SUPREME COURT OF NOVA SCOTIA

Citation: Cormier v. Universal Property Management Ltd., 2011 NSSC 16

Date: 20110114
Docket: Hfx. No. 327439
Registry: Halifax

Between:

Shawn Michael Cormier

Plaintiff

v.

Universal Property Management Limited, Fenwick Holdings Limited, Rob Schelleman

Defendants

Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	January 11, 2010, in Halifax, Nova Scotia
Oral Decision:	January 14, 2010
Written Decision:	January 14, 2010
Counsel:	Kevin A. MacDonald, for the Plaintiff Joseph Herschorn, for the Defendants

By the Court:

Introduction

[1] Mr. Cormier rented space for his hair salon, Shear Logic Hairstyling, at 5595 Fenwick Street, Halifax from Fenwick Holdings Limited. Universal Property Management Inc. was the property manager and agent of Fenwick.

[2] Mr. Cormier was attempting to sell his business in the summer of 2007, and after renewing the lease from September 1, 2007 to August 31, 2012 he decided to assign his lease to an interested party, 3019421 NS Ltd., operating Julienne's Restaurant in the space next to his salon. They agreed on terms and price.

[3] Universal and Mr. Cormier had discussions about this proposed assignment. Mr. Cormier believed Universal, through it's agents and on behalf of Fenwick, had approved the assignment to 3019421 NS Ltd. and therefore he disposed of his business assets (tanning beds, hairstyling equipment and accessories) and vacated the premises at the end of October 2007 having paid rent up to September 30, 2007. The new lease assignee was to pay rent after September 30, 2007. The "deal" between Mr. Cormier and 3019421 NS Ltd. "fell apart" when Universal

later indicated its refusal to consent to the assignment agreed to between those two tenants.

[4] Fenwick and Universal, take the position that the assignment from Mr. Cormier to 3019421 NS Ltd. required their consent/approval and such approval was not given.

[5] Mr. Cormier started an action against Universal, Fenwick and Rob Schelleman, one of Universal's employees. The Defendants filed a Defence and Counterclaim, to which Mr. Cormier filed a Defence.

[6] On October 13, 2010 a Motion for Summary Judgment on Evidence pursuant to *Civil Procedure Rule* 13.04 was filed by the Defendants. The hearing proceeded on January 11, 2011 before me.

[7] To understand the pleadings in this proceeding, especially in so far as the Plaintiff's claim of the tort of Abuse of Court Process against the Defendants, the litigation history, in its broad sense, is relevant.

Litigation History

SCCH 307150 - Proceedings in Small Claims Court - Decision - July 31, 2009

> Mr. Cormier was ordered to pay 3019421 NS Ltd. $9000 ($1000 original deposit and $8000 for first interim payment).
>
> Universal Property Management Limited was ordered to pay Cormier $25,000 (for lost sale price of lease assignment to 3019421 NS Ltd.). - Exhibit “J” to affidavit of Rob Schelleman, sworn December 21, 2010.

[8] Universal successfully appealed the decision to Nova Scotia Supreme Court, Justice Robertson, who on February 8, 2010 remitted the matter for re-hearing to the Small Claims Court - para. 15 brief of Defendants, December 22, 2010. A Notice of Discontinuance was filed September 1, 2010 [Plaintiff’s Date Assignment Conference Memo] - and Exhibit “A” - 21 Cormier affidavit.

2010 Hfx. No. 327439 In Nova Scotia Supreme Court:

Pursuant to *Civil Procedure Rule* 57, a Notice of Action (Statement of Claim) was filed April 15, 2010: Shawn Michael Cormier v. Unversial Property Management Limited, Fenwick Holdings Limited and Rob Schelleman. The claim is based on breach of contract, negligent misrepresentation, equitable fraud and Abuse of Process - para. 55 of the Statement of Claim.

A Notice of Defence and Counterclaim was filed by all three Defendants - June 8, 2010.

The Defendants argue Cormier has no standing as the contract was with Snip it First Ltd. Alternatively, the Defence is based on a denial of breach of contract or misrepresentation; and on *res judicata* regarding the issue of withholding consent unreasonably to the assignment of the premises by Cormier to 3019421 NS Ltd.

A Counterclaim was filed against the Plaintiff (Shawn Cormier) for having occupied the premises for September, October, November and December 2007, without paying rent, which amounts to breach of the lease.

A Defence to Counterclaim was filed by the Plaintiff on June 24, 2010 and is a denial of “each and every assertion made in the Defendant’s Counterclaim”.

The Evidence Presented at the Hearing

[9] The Applicant Defendants presented the affidavit evidence of 2 employees of Universal:

Rob Schelleman and Wanda Hart; who were thereafter cross-examined.

[10] The Respondent Plaintiff presented the affidavit of evidence of Mr. Cormier who was also cross-examined. With leave of the Court, Mr. Cormier was permitted to give direct evidence supplemental to his affidavit, on which he was also cross-examined.

[11] No exhibits were filed. Neither party wished to present any further evidence.

The Law Regarding Motions for Summary Judgment on Evidence

[12] *Civil Procedure Rule* 13.04 is applicable and reads:

> **Summary judgment on evidence**
>
> 13.04 (1) 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.

> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[13] As Justice Farrar put it in *Gilbert v. Giffin* 2010 NSCA 95 at para. 14:

> 14 The prerequisites for summary judgment to dismiss an action are -- first that the applying defendant shows that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success (**Guarantee Co. of North America v. Gordon Capital Corp.,** [1999] 3 S.C.R. 423 at para. 27).

[14] More recently Justice Pickup set out the applicable principles in *Spencer v. Canada* 2010 NSSC 446 at paras. 8 - 9:

> 8 The principles to be applied to summary judgment have been discussed and commented on in numerous cases, both in this court and the Court of Appeal. Justice Bryson (as he then was) in ACG Flat Glass North America Ltd. v. CCP Atlantic Specialty Products Inc. (2010), 289 N.S.R. (2d) 290 (S.C.), [2010] N.S.J.

No. 140, listed four propositions that are appropriate in determining whether or not summary judgment should be granted. He said, at para. 13:

> (1) The plaintiff must show that, on uncontroverted facts, it is entitled, as a matter of law, to succeed; that is to say, that there is no fact material to the cause of action that is in issue;
>
> (2) The burden then shifts to the defendant to show evidence that the defence has a real prospect of success; that is to say that there is a genuine issue of fact material to the claim or defence, that must be decided before the case can be determined on its merits;
>
> (3) The responding party must put "its best foot forward" or risk losing. This requires more than a simple assertion, but requires evidence, [United Gulf Developments Ltd. v. Iskandar, 2004 NSCA 35];
>
> (4) If material facts are not in dispute, the court has an obligation to apply the law to those facts and decide the matter.

9 A defendant can also obtain summary judgment. Cromwell, J.A. of the Court of Appeal (as he then was) in Cherubini Metal Works Limited v. Nova Scotia (Attorney General) (2007), 253 N.S.R. (2d) 144 (C.A.), [2007] N.S.J. No. 134, referring to the Supreme Court of Canada decision in Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, said at para. 8:

> Summary judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success ...

[15] In *Spencer*, Justice Pickup elaborated on the second step analysis: ie. whether the plaintiff can show they have a real chance of success at trial once the Defendants have demonstrated there is no genuine issue of material fact requiring a trial - paras. 15 - 19:

Real Chance of Success at Trial:

15 As there are no material facts in issue, the burden shifts to the plaintiffs to show that their claim is one with a real chance of success. They must put "their best foot forward" or risk losing. The plaintiffs have not submitted any affidavit evidence, but they have cross-examined Corporal Christensen on his affidavit.

16 In MacNeil v. Bethune (2006), 241 N.S.R. (2d) 1, [2006] N.S.J. No. 62, Roscoe, J.A. commented on the second step of the summary judgment test at para. 33:

> ... at the second step of the test, there is an evidential burden on the responding party to put its best foot forward or risk losing. I agree with the statement in [Marco Ltd. V. Newfoundland Processing Ltd. (1995), 130 Nfld & P.E.I.R. 317, 1995 CarswellNfld 134 (Nfld T.D.)]:
>
> > If the applying party satisfies the threshold test for the application of the rule by putting forward an evidentiary basis for his or her position, the responding party then has an evidentiary burden to demonstrate that there is a genuine issue for trial. This cannot be accomplished by showing an issue raised by the pleadings. The argument on a Rule 17A application takes place at a level below the pleadings within the forums of evidence and legal argument. The responding party must therefore "put his best foot forward" since failure to do so may lead the court to conclude that there is in fact no genuine issue for trial. The responding party should therefore set out in affidavits, or answers given on interrogatories or oral discoveries, an evidentiary foundation for his or her case so that the court can see that there is a genuine issue of fact or law that is joined and has to be resolved before the court can make an ultimate determination on the merits.

17 In Papaschase Indian Band No. 136 v. Canada (Attorney General) 2008 SCC 14, [2008] S.C.J. No. 14, the Supreme Court of Canada held at para. 19:

> ... A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. ...

18 The trial judge defined "real chance of success" in Eikelenboom et al v. Holstein Canada, 2003 NSSC 241, [2003] N.S.J. No. 479, as follows at para. 10:

> ... A "real" chance of success is not to be expressed in percentages. It does not mean that the plaintiffs are likely to succeed at trial or have a better than 50/50 chance of success. At trial, plaintiffs have the onus of establishing their claim on the balance of probabilities. A real chance of success means the possibility of their success is not illusory or unrealistic. It is no more than saying they could succeed and the determination of whether they will or not should be left for the trial. The trial judge will have to examine all the surrounding circumstances. That is not the role of a chambers judge on a summary judgment application.

19 The trial judge's decision was reversed on appeal (2004 NSCA 103), but the Court of Appeal did not appear to disagree with this statement of the law.

The Pleadings Specifically

[16] In the case at Bar, the plaintiffs have pleaded (Statement of Claim para. 55 as paraphrased by me):

> Against both corporations Fenwick and Universal:
>
> 1. Breach of Contract (which lease extension Agent would have allowed assignment of lease)
>
> Against Fenwick alone

2. Abuse of Process

Against Universal alone

3. Negligent Misrepresentation or Equitable Fraud “for its employee for which it is vicariously liable”.

Against Schelleman alone

4. Negligent or fraudulent misrepresentation as an employee of Universal (the Defendants have interpreted this as also possibly alleging the tort of deceit in their written submissions).

[17] The Defendants collectively have pleaded (paraphrased by me):

- Defence admits Schelleman is an employee of Universal - para. 4

- and that the lease was extended in favour of Snip It First Limited to August 31, 2012.

- That Cormier could not assign the lease because:

(a) The use of the premises were limited to a “hair salon”.

(b) Even if the use were to remain the same Universal was justified and did not unreasonably withhold its consent to the lease assignment.

> (c) Any approval of the lease assignment was not confirmed by Universal, and was not in writing.

[18] Moreover:

> (d) The issue of whether the lease extension agreement included any restriction on the "use" term was settled by Robertson, J. in the Small Claims Appeal. She found that the "use" term is not subject to the requirement not to withhold consent unreasonably. Therefore the issue is *res judicata* and the Plaintiff cannot rely on the alleged unreasonable refusal to approve the lease assignment in this Nova Scotia Supreme Court proceeding.
>
> (e) There was no misrepresentation of any kind made - as there was no representation that Universal or Fenwick had approved the lease assignment - at most Schelleman may have suggested "that approval might be possible".
>
> (f) Both Mr. Schelleman and Universal were acting within the scope of their authority as Agents for Fenwick and therefore any liability is that of Fenwick.

[19] Finally:

> That the lease contractual relationship was between Universal, on behalf of Fenwick, with Snip It First Limited, and therefore, Mr. Cormier as an individual has no standing to bring the action.

Application of the Law to the Apparent Facts

[20] At its core, this matter is about whether Fenwick, Universal and Schelleman had legal obligations to Mr. Cormier which they breached, whether characterised as contractual or tortious.

[21] In essence, the Plaintiff argues that, as a matter of fact, he was promised an approval, and received approval, for the assignment of the lease to 3019421 NS Ltd., and that in not implementing that approval, Fenwick, Universal and Schelleman breached their legal obligations.

[22] The pleadings and evidence presented require application of the law regarding contracts, the torts of negligent misrepresentation, abuse of process, “equitable fraud”, also referred to by the Plaintiff at times as fraudulent misrepresentation; and agency principles.

Contract Law

[23] In *Executive Rental Agency v. Quaintance* 2009 NSSC 20, Beveridge, J (as he then was) made succint reference, in the context of a Small claims Appeal, to some of the contractual issues at play in the case at Bar:

> 26 With all due respect to the appellant, what is or is not a contractual term is in essence a finding of fact and a Court is not limited by the words used in a written contract. Even where there are "entire agreement" clauses specifying that the written contract constitutes the "entire agreement" between the parties does not in and of itself exclude any finding of a side agreement or collateral contract, let alone the potential for legal consequences from misrepresentations (see Cartwright, Misrepresentation Mistake and Non-Disclosure 2nd (Sweet and Maxwell, London 2007 para. 9.12)
>
> 27 In Fridman, The Law of Contract in Canada, 5th ed. (Thomson Carswell, Toronto 2006) the author reviews the law with respect to statements made by a party to a contract at or prior to the finalization of the agreement. He notes the distinction between statements that are intended to be and are regarded as being terms of the contract and statements which are not terms, but are merely inducements to the making of the contract and the different approach at common law and equity to these kinds of statements. He notes that at common law if the statement was made to get consent to enter into a contract it will usually be considered a term of the contract (see p. 296).
>
> 28 If representations amount to a term of the contract, then the innocent party can sue for breach of contract and damages. If the representation was not a term of the contract then the innocent party can sue for non-contractual remedies such as avoidance or rescission of the contract, not to mention the potential for the innocent party to advance a claim in tort for the **negligent misrepresentation.** Representations can also amount to a collateral contract.
>
> [My underlining]

[24] Moreover, it is possible that parties who intend to agree to terms of a contract, may find that they have contracted to a term without their intent to be so bound.

[25] This situation is addressed by J. Swan, Canadian Contract Law (1st ed. Lexis Nexis Inc. 2006 Markham, Ont) at p. 188 under the title: "The Intent of the offeror". Swan states:

> "The situations where difficulties arise are, of course, those where the offeror's intentions are either not clear or are at variance with what the offeree understood. In these situations, the law has had to take an objective view: the question will be, not what the offeror as a matter of fact subjectively intended, but what a reasonable person in a position of the offeree would have understood the offeror to have intended by doing what was done, by saying what was said."

[26] To similar effect see Fridman, The Law of Contract (5th ed.) (2006) at p. 15:

> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. As Fraser C.J.A. said in *Ron Chitter Property Consultants Ltd. v. Beaver Lumber Co.:*

> the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.
>
> ...
>
> Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties. If the plain wording of the document reveals a clear and unambiguous intent, it is not necessary to go further. Indeed, once that has been done, it may not be possible to have recourse outside such document, either to other written material or to parol evidence from the parties or anyone else, in order to explain, or otherwise clarify what is contained in the document.
>
> If there is no single document to which reference can be made in order to decide if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done, or written, in combination if necessary, there must be established a bargain or an agreement. ...

[27] Moreover, one must distinguish between conditions to reaching an agreement, and the implementation of a step in carrying out an already enforceable agreement: See *Mitsui & Co (Point Aconi) Ltd. v. Jones Power Co.* (2000) 189 NSR (2d) 1 (CA) per Cromwell, JA (as he then was) at para. 67.

[28] This is relevant in the case at Bar to the allegation that approval had been given for the assignment of the lease and all that was lacking was its implementation - i.e. a formal document to that effect.

[29] On the other hand, as a matter of fact finding, Courts will be reluctant to imply essential terms of a contract, and therefore require "strong evidence" thereof - see eg. *Sinanan v. Woodyer* (1999) 176 NSR (2d) 201 (CA) per Roscoe, JA at paras. 43 - 47.

The Law of Agency

[30] It is clear that Fenwick contracted Universal, to manage its property and that Universal was represented by its agents: Sherri Grant [Corporate Leasing Manager - see her July 9, 2007 letter to Cormier at Tab A-5 of his January 7, 2011 affidavit]; Wanda Hart [Administration Manager - see her September 14 letter to Cormier at Tab A-8 of his January 7, 2011 affidavit]; and Robert Schelleman, who is described in his affidavit of December 21, 201 as "employee of Universal Property Management Limited for which I am a property Manager".

[31] In The Law of Agency, Fridman, (7th ed. 1996 Butterworths, Toronto, Ontario) the author points out that **contractual agents** have varieties of authority including:

1. Actual authority

2. Implied authority

3. Apparent authority [which arises separately as a result of the operation of the legal doctrine of estoppel and exists even where the principal did not want or appoint the agent to act on his behalf. By its exercise of such apparent authority, the agent can affect the legal position of the person whose conduct or representations for whom it is made to appear that the agent has authority to act].

- pp. 61 - 62 and 122 - 123.

[32] Most relevant to this matter are the concepts of actual and implied authority:

P. 61 Fridman

Varieties of authority. Once it has been determined that an agency relationship has been created, it is necessary to establish the scope of such relationship. By this is meant the exact nature and extent of the power possessed by the agent. The power of an agent to affect the legal position of his principal is a concept already examined. The nature and extent of such power are explicable in terms of 'the agent's authority', which is an artificial notion of law. This is the central, most important feature of the whole relationship. Upon it depend not only the legal relations of the principal and his agent but also the relations which may emerge between the principal and the third party or the agent and the third party. At this juncture it is sufficient to state, without further elaboration, that the principal will only be bound to the third party by acts which are within the agent's authority. Anything that the agent does in excess of that authority will not affect the principal, unless the principal adopts what the agent has done in accordance with the doctrine of ratification. Moreover, if the agent acts outside his authority, he may be liable to his principal for breach of the contract of agency, or otherwise, or to the third party for breach of the implied warranty of authority.

When the agency relationship has been created by contract (or consent), the relevant variety of authority is *actual*, or as it is sometimes termed, *real* authority.

> **Actual authority**. Actual authority is the authority which in fact the agent has been given by the principal under the agreement or contract which has been made between them, or by virtue of subsequent ratification.

[33] It has been said that:

> 'An **"actual"** authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.'

Fridman continues at p. 62:

> To this agreement, of course, a third party contracting with the agent was a stranger. Indeed he might be totally ignorant of the existence of any authority, ie that an agency relationship was in existence. This would occur where the principal was undisclosed, a situation which gives rise to certain important differences and anomalies. Nevertheless, if the agent did enter into a contract

> pursuant to the 'actual' authority, it would create contractual rights and liabilities as between the principal and the third party. Such actual or real authority may be sub-divided into three categories, viz, express authority; implied authority; and usual or customary authority.

[34] Furthermore, Fridman notes at p. 122 - 123:

> The apparent authority must be carefully distinguished from the *implied authority* in particular that variety of implied authority which has been called *usual* authority, which some agents may possess over and above the express authority granted them by the principal. ***Implied*** (including in this context *usual*) authority is the authority which in fact the agent possesses as a result of the construction of his contract of agency in the light of business efficacy, or of the normal practices and methods of the trade, business, market, place, or profession, in which the agent is employed. *Apparent* authority, on the other hand, is the authority which, as a result of the operation of the legal doctrine of the estoppel, the agent is considered as possessing, in view of the way a reasonable third party would understand the conduct or statements of the principal and the agent. Sometimes this is described as implied authority, on the ground that it is implied by the law, or as usual authority, on the ground that it is what a third party would expect an agent in such a position to possess

in the ordinary course of events. Such use of the terms implied authority and usual authority, it is suggested, is a source of confusion.

Vicarious Liability

[35] The principles of vicarious liability of principals for their agents in cases of intentional torts was canvassed recently by Farrar, JA in *Gilbert v. Giffin* 2010 NSCA 95 at paras. 50 - 53. There Farrar, JA stated:

> 50 In **Bazley** [1999] 2 S.C.R. 534, **supra**, the Court was addressing whether a non-profit organization, operating two residential care facilities for the treatment of emotionally troubled children was vicariously liable for an employee's tortious conduct in sexually abusing a resident of the facility. After a consideration of the law and policy considerations, the Court concluded:
>
> > 41 Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:
> >
> > > (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
> > >
> > > (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated

to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

(3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;

> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

51 **Bazley** is distinguishable, on its facts, from the present situation. It involved an employee committing an intentional tort on a vulnerable victim during the course of his employment.

52 However, **Bazley**, supra, was considered in a non-employer/employee relationship recently by the Supreme Court in **Fullowka v. Pinkerton's of Canada Ltd.**, 2010 SCC 5. In **Fullowka,** the appellants sought to impose vicarious liability on the national union for the intentional actions of the members of a local. The Court concluded that the national union was not vicariously liable and held:

> [142] The question of whether vicarious liability should be imposed is approached in three steps. First, the court determines whether the issue is unambiguously determined by the precedents. If not, a further two-part analysis is used to determine if vicarious liability should be imposed in light of its broader policy rationales: Bazley v. Curry, [1999] 2 S.C.R. 534, at para. 15; John Doe v. Bennett, 2004 SCC 17, [2004] 1 S.C.R. 436, at para. 20. The plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and that the wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought: Bennett, at para. 20. The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation: Bennett, at para. 20.

53 The three step analysis in **Fullowka** may be summarized as follows:

> 1. Has the issue of vicarious liability been unambiguously determined by the precedents?
>
> 2. If not, has the plaintiff shown that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close?
>
> 3. If the relationship is sufficiently close, is the wrongful act sufficiently connected to the contact authorized by the parties against whom liability is sought?
>
> [My underlining]

[36] The primary tort claim herein is for negligent misrepresentation, and the alternate basis for liability is breach of contract, which both involve traditional principles of vicarious liability.

[37] In **Bowstead and Reynolds on Agency** (2001) 17th ed. Sweet & Maxwell, London England, we find those principles:

> **Article 76**
>
> Fraud of Agent

An act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.

Comment

This principle is applicable to cases of contract; in tort; in the disposition of property; a similar result even appears in criminal cases.

Article 77

DISCLOSED PRINCIPAL NOT BOUND BY ACTS OUTSIDE ACTUAL OR APPARENT AUTHORITY

A disclosed principal is not bound by an act of his agent which is outside the scope of the agent's implied or apparent authority unless the principal in fact authorised the agent to do the particular act or ratified it. This Article is subject to the provisions of Articles 86 to 89.

Article 81

DEFENCES TO ACTION BY OR AGAINST PRINCIPAL

(1) Where a principal sues the other party to a contract made through an agent, the other party has all the defences which he would have had against the principal if the principal had himself made the contract in the same circumstances.

(2) Where an undisclosed principal sues the other party to a contract, the other party may, in addition to the defences mentioned above, plead all defences which accrued against the agent before he had reasonable notice that the agent was not acting for himself.

(3) Where the other contracting party sues the principal, the principal, whether disclosed or undisclosed, can plead against him all defences arising out of the transaction with the agent, and defences personal to himself, but not defences personal to the agent.

8-098 Rule (1). General Rule. The third party should be able to use all defences arising out of the contract itself, and all defences available against the principal himself (*e.g.* set-off, the fact that he is an alien enemy) but not defences and set-offs which he may have against the agent by which are not connected with the instant transaction. It is clear that he can allege fraud, misrepresentation, non-

performance, illegality and mistake, where these are attributable to the agent, just as he could against the agent. And where he has such a defence, he can also take proceedings for rescission and restitution. The relevant act of the agent must, however, have been within the authority of that agent, actual or apparent, or else the principal is obviously not affected by it.

Article 92

LIABILITY OF PRINCIPAL FOR TORTS COMMITTED BY AGENT

8-177 (1) If an agent is the servant of his principal, the principal is liable for loss or injury caused by the wrongful act of the agent when acting in the course of his employment.

(2) A principal is liable for loss or injury caused by the tort of his agent, whether or not his servant, in the following cases:

(a) if the wrongful at was specifically instigated, authorised or ratified by the principal;

(b) if the wrongful act amounts to a breach by the principal of a duty personal to himself, liability for non-performance or non-observance of which cannot be avoided by delegation to another;

(c) (perhaps) in the case of a statement made in the course of representing the principal made within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal.

(3) Where principal and agent are both liable for a wrongful act committed by the agent they are joint tortfeasors.

(4) In this Article, save where the context requires otherwise, “act” includes “omission,” and phrases which include the word “act” are capable of any necessary consequential modification.

Deceit: division of ingredients. The tort of deceit, where agency terminology is frequently used, raises special problems where agents are involved, in so far as it requires a false statement made, with the intention that it should be acted on,

"knowingly, or without belief in its truth, or recklessly, careless whether it be true or false." Is the principal to be liable to a third party where (for instance) the agent made a representation innocently, believing it to be true, and the principal knew of the untruth of the statement but did not know that it was being made? In such case no individual is guilty of personal fraud: there is an "innocent division of ingredients." But are the acts and minds of principal and agent to be regarded as so far one that, by taking the agent's statement and the principal's knowledge together, the principal can be held liable to the third party in deceit? There was some authority that they were: but the law was later clarified by the decision of the Court of Appeal in *Armstrong v. Strain and is best stated in a series of propositions.*

(a) The principal is liable if he authorised the agent to make the false representation which he (the principal) knew to be untrue (or did not believe to be true), whether the agent knew the truth or not.

(b) The principal is liable if, while not expressly authorising the agent to make the false representation, he knew it to be untrue and was guilty of some positive wrongful conduct, as by consciously permitting the agent to remain ignorant of the true facts, so as to prevent the disclosure of the truth to the third party, if the third party should ask the agent for information, or in the hope that the agent would make some false representation. The agent's representation when made would of course require to be within the scope of his actual or apparent authority.

(c) The principal is liable if the agent made the false representation fraudulently, it being within the scope of his actual or apparent authority and within the course of his employment, to make such a representation, sometimes even where the representation reached the third party by way of another innocent agent, or by way of the innocent principal himself, because in such a case the innocent second agent or principal may be no more than a conduit pipe for the fraud of the guilty agent.

(d) The principal is not liable if the agent made the false representation innocently, the principal knowing the true facts but not having authorised the

> agent to make the representation, nor knowing that it would be made, nor being guilty of fraudulent conduct as in (b) above.
>
> (e) Conversely, the principal is not liable if he himself made the false representation innocently, notwithstanding that the agent knew the true facts.
>
> [My underlining]

[38] These traditional principles can be contrasted with those in *Gilbert v. Giffin* which reflect a more principled approach to the vicarious liability considerations applicable where unauthorized intentional wrongs are committed and legal precedent is inconclusive.

The TORTS alleged:

Negligent Misrepresentation

[39] The requirements of establishing this tort are found in Justice Iacobucci's decision in *R v. Cognos Inc.* [1993] 1 S.C.R. 87 at para. 33:

> (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Abuse of Process

[40] The four elements of this tort are (*Coughlan v. West Miner Cdn. Ltd.* (1994) 120 (2d) 91 (NSSC TD) Nunn, J. at para. 638) - affirmed on this aspect - 127 NSR (2d) 241 (CA):

1. The party must have used the legal process.

2. They must have done so for a purpose other than that for which the process is in question was designed to serve (that is for a collateral and illicit purpose).

3. They must have done some definite act or made some definite threat in furtherance of that purpose.

4. Some measure of special damage must be shown.

Equitable Fraud

[41] At the hearing, Plaintiff's counsel elaborated that this is an alternative argument. It is an allegation that Mr. Schelleman, held out that he had authority, when he did not have authority, to bind his principals.

[42] Therefore, it may be viewed as an agent acting outside his authority and so liable for breach of the implied warranty of authority - p. 61 footnote 19 *Fridman.*

[43] The requirements of this tort were canvassed in *St. Dennis v. Antoine* [1981] B.C.J. No. 499 (Co. Ct.) by Judge MacDonald at paras. 19 - 21; they are:

> 1. Where a person purports to act as the agent of another they are deemed to have entered into an implied contract of warranty with any person who contracts or otherwise deals with him in reliance on his authority.
>
> 2. If that person misrepresents the existence or extent of his authority, he is liable in damages for any loss thereby suffered by those who have dealt with him; the rule in *Derry v. Peek* being excluded by the existence of a contract implied in law.

The Evidence presented at the Hearing

[44] Was there evidence of a genuine issue of material fact?

[45] While I could be more specific, I do not believe it necessary given the substantial factual disputes that are readily apparent in this case.

Breach of the Agreement to allow Cormier to assign the lease

[46] Mr. Cormier's evidence is to the effect that, after the lease extension agreement was agreed to by Universal, he was told by Universal's agent, Schelleman, that his request for permission to assign his lease to 3019421 NS Ltd. was approved.

[47] Mr. Schelleman disputes this in his evidence.

[48] Nevertheless, whether an agreement came into being is in essence a question of fact, and given the substantial credibility issues herein, there is a genuine issue of material fact regarding the plaintiff's contractual claim that requires trial.

[49] I have not overlooked the Defendant's argument that the restriction on "use" in the lease was a further requirement of assignment of the lease for which Mr. Cormier did not seek approval, and as such none was given.

[50] This restriction however, was not enforced it appears when Mr. Cormier assigned 100 square feet in 2006 to 3019421 NS Ltd. (space from his hair salon to a restaurant i.e. Julienne's). This could have reasonably affected Mr. Cormier's perspective about the change of use restriction in 2007.

[51] Moreover, Mr. Cormier notes that: he requested the assignment approval and did all that was asked of him; the assignee was to be an existing tenant so he reasonably relied on the Defendants either waiving the formal approval for change

of use as they were aware of the assignee's intentions for the space more than he was or the Defendants were impliedly approving the change of use by its actions and words in their contact with Mr. Cormier and the proposed assignee 3019421 NS Ltd.

[52] Notably, the Defendants appear to have been relaxed generally in their approach to who the actual tenant was, since Mr. Cormier was arguably the tenant since the sale by Kunz to him and this was recognized by Wanda Hart as Cormier was paying the rent, and all the while Snip It First Ltd. and Flona Kunz were still the official "tenants".

[53] The upshot is that, the change of use restriction could arguably have been modified in this case on the evidence, such that Mr. Cormier did not require, **or** had actual, approval sufficient to allow assignment of his lease to 3019421 NS Ltd.

[54] Whether this was so is a question of fact that is in dispute and requires a trial for its determination.

[55] I note that Mr. Schelleman was actively investigating, in the fall of 2007, an expansion of Julienne's (he thought) into the hair salon space, yet the change of use was never mentioned as an issue until after Mr. Cormier had been advised he had approval (according to Mr. Cormier) - see also Mr. Schelleman's affidavit, paras. 21 - 33.

[56] Mr. Cormier testified that he never received the October 25, 2007 letter shown at Exhibit "F" to Mr. Schelleman's affidavit. To the extent that the Defendants' Counterclaim is based on the lease extension agreement, it is arguable that the Defendants breached the contract by their actions, and therefore the validity of their claim in counterclaim rises or falls as a matter of fact, on the continued validity and enforceability of the lease extension agreement.

[57] Thus the Counterclaim is not properly determined without a trial either.

[58] I should note that the Defendants rely on the comments of Borins, J., as he then was, in *RBC v. Feldman* (1993) 15 O.R. (3d) 501 regarding the extent to which credibility of witnesses may play a part in a summary judgment motion.

[59] At pp. 799 - 800 Borins, J. stated:

> **4** It would appear that the master was of the view that any issue with respect to credibility constitutes a genuine issue for trial, precluding the granting of summary judgment. This is not correct. The court is precluded from granting summary judgment "only when what is said to be an issue of credibility is a genuine issue of credibility": Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 at p. 552, 83 D.L.R. (4th) 734 (C.A.), as discussed in Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994), 22 O.R. (3d) 25 (Gen. Div.) (emphasis added). Furthermore, the master was entitled to assume that the defendant had put her "best foot forward" and that, if the case were to go to trial, she would present no further evidence as to the identification of her signature on the relevant documents. He was entitled, therefore, to assume that the defendant would be unable to provide any explanation as to how her signature came to be on the documents other than what was contained in her affidavit and examination for discovery.

[60] I note that our Courts have not gone that far - as Bryson, J. as he then was, stated in *AGC Flat Glass North America Ltd. v. CCP Atlantic Specialty Products Inc.* 2010 NSSC 108 at para. 16 and 14 respectively:

> **16** In response to the motion, CCP claims that there are "material facts" in dispute relating to "... credibility and assessment of evidence as to the knowledge and conduct of the parties during the final months of occupation of the premises by the Respondent." If CCP is correct, the motion must fail because the court will not resolve questions of credibility or disputes about material facts on a summary judgment motion: Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at para. 19, referring to Aguonie v. Galion Solid Waste Material Inc. (1998), 156 D.L.R. (4th) 222, (Ont. C.A.), at para. 32.

> **14** To defeat a summary judgment application, a responding party cannot be coy about its true position. A vague assertion of factual disputes will not do. In

Canada (Attorney General) v. Lameman, [2008] 1 S.C.R. 372, 2008 SCC 14, the Court said:

> [11] ... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried ... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts ...
>
> [My underlining]

The Torts

1. Negligent Misrepresentation

[61] If the statement by Mr. Schelleman that the assignment was approved was made, which is a factual issue in dispute, then pre-conditions 1, 2, 3, and 5 could be arguably satisfied.

[62] The Defendants specifically raised in oral argument that there is no dispute possible that Mr. Cormier acted unreasonably in claiming to rely on the negligent misrepresentation he claimed was made to him.

[63] To determine reasonable reliance, requires a finding of fact, and there is an arguable basis here that Mr. Cormier reasonably relied on the alleged negligent misrepresentation made by the Defendants.

[64] There is a genuine issue of material fact requiring a trial with respect to this claim.

2. Equitable Fraud - or what I characterized as breach of implied warranty of authority

[65] Given the evidence available to me, I must conclude this is an arguable claim as well.

3. Abuse of Process

[66] Bearing in mind the four prerequisites in *Coughlan v. Westminer, supra.*, I conclude there is no evidence presented that could support such a claim.

Lastly

[67] I have not overlooked the Defendants argument that the individual Plaintiff, Mr. Cormier, is not a party to the lease extension agreement and therefore not capable of suffering a breach of contract and its consequences.

[68] The Defendants argue that the Lease and Lease Extension Agreement are all in the name of Snip It First Ltd. and that therefore, Mr. Cormier is not privy to the contract.

[69] There was evidence that Mr. Cormier bought "the assets of the business from Flona Kunz who was operating under the name Snip It First Ltd. ..." - para. 24, Affidavit of Mr. Cormier, sworn January 7, 2011.

[70] Moreover, the Defendants treated Mr. Cormier as the "owner":

1. They accepted his personal cheques as rent payments.

2. They permitted him to sign the lease extension agreement for "Snip It First Ltd".

3. They conducted their property management duties with him as if he were the “tenant”.

[71] If “Snip It First Ltd.” should be the proper party to this action, there are procedural mechanisms to allow this to be done - eg. *Civil Procedure Rule* 83 and 35.06, 35.07 and 35.08.

[72] I do not find it appropriate to prevent a trial in this action on the basis of this Defence submission. There is evidence that could sustain the argument that Mr. Cormier is the proper party to this action and that he could be entitled to relief as a consequence.

[73] Having determined that there is a genuine issue of material fact to be decided at trial respecting the breach of contract, negligent misrepresentation and “equitable fraud” claims, I need not consider whether the Defendants have demonstrated that their Defences have a real chance of success.

Conclusion

[74] Pursuant to *Civil Procedure Rule* 13.04(2), I grant summary judgment in favour of the Defendants only in so far as the claim of the Plaintiff is based on the tort of “Abuse of Process”.

[75] Otherwise, I dismiss the Motion for Summary Judgment.

J.