SUPREME COURT OF NOVA SCOTIA
Citation: IForm Inc. v. Rossignol , 2011 NSSC 273

Date: 20110719
Docket: Hfx. No. 333223
Registry: Halifax

Between:

IForm Inc., a body corporate

Plaintiff

v.

Real Rossignol, Principal Developments Limited, a body corporate, Pacific Formwork Limited, Sarkas Metlej and Peter Metlej

Defendants

DECISION ON COSTS

Judge: The Honourable Justice Suzanne M. Hood

Heard: in Halifax, Nova Scotia *via written submissions*
Last written submission: April 27, 2011

Written Decision: July 26, 2011

Counsel: **Blair Mitchell** for the Plaintiff
James D. MacNeil for the Defendant, Real Rossignol
Gavin Giles, Q.C., John Kulik, Q.C. and **John DiCostanzo** for the Defendants, Principal Developments Limited, Pacific Formwork Limited, Sarkas Metlej and Peter Metlej

By the Court:

[1] The defendants, Principal Developments Limited, Pacific Formwork Ltd., Sarkas Metlej and Peter Metlej seek solicitor/client costs against IForm Inc. They also seek costs personally against Plaintiff's counsel.

[2] The defendant, Real Rossignol, also seeks costs against IForm in the amount of $2,000.00.

[3] The plaintiff says costs in favour of the four defendants should be awarded pursuant to Tariff C. It says costs for a 2 day matter should be $4,000.00. It also says no costs should be awarded to the defendant, Rossignol, since he appeared only as a witness and was not a party to the motion.

COSTS OF PRINCIPAL, PACIFIC AND METLEJ

[4] I do not agree that this is the rare case where it is appropriate to make an award of solicitor/client costs or to award costs against plaintiff's counsel personally as argued by counsel for the four defendants in a twenty-one page

submission. The matter has not yet been tried, this was an interlocutory motion and no findings of fact were made.

[5] In my decision, I said in para. 4:

> ... the matter proceeded on the basis of the facts alleged by the plaintiff in the Statement of Claim and not on evidence.

[6] My decision canvassed case law with respect to *Lis Pendens* and analyzed the plaintiff's statement of claim. I concluded that the common law *Lis Pendens* was invalid because of a lack of notice to the landowner. In the alternative, I concluded that the *Lis Pendens* should be discharged as provided for in the *Land Registration Act*, S.N.S. 2001, c. 6. on the basis that there was no merit to the claim of a constructive trust which would support a *Lis Pendens*.

[7] I made no negative comments about the plaintiff's action. A claim found to have no merit is different from a frivolous or vexatious claim. Nor did I make any negative comments about plaintiff's counsel having filed a *Lis Pendens*. Before this decision, there was no decision requiring notice of the filing of a *Lis Pendens*.

[8] Counsel for the four defendants says at p. 7 of his written submissions:

> Open to all to readily and accurately infer is that the only reason the Plaintiff embarked on such a process was to fetter Principal's access to its project financing with the prospective result being a form of payment, by Principal to the Plaintiff, to which the Plaintiff was not entitled.

In my decision, I made no such finding nor did I draw that inference.

[9] Nor did I say, as counsel for the four defendants states, the Certificate of *Lis Pendens* "had in fact been issued improperly." (p. 2 of counsel's brief). To the contrary, I said in my decision that the *Lis Pendens* was invalid because no notice had been given of its issuance. I found no fault with the original issuance of the Certificate of *Lis Pendens* but only with the lack of notice thereafter to the landowner that a *Lis Pendens* had been filed.

[10] Counsel for the four defendants, under the heading "Duties of Candour When Proceeding *Ex Parte*," make much of the role of plaintiff's counsel with respect to the prothonotary who issued the Certificate of *Lis Pendens.* He alleges there were several things outside of the pleadings which plaintiff's counsel should have brought to the attention of the prothonotary when he sought to have the

Certificate of *Lis Pendens* issued. In my view, this misinterprets the role of the prothonotary in considering whether to issue a Certificate of *Lis Pendens*.

[11] Wright, J. in *Dempsey v. Dempsey*, 2008 NSSC 137 said at para. 16:

> ... The role of the prothonotary therefore is to review the allegations pleaded in the Statement of Claim and if those allegations clearly call into question some title or interest in a specified parcel of land, the prothonotary should then sign the Certificate of *Lis Pendens* ... .

[12] Para. 17 (a) of the Statement of Claim clearly sets out the claim for constructive trust in the lands. It says:

> 17. This party claims an order providing the following remedies:
>
> a. An order declaring the equitable title of the Plaintiff in the lands described as 'PID # 41296781' and that the same are held by the Defendant Principal subject to a constructive trust in favour of the Plaintiff; ...

[13] It is not for the prothonotary to determine if the claim has merit. At that time, no defence had been filed and the only document before the prothonotary was the Statement of Claim.

[14] It is for the court to decide whether the claim has merit and that is what happened in this case. I concluded that the claim of constructive trust had no merit but that was after hearing submissions both for and against that proposition.

[15] The plaintiff had no opportunity to appear before the defendant to argue its case. In fact, that would be inappropriate and beyond the limited role of the prothonotary in determining if the Certificate of *Lis Pendens* should be issued.

[16] Counsel for the four defendants says in his written submissions at page. 8:

> As Your Ladyship has clearly found, the plaintiff knew or ought to have known that none of the allegations against Principal or Peter Metlej constituted *in rem* claims. In the result, the Plaintiff's pleadings should be seen for what they were; an oblique attempt to trump up allegations designed solely to beguile Prothonotary Boucher, Q.C. to issue a certificate of *Lis Pendens* which, as Your Ladyship has clearly found, should never have been issued.

[17] I made no such statement in my decision, which was reduced to writing and provided to counsel before the costs submissions were made. In fact, counsel for the four defendants refers to having it before making his costs submissions.

[18] I considered at some length issues of unjust enrichment and whether all claims for it lead to an interest in land. Only after careful consideration did I conclude that it did not in this case. As I have said, I did not conclude that the Certificate of *Lis Pendens* should never have been issued. I found instead that it was proper that it be discharged. I therefore conclude that there are absolutely no grounds to conclude there was any "improper or negligent conduct" (quoting from *Civil Procedure Rule* 17.12(2)).

[19] I therefore conclude that the four defendants shall have their costs of the contested chambers motion of two days pursuant to Tariff C, in the amount of $4,000.00, payable forthwith.

[20] I make no award of costs against the plaintiff's counsel personally.

Rossignol Costs

[21] Real Rossignol is a party to this action but was not a party to the four defendants' motion to have the *Lis Pendens* declared invalid. However, the

plaintiff requested him to testify and file an affidavit. His counsel appeared with him when he was questioned on the affidavit.

[22] I conclude that, since he is a party to these proceedings, he may be entitled to have his costs. His role was as a witness but an affidavit was prepared by his counsel. It was prudent for his counsel to be present when he testified because of his role as a party to the action.

[23] However, if he is unsuccessful at trial, no costs award should be made in his favour. Because he was not a party and took no position on the other defendants' motion to discharge the *Lis Pendens*, his costs award must take that into consideration. If he is successful at trial, he should have his costs of this motion in the amount of $750.00.

Hood, J.