SUPREME COURT OF NOVA SCOTIA

Citation: *AtlanticSpark Professional Services Inc. v. Hryshyna*, 2016 NSSC 114

Date: 20160428
Docket: Halifax No. 445582
Registry: Halifax

Between:

AtlanticSpark Professional Services Inc.

Applicant

v.

Yauheniya Hryshyna

Respondent

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	March 15, 2016, in Halifax, Nova Scotia
Counsel:	John O'Neill, for the Applicant Richard Norman and Deanna Bru, for the Respondent

By the Court:

[1] AtlanticSpark Professional Services Inc. ("AtlanticSpark") has brought an application against the respondent, Yauheniya Hryshyna , and seeks an order for damages, return of property and other relief, alleging breach of contract, conversion and detinue of its property, fraudulent misrepresentation and deceit.

[2] Ms. Hryshyna, the respondent, moves for an order converting this application into an action pursuant to Civil Procedure Rule 6.

Background

[3] Ms. Hryshyna was hired as office manager at AtlanticSpark on January 18, 2015 and was terminated on April 15, 2015. The application in court contained the following allegations at paras. 3 – 6 of the application document:

> 3. AltanticSpark states that during the course of her employment Hryshyna disclosed and provided AtlanticSpark's proprietary and confidential information to her husband, Milan Vrekic, ("Milan"), & his company, 327396 Nova Scotia Limited. This property and information was then used to undermine AtlanticSparks existing contracts, business relationships and unlawfully re-direct work that belonged to AtlanticSpark.
>
> 4. AtlanticSpark states that during the course of her employment Hryshyna falsified bookkeeping records and recorded as loans contract payments due from AtlanticSpark to Milan Vrekic and 327396 Nova Scotia Limited.
>
> 5. AtlanticSpark states that during the course of her employment Hryshyna fraudulently charged AtlanticSpark for work she personally undertook for Milan and 327396 Nova Scotia Limited.

[4] Ms. Hryshyna denies these allegations and states, in particular, at paras. 17 – 19 of her notice of contest:

> 17. Ms. Hryshyna denies disclosing confidential information to anyone and denies AtlanticSpark was undermined in any way by any action or omission of Ms. Hryshyna. She puts AtlanticSpark to the strict proof thereof.
>
> 18. Ms. Hryshyna denies falsifying records or charging AtlanticSpark for work undertaken for any other individual company, and puts

> AtlanticSpark to the strict proof thereof. Ms. Hryshyna did take four personal days off during her employment with AtlanticSpark. During that time she volunteered without compensation to assist her husband with a workshop.
>
> 19. As to the whole of the claim, Ms. Hryshyna says it is completely devoid of merit and is designed to purely embarrass her and her husband.

[5] It is evident from the pleadings that AtlanticSpark makes a number of allegations against Ms. Hryshyna's reputation by these allegations of breach of contract, conversion and detinue of Atlantic Sparks property, fraudulent misrepresentation and deceit.

[6] Ms. Hryshyna brings this application to convert the application to an action, and submits that the application process does not provide procedural safeguards necessary to permit her to make a full defence to these allegations. She alleges these are serious questions of credibility that are better assessed through an action. Moreover, she states that she is not prepared to waive her right to a jury trial but cannot make that election at this time because the details of the claims are not yet apparent. In summary, she states conversion will ensure that she has a full opportunity to challenge the allegations made against her.

[7] AtlanticSpark opposes the conversion and says to convert will lead to higher costs and undue delay.

Issue

[8] Should the present application in court be converted to an action?

Relevant Civil Procedure Rules

[9] A motion to convert is governed by Civil Procedure Rule 6.02, which reads:

> **Converting action or application**
>
> 6.02 (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.

(3) An application is presumed to be preferable to an action if either of the following is established:

(a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;

(b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

Evidence for converting an application

6.03 (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:

(a) a description of the evidence the party would seek to introduce;

(b) the party's position on all issues raised by the application;

(c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.

> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[10] Both parties refer to *Jeffrie v. Henriksen*, 2011 NSSC 292, where at para. 13, the court set out a three-stage analysis to be followed at a motion to convert:

> 13 Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
>
> > a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
> >
> > b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);
> >
> > c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[11] While there is a presumption in Rule 6.02(2) in favour of proceeding by application, it is a rebuttable presumption. Moir J. noted in *Guest v. MacDonald*, 2012 NSSC 452, at para. 11:

> … the application is not for every circumstance. It is suitable for some disputes, but not others.

[12] The burden is on Ms. Hryshyna pursuant to Rule 6.02(2) to persuade me that this matter should be converted to an action.

Analysis,

[13] What follows is an analysis based on the three-stage test set out *Jeffrie, supra*.

Stage 1 – Are any of the presumptions in favour of an application applicable in this case pursuant to Rule 6.02(3)?

[14] AtlanticSpark alleges that its substantive rights will be eroded in the time it will take to bring an action to trial, thus triggering the presumption under Rule 6.02(3)(a).

[15] AtlanticSpark says that Ms. Hryshyna has disclosed proprietary and confidential information to her husband which has been used to undermine its existing contracts and business relationships and which has redirected work that belongs to AtlanticSpark. AtlanticSpark says her continued possession and disclosure of this information will significantly erode its substantive rights if the action is converted into an action.

[16] Ms. Hryshyna replies that there is no evidence that the substantive rights, asserted by AtlanticSpark, would be eroded in the time it would take to bring an action to trial. She says the losses claimed are not ongoing and would be compensable in monetary damages if AtlanticSpark is successful in its claim. Finally she says there is no evidence that the passage of time has created a prejudice to AtlanticSpark.

[17] I am not satisfied that the presumption in Rule 6.02(3)(a) has been established. Any damages that would flow from this allegation would be monetary and, therefore, be compensated in damages regardless of whether the matter proceeds by application or action.

[18] I am not persuaded that the erosion will be significantly lessened if the dispute is resolved by way of application.

[19] I have reviewed Rule 6.02(3)(b) and find that it is not applicable in this proceeding.

Stage 2 – If the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4).

[20] Rule 6.02(4)(a) reads:

> (4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:
>
> > (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

[21] Ms. Hryshyna indicates for the purposes of this motion she will elect trial by jury. Her wish to preserve her right to a jury trial brings her within the presumption in favour of an action in Rule 6.02(4)(a).

[22] Ms. Hryshyna refers to *Leigh v. Belfast Mini-Mills Ltd*. 2011 NSSC 300, in particular paras. 101-102, which are of application here:

> 101 The defendants have been candid in saying that it is premature for them to be certain that they want the trial of this matter to be conducted with a jury. That is a decision that can only be finalized, they say, once discoveries are complete and all undertakings have been satisfied. The submission continues "... for the purposes of this motion, the Defendants do specifically indicate that they will elect trial by jury", and that there are "no cogent reasons to take away that right to a trial by jury." They submit this is a case that involves multiple issues of fact and credibility, which are "appropriate and suitable for a determination by a Jury".
>
> 102 I am satisfied that the criteria in Rule 6.02(4)(a) have been met, deeming action to be the preferred procedure. *The Judicature Act* R.S.N.S. 1989, s. 34 provides the *prima facie* right to a jury trial, which is jealously guarded by the Courts. I accept the defendants' representation that they wish to exercise that right in this case which raises substantial disputes of fact. If the defendants' position changes prior to trial and they do not elect jury, it would not have been improper to express a desire at this stage in the proceeding to preserve their right to a jury trial, which I find they are doing in good faith.

[23] A litigant in Nova Scotia is not deprived of a right to a jury trial except for cogent reasons. AtlanticSpark argues that the cost of a jury trial for the court system would be out of a proportion to the value of the claim. It refers to *Guest, supra,* wherein Justice Moir commented at para 21:

> 21 The Rules support the view that, depending on the circumstances of the claims between the parties, the relative cost and timing of trial by jury and determination by application may provide cogent reasons to deprive a party of the right to a jury trial. Or, to stick with the language of the Rule, relative cost and delay may show that it is not unreasonable to do so.

[24] Ms. Hryshyna refers to *Anderson v. Cyr*, 2014 NSCA 51, which was a decision subsequent to *Guest, supra,* and provided guidance on limiting the substantive right to a jury trial. Although the list of reasons provided by the court (at para. 96) was not exhaustive, nowhere did the court suggest that it is appropriate to weigh the proposed monetary size of the claim against the costs of a jury trial.

[25] I am satisfied that in this particular matter cost is not a cogent reason to limit Ms. Hryshyna from requesting a jury trial. In any event, there is no evidence of the monetary value of AtlanticSpark's claim in evidence.

[26] I am satisfied that the presumption in Rule 6.02(4)(a) in favour of an action applies.

[27] Rule 6.02(4)(b) also provides a presumption in favour of an action. Rule 6.02(4)(b) reads as follows:

> (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[28] Ms. Hryshyna submits that this particular provision is relevant because the issue in this proceeding will turn on credibility. Ms. Hryshyna submits she is not prepared to waive her ability to withhold information about witnesses. She says that there may be other witnesses who she will call in addition to those listed in the notice of contest.

[29] I am not persuaded that there is sufficient evidence before me to apply the presumption in favour of an action in Rule 6.02(4)(b).

Stage 3 – The court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5), and determine the relative cost and delay as between an action and application under Rule 6.02(6).

[30] Rule 6.02(5) lists certain factors that favour an application:

> 6.02(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;
>
> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross examination.

[31] As to Rule 6.02(5)(a), Ms. Hryshyna indicates that notwithstanding that her notice of contest listed certain witnesses she is not in a position to identify all the witnesses she may intend to call. In addition, she says she will have to engage and instruct one or more experts.

[32] AtlanticSpark says the fact situation centers on the relationship between Rachel Craig of AtlanticSpark and Ms. Hryshyna and, therefore, both parties have identified their "important fact witnesses". I agree. I am satisfied the parties can quickly ascertain who their important witnesses will be and, therefore, this factor in favour of an application would apply.

[33] Rule 6.04(5)(b) asks whether the parties can be heard in months, rather than years. AtlanticSpark submits that the matter can be heard quickly. In response, Ms. Hryshyna says this is not a single breach of contract case which can be resolved in a few months, but rather that time is required to fully examine AtlanticSpark's evidence to support their many allegations of fraud and deceit.

[34] I am not satisfied that the factual basis for this case is particularly complex, nor am I persuaded that complexity prevents a matter proceeding by way of application. The real issue with respect to the complexity of the matter is the amount of work that needs to be done before this case can proceed, combined with the large number of claims advanced by AtlanticSpark . AtlanticSpark raises numerous issues, and it would seem to me that an inordinate amount of work will need to be done to sort out these various allegations and remedies before the case can proceed. I am not persuaded that this is a factor in favour of an application, as there are serious allegations made by AtlanticSpark that will require time to fully examine and, in particular, to ferret out the evidence that would support the many remedies AtlanticSpark seeks.

[35] I am not satisfied that this matter can be ready to be heard sooner (relative to an action) rather than later.

[36] Rule 6.02(5)(c) asks whether the hearing is of a predictable length and content. AtlanticSpark suggests one day is sufficient. With respect, this is clearly unreasonable. There are significant factual issues layered with credibility determinations. Even the estimate by Ms. Hryshyna of four to five days may not be sufficient.

[37] I am satisfied at this point that it is not possible to predict the length and content of the hearing accurately, given the number and nature of the allegations and remedies sought. It would appear that full disclosure and discovery are required in order to determine the issues that must be dealt with at a hearing or trial. I am not satisfied that there is sufficient information to determine that the hearing is of predictable length and content and, therefore, this presumption does not apply.

[38] Rule 6.02(5)(d) asks whether the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct evidence and cross-examination.

[39] AtlanticSpark objects to what it says is the lack of evidence filed by Ms. Hryshyna on this motion, and in relation to the credibility issue in particular.

[40] AtlanticSpark refers to the evidentiary burden in Rule 6.03 on a motion to convert:

> **Evidence for converting an application**
>
> 6.03 (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
>
> (a) a description of the evidence the party would seek to introduce;
>
> (b) the party's position on all issues raised by the application;
>
> (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
>
> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[41] Ms. Hryshyna submits that she can rely on the pleadings that indicate that credibility will be an issue in this proceeding. Ms. Hryshyna refers to *Dr. Robert Hathawa Professional Corporation v. Smith*, 2015 NSSC 68, wherein the court noted:

> 36 I agree with the suggestion by the Applicants that the affidavit filed by the Smith Respondents pursuant to Rule 6.03 does not provide a detailed description of the credibility issues that are in play in this proceeding. I am satisfied, however, that when deciding this motion, I can also take into consideration the pleadings that have been filed. These pleadings clearly indicate serious disputes about whether agreements were ever reached between the various parties. I am satisfied that in these circumstances (where one party alleges binding, verbal or unsigned agreements, and the other parties deny such agreements), credibility will be in issue at the hearing of the matter. The issue is whether, in this case, credibility can be satisfactorily assessed by way of the application process. As noted by Bryson J. in *Citibank*, *supra*, Rule 6.02(5) contemplates that credibility may be an issue in an application. Put another way, the fact that credibility is an issue does not mean that the proceeding cannot proceed by way of application.

[42] Ms. Hryshyna refers to the pleadings that make a number of allegations of facts in dispute which will require an evaluation of credibility:

- The Applicant alleges the Respondent was terminated; the Respondent says she quit;
- The Applicant says there are outstanding items owed to it by the Respondent; the Respondent says everything was returned and there is nothing outstanding;
- The Respondent completely denies the allegations about using confidential and proprietary information; and
- The Respondent alleges the Applicant has an ulterior motive for bringing this litigation.

[43] Ms. Hryshyna submits that credibility cannot be satisfactorily assessed unless the matter proceeds by way of action. She says that affidavits in place of direct *viva voce* evidence will not provide the opportunity for the court or jury to finally assess the witnesses' credibility.

[44] It has been said that an action is a better forum for testing credibility than an application: see *Budlakoti v. Canada (Minister of Citizenship and Immigration*), 2014 FC 855, [2014] F.C.J. No. 912 (F.C.), at para. 34, affirmed at 2015 FCA 139, leave to appeal refused, [2015] S.C.C.A. No. 334; *Daudinot (Litigation guardian of) v. Notarfonzo Estate*, 2013 ONSC 2496, [2013] O.J. No. 1976, at paras. 19-22.

[45] It is clear, of course, that under our *Civil Procedure Rules* the "mere fact that credibility is an issue will not, on its own, be sufficient to convince the court that the action is preferable route", as LeBlanc J. said in *Matheson v. CIBC Wood Gundy (c.o.b. Wood World Markets/Marches M*), 2011 NSSC 85, at para 12. The availability of cross-examination on affidavits will generally allow issues of credibility to be satisfactorily resolved: *Matheson, supra,* at paras. 13-15. That being said, the dispute in *Matheson, supra,* was "principally about the legal significance of agreed-upon events and the resulting relief and the quantification of damages" (para. 11). LeBlanc J.'s comments about cross-examination were based on remarks by Warner J. in *Kings County v. Berwick (Town)*, 2009 NSSC 398, which also lacked the fundamental factual disputes and (in particular) the allegations of deceit and dishonesty found in the present case.

[46] As I have noted, I am mindful here that various claims advanced by AtlanticSpark go to issues of alleged dishonesty, deceit, and fraud. In *Martin v. Berman*, [1993] O.J. No. 1088 (Ont. Ct. J. (Gen. Div.)), the allegation against the

defendant was "based in fraud; that he became a constructive trustee; did not tell the beneficiaries of the trust that the trust had been breached; and that he participated in covering up that breach" (para. 2). The Master commented that "[i]n answering such allegations, a defendant ought not to be confined to affidavit evidence, cross-examination and a motion. Such allegations are serious and deserving of a full trial if a trial is demanded..." (para. 3). Clearly the *Nova Scotia Civil Procedure Rules* and the caselaw interpreting them do not support such a sweeping statement. In this case, though, I believe the multiplicity of claims and the disputed facts, combined with the fundamental issues of credibility, strongly support an action as the preferable course.

[47] After hearing the parties' positions, I have concluded that credibility cannot be satisfactorily assessed by way of the application process. I agree with Ms. Hryshyna that there are not sufficient procedural safeguards in the application process to permit her to make a full defence to these allegations. In most cases credibility can be dealt with by way of the application process. In this case, however, because of the many allegations that reflect on Ms. Hryshyna's reputation and the number and varieties of remedies sought by AtlanticSpark, some of which involve allegations of deceit or dishonesty, I am persuaded that an action is the appropriate process and, therefore, this presumption is not applicable.

Determination of the relevant costs and delay pursuant to Rule 6.02(6).

[48] The final part of the third stage of the test concerns Rule 6.02(6), requiring the court to consider the relevant costs and delays of an action or an application in the context of a motion to convert the proceeding.

[49] AtlanticSpark submits the application process is a more streamlined and cost-effective process. It says a jury trial will add significantly to the cost and, therefore, an application will result in reduced costs.

[50] As to delay, AtlanticSpark says the action process is inherently slower than an application, and finding dates for a jury will result in delay. No evidence was provided on these issues.

[51] Ms. Hryshyna submits that proceeding by action will likely be less expensive than an application in court. She says that preparing affidavits is expensive and submits that *viva voce* direct evidence will be less expensive and will provide a better opportunity for the parties and the court to assess credibility.

[52] As I have set out, AtlanticSpark has chosen to make wide-ranging allegations against Ms. Hryshyna, and, in particular:

- that she has refused or neglected to return or destroy materials belonging to the company, and that during her course of employment she provided confidential and proprietary information to her husband and undermined AtlanticSpark's business contacts and relationships.
- that she directed work to her husband that belonged to AtlanticSpark;
- that during her employment she falsified bookkeeping records; and
- that during her employment Ms. Hryshyna fraudulently charged AltanticSpark for work she personally undertook for her husband and 327396 Nova Scotia Limited.

[53] I am not satisfied costs will be necessarily greater if this matter were to proceed by action. I note the comments of Justice Murphy in *Monk v. Wallace*, 2009 NSSC 425:

> 15 Although the expanded application route under the Rules is intended to offer prompt and more economical relief to parties who qualify for an application procedure, the Rules now also provide a more streamlined action procedure. Ms. Monk will not necessarily be subjected to inordinate delays and procedural hurdles because this matter will be determined through an action rather than by application. The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-of-court settlement, I am convinced that the Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.

[54] In summary, I conclude:

i. there are no presumptions in favour of an application applicable pursuant to Rule 6.02(3);

ii. the presumption in favour of an action contained in Rule 6.02(4)(a) is applicable; and,

iii. Rule 6.02(5)(a) is a factor in favour of an application.

[55] I have considered Rule 6.02(6) and on balance, I am satisfied, because of the seriousness, complexity and wide-ranging allegations, and for the reasons outlined previously in my analysis of the three-stage test set out in *Jeffrie, supra,* that an order to convert this matter to an action will issue. I conclude in particular that the issues of credibility raised here, when combined with the nature of the allegations, militate strongly in favour of the procedural and evidentiary safeguards of the trial process. Ms. Hryshyna shall have her costs in the amount of $750.00.

Pickup, J.