SUPREME COURT OF NOVA SCOTIA
Citation: Waterbury Newton v. Lantz, 2010 NSSC 359

Date: 20100930
Docket: Ken. No. 270667
Registry: Kentville

Between:

Waterbury Newton

Plaintiff

v.

Jeffrey Lantz, Walter O. Newton, Q.C.

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	June 10, 2010, in Kentville, Nova Scotia
Oral Decision:	July 15, 2010
Written Decision:	September 30, 2010
Counsel:	Christopher W. Madill, for the plaintiff, Waterbury Newton The defendant, Jeffrey Lantz, Not Participating Jonathan G. Cuming, for the defendant, Walter O. Newton, Q.C.

By the Court:

[1] The defendant seeks a stay of the proceeding on the basis that the dispute should be resolved by arbitration rather than by a court proceeding.

[2] The plaintiff is a law partnership in which the defendant, Mr. Newton, was formerly a member. The Partnership Agreement dated from December 23, 1998. Mr. Newton withdrew from the partnership on May 31, 2004. The plaintiff commenced the proceeding in September 2008, seeking to recover fees and disbursements charged by the defendant while he was a partner representing Mr. Lantz in a personal injury claim. The plaintiff filed an amended statement of claim on March 10, 2008, adding Mr. Newton as a defendant. Mr. Newton filed a defence on April 7, 2008.

Issue

[3] The issue is whether Mr. Newton has attorned to the court's jurisdiction by filing a defence.

Arguments

[4] The plaintiff says Mr. Newton has engaged with the claim on the merits, and has thereby attorned to the court's jurisdiction. The defendant says he has, in his defence, reserved the right to seek a stay on the basis that the Partnership Agreement requires disputes between the parties to be determined by arbitration rather than by court proceedings.

[5] The *Civil Procedure Rules 1972* provide, at Rule 11.05(a):

> Application to set aside originating notice, etc.
>
> 11.05. A defendant may, at any time before filing a defence or appearing on an application, apply to the court for an order,
>
> (a) setting aside the originating notice or service thereof on him;
>
> ...
>
> and the application shall not be deemed to be a submission to the jurisdiction of the court.

[6] The 2009 *Civil Procedure Rules* provide, at Rule 4.07:

Lack of jurisdiction

4.07 (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.

(2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.

(3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

[7] The transition provisions are found at Rule 92 of the 2009 Rules, which provides, in part:

Application to outstanding proceedings

92.02 (1) Unless this Rule provides or a judge orders otherwise these Rules apply to all steps taken after the following dates in the following kinds of proceedings:

(a) June 30, 2010 in a family proceeding started before that day;

> (b) January 1, 2009 in an action started before that day.
>
> (2) The Nova Scotia Civil Procedure Rules (1972) apply to all other proceedings started before January 1, 2009 unless a judge orders otherwise.
>
> Document and step in action preserved
>
> 92.03 On a motion, in a trial or hearing, and in connection with any other step taken after June 30, 2010 in a family proceeding started before that day, or after January 1, 2009 in an action started before that day, both of the following apply:
>
> (a) each notice, pleading, affidavit, order, and other document filed in the action under the Nova Scotia Civil Procedure Rules (1972) must be treated, as nearly as possible, as if it conformed with these Rules;
>
> (b) each step taken in the family proceeding, or action, and completed before June 29, 2010 in the family proceeding, or January 1, 2009 in the action, must be treated, as nearly as possible, as a step taken under these Rules.

[8] This is an action for the payment of legal fees and disbursements. The plaintiff alleges that the defendant Lantz retained Mr. Newton, then a partner in the firm, to act on his behalf in a personal injury matter on December 31, 2002. The

plaintiff alleges that Mr. Newton provided legal services to Mr. Lantz and incurred certain disbursements and expenses on his behalf. Mr. Lantz remained Mr. Newton's client when Mr. Newton left the partnership. Mr. Lantz's claim was settled in January 2005, and Mr. Newton collected fees and disbursements accordingly. Mr. Newton had left the firm in May 2004.

[9] The plaintiff alleges that between the date of retention by Mr. Lantz in January 2003 and Mr. Newton's withdrawal from the partnership in May 2004, Mr. Newton provided his services as a member of the partnership. The plaintiff alleges that, when he withdrew from the partnership, Mr. Newton agreed to provide, out of any settlement received by Mr. Lantz, the amount due to the firm. The plaintiff seeks the amount due to the firm. The Amended Statement of Claim seeks a sum of $21,878.21, including legal fees, HST, disbursements and HST on disbursements. The plaintiffs also seek exemplary, punitive or aggravated damages. The plaintiff also claims that Mr. Newton was impressed with a trust for the amount received on account of Mr. Lantz's settlement.

[10] In his defence, Mr. Newton denied every allegation in the statement of claim except the identity of the parties and the fact that Mr. Lantz had retained the

plaintiff to provide legal services, with the account to be settled upon conclusion of a settlement of the claim. Mr. Newton also pleaded para. 25 of the Partnership Agreement, which provided:

> All disputes and questions whatsoever shall arise among the Partners or between the Partners and the personal representatives of a Partner or Partners touching this agreement or the construction or application thereof or any clause or thing herein contained or any account valuation or division of assets, debts or liabilities to be made hereunder or as to any act, deed or omission of any Partner or as to any other matter in any way relating to the Partnership business or the affairs thereof or the rights, duties or liabilities of any person under this agreement shall be referred to arbitration in accordance and subject to the provisions of the Arbitration Act (Nova Scotia), as amended.

[11] The defendant also claims that the Court does not have jurisdiction to determine the issues between the plaintiff and Newton and seeks dismissal of the proceedings against both defendants.

The positions of the parties

[12] Mr. Newton says the Court should proceed under Rule 4.07 rather than the 1972 Rules. He argues that this Rule represents a significant change from the Rule 11.05 under the 1972 Rules, which provided that the defendant could not make a stay application if a defence had been filed. Rule 4.07(1) permits a defendant to

seek a stay for want of jurisdiction. This presupposes that the defendant can file a Statement of Defence, provided the defendant maintains his position that the Court does not have jurisdiction.

[13] Mr. Newton argues that he did not attorn to the jurisdiction of the court by filing a defence. He cites *Farough v. Financial Control Industries Inc.*, 2007 BCPC 351, 2007 CarswellBC 2784 (B.C. Prov. Ct.), where the defendant claimed that the Court lacked jurisdiction because the parties because the parties had agreed that disputes would be resolved by arbitration. The defendant pleaded the merits and attended a settlement conference. The Court held that the defendant had attorned to jurisdiction, having defended the action on the merits, and having pleaded the merits independently of the issue of jurisdiction, not as an alternative defence. A similar result occurred in *Imagis Technologies Inc. v. Red Herring Communications Inc.*, 2003 BCSC 366, 2003 CarswellBC 540 (S.C.), where the defendant demanded discovery and production of documents, and filed a defence. The court concluded that the defendants had pleaded the merits independently of the issue of jurisdiction and not as an alternative defence.

[14] Mr. Newton’s position is that the two British Columbia cases are distinguishable because his defence did not specifically address the merits of the plaintiff's claim. He also asserts that he did not attorn to jurisdiction because he refused to answer any discovery questions concerning the merits of the claim. This underlines his position that merely filing a defence is not prejudicial to his position that the Court does not have jurisdiction.

[15] The Firm submits that the applicant has addressed the merits of its claim by admitting para. 3 of the Statement of Claim and by denying the remaining allegations. Those allegations include the claim that the Lantz claim was settled in February 2006; that the Firm was entitled to the amount claimed; that Mr. Newton provided legal services to Mr. Lantz, while he was a member of the partnership; that he incurred disbursements that were paid by the partnership on behalf of Mr. Lantz; that he provided an express undertaking to pay the amount owing to the plaintiff for legal fees and disbursements he incurred when he was a partner in the law firm from any settlement money received by Mr. Lantz; that he failed to honour undertaking to the respondent to pay the amount owing to the respondent on behalf of Mr. Lantz; and that he failed to pay the Firm's account in breach of the terms of the agreement.

[16] The Firm argues that Mr. Newton engaged in the merits of the claim and that whether he pleaded jurisdiction in the alternative is not relevant to the issue of attornment. The Firm cites the statement of Professor Walker in *Canadian Conflict of Laws*, 6th edn. (2005), at p. 11-2, that "[o]nce a party take steps to contest the merits of the claim, even if those steps are taken ... with express notice of the intention to challenge jurisdiction, the party will be precluded from challenging the jurisdiction of the court...." The Firm says the Imagis case supports its position, as does *Stoymenoff v. Airtours PLC*, [2001] O.J. No. 3680 (Ont. Sup. Ct. J.).

[17] Mr. Newton also maintains that the Partnership Agreement prevails and that the court should defer to the arbitration process.

[18] The Firm argues that Mr. Newton failed to follow the procedures in s. 7 of the *Arbitration Act*, R.S.N.S. 1989, c. 19, which provides:

> Stay of proceedings

> 7 If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect to any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[19] Arbitration of disputes was provided for in the Partnership Agreement, and by express reference the provisions of the *Arbitration Act* are included in and form part of the arbitration clause. This provision provides that the defendant, before delivering any pleading or taking any other step in the proceeding has to apply to court to stay the proceedings. The Firm submits that the provisions are clear and it is necessary to challenge the jurisdiction of the court before filing any pleadings or taking any such steps.

[20] A number of other cases are referred to as authority for the Firm's position. In *Sumitomo Shoji Canada Ltd. v. Graham et al.*, [1973] 3 W.W.R. 122, [1973] A.J. No. 121 (Alta. S.C.), the court dismissed an application for a stay under the Alberta *Arbitration Act* where there had been a statement of defence filed. In *O'Hara v. Wawanesa Mutual Insurance Co.* (1990), 72 D.L.R. (4th) 759, [1990]

A.J. No. 812 (Alta. C.A.), app. for leave to appeal dismissed, [1990] S.C.C.A. No. 445, the plaintiff commenced an action despite the existence of an arbitration clause in the insurance contract. The defendant insurer filed a defence, then moved to stay or strike the proceeding pending arbitration. Although the motion could be struck on the basis that it failed to seek a determination of the court jurisdiction prior to the filing of a defence, the defendant also agreed to participate in discovery and produced documents. The plaintiff had waived its right to arbitration by delivering a statement of defence and taking subsequent steps in the action, thus attorning to the court's jurisdiction of the court. The Alberta *Arbitration Act* required a stay application to be made before delivering pleadings. The Firm also cites *Cincurak v. Lamoureux*, 2002 ABQB 777, [2002] A.J. No. 1050 (Alta. Q.B.), a *forum non conveniens* case that does not involve arbitration, but does address the question of attornment. In that case the court confirmed that "[a]ttornment to the jurisdiction in which the action is brought is an important consideration because it may be sufficient to disentitle one to later challenge jurisdiction. Where a defendant wishes to contest the jurisdiction the plaintiff has selected for the litigation, the defendant must do so in a clear and unambiguous manner, and must not take any further steps in the proceeding until the question of jurisdiction has been settled" (para. 22).

Conclusion

[21] Although I am satisfied that the Partnership Agreement provided that disputes of this kind would be determined by arbitration, Mr. Newton filed a defence addressing the merits of the plaintiff's claim. He also took fresh steps to advance the proceeding by producing a list of documents, providing additional documents and agreeing to dates for his discovery. I am mindful that he refused to participate in the discovery itself, relying on the claim that the matter should be resolved at arbitration rather than in litigation. But Article 25 of the Partnership Agreement provided that disputes as to the division of assets, debts and liabilities would be referred to arbitration pursuant to s. 7 of the *Arbitration Act*. It was necessary for Mr. Newton to move to stay or dismiss on the basis of jurisdiction before the filing a defence.

[22] I conclude that Rule 4.07 does not permit the defendant to file a defence and then apply for a stay. Rule 4.07(3) clearly contemplates that no defence has been filed at the time the motion for stay is filed, because the chambers judge must set a date for the filing of a defence where the motion is dismissed. In addition to s. 7 of

the Act, I am satisfied that Rule 4.07(3) contemplates that the defence would not yet be filed at the time the motion is heard.

[23] I conclude that by filing a defence addressing the merits of the claims advanced by the respondent, Mr. Newton attorned to the jurisdiction of this Court. I am also satisfied that he took steps after filing the defence that were inconsistent with the view that the court did not have jurisdiction. He was, in effect, complying with pre-trial procedural requirements. Apart from refusing to be discovered, it appears to me that Mr. Newton took several of the steps discussed above, and was, in fact, participating in the court process.

[24] An additional concern, raised by the Court at the hearing, is the difficulty of conducting the proceeding if one of the parties in the litigation is not a party to the Partnership Agreement. Mr. Lantz did not contract with the plaintiff or the defendant to submit any dispute to arbitration. This is an additional factor that would support the necessity of a court proceeding rather than arbitration. I note the decision of Stewart, J. in *MacKay v. Applied Microelectronics Inc.*, 2001 NSSC 122, 2001 CarswellNS 304, holding that a party who had not contracted to have a dispute decided by arbitration could not be required to submit to arbitration.

[25] Mr. Newton's application for a stay of the proceeding is dismissed. I also direct Mr. Newton to attend for examination on discovery.

J.