SUPREME COURT OF NOVA SCOTIA
Citation: *Hannem v. Stilet*, 2015 NSSC 341

Date: 20151126
Docket: Hfx No. 429723
Registry: Halifax

Between:

Mark Wesley Hannem

Plaintiff

v.

Daniel Marvin Stilet, Shannon Lynne Stilet, Kelli Denise Lendrum, Barbara Elizabeth Byrne, Georgina Ann Byrne and Patrick Joseph Byrne

Defendants

DECISION

Judge: The Honourable Justice Jeffrey R. Hunt

Heard: July 13, 2015, in Halifax, Nova Scotia

Decision (written): November 26, 2015

Counsel: Tim Hill, Q.C., Solicitor for the Plaintiff
Jason T. Cooke and Leon Tovey, Solicitors for the Defendants

By the Court:

Introduction

[1] This is a motion for summary judgment on evidence brought by the Plaintiff against five of the six defendants. The sixth, Georgina Ann ("Gina") Byrne, has already had a default judgment registered against her as a result of her failure to defend the claim.

Facts

[2] In August, 2004 the parties incorporated 3092653 Nova Scotia Limited ("the Company"). The Company was created for the purpose of operating a Boston Pizza franchise in Lower Sackville, Nova Scotia. The majority of the investors were extended family members. Mark Hannem and his spouse were exceptions. They were acquaintances and neighbours of Barbara Byrne. The Hannems learned of the investment opportunity and opted to participate. The Hannems, like Barbara Byrne, were residents of Alberta.

[3] Barbara Byrne is the mother of P.J. Byrne and was, at the time of the investment, the mother-in-law of Gina Byrne.

[4] The shareholdings remained unchanged throughout the relevant time period:

- Mark Hannem - 15%;
- Brenda Hannem - 15%;
- Shannon Stilet - 10%;
- Kelli Lendrum - 10%;
- Barbara Byrne - 30%;
- Gina Byrne - 10%;
- P.J. Byrne - 10%.

[5] The parties executed a series of documents including a Shareholder's Agreement and various financing documents. The financing was with GE Capital. The loan was secured by three security instruments:

1. General Security Agreement (the "GSA");
2. Real Property Mortgage (the "Mortgage");
3. Unlimited personal guarantees (the "Guarantees").

All parties executed these documents. Of specific relevance to this proceeding is the Guarantee which was dated May 19, 2005.

[6] The restaurant began operation in September, 2005. In accordance with the terms of the Shareholder's Agreement the day to day operation of the business was in the hands of Gina and P.J. Byrne.

[7] Within the initial corporate structure Gina Byrne acted as President and P.J. Byrne as Secretary/Treasurer. Mr. Byrne was, at the time the business commenced, a full-time commercial pilot. Within months of the restaurant becoming operational he was asked by his employer to transfer to Ontario. P.J. Byrne opted to take a lesser position and remuneration in order to continue to reside in Nova Scotia and thus remain closer to the business.

[8] Gina Byrne continued to act as the General Manager of the restaurant and received an agreed upon yearly salary.

[9] The franchise struggled financially from the very beginning. Relations among the investors frayed as the financial woes continued and deepened.

[10] In mid-2009 a meeting of shareholders was held in Nova Scotia. It culminated in Mark Hannem making accusations of mismanagement and misappropriation against P.J. and Gina Byrne. These allegations were vehemently denied by the Byrnes. In response they resigned their roles in day to day management as well as their positions as officers of the corporation. Following the

reorganization the Plaintiff became President of the Company with Barbara Byrne assuming the title of Vice-President. Shannon Stilet was named Secretary/Treasurer.

[11] Between June, 2009 and August, 2010 Mark Hannem became more involved in directing the day to day operations of the restaurant. He instituted management changes including the hiring of a new General Manager at a salary which the Defendants allege exceeded the amount that could be paid without shareholder approval.

[12] In August, 2010 the shareholders voted to re-instate Gina Byrne as General Manager. The evidence is that she and P.J. Byrne then reassumed day to day operational duties and control.

[13] Following this change in August 2010 profitability did not improve. Some effort was made by the Byrnes to explore options for refinancing or even for a sale of the business. As a function of the financial situation and overall negative performance of the restaurant, none of these efforts proved fruitful.

[14] Mark Hannem remained as notional President of the corporation after mid 2009. Following the August 2010 changes he essentially was President in name only. Relations and communication between the Hannems and other investors

continued to deteriorate to the point of non-existence. Day to day operation of the restaurant was in the hands of Gina and P. J. Byrne.

[15] The Company eventually came into default of its obligations to GE Capital under the terms of the GSA, Mortgage and Guarantee. On October 17, 2012, GE Capital demanded payment of $860,341.91. The debt was also continuing to grow as it attracted further interest. On October 29, 2012 the Plaintiff made a payment of $95,000.00. Following negotiation he eventually made a further payment of $761,802.13 which was acknowledged by GE Capital to represent a full pay out of all amounts owed under the loan. The final payment occurred on February 26, 2013. The total paid was $856,802.13 (the "GE Capital Debt).

[16] There is no question that neither the Company or the Defendants provided any payment towards the amount demanded by GE Capital. There is also no question that GE Capital considered the debt of the Company and the guarantors to have been fully satisfied by the payments made by the Plaintiff. No party has challenged the validity of the GE Capital debt nor the right of GE Capital to act on its security including the Guarantees.

[17] On June 23, 2014, Hannem demanded payment from the Defendants of their pro fata shares (based on shareholding percentages) of the principal, interest

and fees owing under the terms of the Loan Agreement paid out by the Plaintiff to GE Capital. Hannem included with the demand a Notice of Intention to Enforce Security in accordance with s. 244 of the **Bankruptcy and Insolvency Act**. No payments have been made to Hannem by the Company or other Defendants in response to this demand and Notice.

[18] On July 3, 2014 the Plaintiff appointed as Receiver of the Company the firm of Green Landers Limited. This appointment was made pursuant to the GSA. A Notice of Receiver dated July 10, 2014 was delivered to the Defendants. No party opposed the appointment of the Receiver.

[19] In order to clear the way for the Receiver to attempt to realize on the business, Hannem paid Boston Pizza International Incorporated ("BP International") the sum of $60,000.00 against the $100,000.00 in unpaid royalties then owing. Following this payment BP International agreed to an assignment of the franchise agreement to the Receiver. This was a pre-condition to any sale of the operation as a going concern. The Receiver eventually sold the assets of the Company to Whynot Family Restaurant Incorporated for $385,000.00.

[20] The Company continued to be insolvent after the asset sale. On August 21, 2014 a Notice of Application for Bankruptcy Order was filed by the Plaintiff. This was not opposed and the Bankruptcy Order was issued on September 2, 2014.

[21] The Plaintiff seeks Summary Judgment against his fellow Guarantors whose obligation he has discharged.

[22] The Plaintiff asserts this is a straight forward instance of his having stepped into the shoes of GE Capital following his payment of the jointly guaranteed debt. He relies on the wording of the Shareholders Agreement and security documents as well as general principles of contract law and subrogation. The Plaintiff is seeking in this proceeding to recover against each Defendant only to the extent of their shareholding percentage on a pro rata basis. This is a narrowing of his rights against the Defendants who otherwise would be exposed to a claim of joint and several liability.

[23] The Defendants say they have various defences and set offs against the Plaintiff. They resist summary judgment. They assert a right of set off and say their claims against the Plaintiff are a bar against summary judgment.

Issue

Is the Plaintiff entitled to summary judgment on evidence in these circumstances?

Legal Authorities

[24] **Nova Scotia Civil Procedure Rule** 13.04 addresses to a motion for 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.

[25] The Nova Scotia Court of Appeal has recently reviewed and summarized the law with respect to summary judgment motions on evidence. In **Burton Canada Company v. Coady,** 2013 NS CA 95, Saunders, JA, for the Court summarized the two step analysis as follows:

> 87…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 check list or template to guide counsel and judges in their application. In Nova Scotia:
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> 1. Summary judgment engages a two stage analysis;
> 2. The first stage is concerned only 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 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 change 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.
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> 8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plan, 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.
> 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.
> 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.
> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
> 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.

[26] The Supreme Court of Canada has also delivered recent comment with respect to the application of rules for summary judgment. In **Hryniak v. Mauldin,** [2014] S.C.J. No. 7 (SCC). Karakatsanis, J. said that the rules surrounding the granting of summary judgment ought to be interpreted broadly:

> 4. …in my view a trial is not required if a summary judgment motion can achieve a fair and just adjudication. If it provides a process that allows the

> judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious, and less expensive means to achieve a just result than going to trial.
>
> 5. To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims.

[27] The Supreme Court of Canada went on to offer comment with respect to what constitutes a genuine issue requiring a trial:

> 49 A genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process:
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> (1) Allows the judge to make the necessary findings of fact;
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> (2) Allows the judge to apply the law to the facts, and
>
> (3) Is a proportionate, more expeditious and less expensive means to a just result?
>
> 50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard of fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[28] While the **Hryniak** decision pertained to the Ontario Rules of Court there have subsequently been a number of Nova Scotia cases which have affirmed that the principles are applicable to this jurisdiction. These include: **Mason Tech Inc.**

v. Aaffinity Contracting, 2014 NSSC 164 and **McFarlane v. MacDonald**, 2015 NSSC 107. In **Mason Tech. Inc.,** Justice LeBlanc stated:

> 33 The discussion of the technical aspects of summary judgments in Hryniak is concerned with the Ontario rule, which provides much broader powers to the judge than does Rule 13.04. However, it is clear that the court intended the policy aspects of the decision to be of general application.

Analysis

[29] It is not every factual dispute or nuance which can be the basis for resisting a summary judgment motion. Any disputed fact must be material, i.e. essential to the claim or defence. A dispute over an incidental or marginal point will not be sufficient.

[30] The Defendants in this matter have effectively made one substantive argument respecting material disputed facts (outside of the quantum which will be addressed separately). The Defendants assert that there is a question as to whether the Plaintiff is in fact subrogated to the claim of GE Capital. They assert that no assignment document has been produced. The existence of the Financing documents is not in dispute; neither is the legitimacy of the demand by GE Capital nor the payment by the Plaintiff and the subsequent satisfaction of the debt with GE Capital. The operation of the principles of subrogation, or the interpretation of

the Shareholders Agreement, are not disputes of fact but rather questions of legal interpretation and application.

[31] Other factual points raised by the Defendants are effectively limited to issues of quantification or set off.

[32] I conclude there are no material facts in dispute with respect to the liability of the Defendants to the Plaintiff. For this reason the Plaintiff has discharged his burden at the first stage of the analysis.

[33] Having found there are no material facts in dispute with respect to the merits of the claim (leaving aside, for the moment, the issue of quantum) I must determine whether the Defendants have satisfied their evidentiary burden of demonstrating that their defence has a real chance of success. To satisfy this burden the Defendants must rely on evidence and not mere assertions in pleadings or otherwise.

[34] A party can establish a real chance of success if they demonstrate a prospect rooted in evidence. It cannot be a prospect based on a "hunch, hope or speculation". This stage of analysis requires an assessment of the relative merits of the litigants positions.

[35] I cannot find that any of the defences raised by the Defendants on the issue of liability have any prospect of success. Their arguments were directed towards asserting a right of set off. During the course of argument it was acknowledged by the Plaintiff that one option available to the Court would be to grant summary judgment and stay the entering of judgment pending the disposition of the claim of set off.

[36] After reviewing the evidence and having regard to the material undisputed facts, I conclude that the Plaintiff ought to have summary judgment on the amount paid on the GE Capital Debt in order to discharge the guarantees of the Defendants. I find that the Plaintiff clearly "stepped into the shoes" of GE Capital. This would be the case on contractual as well as equitable grounds. For the purposes of this Motion the Plaintiff was prepared to proceed only with respect to the core debt amount paid to GE Capital. Their claim also included "secondary" amounts such as the payment to Boston Pizza International and also the realization and recovery costs. These were acknowledged by the Plaintiff to be based in a different legal argument. They recognized that these claims were not ones that fell within the GE Capital Debt subrogation umbrella. These secondary claim amounts will not form part of the Summary Judgment Order.

[37] The Applicant will have summary judgment on this basis. Enforcement of the judgment will be stayed pending the disposition of the Defendants set off claim or further Order of the Court.

[38] All parties wish to have this next phase of the process proceed as quickly as possible. I direct that within 30 days the parties make arrangements to bring the matter forward for a case conference. The purpose of this conference will be to discuss scheduling and disclosure issues necessary to advance the remaining issues as swiftly as reasonably possible. In giving this direction I am intending to follow, to the extent possible, the process adopted by Justice Gogan in the matter of **Keating Construction Company v. Ross**, 2015 NSSC 173.

[39] Summary judgment will be granted in the sum of $856,802.13 plus interest since the date of payment. The applicable rate was considered briefly at the hearing but will be determined based upon submissions from the parties. Any submissions will be filed within 30 days of today.

Costs

[40] The Applicant is entitled to costs of the Motion. Parties are free to make written submissions with respect to costs at any point within the next 30 days.

[41] To assist in focusing any submissions with respect to costs, I note the motion, while successful, has not been "…fully determinative of the entire matter…" within the meaning of Rule 77(4). If the parties are not successful in resolving the costs issue, any submissions ought to be framed with this consideration in mind.

Justice Jeffrey R. Hunt

11/26/15