

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Enterprises Ltd. v. MacLeod 2003 NSSC 88

Date: 20030325

Docket: 193072

Registry: Truro

Between:

Nova Enterprises Limited

Plaintiff

v.

Donald D. MacLeod

Defendant

DECISION

Judge: The Honourable Justice Gerald Moir
Heard: March 25, 2003 in Truro, Nova Scotia
Counsel: Mr. Robert H. Pineo, solicitor for the plaintiff
Mr. Gary A. Richard, solicitor for the defendant

Moir, J. (orally):

[1] The statement of claim includes "The Defendant, Donald D. MacLeod had several trucks repaired by the Plaintiff". In the circumstances, the pleading allows the plaintiff to prove surrounding agreements at trial. That is, the statement of claim clearly pleads that Mr. MacLeod had a contract with Nova Enterprises to repair trucks. The defence consists of a general denial followed by this:

The Defendant specifically denies that any repairs performed by the Plaintiff in respect of which it has made claims against the Defendant were in fact made on trucks of the Defendant and, therefore, the Defendant has no liability for the Plaintiff's claim.

[2] The plaintiff applies to strike the defence under Rule 14.25(1) and filed an affidavit in that regard. The defendant objects to the affidavit referring to *Seacoast Towers Services Ltd. v. MacLean*, [1986] N.S.J. No. 312 (N.S.C.A.) and *Sherman v. Giles*, [1994] N.S.J. No. 572 (N.S.C.A.).

[3] The defendant argues that the defence is, on its face, reasonable. I do not agree that the defence is, on its face, reasonable. I have concluded that it should be struck under Rule 14.25(1)(a) as disclosing no defence. Further, I do not agree that the affidavit is to be ignored and, as a consequence, I would also strike the defence under Rules 14.25(1)(b) and (d). Incidentally, I take Rule 14.25(1)(b) to simply use old fashioned language to refer to what was always regarded as an abuse of process. Eventually in the development of that field of law, a defence which was absolutely unsustainable came to be recognized as an abuse of process. It is not often resorted to today because of summary judgment proceedings.

[4] The reason I would strike under Rule 14.25(1)(a) is that the explicit pleading raises no defence. One obviously can contract for the benefit of a third party. The reasons I would strike under the balance of Rule 14.25 have to do with this:

(a) The affidavit responds to the situation where the plaintiff or the Court might imply from the defence an allegation that the plaintiff contracted with the defendant's company rather than with the individual defendant. In such a situation the application would have to be analyzed on the basis of a possible amendment to the statement of defence even though one has not been requested.

(b) The affidavit shows that such a defence could not possibly succeed. The situation is very much like that in *Silver v. Co-op General Insurance Company*

(2002), 207 N.S.R. (2d) 14 (C.A.). The affidavit does not contradict any averment in the statement of defence. It merely provides details missing from the statement of defence if it was intended, and Mr. Richard indicates it was, to raise a defence as to contracting parties. Therefore, I am exercising my discretion to consider the affidavit.

(c) The affidavit shows that the credit was contracted in 1996 and that the corporation was incorporated in 1998. On those points particularly, and on the whole of the affidavit evidence, I am satisfied that a defence that Mr. MacLeod was not the contracting party could not possibly be implicated by the statement of defence. Further, even in an amended state, such a defence would be absolutely unsustainable.

[5] Therefore, I allow the application and I will enter judgment in favour of the plaintiff.

[6] Costs. Mr. Pineo?

[7] **MR. PINEO:** It 's the applicant's position that \$500 would be appropriate.

[8] **THE COURT:** Mr. Richard?

[9] **MR. RICHARD:** I have no argument with that My Lord.

[10] **THE COURT:** Good. You can prepare an Order and send it to Mr. Richard, I'll be down in Halifax.

[11] **MR. PINEO:** Okay.

[12] **THE COURT:** Alright. Thank you. \

[13] **MR. PINEO:** That concludes my matters before the Court this morning.

[14] **THE COURT:** Thank you very much Mr. Pineo.

[15] **MR. RICHARD:** And mine My Lord. Thank you.

[16] **THE COURT:** And thank you Mr. Richard.

J.

Truro, Nova Scotia
25 March 2003