SUPREME COURT OF NOVA SCOTIA

Citation: Johansson v. General Motors of Canada Ltd., 2010 NSSC 274

Date: 20100708
Docket: Hfx No. 230488
Registry: Halifax

Between:

Maria Johansson, Steven Johansson
and Jody Johansson

Plaintiffs

v.

General Motors of Canada Limited

Defendant/Applicant

Judge:	The Honourable Chief Justice Joseph P. Kennedy
Heard:	March 4, 2010 (Chambers) in Halifax, Nova Scotia
Counsel:	Nicolle Snow for the Plaintiffs Michelle Awad, Q.C. and Noelle England for the Defendant/Applicant

By the Court:

[1] The Defendant, General Motors of Canada ("GM"), brings this application for summary judgment pursuant to *Civil Procedure Rules* 13.01 and 13.04 against two of the three Plaintiffs, Steven Johansson and Jody Johansson.

Background

[2] The Plaintiffs commenced action against GM on September 13, 2004. Each claimed damages for injuries and loss arising from a single vehicle accident that occurred in Saint John, New Brunswick, on October 25, 1998. The vehicle involved was a 1997 Chevrolet driven by the Plaintiff, Maria Johansson. The Plaintiffs, Steven Johansson and Jody Johansson, were passengers in the vehicle ("the passengers").

[3] The motor vehicle was insured by The Citadel General Assurance Company ("Citadel") at the time of the accident. Claims were made by the passengers against the driver, Maria Johansson, which claims were adjusted and eventually settled by Citadel. Both Steven and Jody Johansson signed releases dated April 14, 1999 as part of the terms of settlement.

[4] The releases are identically worded. The relevant parts of the release signed by Steven Johansson states as follows:

> **IN CONSIDERATION** of the payment of the sum of Three Thousand and Seven Hundred and Fifty ------ xx/100 Dollars ($3,750.00) and which is directed by the undersigned to be paid as follows: Steven Johansson ($3,750.00).
>
> ...
>
> **THE UNDERSIGNED** hereby for themselves, their heirs, executors, administrators, successors and assigns
>
> i) Release and forever discharge The Citadel Assurance and George Johansson and Maria Johansson (herein referred to as the "Releasee") from any action, cause of action, or claim for damages specified above where the injury or, as the case may be, the damage, has been sustained as at the date hereof or may be sustained thereafter, as a result of collision on the Golden Grove Road, Saint John, NB on or about the 25 day of October, 1998.
>
> ii) Agree not to make any claim or take proceedings against any person or corporation who might claim contribution or indemnity under provisions of any statute or otherwise;
>
> ...

[5] The release signed by Jody Johansson contains the same clauses and shows that the consideration paid to her was $3,000.00.

[6] The discovery examination of Steven Johansson in this matter took place on July 19, 2005, and the discovery examination of Jody Johansson took place on July 20, 2005. The trial is scheduled for 11 days in April and May, 2011.

[7] The crux for the Defendant's motion is its submission that the claims made against it by the passengers are barred by the terms of the releases signed by them following settlement of their claims against the Plaintiff driver, Maria Johansson.

Issue

[8] Is the Defendant, GM, entitled to summary judgment on the evidence, dismissing the claims made against it by the Plaintiff passengers, Steven and Jody Johansson, as a result of the releases signed by these two Plaintiffs?

Law and Argument

[9] *Civil Procedure Rule* 13.01(1) establishes the scope of a motion for summary judgment as follows:

> **13.01 (1)** This Rule allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial.

[10] *Civil Procedure Rule* 13.04 addresses motions for summary judgment on the evidence. It provides:

> **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.

[11] Although the language of the *Rule* differs from that of the former *Civil Procedure Rule* 13.01, the grounds that must be established and the standard that must

be met for such a motion to succeed remain the same: *Murphy v. Murphy* (2009), CarswellNS 242 (S.C.), at para. 27, per Warner, J.; and *Flewelling v. Scotia Island Property Ltd.* (2009), CarswellNS 161 (S.C.), at para. 15, per Goodfellow, J.

Test for Summary Judgment

[12] The Supreme Court of Canada has articulated the test to be met by a Defendant on a motion for summary judgment. In *Guarantee Co. of North America v. Gordon Capital Corp.* (1999), 3 S.C.R. 423, CarswellOnt 3171, Iacobucci and Bastarache, JJ. stated the following at para. 27:

> The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. ... Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success".

[13] The courts in Nova Scotia have adopted the *Guarantee Co. of North America* test, *supra*. Justice Cromwell for the Nova Scotia Court of Appeal affirmed the appropriateness of that test in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney*

General), 2007 NSCA 38 at para. 8 (leave to appeal to S.C.C. refused (2007), Carswell 420):

> 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: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27.

[14] GM must first establish that there is no genuine issue for trial arising from the claims advanced against it by Steven and Jody Johansson. If it can, then these Plaintiff passengers must show that their claims have a real chance of success.

[15] It is important to note that *Rule* 13.04(1) does not contemplate the exercise of discretion by the Court. Where a judge has been satisfied upon evidence, or the lack thereof, that a defence or statement of claim fails to raise a genuine issue for trial, summary judgment must be granted.

[16] In *Eikelenboom v. Holstein Association of Canada* (2004), 226 N.S.R. (2d) 235 (C.A.) the Nova Scotia Court of Appeal overturned a decision not to grant summary judgment where the Chambers judge had found that the material facts of the case were clear and undisputed. The Court of Appeal made the following comments:

> For reasons that are not clear to me, the learned Chambers judge concluded that only after a full trial where the judge might "examine all the surrounding circumstances" or where "[a]ll, the circumstances both before and during the hearing before the Committee" could be considered, would it be possible to decide if waiver had occurred. With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in *Gordon Capital*, *supra*, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.
>
> For the reasons stated, this motion is one that required an application of the law to the undisputed facts. The Chambers judge erred in declining to resolve the matter before her by way of summary judgment. As cases like *Hercules* and *Gordon* have shown, while such an analysis may well be difficult and contentious, neither complexity nor controversy will exclude a proper case from the rigours of summary judgment.

[17] Similarly, in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2008] 1 S.C.R. 372, the Supreme Court of Canada made the following comments with regard to summary judgment applications:

> ... 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 . . ..
>
> ...

> ... In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. 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] GM submits that it can meet its burden and show that there is no genuine issue of fact to be determined at trial.

[19] It says that the material facts for purposes of this application are not in dispute.

[20] The Plaintiffs, Steven Johansson and Jody Johansson, settled their claims with the Plaintiff, Maria Johansson, and Citadel more than a decade ago, signing comprehensive final releases.

[21] GM repeats that pursuant to the signed and witnessed releases, the passengers agreed to release and forever discharge Maria Johansson and Citadel and further agreed as follows:

> ii) ... not to make any claim or take proceedings against any person or corporation who might claim contribution or indemnity under provisions of any statute or otherwise;

[22] GM says the passengers are explicitly prohibited from pursuing their claims against GM by the terms of the releases they signed. GM is among the parties or potential parties who may claim against the Plaintiff, Maria Johansson, causing Citadel to again become involved in this matter.

[23] The Plaintiff passengers' claims involve "taking proceedings" against a person or corporation who "might" claim contribution or indemnity from both Citadel and the Plaintiff, Maria Johansson and they are barred.

[24] GM says that a similar situation involving the terms of a release previously signed by a Plaintiff was addressed by the Nova Scotia Court of Appeal in *Orlandello v. Nova Scotia (Attorney General)*, 2005 NSCA 98. In *Orlandello*, the Plaintiff was injured after being struck by a vehicle while she was disembarking from a ferry. She settled her personal injury claims against the driver and owner of the vehicle that struck her, and signed a release agreeing to release them and "all other persons" from any other claims arising from the accident. As a result of the release, the Plaintiff was later barred from bringing a claim in negligence against the ferry operator (the

Province). Beginning at para. 16 of the decision, Fichaud, J.A. made the following comments:

> [16] The Release expressly discharges all claims against, Chase, Meredith, Premier and "all other persons". . ..
>
> [17] I agree with the chambers judge's conclusion that, standing alone, the release of "all other persons" leaves no room for argument. The claim would raise no genuine or arguable issue of fact requiring trial.
>
> ...
>
> [22] There is ample authority that a court may summarily dismiss, before trial, a claim which has been discharged by an unambiguous written release: e.g. *Begg v. East Hants (Municipality)* (1986), 75 N.S.R. (2d) 431 (C.A.), at ¶ 26-29; *Canasia Industries Ltd. v. May* (2000), 204 N.S.R. (2d) 88 (C.A.) at ¶ 30-31; *CIBC Mortgage Corp. v. Ofume* (2002), 208 N.S.R. (2d) 185 (C.A.), affirming 206 N.S.R. (2d) 234 (S.C.); *Nowe v. Allstate Insurance Co. of Canada* (1996), 157 N.S.R. (2d) 148 (S.C.), at ¶ 11; *McQuaid v. Lapierre* (1993), 128 N.S.R. (2d) 327 (S.C.), at ¶ 11-14; *Dipersio v. Nova Scotia (Workers' Compensation Appeals Tribunal),* 2004 NSCA 139, at ¶ 49; *Canada (Attorney General) v. Veinotte* (1987), 81 N.S.R. (2d) 356 (S.C.), at ¶ 22-31; *Kothke v. Ekblad*, [1999] A.J. No. 664 (A.C.A.); *Paletta v. Agro*, [1990] O.J. No. 1417 (S.C. - H.C.J.); *Waldman v. D. N. Kimberley Insurance Brokers Ltd.*, [1998] O.J. No. 4974 (C.J. - Gen. Div.); *Ysselstein v. Tallon*, [1992] O.J. No. 881 (C.J. - Gen. Div.).

[25] The releases in question are not so broad as to discharge subsequent claims against "all other persons" as in *Orlandello*, however, the passengers are both expressly prohibited from making claims or taking proceedings against a class of potential litigants, which includes GM.

[26] GM declares that it does intend to pursue a counterclaim against the Plaintiff driver for contribution and indemnity for any damages it may be ordered to pay to the passengers. GM claims that Maria Johansson's negligent driving caused the accident.

[27] It submits that the terms of the releases, therefore, have been violated by the passengers bringing a claim against a party who could claim contribution and indemnity from Maria Johansson. I agree.

[28] In *1562860 Ontario Ltd. v. Insurance Portfolio Inc.* (2009), 94 O.R. (3d) 785 (Ont. S.C.J.), the Plaintiff restaurant operator experienced a flood. The Plaintiff claimed against his insurer and was compensated for the loss. The Plaintiff subsequently claimed against his insurance broker, alleging that it failed to secure adequate business interruption loss insurance. The broker then claimed against the insurer for contribution and indemnity.

[29] The Court ordered the entire claim stayed. It stated at para. 54-55:

> 54 The release clearly states that the plaintiff agrees not to make a claim against the defendants if the defendants might claim contribution indemnity. ...

> 55 The issues between the plaintiff and the defendants and the plaintiff and the third parties all deal with the issue of business loss insurance. They are interwoven. Again, drawing on the *Woodcliffe* decision at para. 14, having proceeded with the settlement without excepting the defendants, and having obtained the benefits of the settlements, the plaintiff should also have to assume the burden of the release imposed in terms of precluding claims over.

[30] Although GM is not a party to the release executed between the Plaintiffs, it is entitled to rely on it. This follows from the decision of the Supreme Court of Canada in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] S.C.J. No. 48. At para. 32 of that decision, the Supreme Court referred to two conditions it had earlier established in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 that allow a party to enforce a contract, despite not being a party to it:

> (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[31] GM submits that *Fraser River, supra*, applies to this case. In that case, the Supreme court of Canada said the following in relation to a similar, unambiguous clause at para. 33:

> ... Can-Dive has a very compelling case in favour of relaxing the doctrine of privity in these circumstances, given the express reference in the waiver of subrogation clause to "charterer(s)," a class of intended third-party beneficiaries that, on a plain reading of the contract, includes Can-Dive within the scope of the term. ... Given the lack of ambiguity on the face of the provision, there is no need to resort to extrinsic evidence for the purposes of determining otherwise. If the parties did not intend the waiver of subrogation clause to be extended to third-party beneficiaries, they need not have included such language in their agreement.

[32] A claim against GM, an entity entitled to claim contribution from Maria Johansson, is also the "very activity" contemplated by the provision. Therefore, both aspects of the *Fraser River* test have been satisfied.

[33] In *Marble (Litigation Guardian of) v. Saskatchewan* (2003), 236 Sask. R. 14 (Q.B.), the Court followed *Fraser River, supra*, and found that the Defendant was entitled to rely on a release executed between a Plaintiff and a third party. A similar result was also reached in *Orlandello, supra*, wherein Fichaud, J.A. said at paras. 32-33:

> [32] Ms. Orlandello's Release unambiguously satisfies both conditions from *Fraser River*. First, the Release discharged all Ms. Orlandello's claims against "all other persons" which, as discussed, included the Province. Second, the Release discharged those claims "resulting, or to result from a certain loss which happened on or about July 21, 1999", the incident on the Country Harbour ferry. ...
>
> [33] The Province, as third party beneficiary of the contract, would be entitled to use the Release to defend against Ms. Orlandello's claim. ...

[34] GM submits that the unambiguous, written releases signed by the Plaintiffs Steven and Jody Johansson, are sufficient evidence to establish that there is no genuine issue for trial with respect to the claims of the Plaintiffs, Steven and Jody Johansson, against GM.

[35] I conclude that GM has met the onus on the application to show that there is no "genuine issue of fact to be determined at trial". There is no ambiguity as to who benefits from the clause in question, "any person or corporation who might claim contribution ... ", from the driver and, therefore, Citadel.

[36] GM says it will so claim. This action on its part is not speculative - GM would be expected to do so.

[37] Accordingly, the burden shifts to the Plaintiffs to adduce any evidence that they may have which will raise a genuine issue for trial.

[38] The Plaintiff passengers respond their case does have a real chance of success and that GM cannot successfully "claim" against the driver and Citadel.

[39] The passengers submit that GM can only claim indemnity for damages that it would be ordered to pay to the passengers. They argue that GM can only be ordered to pay damages to the Plaintiffs if the Court finds liability in their favour, and if the Court finds in favour of the Plaintiffs, they submit there can be no negligence found on behalf of Maria Johansson.

[40] The passengers say that this is an all or nothing case. Either the accident on October 25, 1998 was caused by the defect in question for which GM is responsible, or it was not. If the accident was caused by the defect in question, it explains why Maria Johansson lost control of the vehicle and crashed. To also find that Maria Johansson was negligent in the operation of the vehicle, even on a contributory basis, would be contrary to the finding that the defect caused the vehicle to lose control resulting in a crash.

[41] I do not agree with this submission. It is clearly possible that, notwithstanding a finding of a flaw in the construction of the vehicle, the Court could find contributory negligence on the part of the driver.

[42] The passengers further argue that when they signed these releases, they had no intention of having the contract extend to GM - they had no knowledge of a hidden defect that might have caused the accident.

[43] What the passengers may have envisaged specific to GM is irrelevant.

[44] The Release was all about protecting Citadel and the clause that is meant to accomplish that goal is not complicated.

[45] By that clause, the passengers were releasing from liability a general class of parties - those who might seek indemnity from Citadel. GM has shown to my satisfaction that it comes within that class.

[46] The Plaintiff passengers, Steven Johansson and Jody Johansson, have not been able to demonstrate that their claims have a real chance of success.

[47] I am granting this application for summary judgment, brought by the Defendant GM, against the two Plaintiff passengers.

[48] I will be pleased to receive short written submissions with respect to costs.

Joseph P. Kennedy
Chief Justice