SUPREME COURT OF NOVA SCOTIA

Citation: Thompson v. Enterprise Cape Breton Corporation, 2011 NSSC 280

Date: 20110708
Docket: Syd No. 339138
Registry: Sydney

Between:

Leslie Thompson

Plaintiff/Applicant

v.

Enterprise Cape Breton Corporation (ECBC)

Defendant/Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	March 21, 2011, in Sydney, Nova Scotia
Counsel:	Darlene MacRury, for the Plaintiff Jennifer C. Nolan, for the Defendant

By the Court:

Introduction:

[1] The Defendant/Applicant, Enterprise Cape Breton Corporation (ECBC), has brought a Motion for Summary Judgment against the Plaintiff/Respondent, Leslie Thompson (Mr. Thompson). The basis for the motion is that the Plaintiff's Statement of Claim does not disclose a reasonable cause of action and does not contain sufficient information for the Defendant to know the case it must meet. The Defendant also states that an amendment of the Statement of Claim should not be permitted. No defence has yet been filed by the Defendant/Applicant pending a decision of the motion.

Background:

[2] The Plaintiff Mr. Thompson filed a Statement of Claim in Supreme Court on the 9th day of November, 2010 and service was effected on the Defendant, ECBC. In it he claims general damages, special damages, injunctive relief, prejudgment interest, and costs.

[3] The Plaintiff is a coal hauler and in the past has hauled coal for former employees of the Cape Breton Development Corporation (Devco or the Company). The Devco employees had an arrangement with the Company to obtain coal from the Company. They were however responsible to get it hauled from the coal yard to their premises. This is where the Plaintiff came into the picture. The Plaintiff states that he was permitted by the Company to access its coal yard to haul coal for the employees.

[4] The coal yard property, and its operations, have been assumed by ECBC, as the successor to Devco. Thus the Defendant is the owner of Devco's former assets, including the coalyard.

[5] What gives rise to the Statement of Claim is that ECBC, the Defendant, has given notice to Mr. Thompson that he is no longer permitted to access the coal yard to haul the coal for the Devco employees. The Defendant states this was done as of a matter of right under the *Protection of Property Act* R.S. c. 363, s.1. ECBC states it has no obligation the Plaintiff, Mr. Thompson. As a property owner, ECBC says it is entitled to control access to and from its property. Further it states as owner, it must control who enters their property from time to time. Although it

has not been pleaded, the *Occupiers Liability Act* 1996, c. 27, s. 1 may be relevant to this action.

[6] The Plaintiff, for its part, states that ECBC's actions have affected his livelihood, and that he has suffered economic loss, and loss of reputation. A host of remedies are claimed by the Plaintiff including judgment for unliquidated damages as well as the following:

A) General Damages for loss of reputation;
B) Special Damages for loss of income and future loss of income;
C) Injunctive relief permitting him access to the coal yard;
D) Prejudgement interest and costs.

[7] The pleadings, at this point, consist of only the Statement of Claim. This is the document at issue on this motion.

The Issues

[8] I) Does the Statement of Claim, disclose a reasonable cause of action against the Defendant, ECBC?

ii) If not, then should it be struck, or alternatively, should summary judgment be granted to the Defendant ?

Law and Analysis

[9] The *Rule* in Nova Scotia for Summary Judgment on the Pleadings is *Rule* 13.03 which states in part as follows:

> "13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own."

[10] From this rule, and with respect to Summary Judgment in general, there are several important principles which must be mentioned. First, the Chambers, or Motions Judge, is restricted to the pleadings only and does not go beyond them to consider other evidence by way of affidavit or otherwise (Rule 13.03(3)). Secondly, while material facts should be pleaded, evidence in support of those facts should not be pleaded (Rule 38.02(3)) . Thirdly, while statutes and legislation relied upon are normally included in the pleadings, a point of law need not be included . If it is however, then the material facts that make it applicable must also

be pleaded. In addition any conditions required to be met as part of the pleadings, are assumed to be proven for the purposes of the pleading only (Rule 38.04).

[11] In terms of the Court's approach to Summary Judgment, the Statement of Claim is observed "at its highest". This means that the Court should look at the Claim as if the Plaintiff will be able to prove, and establish in evidence, everything which is alleged. The allegations therefore are presumed to be true when weighing whether or not a reasonable cause of action has been disclosed, and whether it is one that the Defendant can answer to with certainty. Most important, the Defendant should not be caught "off guard" or surprised at a later point in time (see **Rowe v New Capital Inc**. (1994) 134 N.S.R (2d) 52).

[12] In **Rowe**, Justice Goodfellow discussed the reason for pleading particulars as it relates to the purpose of the *Nova Scotia Civil Procedure Rules* 2009. At paragraph 12 of the decision, the learned Justice commented on Rule 14.04, the predecessor rule to Rule 13.03:

> "The object of the Civil Procedure Rules is to secure the just, speedy and inexpensive determination of every proceeding. This must be kept in mind from the commencement of a proceeding to its conclusion if necessary, on appeal. Civil Procedure Rule 14.04 is one of the most fundamental rules that must be followed to achieve the mandated objective. The requirement of every pleading containing a statement

> setting out material facts in summary form must be followed, otherwise the opposing side will not know with sufficient certainty what is in issue. Only by clearly outlining what is in issue can the matter proceed fairly, which means without surprise or abuse."

[13] In addition to the requirement that pleadings be drafted with efficiency in mind, the test to be applied in Summary Judgment Applications is stringent. The granting of Summary Judgment is considered a "drastic remedy" and thus the burden on the applicant is onerous.

[14] In **Murphy v Murphy** (2009) NSSC 138 the court discussed the nature of the test to be applied under *Rule* 13.03. In doing so Warner, J. borrowed from the Supreme Court of Canada in the case of **Hunt v Carey Inc.** as follows at paragraph 26:

> "The test in new CPR 13.03 (old CPR 14.25) - summary judgment on pleadings, is that the pleading discloses no cause of action [13.03(1)(a)], or the claim is clearly unsustainable when the pleading is read on its own [13.03(1)(c)]. In Hunt v. Carey Canada Inc. [1990] 2 S.C.R. 959, the Supreme Court wrote that the question was: assuming the facts stated in the pleadings can be proved, is it plain and obvious that the statement of claim disclosed no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should it be struck."

[15] In the case of **CBRM v Nova Scotia Attorney General**, 2009 NSCA 44 our Court of Appeal stated the following at paragraph 18 in regard to these types of motions:

> "In following Hunt, our court has recently confirmed that in order to strike pleadings under Rule 14.25 (1)(a), they must appear to be either "certain to fail" (Sable Offshore Energy Inc. v. Ameron International Corp., 2007 NSCA 70 at para. 13) or "absolutely unsustainable" (CGU Insurance Co. of Canada v. Noble, 2003 NSCA 102 at para. 13)."

[16] Taking this into account, the threshold is high for the Applicant, ECBC. On the other hand Rule 13.03 states that a Court "must" grant Summary Judgment where it discloses no cause of action and is clearly unsustainable. Although granting Summary Judgment is stated in mandatory terms, the Court must still be satisfied that the stringent test has been met.

[17] The parties here are in agreement as to the test to be applied. In the Applicant's brief he cited the case of **Rice v Arneau** 2010 NSSC 369, where at paragraph 11 Justice LeBlanc stated as follows:

> "A motion to strike, if granted, is a drastic measure. The Court of Appeal has indicated that a trial judge must find that the pleadings are "certain to fail" or "absolutely unsustainable" before granting that relief: Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General), 2009 NSCA 44, at para. 18."

[18] The Respondent, ECBC's in its brief it stated at paragraph 6 :

> "Accordingly, the applicable case law indicates that the appropriate test to be applied in the circumstances is whether it is plain and obvious that the Statement of Claim disclosed no reasonable cause of action. Failure to disclose a cause of action in the Pleadings may result in the claim being struck."

Pleadings:

[19] The Plaintiff argues that its obligation is to plead material facts only in summary form, such facts to be proven at trial. This he says, is distinguishable from evidence, which should not be pleaded but must be led at trial to establish these facts.

[20] The Plaintiff points to the fact that it had "authorized access" (para. 3) and that he was "no longer permitted access" by the Defendant(para.8) and that he "did not commit any act that would deny him access" (para 10). The Plaintiff argues, therefore, that the pleadings are not certain to fail, especially if presumed to be true.

[21] The Defendant argues that it is plain and obvious that the Statement of Claim discloses no reasonable cause of action, even assuming all facts contained in it are proven. The Defendant states in it's brief:

> "Upon review of the Statement of Claim, paragraphs 1 - 10 contain statements of fact; paragraphs 11 - 13 contain statement of the alleged damage suffered by the Plaintiff; and paragraph 14 contains a statement of the relief sought by the Plaintiff. None of these statements contains any allegation of a tort, breach of contract or other actionable wrong by the Defendant."

[22] Paragraph 3 of the Plaintiff's Statement of Claim reads as follows:

> "At all time (sic) material hereto, the Plaintiff, Leslie Thompson has authorized access to the coal yard operated by the Cape Breton Development Corporation, now by the defendant herein, as successor to the Cape Breton Development Corporation"

[23] By receiving notice from the Defendant, the Plaintiff says it was denied access which resulted in his main source of income being "terminated". The obvious question is, what is the legal basis for the Plaintiff having lawful access? Knowledge of this would lead to an understanding of what the Plaintiff is pleading as the actionable wrong. An example would be breach of contract. Indeed the Plaintiff in its submissions states there was an arrangement between the parties, and that a verbal contract is implied in the Pleadings.

[24] The Defendant takes the opposite view. It states at page7 of its brief:

> "The Plaintiff was not at any time an employee of the Defendant Company and no contract of employment or any other contract existed between the Plaintiff and the Defendant. Further, the Plaintiff concedes at paragraph 2 of the Statement of Claim that he was an independent coal hauler. Accordingly, there can be no action grounded in employment law. Since there was no contract of any sort in existence between the Plaintiff and the Defendant, there has been no breach of contract"

[25] Maintaining focus solely upon the Statement of Claim, the law states it is not enough to simply allege a wrong doing but the facts upon which the wrong doing is based must also be pleaded.

[26] In this respect, the Plaintiff merely states it did nothing to cause the Defendant to deny them access. Further in paragraph 10, the Plaintiff states in reference to the Defendant, that he puts the Defendant Corporation to the strict proof of any and all allegations justifying the denial of his access to the coal yards.

[27] It is well accepted that the onus, in a civil action, is on the Plaintiff to prove its case on the balance of probabilities. There is no onus on the Defendant as the pleading of the Plaintiff suggests.

[28] The existence of a contract may well be a material fact which, if pleaded, would allow the Defendant to know more about what is being alleged. It may even require them to search out, or perform due diligence, in anticipation of its filing of a defence.

[29] The Nova Scotia *Civil Procedure Rule* 38.03(2)(c) states:

> "38.03(2) The following additional rules of pleading apply to all pleadings in an action:
>
> (c) a pleading that refers to a material document, such as a contract, written communication, or deed must identify the document and concisely describe its effect without quoting the text, unless the exact words of the text are themselves material;"

[30] In this case, the pleading does not refer to a contract written or oral. Whether it is necessary to plead, or mention the existence of a contract as the basis for the lawful access of the Plaintiff, is a relevant issue on this motion. In the text entitled "Odgers on Pleadings and Practice (13th ed.) ", there are competing views on this subject. On the question of wrongful act, it states as page 84 :

> "If the Plaintiff's case is that certain damage has happened to him as a consequence of some wrongful act of the Defendant, it is not necessary to set out the facts which show the connection between the damage and the wrongful act. These are but evidence of the Plaintiff's assertion that the damage which he has sustained is the consequence of the Defendant's act. It is sufficient to allege the

> wrongful act and that the Defendant caused it and then to continue, 'The Plaintiff has thereby suffered etc. (damages).'"

On the other hand, in referring to whether a contract should be pleaded, the author states at page 85:

> "Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such a contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail."

[31] *Rule* 38.02(4) states that a point of law may be pleaded but it is not necessary. In the present case pleading the existence of a contract may indeed be necessary as would pleading a breach of same, under the law of contract .

[32] *Rule* 38.07 requires all remedies (other than damages) to be pleaded specifically, while *Rule* 38.02(2) states that pleadings are to be concise and not include evidence. As stated the pleadings must provide sufficient information to allow the other party to know, when preparing for trial, what case it has to meet. They must also ensure that there will be no surprise when the pleading party seeks to prove a material fact.

[33] In this case, the pleading of the Plaintiff is lacking obvious but important information. The Pleadings must show that the Defendant was wronged in some legally actionable way. Fairness would dictate that if a contract (even a verbal one) is being relied upon, that it be pleaded. The least mention of it would make the Defendant aware of the arrangement even without knowing the particulars. The same would apply to an alleged breach of contract. Instead of mentioning these the Statement of Claim is silent.

[34] The Defendant relies heavily on the **SAR Petroleum Inc. v Peace Hills Trust Co.** 2010 NBCA 22 in support of its argument that the Plaintiff has not made out a sustainable cause of action in respect of intentional interference with economic loss. The Defendant has outlined eight (8) ingredients necessary to make out this tortious claim. In oral submission, Ms. Jordan stated that two of the basic components, knowledge and intent, on the part of the Defendant have not been pleaded. Specifically, these are knowledge by the Defendant that its actions would cause harm to the Plaintiff as well as an intention to cause that harm.

[35] The Plaintiff responds by referring to **Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.** 2010 NSSC 25 (at para. 26) in support of its argument that there are three (3) components to this cause of action :

> "1) an intention to injure the plaintiff;
>
> 2) interference with another's method of gaining his or her living or business by illegal means; (see I.B.T.. *Local 312 v Therien* [1960] S.C.R. 265 at 280.) and;
>
> 3) economic loss caused thereby."
>
> (See **Daishowa Inc. v. Friends of the Lubieon,** 1996 CarswellOnt 1620 (Gen.Div.).

[36] *Odgers on Pleadings and Practice* 22nd edition states at page 164 :

> "A statement of claim should state the material facts upon which the Plaintiff relies and then claim the relief he desires. As pleadings are now merely concise statements of facts which the party pleading deems material to the case, it is unnecessary to particularize the form of action in which the relief would, in former days, have had to have been sought. To state what form of action the Plaintiff takes is to state a conclusion of law and it is always unnecessary now for either party to state conclusions of law in his pleading – the Court will draw proper inference from the facts alleged."

[37] The author further states, in an action in tort, it is unnecessary to set out the right, which has been violated, in cases where that right is not particular to that Plaintiff in any way but is one possessed by every subject of the Crown.

[38] In other actions, such as liable, slander, false imprisonment, or assault, the claim is merely a statement of the wrong. In cases where the Plaintiff claims a special right to himself, such as an easement or copyright, the right must be stated with all due particularity. This is especially so in actions for the recovery of land.

[39] It has been argued by the Plaintiff that this action is brought on the basis of an implied contract. We know this not from the pleading itself but from the Plaintiff's representations. The test here is on the basis of the pleading alone. A contract should be first alleged and then secondly it's breach explained, albeit in a summary way.

[40] Having considered the arguments of both parties as well as the case law submitted, I have concluded that the Statement of Claim, while it may be in need of amendment, is not "clearly unsustainable" or "certain to fail". The Court must be careful not to direct the parties how to frame its pleadings. To that extent and in respect of this action, it is "early days". As the pleadings have not closed, the Plaintiff is entitled to amend the Statement of Claim at this time without leave of the Court.

[41] The Defendant's argument that an amendment will not suffice is based on matters which are best left for determination at trial. The Defendant states there was no contract. The Plaintiff, in its submission is alleging there was a contract. Those matters involve evidentiary issues. The court at this stage must concern itself with the pleadings only, assuming them to be true. Where there is a dispute as to material facts, summary judgment will not be granted.

[42] A second course of action available to the Defendant is the right to demand particulars. That is contained in Rule 38.08 and its effect would provide the Defendant with further particulars. It may be that after an amendment is made or particulars are provided that a Plaintiff's case is weak. Generally speaking a weak case itself is not a reason for granting Summary Judgment or striking the Statement of Claim. Nor would a Defendant be prevented subsequent to an amendment from making a further application either under 13.03 on the pleadings or under 13.04 summary judgment on the evidence, once the pleadings are finalized.

[43] In **Bank of Nova Scotia v MacKenzie Auto Mart Incorporated** 2009 NSSC 293, the court decided that the terms of a guarantee, how it would be interpreted, and how it contractually excused the bank from protecting the

Plaintiff's equitable rights, is a determination not to be made summarily. The Nova Scotia Court of Appeal [2010] N.S.J. No. 529 affirmed that decision and in doing so discussed what is an appropriate matter to be determined on a Summary Judgment application. The Court concluded at paragraph 24 as follows:

> "...The activities of Aaron MacKenzie, the extent of those activities, the bank's knowledge of those activities whether it increased the indebtedness and what impact this would have on MacKenzie's obligations to the bank **are all matters which can only be determined after a full hearing at trial**." (Emphasis added)

[44] Chapter 10 of *Odgers on Pleadings* (24th ed.) also discussed the Court's approach to a Summary Judgment Application on the pleadings as follows at page 207:

> "The court's power is exercisable at stage of the proceedings, but it should only strike a pleading in "plain and obvious cases" and where no reasonable amendment would cure the defect. If the point requires substantial argument and careful consideration it may be more appropriate to set it down for trial but the summary procedure striking out is only appropriate where it is plainly evident the Statement of Claim or particulars as it stands is insufficient."

[45] Further the author stated:

> "So long as the Statement of Claim or the particulars served under it disclose "*some*" cause of action, or raise some question fit to be decided by trial, the mere fact that a case is weak and is not likely to succeed is not ground for striking it out."

[46] Accordingly, for the foregoing reasons I am not satisfied that Summary Judgment is warranted in respect of this Application. In my view it is not plain and obvious that the entire Statement of Claim is certain to fail or that it is clearly unsustainable.

[47] Where I do find difficulty in the Plaintiff's Statement of Claim is in respect of the claim of loss of reputation. The Plaintiff has provided little or no basis in the Statement of Claim for loss of reputation and it is devoid of particulars in respect of same.

[48] The extent of the Plaintiff's Statement of Claim for loss of reputation is limited to the following pleading in paragraph 12:

> "...that the Defendant Corporation in denying him access to the coal yards '**affected his person and reputation**' as the Plaintiff states '**that the public would have the perception he had committed a wrongful act justifying his permission from attending the coal yards'**."

[49] The only other mention is in paragraph 13 where the Plaintiff claims that as a result of the unlawful act he lost income and "suffered personal loss of reputation". That is the extent of the claim as pleaded by the Plaintiff.

[50] It has been stated in **Body Shop**, that Plaintiff's face the risk of having their pleadings dismissed if sufficient particulars are not given. It is not necessary to tell the entire story, but in my view it is necessary not to make assumptions as to what the public might perceive as a basis for a cause of action, as was the case here.

[51] Further even if the claim is based on a reasonable or logical assumption, there appears to be no connection between the act of the Defendant and any knowledge or intent it would have to damage the reputation of the Plaintiff. Unlike the claim for economic loss, where the Defendant also argued that knowledge and consent were lacking, it is more evident that the Plaintiff would be aware that denying a coal hauler access is more likely to interfere with his ability to earn an income. It is not so obvious or evident that the Defendant would understand what the public's reaction would be to what the Defendant believed was a lawful act on its behalf.

[52] Consequently I believe the Defendant's position that the Plaintiff's claim is not sustainable in regard to the personal loss of reputation has merit. The Defendant will therefore be entitled to Summary Judgment in respect of the

Plaintiff's Statement of Claim, as it pertains to loss of reputation. As a result, that aspect of the Plaintiff's Statement of Claim shall be struck.

[53] As there is a mutual success in respect of this application, the Court's view is that shared success would result in no costs being ordered. Notwithstanding if the parties would seek to make further submissions in respect of costs the Court will consider same and provide a ruling in respect of that matter.

J.