IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Clarke v. Halifax (Regional Municipality), 2008 NSSC 235

Date: 20080725
Docket: SH 265203
Registry: Halifax

Between:

Kenneth Clarke and Judy Diane Clarke

Respondents/Plaintiffs

and

Halifax Regional Municipality
Lancaster Holdings Limited and Joyce Cooper
Parker Longstaff Surveyors and Frank Longstaff

Applicants/Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: July 2 and 3, 2008, in Halifax, Nova Scotia

Written Decision: July 31, 2008

Counsel: Judy Clarke, on her own behalf and on behalf of Kenneth Clarke
Randolph Kinghorne, on behalf of Halifax Regional Municipality
Matthew Moir, on behalf of Lancaster Holdings Ltd. and Joyce Cooper
Roderick (Rory) Rogers, on behalf of Parker Longstaff Surveyors and Frank Longstaff (observing)

By the Court:

[1] On April 25, 2006, Kenneth and Judy Diane Clarke (the "respondents") commenced an action against Halifax Regional Municipality, Lancaster Holdings Limited, Joyce Cooper, Parker Longstaff Surveyors and Frank Longstaff. Defences have been filed by all named defendants.

[2] The respondents are self-represented. Their action, which is framed in negligence, arises out of the purchase of a lot of land described as Lot 18 on a survey plan entitled: "Plan of Survey showing Lots 1 to 18 incl., Montague Village, a Subdivision of Lands owned by Lancaster Holdings Limited, Montague Road, Halifax County, Nova Scotia." The plan, prepared by Frank Longstaff Surveying Limited, was signed by Frank Longstaff, Nova Scotia Land & Mine Surveyor on the 12th day of June, A.D. 1986. It was approved by the Development Officer for the Municipality of the County of Halifax on the 15th day of August, A.D. 1986. The respondents acquired title to Lot 18 by way of Warranty Deed dated the 14th day of May, 1998. The deed was registered at the Registry of Deeds office for the County of Halifax on May 21st, 1998.

[3] Lot 18 contains 10,341.82 square meters. A portion of the lot is subject to periodic flooding or "ponding" as it is sometimes referred to. There is also a brook or stream which runs through the property. Neither the Plan of Survey nor the legal description makes reference to the watercourse or the area that is subject to "ponding."

[4] The respondents nonetheless were aware of the existence and location of the watercourse and the area subject to ponding prior to purchasing the lot in 1998. They not only viewed the property but they also held discussions with representatives of the Departments of Environment, Fisheries and Transportation regarding septic installation, access to the public road and the possible construction of a bridge over the brook. Evidence of this is contained in a letter dated April 18, 1998, signed by the plaintiff, Kenneth Clarke, and directed to someone named "Stephen." This letter pre-dates the closing of the sale to the respondents which occurred on or about May 14, 1998. A copy of this letter is attached to the affidavit of Beverly LaPenna which was filed in support of the application brought on behalf of Lancaster Holdings Limited and Joyce Cooper. It is clear from reading this letter that the respondents were not only aware of the existence and location of the pond and the brook but also that their plans to develop the land were subject to Provincial Government regulations respecting existing waterways. They might not have known the total extent of the impact that the brook and pond would have on future development but it is apparent they had some awareness of and appreciation for the potential restrictions involved.

[5] The respondents say they did not realize they had a cause of action against the various defendants until June 1, 2005. It was then that they were provided with a copy

of an earlier Plan of Survey prepared by Frank Longstaff, Nova Scotia Land Surveyor, bearing the date of 26 April, 1985. This 1985 plan was entitled:

> PLOT PLAN SHOWING DETAIL ALONG EXISTING WATERCOURSE LYING BETWEEN MONTAGUE ROAD and PROPOSED BURNHOPE DRIVE.

It depicted a portion of the Montague Village Subdivision and showed the location of the pond and brook within the boundaries of the lot which is now owned by the respondents.

[6] The respondents claim that Mr. Longstaff's failure to show the brook and pond on the Plan of Subdivision which he prepared a little more than a year later amounts to negligence. They further contend that Halifax Regional Municipality as successor to the Municipality of the County of Halifax is liable in negligence for approving the Subdivision Plan which they knew, or at least ought to have known, was missing this detail.

[7] While it is not clear from reading the statement of claim, the respondents' cause of action against Lancaster Holdings Limited and Joyce Cooper appears to be based on negligent misrepresentation or perhaps vicarious liability for the alleged negligence of their agents, Parker Longstaff Surveyors and Frank Longstaff. It might also be based on breach of contract. It is difficult to know for sure.

[8] The respondents contend that the legal description for their property fails to disclose the encumbrance created by the existence of the brook and pond. They suggest that the legal description should also indicate the existence of an easement regarding drainage. Unfortunately the statement of claim does not make this clear nor does it provide sufficient facts to effectively identify this as a cause of action. The Court is mindful of the fact that the respondents are not legally trained. Even taking this all into account, it is still difficult to understand how this allegation constitutes breach of contract, negligence or negligent misrepresentation on the part of Lancaster Holdings Limited and Joyce Cooper.

[9] The Court has not been asked to consider striking all or any portion of the statement of claim, nor is it being asked to order possible amendments to the document. The two applications that are before this Court are for summary judgment.

[10] Lancaster Holdings Limited and Joyce Cooper ask the Court to grant an order for summary judgment pursuant to **Civil Procedure Rule** 13 on the grounds that the action is statute-barred pursuant to the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258.

[11] Halifax Regional Municipality (henceforth "HRM") similarly requests summary judgment based on a limitation defence but only as it pertains to a portion of the respondents' claim. It points out that the *Municipal Act*, R.S.N.S. 1967, c. 192, which is the predecessor legislation governing the affairs of the former Municipality of the County of Halifax, only provided for a twelve month limitation period in which to bring an action. A similar provision is contained in sub-section 512(1) of the *Municipal Government Act*, S.N.S. 1998, c. 18 (as amended).

[12] Counsel for HRM also relies on sub-section (4) of section 504 of the *Municipal Government Act*, which states:

> 504 (4) If a municipality or a village receives a certification or representation by an engineer, architect, surveyor or other person held out to have expertise respecting the thing being certified or represented, the municipality or the village and its officers and employees are not liable for any loss or damage caused by the negligence of the person so certifying or representing.

SUMMARY JUDGMENT APPLICATION

[13] **Civil Procedure Rule** 13 provides for summary judgment applications. It reads:

> 13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (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.

[14] In the case of a defendant seeking a dismissal of an action, the initial burden is on the applicant/defendant to show that there is no genuine issue of material fact requiring a trial. If successful, the burden then shifts to the respondent/plaintiff to establish that his or her (or its) claim has a real chance of success. The leading case on summary judgments is **Guarantee Co. of North America** v. **Gordon Capital Corp.**, [1999] 3 S.C.R. 423(S.C.C.). In a joint decision, Iacobucci and Bastarache, JJ., stated at para. 27:

> 27 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 Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 15; Dawson v. Rexcraft 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).

[15] This test was adopted by the Nova Scotia Court of Appeal in the case of **United Gulf Developments Ltd.** v. **Iskandar** (2004), 222 N.S.R. (2d) 137. Roscoe, J.A., at para. 9 on p. 5 wrote:

> 9 .... 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 (S.C.C.).

Justice Roscoe then goes on to recite para. 27 of the decision which is the same paragraph that I earlier cited.

a) Limitation

[16] Lancaster Holdings Limited and Joyce Cooper (henceforth “Lancaster & Cooper”) and HRM both raised a limitation defence in their pleadings. The discoverability rule would therefore apply.

[17] In **Central & Eastern Trust Co.** v. **Rafuse**, [1986] 2 S.C.R. 147 (S.C.C.), LeDain, J., for the Court, described the discoverability rule as follows at pp. 151-152:

> ....A cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

[18] The respondents, as previously indicated, submit that they only became aware of the facts giving rise to their action when they were presented with a copy of the 1985 Plan of Survey showing the watercourse and pond. They first obtained a copy of this plan on June 1, 2005. To accept this argument, the Court would have to reject or disregard the respondents' actual knowledge of the existence and location of the watercourse and pond on their property prior to its purchase in 1998. The letter signed by Kenneth Clarke on April 28,1998, would have to be ignored. This letter reveals a prior awareness on the part of the respondents of certain Provincial Government regulatory restrictions pertaining to potential use and development of the property. They, nonetheless, proceeded to purchase the property a few weeks later. It is not necessary that the full extent of the problem be known in order to start the prescription time-clock ticking. It is clear that the respondents either knew or ought to have known that the existence of the watercourse and pond might affect the future use and development of the property prior to its purchase on May 14, 1998. As such, their action in negligence (or negligent misrepresentation if that is what is being alleged) would have had to have been commenced against Lancaster & Cooper no later than May 14, 2004 in order to comply with the limitation period set out in the *Limitation of Actions Act*.

[19] The limitation period for commencing an action against the municipality, is contained in section 512(1) of the *Municipal Government Act*. It states that "the limitation period for an action or proceeding against a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them, is twelve months." The *Limitation of Actions Act* allows for this type of statutory over-ride in section 2(3) where it states:

> 2 (3) Nothing in this section contained shall extend to any action given by any statute when the time for bringing such action is by any statute specially limited.

[20] The Legislature in its collective wisdom decided to shorten the time period for commencing an action against municipalities and their elected representatives, officers and employees. It has the legislative authority to do so.

[21] It should also be noted that the *Municipal Government Act* in sub-section (3) of section 512, requires one month's notice to be served on the intended defendant prior to the commencement of the action. There was no evidence presented to confirm if this has or has not been done in the case that is before this Court. For purposes of this application it does not really matter. The limitation period has been missed. Even if the respondents had applied under section 3(2) of the *Limitation of Actions Act* to disallow the time limitation defence, the very latest the action against HRM could have been commenced would have been on or about May 14, 2004. Given that it was filed more than 23 months after this date, it is clearly out of time.

[22] The respondents have not applied to extend the limitation period for filing their action. They have taken the position that they are within the time period prescribed by legislation. I have concluded, based on the undisputed facts of this case, that they have failed to commence their action in time.

[23] The two applicants have established that there is no genuine issue of material fact requiring trial. The onus which then shifts to the respondents to establish their claim as being one with a real chance of success has failed. I, therefore, rule that the action against Lancaster & Cooper and that aspect of the action against HRM, pertaining to the alleged negligence of its Development Officer, are dismissed.

b) *Municipal Government Act*, Section 504(4)

[24] HRM also raised the provisions of section 504(4) of the *Municipal Government Act* as a defence to the respondents' action. Sub-section (4) states:

> 504 (4) If a municipality or a village receives a certification or representation by an engineer, architect, surveyor or other person held out to have expertise respecting the thing being certified or represented, the municipality or the village and its officers and employees are not liable for any loss or damage caused by the negligence of the person so certifying or representing. 1998, c. 18, s. 504; 2001, c. 35, s. 26.

[25] HRM's Development Officer relied on the Plan of Subdivision certified by a duly qualified surveyor. Sub-section (4) of section 504 makes it clear that the municipality and its officers or employees shall not be liable for any loss or damage caused by the negligence of the person so certifying or representing. The Development Officer was entitled to rely on the certificate of the surveyor. As such,

HRM and its Development Officer cannot be held liable for so doing. On this basis as well, I would dismiss the respondents' claim against HRM as it relates to any alleged negligence on its part or on the part of its development officer.

[26] The Court is prepared to hear from the parties regarding costs. If the parties feel that an agreement can be reached I will be happy to grant you time to try to do so. Otherwise, I will hear from you now.

McDougall, J.