SUPREME COURT OF NOVA SCOTIA
Citation: M5 Marketing Communications Inc. v. Ross, 2011 NSSC 32

Date: 20110126
Docket: Hfx No. 293140
Registry: Halifax

Between:

M5 Marketing Communications Inc., a body corporate

Plaintiff

and

Gregory Joseph Ross, carrying on business as Ross Built Home; Sheppard's Island Incorporated, a body corporate, Sheppards Island Development Limited Partnership, a limited partnership; and Sheppards Island Development GP Incorporated, a body corporate

Defendants

And Between:

Gregory Joseph Ross, carrying on business as Ross Built Homes

Defendant/Plaintiff
By Counterclaim

and

M5 Marketing Communications Inc., a body corporate

Plaintiff/Defendant
By Counterclaim

Judge: The Honourable Justice Glen G. McDougall

Heard: October 7, 2010, in Halifax, Nova Scotia

Counsel: John T. Shanks, Esq. and Matthew Pierce, Esq., for the plaintiff/defendant by counterclaim
John Keith, Esq., for the defendants

By the Court:

[1] By Notice of Motion filed the 23rd day of September, 2010 the Plaintiff, M5 Marketing Communications Inc., seeks leave to withdraw its claim against the defendant, Gregory Joseph Ross, and to add another party, GJR Developments Ltd., in his place. The amendment, if allowed, would necessitate further amendments to the Statement of Claim filed on the 10th day of March, 2008 and amended once already on the 14th day of April, 2010.

[2] The Motion is made pursuant to Civil Procedure Rule 83.04 and is supported by the affidavits of:

– Matthew Pierce sworn September 23, 2010;
– James Megann sworn September 28, 2010; and
– Matthew Pierce sworn October 6, 2010.

[3] The Motion to amend is opposed by Sheppard's Island Incorporated, Sheppards Island Development Limited Partnership, and Sheppards Island Development GP Incorporated (henceforth the "Corporate Defendants").

[4] Although provided with notice of this hearing, Gregory Joseph Ross (henceforth "Mr. Ross") did not file any materials nor did he, or anyone else, attend on his behalf. Mr. Ross is self-represented. A Notice of Intention to Act on One's Own was filed with the Court on March 6, 2009. Mr. Ross has failed to actively participate in the proceedings for most of the time since then.

[5] His lack of involvement does not preclude me from dealing with the Motion on its merits. I am satisfied that he was made aware of the time and date for the hearing. He did not request an adjournment or communicate with the Court or any of the counsel or other parties involved in any way.

[6] A defence was earlier filed on behalf of Mr. Ross. It also advances a counterclaim against M5 Marketing Communications Inc. (henceforth "M5 Marketing"). The draft order presented with the Motion documents contains a paragraph which would permit:

> 3. GJR Developments Ltd. and/or Gregory Joseph Ross... leave for a period of thirty (30) calendar days from the date of this Order to amend the

> counterclaim of Gregory Joseph Ross to substitute GJR Developments Ltd. as Plaintiff by Counterclaim, failing which said counterclaim shall be dismissed without costs; ...

APPLICABLE RULES:

[7] A motion to either join or remove a party is provided for in the Nova Scotia Civil Procedure Rules (henceforth the "Rules" or "Rule"). Rule 35.05 states:

> 35.05 A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 - Amendment.

[8] Rule 35.06(2) has particular relevance to this motion. It provides:

> (2) A judge may make an order removing or adding a party to prevent the defeat of a proceeding, unless doing so would cause serious prejudice that cannot be compensated in costs or an abrogation of an enforceable limitation period.

[9] Rule 35.07(1) allows a judge to remove a party if satisfied on any of the following:

> (a) the party was joined in circumstances that do not conform with Rules 35.02 and 35.03;
>
> (b) a respondent in a judicial review or an appeal should cease to be a party;
>
> (c) a third party proceeding was taken in circumstances outside those in Rule 4.11, of Rule 4 – Action;
>
> (d) the person has ceased to be in circumstances that justify being joined as a party;
>
> (e) an injustice would result if the person continues to be a party.

[10] Rule 83 and, specifically, Rule 83.04 allows amendments to add or remove a party to a proceeding. It states:

Amendment to add or remove party

83.04 (1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).

(2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:

(a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;

(b) the expiry precludes the claim;

(c) the person protected by the limitation period is entitled to enforce it.

(3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.

[11] Although the strict application of the Rules should always be the guiding principle, there will always be circumstances that require the exercise of judicial discretion. This is in keeping with the stated purpose and object of the Rules which is to provide "for the just, speedy and inexpensive determination of every proceeding." [See Rule 1.01]

[12] The general discretion accorded to judges is not unfettered, however. It must be exercised judiciously. In other words it must be done fairly and equitably "... in order to do justice between the parties." [Reference **Garth** v. **Halifax (Regional Municipality)** (2006), 245 N.S.R. (2d) 108 (N.S.C.A.) Cromwell, J.A. (as he was then), para. 30]

[13] Rule 2.03 speaks to general judicial discretion and allows a judge to, amongst other things, excuse compliance with a Rule. Sub-rule (2) and (3) of Rule 2.03 place certain limits on the discretion that may be exercised. In particular sub-rule (3) states:

(3) The general discretions do not override any of the following kinds of provisions in these Rules:

(a) a mandatory provision requiring a judge to do, or not do, something;

(b) a limitation in a permissive Rule that limits the circumstances in which a discretion may be exercised;

(c) a requirement in a Rule establishing a discretion that the judge exercising the discretion take into account stated considerations.

APPLICABLE CASE LAW

[14] I will now turn my attention to some of the caselaw that bears on the issue that must be decided.

[15] In **Canada Life Assurance Co.** v. **Saywood**, 2010 Carswell NS 129, 2010 NSSC 87, 914 A.P.R. 273, 288 N.S.R. (2d) 273, (a case in which I was called upon to make a ruling) this was stated at paras 7 - 12:

> Apparently there are no written decisions regarding the new Rule 83.02. There are, however, a number of cases pertaining to the predecessor Rule 15 (1972 Rules). In the case of Global Petroleum Corp v. Point Tupper Terminals Co. (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:
>
> > [15] The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (Baumhour et al. v. Williams et al. (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564 (C.A.)).
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> This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of Shea v. Whalen (2008), 250 N.S.R. (2d) 65 at para. 6.
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> In the case of Garth v. Halifax (Regional Municipality) (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:
>
> > [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs:
>
> While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

> The new rule does change the time to amend the pleadings, as of right, from 20 days after the close of pleadings to 10 days.
>
> There have also been changes which would limit the ability to add a third party after expiry of a relevant limitation period (Rule 83.04) or to make material changes to a cause of action but the general discretion to allow an amendment to the pleadings still rests with the court.

[16] I maintain the position that the cases decided prior to the implementation of the current rules continue to offer guidance in deciding whether to exercise discretion to allow amendments to pleadings or to add or remove parties. Unless precluded by the expiration of a limitation period (Rule 83.04(2)) or "unless doing so would cause serious prejudice [emphasis added] that cannot be compensated in costs...." [Rule 35.06(2)] the Court has discretion to allow a party to either amend the pleadings or to add or remove a party. If anything, the new rules seem to have upped the ante slightly such that amendments will generally be allowed unless the other party will suffer "serious prejudice" that cannot be compensated in costs. If an opposing party should establish bad faith on the part of the moving party this, too, would likely defeat the motion.

CORPORATE DEFENDANTS' OPPOSITION TO THE MOTION

[17] The Corporate Defendants successfully challenged portions of the affidavits filed by M5 Marketing in support of its motion. Counsel for the plaintiff agreed that the paragraph which referred to certain discovery testimony of an M5 Marketing representative was not properly before the Court and so should be struck. As such paragraph 7 and Exhibit "C" attached to the affidavit of Matthew Pierce which was sworn to on the 23rd day of September, 2010 and filed with the Court on the same day were struck.

[18] There was no agreement regarding a second paragraph included in the same affidavit. Not only did it fail to identify the source of certain hearsay evidence it also failed to express the affiant's belief in its purported content. After hearing the submissions of counsel the Court ruled it inadmissible and struck the particular paragraph in its entirety. [Reference to **Waverley (Village Commissioners)** v. **Nova Scotia (Minister of Municipal Affairs)** (1993), 123 N.S.R. (2d) 46 (NSSC)] The remaining portions of the affidavit consisting of paragraphs 1 to 4; 6; and 8 were admitted in evidence.

[19] Counsel for the Corporate Defendants, Mr. Keith, filed an affidavit of Greg Coleman sworn on September 28, 2010. He also urged the Court to consider an affidavit of James Megann filed earlier by counsel for M5 Marketing in support of a motion for summary judgment. That motion was scheduled to be heard on April 21, 2009 but had to be adjourned without day. It has not been pursued to date.

[20] Mr. Keith asked the Court to consider this particular affidavit as it sets out the facts that M5 Marketing was relying on at that time to support its motion for summary judgment against Mr. Ross personally. It consists of 38 paragraphs along with attachments. One of the attached exhibits contains 60 separate components. It helps to illustrate the Corporate Defendants primary reason for opposing the current motion.

[21] M5 Marketing's action initially named Mr. Ross and Sheppard's Island Incorporated as defendants. Its claim against Sheppard's Island Incorporated was based on unjust enrichment. The Statement of Claim alleges that M5 Marketing provided services to Mr. Ross while carrying on business under the firm name and style of Ross Built Homes. Mr. Megann's affidavit states that M5 Marketing was dealing with Mr. Ross in his personal capacity and not as an agent for any corporate entity.

[22] M5 Marketing now seeks to resile from its initial position and pursue its claim not against Mr. Ross personally but rather against GJR Developments Ltd. Mr. Ross is the President and Secretary as well as the sole Director of this company.

[23] In Mr. Megann's affidavit of September 28, 2010 he states that "I had dealings with Gregory Joseph Ross..... in his capacity as officer and director of GJR Developments Ltd." By way of explaining the apparent change in position, Mr. Megann offered the following:

> 6. I understood, based on dealings had with Mr. Ross, that the proposed Sheppards Island development was initially marketed under the trade name Ross Built Homes. All invoices issued by M5 Marketing for services provided to the Sheppards Island project were issued in the name of either Ross Built Homes or Sheppards Island. I understood, based on my dealings with Mr. Ross, that Ross Built Homes and Sheppards Island were both trade names used by GJR Developments Ltd.

> 7. On or about February 26, 2009, I swore an affidavit in this proceeding indicating my understanding that Ross Built Homes was a trade name registered by Gregory Joseph Ross. In doing so I simply intended to indicate that Mr. Ross was the individual who took steps to have the trade name registered, rather than that he was doing so in his personal capacity. At the time I did not appreciate the potential legal significance of identifying Mr. Ross personally without reference to the corporate entity he was representing.
>
> 8. It was my understanding from my discussions with Mr. Ross that the party with whom M5 Marketing was contracting was GJR Developments Ltd. I understood that M5 Marketing was to provide services to GJR Developments Ltd., and that GJR Developments Ltd. was to be responsible for all debts owing to M5 Marketing in respect of those services.

[24] The affidavit also provides a copy of two cheques paid to M5 Marketing as partial payment for the project. Both cheques were drawn on a bank account in the name of GJR Developments Ltd. Two other cheques tendered in partial payment of the outstanding account could not be located by Mr. Megann. Based on his recollection, he thought that they, too, were written on GJR Developments Ltd.'s account.

[25] On July 21, 2010 Mr. Megann was examined on discovery by Mr. Keith. Excerpts of the discovery transcript were tendered as exhibits during the hearing of the motion. Mr. Megann was not asked to appear for cross-examination on his affidavits.

[26] It is clear from his answers given on discovery that he appreciated the distinction between an individual contracting personally and one contracting as an agent for an incorporated legal entity.

[27] Mr. Megann on discovery also indicated that in his dealings with Mr. Ross he considered him to be acting as an agent for GJR Developments Ltd. This is obviously at odds with his 2009 affidavit but as indicated earlier he offered an explanation for his misunderstanding in his most recent affidavit.

[28] Counsel for the Corporate Defendants questioned the timing of the change in position taken by M5 Marketing. He pointed out that the proposed changes follow a virtual admission by Mr. Megann during discovery that M5 Marketing's claim for

unjust enrichment against the Corporate Defendants has very little, if any, chance of success.

[29] Mr. Keith also pointed out that the proposed changes were designed to improve M5 Marketing's prospects of succeeding on a third party beneficiary claim against the Corporate Defendants. The Corporate Defendants had previously entered into a Contribution Agreement and a Side Agreement and, more recently, a Settlement Agreement with GJR Developments Ltd. They agreed to assume liability for certain debts of GJR Developments Ltd. but not any personal debts of Mr. Ross. The Corporate Defendants paid $40,000.00 for the benefits they hoped to receive under these various agreements. If they become liable to pay what might be owed to M5 Marketing by GJR Developments Ltd. they suggest they would not be able to recover any of it.

[30] Depending on how this case eventually resolves, the Settlement Agreement and the accompanying mutual releases between the Corporate Defendants and GJR Developments Ltd. and Mr. Ross (and others) could create problems for some of the parties thereto. This should not, however, prevent M5 Marketing from amending its claim or replacing one defendant with another if new facts and a new appreciation of the claim being advanced comes to light based on evidence uncovered during discoveries. I would suggest that this is not an uncommon occurrence. It happens quite regularly although the timing often varies.

BAD FAITH SUGGESTION

[31] Counsel for the Corporate Defendants has raised the possibility of bad faith as the motivation behind this motion. The burden of establishing bad faith is on the party raising it. It is a serious allegation and there would have to be strong and compelling evidence in support of it. I am not satisfied that sufficient evidence has been offered to raise anything more than a mere suspicion. Certainly there is not enough to support a finding of bad faith.

CONCLUSION

[32] I am not satisfied that the proposed amendments would cause serious prejudice to any existing or proposed defendant that could not be compensated in costs. And, as stated previously, I am not persuaded that there is any element of bad faith involved. The Plaintiff's motion is therefore granted with leave to Mr. Ross to amend his counterclaim to substitute GJR Developments Ltd. as Plaintiff by Counterclaim. He will have thirty days in which to do this, failing which his counterclaim shall be dismissed.

[33] I will leave it to counsel and Mr. Ross to try to reach an agreement on costs. If an agreement cannot be reached the parties may make further written submissions within thirty days of the date of release of this decision.

McDougall, J.