IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Levasseur v. Crawley, 2008 NSSC 303

Date: 2008/10/16
Docket: S. H. No. 287475
Registry: Halifax

Between:

Yves Levasseur

Plaintiff

and

Trevor Sean Crawley, Joshua Kenneth Hanley, Christopher Paul Myer and Ryan David Walker

Defendants

Judge: Justice N. M. Scaravelli

Heard: October 7, 2008, in Halifax, Nova Scotia

Counsel: Gilles Deveau, for the Plaintiff
Shelley Wood, for the Defendants

By the Court:

[1] This matter involves an Interlocutory Application by the Plaintiff for an Order excluding Co-Defendants from each other's examination for discovery.

Background

[2] The Plaintiff started an action against the Defendants arising from the purchase of a residential property. The Plaintiff has alleged both in his Statement of Claim and Affidavit in support of this Application that, after taking possession of the property, he noticed "extensive and persistent water leakage in the basement" and subsequently determined the concrete foundation was "leaking and broken without any footings under the foundation".

[3] All Defendants had previously completed the same Property Condition Disclosure Statement (PCDS) which (according to the Purchase and Sale Agreement) formed part of the Agreement. The PCDS provided in part as follows:

> 6A Are you aware of any structural problems, unrepaired damage or leakage in the foundation?

Answer: No

8C Have all necessary building permits been issued for improvements on the property?

Answer: Does not apply.

[4] The Plaintiff alleges that the Defendants representations with respect to the foundation were made negligently or recklessly, not caring whether such statements were true or false. The Plaintiff further alleges the condition of the foundation constituted a material latent defect known to the Defendants in which the Defendants were under a legal duty to disclosed

[5] All Defendants are represented by the same legal counsel. Their Statement of Defence essentially denies all of the Plaintiff's allegations. The Defendants are unrelated and currently reside in different locations. One of the Defendants resides outside the Province of Nova Scotia, namely Fort McMurray, Alberta.

[6] Discovery examination of all Defendants was scheduled by Agreement between counsel. Upon attendance for Discovery, Plaintiff's counsel requested

that Defendants be excluded during each other's testimony. Counsel for the Defendants refused the request resulting in this application.

[7] None of the Defendants filed an Affidavit in response to the Affidavit filed by the Plaintiff in this Application.

[8] **Law and Analysis**

[9] While *Civil Procedure Rule 30.06* deals with the exclusion of witnesses at trial, the *Rules* do not deal with the exclusion of a party at discovery. Our *Civil Procedure Discovery Rules 18, 19 and 20* allow for full production and disclosure of relevant evidence prior to trial. This enables the parties to become informed of and to prepare for the case they have to meet. In *Global Petroleum Corp. v. CBI Industries Inc.,* (1998), 172 N.S.R. (2d) 326 C.A., our Court of Appeal stated at paragraph 16:

> The rules respecting procedure and discovery in civil matters should be liberally interpreted to give effect to full disclosure prior to trial. The object is to avoid surprise, save expense, and encourage settlement. See *Westminer Canada Holdings Limited v. Coughlan* (1989), 91 N.S.R. (2d) (N.S.C.A.) at 221; *Soke Farm Equipment v. New Holland Canada Limited* (1992), W.W.R. 762 (Sask. C.A.) at 768.

[10] In *MacMillan v. Slaunwhite,* 1979 CarswellNS 63 Chief Justice Cowan proposed that an Order may be granted for the exclusion of individual co-parties during discovery examination where the following factors exist:

(I) individuals have a common interest;

(ii) the same ground will be covered in discovery examination;

(iii) questions of credibility will be raised at trial;

(iv) there is no prejudice to the party opposite.

[11] In *Coughlan v. Westminer Canada Holdings Limited,* (1989), 91 N.S.R. (2d) (N.S.C.A.) at 221, the Court of Appeal reviewed the issue including the *MacMillan* decision as follows:

> 9. Robert White, Q.C. in *The Art of Discovery* (1990: Canada Law Book Inc., Ontario) discusses the individuals who are to be present at discovery examinations. His discussion of this issue is limited to parties and experts. With regards to parties, he states at p. 107:
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> > As a general rule, all parties to a lawsuit have the right to be present at all of the oral examinations conducted in that suit, in person or by counsel. This right is, however, subject to an important exception when credibility is in issue.

> If more than one adverse party is to be examined on the same subject matter, and if the credibility of the parties to be examined is in issue, it is possible to obtain an order excluding each such party from the examination of the other. A request for an exclusion of one adverse party from the examination of another should be made as a matter of course in such circumstances. If the court can be shown the prejudice to the examining party would result if each were present during the discovery of the other, the court's discretion should be exercised in favour of the examiner. To do otherwise would lessen the effect and retard one of the purposes of the discovery.

10. The majority of cases and certainly the Nova Scotia Supreme Court Trial Division in *MacMillan et al v. Slaunwhite et al* (1979), 40 N.S.R. (2d) 25, support the position that where the individuals have a common interest and the same ground will be covered in examination, individuals should be excluded from the examinations of one another.

11. In the *MacMillan* case, Chief Justice Cowan recognized that there was no Civil Procedure Rule dealing specifically with the situation of exclusion of co-parties during discovery examinations. After a review of the Rule (Civil Procedure Rule 30) dealing with exclusion of witnesses for purposes of a trail and the relevant case law, Cowan, C.J.N.S., concluded (p.34):

> In the absence of a specific rule in this province dealing with exclusion of co-parties on examination for discovery, I am of the opinion that the position is similar to that set forth in the British Columbia cases of *Sissons v. Olson; O'Neal v. Murphy; Sweet v. B.C. Electric* and *Benson v. Westcoast, supra,* and in the decision of Bence, C.J.Q.B., in *Basu v. Bettschen, supra.* In my opinion, there is a discretion in the person presiding at an examination for discovery or in a judge to direct the exclusion of co-plaintiffs or co-defendants when fellow parties are testifying on examination for discovery, where the parties have the same interests and the examinations of the parties will cover the same ground.
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> In the case before me, the seven infant plaintiffs have the same interest in establishing gross negligence on the part of the defendant, Slaunwhite, and in negativing the defences of voluntary assumption of risk, contributory negligence and *ex tupi causa non oritur actio.* Questions of credibility will, undoubtedly, be raised at the trial. In my opinion, this is a proper

> case for the exercise of the discretion in favour of excluding co-parties during examination for discovery.
>
> I find that there will be no prejudice to the plaintiffs if such an order is granted. An order will, therefore, issue on the application of the defendant, Slaunwhite.

[12] The burden is on the Applicant to show that exclusion of co-parties at discovery is in the interests of justice, although the burden is lighter than in a normal situation. *Coughlan, (supra).*

[13] Counsel for the Plaintiff in this Application submits that while it is the inherent right of every party to be present throughout legal proceedings (including discovery), the Court has the power to exclude Co-Defendants when testifying on discovery where it is in the interest of justice. The Court should exercise its discretion to exclude Co-Defendants in the present case as they have common interests and the examination of the parties will cover the same ground. Moreover, credibility will be an issue at trial.

[14] Counsel for the Defendants submits the inherent right of parties to attend all proceedings should be interfered with rarely. That the Plaintiff has failed to discharge the burden of showing just cause why the Co-Defendants should be

excluded from each other's examination for discovery. It was also argued that exclusion on discovery would affect Counsel's ability to represent all Defendants as sole Counsel.

[15] Counsel for the Defendants cited a number of cases where applications of this nature were denied by the Courts including *Baywood Paper Products v. Pay Master Cheque-Writers (Canada) Ltd.* 1986 CarswellOnt 465 (Ont. Dis. Ct.), *Armour Group Limited v. Trans Canada Pipelines Limited* 1991 CarswellNS 77 (N.S.C.A.), *Croft v. Burrell,* 1996 CarswellNS 268 (N.S.S.C.); and *Rowe v. Lee* 2006 NSSC 377 (Can. LII).

[16] Clearly the exercise of the Court's discretion to exclude co-parties on discovery examination depends upon the facts adduced by evidence in each case. In the *Baywood Paper Products* case and the *Armour Group Limited* case, decisions to exclude co-parties from examination for discovery were overturned based upon the application of incorrect principles of law. In *Baywood,* the official examiner accepted the Plaintiff's submission that a party adverse in interest was not permitted to be present when the examination of an opposite party takes place. In *Armour Group* case the Chambers Judge erred in applying the principle that the

benefit of any doubt as to whether a party was to be excluded should be given to the party who requested the exclusion.

[17] In the *Croft* case the Plaintiff brought an action against her mother and sister for damages for being physically, emotionally and sexually abused by the Defendants over a period of several years. Although credibility was an issue on discovery, the application for exclusion was denied as the co-defendants were facing different specific allegations.

[18] In the *Rowe* case, the co-defendants in a motor vehicle accident were spouses of each other and resided together for some 11 years between the date of the accident and the discovery date. The request to exclude was based on the issue of credibility. The Court found that this issue alone was not sufficient to warrant exercise of the Court's discretion to exclude co-defendants. Moreover, there was a high likelihood they had discussed the accident over the intervening years, therefore, excluding them from each other's discovery examination was of little value.

[19] In the present case I find as follows:

1. The Defendants have the same common interests in that they are not adverse. They share a common defence.

2. Essentially the same ground will be covered in discovery examination. Questions will obviously surround the Defendants' knowledge of leakage and foundation problems during the period of time they owned the property.

3. According to the Plaintiff's Statement of Claim and Affidavit evidence, the water leakage was significant to the extent that it would be noticeable and within the knowledge of the Defendants. The denial set out in the Statement of Defence conflicts with the allegations of the Plaintiff, thereby raising the issue of credibility. As indicated, the Defendants did not file any Affidavits denying the existence of the issue of credibility.

4. There will be no prejudice to the Defendants. There is no obvious need for a Defendant to be present for discovery examination of another Defendant with a common interest where credibility is likely to be an issue. Given the purposes of discovery examination as stated above, I agree with the

comments of Fraser, J. (dissenting) in *Lambert v. Lomore,* CarswellAlta 1049 (Atla. CA) where he states:

> 47 ... it is reasonable to infer that the discovery process is not intended to provide parties having common interests with the opportunity to explore the evidence or position of each other. That is particularly so in situations in which credibility is a primary issue and in which the parties are, as in the case at bar, represented by the same counsel. Further there should be no possibility of prejudice arising from exclusion from the discovery of a party with a common interest because, as was noted in *O'Neal*, there should be no prejudice to a truthful defendant if an exclusion is ordered.
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> 48 A party having a common interest with a party being examined has no part to play in the examination of the latter. The party having a common interest is not entitled to question the party being examined, or to object or to otherwise take part in the examination. He plays no part in achievement of the purpose of the discovery by the examining party because he and his counsel play no part in the examination. Nor does the party having a common interest need to be present at the examination in order to instruct his own counsel about the conduct of his own case which is a primary reason for his attendance at trial.

5. In this case, where the parties are not adverse, have a common interest and credibility is an issue, the possibility of prejudice to the Plaintiff exists should the Plaintiff be unable to test the evidence of Co-Defendants by excluding them from each other's examination for discovery.

[20] Under the circumstances of this case, I find it is appropriate to grant an Order excluding each of the Defendants from the discovery examination by the Plaintiff of the other Defendants.

[21] The Application of the Plaintiff is allowed. Costs in the amount of $750.00 payable to the Plaintiff in any event of the cause.

J.