

SUPREME COURT OF NOVA SCOTIA

Citation: *Annapolis County (Municipality) v. R. G. Graves Groceries Ltd.*, 2016 NSSC 142

Date: 20160610

Docket: ANN No. 421027

Registry: Annapolis Royal

Between:

The Municipality of the County of Annapolis, a body corporate
under the provisions of the *Municipality Government Act*

Plaintiff

v.

R. G. Graves Groceries Limited, a body corporate,
Gerald Hackenschmidt, William Hamilton and Peter Newton

Defendants

and

Marilyn Wilkins, Brian "Fuzzy" Connell, Wayne Fowler,
Paul MacDonald, Tom Vitiello, Patrick McWade, Reg C. Ritchie,
Frank Chipman, Martha Roberts, and Ron Trimper

Third Parties

Judge: The Honourable Justice Michael J. Wood

Heard: February 2, 2016, in Annapolis Royal, Nova Scotia

**Final Written
Submissions:** April 4, 2016

Counsel: W. Bruce Gillis, Q.C., for the Plaintiff and Third Parties
Oliver Janson, for the Defendant, R.G. Graves Groceries Limited
Geoff P. Muttart, for the Defendant, Gerald R. Hackenschmidt
David G. Cottenden, Q.C., for the Defendant William Hamilton
Ronald D. Richter, for the Defendant, Peter Newton

By the Court:

[1] This litigation arises out of a lease between the Municipality of the County of Annapolis and the operator of a grocery store in Cornwallis Park, Nova Scotia. It has expanded to include allegations against former wardens, councillors, and municipal employees and raises legal issues so arcane that the most current case authority found by counsel dates from the early twentieth century.

[2] The parties have exchanged pleadings but the matter has progressed no further. I have been asked to strike out the third party statement of claim on the basis that it discloses no cause of action. I will briefly outline the allegations in the pleadings in order to provide the necessary context for this motion.

[3] This action was started by the Municipality in October 2013 against R. G. Graves Groceries Limited claiming unpaid rent under the terms of a lease entered into in June 2009. Graves responded with a defence and counterclaim alleging that no money was payable under the lease due to an amendment agreed to by the Municipality.

[4] In September 2014 the Municipality amended its notice of action and statement of claim to add a former warden, Peter Newton, and two employees as defendants alleging that any amendment was not approved by resolution of council as required under the provisions of the *Municipal Government Act*, S.N.S. 1998, c. 18 and is therefore void and unenforceable. The amended statement of claim further alleges that if Graves is successful in defending the claim on the basis of an amended lease, the individual defendants are personally liable to the Municipality because of their involvement in the dealings with Graves.

[5] Mr. Newton's defence says that he was acting as warden, member of the finance committee, and member of council of the Municipality at all relevant times. He goes on to allege that an employee of the Municipality recommended a change to Graves' rental terms which was approved by both the finance committee and council.

[6] In addition to defending the Municipality's claim, Mr. Newton issued a third party claim in July 2015 against ten individuals whom he identifies as being members, with him, of the finance committee and council. The third party statement of claim states that all actions taken in relation to the Graves lease were done by, or on the direction of, "the Municipal Council and/or Finance

Committee". Mr. Newton says if he is found liable to the Municipality then the third parties are also liable and must make contribution to him under the *Tortfeasors Act*, R.S.N.S. 1989, c.471.

Nature of the Motion

[7] The third parties have made a motion for summary judgment on pleadings under *Civil Procedure Rule 13.03*. No evidence is admissible on such a motion and the court must make its decision based only on the pleadings as filed.

[8] For purposes of the motion the court must assume that all of the facts alleged in the pleading being challenged are true. It must then assess whether those facts disclose a cause of action. In order to grant summary judgment it must be plain and obvious that the claim cannot succeed.

[9] In this case the pleading being challenged is the third party statement of claim filed by Mr. Newton. That document incorporates, by reference, the provisions of Mr. Newton's defence. According to these pleadings the essential facts which I must presume to be true are as follows:

- (a) As of May 2010, Mr. Newton was warden, member of finance committee, and member of council for the Municipality.
- (b) In May 2010 an employee of the Municipality recommended to the finance committee that Graves should stay in possession of the property and pay rent at the current rate until circumstances changed at Cornwallis Park.
- (c) The finance committee approved this recommendation and the matter was placed before council for approval.
- (d) All decisions, actions, resolutions, or agreements in relation to the Graves lease and any amendments of that agreement were made by the municipal council and/or the finance committee or on their direction.
- (e) Mr. Newton did not negotiate or renegotiate any agreement with Graves.
- (f) All of the third parties were members of council at the material time and some were also members of the finance committee.

[10] The position of the third parties is that an amendment of the Graves lease could only be done by resolution of council because of the provisions of the *Municipal Government Act*. Their argument in support of the motion to strike out the third party statement of claim is summarized in the following passage from the motion brief:

Newton alleges in the Third Party claim that the amendments were approved either by the full Council or by the Finance Committee. It is clear that the Finance Committee had no authority under the *Municipal Government Act* to make any amendments without the approval of the full Council.

As a result, if the evidence establishes that the change in rent that was apparently communicated to the Graves' by Newton and the other Co-defendants was, in fact, approved by the Council (as alleged in paragraph 4 of the Third Party Statement of Claim), then the whole action fails and the Third Party Claim with it, and therefore the Third Party Claim is meaningless as put forward by Newton, and therefore frivolous and vexatious.

On the other hand, if the evidence establishes that Council did not authorize any change then the allegation that the Third Parties properly authorized and approved the decision fails completely.

Graves have not identified any other council members or council officials except for Hackenschmidt, Hamilton and Newton as participating in a decision to amend the rental.

Therefore, none of the named Third Parties could possibly be liable to contribute to the claim against any of the Defendants by the Plaintiff.

[11] It is clear that the position of the third parties is not that the third party statement of claim fails to disclose a cause of action, but rather, that it is not necessary because there are no circumstances in which they might be liable. This is based upon the assertion that there are only two potential outcomes to the litigation: Mr. Newton is successful in defending the Municipality's claim, or he is liable but the third parties were not involved in the ostensible amendment. In either case, the third parties, argue they would not be liable.

[12] The position of Mr. Newton is that if he is liable to the Municipality because the amendment of the Graves lease was not properly authorized then other members of the finance committee and council who participated in the process are as well.

[13] The Municipality, Graves and the other defendants did not file briefs or participate in the summary judgment motion. The Municipality is represented by Mr. Gillis who also acts for the third parties. The issue of potential conflict was raised by counsel for Mr. Newton, however, Mr. Gillis confirmed that the plaintiff had no objection to his representation of the third parties, at least with respect to this motion.

[14] At the motion hearing in February 2016, I indicated to counsel that neither party had clearly identified the legal basis on which a councillor might be liable to a Municipality. Such a claim underlies both the third party claim and the Municipality's claim against Mr. Newton. At my request both counsel filed supplementary briefs on this issue.

Analysis and Disposition

[15] *Civil Procedure Rule 13.03(1)* says that a judge must set aside a statement of claim that discloses no cause of action or makes a claim that is clearly unsustainable.

[16] The fact that a successful defence by Mr. Newton will also result in success for the third parties is not a sufficient reason to strike out the third party claim. Here the third parties are not disputing the existence of a cause of action against municipal councillors, but they argue the third party claim is doomed to fail. They say that in the circumstances of this case they cannot be liable because they were not involved in the actions of the Municipality leading to the alleged lease amendment. This may be how the evidence unfolds, but Mr. Newton's third party claim alleges they were participants and I must accept those allegations as true for purposes of this summary judgment motion.

[17] In some situations a motion for summary judgment on pleadings involves a question of law. In that case the judge is not obliged to decide the question but rather has a discretion whether to do so. This is confirmed by Rule 13.03(5) which states as follows:

- (5) A judge who hears a motion for summary judgment on pleadings, and who is satisfied on both of the following, may determine a question of law:
 - (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;

- (b) the outcome of the motion depends entirely on the answer to the question.

[18] In my view, this motion for summary judgment raises the issue of whether, and in what circumstances, a municipality has a cause of action against a warden or council member. The answer to this question will define the elements of the cause of action and enable the court to determine whether the facts alleged by Mr. Newton satisfy those requirements. Even though the third parties do not dispute the existence of a cause of action its identity, content and scope is far from clear.

[19] The complication in this case is that the Municipality's claim against Mr. Newton involves the same potential cause of action as the third party claim. It is Mr. Newton's position that he is not liable, however, if he is, he says that other finance committee and council members are as well.

[20] In most cases the elements of the cause of action being advanced are clear. The issue on a motion for summary judgment on pleadings is usually whether the facts alleged meet those requirements. In this case there is no such clarity, primarily because of the unusual nature of the cause of action alleged by the Municipality and repeated by Mr. Newton in his claim against the third parties.

[21] After being given an opportunity to research the issue further both counsel agreed that they could find little authority on point. The only decision which they found addressing the issue directly is *Town of New Glasgow v. Brown* (1907), 39 S.C.R. 586. In that case, the town council of New Glasgow consisted of six members and the mayor. According to the trial decision (41 N.S.R. 542) three of the councillors were also members of the water committee which had been tasked with borrowing money and constructing a water main. When work on the main ceased there was surplus pipe on hand. The chair of the water committee sold the pipe to a third party without a resolution of council approving the sale. He had consulted with the committee members and one other counsellor who all agreed to the transaction. The town successfully sued all four councillors for conversion of the pipe. That decision was upheld by the Supreme Court of Canada on the basis that the sale and delivery amounted to conversion of municipal property.

[22] Although the decision in *New Glasgow v. Brown* appears to support a claim by a municipality against council members where property has been converted, the authority is very old. Counsel's research has not found any indication that a Canadian court has dealt with the issue since 1907. I am not satisfied that I have

sufficient information to make a definitive determination with respect to the nature and extent of any claim which could be made by a municipality against elected officials for unauthorized actions. Is it limited to the tort of conversion or is it broader in scope? Does it capture all council members who participated in the discussion and may have been aware of the decision or only those who took active steps to implement it? Further research may shed some light on these issues.

[23] *New Glasgow v. Brown* provides some basis for saying that a municipality can sue members of council for acting in the absence of proper authority. Such a claim may extend to councillors who were consulted and who approved of the transaction. It may not be restricted to those directly involved in the implementation process. While the nature of this cause of action may be relevant to this motion for summary judgment I am not prepared to try and define it with any more specificity than I already have. I say this because the answer to this question of law will not be determinative of the motion. It's definition and application will require consideration of facts beyond those alleged in the third party statement of claim. I am also influenced by the apparent lack of jurisprudence and the potential implications for the action against Mr. Newton. The Municipality did not formally participate in this summary judgment motion and should have input into any judicial determination that defines the parameters of their claim against Mr. Newton.

[24] It is not plain and obvious that the third party claim discloses no cause of action and therefore cannot succeed. The third parties have also not shown that Mr. Newton's allegations are clearly unsustainable. For these reasons I will dismiss the motion of the third parties for summary judgment on pleadings. If the parties wish to make submissions on costs they may do so in writing.

Wood, J.