

SUPREME COURT OF NOVA SCOTIA

Citation: Thomas v. Yuille Auto Works, 2013 NSSC 97

Date: 20130314

Docket: Hfx No. 408993

Registry: Halifax

Between:

Charlene Anne Thomas

Plaintiff

v.

Yuille Enterprises Limited carrying on business as
"Yuille Auto Works" and Robert Yuille

Defendants

Judge: The Honourable Justice Kevin Coady

Heard: January 31, 2013 in Halifax, Nova Scotia

Decision: March 14, 2013

Counsel: Kevin A. MacDonald for Charlene Thomas
M. Jean Beeler for Yuille Enterprises Limited carrying
on business as "Yuille Auto Works" and Robert Yuille

By the Court:

[1] The plaintiff Charlene Thomas and the defendant Robert Yuille are former spouses. They were also business associates of the corporate defendant Yuille Enterprises Limited. In 2007 the marriage failed and in 2008 the corporate defendant released Ms. Thomas from her employment. She received her regular salary until November 2009, a period of one year. Ms. Thomas and Mr. Yuille were also involved in the investment property business.

[2] The individual parties have been involved in divorce litigation since 2007. In advance of a 2009 trial they settled. After the trial was cancelled Ms. Thomas took the position that there was no settlement and she dismissed her counsel. Over the next year Ms. Thomas retained and dismissed several lawyers and resisted resolving the issue of whether there had been a settlement. On November 17, 2011 Justice Beryl MacDonald ruled that the parties had reached a settlement and she later awarded Mr. Yuille \$20,000 in costs. Ms. Thomas then appealed Justice MacDonald's decision but abandoned it on the eve of the hearing.

[3] The record indicates that the individual parties agreed to leave the issue of their investment property out of the divorce and to resolve it separately. Mr. Yuille alleged that an investment property settlement was reached in May, 2012. Ms. Thomas argued that the negotiations had not resulted in an agreement. Mr. Yuille then brought a motion pursuant to *Civil Procedure Rule* 10.04 for an order enforcing the terms of the alleged settlement agreement. Justice Wood heard that application on July 24, 2012.

[4] Justice Wood concluded that the individual parties had achieved a binding and enforceable settlement agreement which provided that Ms. Thomas would receive \$200,000 for her interest in the investment property. Ms. Thomas is in receipt of this sum. Ms. Thomas agreed that she would not appeal if Mr. Yuille would not pursue costs.

[5] On November 13, 2012 Ms. Thomas filed a Notice of Action against Robert Yuille and Yuille Enterprises Limited. She seeks the following relief:

- a. a Declaration that the Plaintiff was wrongly dismissed by the Corporation;
- b. A Declaration that the Corporate Defendant was acting pursuant to inappropriate directions of the Personal Defendant for which it is vicariously liable, amounting to tortious interference;

- c. A Declaration that Robert Yuille intentionally tortious interfered with her employment relations with the Corporate Defendant; intentionally harassed, intimidated and inflicted Emotional and Economic Harm on the Plaintiff; and, intentionally Sexually Harassed;
- d. Special damages respecting one year salary which taken together with the year of salary paid to her would be the appropriate notice period for a tenured employee who is wrongly dismissed without cause in these circumstances.
- e. Special damages representing the differential between the \$175,000 that she was paid for her share of the investment property versus the actual value of the land at the time of transfer as determined by this Honourable Court;
- f. Punitive damages;
- g. Exemplary damages;
- h. Pre-judgment interest;
- i. Solicitor and Client Costs;
- j. Such further relief as this Court may deem just.

[6] On December 7, 2012 the defendants filed a Notice of Defence. They advanced the following position:

- That Ms. Thomas was terminated for cause and in the alternative was paid in lieu of notice.
- The Corollary Relief Judgment contained a provision affirming Mr. Yuille as the sole owner and shareholder of Yuille Enterprises Limited free from any claim by Ms. Thomas.
- That the investment property issue was resolved by court order dated September 25, 2012.

The defendants further plead that the causes of action and issues set out in the Statement of Claim have been adjudicated and that Ms. Thomas is estopped from pursuing those claims (*res judicata*).

[7] On December 10, 2012 the defendants filed a Notice of Motion seeking the following interlocutory relief:

1. Striking the Notice of Action filed by the plaintiff on November 13, 2012;
2. Dismissing the proceeding; and
3. Costs

The defendants argue that Ms. Thomas' latest action is an abuse of process and rely on *Civil Procedure Rule* 88.02 for relief.

The Wrongful Dismissal Claim:

[8] There are a number of undisputed facts that underscore Ms. Thomas' wrongful dismissal claim. She was never an owner or shareholder of the corporate defendant. She was employed by the corporate defendant from 1988 to 2008. In 2002 the marriage started to unravel and as a result the individual parties' working relationship deteriorated. On December 29, 2008 Mr. Yuille, on behalf of the

corporate defendant, terminated Ms. Thomas' employment. At the time of this dismissal Ms. Thomas' salary was \$75,000 and this salary was continued until November, 2009.

[9] The individual parties' divorce proceeding was active during this period of time. Pursuant to the Corollary Relief Judgment Mr. Yuille was required to pay Ms. Thomas spousal support of \$4,167.00 per month from January 1, 2010 until December 1, 2012. The order directed that entitlement and quantum would be reviewed as of the latter date. Ms. Thomas commenced this action on November 13, 2012.

[10] Mr. Yuille argues that this claim is against the corporate defendant as Ms. Thomas' employer. It is his position that all claims against the corporate defendant were settled in the Corollary Relief Judgment and, as such, this claim is *res judicata*. He relies on paragraph 4 which states as follows:

4. Business Assets

- a. Robert Yuille shall remain as the sole owner and shareholder of Yuille Enterprises Limited, also known as Yuille Auto Works, free from any claim by Charlene Thomas.

- b. Robert Yuille shall retain his ownership and shares in R&R Realty Limited for his own use absolutely, free from any claim by Charlene Thomas.
- c. Robert Yuille shall retain his ownership and shares in Martock Developments Limited for his own use absolutely, free from any claim by Charlene Thomas.
- d. Robert Yuille shall pay Charlene Thomas \$300,000 for any and all interest she may have in the above named business assets. Payment shall be in accordance with paragraph (8) herein.

[11] Ms. Thomas argues that the wrongful dismissal issue has never been adjudicated upon. She submits it is not reasonable to assume that she would include her wrongful dismissal claim against Yuille Enterprises Limited in the divorce proceeding. She submits that Mr. Yuille "was well aware that this claim remained outstanding." With respect I see no independent evidence to support this statement. In fact, I accept Mr. Yuille's *viva voce* evidence that he felt it was covered by the Corollary Relief Judgment.

[12] Justice MacDonald prefaced her remarks with "the question before me is whether the parties, Ms. Thomas and Mr. Yuille, did indeed reach an agreement on all outstanding issues." She indicated that Ms. Thomas' employment with Yuille Enterprises Limited entitled her to a share in Mr. Yuille's business assets. Justice MacDonald stated as follows:

Moving on, there were business assets. There was Yuille Auto Works and I think, occasionally, the name "Yuille Enterprises" was used, but I think they're one and the same, in which Ms. Yuille had no shares, but she had been a paid employee for quite some time and would be using that as an argument under Section 17 of the **Matrimonial Property Act** to claim an interest in the property and also to claim an interest coming through Mr. Yuille's ownership based on length of marriage and intent of the business asset and so on.

[13] The Court continued as follows:

So then the back and forth was focusing on this figure and eventually the sum of \$300,00 was reached. And I am satisfied that the \$300,000 was reached as a settlement in all and any claims, interest, whatsoever that Ms. Thomas may have in respect to the three remaining assets, which were the business assets, which were Yuille Auto and R&R and Martock.

[14] The Court delivered its decision on costs on December 15, 2011. Ms. Thomas was required to pay Mr. Yuille \$20,000 costs. Justice MacDonald commented as follows:

What I see here is an individual who has never been able to accept certain realities that unfolded as this matter progressed.

[15] And further:

But on the evidence before me, and I found Ms. Cornish to be a credible witness, I would be satisfied that had I been pushed to that that she had actual authority to make the final agreement that the parties made. But Ms. Yuille didn't like it and she thought maybe by not carrying through on it, she could get out of it. Didn't happen.

So she's like many other plaintiffs who just couldn't accept a reality, or defendants, and took it to court and was unsuccessful. And in those

circumstances, you're entitled to party/party costs and, clearly, Mr. Yuille is entitled to that.

A costs award of this magnitude in a family matter speaks volumes.

[16] I conclude that this wrongful dismissal claim is just another afterthought on the part of Ms. Thomas. She resolved all claims against the corporate defendant through the business asset claim in the divorce. I find it difficult to comprehend how she can expect to receive wrongful dismissal damages from the business that she derived such an asset award. I also find her misguided given that she received her full salary for one year after her termination.

The Investment Property Claim:

[17] Mr. Yuille and Ms. Thomas were involved with two businessmen in a property holding company called "Chisholm Yuille Realty." Ms. Thomas advanced a claim against this company during the divorce proceeding. Mr. Yuille and Ms. Thomas agreed that the Yuille Chisholm Realty issue be excluded from the matrimonial litigation. In January, 2008 an agreement was reached that would see Ms. Thomas receive \$175,000 for any interest she might have in that company. This settlement was not implemented and as a result Ms. Thomas started an action

against Chisholm Yuille Realty and its principals. This action was ultimately settled and Ms. Thomas was awarded \$200,000.

[18] Ms. Thomas, in this action, seeks additional money from Mr. Yuille in relation to the Chisholm Yuille Realty issue. She describes the basis for this additional claim at paragraphs 52 & 53 of her Statement of Claim:

52. The Plaintiff further says that at all times, the Defendant, Robert Yuille pressured her to sell the investment property at a loss to herself over a two year period and the property was excluded from the Divorce negotiations because of this pressure.
53. The Plaintiff says that the valuation of the property was significantly higher than what she was aggressively informed by the Defendant Robert Yuille, which she say he knew was low; and, that the Defendant mislead her to her detriment by claiming her position at work would be "safe" if she agreed to sell him her interest in the land at what she now knows was an artificially low price.

Ms. Thomas argues that this claim has never been adjudicated on by any court and is therefore not *res judicata*.

[19] Ms. Thomas relies on a 2012 appraisal by Kempton Appraisals Limited indicating an opinion that the subject property is worth \$755,000.

[20] Mr. Yuille's evidence on this issue appears at paragraphs 28 - 30 of his December 6, 2012 Affidavit. He stated as follows:

Chisholm Yuille Property

28. The plaintiff and I owned property in partnership with John and Trevor. Chisholm. The plaintiff and I agreed to leave that property and that matter out of the divorce file and to have it adjudicated separately.
29. Following the divorce but when the appeal was still outstanding the plaintiff and I settled all issues regarding that property.
30. The plaintiff then refused to honour the agreement much like she had done after the divorce agreement. I was represented by Michael Owen throughout that matter. The Chisholms were represented by Cox and Palmer.

[21] Justice Wood heard a motion brought by Mr. Yuille pursuant to *Civil Procedure Rule* 10.04 seeking an order enforcing the terms of the alleged settlement. Justice Wood described his interpretation of the agreement at paragraph 36:

[36] It is clear from this correspondence that a consensus had developed between Mr. Owen and Mr. MacDonald with respect to the basis on which the dispute between Ms. Thomas and Mr. Yuille would be resolved. She was to receive \$200,000 allocated as indicated by Mr. MacDonald in exchange for transferring her interest in the Property and the partnership. The litigation would be dismissed without costs to any party, and this would include mutual releases. Finally, this resolution would not affect any of the issues in the divorce proceeding and, in particular, Ms. Thomas' claim that the Property was a matrimonial asset.

[22] He offered the following conclusion at paragraph 58:

[58] In summary, I am satisfied that a binding settlement agreement was reached between Ms. Thomas and Mr. Yuille by the exchange of correspondence between counsel in May, 2012. In coming to this conclusion, I have considered the language used in that correspondence, the context of the agreement and the subsequent conduct of the parties.

[23] Ms. Thomas has continually alleged that she made bad deals while under duress from Mr. Yuille. She made the same argument in front of Justice Wood.

He addressed that submission at paragraphs 71 and 72 as follows:

[71] I have carefully reviewed the affidavit of Ms. Thomas with these principles in mind. The affidavit does not contain any assertions that Ms. Thomas was subject to any pressure or influence by Mr. Yuille, or any other party to the litigation, over the months leading up to the settlement correspondence in May, 2012...

[72] ... There is simply no factual basis for an allegation of duress or unconscionable dealings which would undermine the negotiations or the agreement itself.

[24] Justice Wood commented further at paragraph 73:

[73] As final matter, I would note that the essential terms of the settlement agreement are found in Mr. MacDonald's initial letter of May 14, 2012. It is difficult to see how a party can complain about the fairness of an agreement when the terms were first proposed by their own legal counsel.

[25] All counsel consented to a form of order that was issued on September 25, 2012. The binding and enforceable agreement was described as follows:

Robert Yuille shall pay to Charlene Thomas (Yuille) the sum of Two Hundred Thousand Dollars (\$200,000.00) to be allocated as follows:
One Hundred Seventy-Five Thousand Dollars (\$175,000.00) as payout of Charlene Thomas's (Yuille's) interest in the property referred to in these proceedings as the Chisholm/Yuille Realty property consisting of two parcels of land having PID Identification numbers (P.I.D.'s) 00136036 and 00113993 and Twenty-Five Thousand Dollars (\$25,000.00) to be allocated to Charlene Thomas's (Yuille's) costs and expenses in these proceedings.

Additionally, the parties were required to execute any documents necessary to effect the order.

[26] A transfer of partnership interest was signed on August 10, 2012.

Paragraph one of the document states as follows:

Charlene hereby conveys and transfers, free and clear of all encumbrances, her Partnership Interest in Chisholm/Yuille Realty to Robert for Ten Dollars (\$10.00) and for such other good and valuable consideration the receipt of which is hereby acknowledged;

One would expect these documents to be the end of the matter. However, once again, Ms. Thomas is attempting to find creative ways to continue the litigation.

[27] Ms. Thomas argues that this claim was reserved out of the settlement found to exist by Justice Wood. She relies on the handwritten remarks of her counsel

appearing in an August 30, 2012 "full and final release." The words she relies on are as follows:

I further acknowledge that this release shall be a defence to any such claims or causes of actions "save and except the within release is without prejudice to the parties agreement as reflected in the letters of counsel dated May 14, 15 and 18th, 2012".

[28] It is noteworthy that these letters were before Justice Wood and appear in his decision. It is also noteworthy that similar language appears in Mr. Yuille's full and final release dated September 20th, 2012 as follows:

I further acknowledge that this release is without prejudice to the parties agreement as reflected in the letters of counsel dated May 14th, 15th and 18th, 2012.

[29] Mr. MacDonald's letter to Mr. Owen dated May 14, 2012 contains the following:

The within payment is made without prejudice to Ms. Thomas' right to claim that the land was always a matrimonial asset that should have been dealt with on the divorce, along with other properties. In addition she reserves the right in the present appeal and any re-trials or other hearings that may flow therefrom.

[30] Mr. Owen's letter to Mr. MacDonald dated May 15, 2012 contains the following:

Should Ms. Thomas's (Yuille's) appeal be successful the agreement is without prejudice to Ms. Thomas's claim that the land was a matrimonial asset and should be dealt with on that basis along with the other properties and, Mr. Yuille shall have the right to claim the land in question and other properties were and are business assets (not matrimonial).

that should Ms. Thomas's (Yuille's) appeal not be successful the proposed agreement/order will not effect Mr. Yuille's right to rely on the corollary relief judgment in any future litigation between the parties, i.e., Mr. Yuille shall have every right to rely on the corollary relief judgment in any proceedings between Mr. (sic) Thomas (Yuille) and Mr. Yuille.

[31] Mr. MacDonald's letter to Mr. Owen dated May 18, 2012 contains the following:

... We will consent to an Order dismissing litigation against all parties without costs on the understanding that all claims against Ms. Thomas are also being dismissed and a mutual release will be signed as between her and the Chisholms and Bob confirming that the litigation resolved, subject to the within Agreement between Mr. Yuille and Ms. Thomas (which has no bearing on the Chisholms), and the balance of the terms set out in your letter of May 15, 2012, mainly bulleted points 2, 3, 4, and 5.

[32] On May 24, 2012 Mr. MacDonald sent a draft agreement to Mr. Owen which attached the above three letters. On June 2, 2012 Mr. Owen sent Mr. MacDonald the \$200,000 and an agreement to be signed by Ms. Thomas. The agreement contained the following three clauses:

8. The parties shall not use, attempt to introduce or otherwise raise this Agreement, aspects thereof or the associated consent order in the parties' divorce appeal proceedings (CA No. 390815) currently before the Nova Scotia Court of Appeal;

9. Should Ms. Thomas's (Yuille's) appeal be successful and the divorce matter is returned to the Nova Scotia Supreme Court for a re-trial or a re-trial is ordered this Agreement is without prejudice to Ms. Thomas's claim that the Lands (or the moneys arising from the sale of the Lands/properties) was a matrimonial asset and should be dealt with on that basis along with the other properties (or the moneys arising from the sale of the Lands/properties) and, Mr. Yuille shall have the right to claim the Lands in question and other properties (or the monies arising from the sale of the Lands/properties) were and are business assets (not matrimonial);
10. That should Ms. Thomas's (Yuille's) appeal not be successful and the divorce matter is not returned to the Nova Scotia Supreme Court for a re-trial or a re-trial is not ordered this agreement/and associated consent order shall not effect Mr. Yuille's right to rely on the corollary relief judgment issued in the parties' divorce proceedings 1201-062404 (56923) in any future litigation between the parties. Mr. Yuille shall have every right to rely upon the corollary relief judgment in any proceedings between Ms. Thomas (Yuille) and Mr .Yuille;

Ms. Thomas refused to sign the agreement that was essentially authored by her counsel in his May 14, 2012 letter. It was this refusal that led to the *Rule 10.04* Motion and Justice Wood's decision.

[33] The above letters and draft agreement satisfies me that the only "reservation" was limited in its application to the appeal and any possible divorce re-trial. I am satisfied that both Ms. Thomas and Mr. Yuille, as well as their counsel, were *ad idem* on this point. Ms. Thomas abandoned her appeal of the divorce. Consequently Justice MacDonald's decision stands and all property issues have been resolved.

[34] I conclude that Ms. Thomas' claims for wrongful dismissal and for a greater share of the Chisholm Yuille Realty property have been adjudicated upon.

Res Judicata

[35] Bryant, Lederman and Fuerst in their text "The Law of Evidence in Canada" (3rd Ed) LexisNexis, 2009 define this principle at page 1284:

The modern rule of estoppel by *res judicata* is grounded upon two broad principles of public policy: first, that the state has an interest that there should be an end to litigation (*interest republicae ut sit finis litium*) and, secondly, that no individual should be sued more than once for the same cause (*nemo debet bis vexari pro una et eadem causa*) or punished more than once for the same offence (*nemo debet bis puniri pro uno et eodem delicto*). The following may be taken as a correct general statement of the common law rule:

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they are or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

[36] The authors list the constituent elements of estoppel by *res judicata* in civil cases at page 1285:

- (i) that the alleged *judicial* decision was what in law is deemed such;
- (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;

- (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
- (iv) that the judicial decision was final;
- (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
- (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

In light of my findings above, I am satisfied that Ms. Thomas' present action is *res judicata* in all respects.

Abuse of Process:

[37] The principle of abuse of process was discussed in **Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc.** 2011 NSSC 381. Pickup, J. cited **Toronto (City) v. C.U.P.E. Local 79**, 2003 SCC 63 at paragraph 8:

In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p.358, [1990] 2 All Er. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[38] *Civil Procedure Rule* 88.02 addresses circumstances where abuse of process occurs. The *Rule* states as follows:

(1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:

(a) an order for dismissal or judgment;

(b) a permanent stay of a proceeding, or of the prosecution of a claim in a proceeding;

(c) a conditional stay of a proceeding, or of the prosecution of a claim in a proceeding;

(d) an order to indemnify each other party for losses resulting from the abuse;

(e) an order striking or amending a pleading;

(f) an order expunging an affidavit or other court document or requiring it to be sealed;

(g) an injunction preventing a party from taking a step in a proceeding, such as making a motion for a stated kind of order, without permission of a judge;

(h) any other injunction that tends to prevent further abuse.

[39] In light of my conclusion that this action is *res judicata*, I conclude that it amounts to an abuse of process. The appropriate remedy is to strike this action.

[40] I will hear the parties on costs should they be unable to agree.

J.