1989 S.H. No. 71106

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

MURRANT BROWN, a Registered Partnership

Plaintiff

- and -

VALLEY PONTIAC BUICK INCORPORATED,
a body corporate,

Defendant

HEARD: At Halifax, Nova Scotia, before the Honourable Mr. Justice David W. Gruchy, in Chambers, on December 20, 1990

DECISION: January 7, 1991

COUNSEL: Mr. Robert Murrant, Q.C., Solicitor for the Plaintiff

Mr. John Kulik, Solicitor for the Defendant

1989 S.H. No. 71106

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

MURRANT BROWN, a Registered Partnership

Plaintiff

- and -

VALLEY PONTIAC BUICK INCORPORATED,
a body corporate,

Defendant

GRUCHY, J.

This is an application by the Plaintiff to strike out certain paragraphs in the statement of defence filed herein, pursuant to Civil Procedure Rule 14.25(1)(b) and (c). The notice of application was dated December 14, 1990, and was heard in Chambers on December 20, 1990. At that time I reserved decision.

The action was commenced on December 29, 1989, and, essentially, sets out that the law firms of Boyne Clarke and later, Murrant Brown, did legal work for the defendant for which an account was presented to the defendant in the amount of Fifty-Eight Thousand Three Hundred and Sixty Dollars and Fourteen Cents ($58,360.14). The claim is for the balance outstanding of that account in the amount of Thirteen Thousand Ninety-Five Dollars and Thirty-Four Cents ($13,095.34). The account had not been taxed by the Taxing Master at the time of the commencement of the action. The file discloses that it was

subsequently taxed, but apparently a difficulty exists with respect to the result of the taxation as is evidenced by other proceedings within the file.

I will briefly review the various pleadings and proceedings of the file:

1. Originating Notice and Statement of Claim dated January 2, 1990;

2. Defence dated January 12, 1990 and filed January 17, 1990;

3. Application for Summary Judgment pursuant to Civil Procedure Rule 13.01 dated January 19, 1990, and filed January 22, 1990. There are various affidavits and counter-affidavits filed with respect to that application which was apparently heard on Thursday, February 1, 1990, and which application was unsuccessful.

4. A further Originating Notice (Application Inter Partes) was dated and issued May 28, 1990, naming Arthur E. Hare, Q.C., as the defendant. The application was for an order in the nature of mandamus, under Rule 56, to compel Mr. Hare, who is a Taxing Master, to issue a decision in the taxation of the plaintiff's account, which account includes services rendered for the subject matter of this action. That application was supported by the affidavit of Mr. Robert Murrant and although there is no decision, it would appear that following notice of the application, Mr. Hare completed the taxation of costs and filed a completed bill of costs.

5. On October 15, 1990, the application for summary judgment, set forth in No. 3 above, was again placed on the Chambers docket, initially for October 18, 1990, which was subsequently changed to October 24, 1990. Further affidavits and memoranda

were submitted to the Chambers Judge and on october 24 Mr. Justice Goodfellow dismissed the application for summary judgment with costs in the cause.

As noted above, this application was commenced by interlocutory notice (application inter partes) dated December 14, 1990. While no affidavits were filed with respect to this application, the notice does refer to the affidavits of James S. Landry and Robert Murrant, Q.C., previously filed.

The points of contention in this application are found in paragraphs 3, 4, 6, 7, 8 and 9 of the statement of defence. Those paragraphs are as follows:

> "3. With respect to the allegation in paragraph 3 of the Plaintiff's Statement of Claim the Defendant says that it received an opinion from the law firm of Boyne Clarke and on the basis of that opinion decided to retain Boyne Clarke to provide legal services relating to a claim against the Canadian Imperial Bank of Commerce (referred to below as 'the Bank'). The opinion and advice received by the Defendant from Boyne Clarke did not contain any reference to any novel or unusual nature, feature or aspect of the claim against the Bank nor that fees for legal services could be unduly expensive as a result.
>
> 4. After the transfer of the file of the Defendant's claim against the Bank from Boyne Clarke to the Plaintiff referred to in paragraph 4 of the Statement of Claim, the Plaintiff never advised, informed or made the Defendant aware of any novel or unusual feature or aspect of the claim by the Defendant against the Bank that could result in unduly expensive fees for legal services.
>
> 6. The Defendant says that the Plaintiff appropriated to itself and Boyne Clarke $33,399.74 recovered by the Defendant in the successful action against the Bank, in partial satisfaction of the fee for legal services provided without the knowledge of Desjardins, prior to the rendering of an account and at a time when Landry was negotiating a sale of the dealership to Desjardins.
>
> 7. The Defendant says that it was never properly advised or made aware of the full extent of the legal cost or

potential legal cost of pursuing the claim against the Bank.

8. Additionally the Defendant was never properly advised, made aware of or understood that the potential cost in bringing an action against the Bank could exceed the recovery if the action were successful.

9. The Defendant maintains that it was led to believe by the Plaintiff and understood that the legal fees outstanding at the time of the acquisition of the shares of the dealership by DesJardins Inc. could be written down prior to and to facilitate the closing of that share acquisition and that, in any case, the legal fees outstanding would be written down to the amount recovered by the Defendant in its successful action against the Bank."

The application is made to strike those paragraphs pursuant to Rule 14.25(1)(b) and (c). That Rule reads:

"14.25. (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

"(a) it discloses no reasonable cause of action or defence;

(b) it is false, scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the proceeding;

(d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

(2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a)."

The function of a Chambers' Judge in an application of this nature is aptly described in **The Supreme Court Practice**, 1988, p.312, as follows:

"This Rule constitutes a wide and general provision both useful and necessary to enforce the rules of pleading. It empowers the Court...

(2) to strike out any pleading or indorsement or any matter contained therein which does not conform with the overriding rule that a pleading must contain only material facts to support a party's claim or defence, and must not therefore be, or contain any matter which is, scandalous, frivolous or vexatious or which may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the Court.

Not every pleading which offends against the rules will be struck out. The applicant must show that he is in some way prejudiced by the irregularity. Still, 'the defendant may claim ex debito justitiae to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it'."

Rule 14.25 was considered by the Appeal Division of this Court in **Curry v. Dargie** (1984), 62 N.S.R. (2d) 416 as follows:

"The law is quite clear that the summary procedure under Rule 14.25 can only be adopted where the claim is, on the face of it, absolutely unsustainable. Thus, if it is clear beyond any doubt that an action cannot possibly succeed there is no reason for refusing to strike out the statement of claim. The mere fact, however, that the plaintiff appears unlikely to succeed at trial is no ground for striking out the statement of claim."

For the purposes of this particular application, I am not restricted to considering the pleadings, but may regard affidavit evidence.

I will examine in the context of the affidavit evidence before me the specific allegation in the defence of which the plaintiff complains.

Paragraph 3

Paragraph 3 of the defence contains two allegations which appear to be in issue:

(a) "The opinion and advice received by the defendant from Boyne Clarke did not contain any reference to any novel or unusual nature, feature or aspect of the claim against the Bank..."

Mr. Jacques Desjardins' affidavit attaches a copy of a letter from Boyne Clarke dated November 18, 1985, addressed to Mr. James S. Landry of Jim Landry Pontiac Buick Limited with a copy being forwarded to Mr. Desjardins. The specific allegation of this paragraph and the defence is not mentioned in Mr. Desjardins' affidavit. There are a number of references to various claims within that letter and I set them forth as follows:

> "If however, it is the Bank's intention that this credit be tendered as full and final settlement of all of your company's outstanding claims against it, it is our opinion that this offer should be refused as we feel that a cause of action exists against the Bank for its failure to provide your company with adequate notice of its intention to call your loans when they were not in default."

The letter then deals with certain reported cases on the subject of "bad faith" claims against banks, but at no time indicates that such a claim against a bank has any novel or unusual nature, feature or aspect. The letter then compares the claim against the bank with a "bad faith" claim against the Home Insurance Company of Canada and concludes, in part, that "it is our opinion that this matter (the claim against Home Insurance) is somewhat more tenuous".

(b) "The opinion and advice received by the Defendant from Boyne Clarke did not contain any reference to (the fact that)....that fees for legal services could be unduly expensive as a result."

In fact, the only reference to the matter of fees for the bad faith claim against the bank is found in the following paragraph of the letter:

> "Our firm would be prepared to continue this action and to defer the payment of our account until such time as the court has rendered its decision in the matter. Our fee for the prosecution of this action would be based upon our normal hourly rates. In addition, your company would be responsible for any disbursements relating to the action."

With respect to the allegations complained of in paragraph 3 of the statement of defence, therefore, there is clearly an issue between the parties and, accordingly, the paragraph will not be struck.

Paragraph 6

Paragraph 6 of the defence alleges that the plaintiff "...appropriated to itself and Boyne Clarke $33,399.74 recovered by the Defendant in the successful action against the Bank...without the knowledge of Desjardins, prior to the rendering of an account and at a time when Landry was negotiating a sale of the dealership to Desjardins". The phrase "appropriated to itself" has a pejorative implication, suggestive of misappropriation. There is no suggestion within any of the pleadings, affidavits or memoranda that the plaintiff took that sum of money without giving full credit to the defendant or misappropriating the funds in any way. Additionally, the "knowledge of Desjardins" is irrelevant to the issues between the parties. The knowledge of Desjardins could be imputed to the defendant, but the lack of knowledge of Desjardins is not determinative, nor is the fact that the account was rendered at a time when Landry was negotiating a sale of the dealership to Desjardins. These facts may be relevant in another context, but not within the context of this action. This particular

paragraph shall be amended to show that the plaintiff and/or Boyne Clarke recovered the sum of $33,399.74 and applied same against legal fees and costs.

Paragraph 7

Paragraph 7 of the defence alleges that the defendant "...was never properly advised or made aware of the full extent of the legal cost or potential legal cost of pursuing the claim against the Bank". There is clearly a disagreement between Mr. Desjardins and Mr. Landry on this subject. Their respective affidavits are diametrically opposed to one another in this regard. Accordingly, there is an issue between the parties. It is not my function to make a decision with respect to the two sets of allegations and, accordingly, this allegation is not struck.

Paragraph 8

Paragraph 8 of the defence is similar to that of paragraph 7 and for the same reason that allegation is not struck.

Paragraph 9

Paragraph 9 of the defence raises the matter of certain negotiations which occurred between the plaintiff and defendant concerning the reduction of fees. Again, there is a direct disagreement between the evidence of Mr. Landry in his affidavit and that of Mr. Desjardins. It is an issue which should be determined by trial as opposed to an interlocutory application and, accordingly, I will not strike that paragraph of the defence.

As the plaintiff's success in this application is minimal, I award costs of this application to the defendant

in any event.

Gruchy, J.

Halifax, Nova Scotia
January 7, 1991

1989 S.H. No. 71106

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

MURRANT BROWN

Plaintiff

- and -

VALLEY PONTIAC BUICK INCORPORATED

Defendant

D E C I S I O N

GRUCHY, J.

CASE NO. **VOL. NO.** **PAGE**

PRENOR TRUST COMPANY OF CANADA v. S.B. GUPTA INVESTMENTS LIMITED and SHAM B. GUPTA

1990 S.H. No. 74308 GRUCHY, J.

HEARD: December 20, 1990

DECISION: January 7, 1991

WRITTEN RELEASE OF ORAL: N/A

SUBJECT: Practice
Application for Summary Judgment-CPR 13
Application for leave to amend defence - CPR 14

SUMMARY: Plaintiff applied for summary judgment in foreclosure action. Plaintiff had supplied details of default pursuant to Demand for Particulars and on this application. Defendants failed to discharge burden, no matter how slight, in response to application. Defence was defective, not complying with CPR.14, in that no facts were alleged to support defence. Amendments to defence were similarly defective. Affidavit in support of application to amend defence was also defective.