SUPREME COURT OF NOVA SCOTIA

Citation: Kairos Community Development Inc. v Nova Scotia (Attorney General), 2011 NSSC 8

Date: 20110111
Docket: Hfx.No. 265555
Registry: Halifax

Between:

Kairos Community Development Inc.

Plaintiff

v.

The Attorney General of Nova Scotia
Representing Her Majesty the Queen in Right of the Province of Nova Scotia
(Department of Community Services)

Defendant

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	December 22, 2010, in Halifax, Nova Scotia
Decision:	January 11, 2011
Counsel:	Grant Machum & Mark Tector, for the plaintiff Aleta Cromwell & Glenn Anderson, for the defendant

By the Court:

[1] The trial of this proceeding commenced on December 8, 2010. On December 14, 2010, the Plaintiff applied to adjourn the balance of the trial. On December 15, 2010, I granted the adjournment and the remainder of the trial has been scheduled for June 2011. A number of issues have arisen as a result of this adjournment. This decision addresses those issues and defines the parties conduct between now and the recommencement of this trial.

[2] The reasons for granting this adjournment are set forth in my oral decision. They are not critical to this decision so I will not revisit them in any detail. It is sufficient to say that the adjournment was the direct result of the Defendant's failure to disclose documents relevant to the trial proper.

[3] I should indicate that the critical documents were in the possession of both parties in the lead up to the trial. It is obvious they did not feel the documents were relevant. These documents were not produced until they were put to the principal plaintiff in cross-examination.

[4] These documents, and the import that flowed from them, changed the entire texture of the trial. Prior to their introduction this case was all about measuring a stream of income from the defendant to the plaintiff and assessing whether the plaintiff was short changed over many years. Subsequent to their introduction they created an assertion that the plaintiff was fraudulent in its relationship with the defendant and, to a degree, were suing for monies already received. It was apparent to the Court that the thrust of the trial had changed from an accounting analysis to accusations of fraudulent behaviour. These accusations might have been innocently refuted if the plaintiff had been aware of their existence and relevance prior to her direct examination. I am satisfied that both the plaintiff, and her counsel, were taken by surprise by their introduction and were therefore not in a position to respond on cross-examination.

[5] I am of the view that these documents should have been disclosed well before the start of the trial. However, I am not sure that this failure would support adjourning this trial. In such a case both parties would have produced the documents, held discovery, and built this information into their conduct of the trial. In my adjournment decision I focused on the defendant holding back the documents until completion of direct examination. Failure to produce before that

time was fatal to a fair trial. Proceeding further in this environment would amount to trial by ambush. In granting the adjournment, I satisfied myself that an expanded redirect, by itself, would not address the prejudice to the plaintiff suffered as a result of this non-disclosure.

[6] The Defendant has taken the position that the only purpose in introducing these documents was to test credibility. Challenging credibility is a critical part of any litigation and should not be unduly restricted. I note that defendant's counsel acknowledged that they were not holding back these documents for impeachment purposes as provided by the *Civil Procedure Rules*. There has also been an acknowledgement that they should have been released prior to the testimony of the plaintiff.

SPECIFIC REMEDIES SOUGHT:

DEFENDANTS' PLEADINGS:

[7] The Plaintiff argues that it is entitled to know the case it must meet. It submits that if the Defendant intends to argue fraud or overpayment, then they

must seek leave to amend their pleadings. It is clear from submissions that the Defendant considered an amendment of its defence and/or the filing of a counterclaim. In a written brief dated December 20, 2010 the Defendant stated "the defendant will not be seeking leave to amend its defence to include an allegation of fraud." In oral submissions on December 22, 2010 defence counsel stated they "will not counterclaim." I note that the latter position is different from the position advanced in the December 20th written submission. In light of these admissions, I see no need to further address pleadings.

DOCUMENT PRODUCTION:

[8] In light of the Defendant's decision respecting their pleadings, there is less need for further extensive production. The critical documents are now produced. They will likely be used for the purpose of credibility. I will not order any further document disclosure. I recognize that there would be extensive further disclosure had the Defendant chosen to amend its pleadings or to file a counterclaim. In the event the existence of other documents emerge through the discovery process, which are relevant to credibility, I will accept written submissions as to whether they should be produced.

DISCOVERIES:

[9] I will permit the discovery examination of the eight persons listed in Schedule "B" of the Plaintiff's December 10, 2010 brief. The discovery will be limited to the issue of the "retroactive cheques" and the documents supporting the issuance of those cheques. I do not expect that these examinations will represent an expansive questioning on other issues in this action. The focus must be sharp. If the discovery of these eight leads to the identification of the 9th and 10th persons set forth in Schedule "B," as above, then those individuals may be similarly discovered.

[10] In the event that disputes arise over the breadth of these examinations, I will hear from counsel by way of written brief.

AMENDMENT OF EXPERT'S REPORTS:

[11] The result of these further discoveries may well impact on the expert's reports and their opinions. I, therefore, grant both parties leave to amend their reports.

SCOPE OF REDIRECT:

[12] In light of the Defendants position that they will not amend their pleadings or file a counterclaim, I see no reason to expand the redirect of Dr. LeRoy beyond the issue of the "retroactive" cheques. I will allow an expanded redirect should the circumstances of cross-examination require such expansion. At this time it is not practical to predict how much expansion is required.

ABILITY TO DISCUSS CASE WITH DR. LEROY:

[13] In light of these circumstances I will allow Plaintiff's counsel to discuss the case with Dr. LeRoy who is presently under oath. I do not feel that it is practical to impose restrictions.

COSTS:

[14] The Plaintiff seeks $15,000 in "throw away costs." The Defendant recognizes that some costs are appropriate but suggests they be in the cause. I

award the Plaintiff $10,000 in costs payable forthwith. There will be no additional award in respect of amending expert reports or other secondary activity.

COSTS OF THESE APPLICATIONS:

[15] The Plaintiff shall have their costs of this application in the amount of $750 plus disbursements associated with this application.

DEFENDANTS' APPLICATION:

[16] I will permit the Defendant to discover Dr. LeRoy on the issue of the "retroactive" cheques.

CONCLUSION:

[17] I anticipate that there may be disputes about this evidence when the cross-examination of Dr. LeRoy resumes and during any redirect. The balance between use for credibility and use to infer fraudulent activity may require ongoing rulings. I reserve the right to make those rulings as required. It is important that this

lawsuit is not expanded beyond what was anticipated at the start of this trial. I direct that all of the procedures allowed herein be completed by April 29, 2011.

J.