IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Novak Estate (Re), 2008 NSSC 283

Date: 20080930
Docket: 296134
Probate Court File #14729
Registry: Truro

Between:

In the Court of Probate for Nova Scotia
In the Estate of John Gillis Novak, Deceased

Application pursuant to Section 64(3)(a)
of the Probate Court Practice, Procedure and Forms Regulations

Judge: The Honourable Justice Gregory M. Warner

Heard: September 23, 2008 at Truro, Nova Scotia

Counsel: M. Ann Levangie, Counsel for the Claimant
Ronald R. Chisholm, Proctor for the Estate

By the Court:

A. **Issue**

[1] Douglas MacDonald ("the Claimant") claims from the Estate of John Gillis Novak payment of a Promissory Note in the amount of **$20,000.00**. The Estate challenges the claim.

B. **Estate History**

[2] John Novak died intestate on October 13, 2006. He was unmarried and survived by six infant children (aged 15 to 1) and twelve siblings.

[3] His siblings and the Public Trustee renounced their right to administration of his estate in favour of the deceased's brother Alexander ("Sandy") Novak and his spouse Caroline Novak. They were granted Administration on December 5, 2006.

[4] The gross value of the Estate appears to have been approximately **$116,000.00**.

[5] The only real property was a commercial property from which the deceased had operated a car wash business and which had been purchased by him from Donna Darlene MacDonald (daughter of the Claimant) on or about September 9, 2005. She held a mortgage for part of the purchase price in the amount of **$20,000.00.** The Estate, in settlement of her foreclosure action for **$20,000.00**, sold the property to her for approximately **$30,000.00** (less her mortgage claim of **$20,000.00**).

[6] Other disbursements of the Estate totalled **$17,000.00** and the legal and Probate expenses totalling approximately **$9,000.00**, leaving a net estate value of **$70,633.00**, before consideration of this claim.

[7] On March 4, 2008, the Registrar passed the accounts of the personal representatives as a full and final accounting and discharged the personal representatives, upon the distribution of **$50,633.00** to the Guardian *ad litem* for the infant children and holding a reserve of **$20,000.00** pending adjudication of this claim.

[8] On January 8, 2007, the Claimant had filed this claim for **$20,000.00**. On May 15, 2008, he filed an application for payment of this claim supported by the Affidavits of himself and Paul Monahan.

[9] On the hearing of the application, both the Claimant and Mr. Monahan were cross-examined by the Estate's Proctor.

C. **The Evidence**

[10] The Claimant's affidavit states that:

a) The Claimant had known the Deceased for a few years and leased him the land upon which the Deceased operated his car wash business.

b) The Deceased was often late in paying his rent but eventually did pay; the Claimant never worried about it or pushed him.

c) The Deceased expressed an interest in buying the land; in response the Claimant suggested that he should erect a building and expand his business; in response the Deceased said he did not have the money and asked to borrow the money to build a garage from the Claimant.

d) Since he thought it was a good business plan and the Deceased was a hard worker, the Claimant agreed to lend him **$18,000.00** on the condition that the Deceased build the garage and repay to him **$20,000.00** within six months.

e) Usually the Claimant made these types of loans verbally but his associate Paul Monahan suggested he put it in writing and a Promissory Note was drawn up and signed. The Promissory Note attached to his affidavit reads as follows:

"February 25,2005

I JOHN NOVACK have an agreement with DOUGLAS MACDONALD where I Have borrowed ($18,000) EIGHTEEN THOUSAND DOLLARS from him to construct a garage on property at #11 Highway 311, Truro, N.S.
In return I promise to repay DOUGLAS MACDONALD ($20,000) in cash within a (6) SIX month period from the date of this agreement.

Dated February 25th, 2005 at TRURO, N.S.

(signed by John Novak)
JOHN NOVACK

(signed by Paul Monahan)
WITNESS

(signed by Douglas MacDonald)
DOUGLAS MACDONALD"

f) August 25, 2005 came and went; the Deceased did not repay the loan, but kept promising to pay it.

g) Because he had been late in the past and had always paid, the Claimant did nothing to enforce repayment.

h) About October 2006 the Claimant noticed that the Deceased had purchased a new truck. It upset the Claimant that he would buy a new truck when he owed the Claimant money.

i) The Claimant saw the Deceased at his car wash one day and asked him about the loan. The Deceased said that he had **$17,000.00** but needed a few more days to get the other **$3,000.00** and would pay the next week. The Claimant advised that he was going to Ontario for a few days. He told the Deceased he could pay him on his return, and the Deceased agreed.

j) While the Claimant was in Ontario Mr. Novak died, and the debt has never been repaid.

[11] On cross-examination, the Claimant stated that he owned and operated a used car business. He stated that the land that the Deceased leased from him as containing two small sheds, one of which contained the sprayer washing equipment.

[12] The Claimant said that his wife prepared the Promissory Note and that he, Mr. Monahan and the Deceased were at his home at his kitchen table when they signed it on the evening of February 25, 2005.

[13] The Claimant was asked to compare the shaky signature of the Deceased on the Promissory Note with the Deceased's signature on several cheques written at the same time. The Claimant insisted that the signature on the Promissory Note was made by the Deceased.

[14] With respect to how the **$18,000.00** loan was advanced, the Claimant said it was not advanced by cheque but the **$18,000.00** was withdrawn from the Bank. He did not have statements in Court to show the withdrawal. He said he thought the money was advanced in cash in $100.00, and maybe some $50.00, dollar bills.

[15] The Claimant stated that the purpose of the loan was to build a garage on the land leased by the Deceased from the Claimant, but he acknowledged that the Deceased never built a garage on the land, within the six-month period or otherwise.

[16] By August 25, 2005, the date when the loan was due, there was no garage and had been no payment made on the loan. When asked why he had not tried to enforce the Promissory Note in light of the Deceased's failure to use the money as intended, the Claimant said he asked him quite a few times, but that he had lent him money before and trusted him. He denied knowing that the Deceased had a criminal record.

[17] With respect to the conversation in October 2006 at the car wash, Mr. Chisholm asked the Claimant why - if the debt was more than a year overdue, the garage had not been built, and he was upset at Mr. Novak for having bought a new truck - he did not collect the **$17,000.00** that

Mr. Novak said he had and was waiting until the next week to collect the remaining **$3,000.00**. The Claimant replied that he did not bother collecting it because he was going to Toronto. The Deceased did not have it on him and the Claimant just had to go to Toronto.

[18] The Claimant was shown a copy of a foreclosure action taken by Donna Darlene MacDonald (the Claimant's daughter) against the Estate of Mr. Novak to collect **$20,000.00** evidenced by a Promissory Note dated September 9, 2005 and secured by a mortgage on the car wash property. Mr. Chisholm asked whether, in effect, this Promissory Note of September 9 was the same money that was owed by Mr. Novak to the Claimant and due on August 25, 2005. The Claimant stated that it was a separate loan.

[19] The Claimant was asked why the loan was to his daughter and the Claimant answered to the effect that he thought he had given the car wash property to his daughter (even though he referred throughout his evidence to the Deceased renting from him and building on his land) and that the loan from his daughter was a separate loan.

[20] Ms. Levangie, in redirect, again asked the Claimant why he did not try to enforce the lapsed loan, to which the Claimant replied that the Deceased was a good guy, the Claimant had lent the Deceased money four or five times before, and had always paid his rent even though, at one point, the Deceased had been more than a year in arrears of rent.

[21] Ms. Levangie then asked the Claimant why he had to go to Toronto. He replied that one of his sons was in trouble and that he had to be up there, he could not wait.

[22] In order to show that the September 9, 2005, **$20,000.00** loan to Donna Darlene MacDonald was not the same debt secured by the February 25, 2005, Promissory Note, the Claimant was shown a copy of an Agreement of Purchase and Sale signed on August 30, 2005, between the Claimant's daughter as seller and the Deceased as purchaser to purchase the car wash property for **$35,000.00** with a closing date of September 9, 2005. **$15,000.00** cash was to be paid at or before the closing, and the balance of **$20,000.00** was to be paid by a non-interest bearing Promissory Note secured by a Collateral Mortgage payable 12 months after closing.

[23] The Claimant testified that, after the property was conveyed back from the Estate, which the Court understands involved a payment to the Estate of **$10,000.00** (in effect a repurchase price of **$30,000.00**), it was sold again for, he thinks, **$40,000.00**.

[24] The Court asked the Claimant if the only reason he went to Toronto in October 2006 was because his son was in trouble; the Claimant said that was the case.

[25] Paul Monahan's Affidavit of May 6, 2008 states that:

a) Mr. Monahan was present when the Deceased asked the Claimant for a loan and Mr. Monahan suggested that the Claimant put it in writing.

b) Mr. Monahan knew the Claimant for ten years and had seen the Claimant lend other money in the same way before.

c) Mr. Monahan was present when the Claimant has asked the Deceased to repay the loan, on which occasions the Claimant told him that the Deceased was good for the money and he did not want to push him because he wanted the Deceased to get ahead, he trusted him and he was a hard worker and good guy.

d) In October 2006 Mr. Monahan drove a vehicle to the car wash to get washed. He asked the Deceased what was going on, referring to the fact that he had a new truck and had not repaid the loan. The Deceased said he had most of the money and would deal with it next week. Mr. Monahan told the Deceased that he better does so because the Claimant was whining about the Deceased having bought a new truck without paying him off. About two days later, both Mr. Monahan and the Claimant arrived in vehicles to get them cleaned to take to auction. The Deceased told Monahan and the Deceased that he had $17,000.00 but was $3,000.00 short and would have the rest next week. He heard the Claimant tell the Deceased that he would get it when they got back from Ontario.

e) While they were in Ontario, they were advised that Mr. Novak had died.

[26] Mr. Monahan was first questioned by Ms. Levangie. He was asked about the paragraph in his affidavit stating that the purpose of the trip to Toronto was to buy automobiles for the Claimant's business. He replied that while the trip was for the purpose of buying vehicles, he also understood that the Claimant's son was in some trouble.

[27] On cross-examination by Mr. Chisholm, he was first asked about his relationship with the Claimant. He acknowledged that he had worked for the Claimant off and on, probably for ten or eleven months out of the year. He would prepare sales ads, prepare vehicles for sale, buy and sell vehicles, and "do contracts". He would be at the Claimant's business every day that he was working for him.

[28] Mr. Monahan was asked by Mr. Chisholm whether it was odd, in his view, that the Claimant would lend the Deceased more money to buy his (or his daughter's) land when he had not paid him back the earlier debt; he replied that in the car business it is done lots of times; he added that the Deceased was trust worthy.

D. **The Law**

[29] In a civil case, the legal burden of proof (sometimes called the persuasive burden) of establishing the claim is on the proponent. A secondary burden (often called the evidential or tactical burden) describes an onus on a party to ensure that sufficient evidence of a factual issue is before the Court to pass the threshold test. The latter burden may switch between parties

during a trial and does not impose on any party the obligation to call evidence. The threshold may be met by evidence from other parties.

[30] The standard of proof on a party with a legal burden is to establish its allegation on a balance of probabilities.

[31] Presumably, because of the vulnerability of an Estate to claims made against a deceased, Section 45 of the *Evidence Act* R.S.N.S. 1989, c. 154, places an additional burden on a claimant to provide corroboration by some other material evidence of the proponent's claim.

[32] The section reads:

> "**Competency and compellability at trial**
>
> 45 On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, ***provided that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony,*** or that of his wife, or of both of them, ***with respect to any dealing, transaction or agreement with the Deceased, or with respect to any act, statement, acknowledgement or admission of the Deceased, unless such testimony is corroborated by other material evidence***. R.S., c. 154, s. 45." (emphasis added)

[33] The rationale and parameters of this statutory provision are discussed in **The Law of Evidence in Canada** by John Sopinka, Sidney Letterman and Alan W. Bryant, Second Edition, ¶ 17.46 to 17.54.

[34] What constitutes "other material evidence" has been addressed by the Supreme Court of Canada in a number of decisions which were summarized at ¶ 25 in **Re O'Connell**, 1980 CarswellNS 243 (NS Probate Ct), which reads:

> "25. There are many reported cases dealing with the phrase "other material evidence" for it occurs in the statutes of most, if not all, other provinces of Canada. The leading case is perhaps *Thompson v. Coulter* ((1903) 34 S.C.R. 261, 3 O.W.R. 82) in which Killam, J. said,
>
> > In my opinion this enactment ... demands corroborative evidence of a material character supporting the case to be proved by ... the 'opposite ... party' in order to entitle him to a verdict... A mere scintilla is not sufficient. At the same time, the

> corroborating evidence need not be sufficient in itself to establish the case ... the corroboration may be afforded by circumstances..

Adverting to the last sentence in this quotation, Taschereau, C.J.C. had said in a previous case on appeal from Nova Scotia (*MacDonald v. MacDonald* (1903) 33 S.C.R. 145):

> Circumstantial evidence and fair inferences of fact arising from other facts proved that render it improbable that the facts sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence..

(See also *Re MacDonald* ((1924) 56 N.S.R. 451 (C.A.) to the same effect). However, the corroboration must be of some fact necessary for success (*Elgin v. Stubbs*, [1928] 2 D.L.R. 838, 62 O.L.R. 128) and evidence which is consistent with two views is not corroborative of either (Killam, J. in *Thompson v. Coulter* (supra)).

[35] In the case at bar, the evidence of the creation of the debt is a written document that on its face appears to bind the Deceased to pay the Claimant **$20,000.00**. What is not in any written format, or supported by any documentary evidence, is whether the debt was outstanding as of the Deceased's death. In this regard, the evidence of the Claimant, Mr. MacDonald, and his associate, Mr. Monahan, is crucial.

[36] There are many tools for assessing credibility:

a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

b) The ability to review independent evidence that confirms or contradicts the witness' testimony.

c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in ***Faryna* v. *Chorny,*** 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.

d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution (***R. v. Mah***, 2002 NSCA 99 ¶¶ 70-75).

e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. ***R. v. J.H.*** [2005] O.J. No.39 (OCA) ¶¶ 51-56).

[37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See ***R. v. D.R.*** [1966] 2 S.C.R. 291 at ¶ 93 and ***R. v. J.H.*** *supra*).

E. **Analysis**

[38] The Estate questions the authenticity of the Deceased's signature on the Promissory Note. Neither the cross-examination of the Claimant by the Proctor, nor perusal of the signatures on the cancelled cheques and comparing them with the signature of the Promissory Note, discharges the evidential burden on the Estate to show that the signature on the Promissory Note is not that of the Deceased; on the contrary, I am satisfied that the signature on the Promissory Note is that of the Deceased.

[39] While the absence of any record of a cheque payable to the Deceased or of any bank withdrawal at the time of the loan is disconcerting, the Promissory Note corroborates the evidence of the Claimant that he lent **$18,000.00** to the Deceased on February 25, 2005, for the purpose of building a garage on the Claimant's land (registered in the name of his daughter) and that the Deceased agreed to repay the Claimant **$20,000.00** on or before August 25, 2005.

[40] On the other hand, the Claimant has not established, on a balance of probabilities, that the loan was outstanding; that is, not repaid, before Mr. Novak died on October 13, 2006. I come to this conclusion for several reasons.

[41] My assessment of the credibility of the Claimant's evidence involves application of the tools for assessing credibility.

[42] First, the evidence of the financial dealings between the Claimant and the Deceased are not plausible in more than one respect:

a) It does not make sense that the Claimant would lend the Deceased money to build a building on the Claimant's land, then not build the garage for which the loan was made, and that the Claimant would not worry about that fact or make efforts to enforce the Promissory Note until after the death of the Deceased more than one and a half years later.

b) It does not make sense that the Claimant, through his daughter, would enter an agreement dated August 30, 2005, which closed September 9, 2005, to sell to the Deceased the land on which with the building should have been constructed with the money lent by the Claimant, and to purportedly receive on closing **$15,000.00** from the Deceased and advance to him a <u>further</u> **$20,000.00** loan to purchase the land.

c) It does not make sense that the Claimant was upset with the Deceased for purchasing a new truck in October 2006; was at the Deceased's car wash getting vehicles washed to take to auction; and, was told by the Deceased that he had **$17,000.00** of the

$20,000.00 he owed but not take the time or the effort to collect the **$17,000.00** then and there, rather than advising the Deceased that he would collect the full **$20,000.00** when he returned the next week.

[43] Secondly, the reason given by the Claimant as to why he was in a hurry to go to Toronto is contradicted by previously filed Affidavits of himself and Mr. Monahan. The attempts to reconcile the different reasons for going to Toronto, both in redirect of the Claimant and in direct examination of Mr. Monahan were not credible.

[44] Mr. Monahan's affidavit stated that: "Doug and I were going to Toronto to purchase automobiles for Doug's business." The Claimant's Affidavit did not state the reason.

[45] Following the Proctor's question as to why the Claimant would not take the **$17,000.00** the Deceased had at the time the Claimant was at his car wash in October 2006, and the Claimant's reply that he did not have the time, the claimant's counsel asked why the Claimant went to Toronto and he replied that one of his sons was in trouble; it could not wait; and he had to get up there.

[46] The Court asked if that was the only reason and the Claimant replied in the affirmative.

[47] This evidence is in direct contradiction of Mr. Monahan's Affidavit evidence. The redirect of the Claimant and the direct examination of Mr. Monahan did not change these conflicting explanations as to why the Claimant would not take the time to receive from the Deceased the **$17,000.00** he purportedly had at that time before leaving for Toronto.

[48] Whatever trouble the Claimant's son may have been in was not explained. It is not logical that, if the Claimant's son was in such trouble as to create such urgency, the Claimant and Mr. Monahan would be attending at the car wash to have cars cleaned to get ready for auction.

[49] Thirdly, recognizing the caution to be exercised in drawing conclusions from the demeanor of witnesses, the Court observed a difference in the Claimant's sincerity and frankness exhibited at some times, and the reticence and evasiveness exhibited other times, in answering questions. His evasiveness in describing the events of October 2006, and his failure to take obvious steps to collect the loan that was long overdue and not used for the intended purpose, and to lend the Deceased more money respecting the sale of the land, after the Deceased had defaulted in his promises, was disconcerting.

[50] Section 45 of the *Evidence Act* requires that the testimony of the Claimant be corroborated by some material evidence. This corroboration can consist of "circumstantial evidence and fair inferences of fact arising from other facts proved that render it improbable that the facts sworn to be not true".

[51] The evidence of the Promissory Note does not, in all of the circumstances of this case, imply that the debt was outstanding at the time of the Deceased's death. Mr. Monahan was, and is, closely associated with, and dependent upon, the Claimant, for his livelihood. I made similar observations respecting his evidence.

[52] I find that neither the totality of the circumstances nor Mr. Monahan's evidence corroborate the claim that the debt was outstanding at the time of the Deceased's death. On the contrary, the circumstantial evidence and fair inferences of fact suggest that the debt was paid before the Deceased's death.

F. **Conclusion**

[53] The Claimant has not discharged the legal burden of proof of establishing the claimed debt. The claim is denied.

[54] Counsel for the Estate shall have his costs of defending the claim on a solicitor/client basis as approved by the Registrar of Probate, and the balance of the funds retained by the Estate shall be paid to the guardian *ad litem* in trust for the heirs.

J.