

SUPREME COURT OF NOVA SCOTIA

Citation: Atiyah v. Twin Lighthouse Farm Ltd., 2010 NSSC 389

Date: 20101223

Docket: Syd. No. 304367

Registry: Sydney

Between:

Heather Atiyah

Plaintiff

v.

Twin Lighthouse Farm Ltd., Joan LeRoy and Paul Ginter

Defendants

Judge: The Honourable Justice Patrick J. Murray

Heard: September 22, 2010, in Sydney, Nova Scotia

Written Decision: December 23, 2010

Counsel: John Khattar Q.C., for the plaintiff
Kathleen Hains, for the defendant, Joan LeRoy

By the Court:

(Introduction)

[1] The matter before the Court is a motion by the Defendant, Joan LeRoy, for the production of certain documents. The following documents included in the motion filed by the Defendant were confirmed by the Defendant as still outstanding as part of her production request:

- (i) Cape Breton Western Rider Membership forms
- (ii) Heather Atiyah personal income tax records
- (iii) American Paint Association Papers to include signed transfer forms
- (iv) Farrier receipts for ALL horses owned by Heather Atiyah
- (v) Records from both Sydney Animal Hospital and Baddeck Veterinary disclosing all account held by Heather Atiyah
- (vi) Income Tax Returns of the Plaintiff

[2] At a hearing held on September 20, 2010, the Court, after hearing submissions from both the Plaintiff and Defendants dealt with all but two items. The Court reserved decision on two (2) items, namely: (1) American

Paint Association Papers (which are to include signed transfer forms); and

(2) Farrier receipts for all horses owned by Heather Atiyah.

[3] For the record the documentation requested by the Defendant was dealt with by the Court on September 22 as follows:

[4] (i) ***Cape Breton Western Rider Membership forms:*** This matter was dealt with by the Court directing the Plaintiff to confirm in a letter to the Defendants that the membership forms already provided are the only documents in the possession of the Plaintiff and that the copies provided are true copies of the original documents. This was acceptable to the Defendants. The Defendants were directed that further questions regarding those documents can be made by the use of discovery or interrogatories under Rule 19.

[5] (ii) ***Sydney Animal Hospital Records:*** The Court ruled the records already provided by the Plaintiff from the Sydney Animal Hospital for the periods 2004 to 2008 satisfied the discovery request of the Defendants. The Court questioned Plaintiff's Counsel in detail as to

whether all of the records from the Sydney Animal Hospital had been provided. The Defendants were directed that if they had further questions pertaining to the documents provided, they could obtain particulars either through discovery or interrogatories under Rule 19.

[6] (iii) **Cheques:** The Defendant, Joan LeRoy, through her representative Kathleen Hains, requested seven (7) cheques which were written to Mr. Wayne Brewster by the Plaintiff who sold horses to the Plaintiff. The Plaintiff through her Counsel provided a letter signed by Mr. Wayne Brewster on September 8, 2010 stating that all of the sales for the horses in question were “cash sales”. The Plaintiff as “ purchaser”, did not ask for receipts from Mr. Brewster and none were given. This document was signed and authored by Mr. Brewster who would be the source of any cheques (if they had been written to him) by the Plaintiff. The Defendant acknowledged that this satisfied her request in regard to this particular matter. The Defendants will have a further opportunity to question this document and/or it’s author during discovery or by way of interrogatories under the Rules of Court.

[7] (iv) ***Income Tax Returns:*** The Plaintiff objected to the production of these documents as being too broad a request, open to abuse and irrelevant. Whether the Plaintiff did or did not claim expenses associated with her horses had nothing to do with whether the actions alleged against the Defendant, namely, wrongful sale and conversion of the Plaintiff's horses had occurred. Counsel for the Plaintiff, Mr. Khattar and Ms. MacKinnon, provided a letter from the Accountant, Sheila Gillis, C.A. dated September 21, 2010, in which she addressed the income tax returns for the Plaintiff for each of the years 2004 to 2009 inclusive. The Defendant acknowledged at the hearing that this letter satisfied her request for production regarding production of the Income Tax Returns.

The Two Outstanding Items:

[8] (i) AMERICAN PAINT ASSOCIATION (APA)- registration forms:
The Defendant, Joan Leroy, seeks production of American Paint Association papers including signed transfer forms from the Plaintiff to demonstrate ownership of the horses and other animals that were boarded

at the farm of the Defendants. In a blue binder containing a list of exhibits filed on September 17, 2010, Joan LeRoy stated in paragraph (e) of her affidavit:

“I have previously supplied the Plaintiff’s lawyer with copies of signed American Paint Horse Association (will continue in this document to refer to as APHA) transfer form which can also be found in the defendants Affidavit disclosing Documents Tab 13 Book 1 (known as **Exhibit “L”**). Also in the Statutory Declaration of Wayne Brewster (known as **Exhibit “M”**) dated August 25, 2008 paragraph 6 “hat I am unaware of any other rightful owner of these three horses am in the process of preparing the appropriate registration papers to provide further evidence of the ownership of these horses by Heather Atiyah.” I also supplied to Plaintiff with American Paint Horse Association Bylaws and a copy of Criminal Code of Canada//Animal Pedigree Act (known as **Exhibit “N”**). **Therefore I believe the demand for production of the records I have requested are necessary, are warranted and are required.**” (Quote with typing errors)

[9] The Plaintiff’s position is that they cannot provide these forms as they do not exist. The Plaintiff provided the Defendant with one transfer form which is contained in tab “L” of the exhibit list referred to. This was completed by Mr. Brewster in respect of the registered name of the horse “Henry’s Cotton Candy.” This form was never sent in to APA by the Plaintiff. In other words, it was not registered.

[10] The Plaintiff in a supplementary affidavit filed May the 10th, 2010 states in paragraph six:

“I have arranged all documents listed in schedule “A” to be copied and placed in a booklet or scanned and copied in a readily exchangeable electronic format, organized in a way that corresponds to Schedule “A”, and delivered to each other party immediately.”

[11] In his brief dated September the 7th Mr. Khattar, on behalf of the Plaintiff, stated:

“The Plaintiff has already informed the Defendant that she does not now have, nor did she ever have the following documentation requested by the Defendant. (i) Bill of Sale for her horses (ii) American Paint Association papers (iii) Farrier receipts for the horses owned by her.”

[12] He further states the Plaintiff has already informed the Defendant that she objects to producing the remaining documents requested in the Notice of Motion on the basis of non-relevance, non-existence or both. They request that the Court reject the defendant’s Demand for Production of the American Paint Association Papers.

[13] From her submissions it appears that Ms. Hains, on behalf of Ms. LeRoy is seeking production of papers for all of the horses (and perhaps even additional animals) which were kept by the Plaintiff at the Defendant's farm. However on the motion, Ms. Hains stated in response to the Defendant's claim that these papers did not exist :

“because they did file a statutory declaration on behalf of the Plaintiff, Heather Atiyah, from the seller of these horses where in paragraph 5 said that he would work on getting these things together to file for her proof of ownership”.

The Statutory Declaration referred to by Ms. Hains is the Statutory Declaration of Wayne Brewster sworn to on the 25th day of August, 2008.

It is paragraph 6 in which he states as follows:

“That I am unaware of any other rightful owner of these three horses and I am in the process of preparing the appropriate registration papers to provide further evidence of the ownership of these horses by Heather Atiyah.”

The three horses referenced in paragraph 5 of Mr. Brewster's declaration are: Breeze, Penny and Nicki.

[14] Under Rule 14.12 the Court may issue an Order directing the production of certain documents to a party by a non party. The first question which must be addressed is, are the documents being sought relevant?

[15] Effective January 1, 2009 the Rules of Court provided its own definition of "relevant" or "relevance" in respect of disclosure.

[16] Rule 14.01 states as follows:

“1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:

(a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;

(b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.”

[17] In the case of **Halifax Dartmouth Bridge Commission v Walter Construction Corp.** 2009 286 NSR (2D) 179 Justice A.J. LeBlanc at paragraph 13, discussed the meaning of relevancy under the 2009 Civil Procedure Rules, as compared to the Civil Procedure Rules (1972):

“The Nova Scotia Court of Appeal has established that the threshold of relevancy in the examination for discovery and production of documents in support of discovery under the Civil Procedure Rules (1972) is a "semblance of relevancy", resulting in a wide and liberal interpretation of the rules of disclosure and discovery. Documents produced at discovery or at the pretrial stage on a standard of "semblance of relevancy" are not necessarily admissible on a more stringent test of relevancy at trial. The 2009 Civil Procedure Rules, however, impose a more stringent test of "relevancy" at the pre-trial stage.”

Also, at paragraph 15 he stated with respect to Rule 14.01:

“This rule provides that relevancy is to be determined on the threshold of relevancy at trial.”

[18] In her Statement of Claim, the Plaintiff alleges that she owned horses which were boarded at the Defendant's farm. The Plaintiff claims the return of these horses “the Atiyah horses” which she states were wrongly

converted by the Defendants. In paragraph 10 of her Statement of Claim, the Plaintiff claims ownership of the horses known as Stardust, Nicki, Breeze and Velvet. They are referred therein to as the "Atiyah horses". For conversion to have occurred, the party alleging conversion must have owned the property in the first place. Throughout the Statement of Claim, she refers to these horses as "her" horses.

[19] The Court finds that the test for relevancy of these documents (that Brewster stated he would prepare) has been met and is satisfied that a judge at a trial or hearing would find the documents to be relevant in accordance with the definition given in Rule 14.01.

[20] The Plaintiff further objects to production of these documents on another basis, non-existence. The Plaintiff claims they do not have possession of these documents and therefore cannot and should not be forced to disclose them.

[21] Under the new *Civil Procedure Rules*, and as previously noted, production of documents from a non-party is addressed in *Rule 14.12*. The relevant portions of that rule read as follows:

- (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
- (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.”

[22] The Court is entitled to order production of records from a non-party pursuant to *Rule 14.12* and the Court of Appeal in **Nova Scotia (Attorney General) v Royal SunAlliance Insurance Co. Of Canada**, 2005, Carswell NS 80 provides guidance in assessing whether an Order should be granted pursuant to *Rule 14.12*, notwithstanding that the rule is both new and different.

[23] The Rules also provide a certain discretion to the court in dealing with motions (*Rule 94.06*) and general discretion (*Rule 2.03*). Subject to the stated limitations in these latter rules, whether production is in the public interest, and whether production is required for fairly disposing of a

proceeding would appear to have been relevant considerations under the previous Rules , as touched upon by Cromwell, J.A. in **Nova Scotia Sun Alliance Insurance Co of Canada**, supra.

[24] The new rule is clear in stating (1) what the test is for relevancy ,and (2) that the Court may order production from a non-party. On it's face the new Rule does not involve consideration by the Court as to whether production is necessary for fairly disposing of a proceeding and whether the Court is required to determine whether production would be in the public interest.

[25] Additionally, Civil Procedure Rule 15.02(2)(c) allows for documents newly created to be provided as part of the production request.

The Rule states:

“15.02 Duty to make disclosure of documents

(1) A party to a defended action or a contested application must do each of the following:

(a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;

(b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;

(c) acquire and disclose relevant documents the party controls but does not actually possess.

(2) The party must also disclose information about all of the following: (emphasis added)

(a) a relevant document the party once controlled but no longer controls, such as a lost document or a document given away;

(b) a claim that a document in the control of the party is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege;

(c) **a relevant document newly created, discovered, or acquired;** (emphasis added)

(d) a relevant document that has ceased to be privileged.”

[26] The problem here is that the documents requested are not yet prepared but they were to be provided by Mr. Brewster, at least according to the Plaintiff. He did state in his own declaration that he was “in the process of preparing the appropriate registration papers”, but that was as of August 25, 2008, two years previous to this request.

[27] I find rule 15.02(2)(c) to have application to the Plaintiff's request in that when the documents are prepared, they could be considered "newly created". They must then be disclosed to the Defendant, provided they are relevant, on which I have already ruled. The Court is satisfied that the registration papers that would provide further evidence of ownership.

[28] In **Halifax Bridge Commission, supra**, LeBlanc, J. discussed the obligation of a party with respect to disclosure of documents. At paragraph 15 the learned Justice stated:

"Therefore under Rule 15, parties have to search for, acquire, and disclose relevant documents."

[29] Accordingly, the Court is unable to order production of these Registration Papers from Mr. Brewster as they do not yet exist. If he does prepare them the Plaintiff will have an obligation under the Rules to "acquire" them and also provide them as "newly created" documents. If and when they are provided and if necessary the Court would be prepared to order their production under Rule 14.12, as they appear to be relevant. It should be noted that the letter provided by the Plaintiff (at the hearing) ,

signed by Mr. Brewster, confirms that he sold horses to the Plaintiff. This is further evidence of ownership, at that point in time.

(ii) **FARRIER RECEIPTS**

[30] The final item of those requested by the Defendant are the so called “farrier receipts”. A farrier is a person who cares for and maintains horses hoofs. Often their services are paid in cash without invoices or receipts being provided. The Plaintiff claims that these receipts do not exist and questions the relevancy of them. These receipts have some relevance to the ownership of the horses. The relevance of these receipts is more incidental and not as direct as are the American Paint Association Registrations , the latter of which are provided for that very purpose, establishing ownership. The APA papers would evidence ownership, similar to a way a bill of sale evidences ownership of a vehicle.

[31] The Defendant claims these receipts in a further effort to open a “doorway” to proving how many horses owned by the Plaintiff were boarded and serviced at the Defendant’s farm. At the same time, the Defendant through her representative, Ms. Hains, indicates that it is common for farriers to accept cash without providing receipts.

[32] For her part, the Plaintiff is not in the horse business but rather is an individual horse owner. Invoices and receipts of this nature would not be of any importance to her and she is not claiming in the lawsuit expenses she claimed for her horses for farrier service. With respect of this request, the Court is of the view that the relevance of these receipts, if they were available, is questionable. Further, the Plaintiff is unable to provide them and forcing the Plaintiff to do so would be overly burdensome considering the relevancy they hold. The Court agrees and is therefore not prepared to order production of these receipts.

[33] Whereas the Plaintiff has made extensive efforts to provide production, no costs are awarded on the motion.

J.