SUPREME COURT OF NOVA SCOTIA
Citation: Flewelling v. Scotia Island Property Ltd., 2009 NSSC 94

Date: 20090323
Docket: Hfx No. 286346
Registry: Halifax

Between:

Elizabeth Flewelling and Dean Flewelling and
Elizabeth Flewelling as Litigation Guardian for
Cody Flewelling and for Ryan Flewelling and for
Tyson Flewelling

Plaintiffs

v.

Scotia Island Property Limited, a body corporate and
Maria Sharbell

Defendants

Editorial Notice

Some information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Walter R. E. Goodfellow

Heard: March 18, 2009 in Chambers, Halifax, Nova Scotia

Counsel: No one appearing on behalf of plaintiffs, Elizabeth Flewelling and Dean Flewelling
Andrew N. Montgomery and Charles V. Warren, for the defendants

By the Court:

BACKGROUND

[1] Elizabeth Flewelling and Dean Flewelling rented East 4774 #302 Highway, Nappan, Cumberland County, from Maria Sharbell, now Maria Van Valpen. The

parties entered a written standard form of lease which makes no mention of the Defendant, Scotia Island Property Limited. The lease is dated October 1, 2006 and Dean and Elizabeth Flewelling went into occupation of the property with their three children: Tyson Flewelling, born March 24, 2002; Cody Flewelling, born August 3, 2003; and Ryan Flewelling, born December 17, 2004.

[2] Maria Val Valpen filed a Residential Tenancies Application for termination of the tenancy and payment of rent in arrears and repairs on January 29, 2007 and a hearing was scheduled for Monday, February 19, 2007. The Director of the Residential Tenancy Board issued an Order February 21, 2007 requiring Dean Flewelling and Elizabeth Flewelling to vacate and deliver up possession of the property on or before March 2, 2007, and Dean and Elizabeth Flewelling were ordered to pay the landlord, Maria Van Valpen $801.25 rental arrears.

[3] On February 26, 2007 Dean and Elizabeth Flewelling filed a Notice of Appeal. The appeal was scheduled to be heard June 18, 2007. On June 18, 2007 Small Claims Court Adjudicator Parker dismissed the appeal and upheld the Residential Tenancy Order, as neither Dean nor Elizabeth Flewelling appeared at their own Appeal. This Originating Notice (Action) by Dean and Elizabeth Flewelling in their own right and by Elizabeth Flewelling as litigation guardian for their three children, Cody, Ryan and Tyson Flewelling, was issued December 7, 2007 and served on the defendants on or about the 17th of December, 2007. A defence to the Originating Notice (Action) was filed January 21, 2008.

[4] On the 22nd day of February, 2008, Maria Van Valpen brought a further application to the Director of Residential Tenancies to recover money for damages to her property and a hearing was scheduled for March 17, 2008. The decision on the March 17, 2008 hearing was issued April 8, 2008, as apparently neither Dean nor Elizabeth Flewelling attended the hearing. The decision ordered Dean Flewelling and Elizabeth Flewelling to pay Maria Van Valpen the sum of $4,404.21. This judgment was acknowledged by the then solicitor for the plaintiffs and he advised that the Order was academic as the Flewellings had no money or resources to pay the judgment.

[5] Generally speaking, efforts by Maria Van Valpen to move the litigation forward have been mostly unsuccessful and the response from the plaintiffs includes an indication from the litigation guardian, Elizabeth Flewelling, that the plaintiffs

were waiting in particular for medical evidence relating to the alleged sickness of the children.

[6] This application was originally one for summary judgment and an order directing the attendance of Dean and Elizabeth Flewelling on discovery. Their then solicitor of record was provided notice, however, it was subsequently adjourned and now comes before me as an application for a summary judgment, and an application for the plaintiffs, Dean Flewelling and Elizabeth Flewelling to post security for costs. The initial solicitor for the plaintiffs was Matthew Napier, Q.C. of Boyne Clarke and, subsequently, his associate from the same firm, Robert Carter, appears to have had the carriage of most, if not all of the file and an application was filed to permit Matthew Napier and Boyne Clarke to withdraw as solicitor of record for the plaintiffs. This application resulted in an Order by Chief Justice Joseph Kennedy permitting Matthew Napier and Boyne Clarke to withdraw from the file, directing that the plaintiffs must retain new counsel or file documentation indicating their intent to represent themselves and, upon failure to do so, within six months the action will stand dismissed.

EXTENT OF THE ORDER OF CHIEF JUSTICE KENNEDY ISSUED ON FEBRUARY 26, 2009:

[7] It is clear that it was not brought to Chief Justice Kennedy's attention the consequences of allowing the solicitor, Matthew W. Napier and Boyne Clarke to withdraw, given the fact that three of the plaintiffs are persons under disability; namely, infants.

[8] Elizabeth Flewelling signed an Affidavit of Litigation Guardian on the 16th of July, 2007 which included compliance with the prerequisite of a solicitor acting for the plaintiffs under disability in the following terms:

> 4) That I confirm that I have given the authority to Matthew W. Napier, of Boyne Clark, Barristers and Solicitors, to act in this proceeding.

The new *Civil Procedure Rules* mirror the requirements in law under the 1972 *Civil Procedure Rules*. *CPR* 36.04 states:

> **Representative must have counsel**

> **34.04** A representative party must act by counsel, unless a judge permits otherwise.

[9] *CPR* 36.07(5)(c) reiterates the requirement of the litigation guardian, namely:

> **36.07** (5) ...
>
> (c) confirmation the litigation guardian has appointed counsel for the party;

[10] It is my determination that the moment Mr. Napier was permitted to withdraw, the action on behalf of the three infants is effectively stayed unless and until the litigation guardian, Elizabeth Flewelling, grants authority to a solicitor for the infants under disability and that solicitor files a Notice of Change of Solicitor in accordance with the *Rules*. A person under disability must be represented by a solicitor, see **Sherman** v. **Dalhousie College and University**, [1996] N.S.J. No. 302. The Order of Chief Justice Kennedy indicating that the action will be dismissed if the plaintiffs do not file a notice of intent to represent themselves or retain new counsel applies **only** to the plaintiffs, Elizabeth Flewelling and Dean Flewelling. Given the fact that there are persons under disability, wide latitude must be given. I will grant the defendant, Maria Van Valpen, an Order requiring the litigation guardian, Elizabeth Flewelling, to comply with the requirement of authorizing and maintaining a counsel on record for the children; and, should she fail to do so on or before the 1st of March, 2010, then the application of Maria Van Valpen to dismiss the action on behalf of the infants will be heard on Tuesday, March 16, 2010 at the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia B3J 1S7, at 9:30 a.m. This time frame will provide more than ample opportunity for the litigation guardian to comply and maintain counsel on record and at the same time provide an opportunity for relief to the defendant, Maria Van Valpen, should there be non-compliance.

[11] The use of two dates to address the situation where there is a direction for compliance and failure by the initial date sets the motion for dismissal at a subsequent date permitting a final opportunity to present a satisfactory explanation for non-compliance or an end to the litigation. This was the practice set out in **Dorey** v. **Nova Scotia (Registrar of Motor Vehicles)**, [2000] N.S.J. No. 227, 186 N.S.R. (2d) 362.

ISSUES:

(1) Is the Defendant, Maria Van Valpen entitled to summary judgment against Elizabeth Flewelling and Dean Flewelling?

(2) Has Maria Van Valpen established that this is a proper action requiring Elizabeth Flewelling and Dean Flewelling to post security for costs before being permitted to advance the action?

THE LAW - SUMMARY JUDGMENT:

[12] Summary judgment applications have been most recently canvassed in decisions such as **Broussard** v. **Hawley**, 2009 N.S.S.C. 1 (CanLII) where Coady, J. in his decision canvasses recent case law on summary judgment applications:

> [18] The two part test for summary judgment was described in *Fournier v. Green* [2005] N.S.S.C. 253 as follows:
>
> > The plaintiff, in order to succeed in a summary judgment application, first has the obligation to prove her claim and then the burden shifts to the defendant to satisfy that he has a bonafide *[sic]* defence or at least an arguable issue to be tried before the court. He must disclose the nature of the defence or issue to be tried before the court. He must disclose the nature of the defence or issue to be tired *[sic]* with clarity through sufficient facts to indicate that it is a bonafide *[sic]* defence or issue to be tried.
>
> [19] The test for summary judgment was articulated in *Pricewaterhouse Coopers Inc. v. County Realty Ltd.* 2006 N.S.S.C. 132:
>
> > [10] the *[sic]* test for summary judgment in Nova Scotia is well established. In *Canadian Imperial Bank of Commerce v. Tench* 1990 CanLII 2451 (NSCA), (1990), 97 N.S.R. (2d) 325 (C.A.), Macdonald, J.A. stated at paragraph 9:
> >
> > > The law is clear that a plaintiff is entitled to obtain summary judgment if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an arguable issue to be tried – see *Bank of Nova Scotia v. Dombroswski* (1977), 23 N.S.R. (2d) 532; 32 A.P.R. 532... Under the circumstances of this case, if the allegations contained

> in the statement of defence are correct, they would afford an answer to the bank's claim.
>
> [11] In *D.E. & Son Fisheries Ltd. v. Goreham* 2003 NSCA 23 (CanLII), 2003), 217 N.S.R. (2d) 199, (N.S.C.A.), Cromwell, J.A. stated at para. 2
>
> > Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a bona fide defence or raise an issue against the clam *[sic]* which ought to be tried. *Bank of Nova Scotia and Simpson (Robert) Eastern v. Dombrowski* (1978), 23 N.S.R. (2d) 523, A.P.R. 532 (CA), (1996), 153 N.S.R. (2d) 267, 450 A.P.R. 267 (CA) at para. 15.
>
> [12] There is no meaningful difference between an "arguable" issue and a "genuine" or "bona fide" issue: see Roscoe J.A. in *United Gulf Developments Ltd. v. Iskandar*, 2004 N.S.C.A. 35 (N.S.C.A.).
>
> [20] It is clear from reading a **Rule 13** and the cases above cited that an onus rests upon the Defendant to bring forth sufficient facts to show that a bona fide defence or issue exists which ought to be tried.

[13] LeBlanc, J.'s decision in **Boehner** v. **United Gulf**, 2004 N.S.S.C. 34 also reviews the prerequisites of a summary judgment and further notes **Bank of Montreal** v. **Scotia Capital Inc.**, 2002 N.S.S.C. 252 (CanLII), (2002), 210 N.S.R. (2d) 78 S.C.

> **18** Goodfellow J. commented, at paragraph 15:
>
> > It seems that in Nova Scotia the burden on a party opposing summary judgment is not as heavy as in Ontario in that Nova Scotia Civil Procedure Rule 13 specifically references an arguable defence "no arguable issue to be tried" and the requirement in Ontario of establishing a claim with a real chance of success is a much higher threshold.
> >
> > ...

> **20** I agree with Goodfellow J. that the threshold is indeed very low. However, it must be established that there is an arguable issue.

Issue No. (1): Is the Defendant, Maria Van Valpen entitled to summary judgment against Elizabeth Flewelling and Dean Flewelling?

[14] The application for summary judgment is on behalf of the defendant. Such an application is available to a defendant, but most often summary judgment is more applicable to providing relief to a plaintiff. The two-part test for summary judgment envisions the proof of one's claim.

[15] In dealing with this application, the grant of summary judgment would have the effect of striking the plaintiffs' action and on an application to strike, the legal test is somewhat different. See **Chater** v. **Canada Lands Co.**, [2005] N.S.J. No. 6, approved on appeal, [2005] N.S.J. No. 373. The former application to strike appears on quick examination to be covered now by new *CPR* 13.03, Summary Judgment on Pleadings, and the matter before me would appear to fall under the new *CPR* 13.04, Summary Judgment on Evidence. In any event, addressing this application as one for summary judgment, there is attached to such an application an overall duty on the court to be satisfied the circumstances placed before the court warrant finality of summary judgment. The defendant outlines a history of non-cooperation by the plaintiffs, et cetera. For a period of time it was perhaps reasonable for Elizabeth Flewelling to take a position of needing to have the medical determination as related to the children's condition before advancing the litigation; however, that time has long expired and the defendant was entitled and remains entitled to pursue discovery, et cetera.

[16] The Statement of Claim alleges several causes of action including allegations of breach of contract, negligence, breach of the *Occupiers' Liability Act* and nuisance. If the plaintiff was seeking summary judgment, there is the highest of probability approaching certainty such would be denied because at this stage there is no clear indication of the duty or allegations of breach of duty. There is a question of whether or not the attic to the rented property was part of the lease, allegations and denials as to the question of whether or not the condition of the attic was of such nature and magnitude as to create an environmental situation and, further, whether or not if it did exist, has it had any consequences on the children or the adult plaintiffs, et cetera, et cetera. It seems to me that on a summary judgment application the court has to

consider also whether or not such application is based on sufficient crystalized facts and such by no means exists here and I conclude that the application for summary judgment is premature and therefore stands dismissed.

[17] Quite probably the 1972 *Rule* applies because this application was set down long before the Order of February 26, 2009 permitting the withdrawal of the plaintiffs' solicitor. Notice was given to the plaintiffs and I note in the file a specific notice that pre-dates the new *Rules* and pre-dates, considerably, the withdrawal of Mr. Napier because it was filed November 25, 2008. I have, however, applied the new *Rule* which is much more strict and, in any event, the determination is to dismiss the application by the defendant for summary judgment. The same result would have occurred, but on an easier basis, if I had applied the 1972 *Rule*.

Issue No. (2): Has Maria Van Valpen established that this is a proper action requiring Elizabeth Flewelling and Dean Flewelling to post security for costs before being permitted to advance the action?

[18] The posting security for costs by a party into court is governed by *Civil Procedure Rule 45.02(1):*

> **Grounds for ordering security**
>
> (1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, *if all of the following are established*: [italics added]
>
> (a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
>
> (b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;
>
> (c) the undue difficulty does not arise only from the lack of means of the party making the claim;
>
> (d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.

[19] This *Rule* represents a considerable change from the 1972 *Rule, CPR* 42.01. Under *CPR* 42.01 a number of examples are set out; however, they are not exhaustive or determinative and security could, in the justice's discretion, be ordered whenever it was just to do so even, as I say, where the facts did not fall within one of the examples set out in the *Rule*. In **Silver** v. **Cooperators General Insurance** (1997), 159 N.S.R. (2d) 218, the Court stated at paragraph 41:

> *Civil Procedure Rule 42.01* recognises, "without limiting the generality of the foregoing", the discretion the Court has with respect to costs. *CPR 42.01* does provide considerable guidance but such guidance is not exhaustive. The defendants rely substantially on 42.01 (d) and (f).

> Rule 42.01 sub (a) through (i) provides examples of where the Court may exercise its discretion in respect of ordering security for costs, but the examples do not limit the ability of the court to exercise that discretion wherever the Court "deems it just".

The new Rule appears to me to put limitations on the exercise of judicial discretion because it sets out the requirement "*if all of the following are established*."

[20] In the case before me, I find the following:

(a) The defendant has filed a Statement of Defence in the proceeding and is contesting the claim.

(b) The plaintiffs already have two judgments outstanding and the evidence to date is clearly that the plaintiffs have no intention of responding. There is in the evidence, for example, the most recent telephone message left by Elizabeth Flewelling - a clear indication of a lack of any intention to be cooperative in any way. I have no doubt that such an attitude would prevail against any and all efforts made by the defendant to realize upon its existing judgments or a subsequent judgment for costs.

(c) The undue difficulties that I conclude exist do not only arise from the lack of means of the party making the claim. The evidence is clear that the plaintiffs' solicitor has advanced that the judgments against his then clients were academic on the basis that they had no capacity to respond to any judgment. The plaintiffs chose not to respond to this application thereby missing their opportunity to advance an

outline of their financial position, employment income, assets, indebtedness, et cetera. This failure does not relieve the defendants from meeting the requirement of *CPR* 45.02(1)(c). What the defendant is able to point to is a history of lack of cooperation, delay, et cetera, et cetera. The flavour of what the defendant has to contend with is to a degree shown by the voice mail message left by Elizabeth Flewelling at the defendant's solicitor's office on Monday, March 9, 2009 which has been transcribed as follows:

> This is Elizabeth Flewelling called at on Saturday afternoon. Number one I do not a being, appreciate being assaulted by your little weasel delivery person that was here. I do have his place um, I'm be forwarding that plate on. Also I would like Mr. Montgomery to please call me as promptly as possible at *. He is the only one that's to be calling me back. As of right now we are in the process of looking for a real lawyer that can deal with Maria Sharbell Van Vulpin whatever her name is today. Ah um and it will be a lawyer from New Brunswick who can act in Nova Scotia Supreme Court. Also the documents that you were saying that you guys use in court this week to dismiss this claim or try to suck money out of us well, takin money out of a rock. We don't have anything and number two, she did endanger our lives and that's why this claim has been opened. We are sick. It's not our fault that our lawyer hasn't done anything. Obviously incompetency level for Nova Scotia is greatly high. That's why we are getting a real lawyer from New Brunswick where we are originally from. So then and I do not want this phone number given out to anyone other than Mr. Montgomery. If harassing phone calls do commence after this phone number has been given to you, legal action will be taken. Again the number is * and I expect to hear from Mr. Montgomery first thing Monday morning. Thank you and have a wonderful day. God bless you all. Bye.

The failure time and again of the plaintiffs to attend proceedings, including this application, is indicative of their attitude. It is clear and overwhelming beyond any possible lack of financial resources and means given the attitude of the plaintiffs, their lack of cooperativeness, the difficulties here do not arise only from the lack of means suggested by the plaintiffs.

(d) The fact that any and every legitimate legal procedure that needs to be taken by the defendants has and will be met by a lack of cooperation resulting in the incurring of unnecessary use of resources and delay, so that I readily conclude that it would be unfair not to require the plaintiffs, Dean Flewelling and Elizabeth Flewelling, to continue their claim without an Order for Security for Costs.

QUANTUM: What, in the circumstances, should be the amount of security to be posted by the plaintiffs, Elizabeth Flewelling and Dean Flewelling?

[21] As I have noted, there is no indication of the plaintiffs' financial position, employment, indebtedness, assets, et cetera. The amount of security to be posted depends entirely on the situation before the court, and all the court can do at this stage, where there is no assistance given by the plaintiffs, is to make a very preliminary estimate that the defendant will experience continual delay before the matter can be addressed so that when it goes to trial it would likely be some time off and a very preliminary estimate is for a two to three day trial. Unfortunately it has the possibility of being much more lengthy. However, based on that very preliminary estimate at this stage it seems to me that a reasonable amount to be posted for security for costs would be in the range of $5,000 to $10,000 and I order the action of Elizabeth Flewelling and Dean Flewelling stayed unless and until they post security for costs by way of cash deposit with the Prothontary of the Supreme Court in the amount of $5,000.

COSTS:

[22] Maria Van Valpen is entitled to her costs of this application, with no costs on the summary judgment application. Her costs I fix and allow in the amount of $550.00, payable forthwith by Elizabeth Flewelling and Dean Flewelling.

J.