SUPREME COURT OF NOVA SCOTIA
Citation: Hiltz v. 2420188 Nova Scotia Ltd., 2013 NSSC 112

Date: 20130320
Docket: Hfx No. 328319
Registry: Halifax

Between:

Michelle L. Hiltz and Jeffrey Earl Hiltz

Applicants

v.

2420188 Nova Scotia Ltd. and Peter G. Alex

Respondents

DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	September 21, 2012
Last Written Submissions:	January 18, 2013
Counsel:	Devin W. Maxwell, for applicants Brian K. Awad and Ronald R. Chisholm, for respondents

Moir J.:

[1] Mr. and Ms. Hiltz filed a notice of application in court almost three years ago.

[2] In 2001, the numbered company sold the Hiltzes a home on a private road in a subdivision in Antigonish County. The subdivision was developed by the company, which Mr. Alex owns and manages. The grounds allege that Mr. Alex "covenanted" to maintain portions of the private road and to bring it up to Department of Transportation standards. The grounds allege that the covenant was repeated in a letter delivered in 2005. They allege that nothing was done to improve the road, and little has been done to maintain it.

[3] The notice claims an injunction requiring the respondents to bring the road up to standards, an injunction for maintenance, and damages.

[4] The company and Mr. Alex filed a notice of contest. They say that there was no covenant, and the road has been maintained in any case.

[5] Soon after the notice of application in court was filed, Justice LeBlanc gave directions. He set required deadlines for affidavits, discovery, notice for cross-examination, and briefs. He set a time in September, 2011 for the respondents to make a summary judgment motion. And, he set a day in January, 2011 for hearing the application.

[6] The summary judgment motion was heard as scheduled, and Justice McDougall gave a decision dismissing it two days later.

[7] Justice LeBlanc's deadlines were missed. I gave new directions one year ago. Among other things, I set the issues to be determined on the pleadings, deadlines for outstanding disclosure, deadlines for expert reports, terms for discovery or an affidavit on road construction standards, and deadlines for affidavits and briefs. I adjourned the hearing to three days in October, 2012.

[8] The notice of application says that the applicants intend seven witnesses, and, as the case developed, the applicants determined that further fact or opinion witnesses on road standards were required. The new deadline for the applicants'

affidavits was July 3, 2012. That gave the respondents just two months to complete their affidavits.

[9] None of the applicants' affidavits had been filed on time. Three affidavits were delivered to respondents' counsel in September, 2012 after the deadline for the respondents' own affidavits. The applicants intended further affidavits or discoveries of those who would not swear an affidavit.

[10] The respondents moved for dismissal, or an order striking the injunctive claims and the claim for damages. Later, they filed an amended notice of motion for summary judgment on the application or on any of the claims for relief.

[11] When I heard that motion, I decided that the October hearing dates had to be cancelled. I formed the impression that a settlement might be achieved if certain discoveries in lieu of affidavits were conducted by the applicants. So, I reserved decision, made an order permitting the discoveries, and said that I would render the decision after the end of October if a party requested me to do so. I recorded this in my directions dated September 25, 2012:

1. The decision on the respondents' motions for dismissal, indemnity, and summary judgment on certain claims is reserved until after October 30, 2012.

6. The parties may agree that I should continue to hold the decision on the respondents' motions in reserve or either party may request, after October 30, that I issue it.

Nevertheless, the applicants sent me lengthy submissions after the discoveries were complete. The respondents objected, rightly I think.

[12] The motion for summary judgment relies on the absence of evidence supplied by the applicants to the date of the motion or its amendment. The applicants' deadline went by, but they failed to provide "information or the details on the road construction they seek" as directed. They provided no evidence of road maintenance standards to support their claim for injunctive relief. They provided no evidence by which the claim for damages could be assessed. This situation was not improved by the lately filed affidavits.

[13] A respondent who moves for summary judgment must show that the grounds in the notice of application, the grounds not the respondents' evidence on

the application, fail to raise a genuine issue for the hearing of the application: Rule 13.04(1) read with the definitions in Rule 13.02 in mind.

[14] At the hearing of the motion, it was submitted that the relief sought by the respondents was more akin to a non-suit. With respect, an application cannot be non-suited.

[15] The hearing of an application is regulated by Rule 53 - Conduct of Hearing. Some of the provisions in Rule 51 - Conduct of Trial are incorporated for hearings by Rule 53.07, but Rule 51.06 on non-suit is not one of them. That is because non-suit does not fit with the production over time of direct evidence by affidavit, direct evidence by examination in or out of court, and cross-examination in or out of court that underlies the hearing of an application. Because the evidence is produced over time there can be no opening or closing of one's case. (Compare Rule 51.05 with Rule 53.04.) Therefore, there can be no non-suit in an application.

[16] The respondents' motion for summary judgment invites the court to assess the applicants' causes based on the lack of evidence at the deadline for the

applicants' direct evidence by way of affidavit, without allowing for whatever further evidence the applicants may be entitled to call, without having whatever direct evidence the respondents will provide that may be helpful to the applicants' position, and without the benefit of whatever evidence the applicants might adduce by cross-examination. The application does not work that way.

[17] Therefore, the motion for summary judgment as a whole and the alternative motions on each of the claims for relief are to be dismissed.

[18] However, I cannot stop there. The application in court is a new procedure introduced when the present *Nova Scotia Civil Procedure Rules* came into force at the beginning of 2009. "[I]t is available, in appropriate circumstances, as a flexible and speedy alternative to an action": Rule 5.01(4).

[19] The application in court will cease to be a nice procedural tool ("available in appropriate circumstances") if we tolerate the way in which this application has been conducted. One relevant appropriate circumstance is "the parties can be ready to be heard in months, rather than years": Rule 6.02(5)(b). However, the applicants have approached this case as if they can follow their own schedule

rather than the court's direction and as if they can develop the issues and evidence although court dates have already been set on their representations about the issues and their evidence.

[20] This application has been set for hearing and adjourned twice, at a cost to the public in court scheduling and time. It has been outstanding, not for the period of months rather than years contemplated by Rule 6 - Choosing Between Action and Application, but for three years.

[21] I am open to receiving submissions on whether the course this application is following requires it do be converted to an action. Any submissions in that regard should be provided in writing no later than two weeks after these reasons are released.

[22] Although the motions are to be dismissed, I will order costs against the applicants because the motions were occasioned by their defaults. The costs will be $1,500 plus disbursements payable by the applicants to the respondents on final order concluding the proceeding.

J.