SUPREME COURT OF NOVA SCOTIA

Citation: Maple Trade Finance Inc. v. A & E Plumbing Ltd., 2009 NSSC 11

Date: 20090113
Docket: Hfx No. 293912
Registry: Halifax

Between:

Maple Trade Finance Inc.

Plaintiff

v.

A & E Plumbing Ltd., Rosario Pincente (a.k.a. Roy), 809854 Ontario Limited c.o.b. Melody Homes, Lormel Developments (Weston) Inc.

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	September 17, 2008 and September 26, 2008, in Halifax, Nova Scotia
Counsel:	John A. Keith with Dan Luxat, for the plaintiff Augustus Richardson, Q.C., for the defendants

By the Court:

[1] The applicants, who are two of five defendants, seek an Order pursuant to *Civil Procedure Rule 11.05(a)* setting aside the service of the originating notice on the basis that Nova Scotia is a *forum non conveniens*.

BACKGROUND

[2] The plaintiff and respondent, Maple Trade Finance Inc., is a Nova Scotia company carrying on business across Canada. It's business is the financing of accounts receivable.

[3] The plaintiff entered into a contract with A & E Plumbing Ltd. to finance receivables owing to A & E. A & E was a plumbing subcontractor on various housing and commercial projects in Ontario. 809854 Ontario Limited (carrying on business as Melody Homes), Lormel Developments (Weston) Inc. (Lormel) and Sunfield Homes (Mississauga) Limited (Sunfield) were involved in various commercial and residential projects in Ontario.

[4] On May 28, 2007, A & E executed an Assignment of Contract and Accounts Receivable in favour of the respondent. The respondent was entitled to receive a total of $245,382.17 owing to A & E between June 26, 2007 and September 27, 2007. These receivables were owing by Lormel, Melody and Sunfield. In exchange for an advance of funds, A. & E. assigned outstanding invoices and accounts receivable to the respondent, Maple Trade. In addition to the Assignment Agreement, A & E, obtained Directions to Pay, directing Melody, Lormel and Sunfield to pay the invoices to the respondent.

[5] The respondent claims that it carried out due diligence to ascertain the amount owing to A & E, and that the amounts were properly owing. It says these amounts were outstanding, that the work had been done by A & E, and that the amounts would be remitted to the respondent by Melody, Lormel and Sunfield.

[6] The applicants rely on the affidavits of Saverio Montemarano, an officer of Melody Homes, and Ivonis De Meueghi of Lormel. Mr. Montemarano states that the head office and principal place of business of his company is in Ontario, and that it does not carry on business outside that province. He claims that he only became aware that A & E had assigned certain of his accounts receivable to the

respondent on November 7, 2007, when he received a fax from the respondent requesting payment of certain invoices submitted to it by A & E. Until November 7, 2007, he says, he had no knowledge of any assignment of accounts receivable. He claims the signature on the Notice is not his own, but that someone executed the Notice and signed his name without his knowledge, consent or authority. Upon being contacted by the respondent, Mr. Montemarano contacted Mr. Pincente, who notified the respondent in a letter of November 12, 2007, that Melody was raising questions as to the authenticity of Mr. Montemarano's signature. Mr. Montemarano claims that the payments were made directly to A & E in ignorance of any assignment or Notice to Pay. Amounts owing to A & E were paid subject to lien holdbacks and any amounts owing for work not done.

[7] Mr. De Meueghi avers that Lormel is incorporated pursuant to Ontario law and carries on his business exclusively in Ontario. He has been conducting business with A & E and Mr. Pincente since 1997. In 2007, he says, Mr. Pincente asked him to sign a Notice and Direction to Pay, informing him that A & E was arranging interim financing with the plaintiff and would assign its accounts

receivable to the respondent. Mr. De Meueghi says he signed the Notice on June 7, 2007.

[8] Customarily, Mr. De Meueghi says, he would pay A & E's accounts within sixty days of receipt. He says Mr. Pincente usually picked up the payments personally. In July 2007, Mr. Pincente informed him that he was no longer dealing with the respondent and was going to pay them off and deal directly with the TD Bank. Accordingly, there was no requirement to pay the respondent. He claimed that the invoices provided for payments to be made to A & E and mailed to the plaintiff. He identified the payments made to A & E on July 30, 2007, August 17, 2007, and August 23, 2007. Invoices claimed to have been issued to his company after this date were not received or paid.

[9] The A & E invoices did not contain the notation that they were "Sold and Assigned" and payable only to Maple Trade Finance Inc. but rather carried the following notation;

> "Please make cheque payable to A & E Plumbing Ltd. care of Maple Trade Finance, 5475 Spring Garden Road, Suite 71, Halifax, Nova Scotia".

[10] Mr. De Meueghi claimed that he only received notification of the Assignment Agreement after paying these invoices to A & E. He added that A & E employees filed a lien for unpaid wages and these unpaid wages were satisfied directly by Lormel.

[11] Michael Miller who was vice-president of the respondent, states in his affidavit that the respondent was in the business of offering short-term financing to approved clients by financing their accounts receivable. The respondent, was incorporated under the laws of Nova Scotia. It has four employees located outside of Halifax, Nova Scotia, who are all sales representatives. Due diligence is conducted by Halifax employees and the decisions whether to approve financing is made in Halifax.

[12] Mr. Miller outlined the approval process before funds are advanced to a potential customer against the receivables. Applicants such as A & E submit their

applications to the Halifax office. These are reviewed before due diligence is carried out from the Halifax office. The results of this due diligence are reported to a credit committee, which decides whether to advance financing. Upon a decision to grant financing, the Halifax office prepares Assignments in Accounts Receivable and General Security. Documents are then sent to the applicant for completion. In this instance, the contract went to A & E, for completion and was returned to the respondent. Mr. Miller stated that before funds were advanced, in each instance the respondent's representatives contacted representatives of Melody and Lormel. He said these discussions took place from the Halifax office, that all of the witnesses who would be testifying at trial are located in Halifax and that all of the documents relevant to these proceedings are in the Halifax office.

[13] Claude Bricault is the plaintiff's service coordinator. He stated that he contacted Melody and spoke to Sally Smith and Tony Murdocca, Project Manager with Lormel. He claims that when he carried out his due diligence inquiry and contacted representatives of Melody and Lormel, he confirmed with each of them that their company:

1. Had received the goods and services from A & E upon which the receivables were based;

2. That the goods and services provided by A & E were satisfactory;

3. That their company had no issue with the receivables;

4. That they had received the Notice to pay the respondent; and

5. That the Company understood the payment was to be directed to the respondent.

[14] Mr. Miller says each of the applicants and A & E signed a Notice and Direction to Pay that provided for the accounts receivable to be made payable to the Respondent.

[15] A & E and Rosario Pincente have not filed a defence. The respondent has discontinued against Sunfield. The remaining defendants are A & E, Rosario Pincente, Melody and Lormel. The time for filing a defence has expired.

ARGUMENTS

[16] The Nova Scotia Court of Appeal reviewed the development of the law of *forum non conveniens* in *679927 Ontario Ltd. v. Wall* (1997), 156 N.S.R. (2d) 360; 1997 CarswellNS 52. Flinn J.A., for the court, described the development of the basic test enumerated in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795 (H.L.) and *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, [1986] 3 All E.R. 843 (H.L.), and ultimately addressed by the Supreme Court of Canada in the case of *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897. Flinn J.A. said:

> 21 In *MacShannon*, Lord Diplock enunciated the test in the following words at p. 810-812, [1978 A.C.]:

> A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.
>
> In order to justify a stay two conditions must be satisfied, one positive and the other negative:
>
> > (a) the defendant must satisfy the court that there was another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and
> >
> > (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.

22 As to condition (b) of the test enunciated in *MacShannon*, Justice Sopinka said the following in *Amchem* at p. 919:

> In my view there is no reason in principle why the loss of a juridical advantage should be treated as a separate and distinct condition rather than

> being weighed with the other factors which are considered in identifying the appropriate forum.

23 In *Spiliada*, decided by the House of Lords eight years after *MacShannon*, Lord Goff stated the test as follows at p. 854-855, ([1986] 3 All E.R.):

> The basic principle is that a stay will only be granted on the ground of *forum non-conveniens* where a court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> As Lord Kinnear's formulation of the principle indicates, in general, the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence.

[17] Flinn, J.A. took note (at para. 24) of Lord Goff's comment that in a federal state such as Canada, "it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff on which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions." He went on to discuss the necessity for the party challenging the choice of forum to "clearly establish" that the alternate forum is more appropriate. He cited Justice Sopinka's remark in *Amchem* that "where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum." Flinn, J.A. added:

> 28 There is good reason why, in order to displace an appropriate forum selected by the plaintiff, a more appropriate forum must be clearly established. I cannot express that reason any better than did McLachlin, J.A. (as she then was) in the case of *Avenue Properties Ltd. v. First City Development Corp.* (1986), 7 B.C.L.R. (2d) 45 (C.A.) at p. 50:
>
> > ...a plaintiff's choice of forum should not be lightly denied. It is his right to have ready access to the courts of his jurisdiction and not to be required to travel outside his jurisdiction to present his case. This is particularly

> the case where the plaintiff resides in the jurisdiction where he seeks to bring his action or where there is some other bona fide connection between the action and the jurisdiction in which it is sought to be brought. Accordingly, the court's jurisdiction to stay proceedings should be used sparingly.

29 It is apparent, from what Justice Sopinka has said in *Amchem*, that when a plaintiff who has commenced an action in Nova Scotia is faced with an application by a defendant to stay the action (because the defendant claims that another jurisdiction is, clearly, a more appropriate jurisdiction to hear the matter) the plaintiff cannot sit back, do nothing, and claim that the onus is on the defendant to make his case. If the plaintiff does so, he runs the risk that the Court will find, on the evidence before it, that the other jurisdiction is clearly the more appropriate jurisdiction. The plaintiff, therefore, has an evidentiary burden as well, to show the existence of factors which will persuade the Court to exercise its discretion in his favour, and against the defendant's application.

30 Finally, as Justice Sopinka said in the introduction to his discussion of *forum non-conveniens*, in *Amchem* at p. 912:

> I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others.

[18] In *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577; 2002 CarswellOnt 1756 (Ont. C.A.), Sharpe, J.A. reviewed the law on jurisdiction *simpliciter* and *forum non conveniens*. He stated, at paragraph 41:

> Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action, including the following:
>
> - the location of the majority of the parties
>
> - the location of key witnesses and evidence
>
> - contractual provisions that specify applicable law or accord jurisdiction

- the avoidance of a multiplicity of proceedings

- the applicable law and its weight in comparison to the factual questions to be decided

- geographical factors suggesting the natural forum

- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court

[19] The applicants maintain that they are Ontario companies without any connection to Nova Scotia, carrying out all of their business in Ontario. They say they do not have any connection to Nova Scotia. All of their business records are located in Ontario and all of their witnesses work and reside in that province. Furthermore, the applicants maintain that the respondent's promotional material advertises it as a global company that carries on business in Canada and represents it as having offices in Halifax, Montreal, Ottawa, Toronto and Vancouver. All of the defendants have their offices in Ontario and Mr. Pincente is a resident of that province.

[20] The applicants maintain that virtually all of the relevant events, and the cause of action itself, arose in Ontario. The original financing agreement between A & E and Maple Trade was made in Ontario, and the invoices that form the basis of the claim as between A & E and Lormel and Melody were Ontario construction contracts pertaining to Ontario real estate. The liability of the applicants to pay the invoices is, it is submitted, governed by events and causes of action located in Ontario, including allegations of fraud and misrepresentation against Mr. Pincente and allegations respecting the propriety of the manner in which the A & E invoices were issued. These matters, the applicants submit, require Ontario witnesses. In addition, if the Notice and Direction to Pay are valid, their liability to pay under the invoices would depend on whether A & E has made out its entitlement to collect (e.g. with respect to completion of the work, holdbacks and liens). These matters, too, would require Ontario witnesses.

[21] In the Agreement regarding the Assignment of Receivables, A & E and the respondent agreed that Nova Scotia law would govern the construction of the Agreement. This Agreement was not signed or acknowledged by the Applicants. The applicants were not privy to the assignment agreement signed by the plumbing

contractor and the respondent. Therefore, they claim that they made no agreement with the respondent to have this matter tried in Nova Scotia, or for that matter, to have Nova Scotia law apply. Mr. Richardson maintains that the respondent is a national company with a global reach. One of its subsidiaries claims that it has offices in Halifax, Montreal, Ottawa, Toronto and Vancouver. The initial contact was made through the respondent's Toronto office and it was the respondent who sought out the defendants.

[22] Furthermore, the applicants say, the cause of action as against them is not in any way similar to the cause of action against the plumbing contractor. They submit that the conclusion that Nova Scotia may be the appropriate forum against the plumbing contractor does not automatically lead to the same conclusion as against Melody or Lormel. Simply doing justice to the respondent and the plumbing contractor is not sufficient. It is necessary to do justice to all the parties.

[23] The burden is on the applicants to establish that Ontario is clearly more convenient. The respondent's choice should not be interfered with lightly. The applicants maintain that the factors considered in *O'Brien v. Canada (Attorney*

General) (2002), 201 N.S.R. (2d) 338 (C.A.), lead to the conclusion that Ontario is clearly the most convenient forum.

[24] Although the plaintiff's due diligence was performed from Nova Scotia, the applicants maintain that this activity was carried on after the delivery of the Notice and Direction to Pay on June 14, 2007, and is therefore not relevant to the claim against them. The bulk of the evidence, both documents and witnesses, against Melody and Lormel is located in Ontario. The court is obliged to take into account the cost of attending trial in Nova Scotia and of removing all of the relevant documents from Ontario to Nova Scotia. Consequently, the applicants argue, efficacy depends on having the trial in Ontario.

[25] As mentioned above, insofar as Melody and Lormel are concerned, the applicable law is that of Ontario, not of Nova Scotia. There was no agreement on their part to attorn to Nova Scotia Law. They also say there is no loss of juridical advantage resulting from a finding that Ontario is the most convenient forum.

[26] The applicants say the settlement of the claim by Sunfield, another defendant, does not address the issue of whether Ontario is clearly the most convenient forum.

[27] As to whether the agreement was made in Ontario, it is evident that the principal representatives of the respondent were Mr. Miller and Mr. Bricault, both of whom are employed by the respondent in its Halifax office.

[28] The real issue which the court will have to confront in the second cause of action against the applicants relates to the respondent's performance of due diligence. This was clearly done from the Halifax office and had to be done prior to any advance of funds from the respondent to the plumbing contractor. There are two witnesses in Nova Scotia and two witnesses in Ontario on the question of what actually occurred at the time due diligence was carried out.

[29] As for claims under the Ontario *Builders' Lien Act*, the respondent says these represent a small portion of the accounts receivable affected by the assignment, if any, and should not be an important factor in favouring the province of Ontario as being a more convenient forum.

[30] The respondent maintains that allowing the action against the plumbing contractor and its principal to go ahead in Nova Scotia, while granting the application for a stay in respect of the action against Melody and Lormel, would lead to a multiplicity of actions. The respondent says permitting a multiplicity of proceedings would be contrary to the objective of the *Civil Procedure Rules*, that being "to promote the just, speedy and inexpensive determination of every proceeding": *Rule 1.03*. Further, allowing issues in the present proceeding to be decided partly in Nova Scotia and partly in Ontario might lead to different results. Sunfield, it is submitted, accepted the jurisdiction of this province when it settled with the respondent. Furthermore, the plumbing contractor and Mr. Pincente did not raise any concern about the jurisdiction of Nova Scotia as being an appropriate forum.

[31] The respondent says that from the point of view of expense and efficiency, it is better to conduct the litigation in Nova Scotia, and that it will likely be more speedy to have the matter decided in this province as compared to Ontario.

[32] If the respondent was successful against all of the defendants, it would have to seek enforcement proceedings in the province of Ontario. This, however, does appear to be a hindrance, in view of the reciprocal enforcement legislation.

[33] I note that the *Court Jurisdiction and Proceedings Transfer Act*, a recently proclaimed statute that is not determinative of this proceeding, describes the factors necessary for this court to consider whether to stay a proceeding on the basis of jurisdiction or *forum non conveniens*. Section 11 provides, in part:

> Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding...
>
> ...
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province.... [or]
>
> (ii) by its express terms, the contract is governed by the law of the Province....

[34] The respondent argues that the plumbing contractor's agreement that Nova Scotia law would be applied that is an important consideration when applying the doctrine of forum *non conveniens*. Under s. 12(2)(b) of the Act, the court is required to take into account the law to be applied to the issue in the proceeding when deciding whether to exercise its discretion to refuse jurisdiction. The overarching issue raised by both causes of action is the validity and effectiveness of the assignment of the Accounts Receivable to the respondent by the plumbing contractor. Clearly, the plumbing contractor agreed that this would be decided according to Nova Scotia law. This factor favours Nova Scotia.

CONCLUSION

[35] Having reviewed the principles set out in such cases as *Amchen, Muscutt* and *O'Brien* I do not believe that the applicants have established that Ontario is clearly a more convenient forum than Nova Scotia. The plaintiff's choice of forum should not be lightly denied, particularly where the competing forums are two provinces in a federal state. In addition, granting a stay would have serious potential ramifications for multiplicity of proceedings. This is not a case where it is clear that the alternative forum proposed by the applicants is clearly more convenient

than the forum chosen by the respondent. The application is accordingly dismissed.

[36] I request written submissions on costs within three weeks if counsel are unable to agree.

J.