SUPREME COURT OF NOVA SCOTIA
Citation: Leeman v. Baine, 2009 NSSC 311

Date: 20090910
Docket: Hfx 177859
Registry: Halifax

Between:

Christopher Leeman

Plaintiff

v.

Russell Baine, SMS Modern Cleaning Services Inc. and Sears Canada Inc.

Defendant

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	September 10, 2009, in Halifax, Nova Scotia
Oral Decision:	September 10, 2009
Written Decision: Released	October 8, 2009
Counsel:	Mr. David Grant, for the Plaintiff Mr. Andrew Gough, for the Defendant, Sears Canada Inc.

By the Court – orally:

[1] This is a Motion for Summary Judgment, brought by the Defendant Sears Canada Inc. against the Plaintiff, Christopher Leeman pursuant to Civil Procedure Rule 13.04. That rule pertains to Summary Judgment Motions sought on the basis of evidence, as opposed to pleadings.

[2] The motion is opposed by Mr. David Grant, solicitor of record for the Plaintiff, Leeman. Unfortunately Mr. Leeman passed away in 2007. His estate has not been probated, nor has anyone, including his widow or mother, sought to advance the claim on the Estate's behalf. That is a difficulty that has been central to the motion today, and must be addressed by the Court.

Factual Background

[3] By way of factual background, Mr. Leeman commenced an action in March of 2002 against three named defendants, Mr.

Russell Baine, S.M.S. Modern Cleaning Services and Sears Canada Inc. In that claim Mr. Leeman alleged that he was sexually assaulted by Mr. Baine on March 15, 2001. At that time, both men were employees of S.M.S. Modern Cleaning Services. That company provided cleaning services to the two Sears Canada stores located in Halifax.

[4] A review of the material on file with the court is helpful to understand the progression of this claim. Mr. Baine was served on July 15, 2003 with the Originating Notice and Statement of Claim. A defence was not filed on his behalf and it appears as if a default judgment was issued against him on April 22nd, 2004.

[5] Further, it appears as if S.M.S. Modern Cleaning has never been served and that Sears Canada Inc. is the only defendant who has actively participated in the action. In fact, on February 15, 2008, it was the Defendant Sears who filed a Notice of Trial and

Certificate of Readiness seeking to have the matter move along and ultimately head to a hearing.

[6] By letter dated February 22, 2008 Mr. Grant objected to the Notice of Trial. He writes:

> "The Plaintiff, Christopher Leeman died leaving little estate. No estate has been opened by either his widow or mother. I am unaware of any will. The Public Trustee has declined to open an estate on his behalf."

In that correspondence addressed to Prothonotary Annette Boucher, Mr. Grant requested that a conference with a Judge be arranged.

[7] A Notice to Appear was issued by Prothonotary Boucher on February 25, 2008 setting down an appearance on April 4, 2008.

In response to this Notice Mr. Grant wrote to Ms. Boucher on March 7, 2008 as follows:

> "We understand that the matter is to be taken off the docket indefinitely."

[8] The Court file reveals that Ms. Boucher wrote to counsel indicating that there was nothing in the Court file to establish that the action had been removed "indefinitely" from the Court docket. The matter did not proceed on April 4, 2008, it being left to Counsel to resolve the objection raised to the Notice of Trial. The matter has never subsequently been set back down.

[9] On July 14, 2008, Ms. Margot Ferguson, counsel for the Defendant Sears wrote to the Court advising of her client's intent to make application for summary judgment. This was copied to Mr. Grant, as was several other letters from Counsel for the Defendant Sears repeating it's intent to seek summary judgment in relation to this matter.

[10] The Motion for Summary Judgment was filed on July 10, 2009. As noted above, Mr. Grant opposes the Motion for Summary Judgment proceeding at this time. I will deal with his objections and arguments.

[11] Mr. Grant argues given the death of the Plaintiff, that the action is stayed and should not proceed further until such time as a representative party is appointed by the Court to represent the Plaintiff. Mr. Grant indicates he is unwilling to take the necessary steps to do so, given the cost involved. He submits that the Defendant Sears may also consider undertaking the application and bearing the resulting costs.

[12] I have referenced the Civil Procedure Rules which I will speak to in a few moments, as well as the **Survival of Actions Act**, R.S.N.S. 1989, c. 453. In particular, Section 7 of the Act reads as follows:

> "Where there is no executor administrator, or none within the Province, of an estate against

> which or for the benefit of which a cause of action survives under this Act, a judge of the Trial Division of the Supreme Court or a judge of a county court, on an application made after the expiration of twenty days from the date of death, may, on such terms as to costs or security therefor as the judge thinks fit, appoint a person to represent the estate for all purposes of any action, cause or proceeding on behalf of or against the estate."

[13] I particularly note that the above provision, by use of the word "may", leaves discretion in a Judge considering the matter, as to whether a representative is appointed. It is not mandatory.

[14] Further I have reviewed Civil Procedure Rule 36.12. Subsection (1) of that provision reads:

> 36.12(1) "A judge may appoint a person to be a party representing the estate of a deceased person whose estate has no executor, administrator or personal representative."

[15] Again the wording is permissive, not mandatory. It would appear as if the appointment of a representative party is not

mandatory, but to be determined based on the nature of the matter before the Court, on a case by case basis.

[16] Other that Mr. Grant's submissions, no where in the material provided to, or reviewed by the Court, is there any directive that the Defendant Sears, or the Court should be mandated with seeking out a representative party for the deceased Plaintiff's benefit.

[17] I have also considered carefully Civil Procedure Rule 35.11 (1) which reads:

> "A proceeding is stayed from when a party dies until an executor, administrator, or other personal representative of the estate of the deceased becomes a party, or a judge appoints a representative under Rule 36 - Representative Party."

[18] Mr. Grant has correctly pointed out that a strict reading of that provision suggests that this matter is stayed. However, I

must ask, is it reasonable to interpret that rule as permitting an action to remain stayed indefinitely? To do so, I believe, would be incompatible in this instance with the over all objects of the Rules, namely “the just, speedy and inexpensive determination of every proceeding”.

[19] I find it is not just to ask the Defendant Sears to either undertake the effort and cost of finding and making application for a representative party, or alternately, to have the matter remain indefinitely unresolved. Such certainly would not promote the goal as outlined in the Rules of a speedy determination.

[20] I find further that it is not reasonable to hold the conclusion of this action in abeyance awaiting the appointment of a representative party. Such an individual may never come forward. Given that Mr. Leeman’s closest family members nor the Public Trustee have sought to move this matter forward in the last two years, it is not at all clear that anyone ever will.

[21] The Rules exist to serve the Court and the proper and effective Administration of Justice. The Court does not serve the Rules. Rule 35.11, or any other, should not be literally applied where such would be contrary to the overall goals of the Administration of Justice.

[22] I find that it is appropriate to proceed at this time to consider the Defendant Sears' Motion for Summary Judgment. I am not prevented from doing so because of a stay of the proceedings, given the Plaintiff's death in this particular instance.

[23] As noted above, the Motion for Summary Judgment is brought pursuant to Rule 13.04. There are several subsections of that Rule that are particularly relevant.

> 13.04 (1) A judge who is satisfied that evidence or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross examination, or other means permitted by a judge.

[24] Clearly, the Court, pursuant to the above provisions and also a reading of Rule 13.01, has jurisdiction to consider the motion. In doing so I have considered not only the submissions on behalf of the Defendant Sears, but the affidavits filed with the court.

[25] It is noted that no evidence was provided on behalf of the Plaintiff. This is contrary to Rule 13.04(4) which mandates that a responding party provide evidence in some fashion. Although I

appreciate that the Plaintiff is deceased, I would anticipate that evidence, if it existed, could be illicited from other sources, be it the transcript from the criminal proceedings, non-party affidavits or otherwise. As is noted in the case authorities, a party that does not respond in some meaningful way risks, the Court finding that no evidence exists to counter that put forward by the applicant.

[26] Although the Plaintiff is not available to provide instruction to Mr. Grant, he has been counsel for record since the onset of the claim in 2002. Presumably, he would be aware of what sources of evidence, other than the Plaintiff's own testimony would or could be brought forward to refute that presented by the Defendant Sears. The Court has not been provided with any evidence to refute the application.

[27] The case authorities relating to summary judgment and in particular when sought by a Defendant are well established. The

new Civil Procedure Rules are not, in my opinion, inconsistent with the earlier jurisprudence.

[28] Our Court of Appeal has recently re-affirmed the test for summary judgment in **Glaxo Smith Kline** v **Cherney**, 2009 NSCA 68, referring back to the court's earlier decision in **Selig** v **Cooks Oil Company Ltd.**, 2005 NSCA 36 which stated the test as follows:

> "First the applicant must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle then the respondent must establish on the facts that are not in dispute that his claim has a real chance of success."

[29] Counsel for the Defendant Sears, referenced in his written submissions a number of Ontario decision under that province's Rule 20. It is not materially different from our Rule 13.04 and it is helpful to consider the interpretation of that rule by Courts in that province. The authorities provided from Ontario are consistent with the approach taken by the Courts of this province. Notably,

in the decision of **Lang** v **Kligerman** [1998] O.J. No. 3708, a decision of the Ontario Court of Appeal, that court writes:

> "However where the evidence presented by the moving party prima facie establishes that there is no genuine issue for trial and the moving party is entitled to summary judgment as a matter of law. To preclude the granting of summary judgment, the responding party assumes the evidentiary burden of presenting evidence which is capable of supporting the position advanced by the responding party in it's pleadings. On the basis of this evidence when considered with all of the evidence before the motion's judge, it will then for the motion's judge to determine whether the evidentiary record raises a genuine issue for trial."

I also found helpful as noted in **Guarantee Company of North American** v **Gordon Capital Corp.,** a decision of the Supreme Court of Canada, [1999] 3 SCR 425 that:

> "The responding party may not rest on unsupported allegations but must "lead trump or risk losing". The responding party must establish that the claim has a real chance of success."

And further, in **Dawson** v **Rex Craft** and **Royal Bank** v **Feldman** [1995] O.J. No. 1598:

> "On the motion, a judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial.

[30] I have carefully reviewed the Statement of Claim filed on behalf of the Plaintiff, and in particular those allegations relating to the wrongdoing and liability of the Defendant Sears. I am satisfied that the affidavits of Mr. Novelli and Mr. Curtis refute all of the allegations contained in the Statement of Claim relating to Sears' potential liability. I agree entirely with the analysis contained in the Defendant Sears' written submissions.

[31] The evidence of Mr. Novelli and Mr. Curtis is unrefuted. I find that their evidence along with other material on file establishes there is no genuine issue for trial. No evidence has been put forward on behalf of the Plaintiff to refute the Defendant Sears' evidence, or support the assertions contained in the Statement of Claim.

[32] I recognize that granting summary judgment on the application of the Defendant is a matter deserving of careful consideration, given the finality of the outcome. Depriving a Plaintiff of his right to proceed with the claim is not a decision to be made arbitrarily, or without careful review.

[33] In the circumstances before me, however, I am satisfied that the Defendant Sears, is entitled to summary judgment as the totality of the evidence before the Court established no genuine issue for trial and Plaintiff's counsel has been unable to elicit evidence to establish that the claim has a real chance of success.

[34] The motion, accordingly, is granted. If the parties cannot agree as to costs, I will hear further submissions in that regard.

j.