<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Northeast Equipment Ltd. v. 3238633 Nova Scotia Ltd,* 2016 NSSC 346

Date: 20160912
Docket: Hfx No. 437820
Registry: Halifax

Between:

Northeast Equipment Limited

Applicant

v.

3238633 Nova Scotia Limited (formerly known as "G.A, Turner Plumbing & Heating Limited"), 1109082 Nova Scotia Limited (formerly known as "Greg Turner Plumbing and Heating Limited"), Gregory A. Turner, Bernice Turner, Brenda Turner Schroder, and Leanne Turner Wells

Respondents

Judge: The Honourable Justice Patrick J. Murray

Heard: August 4, 2016, in Halifax, Nova Scotia

Written Decision: September 12, 2016

Counsel: Blair Mitchell for the Applicant
John O'Neill for the Defendants

By the Court:

Introduction

[1] The Respondents move for summary judgment on the evidence, and for dismissal of an application on the basis of abuse of process.

[2] The application is an Application in Court by Northeast Equipment Limited. It was first filed on April 2, 2015 and subsequently amended on May 21, 2015.

[3] Among other things Northeast claimed in the Application that the Respondent transferred corporate, good will, assets and records from G. A. Turner, (a debtor corporation) to Greg Turner Plumbing, (a revoked corporation) to Greg Turner Plumbing and Heating 2015 (a new company).

[4] As such the application is pursuant to the third schedule, section 5(2) of the *Companies Act*, R.S.N.S. 1989, c. 234. Northeast seeks a remedy to address their claim of oppressive, unfair, and prejudicial conduct of the Respondents in disregarding Northeast's interests.

[5] The Respondents deny that any such conduct occurred. In their Notice of Contest they state that the Application should be dismissed. The Respondent deny each fact set out in the Application.

[6] The application states that 3238633 NS Ltd. accrued debt to the Applicant between 2012 and 2014. The Applicant seeks compensatory damages in the amount of $189,696.38, exemplary damages, an order for a name change, and solicitor client costs.

The Present Motion

[7] This motion follows the Respondents' October 29, 2015 motion to have Northeast's Application dismissed on the sole ground of want of prosecution.

[8] For this motion the Respondents rely on the affidavit of John O'Neill sworn on October 22, 2015 and filed in support of the previous motion. In doing so they cite *Rule 39.06(2)* as authority.

[9] The Respondents also rely on the affidavit of John O'Neill sworn on July 10, 2016 filed with the Notice of Motion on July 13, 2016. The Notice of Motion cites

Civil Procedure Rules 1.01; 13.04; 5.15; 5.19; 5.21 and *Rule 88.02*. Mr. O'Neill is the Respondents' solicitor.

[10] The Applicant, in response to the motion, has submitted the affidavit of Blair Mitchell, sworn to on August 4th, the motion hearing date. The unsigned affidavit of Mr. Mitchell was filed with the Court on August 3, 2016.

[11] Mr. O'Neill, for the Respondents, objects to the admission of Mr. Mitchell's affidavit, as it is well past the filing deadline contained in *Rule 23.11*, dealing with motions.

[12] Mr. Mitchell, in turn objects to the content of affidavit(s) of Mr. O'Neill on the basis that the information contained therein is not within his personal knowledge, and therefore hearsay.

[13] I shall first deal with the Motion for Summary Judgment on the evidence as this can be done in short order. *Rule 13.01(1)* states as follows:

> **13.01(1)** This Rule is for summary judgment on evidence in an action and summary judgment on pleadings in an action or an application.

[14] The Respondents are seeking Summary judgment on the evidence in an application. By their own admission through counsel, their motion is outside the scope as permitted by the *Rule*, which states quite clearly that summary judgement on the evidence applies to an action only.

Objections to Affidavits and Ruling.

[15] The Applicant's affidavit, filed by Blair Mitchell on this motion was filed on August 3, the day before the hearing. Pursuant to *Rule 23.11*, it was required to be filed 5 clear days before the hearing on August 4th or filed by July 26th, 2016.

[16] There is every reason to refuse admission of Mr. Mitchell's affidavit. The motion was filed on July 13 and the affidavit was filed the day before the hearing of August 4, 2016. There was some contact on August 2, but that is hardly reasonable.

[17] Not only was there no time to prepare, but the Respondents had no opportunity to provide a reply to which they are entitled under the *Rules*. The legal brief of course, is another matter. That too was filed the day before. Again, the Respondents had no opportunity to file a reply brief.

[18] *Civil Procedure Rule 23.12(1)* states that documents not filed in accordance with the *Rules* for motions shall not be admitted, unless the judge hearing the motion allows it. In such instance there should be a motion made to file a late affidavit. The Applicant here seeks leave of the Court to allow Mr. Mitchell's affidavit.

[19] The *Rule* would further serve to exclude the legal brief of the Applicant, as well. The *Rule* requires the Respondents brief to be filed 5 days before the hearing.

[20] *Rule 23.12(1)* states that when a party seeks leave, the Court must weigh the three factors set out therein, all relating to prejudice, including prejudice caused by an adjournment and prejudice to the public, if motions by appointment are frequently adjourned.

[21] On the other hand, this would always be the case where the remedy sought by the aggrieved party, is dismissal. Except for not filing any response at all, it is difficult to imagine a more serious breach of the *Rules*, than waiting the day before to file a response.

[22] The reason offered by the Applicant for the untimely filings, is a general state of being "very busy". By its own admission this is not the strongest reason.

[23] There is also the fact that the Applicant takes issue with the affidavits filed by the Respondents in support of the motion. The Respondents would learn of this for the first time on the day of the hearing.

[24] The objection put forth by the Applicant mainly concerns paragraph 9 of the July 10th, 2016 affidavit of Mr. O'Neill. Mr. Mitchell says acting as counsel does not give Mr. O'Neill personal knowledge of the Respondents affairs. It is not enough says Northeast for Mr. O'Neill to have personal knowledge, the affidavit says nothing about him having a personal belief.

[25] I refer to *Rule 39.08* dealing with the form of as affidavit. My reading of *Rule 39.08(2)(b)* is that a witness must describe the relationship to the proceedings, and swear or affirm that it contains information based on personal knowledge. In my view if there is personal knowledge, there is no need for a personal belief. That would apply to hearsay, with a statement of the source and the witness's belief in the information.

[26] In my view there is substantial prejudice to the Respondents in admitting the affidavit, for reasons I have outlined. Not admitting Mr. Mitchell's affidavit could be fatal to the Applicant in terms of the motion.

[27] That said it would be hard to imagine a more obvious case for excluding it.

[28] Both solicitors have filed affidavits in support of their clients' positions. While that may not be the preferred practice, much of the relevant evidence is procedural, relating to what steps have been carried out in the proceeding.

[29] In addition the *Rules* contemplate hearsay evidence being admitted in matters that are largely procedural. (*Rule 22.15(2)(c);*see *also* ***Milburn Growth Works Canadian Fund Ltd.****, 2011 NSSC 346).*

[30] I am going to admit the affidavits filed by both parties and assess the respective weight I will assign to them. This is consistent with my preliminary ruling on the O'Neill affidavits made at the hearing. Given the seriousness of the motion I'm going to allow the Applicant's brief as well.

[31] Mr. O'Neill provided the requisite notice to admit the October affidavit from the previous motion, in accordance with the deadline for affidavits. Mr. O'Neill had no objection to the affidavit of Angela Power, though no notice was given.

Position of the Parties

The Applicant Northeast's Position

[32] The Applicant's brief states at page 7:

> In this case it is submitted on its face:
>
> 1. The commencement of the Application was warranted by the circumstances discovered by the Applicant;
>
> 2. There is ample evidence to support the grounds pleaded in the Application;
>
> 3. There is no indication that the application was commenced or is continued for an improper or collateral purpose amounting to an abuse of the court process;

4. The fact and content of the examination in aid of execution (if permission is granted to refer to it) was expected to be and was relevant to this Application;

5. The proceeding continues to be well within the statutory time limit to bring an application for oppression under Schedule III of the Companies Act;

6. The Respondents have avoided pleading to the grounds alleged in the Notice or contesting them beyond stating a ground of contest akin to a general denial;

This proceeding is accompanied by the continuing and active enforcement proceeding in the parallel action, in which the Respondents have most recently participated by making their response on July 27, 2016. This includes discovery and disclosure of evidence directly material in this proceeding.

The Respondents' Position

[33] In their Brief of October 22, 2015 the Respondents outlined their position at page 11:

> The Respondents further submit that Northeast did nothing from April 23rd,2015 onward and said nothing until September 11th. Northeast's failure to prosecute its case in a timely and diligent manner and within the agreed time frame, unfairly exposes the Respondents to the old adage that "time is not their friend". Memories deteriorate with the passage of time. No discoveries have been held.
>
> … On April 23rd, 2015, Northeast agreed to prosecute its case in accordance the Directions timelines and general Rules. Northeast has done neither. Northeast's conduct has prejudiced the Respondents. The Respondents repeat the foregoing and refer the Court to the failure to comply provision of *Rule 5.21*.

[34] In their Brief on the present motion filed in July, 2016, the Respondents submit in short at page 19:

1. That more than 15 months have passed since Northeast filed its claim;

2. That almost eight months have passed since Northeast was granted an adjournment and agreed to new filing and discovery timelines;

3. The parties are less three months away from a two day complex chambers hearing; and

4. The parties have only exchanged their Affidavits of Documents.

Analysis and Discussion of issues on Motion

[35] In his oral submission Mr. Mitchell advanced a number of arguments in support of Northeast's position.

[36] In his submission Mr. Mitchell states this is not "parked" litigation, so called. The main thrust of his affidavit pertains to the so called debt action which is a related action. In that action Northeast obtained summary judgment against G.A. Turner Plumbing and Heating Ltd. in Halifax No. 436323.

[37] Relying on paragraphs 10 – 13 and paragraph 17 of the Mitchell affidavit, and the Affidavit of Angela Power, (Exhibit "G"), Northeast argues that contrary to the Respondent's position, the two matters are not separate, but closely related.

[38] The crux of this argument involves an examination in aid of execution, held on January 15, 2016. There were undertakings in relation to that examination which were just received states Mr. Mitchell, "out of the blue". Applicant's counsel stated for the record that these undertakings may be subject to an undertaking of confidentiality.

[39] At any rate, Ms. Power's affidavit speaks to an important aspect of Northeast's position on this motion. That there have been unsuccessful attempts to secure financial records and production of documents. They were being withheld by the accountant who claimed a lien for fees, etc., on them. Northeast makes the point it has been diligent in an attempt to gain access to those documents. Northeast submits these records contain significant evidence related to the oppression allegations.

[40] At the same time Northeast submits this matter is in its infancy, admitting that all that has occurred has been an exchange of documents.

[41] Northeast further argues that an Application in Court is a flexible vehicle, referring to *Rules* such as *5.11; 5.13*; and *5.15*. There is the ability for the Court to set subsequent dates and motions.

[42] Northeast says the law permits allegations of the type contained in the Notice of Application to be made in the next year or four months. This it submits is the remaining limitation period of 3 years under the 3rd schedule of the *Companies Act*.

[43] This is not a circumstance, argues Northeast where an abuse of process claim could exterminate a claim brought within a valid time, especially given that the Respondent's Notice of Contest consists of only a general denial.

[44] The Applicant advances further arguments. Without detailing all of them, the Applicant states that Northeast was focused on the undertakings, in aid of execution in the related action.

[45] Among other things Northeast submits there is a supervisory process which the Court has under *Rule 5.13*, Motion for Directions. In addition, Northeast suggests it was not appropriate for the Respondents to sit back and not "exercise access" under *Rule 5*.

[46] The Respondents state, this is not their application. On this application they submit Northeast has "parked the car" and they have not "continued to drive". Once the Application is made, the *Rules* are in play, say the Respondents.

[47] The Respondent submit, that once a party "signs on to dates, they take priority". In this case they argue that quite clearly, Northeast is not participating in its own litigation.

[48] The Respondents submit this is clearly evidenced by the fact that there is no affidavit evidence, no brief, no motion on the Application itself, but yet the hearing dates remain.

[49] The Respondents rely on the case of ***Giffin v. Soontiens***, 2012 NSSC 354, where Moir, J. stated at paragraph 9 as follows:

> [9] The invitation to consider a full indemnity is grounded in the fundamental legislative purposes underlying the shareholder oppression cause. An extraordinary remedy was legislated in order to protect minority shareholders form unfair conduct. The legislation calls for an application, not an action and a trial. **It intends a quick proceeding. When the trial route becomes necessary, the delay and expense could undermine the legislative purpose.** (Emphasis added)

[50] The Respondents state the *Rules* provide that Applications are meant to go forward quickly. They say the Applicants here have not moved at all.

[51] The Respondents submit that Moir, J. did not have occasion to refer to the "flexibility" built into the *Application Rule* itself, as it was a cost decision. The

application was filed as matters were continuing to develop, for example. The application was brought quickly. *Rule 5* is a new mechanism described to manage these kinds of proceedings.

[52] Critical to the Applicant's position is that the two proceedings are related. The Respondents state they are separate proceedings. It is apparent that paragraph 16 of the Amended Application is an important allegation, referring to conduct and steps yet unknown that "represents an attempt to evade payment of the debt to the Applicant".

[53] The debt action is referred to in the grounds for the application at paragraphs 9, 12, 15. Notably, Northeast seeks an Order for Compensation and Damages in the amount of $189,696.83. This is the same amount as the Summary Judgment obtained at G. A. Turner Plumbing and Heating Ltd.

[54] I have considered the submissions of both counsel and have weighed and considered the evidence.

Reasons for Decision - Motion to dismiss for Abuse of Process – *Rule 88*

[55] The Application in Court is a process which allows for flexibility and a timely hearing of the issues. As compared to an action, the Application process is designed to be heard in a matter of months.

[56] The Respondents chose the application process.

[57] There have been two motions for directions in this matter, whereby dates for hearing were set.

[58] The first motion was heard before Justice Hood on April 23, 2015 who set forth the steps to be followed by the parties, leading up to the hearing date, which was set for 2 full days on September 16 and 17, 2015.

[59] The deadlines set for completion by Justice Hood were as follows:

> (i) Hearing Dates assigned: Two day Complex Chambers Hearing - **September 16 and 17, 2015.**
>
> (ii) Filing timelines and deadlines:
>
> - Mr. Mitchell to file Amended Application right away (for Newco and spelling of Shroder)

- Mr. O'Neill to file Notice of Contest within two weeks of Mr. Mitchell filing Amended Notice.

- Conflicts issue to be resolved by May 22, 2015

- Production and exchange of documents to be completed by June 12, 2015

- All Affidavits are to be filed by July 31, 2015

- Applicant's Brief to be filed by August 19, 2015

- Respondents' Brief(s) to be filed by September 2, 2015

- Reply Brief, if any, to be filed by September 9, 2015

[60] The Respondents subsequently sought dismissal of the Application on October 29, 2015. Justice Robertson granted an adjournment and assessed costs against the Applicant in the amount of $2,000.00.

[61] On January 25, 2016 Justice Robertson issued a second order for directions setting new dates to be complied with and new hearing dates, as follows:

(i) Hearing Dates Assigned - Two Day Complex Chambers Hearing- **September 27 and 28, 2016.**

(ii) Filing Timelines and Deadlines:

- Exchange of documents to be completed by February 29, 2016

- Discovery Examinations to be completed by April 29, 2016

- Applicant's Affidavit(s) to be filed by May 16, 2016

- Respondent's Affidavit(s) to be filed by May 30, 2016

- Applicant's Brief to be filed by June 30, 2016

- Respondent's Brief to be filed by July 29, 2016

- Reply Brief, if any, to be filed by August 15, 2016

[62] Of the second set of dates contained in the order, the Respondents submit the only thing that has been completed is an exchange of documents. They say

none of the other steps have been complied with. I refer to the following paragraphs in Mr. O'Neill's affidavit of October 22, 2015 and of July 13, 2016:

> (6) That as of date, the Applicant has not provided the Respondents with its Affidavits of Documents, Affidavits, or Hearing briefs or requested discovery dates.
>
> (7) As of date, the Applicant has not provided the Respondents with its Affidavits or Hearing Brief of made any request for discovery dates.

[63] Twice hearing dates have been set, with directions given. On each occasion there has been default by the Applicant of the directions given. No evidence has yet been produced from the Applicant by way of Affidavit.

[64] The new hearing dates of September 27 and 28, 2016 are very near. It appears to be a foregone conclusion that the second set of hearing dates will not proceed, requiring for a third time, that new dates be set, for a hearing which will be many more months down the road.

[65] There is little reason to think future dates will be met and further directions followed, given the past history of this application. It has now been 15 months since the application was originally filed.

[66] The evidence of what has been completed is essentially uncontradicted. The only process completed has been an exchange of affidavits. This is not what the *Rules* contemplated for applications. For example, *Rule 6.02(5)(a)* states:

> On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> (b) the parties can be ready to be heard in months, rather than years;

[67] The Applicant's counsel cites a general state of being very busy as the reason for such delay on this motion. The Respondents' counsel states this mimics the state of the Application itself.

[68] The Applicant submits that it has spent considerable time collecting on a judgment against the Respondent company in a related proceeding. In particular, the Applicant points to an examination in aid of execution. Northeast argues it had been awaiting undertakings in that proceeding to be completed by the Respondents.

[69] Northeast states these completed undertakings have now appeared, "out of the blue". By this the Applicant suggests that the Respondents completed the undertakings to place the motion for dismissal, in a favourable light.

[70] The Applicant took further issue with paragraph 9 of Mr. O'Neill's affidavit. Northeast submits that referring to the employment status of the individual Respondents, creates the impression that there is no merit to the oppression.

[71] Northeast also took particular issue with the Respondents brief and the two paragraphs at the end of page 15. His argument is there is no evidence to support these statements.

[72] In regard to the matters (paragraph 9, page 15) I can state that neither factor weighed heavily in my decision on the motion. Nor did the fact that the two actions are related. While they may be related they are still separate proceedings, one being for an action which has resulted in a judgment. The other being an application which has not.

[73] While the proceedings may be related, I know of no authority that allows one to remain at a standstill, because the parties are focused on the other proceeding. *Rule 5.13(2)(n)* allows a court to give "any other directions needed". The Applicant did not seek further directions.

[74] The fact that Northeast admits to this action being in its infancy, after 15 months is telling. Northeast further admits to only having exchanged documents.

[75] On the evidence before me I find there has been an egregious breach of the *Rules* by the Applicant. Little more need be said but that twice dates have been set and the directions have not been complied with. Even the cost award issued previously by Justice Robertson has not been paid.

[76] *Rule 1.01* calls for the just, speedy and inexpensive determination of every proceeding.

[77] I refer to the case of ***Toronto City v. Canadian Union of Public Employees***, 2003 SCC 63, where the court stated:

> 37…The doctrine of abuse of process engages the inherent power of the court to prevent misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it would in some other way bring the administration of justice into disrepute. **It is a flexible doctrine unencumbered by the specific**

> **concepts such as estoppel.** (See House of Spring Gardens Ltd.v. Waite, 1990 3 W.W.R. 347) (Emphasis added)

[78] I find the actions, or more to the point, the inaction of the Applicant, amounts to an abuse of the Court's process. I do not think it is prudent or fair to expect the Respondents or the Court to be subjected to more of the same.

[79] The reasons given for such inaction and delay are in my view not acceptable. They do not justify or minimize what I find to be an abuse of process, pursuant to *Rule 88*. *Rule 88.01(2)* recognizes that it should not limit the kinds of conduct that amount to abuse. *Rule 88.02 (a)* provides that an order for dismissal may result.

[80] *Rule 5.21(a)* also provides a remedy for dismissal of an application for failure to comply with a judge's directions, if the Applicant causes prejudice. The Respondents cited this *Rule* in support of the motion.

[81] I am cognizant that dismissing a proceeding for abuse of process is an extreme remedy reserved for cases where it is necessary to maintain the integrity of the judicial system, and rarely granted. (***Ocean v. Economical Mutual Insurance Company***, 2013 NSSC 14)

[82] I am further aware that it is also available against litigants who passively render the judicial process a futile effort. I find that to be the case here. (***Bridges v. Dominion Canada***, 2012 NSSC 169)

[83] On the whole of the evidence I am satisfied there has been an abuse of process. As a result, the Application in Court filed by Northeast Equipment Ltd. is hereby dismissed with costs. I shall hear the parties further on the matter of costs within twenty (20) days from this decision.

[84] Order accordingly.

Murray, J.