SUPREME COURT OF NOVA SCOTIA

Citation: *Wright v. TD Auto Finance (Canada) Inc.*, 2017 NSSC 220

Date: 20170817
Docket: Hfx No. 462471
Registry: Halifax

Between:

Mary Hale and Blake Wright

Applicants

v.

TD Auto Finance (Canada) Inc. and Maritime Bailiff

Respondents

Judge:	The Honourable Justice Peter Rosinski
Heard:	June 15, 2017, in Halifax, Nova Scotia
Final Written Submissions:	June 23, 2017
Counsel:	Blake Wright and Mary Hale, Self-represented Applicants
	Sarah J.S. Emery, for the Respondent, TD Auto Finance (Canada) Inc.

By the Court:

Introduction

[1] Ms. Hale and Mr. Wright obtained an interim injunction which restrained TDAF from further dealing with their repossessed vehicle until this matter was resolved. I rejected their motion to have the vehicle returned to their possession. This is the costs decision arising therefrom. TDAF seeks solicitor-client indemnification of its costs, based on the terms of the applicable conditional sales contract. I decline to do so; such claims should be given little or no weight. I am awarding costs in accordance with Tariff "C", Rule 77, of our Civil Procedure Rules, as that appears to be the proper approach – see: *Farm Credit v. Wolfridge Farm Ltd.* 2015 NSSC 309, per Chipman J.; *Ackerman v. Deckman Trust*, 2014 NSSC 335, per Scaravelli J.; *Royal Bank of Canada v. Manor Custom Homes Inc.*, 2014 NSSC 281, per Rosinski J.; *Xceed Mortgage Corp. v. Jesty*, 2014 NSSC 51, per Wood J.; [earlier decisions were to similar effect on balance – *Jim Landry Pontiac Buick Ltd. v. CIBC*, [1988] NSJ No. 145, per MacDonald J.; *Continental Bank of Canada v. Snow* [1987] NSJ No. 579, per Hallett J., at paras. 38-39; *Craig v. de Oliveria E Sousa*, [1984] NSJ No. 387 (CA), per MacKeigan CJNS.

Background

[2] The Applicants' 2011 Toyota Sienna van had been repossessed by TDAF on March 9, 2017. On April 13, 2017, Justice Moir granted an ex-parte Interim Injunction in favour of Ms. Hale and Mr. Wright ("Hale/Wright"). TDAF claimed they had defaulted on the payments, thus triggering the right to repossess. The injunction restrained TDAF from further dealing with the vehicle until this matter was resolved.

[3] On April 26, 2017, Hale/Wright filed a motion to have the vehicle returned to their possession. At the hearing, TDAF argued that it was entitled to repossess the vehicle and there was no waiver by its representatives of any of its rights. Hale/Wright countered (and had expressly maintained since Wright's initial affidavit April 12, 2017) that they had been advised on the phone by TDAF representatives in February/early March 2017, that if they could make up their default payments by March 2017, TDAF would not repossess their vehicle in the interim.

[4] TDAF's Mr. Shelley provided his May 5, 2017 sworn affidavit [copy received by the court May 12, 2017] attaching "collection notes" of their telephone operators between December 17, 2013 to April 8, 2017, one notation of which specifically related to a purported February 14, 2017, conversation with Mr. Wright. This document therefore would have allowed TDAF to identify with precision the date of Mr. Wright's call, which was determinative in this case. Remember that Hale/Wright were claiming that they had until March 16 – 17, 2017 to make up their default payments. The notes read in part: "customer called office – cx called in, adv of the TAD, cx said he will make $793.59 on 2/17 online, adv of the reg pmt also due on 2/17,cx is fine, adv cx to call us back with the conf #, cx aware."

[5] At the hearing, Mr. Wright testified that he understood he had until March 17, 2017 to make good the defaults, failing which thereafter his vehicle would be at risk of repossession. He questioned the accuracy of the notes. This cast a real question upon the weight to be accorded to the arguably "business records" (although incomplete notations of the verbal conversation) referred to as "collection notes".

[6] On June 15, 2017, I rendered an oral decision rejecting Hale/Wright's position. Therefore, the repossession was justifiable.

[7] Determinative to that decision, was the evidence of the conversation Mr. Wright had with a TDAF representative on February 14, 2017. Mr. Wright claimed that he was told that day that he had until March 17, 2017 to make up their default payments. During the hearing, I permitted Mr. Wright an opportunity to return to his home and retrieve certain documentation. TDAF disputed the admissibility of these documents, nevertheless, I permitted him to introduce evidence of his handwritten notations he purportedly made February 14, 2017, and a notation on his family calendar which he says also suggests that he believed he had until March 17 to make up their default payments. We adjourned for lunch and continued Wright's cross-examination. Thereafter, counsel for TDAF announced that over lunch, TDAF witness, Darryl Shelley, had caused to be retrieved and emailed to his mobile phone a complete and authentic recording of the February 14, 2017 conversation Mr. Wright referenced in his evidence. Counsel for TDAF argued that this late disclosure was justifiable as "impeachment" evidence.

[8] Rule 94.09 allows the withholding of information *solely* to impeach a witness. If the late disclosure and use of the tape recording was justifiable, as

argued by TDAF, then the recording also "cannot be used by the withholding party to prove any fact in issue other than credibility".

[9] Here, TDAF relied on the taped conversation to prove that there had been no waiver to March 17, 2017 by its representative. Whether or not there was a waiver by the TDAF representative is a fact which was in issue.

[10] Hale/Wright's position that there had been a waiver to March 16 – 17, 2017, communicated by its representative on a telephone conversation with Mr. Wright, was evident very early on in this litigation – e.g. their brief filed April 26, 2017, at para. 3.

[11] I find as a fact that Mr. Wright had a bona fide belief that he had until March 17, 2017 to make up the default payments. I find as a fact that the position of Hale/Wright regarding the waiver, made known to TDAF very early on in the litigation (and likely communicated to its representatives in telephone conversations that took place on March 9, 2017 – see "collection notes"), sufficiently alerted TDAF to the importance of the conversation of February 14, 2017. I find as a fact that TDAF was not diligent in locating, and appreciating the significance of, the February 14, 2017 conversation. Had TDAF been diligent, it would have identified as determinative, and could have efficiently produced, a transcript of, the February 14, 2017 conversation, which clearly indicated that Mr. Wright was told he only had until February 17, 2017 to make the regular payment owing as well as the $793.59 additional payment.

[12] It was as a result of this lack of diligence that the litigation progressed to a full hearing.

Why TDAF is not entitled to solicitor client costs

[13] TDAF seeks $14,501 in legal fees and $2,078.86 HST for a total of $16,579.86 plus $189.61 disbursements and exceptionally $1,074.20 travel expenses for Darryl Shelley who travelled here in person, rather than use a video link from Ontario (which counsel assured me would have been at least as expensive: anticipated legal fees to research and effect a motion to permit Mr. Shelley to testify via videoconferencing - para. 16, affidavit of Sarah JS Emery, sworn June 23, 2017). In total, it seeks $17,843.67.

[14] TDAF relies upon, and at page 3 of its brief, cites the remedies provision in clause 13 of the conditional sales contract:

> If you are in default we may do one of the following… In calculating other sums due, net sale proceeds or liquidated damages, you agree that you must pay all costs and expenses, including legal (on a full indemnity basis) and other fees associated with locating you or locating, taking, holding, repairing, or selling the property or asserting or pursuing any of our remedies…

[15] Notably, more accurately, clause 13 also includes the words:

> *If you are in default we may*, except if not allowed by applicable law, *do one or more of the following*: (a) immediately demand from you the outstanding principal amount in full plus any unpaid interest and all other amounts that may be owing under this contract; (b) commence legal action against you in order to recover all amounts owing under this contract, including all legal costs associated with the enforcement of this contract, whether or not we have seized the property; (c) cancel any insurance and authorize and instruct all insurers to pay us directly any proceeds, or refunds resulting from the cancellation; (d) repossess the property, and we will not be held liable for loss or damage to the property or any loss resulting from repossession of the property were any goods located in the property;…(f)… The repossession and sale of the property will where applicable by law not affect our right to recover from you the outstanding principal amount plus interest and all other sums due minus the net amount received by us from the sale of the property… (h) unless prohibited by law, you remain liable to us for any deficiency balance remaining owing to use after exercise of our remedies hereunder. *In calculating other sums due, net sale proceeds or liquidated damages, you agree that you must pay all costs and expenses, including legal (on a full indemnity basis) and other fees associated with locating you or locating, taking, holding, repairing or selling the property or asserting or pursuing any of our remedies*… All remedies hereunder are cumulative and not alternatives, and may be exercised by us in any order or combination…

[16] Clause 16 reads:

> The laws of the province or territory indicated above as the address of the buyer will govern the terms and conditions of this contract. If any provision of the contract contravenes the laws of the province or territory that governs this contract, those provisions will be severed from this contract and the rest of the contract will remain valid and enforceable.

[17] Uniquely in Canada, our Civil Procedure Rules have the status of legislation. On this ground alone, arguably the applicability of the contractual provision can be swept aside.

[18] I am reinforced in the view that I should decide the matter of costs on the basis of our Civil Procedure Rules, because the matter at issue, arises from a motion regarding possession of the vehicle, not a wholesale consideration of what

amounts Hale/Wright owe to TDAF. Moreover, the contractual provision provides no express consideration for factoring in the conduct of TDAF (e.g. its lack of diligence in obtaining the February 14, 2017 conversation/transcript in a timely manner). Rule 77.09 speaks about "indemnification", and is applicable to motion proceedings under Rules 23.09(8) – unnecessary cross-examination of a witness, and 23.12(3) – for expenses resulting from late filing of an affidavit . Although Hale/Wright were self -represented, these Rules recognize that TDAF's lack of diligence in discovering and examining the February 14, 2017 conversation contents could qualify as a matter for which indemnification would otherwise have been payable to Hale/Wright.

[19] I also bear in mind that this is a contract of adhesion- it is a "take it or leave it" pre-printed standard conditional sales document. It should properly be narrowly construed when appropriate.

[20] I conclude that the matter of costs in this proceeding should be determined under our Civil Procedure Rules.

[21] Our Rule 77.02 regarding costs states that I "may… make any order about costs as the judge is satisfied will do justice between the parties." Similarly, Rule 77.03 states that "costs of the proceeding follow the result, unless a judge orders or a Rule provides otherwise."

[22] Hale/Wright made a motion to have their vehicle returned to them. Rule 77.05 states: "(1) the provisions of Tariff C apply to a motion, unless the judge hearing the motion orders otherwise;" [see also Rule 77.06(3)].

[23] The hearing of the merits of a continued injunction was to be heard April 19, 2017 before me. Robert Danter, of Harrison Pensa, Toronto counsel for TDAF appeared by telephone call and requested an adjournment which was granted until May 15, 2017. On April 26, 2017, Hale/Wright filed their motion to have their vehicle returned to them. On May 15, Ms. Emery, of Patterson Law, Halifax appeared for TDAF. Because the original affidavit of Darryl Shelly had not yet been filed with the court, at TDAF's request, the matter was adjourned to June 15, 2017. But for the conduct of TDAF, only one appearance in court would have been required.

[24] I note as well that courts in this Province are reluctant to compensate litigants for their use of out-of-province counsel's additional expenses, unless extraordinarily no counsel is reasonably available within the Province. I note Mr.

Danter did not appear in court, yet TDAF are requesting his fees be paid in the amount of $5440.39. I conclude that some of the Patterson Law fees claimed by TDAF arise exclusively because TDAF had instructing counsel in Toronto, Ontario.

[25] Under Tariff “C”, I find the length of the hearing was a full day- which guideline suggests costs of $2,000 plus disbursements.

[26] I find that the length of the hearing, if not perhaps even the necessity for a hearing, was caused significantly by the lack of diligence of TDAF in discovering and examining the February 14, 2017 conversation contents. It is reasonable to infer that had the conversation contents been discovered and disclosed earlier, the hearing may have been avoided altogether or would have been substantially shorter. In my view, it would have been likely unnecessary for Mr. Shelly to appear for cross-examination. Hence those expenses associated with his travel would not likely have been incurred.

[27] Lastly, I want to emphasize that I do not intend herein to cast aspersions in relation to the conduct of counsel.

Conclusion

[28] Consequently, I find it in the interests of justice here to award costs to TDAF of $1,000 plus disbursements of $189.61, all payable by September 30, 2017.

Rosinski, J.