property to raise funds to contribute to its obligation to satisfy the terms of settlement of a class action. The plaintiffs, who have for many years used Sangaree Island for camping and recreational purposes, claim the defendant holds the property in trust for their benefit, and commenced action to prevent the sale and to obtain other relief. The defendant denies the existence of any trust for the benefit of the plaintiffs or any other party, and commenced action seeking a declaration that it has full and unfettered legal and equitable title to the property, and requesting, among other relief, an order requiring the plaintiffs to vacate. The two actions were consolidated into this proceeding, and the defendant brought this motion for summary judgment on evidence, seeking dismissal of the plaintiffs' claims and other relief.

BACKGROUND

[3] The plaintiffs' claim is based upon their interpretation of a June 30, 1941 warranty deed (the 1941 Deed) which conveyed Sangaree Island from Dr. and Mrs. Giovenetti (the Giovenettis) to Father Campbell, who was the priest at St. Agnes Parish before its amalgamation into St. Leonard's. The 1941 Deed conveyed the Property to the "Grantee his heirs and assigns in trust", but it did not specify the beneficiary of a trust.

[4] After 1941, the parish operated children's summer camps on the Property, and individual members of the parish, at least some of whom were miners whose wages were subject to check off to support parish activities, also used the Property as a campground during their summer holiday.

[5] In 1954 the Giovanettis executed another deed (the 1954 Deed) granting Sangaree island outright to CECA.

[6] Neither deed was registered until 1968, when a solicitor in Antigonish located both deeds in his firm's office. On December 5, 1968, he recorded at the Registry of Deeds office in Sydney the 1941 Deed and immediately thereafter on the same day the 1954 Deed.

[7] In November 1979 Father Campbell executed a quit claim deed conveying all of his trust interest in the Property to CECA, as grantee (the 1979 Deed). That deed, which was recorded December 6, 1979 by Father Campbell's personal solicitor, included the following recitals:

> Whereas by [the 1941 deed]…[the Giovenettis] conveyed [the property] to Father Raymond Campbell, as Trustee; and
>
> Whereas the said lands were in fact held for and on behalf of the Grantee; and
>
> Whereas the Grantor is desirous of conveying the said lands to the Grantee

[8] Sangaree island continued to be used for recreational purposes directed by the parish priest and parish committees, and by parishioners' families for camping. Over the years, the Property has been maintained in part through informal rental payments received from day users and campers; in more recent years non-parishioners have also camped there.

[9] Occasionally the parish discussed selling the Property, but such a move was strongly opposed by the persons who camped on the island. Concerns developed about use of the Property, and during 2005 negotiations took place between the defendant and the campers, culminating in the incorporation of The Sangaree Preservation Society (the Society).

[10] On December 1, 2005, a five-year lease was executed between CECA as landlord and the Society as tenant. The lease makes no mention of any trust affecting ownership of the Property, and no evidence indicates that there was any reference to a trust encumbering the title of the Property during the negotiations which led to the lease. Tenants who abided by the lease, including by making rental payments as campers, included some plaintiffs.

[11] As its term approached the end, the defendant declined to renew the lease, gave notice to quit to the Society effective November 30, 2010, and initiated steps to sell the Property.

[12] The plaintiffs claim CECA cannot sell Sangaree Island; they have registered a certificate of *lis pendens*, and continue to camp there. The defendant says the plaintiffs are wrongfully interfering with their right to sell the Property.

[13] Prior to commencing the action, the plaintiffs had not claimed that they obtained an interest in the Property arising from a trust created in their favour by the 1941 Deed. They now maintain that the case "centers around" the 1941 Deed and say they did not make this argument previously because they were not provided with title information. The plaintiffs do not advance a claim based on adverse possession.

[14] In the proceeding to date, exchange of documentation is complete, and all plaintiffs and representatives of the defendant have been examined at discovery.

THE SUMMARY JUDGMENT MOTION

[15] In support of its motion for summary dismissal, the defendant provided an affidavit from Father Reginald Currie, a retired CECA priest who testified respecting the historical use of the property and the circumstances surrounding Father Campbell's execution of the 1979 Deed. An affidavit was also provided by Father Paul Abbass, the Vicar General of CECA, who testified concerning parish records respecting the Property and described negotiations leading to the 2005 Lease. Both were cross-examined by plaintiffs' counsel.

[16] One of the plaintiffs, Natashia McSween, provided an affidavit that highlighted discovery evidence provided by Mary Mason, the eldest plaintiff with the longest experience involving Sangaree Island, referenced another affidavit provided by the daughter-in law of the Giovenettis in another proceeding, and also described Ms. McSween's interview with a deceased fellow parishioner.

[17] Although the plaintiffs' statement of claim seeks recovery of damages based on multiple causes of action, they acknowledged during the summary judgment hearing that success of their claim depends entirely upon whether the 1941 Deed created a trust in their favour as parishioners.

[18] The defendant correctly identifies the issue in this motion for summary judgment to be whether, on the evidence provided, the plaintiffs have any real prospect of success in proving that a trust to their benefit exists. The Court must determine on the evidence presented whether there is a genuine issue for trial.

THE TEST FOR SUMMARY JUDGMENT

[19] *Civil Procedure Rule 13.04* governs summary judgment on evidence in Nova Scotia, and provides as follows:

> **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 a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour 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.
>
> (6) The motion may be made after pleadings close.

[20] The parties are in general agreement concerning the approach the Court should follow to determine whether the evidence presented raises a genuine issue for trial. They cite similar authorities, including the recent Supreme Court of Canada decision in *Hryniak v. Mauldin* 2014 SCC 7, in which the court directed that summary judgment rules be interpreted "broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of claims" [para. 5]. The Nova Scotia Court of Appeal recognized the importance of that approach in *Blunden Construction Ltd. v. Fougere* 2014 NSCA 52. The test and approach to be applied adjudicating a summary judgment motion in Nova Scotia remains as summarized in *Burton Canada Co v. Coady* 2013 NSCA 95 at para. 87:

> [87] Before turning to the final issue raised on appeal, I wish to provide a quick summary of the law as it presently stands in Nova Scotia concerning summary judgment litigation. From the jurisprudence to which I have referred as well as the case law cited therein, a series of well-established legal principles have emerged. I will list these principles in the hope that their enumeration will serve as a helpful checklist or template to guide counsel and judges in their application. In Nova Scotia:

1. Summary judgment engages a two-stage analysis.

2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.

3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.

4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".

5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.

6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.

8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to

> the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.
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> 9. In Nova Scotia, *CPR 13.04*, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.
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> 10. Summary judgment 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.
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> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
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> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[21] The evidence contemplated by *Rule 13.04(3)* respecting the first stage of the summary judgment test must relate to there being no material facts in dispute. (See *Burton*, Para 87, Item 2.) At the second stage of the test, the respondent's duty is more than presenting only bare allegations of fact – it must present evidence which lends some support to the claim it advances (*Somers v Poirier*, 2008 NSSC42 at para 23).

[22] Plaintiffs' counsel at paragraph 37 of their brief recognizes the difficulty developing evidence in this case:

> 37. The case at bar centers around a deed from 1941 and as such everyone directly involved with the property transfer has since passed away. As a result the plaintiffs are forced to rely on hearsay evidence in support of their claim.

MATERIAL FACT IN DISPUTE

[23] The defendant maintains that the plaintiffs' claim is not based on disputed material facts, but rather on only bold assertions, rumour, folklore, and inadmissible evidence. The defendant says there is no material factual or evidentiary support for the cause of action that plaintiffs assert.

[24] The plaintiffs say the material fact in dispute is:

> "who was the land deed to in 1941. As the decision of this is a fact (sic) would sway the trier of fact one way or another it is a material fact. As there is a material fact in dispute this Honorable Court cannot grant Summary Judgment to the Defendant (Brief, Para. 60).

At paragraph 48 of their brief the plaintiffs say:

> It is submitted the most material fact in this case is who the property was deeded to in 1941 and as there is no agreement on that fact this motion must fail.

[25] The plaintiffs' claim is based upon creation of a trust in their favour by the 1941 Deed. In my view, before addressing what the plaintiffs identify as the material fact in dispute – to whom the Property was deeded in 1941 – the Court must determine whether there is a prerequisite or more basic material issue for trial – *did the1941 Deed create a trust.*

[26] The defendant's position is that there is no trust-based claim because the legal requirements for establishing the trust claimed by the plaintiffs are not met.

[27] Trusts are relationships in which one party, the trustee, holds title to the property, and the beneficial use of the property is vested in another party, the beneficiary.

[28] In Waters' Law of Trusts in Canada, fourth ed. at page 140 the author identifies the requirements to create a trust:

> **For a trust to come into existence, it must have three essential characteristics.** As Lord Langdale M.R. remarked in *Knight v. Knight*, in words adopted by Barker J. in *Renehan v. Malone* and considered fundamental in common law Canada, **(1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain.** This means that the alleged settlor, whether he is giving the property on terms of a trust or is transferring property on trust in

> exchange for consideration, **must employ language which clearly shows his intention that the recipient should hold on trust**. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Third, **the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.** [emphasis added, citations omitted]

[29] I agree with the defendant that in this case the 1941 Deed does not meet the third certainty – "the object of the trust." The plaintiffs claim there was an express or implied trust by the defendant that the Property would never be sold and could be used in perpetuity by the parishioners, their families and extended families (Statement of Claim para. 10). However, the 1941 Deed conveys to Father Campbell and "his heirs and assigns in trust." No beneficiaries are identified or described in the document – it provides no certainty as to who is the beneficiary.

[30] The plaintiffs' premise that the 1941 Deed created a trust must fail because no object is identified with certainty. As the plaintiffs' claim rests entirely upon creation of a trust in their favour, without a trust no material fact is in dispute, and no genuine issue for trial arises.

REAL CHANCE OF SUCCESS?

[31] Even if a material dispute arose in this case respecting the threshold issue – the creation of a trust – the evidence does not raise a material fact to support the plaintiffs' claim that the parishioners are beneficiaries. Documentary evidence clearly suggests otherwise – if a trust were created, the only party with a real chance of being beneficiary is CECA, not the plaintiffs.

[32] Both the 1954 Deed and the 1979 Deed evidence intention to benefit the defendant. The 1954 Deed from the Giovenettis outright conveyed Sangaree Island to CECA. The recitals in the 1979 Deed strongly suggest that Father Campbell had been holding the property in trust for CECA since 1941.

[33] The documentation establishes that the failure to identify a beneficiary in the 1941 Deed was rectified either by the outright conveyance to CECA in the 1954 Deed or by the 1979 Deed to CECA. Despite plaintiffs' counsel's vigorous

cross examination of Father Currie, nothing in the circumstances surrounding Father Campbell's execution of the 1979 Deed supports the plaintiffs' suggestion that the Giovenellis did not intend CECA to benefit from any trust, or that Father Campbell's action contradicted any intention to create a trust in the plaintiffs' favour.

[34] The plaintiffs have not presented admissible evidence which raises a disputed material fact or establishes their claim has a real chance of success. The theories they propose are unsupported, including hypotheses that the deceased parishioners purchased the Property by check off from DEVCO pay, that Father Campbell as a trustee created a new trust in their favour, or that the parish priest held the Property for parishioners' benefit outside of his capacity as priest so that Sangaree island was not church property.

[35] The plaintiffs did not raise the trust issue, upon which they now acknowledge their claim rises or falls, until commencement of this proceeding. The unreliable hearsay statements to which the plaintiffs refer do not diminish the defendant's submission there are no material facts in dispute, or establish their claim has a real chance of success.

[36] The fact the plaintiffs identify as most material in this case – to whom the Property was deeded to in 1941 – is not in dispute. The conveyance, if effective, was to Father Campbell in trust. The plaintiffs have not provided evidence to contradict the 1979 Deed or 1954 Deed, which respectively demonstrate that CECA either was the beneficiary of trust created by the 1941 Deed, or obtained the Property by outright conveyance.

[37] While not in itself determinative, the defendant's position is supported by the Society's entering the 2005 Lease as tenant. The plaintiffs have not challenged the material facts of ownership advanced by the defendant.

CONCLUSION

[38] The plaintiffs have acknowledged their claim rises or falls on their ability to establish a trust in their favour. The defendant has demonstrated that, based on the undisputed material facts, no trust in the plaintiffs' favour exists. The plaintiffs have not met the evidentiary burden of proving that their claim has a real chance of success. The summary judgment motion is allowed and the plaintiffs' claim dismissed.

[39] Following delivery of judgment orally, the parties agreed respecting the form of Order.

J.