**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Concrete Shoring Technologies Inc. v. SCFS Inc., 2009 NSSC 97

**Date:** 20090318
**Docket:** Hfx. No. 295620
**Registry:** Halifax

**IN THE MATTER OF**

The *Builder's Lien Act*,
being Chapter 277, S.N.S 2004, as amended

- and -

Concrete Shoring Technologies Inc.

Applicant

- and -

SCFS Inc. and 3048700 Nova Scotia Limited

Respondents

**Judge:** The Honourable Justice Walter R.E. Goodfellow

**Heard:** March 18, 2009 in Halifax, Nova Scotia (in Chambers)

**Written Decision:** March 25, 2009

**Counsel:** Matthew J.M.Gibbon, for the Applicant
Jeff Aucoin, for the Respondents

**By the Court**:

**BACKGROUND:**

[1] Concrete Shoring Technologies Inc. have been dealing with one Darrell Spears from at least 2003 through companies owned and/or controlled by Mr. Spears and his wife, Joanne Spears.

[2] In or about June of 2007, SCFS Inc. (SCFS), one of the Spears' companies, entered into a contract with Concrete Shoring Technologies Inc. (Concrete) for concrete framing at 342 Main Avenue, Halifax. The verbal contract was for two different systems and Concrete issued SCFS invoices on a regular basis.

[3] SCFS has made payments in 2007 against former invoices owed by another one of its companies. A total of $36,863.34 was paid by SCFS in 2007 against invoices for this verbal contract. SCFS made a final lump-sum payment of $15,000.00 in January of 2008, leaving a claim outstanding for $184,109.88.

[4] Due to non-payment, Concrete caused a lien to be registered against the property at 342 Main Avenue, Halifax, owned by the respondent, 3048700 Nova Scotia Limited.

[5] The lien was vacated by order of this Court when the owners paid the statutory hold-back of $123,866.02 into Court pursuant to the *Builder's Lien Act* and the application before me for summary judgment and severance of the counterclaim was commenced December 22, 2008.

[6] Both counsel agree that the old *Civil Procedure Rules* apply, namely, former *Civil Procedure Rule* 13 and *Civil Procedure Rule* 5.03 dealing with the Court's power to order a separate trial.

**ISSUES:**

(1) Whether summary judgment should be granted based on the following grounds:

(a) whether the applicant is able to prove a *prima facie* claim; and

(b) if so, whether the respondent is able to satisfy the Court that he has a reasonable arguable defence to the applicant's claim or that there is a triable issue.

(2) Whether or not an order for severance should be granted for the counterclaim raised by the respondent in his defence and counterclaim?

[7] The evidence that is not disputed is that the initial contract was in June of 2007 to provide systems on a rental basis to the location 342 Main Avenue at an agreed price. The first system, NOE, was returned by SCFS in September 2007 and the last invoice that included this system was the invoice dated August 31, 2007, number 2007194. It is also undisputed that Concrete sent SCFS regular invoices, initially for a half month period and, subsequently, on a monthly basis.

**THE LAW – SUMMARY JUDGMENT:**

[8] Summary judgment applications have been more recently canvassed in decisions such as **Broussard v. Hawley ,**2009 NSSC 1 (CanLII) where Coady, J. in his decision canvasses recent case law on summary judgment applications:

> [18] The two part test for summary judgment was described in *Fournier v. Green*, [2005] N.S.J. No. 357, 2005 NSSC 253 as follows:
>
> > The plaintiff, in order to succeed in a summary judgment application, first has the obligation to prove her claim and then the burden shifts to the defendant to satisfy that he has a bonafide defence or at least an arguable issue to be tried before the court. He must disclose the nature of the defence or issue to be tried with clarity through sufficient facts to indicate that it is a bonafide defence or issue to be tried.
>
> [19] The test for summary judgment was articulated in *Pricewaterhouse Coopers Inc. v. County Realty Ltd.* [2006] N.S.J. No. 164, 2006 NSSC 132:
>
> > [10] The test for summary judgment in Nova Scotia is well established. In *Canadian Imperial Bank of Commerce v. Tench* (1990), 97 N.S.R. (2d) 325 (C.A.), Macdonald, J.A. stated at paragraph 9:
> >
> > > The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly

> and if the defendant is unable to set up a bona fide defence or raise an arguable issue to be tried - see *Bank of Nova Scotia v. Dombroswski* (1977), 23 N.S.R. (2d) 532; 32 A.P.R. 532 ... Under the circumstances of this case, if the allegations contained in the statement of defence are correct, they would afford an answer to the bank's claim.

[11] In *D.E. & Son Fisheries Ltd. v. Goreham* (2003), 217 N.S.R. (2d) 199, (N.S.C.A.), Cromwell, J.A. stated at para. 2:

> Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. *Bank of Nova Scotia and Simpson (Robert) Eastern v. Dombrowski* (1978), 23 N.S.R. (2d) 523, A.P.R. 532 (C.A.) at 537; *Oceanus Marine Inc. v. Saunders* (1996), 153 N.S.R. (2d) 267, 450 A.P.R. 267 (C.A.) at para 15.

[12] There is no meaningful difference between an "arguable" issue and a "genuine" or "bona fide" issue: see Roscoe J.A. in *United Gulf Developments Ltd. v. Iskandar,* [2004] N.S.J. No. 66, 2004 N.S.C.A. 35 (N.S.C.A.).

[20] It is clear from a reading of *Rule* 13 and the cases above cited that an onus rests upon the Defendant to bring forth sufficient facts to show that a bona fide defence or issue exists which ought to be tried.

**Issue No. 1: Whether Summary Judgment should be granted based on the following grounds: (a) Whether the Applicant is able to prove a *prima facie* claim; and (b) if so, whether the Respondent is able to satisfy the Court that he has a reasonable arguable defence to the Applicant's claim or that there is a triable issue.**

[9] The evidence advanced on this application consists of the affidavits of Elaine Bateman, Controller of Concrete, first filed December 22, 2008; a further affidavit dealing primarily with the severance issue, also filed December 22, 2008; and, a supplementary affidavit filed March 16, 2009. SCFS filed an affidavit of Darrell Spears on March 10, 2009 and an affidavit of Roland Hage on March 16, 2009.

[10] Ms. Bateman was cross-examined by SCFS on her affidavits and Darrell Spears was cross-examined by Concrete on his affidavit. Concrete declined cross-examination of Roland Hage, who was unavailable for the hearing in any event, and Concrete did not wish to incur any further delay.

[11] Darrell Spears in his evidence made the suggestion that the payments that SCFS made were not all credited to the Concrete account. Elaine Bateman in her affidavit and in her evidence indicated that since as early as 2003, payments received from the Spears were applied to whatever company account was outstanding the longest and this practice continued throughout. At no time did SCFS or Spears dispute the practice the parties followed and, indeed, his evidence now is simply listed as stating that some of the payments were applied to the wrong account. He gave absolutely no evidence that contradicted Ms. Bateman's evidence as to the acknowledged practice that occurred for several years. As I have indicated, this practice has not been disputed or denied.

[12] Another issue was raised by Spears relating to the agreement between Concrete and SCFS for a credit on terms which was reversed on failure by SCFS to meet the terms.

[13] Concrete wrote to Darrell Spears on February 14, 2008 as follows:

> Dear Darrell,
>
> RE: Building MU 9, Main Avenue, Fairview
>
> Further to our meeting, I would like to confirm that was discussed regarding your account with us.
>
> We agreed to issue a credit for $35,000.00 against rentals on this job, and this is attached along with a statement, showing the balance owing presently of $144,559.88. Note that I sent a copy of both these documents to Glenda along with the other information you requested.
>
> In order to satisfy this debt you agreed to issue a Letter of Direction to Fares and Associates that any and all amounts due to you on the above contract be paid directly to us.

> Any balance still owing after receipt of the funds from Fares is to be paid to us over the next 12 months.
>
> Yours truly,
>
> Elaine Bateman

[14] On March 24, 2008 Elaine Bateman sent the following fax to Darrell Spears with a copy to Glenda, being Glenda Power of SCFS:

> Hi Darrell
>
> Following are two invoices that Albert wanted me to issue. I have sent copies to Glenda.
>
> At our meeting we agreed to the credit of $35,000 and no charges for the Bhalla job in exchange for you signing over the holdback funds due to you from Fares in the amount of approximately $120,000. However, since there are no funds available from Fares, this agreement is null and void and we are charging for these items.

[15] The invoice affecting the change with respect to the initial credit of $35,000.00 is dated the 29th of February, 2008 and is in the amount of $35,000.00 plus HST of $4,550.00, for a total of $39,550.00 and recites the following:

> cancel credit # 2008115 for rentals at Main Ave
>
> This credit was part of agreement whereby Concrete Shoring Technologies would receive funds due to SCFS from Fares. No funds are available to be paid to us, therefore the agreement is cancelled and the credit is revoked.

[16] Mr. Spears acknowledges that the prerequisite of the credit, a letter for Fares, was never provided; however, he says that the credit is available because of a verbal agreement. Mr. Spears does not say when this supposed verbal agreement took place, who this supposed agreement is between, and he gives no evidence whatsoever of the supposed actual conversation. This supposed verbal agreement is merely wishful thinking on the part of Mr. Spears and does not constitute anything more than that.

[17] SCFS raised no objection to the invoice confirming the failure to meet the condition precedent meant cancellation of this credit. Absolutely no telephone calls,

correspondence, et cetera; absolutely nothing except the silence of acquiescence amounting to confirmation.

[18] The defence filed by SCFS on October 10, 2008 is only a denial of all aspects of the claim. It does not recite any specific defence whatsoever and what is now being advanced is, in fact, the particulars of the counterclaim. There appears to be agreement that when SCFS returned the equipment relating to the February 1, 2007 contract between Concrete and SCFS that SCFS inadvertently put on the same delivery trailer, additional equipment that has absolutely nothing to do with the contract in question. SCFS maintains that Concrete are holding this equipment as a power play to get them to pay their account and there may well be some merit in this allegation. Certainly Concrete attempts to justify the continued retention of equipment which they acknowledge is not theirs on the basis that there is a dispute as to who owns the equipment. If there was a dispute as to ownership of this equipment then it certainly appears to have been resolved no later than confirmation now available by affidavit of Roland Hage who identifies the equipment referred to in the counterclaim of October 10, 2008. This is equipment that he sold to SCFS. The other person that Concrete say might have an ownership interest apparently has confirmed that the equipment is owned by SCFS. The counterclaim is entirely separate from the claim advanced by Concrete. The issues of credibility and dispute raised by the counterclaim are solely related to equipment that was not part of the contract for which Concrete seeks summary judgment.

[19] Concrete has established clearly the prerequisites necessary for summary judgment. I agree with the decision of Justice LeBlanc in **Boehnier v. United Golf** wherein he accepts the decision in **P.P.G. Industries Canada Limited v. J.W. Lindsay Limited et al.** (1982), 52 N.S.R. (2d) 267, is binding authority which restricts set-offs and counterclaims in an action under the *Mechanics Lien Act* for those that arise out of the contract or work done or materials furnished to the property in question as being between the parties to the original lien action. Concrete has made out its claim. There is no arguable issue to be tried with respect to the claim, nor does the defence raise any arguable issue to be tried with respect to Concrete's claim or any part thereof.

**CONCLUSION:**

[20] Concrete is entitled to summary judgment against SCFS in the amount claimed, $184,109.88. There has been paid into Court the sum of $123,866.02 which presumably attracts interest and the parties agree that there is a priority claim by

Canada Revenue Agency. There was also a claim by Perri Formworks System and a letter from their solicitor indicates they are not participating in this action, that the equipment was allegedly returned to Perri as per paragraph 9 of SCFS's counterclaim. The Canada Revenue Agency claim is somewhere in the range of $60,000.00 plus, and it is stating the obvious that Concrete are entitled to an order for payment out of Court of the hold back less the priority of Canada Revenue Agency. Whatever this amount turns out to be, it will be credited against the indebtedness for which judgment has been granted of $184,109.88 and costs awarded.

**Issue No. 2: Whether or not an order for severance should be granted for the counterclaim raised by the respondent in his defence and counterclaim?**

[21] The effect of granting summary judgment on the claim results in the practical conclusion that the counterclaim stands on its own. Nevertheless, as counsel have argued the question of severance I will make a conclusion on that application.

[22] With respect to the counter claim, paragraph 6 reads as follows:

> SCFS, was at all material times and is the owner of and entitled to possession and use of equipment including, but not limited to approximately 2000 shoring jacks, approximately 50 to 60 pieces of aluminum staging, approximately 200 U-heads and approximately 200 base jacks ("collectively the Equipment") which was used by SCFS in its work at Main Avenue and otherwise in its business.

[23] SCFS filed on this application the affidavit of Roland Hage who in paragraph 2 recites this equipment and, in his affidavit, confirms that he has been contacted by SCFS and after contact he telephoned Concrete and advised that he had owned the equipment but had sold it to SCFS Inc. and requested that it be returned to SCFS Inc.

[24] In the affidavit of Elaine Bateman she confirmed that when equipment was returned to Concrete it included a Perri system and arrangements were made for its return to Perri.

[25] The additional equipment delivered in error was retained by Concrete. Initially they received a call from Roland Hage claiming ownership to the material. In any event, none of the additional equipment referred to in the counter claim has anything whatsoever to do with the rental contract for which Concrete has sued and filed a statement of claim. The counterclaim, in part, raises the cause of action conversion.

This equipment was delivered to Concrete months after the contract between Concrete and SCFS and clearly is not related in any way to the claim of Concrete for which they have been granted summary judgment.

[26] The 1972 *Civil Procedure Rules* apply and *CPR* 5.03 is as follows:

> **Court may order separate trials, etc.**
>
> 5.03. (1) Where a joinder of causes of actions or parties in a proceeding may embarrass or delay the trial or hearing of the proceeding or is otherwise inconvenient, the court may order separate trials or hearings, or make such other order as is just. [E. 15/5(1)]
>
> (2) Where a counterclaim or a third party proceeding ought to be disposed of by a separate proceeding, the court may order the counterclaim or third party proceeding to be struck out or tried separately, or it may make such other order as is just. [E. 15/5(2)]

## LAW REGARDING SEVERANCE:

[27] In **Lockhart** v. **Village of New Minas** (2005), 2005 N.S.S.C. 93 (S.C.), Warner J. quoted from **Bank of Montreal** v. **Brett** (1991), 111 N.S.R. (2d) 335 (T.D.) in paragraph 11:

> The court therefore must exercise its discretion to determine whether it should separate the trial of these proceedings to 'prevent injustice' to any party as much as is reasonable in the circumstances and to prevent delay where such delay or such prejudice works a significant or some injustice to the parties involved. ... The obligation of the court is to balance all of these factors and to determine a course of action that constitutes the least injustice to the parties involved and is consistent with the efficient and expeditious resolution of the matters in issue.

**CONCLUSION:**

[28] For actions to be joined or to continue to joint trial there must be a real measure of common interest at stake.

[29] A severance conclusion occurs when it is determined that it is reasonable in the circumstances and to prevent delay where such delay or such prejudice works a significant or some injustice to a party. It is clear in this case that there is no common elements to the claim and the counter claim. The suggestion by SCFS that the retention by Concrete of this equipment referred to in the counter claim as a form of ransom makes it a common issue; however, with respect, there is no arguable point with respect to the contract, the failure to make payment upon, which is the sole subject of the claim. Clearly to prevent injustice and delay the counter claim must be severed from the initial claim. In so doing, I want to make it clear that I placed no weight whatsoever on the argument that the Revenue Agency claim puts the statutory hold-back paid into court into jeopardy. There is simply no evidence before me that such is the case.

**COSTS:**

[30] Counsel have agreed that the costs and disbursements of this application are fixed to Concrete in the amount of $1,000.00 payable forthwith.

J.