SUPREME COURT OF NOVA SCOTIA
Citation: Heydari v. Ingram, 2010 NSSC 110

Date: 20100329
Docket: Hfx No. 311746
Registry: Halifax

Between:

Katayoun Heydari — Plaintiff

and

Paul Ingram and Rebecca Ingram — Defendants

and

Ali Nejat — Third Party

DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Date of Hearing:	January 21, 2010
Counsel:	Peter Coulthard, Q.C., for the plaintiff and the third party Geoffrey Saunders, for the defendants

Moir, J.:

Introduction

[1] Ms. Heydari owns half the common shares in DNS Systems Limited. She is a passive investor. The company paid dividends between 2004 and 2008 of over $300,000 on the common shares of the defendants, who hold fifteen percent each. It paid nothing on Ms. Heydari's shares.

[2] Ms. Heydari sued the Ingrams for half of the dividends. They defended on the bases that Ms. Heydari had not paid the subscribed capital and that she had agreed, through her husband, that the Ingrams were the only shareholders who were to receive money from the company during the period in which the dividends were paid. Although it is not specifically pleaded, the Ingrams also argue that the company, not the shareholders, would be liable for any dividend payable to Ms. Heydari.

[3] Ms. Heydari moves for summary judgment.

The Alleged Agreement

[4] The third party, Mr. Nejat, is Ms. Heydari's husband. Mr. Ingram had worked for a firm that supplied security systems in homes built by Mr. Nejat's construction and development company. They decided to set up their own security systems business.

[5] DNS Systems Limited was incorporated in 2003. Half of the shares were issued to Ms. Heydari, and twenty percent to Mr. Nejat. The remaining thirty percent were issued to the Ingrams, fifteen percent each. There have been no changes in share ownership.

[6] The Ingrams are husband and wife. They work for the company. They are directors, and Paul Ingram is the president. Ms. Heydari is a passive investor. She has never worked for the company, and neither she nor her husband are directors. There is one other director, Ms. Rafar Pekani, who is Ms. Heydari's aunt. All of this is clear enough from the books and records created at incorporation and afterward. However, Paul Ingram had a somewhat different understanding.

[7] Mr. Ingram says that Mr. Nejat dealt exclusively with the lawyer who looked after the incorporation. (Mr. Nejat says otherwise.) According to Mr. Ingram, before 2005 he understood that Mr. Nejat held fifty percent of the shares and Ms. Heydari's aunt held twenty percent. The aunt lived in Denmark, wished to immigrate to Canada, and an investment here would help with that. He also understood that he had thirty percent of the shares, that Ms. Ingram had none.

[8] According to Mr. Ingram, before incorporation the two businessmen studied Mr. Ingram's business plan, and Mr. Nejat agreed to invest $97,900. In return for the investment, he would get seventy percent of the shares. Mr. Nejat denies seeing the plan or agreeing to invest $97,900 for the shares.

[9] Mr. Ingram says that he and Mr. Nejat also agreed that Mr. and Ms. Ingram "would take on the day to day operations of the business and that we would be compensated by the business for our work."

[10] Mr. Ingram says there is no shareholders' agreement. It does not appear that anyone suggested the utility of having one. The alleged agreements on investment and management were oral.

[11] In one of her affidavits, Ms. Heydari swears: "Because he is more knowledgeable in business matters than I am, my husband Ali Nejat often dealt with Paul Ingram in matters regarding DNS and its operations." In his affidavit, Mr. Ingram swears that he dealt exclusively with Mr. Nejat in business matters, and "he led me to believe that he was the decision-maker and he would deal directly with Katayoun [Heydari] and Rafar [Pekani]." During his cross-examination, Mr. Nejat agreed that he dealt with the business of DNS on Ms. Heydari's behalf most often. He made the decision to have shares issued in her name. She was not involved in that.

[12] It appears that Mr. Ingram and Mr. Nejat conducted the general management of the company. The board of directors, as constituted at incorporation, was dormant.

[13] Mr. Ingram and Mr. Nejat provided contradictory evidence about what they said, knew, and decided over the years. Most of these contradictions are not so obviously resolved that a court can go with one version on a motion for summary judgment.

[14] Mr. Ingram says that when the business started he and Mr. Nejat agreed that, in return for their daily work, the Ingrams would receive compensation. He says that $40,000 a year was budgeted for him and $28,600 for Ms. Ingram. In redirect examination, Mr. Nejat said that Mr. Ingram's salary was to be $1,500 every two weeks and nothing was to be paid to Ms. Ingram until late 2006 or early 2007. Then, she was to be paid $550 every two weeks.

[15] At that time, no compensation was to be paid to Mr. Nejat, Ms. Heydari, or Ms. Pekani. They were not working for the company, and it could not even afford to pay the Ingrams' salaries.

[16] DNS retained Mr. David Etter, a certified general accountant, in 2005 to prepare its 2003 and 2004 tax returns. Mr. Ingram and Mr. Etter say they met with Mr. Nejat to finalize the returns. They say that Etter suggested that the Ingrams be

paid by dividends. He said a new class of shares would be required. Ingram says that Nejat agreed to this. Etter says Nejat expressed no opposition and the returns were finalized on this basis. Nejat denies that he agreed to compensation by dividends or creating a new class of shares.

[17] Mr. Etter says that Ingram and Nejat met with him again in 2006, 2007, and 2008 to review the DNS tax return. This included discussion of the dividends. Mr. Ingram says the same. Mr. Nejat denies it. He admits that the Ingrams were to receive something for their wages and that the compensation is shown as dividend on some early returns that were provided to him, but he says that he did not appreciate that the compensation was being taken that way until discussions about valuations were held in late 2008.

Implementation

[18] Mr. Ingram says that, after the meeting with Mr. Etter in 2005, he went to the office of the lawyer Mr. Nejat had retained to incorporate DNS. The lawyer was not available. Mr. Ingram says he explained Mr. Etter's advice to an assistant

and left with the understanding that the firm would do what was required to create a second class of shares.

[19] Before 2005, DNS recorded the compensation paid to the Ingrams as wages and salary. Starting with the first tax returns, the company showed the payments as dividends. It issued T5s, not T4s. It showed the compensation as dividends on each corporate tax return.

Amounts of Compensation

[20] The compensation paid to the Ingrams for their services, and its comparison with the intended amounts according to Mr. Ingram's and Mr. Nejat's evidence, are as follows:

Year	Dividends	Ingram	Nejat
2004	$38,597	($30,003)	$9,597
2005	$30,000	($38,600)	$1,000
2006	$56,000	($12,600)	$25,000
2007	$83,000	$14,400	$37,700
2008	$97,200	$27,600	$53,900
Total	$304,797	($39,603)	$127,197.

[21] In a letter to Mr. Nejat and Ms. Heydari at the beginning of 2009, Ms. Ingram confessed that she "had a problem with overspending" and she used company accounts to pay personal expenses. She also said, "Paul in no way knew what was going on". According to the letter, Mr. Ingram discontinued signing blank cheques when he found out what Ms. Ingram had been doing, and she no longer had ways to access company accounts.

[22] Mr. Ingram says that the larger payments in 2007 and 2008 were meant to make up for shortfalls in the earlier, leaner years. As I said, Mr. Ingram and Mr. Etter claim that the returns were reviewed each year with Mr. Nejat.

[23] There is evidence about some difficulties that may have developed between Mr. Nejat and members of his family. In 2008 Mr. Nejat became interested in liquidating his family's investment in DNS. Mr. Etter prepared a valuation. According to Mr. Nejat, it was in that connection, late in 2008, that he first found out about the dividends and the increasing compensation.

Principles for Summary Judgment or Evidence

[24] The principles for summary judgment have been reviewed by this court in the context of the 2009 Rules in *Dalhousie University v. Aylward*, [2010] N.S.J. 81 (Kennedy, C.J.); *Spring Garden Holdings Ltd. v. Ryan Duffy's Restaurants Ltd.*, [2010] N.S.J. 96 (Smith, A.C.J.); *Barthe v. National Bank Financial Ltd.*, [2009] N.S.J. 478 (Hood, J.); *Little Island Fisheries Ltd. v. Royal Harbour Seafoods Inc.*, [2009] N.S.J. 507 (Edwards, J.); *Leeman v. Baine*, [2009] N.S.J. 484 (Bourgeois, J.); *Bank of Nova Scotia v. A. MacKenzie's Auto Mart Inc.*, [2009] N.S.J. 480 (Bourgeois, J.); *Vaughn v. Hayden*, [2009] N.S.J. 364 (McDougall, J.); *Lumsden v. Barry Cordage Ltd.*, [2010] N.S.J. 35 (Coady, J.); *Crook v. LaFarge Canada Inc.*, [2009] N.S.J. 569 (Wright, J.); *Bailey v. C.U.P.E. Local 759*, [2010] N.S.J. 24 (Edwards, J.); and *Murphy v. Murphy*, [2009] N.S.J. 193 (Warner, J.).

[25] In *Barthe*, Justice Hood specifically addressed an argument that the new rules change our approach to summary judgment. The court has consistently held that the 2009 *Civil Procedure Rules* codify law on summary judgments and do not change it.

[26] Rule 13.04(1) codifies the principle for summary judgment as settled by *Hercules Managements Ltd. v. Ernst & Young*, [1997] S.C.J. 51 and *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. 60:

> 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.

[27] The approach to the question of a genuine issue for trial is somewhat different for motions made by plaintiffs than for motions made by defendants. The possibility of a motion by a defendant was adopted into our Rules about ten years ago. It was recognized that the approach to a plaintiff's motion could not be exactly mirrored for a defendant's motion: *United Gulf Developments Ltd. v. Iskandar*, [2004] N.S.J. 66 (C.A.) at para.9. In that instance, the moving party must show that there is no genuine issue of material fact for trial and, then, the plaintiff must show that its claim has a real chance of success: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, [2007] N.S.J. 134 (C.A.) at para. 8.

[28] The motion in this case is brought by a plaintiff. In that circumstance, the moving party must prove its claim clearly and, once that is done, the defendants are

required to raise an arguable defence (Justice Hood in *Barthe* at para. 7 to 10). The explicit adoption, in Rule 13.04(4), of a requirement that a responding party put, by evidence, its best foot forward does not change this basic approach to genuine issue for trial in cases of motions by plaintiffs (*Barthe* at para. 11 to 16). For a discussion of the best foot forward requirement, see *Canada (Attorney General) v. Lameman*, [2008] S.C.J. 14 as well as *Guarantee Co. of North America*.

Has Ms. Heydari Proved Her Claim Clearly?

[29] Ms. Heydari has not met the burden upon her for summary judgment.

[30] The failure to pay dividends on Ms. Heydari's shares at the same time as dividends were paid on the Ingrams' shares would violate a "fundamental principle of corporate law", unless there is proof that a "precondition" has been met: *McClurg v. Canada*, [1990] S.C.J. 134 at para. 24. The fundamental principle of corporate law at play is "that the rights carried by shares to receive a dividend declared by a company are equal unless otherwise provided in the Articles of Association" (para. 24). The precondition for "derogation from the presumption of equality" is "the division of shares into different 'classes'." (Also see, para. 24).

[31] The evidence presented on this motion shows that it is open to the Ingrams to argue:

- their dividends were premised on an agreement that the company would issue a new class of shares to them
- Mr. Nejat had ostensible authority, or actual authority, to bind the other shareholders to that agreement
- he bound them to it
- the agreement will be taken as preformed.

[32] Nor has the claim been proved clearly. The legal foundation for a claim to dividends by a shareholder who has been left out appears to rest on an implied contract with the company: *Re. Northern Ontario Power Co. Ltd.*, [1953] O.J. 769 (S.C., Master); *Re. Canada Tea Co.*, [1959] O.J. 359 (H.C.), and; *Re. Federal Dairying Co. (Liquidators of)*, [1994] P.E.I.J. 4 (S.C.). It has not been clearly demonstrated that Ms. Heydari has any cause against the Ingrams.

[33] If the case proceeds on the basis that the Ingrams breached obligations owed as directors or employees, then the questions of Mr. Nejat agreeing to the breach and of his authority to bind Ms. Heydari remain. Further, the case has not clearly

been made that the breach is actionable in Ms. Heydari's hands as opposed to a claim by the company directly, or by derivative action, against the Ingrams.

[34] Even if this were a derivative action, issues would remain about what Mr. Nejat committed others to and about the calculation of damages in light of the Ingrams being entitled to remuneration for their full-time work.

Conclusion

[35] The motion for summary judgment will be dismissed. Counsel may make submissions about costs in writing. I request counsel contact my assistant to arrange a time for directions under Rule 13.07.

J.