

SUPREME COURT OF NOVA SCOTIA

Citation: Maritime Travel Inc. v. Boyle, 2011 NSSC 318

Date: 20110811

Docket: Hfx. No. 312635

Registry: Halifax

Between:

Maritime Travel Inc.

Plaintiff

v.

Hugh Boyle

Defendant

DECISION

Judge: The Honourable Justice Peter Rosinski.

Heard: July 28, 2011, in Halifax, Nova Scotia

Counsel: William L. Ryan, Q.C. and Christa M. Brothers, for the plaintiff
George W. MacDonald, Q.C., and Kiersten Amos, for the defendant

By the Court:

Introduction

[1] Maritime as plaintiff, seeks an order for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04(1). This is the second time Maritime has requested summary judgment on evidence in this case - see the decision of Justice Moir, 2010 NSSC 260. Justice Moir dismissed the motion on June 22, 2010.

[2] Originally Maritime successfully sued Go Travel Direct.com. Go Travel appealed that and sought to stay the decision. As part of the negotiation, between lead counsels David Farrar for Maritime and Peter Bryson for Go Travel, the parties came to an oral agreement on September 17, 2008, which was embodied in a consent order, and filed with the Nova Scotia Court of Appeal on October 29, 2008.

[3] That consent order required that:

1 - \$100,000 "be placed into trust by Hugh Boyle in an interest-bearing account with McInnis Cooper by October 17, 2008;

2 - should the appeal and the cross-appeal not be disposed of by this court by March 31, 2009, an amount equal to the remainder of the outstanding judgment [including any costs subsequently awarded by Justice Hood] will be placed into trust by Hugh Boyle with McInnis Cooper no later than March 31, 2009;

3 - should the disposition of the appeal and cross-appeal result in the appellant being required to pay an amount to the respondent, the respondent will be entitled to that amount from the above-mentioned funds held in trust. Should any funds remain in trust after the amount owing to the respondent is satisfied, the remainder will be returned to the party who placed the funds into trust. Any accumulated interest will be paid prorated, according to the percentage payable to each party;

4 - should the disposition of the appeal and cross-appeal result in the appellant not being required to pay an amount to the respondent, the total amount of the above-mentioned funds held in trust, together with accumulated interest, will be fully returned to the party who placed the funds into trust;

5 - the execution of the judgment is stayed pending the disposition of the appeal and cross-appeal, or a further order of this honorable court.”

[4] \$100,000.00 was placed in trust with McInnis Cooper by Hugh Boyle. The appeal and cross-appeal were not decided before March 31, 2009, however no further funds were paid into trust with McInnis Cooper.

[5] Maritime alleges an oral contract existed between itself and Hugh Boyle personally, who was bound thereby to pay the 2 payments referred to in the consent order. It sued Hugh Boyle personally. The statement of claim was filed June 12, 2009, and a defence filed October 19, 2009.

[6] In the motion before Justice Moir, he stated at para. 36 [having noted at para. 9 that he had no evidence from Justices Farrar, Bryson or John Shanks]:

36 The order is secondary to it, and the oral contract could be proved by the people who were there when it was spoken, Justice Farrar, Justice Bryson, and Mr. Shanks. I am saying that it remains unclear whether Mr. Boyle promised, through Mr. Bryson, to pay, or Go Travel promised that Mr. Boyle would put money in trust. For that reason, the plaintiffs case may only be resolved by trial.

Evidence at the Motion

[7] At the second motion before me heard on July 28, 2011, I had before me by way of evidence:

for the plaintiff Maritime:

1 - affidavit of Robert Dexter sworn December 23, 2009;

2 - affidavit of John Shanks sworn February 10, 2011;

3 - affidavit of Christa Brothers sworn February 10, 2011 [I should note that after objection was taken to the discovery transcript of Justice Farrar being included as Exhibit B, Maritime agreed to withdraw that Exhibit and requested the court to ignore it; the discovery transcript of Justice Bryson was attached as Exhibit A , and I ruled on a preliminary motion that Justice Bryson's presence for cross-examination on his affidavit, permitted him to adopt his discovery transcript

for the truth of its contents at the time of acknowledging the truth and accuracy of his filed affidavit- see *Goodick Estate v Conrad Estate* 2011 NSSC 51 at paras. 46-50 per Wright J.];

for the defendant Hugh Boyle:

4 - affidavit of Hugh Boyle sworn June 11, 2010;

5 - affidavit of Justice Peter Bryson sworn July 19, 2011. Justice Bryson did adopt his discovery transcript evidence, therefore I consider his affidavit, cross-examination, and discovery transcript evidence collectively as his evidence in this motion. Having been cross-examined, it falls to me to make a finding regarding the credibility of Justice Bryson. I accept his evidence.

The Merits of the Motion

The Position of the Plaintiff Maritime Travel

[8] Maritime, as the moving party, claims their motion for summary judgment should succeed because there are no material issues of fact in dispute such that there is a genuine issue for trial regarding their claim; moreover, if I find for Maritime on this point, that there is also no evidence upon which the defendant has any "real chance of success".

[9] Specifically Maritime argues:

A - an oral agreement existed between Boyle and Maritime which is accurately reduced in writing to the terms of the consent order filed with the Nova Scotia Court of Appeal as shown by Exhibit 2 to the affidavit of John T. Shanks;

B - the agreement is not ambiguous, and requires Boyle to personally pay both payments referred to in the agreement;

C - Boyle did not pay, and is therefore clearly in breach of the agreement;

D - Justice Bryson was acting as an agent for Boyle within the scope of his authority, and had either actual authority, apparent authority or both to bind Boyle. Maritime's counsel urged that this was the only reasonable conclusion one could reach on a reading of Justice Bryson's discovery transcript evidence, affidavit and cross-examination;

E - even if there is insufficient evidence of actual or apparent authority, Boyle held out that Justice Bryson had authority to act for him personally, and that Boyle should be estopped from denying the authority that Justice Bryson as counsel acted on his personal behalf.

The Position of the Defendant Hugh Boyle

[10] Mr. Boyle's counsel requested that the court consider the following questions, all of which he says are issues of material fact in the action:

A - did Justice Bryson actually have authority to act for Mr. Boyle personally?

B - Did Mr. Boyle represent to Maritime the Justice Bryson had [apparent] authority to act for Mr. Boyle personally?

C - Did Justice Bryson represent to Maritime that Mr. Boyle would personally assume responsibility vis-à-vis Maritime for the to payments referred to in the consent order that would be "placed into trust by Hugh Boyle with Mcinnis Cooper"?

[11] Since inferences can only be drawn from undisputed facts, Mr. MacDonald says that if there is any dispute about these questions, then there is no possibility that summary judgment could be granted in this case. Mr. MacDonald makes the point succinctly: “there is an agreement - but agreement between whom?”

Analysis

[12] The law is not in dispute - it is most recently elaborated upon in *Globex Foreign Exchange Corporation v. Launt* 2011 NSCA 67 per Justice Farrar [Hamilton JA concurring] at paragraph 13 and Justice Bryson at paragraphs 46-47, dissenting based on the facts in the case.

[13] At those paragraphs Justice Bryson states:

46 The Court may draw inferences from undisputed facts provided that they are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30. But the Chambers judge should not assess credibility, weigh the evidence or find facts on disputed evidence [citations omitted].

47 The following principles summarize the foregoing jurisprudence when applying the summary judgment test:

1. The moving party (defendant or plaintiff) must lead evidence to show that there is no "genuine issue" requiring trial; this means that there is "no genuine issue as to any material fact", requiring trial;

2. If the moving party discharges the foregoing burden, the responding party must show that it has a "real chance of success". This does not mean that the respondent is likely to succeed, but only that she could succeed; the prospect for success cannot be illusory or unrealistic; it must be reasonably grounded in legal principle (*Spring Garden Holdings Ltd. v. Ryan Duffy's Restaurants Ltd.*, 2010 NSSC 71, at para. 29, quoting from Justice Hood in *Eikelenboom et al v. Holstein Canada*, 2003 NSSC 241 at para. 10 and Justice Beveridge (as he then was) in *Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.*, 2008 NSSC 252, para. 60).

3. In the case of a defendant moving for summary judgment, he or she must show that the action prima facie fails in law, (Bethune, para. 31, quoting Somers Estate) by providing evidence either of a valid defence to the plaintiff's claim or tending to show that the claim itself has no substance to it (Bethune, para. 32, quoting from *Marco Ltd. v. Newfoundland Processing Ltd.*, [1995] N.J. No. 168 (Nfld. S.C.T.D.)).

4. In the case of a defendant who moves for summary judgment and who passes the first test, the plaintiff must demonstrate that she has evidence on which the claims as pleaded can be allowed (*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; that is to say, that there is a genuine issue for trial, Bethune, para. 33, citing *Marco*).

5. If the court decides there is no genuine issue of material fact requiring a trial, the duty of the court is to apply the law and decide the case: *Eikelenboom v. Holstein Canada*, 2004 NSCA 103, *Gilbert v. Giffin*, 2010 NSCA 95 at paras. 20-21, where Farrar J.A. helpfully explains the comments of Cromwell J.A. (as he then was) in *Lienaux v. Campbell*, [1998] N.S.J. No. 142 (paras. 13-14).

6. Subject to the moving party's initial burden, each party must put "its best foot forward". "Bald assertions" without evidence will not discharge the burden. A self-serving affidavit does not create a triable issue in the absence of detailed facts and supporting evidence (*Guarantee Co. of North America*, para. 31; *Goldman v. Devine*, 2007 ONCA 301, para. 23).

Is there a genuine issue of material fact for trial regarding Maritime's claim? Does Hugh Boyle's defence have a real chance of success?

[14] Only if the answers are "no", and "no", should summary judgment be granted.

[15] Maritime's claim is based on the principles of the law of agency. They say Hugh Boyle held out Justice Bryson had [apparent] authority to represent Mr. Boyle personally; or that Justice Bryson had actual authority; and lastly that if there was no agency relationship between Mr. Boyle and Justice Bryson, Mr. Boyle should be estopped from denying one existed as a matter of justice and fairness.

[16] As Justice Farrar stated in *Globex, supra*, at paragraph 16, 19 and 29:

16 The Court's role is limited to assessing the threshold of whether a genuine issue exists for trial. The evaluation of credibility, the weighing of evidence and the drawing of factual inferences (except in limited circumstances) are functions reserved for the trial judge.

...

19 Whether an agency relationship exists is a question of fact.[citations omitted]"

...

29 In certain circumstances, a 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. *Guarantee v. Gordon, supra*, para. 30. However, that is not the situation here. This is not a situation where there is a full factual record with no material facts in dispute. Whether the agency relationship existed is in itself a finding of fact, whether to lift the corporate veil involves considerations of whether the failure to do so would be unfair and lead to a result "flagrantly opposed to justice" and/or whether this was a situation where the corporation is merely the puppet of Launt. It is not simply a matter of looking at the denial of Launt that Numberco was not acting as his agent.

...

[17] Particularly relevant to the case before me is Justice Bryson's comment at paragraph 42 in *Globex, supra*:

42 ...I agree with the criticism of my colleagues... that the chambers judge should not decide the question of agency but rather whether there was a triable issue of agency...

[18] Whether there is a triable issue of agency is to be determined on this motion by the evidence presented. As noted earlier whether an agency relationship exists is a question of fact usually [paragraph 19 *Globex, supra*, per Farrar JA] or in some cases a question of mixed fact and law [paragraph 49 - 50 *Globex, supra*, per Bryson JA].

[19] I may only make inferences from undisputed facts in this motion, if those inferences are strongly supported by the facts - paragraph 29 *Globex, supra*, per Farrar JA.

Has Maritime established that there are no genuine issues of material fact underlying its claim?

[20] Maritime argues that there exists an oral contract between itself and Hugh Boyle, and its terms are reduced to writing in the consent order herein.

[21] Hugh Boyle did not speak to representatives of Maritime personally at any relevant time before the consent order was created, and then filed with the Nova Scotia Court of Appeal. On the consent order, he is not shown as a party, nor is there any express indication that Justice Bryson signed the order as agent of anyone except Go Travel.

[22] It is necessary, as a matter of its evidentiary foundation, that Maritime rely on the principles of agency to make its argument that there is a binding contract between Maritime and Hugh Boyle personally, which Boyle then breached.

[23] Maritime has not shown that there are no material undisputed facts necessary to support its claim of a binding contract. I can come to no other conclusion.

[24] The fact that Hugh Boyle made the \$100,000.00 payment on October 18, 2008 is not indisputable proof that a binding contract existed between Maritime and Hugh Boyle personally on September 17, 2008.

[25] Whether Hugh Boyle is a party to a binding contract with Maritime is necessarily based on a consideration of the principles of agency.

[26] Whether an agency existed, such that Hugh Boyle was personally bound to a contract with Maritime, is a question of fact or at least mixed law and fact.

[27] The facts in evidence before me suggest that this factual issue is very much in dispute:

1 - there is no evidence from Justice Farrar [the moving party having agreed that the court should ignore the existence of his discovery evidence found at exhibit B of Christa Brothers sworn February 10, 2011 affidavit];

2 - the affidavit evidence of John Shanks sworn February 10, 2011 regarding agency issues is expressly denied by Justice Bryson in his affidavit sworn July 19, 2011 - especially at paragraphs 8, 19, 20 - 22 inclusive;

3 - at the hearing Justice Bryson acknowledged that the terms of the consent order reflected an "evolution" over time, yet noted that on September 17, 2008 outside the Court of Appeal Chambers, and while negotiations were ongoing, he believes that John Shanks was not always present when he negotiated with Justice Farrar, moreover Robert Dexter was "on the same floor, but not the same huddle" as he and Justice Farrar huddled in negotiations;

4 - Hugh Boyle in his affidavit confirms that, as Justice Bryson asserts, it was as a condition of the consent order negotiated between Maritime and Go travel, that "Go travel agreed, with Mr. Boyle's consent, that \$100,000 would be deposited forthwith from Mr. Boyle's personal account into the trust account of McInnis Cooper on behalf of Go travel" - [paragraph 13 Justice Bryson's affidavit] - paragraph 14 - 15 Hugh Boyle's affidavit;

5 - Hugh Boyle confirms, as Justice Bryson asserts at his paragraph 8, that he was not retained as counsel by Hugh Boyle in his personal capacity at any time material to this matter - paragraph 10 Hugh Boyle affidavit;

6 - the wording of the consent order, (though also an "evolution" - see affidavit of John Shanks Exhibits A, C and B in that order), is not determinative. In his October 3, 2008 letter Mr. Shanks states: "Upon review of paragraph one, we note that the source of the funds for the \$100,000.00 is not referenced in the order. As per the discussions on the day of the hearing [September 17, 2008] the agreement required that the funds be paid personally by Hugh Boyle rather than Go travel direct.com... This reference could be added to paragraph 1 to clearly identify the source of the funds." Justice Bryson's unsigned letter dated October 16, 2008 returns the revised consent order drafts accordingly;

7 - in contrast, Justice Farrar's undated letter [acknowledged to be drafted by John Shanks] addressed to Justice Bryson in 2009 [apparently sent on or about March 31, 2009] reads in part [paragraph 27 and 28 and Exhibit G to affidavit of Robert Dexter]:

"... The terms of the consent order... requires an additional sum of funds to be placed in trust by your client on or before March 31, 2009... Clause 2 of the consent order requires the balance... to be deposited by Hugh Boyle into your trust account...".

[28] Even in this letter there are references to Justice Bryson's "client" and "Hugh Boyle" in circumstances where, if they were intended to be the same entity one could argue why would they not be consistently referred to as one or the other?

Conclusion

[29] Given the evidence presented to me at the second motion for summary judgment on evidence, I must reject the motion.

[30] *Civil Procedure Rule* 13.07 requires that I should arrange to give directions in such cases. I would anticipate that all parties will waive this requirement in this case. If not, I ask that they advise my office by August 22, 2011, in writing.

[31] Having reference to *Civil Procedure Rule* 77, I order costs payable in any event of the cause, forthwith, by Maritime Travel Inc. I assess the amount based on tariff C at \$1000.00.

Rosinski, J