

SUPREME COURT OF NOVA SCOTIA

Citation: Nyiti v Cape Breton University, 2009 NSSC 356

Date: November 25, 2009

Docket: Sydney

Registry: Halifax

Between:

RAPHAEL NYITI

Plaintiff

v.

CAPE BRETON UNIVERSITY

Defendants

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: Sydney, Nova Scotia

Date Heard: September 2, 2009

Written Decision: November 25, 2009

Counsel:

Hugh R. MacLeod for the Plaintiff/Applicant

Nancy F. Barteaux for the Respondent/Defendant

By the Court:

[1] This is a motion by the Plaintiff, Raphael Nyiti, seeking to amend the Originating Notice and Statement of Claim filed in relation to this matter.

The motion was heard on September 28th, 2009 in Chambers. As will be noted below, this is not the first interlocutory matter which has occurred in relation to this action.

[2] The procedural history of this matter to date was accurately outlined in the Pre-Chambers Brief submitted on behalf of the Defendant as follows:

“4. The Plaintiff filed his original Statement of Claim on September 7, 2005 for alleged negligence, breach of the *Pension Benefits Act* and breach of fiduciary duty. The nature of his claim relates to his pension benefits with Cape Breton University and its predecessor, St. Francis Xavier University (“St. F.X.”). The Plaintiff has claimed he was not aware of his ability to join the pension plan until membership in the plan became mandatory in 1987. He has further alleged that this has affected the amount of pension benefits he is entitled to receive and that the Defendant is liable for his losses.

“5. Upon application by the Defendant, Justice Simon J. MacDonald in Chambers dismissed the claim against St. F.X. [Exhibit “A” to the Plaintiff’s affidavit filed in support of the instant motion]. Although St. F.X. did not file its own application to strike, it was added to the Defendant’s application and was wholly successful.

6. With respect to the claims against the Defendant, Justice MacDonald struck out the claim for negligence on the basis that it was barred by the *Limitation of Actions Act*. Justice MacDonald also found that the *Pension Benefits Act* did not apply. Only the claim for breach of fiduciary duty remained.

7. After having all of his claims struck except breach of fiduciary duty, the Plaintiff applied to amend his Statement of Claim to add claims of fraud and breach of implied trust, classic trust and contract against the Defendant.

8. By Order dated January 22, 2009 Justice Frank Edwards in Chambers dismissed the Plaintiff's application to amend his Statement of Claim and granted the application of the Defendant dismissing the Plaintiff's fraud claim [Exhibit "B" to the Plaintiff's Affidavit filed in support of the instant motion].

9. The Plaintiff appealed Justice Edward's decision. The Court of Appeal dismissed the Plaintiff's application in a decision dated June 17, 2009. See ***Nyiti v. Cape Breton University***, 2009 NSCA 69 [Tab 6, Defendant's Book of Authorities.]

[3] The Plaintiff is now seeking to amend the Statement of Claim to reflect the above noted interlocutory decisions. The Defendant is not adverse to amendments being made, but raised in its brief concerns with respect to some of the amendments proposed by the Plaintiff and specifically that they were not reflective of the earlier interlocutory orders. In response, Counsel for the Plaintiff prior to the Chambers appearance filed a supplementary brief with attached draft amended Statement of Claim. It was asserted that this final version of the amended Statement of

Claim, filed on September 24th, 2009, reflected not only the previous interlocutory decisions, but addressed the concerns raised by the Defendant in its earlier brief.

[4] The Defendant, upon review of the September 24th version of the amended Statement of Claim, indicated that it was prepared to consent to the amendments as presented therein, with the exception of two paragraphs. These read as follows:

“9. The Defendant, CBU owed a duty to the Plaintiff to inform him of the existence of the Pension Plan. This common law duty was codified in the 1977 *Pension Plan Act* particularly section 20(B)(1) and 20(B)(2) which required a written explanation of all terms and conditions of the Pension Plan including the employees pensions rights that were to be provided by the employer to the employee. The (sic) was not done and the said fiduciary duty created by statute and a common law was thereby breached by the failure of the Defendant, CBU to give written notice to the Plaintiff, Dr. Nyiti.

and

15. The Plaintiff pleads (sic) and relies on :
- (a) Section 31 and Section Ag of the *Pensions Benefits Act* R.S.N.S. 1989 C. 340,
 - (b) Section 20(B) (1) and 20 (B)(2) *Pension Benefit Act* and Regulations c. 15 Statutes of Nova Scotia 1977.

[5] The Defendant submits that the above noted provisions do not comply with the earlier decision of MacDonald, J. who, it is asserted by the Defendant, removed any cause of action which may be brought forward pursuant to the *Pension Benefits Act* or previous pension legislation.

PLAINTIFF'S POSITION

[6] The Plaintiff through his Counsel raised two alternative arguments. Firstly, it was submitted that the decision of MacDonald, J. rendered on October 19, 2007 should not be interpreted as precluding the Plaintiff from bringing an action under the relevant pension legislation. In the alternative, the Plaintiff submits that MacDonald, J. was wrong when ruling that the *Pension Benefits Act* and earlier legislation did not apply in the present instance. This Court was urged to take a different view, and to permit the amended pleadings accordingly.

[7] Counsel for the Plaintiff in his written submissions argues:

“No ruling of a similar court (Judge MacDonald’s court) is binding on this court on what the issue of law may be or may not be heard. This is itself a court of record and can make the determination on it’s own.”

In effect, Counsel for the Plaintiff argues, that should I disagree with MacDonald, J.'s analysis, I am free to reach my own conclusion as to the applicability of the pension legislation and urges that I grant an order amending the pleadings accordingly.

ANALYSIS

[8] I have reviewed the decision of MacDonald, J. in its entirety. With respect to the Plaintiff's first argument, namely that it can be interpreted in such a fashion that a claim under the *Pension Benefits Act* has not been precluded, I disagree. There is no vagueness in the decision. I specifically reject the argument that MacDonald, J. did not intend to remove a claim under the *Pension Benefits* legislation. The contrary is clearly the case, and I specifically reference comments of the Court, contained in the latter part of paragraphs 56 and 57 of the decision, where his Lordship writes:

“[56] ...It is a successful argument the Pension Benefits Act did not apply to the plan prior to the 1994 date.

[57] There was no evidence presented by the Plaintiff by way of affidavit or otherwise at the hearing to show he had any genuine issue for trial in relation to his claim under any Pension Act as he alleged.”

Further in paragraph [73], at the conclusion of his decision,

MacDonald J. writes:

“The application for summary judgment by CBU is granted in relation to the negligence claim of the Plaintiff and his claim under the *Pension Benefits Act* and *1975 Pensions Act*.”

It is abundantly clear what was intended by the Court – the Plaintiff was precluded from seeking remedy under the above noted legislation. It is not, in my opinion, subject to an alternative interpretation.

[9] I now turn to the Plaintiff’s assertion, which if accepted would permit me to substitute my view of the applicable law, over that previously expressed by MacDonald J. With respect to the submissions put forward by Plaintiff’s Counsel on this point, I respectfully disagree. In his written submissions, Counsel for the Plaintiff states:

“The Plaintiff Nyiti does not agree with Judge MacDonald’s interpretation but an appeal was not taken because it was felt it was unnecessary”.

[10] Clearly, the Plaintiff felt that MacDonald J. erred in his determination regarding the applicability of the pension legislation, but this error was not put to the Court of Appeal. That would have been the proper forum for the

correctness of MacDonald J.'s approach to be reviewed. I disagree with the Plaintiff's submission that I can simply replace MacDonald J.'s view with my own. It is not appropriate for me to review an interlocutory decision made by another member of this Court, within the same action.

CONCLUSION:

[11] I find, based on the above, that paragraphs 9 and 15 of the proposed amended Statement of Claim are inappropriate and should not be included. As previously noted, the Defendant did not object otherwise to the contents of the Amended Statement of Claim and I approve it accordingly. I would ask that Counsel prepare an order outlining this decision, accompanied by the final revised Amended Statement of Claim.

[12] Notwithstanding the Plaintiff has succeeded in having the pleadings amended, the arguments raised in relation to paragraphs 9 and 15 were, in my view, without merit and unnecessary. Costs in the amount of \$500 shall be awarded to the, Defendant, payable forthwith.

J.