IN THE SUPREME COURT OF NOVA SCOTIA
Citation: 2301072 Nova Scotia Ltd. v. Lienaux, 2004 NSSC 19

Date: 20040122
Docket: SH 93-5807
(Being the Consolidation of 93-5807 and 93-5909)
Registry: Halifax

Between:

2301072 Nova Scotia Limited

Plaintiff
(Defendant by Counter-Claim)

-and-

Charles D. Lienaux and Karen L. Turner-Lienaux

Defendants
(Plaintiffs by Counter-Claim)

- and -

Marven C. Block, Q.C.

Defendant

-and-

The Toronto-Dominion Bank

Defendant by Counter-Claim

-and-

Wesley G. Campbell and Grant E. MacNutt

Third Parties

Decision:	January 22, 2004
Judge:	The Honourable Chief Justice Joseph Kennedy
Heard:	July 10, 2003, Chambers, in Halifax, Nova Scotia
Counsel:	Alan V. Parish, Q.C., for 2301072 Nova Scotia Limited, The Toronto Dominion Bank and Wesley G. Campbell Joel Fichaud, Q.C, for Marven Block, Q.C. Charles Lienaux representing himself and his wife Karen L. Turner-Lieneaux

Schedules A, B & C referred to in this Decision are not available electronically. Copies will be provided upon request to the Court Administration Office at the Law Courts, Halifax.
(Calling in advance would be appreciated at 424-6900)

By the Court:

[1] Two applications arising out of this matter were argued before me in Chambers.

[2] By one application, 2301072 Nova Scotia Limited, the Toronto-Dominion Bank and Wesley G. Campbell seek to strike portions of defences and counter-claims which have been pleaded against them by Charles D. Lienaux and by his wife, Karen L. Turner-Lienaux. By the other application, Charles D. Lienaux and Karen L. Turner-Lienaux seek to amend their pleadings to include defences, counter-claims and third party claims which are additional to those already pleaded.

[3] In their application to strike pleadings, 2301072 Nova Scotia Limited, the Toronto-Dominion Bank and Wesley G. Campbell are opposed by Charles D. Lienaux and Karen L. Turner-Lienaux. In the application to amend their pleadings, Charles D. Lienaux and Karen L. Turner-Lienaux are opposed by 2301072 Nova Scotia Limited, the Toronto-Dominion Bank and Wesley G. Campbell.

[4] Charles D. Lienaux is a lawyer. He is self-represented and also represents his wife, Karen L. Turner-Lienaux.

[5] I am satisfied that 2301072 Nova Scotia Limited is a company associated with the plaintiff, Campbell.

[6] 2301072 Nova Scotia Limited and Campbell submit that the portions of the pleadings they seek to strike and the proposed amended pleadings in question raise issues and allegations which are *res judicata*.

[7] The subject pleadings and proposed pleadings are contained in three separate documents and are numerous. I have attached those documents to this decision, with each pleading in dispute marked with an “X”.

[8] Schedule “A” is a copy of the amended defence dated April 23, 1998. The paragraphs therein that the plaintiffs seek to strike are designated as indicated.

[9] Schedule “B” is an order made by Justice David MacAdam of this Court, dated November 28th, 1994, attached to which is an amended defence. The paragraphs therein that 2301072 Nova Scotia Limited and Campbell wish to strike are designated as above indicated.

[10] Schedule “C” is the proposed amended defence and counterclaim put forward by Lienaux and Turner-Lienaux, containing the amendments that are opposed by the 2301072 Nova Scotia Limited and Campbell. These contested amendments are designated as above indicated.

[11] The subject matter of the claims of 2301072 Nova Scotia Limited are promissory notes, personal guarantees and mortgages collateral thereto, in respect of the sums of $100,000 and $233,000, which were executed by Lienaux and Turner-Lienaux in favour of Central Guarantee Trust Company (CGT) in 1989. 2301072 Nova Scotia Limited claims the benefit of those notes, guarantees and mortgages, pursuant to their assignment to it by the Toronto-Dominion Bank. The Toronto-Dominion Bank had claimed the benefit of the notes, guarantees and mortgages by virtue of their assignment to it by CGT.

[12] Lienaux and Turner-Lienaux argue that the notes, guarantees and mortgages are void and unenforceable against them. Lienaux argues that they have been discharged as against him as a result of his second assignment into bankruptcy. Turner-Lienaux argues that her guarantees were coerced by undue influence exercised on her by Lienaux and that neither her guarantee, nor the mortgages collateral thereto, were preceded by independent legal advice, to which she says she was entitled.

[13] Another party to the action represented by counsel before me is Marven C. Block, Q.C. He is involved in the litigation because he was the lawyer retained by CGT to prepare the documentation that is central to the matter.

[14] In addition, Lienaux and Turner-Lienaux both raise defences which relate to their participation with Campbell in the development of The Berkeley Senior Citizens Residence in Halifax in 1989. It is these latter pleadings that are the subject of these applications.

[15] The contested pleadings in question can be broadly described as allegations by the defendants of:

> Fraud and breach of fiduciary duty on the part of Campbell;
>
> Conspiracy and extortion on the part of Campbell and the Toronto-Dominion Bank;
>
> Breaches of agreements and undertakings with respect to the financing of The Berkeley Project on the part of Campbell;
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> Professional negligence on the part of Campbell;
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> Breaches of the *Securities Act* on the part of Campbell;
>
> The unlawful appropriation of The Berkeley Project "concept" on the part of Campbell and 2301072 Nova Scotia Limited.

[16] 2301072 Nova Scotia Limited, the Toronto-Dominion Bank and Campbell submit these latter claims and allegations have all been resolved against Lienaux and Turner-Lienaux in the decision of Justice Suzanne Hood of this Court in *Smith's Field Manor Development Ltd., Karen Turner-Lienaux and Byrne Architects Incorporated v. Wesley G. Campbell* (2001), 195 N.S.R. (2d) 220 and upheld by the Appeal Court 2002 NSCA 104, 208 N.S.R. (2d) 277.

BACKGROUND

[17] In 1989, Lienaux, Turner-Lienaux, and Campbell, together with other investors, joined in the development of a senior citizens' residence in Halifax - the Berkeley Project.

[18] The project involved the development, financing, construction and operation of "The Berkeley" up until the time that a receiver was appointed in the fall of 1993. As part of their share of the financing of the project, the Lienauxs borrowed $133,000 from CGT.

[19] Lienaux and Turner-Lieneaux borrowed a further $200,000 from CGT in 1989. Some of these funds were invested in the project and some went elsewhere.

[20] CGT became insolvent in 1993. As a result of its liquidation, Lienaux's promissory notes, Turner-Lienaux's guarantees and the couple's collateral mortgages were assigned by CGT to the Toronto-Dominion Bank.

[21] The Berkeley Project began to experience financial difficulties, even before it was completed. These difficulties escalated between the years 1990 and 1993, when the project's revenues were less than anticipated. The abilities of Lienaux and Turner-Lienaux to repay their indebtedness to CGT were compromised. Their notes, guarantees and collateral mortgages fell into arrears and CGT (and later the Toronto-Dominion Bank) began to demand re-payment.

[22] The Berkeley Project's financial problems resulted in difficulties amongst the investors. These problems culminated in the action that came to trial before Justice Hood.

[23] In November of 1993, the Toronto-Dominion Bank commenced two actions to collect on the notes, guarantees and mortgages which were in default. These two actions were eventually consolidated to become this matter.

[24] In addition to filing defences to the claims of the Toronto-Dominion Bank, Lienaux and Turner-Lienaux commenced third party actions against Campbell and another investor. They also counter-claimed against the Toronto-Dominion Bank.

[25] Eventually an agreement was concluded between the Toronto-Dominion Bank and 2301072 Nova Scotia Limited, whereby the latter company would take an assignment of the Bank's interest in the notes, guarantees and mortgages executed by Lienaux and Turner-Lienaux.

[26] The trial before Justice Hood, resulting from the collapse of the Berkeley Project, was lengthy and complex. It commenced in January of 2001, and involved 38 court days. Decision was rendered on June 18th, 2001. In a lengthy and highly detailed set of reasons, Justice Hood dismissed all of Lienaux's and Turner-Lienaux's claims against Campbell. Of particular note is the following passage from Justice Hood's decision, *Smith's Field Manor Development Ltd. et al v. Campbell*, *supra*, at p. 296, para. 469 *:*

> 469 This lawsuit is about disappointed expectations. It is about blame for those disappointed expectations. It is about allegations of fraud, dishonesty and breaches of duty.
>
> 470 I have concluded that the allegations of the plaintiffs are unfounded. Not only are they unfounded but, in my view, they are pure fiction. I am not only not satisfied on the balance of probabilities that any of the allegations are true, I am satisfied that the opposite is true. This leads me to a consideration of costs.
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> ...
>
> 476 In my findings on credibility, I accepted the evidence of Campbell and Logie over that of Lienaux. On every factual issue raised, I found in favour of Campbell.
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> 477 This case could have been decided solely on the issue of causation or the proper parties. Either would have disposed of the claims made by Smith's Field and Turner-Lienaux.
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> 478 Money was invested as agreed into the Berkeley project. Mortgage money and other money was borrowed for the project. The project had cost over-runs. The Berkeley residence did not attract tenants and therefore did not earn revenues as projected. There was never enough money to pay all of The Berkeley's expenses. The mortgage and property taxes were continuously in arrears. The mortgage lender was more than patient. When matters came to a head in October 1993, its patience was at an end. It did what mortgage lenders do in such circumstances. It acted to protect itself.

ISSUE

[27] The issue posed by 2301072 Nova Scotia Limited, the Toronto-Dominion Bank and Wesley G. Campbell, is whether Lienaux's and Turner-Lienaux's pleadings and proposed pleadings are sustainable in the face of Justice Hood's decision, which decision was upheld by the Nova Scotia Court of Appeal.

[28] Rule 14.25(1) provides as follows:

> 14.25(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

(a) it discloses no reasonable cause of action or defence;

(b) it is false, scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the proceeding;

(d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

RES JUDICATA

[29] In *Hoque v. Montreal Trust Co. et al* (1997) 162 N.S.R. (2d) 321 (C.A.), Justice Cromwell of our Court of Appeal considers the doctrine of *res judicata* at p. 329.

> 19 This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.
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> 20 *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue* (1975), 47 D.L.R. (3d) 544 (S.C.C.) at 555:
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> "... The first, 'cause of action estoppel', precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. ...The second species of estoppel *per rem judicatam* is known as 'issue estoppel', a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:
>
> > 'I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different,

> some point or issue of fact has already been decided (I may call it "issue-estoppel")' ".
>
> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "...prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "...prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
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> 22 It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which *could* have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.

[30] 2301072 Nova Scotia Limited and Campbell herein argue both principles are applicable in this matter. They submit that the contested pleadings in question were either determined by Justice Hood, or they could and should have been brought forward to be determined by that action.

[31] That *Hoque, supra*, decision by Justice Cromwell is central to the determination of this matter. I again cite from that decision at p. 333:

> 37 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all of the circumstances, <u>should</u> have raised, will be barred**.** In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on 'new' evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[32] It is submitted that the pleadings challenged by 1201072 Nova Scotia Limited and Campbell, and the proposed amendments by Lienaux and Turner-Lienaux, violate these principles stated by Justice Cromwell.

[33] The litigation which culminated in Justice Hood's decision [and the appeal to the Court of Appeal] covered the full range of complaints by Lienaux and Turner-Lienaux with respect to the conduct of Campbell in the course of the Berkeley Project. Justice Hood rejected all the claims of assorted misconduct, negligence, perjury, breach of fiduciary duty, misrepresentation, and fraud. The allegations considered by Justice Hood and rejected, related to the period including the 1989 financing of the Berkeley Project, and the 1989 loans from CGT. The Lienauxs pleadings in the first action were as extensive as their defences and counter-claims in this action. Virtually every conceivable avenue of alleged misconduct by Campbell was raised by Lienaux and Turner-Lienaux, considered and rejected by Justice Hood.

[34] To the extent that the contested pleadings herein constitute new allegations, 2301072 Nova Scotia Limited and Campbell argue that these could and should have been raised before Justice Hood.

[35] Justice Hood awarded solicitor-client costs payable to Mr. Campbell because (paras. 485 ff):

> 485 In this case, there were allegations of criminal and equitable fraud and acquiescence in fraud; perjury; breach of fiduciary duty; and dishonesty. All were unfounded. Complaints were made to Campbell's professional governing bodies by Lienaux, who before his bankruptcy was a party to this proceeding. The police conducted an investigation of Campbell at the instigation of Lienaux.
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> ...
>
> 487 This action began with the counter-claim of Lienaux, Turner-Lienaux and Smith's Field against Campbell. Campbell withdrew his action, over the objection of the then plaintiffs by counter-claim, of which Lienaux was one. After Lienaux declared bankruptcy, the action was dormant until 1996 when Lienaux was discharged from bankruptcy. Thereafter, he brought a plethora of applications on behalf of Smith's Field and Turner-Lienaux, most of which were unsuccessful and most of which were unsuccessfully appealed. The Supreme Court file alone consisted of five boxes before the trial began.

488 The history of this action as it unfolded during the trial and as is evidenced in the voluminous court file, coupled with the unfounded allegations referred to above and the public nature of those allegations, combine to make this one of those "rare and exceptional cases" in which I conclude, in my discretion, that it is appropriate to award solicitor-client costs against Smith's Field and Turner-Lienaux. Turner-Lienaux's and Smith's Field's conduct in pursuing unfounded allegations of fraud and dishonesty against Campbell is the sort of reprehensible conduct that I feel must be rebuked through an award of solicitor-client costs. Although such a costs award is not limited to such cases, the courts can use an award of solicitor-client costs to show disapproval of "oppressive or continuous" conduct. I do so in this case.

489 Campbell should not, in the circumstances of this case, be put to any expense for his costs in defending the outrageous and scandalous allegations against him. He has been completely vindicated. Furthermore, I conclude that this action was pursued almost as a vendetta against Campbell. Little else can explain the course of this action since early 1996. Orkin refers to "harassment" and "fruitless litigation". Those words are apt for this action and its result. ...

490 This action continued on the face of the decision by Bateman, J. (as she then was) in 1993 soon after the action was started. In her decision (November 12, 1993 - unreported), she said at page 9:

> " I am further satisfied that Mr. Lienaux acted unilaterally and without authority on a number of occasions. The evidence persuades me that he has taken improper advantage of his legal training and acted in a high-handed and deceptively manipulative way toward Mr. Campbell and the other directors and shareholders."

She continued on page 10:

> "Mr. Lienaux, throughout his evidence, revealed a blind conviction in the righteousness of his position."

491 This indictment of Mr. Lienaux should have been a warning to him, and to Smith's Field and Turner-Lienaux, to re-evaluate their position. After 38 days of trial, including eight days of Lienaux's own testimony, I conclude that he did not. To the contrary, the trial evidence disclosed to me more evidence of high handed and unilateral actions by Lienaux. It also disclosed, as did the statement of claim, the brief and closing submissions, that he redoubled his efforts to blame and discredit Campbell. At the time of Justice Bateman's decision, there were no

> allegations of fraud, perjury, or other dishonesty. As each avenue he pursued closed, he found another; hence the myriad amendments to the pleadings. All this was done because of a failure to recognize the harsh reality that the project had failed and that the investment of time, effort and money he and his wife and their company had put into it was gone. He continued on in sublime ignorance (or wilful blindness) that it was his own attitude and conduct that had pushed the mortgage lender to the brink and then to act. ...
>
> 492 Lienaux himself is acting, not as a lawyer, in this proceeding, but as the Secretary of Smith's Field. He is also the husband of Turner-Lienaux, who although representing herself, left the case almost entirely to be put forward by Lienaux. ...
>
> 493 Lienaux was clearly, and I so find, the driving force behind the litigation. Had Lienaux acted as a lawyer, I would feel compelled to give serious consideration to awarding costs against him as such. His appearance at trial in the role of layperson prevents me from undertaking this consideration.
>
> ...
>
> 498 In this case, although the corporation of which Lienaux is a director is the litigant, so is its sole shareholder. Furthermore, the corporation is not a "man of straw". If anyone is a "man of straw" it is Lienaux himself. The litigants in this case, Smith's Field and Turner-Lienaux, are the only ones of any financial substance. I found as a fact that Lienaux organized his affairs so that he would own no assets, yet he would be the one who would execute any guarantees, including that on the $4.1 million dollar mortgage. In my view, this is not an appropriate case to extend the law to award costs against a "man of straw", regardless of how reprehensible and outrageous I believe his conduct throughout to have been.

FINDING

[36] I do not intend to repeat and dissect each of the subject pleadings herein to find if each was clearly dealt with by Justice Hood, or if they differ from previous allegations in nuance or approach.

[37] Rather, I state generally that I am convinced, and I find, after examining each of the pleadings contested, that they all are allegations that were examined

and determined by Justice Hood, or could and should have been brought for her determination, according to Justice Cromwell's principle in the *Hoque* case.

[38] I agree with the arguments and submissions made by 2301072 Nova Scotia Limited and Campbell and by counsel on behalf of Marven Block, Q.C. in this respect. The allegations by Lienaux and Turner-Lienaux against Campbell, at issue on these applications, in most respects mirror the allegations which were considered by Justice Hood.

[39] Insofar as the current claims may involve aspects different than those considered by Justice Hood, then those pleadings could and should have been raised in the earlier trial.

[40] They are a continuation of a theme of litigation that this Court has previously criticized and dismissed. As such, they are subject to the principles of *res judicata*, cause of action estoppel and issue estoppel. In *Hoque, supra*, Justice Cromwell stated at p. 339 as follows:

> 67 Finality of court orders is an important value. As Flemming James, Hazard and Leubsdorf put it:
>
> > "...the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined. Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, *Civil Procedure* (4th Ed., 1992) at 581.
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> 68 At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral attack, supra, and is reflected in the restrictive approach to *res judicata* founded on default judgments.
>
> 69 In my respectful view, Dr. Hoque cannot be permitted to allege in this action anything which is inconsistent with the final orders of foreclosure. In other words, all of the matters essential to the granting of the final orders of foreclosure are not now open to be relitigated in these proceedings. This is not a mere

> technical rule but an application of a fundamental principle of justice; once a matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging the initial finding.

[41] It is made definitive in Justice Hood's decision that the inability of Lienaux and Turner-Lienaux to repay those loans cannot be linked to any improper dealings by Campbell.

[42] The allegations have been found to be of no merit. That conclusion was tested on appeal and upheld. The campaign of baseless accusation carried by Lienaux and Turner-Lienaux against Campbell is over.

[43] It would be an abuse of the process of this Court to allow those allegations, dressed up in different clothing, to be restated and revisited.

[44] I do not intend to allow that to happen.

[45] 2301072 Nova Scotia Limited and Campbell's submission that the contested pleadings contained in Schedule "A" (amended defence dated April 223, 1998), are *res judicata,* and I find to be correct.

[46] 2301072 Nova Scotia Limited and Campbell's submission that these contested portions of Lienaux and Turner-Lienaux's proposed amended defence should be barred for the same reason, is also correct.

[47] I strike the contested pleadings contained in Schedule "A" and Schedule "B" as an abuse of the process of this Court.

[48] For the same reason I will dismiss the application of Lienaux and Turner-Lienaux to amend their defence to put forward the contested pleadings contained therein.

Chief Justice Kennedy

Halifax, Nova Scotia