1988 S. H. No. 63367

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

XEROX CANADA INC.

Plaintiff

- and -

L & R EQUITIES LIMITED

Defendant

HEARD: at Halifax, Nova Scotia before the Honourable Mr. Justice John M. Davison, in Chambers on Tuesday, April 12th, 1988

DECISION: May 10, 1988

COUNSEL: Mr. Tim Hill, Esq., for the Plaintiff
Mr. Charles Lienaux, Esq., for the Defendent

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DAVISON, J.:

This is an application for summary judgment pursuant to the terms of Civil Procedure Rule 13.01 which reads as follows:

> **Where a defendant has filed a defence or appeared on a hearing under an originating notice, the plaintiff may, on the ground that the defendant has no defence to a claim in the originating notice or a part thereof except to the amount of any damages claimed, apply to the court for judgment against the defendant.**

By an Originating Notice and Statement of Claim issued the 8th day of February, 1988, Xerox (the Plaintiff) claimed from L & R Equities Limited (the Defendant) the sum of $8,473.20 in respect of monies due under a contract to lease a photocopier and a Memorywriter typewriter. In support of

the application, the Plaintiff submitted the Affidavit of Andre Gagnon, the Credit Manager of the Plaintiff, to which was attached as an exhibit the contract between the parties. The relevant terms of the contract, as it related to remedies available to the parties, were:

> **DEFAULT**
>
> **The following constitute Events of Default under this Agreement:**
>
> **(a) Failure of Customer to pay any amount due under this Agreement;**
>
> **...**
>
> **Upon occurrence of any of the Event of Default Xerox shall be entitled to:**
>
> **(a) recover amounts due under this Agreement and unpaid;**
>
> **...**
>
> **(d) consider the Agreement repudiated and after giving Customer written notice of such, to recover as liquidated damages an amount equal to ...**

There followed a formula for calculating the liquidated damages.

On the 25th day of February, 1988, the Defendant filed a document entitled "DEFENCE and CLAIM AGAINST THIRD PARTY" which was attached to an Originating Notice (Third Party). Under Civil Procedure Rule 17, a Third Party proceeding is to be in Form 17.02(a) which is an Originating Notice (Third Party) to which there is attached two schedules - the Plaintiff's Statement of Claim is Schedule "A" and the Statement of Claim of the Defendant against the Third Party is Schedule "B". The

Defence of the Defendant to the claim of the Plaintiff is a separate document and does not form part of the Third Party proceedings.

I will deal with this application on the same basis as if the Defence had been filed as a separate document. In that respect, the only portion of the "DEFENCE AND CLAIM AGAINST THE THIRD PARTY" which could be attributed to the Defence relates to admissions as to particulars of incorporation of the parties and a general denial with respect to the balance of the Statement of Claim which deals with the cause of action and remedies of the Plaintiff against the Defendant. The remainder of the "DEFENCE AND CLAIM AGAINST THE THIRD PARTY" relates to alleged negligent misrepresentations made by the Third Party, John D. Conn, a land surveyor, and the claim against the Third Party is founded in negligence. On the 25th day of February, 1988, the Defendant filed an "AMENDED DEFENCE and CLAIM AGAINST THIRD PARTY" with the additions being refinements of its claims against the Third Party and are immaterial in the consideration of the matter before me.

On the 29th day of March, 1988, the solicitor for the Defendant filed a Notice of Discontinuance which stipulated that "the proceeding commenced in this matter by the Defendant against the Third Party is hereby discontinued". At this point, the only pleading which could be said to be on record on behalf

of the Defendant was a general denial of the claim of the Plaintiff.

In responding to the application, the solicitor for the Defendant, Charles D. Lienaux, filed an Affidavit wherein he deposed that he was corporate counsel to the Defendant and that between November of 1986 and June of 1987 the Defendant was engaged in a dispute with the City of Halifax with respect to the issuance of development and building permits on lands in the south end of Halifax and that while delays were being experienced with respect to this matter, the accounts of the Defendant were placed in abeyance. Lienaux went on to attest that in or about May of 1987, the demand for payment made by Xerox was placed in his hands for determination and that he reviewed the case of **Burry v. Centennial Properties Limited (1979), 38 N.S.R. (2d) 450** and advised L & R that it was entitled to withhold payment of the account and to claim indemnity against the surveyor who caused the delays based on a claim of negligent misrepresentation. The passage in the judgment on which Mr. Lienaux based his opinion to his client was that which appears at page 466 and reads as follows:

> **All the defendant must show is that the plaintiff is claiming against him something for which the third party is liable to the defendant and it then becomes convenient to have the common issues tried at the same time unless good reason is shown by one of the parties to convince the Court that it would be unfair to have a joint trial of the two causes.**

It should be noted that at this point in its judgment, the court was addressing the submission that Civil Procedure Rule 17.02 should be confined to actions for contribution or indemnity.

Mr. Lienaux's Affidavit goes on to state that he advised the Defendant to withhold payment of the Plaintiff's account pending resolution of the issue with the surveyor and that subsequent to this opinion the Plaintiff commenced this action. Mr. Lienaux goes on to say that a solicitor was retained on behalf of the surveyor and that that solicitor convinced him that his Third Party proceedings were inappropriate and that the two matters in dispute did not arise from the same factual circumstances. As a result, Mr. Lienaux filed the Notice of Discontinuance.

Mr. Lienaux's Affidavit goes on to dispute the amount of the claim that is being advanced and suggest that some of the figures are duplicitous in that compensation for the typewriter rental was also included in the rental for the copier.

To grant the Order requested, I must be satisfied that there is no fairly arguable point to be argued on behalf of the Defendant: **Carl B. Potter Ltd. v. Antil Canada Ltd (1976), 15 N.S.R. (2d) 408 (C.A.)**. There is an onus upon the Defendant to disclose the nature of its defence and facts which

indicate a bona fide defence. There is no information in the Defence in this action to suggest that there is a bona fide defence or any fairly arguable point. The Defence is only a denial of the allegation set out in the Statement of Claim.

As I understand the Defendant's submission, it is alleging that it did not have any intention of repudiating the contract but relied on legal advice to the effect that it could withhold payment and continue prosecution of Third Party proceedings. The Defendant says that because it did not intend to repudiate, it did not elect to treat the claim of the Plaintiff as rescinding the contract. The Defendant refers to **Arsenault and Arsenault v. Mont (1980), 34 N.S.R.** 51 and the several references therein by Glube, J. (as she then was) to passages from Cheshire and Fifoot's Law of Contracts, (8th ed), including the following passages at 563 and 568:

> **A BREACH of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in two types of case.**
>
> **Firstly, where the party in default has repudiated the contract before performance is due or before it has been fully performed.**
>
> **Secondly, where the party in default has committed what in modern judicial parlance is called a fundamental breach. A breach is of this nature if, having**

> regard to the contract as a whole, the promise that has been violated is of major as distinct from minor importance.

Further at page 568:

> It must be observed that, even if one of the parties wrongfully repudiates all further liability or has been guilty of a fundamental breach, the contract will not automatically come to an end. Since its termination is the converse of its creation, principle demands that it should not be recognized unless this is what both parties intend. The familiar test of offer and acceptance serves to determine their common intention. Where A and B are parties to an executory contract and A indicates that he is no longer able or willing to perform his outstanding obligations, he in effect makes an offer to B that the contract shall be discharged. Therefore B is presented with an option. He may either refuse or accept the offer. More precisely, he may either affirm the contract by treating it as still in force, or on the other hand he may treat it as finally and conclusively discharged. The consequences vary according to the choice that the he prefers. (Emphasis added)
>
> If the innocent party chooses the first option and, with full knowledge of the facts, makes it clear by words or acts, or even by silence, that he refuses to accept the breach as a discharge of the contract, the effect is that the status quo ante is preserved intact. The contract "remains in being for the future on both sides. Each [party] has a right to sue for damages for past or future breaches."

The Defendant submits this authority for the proposition that it is for the trier of fact to determine whether

or not there has been a repudiation which goes to the root of the contract. With respect, the contract between the parties in this proceeding already defined what amounts to repudiation and the parties have already agreed as to what effect that repudiation has with respect to the continuance or termination of the contract. There has been nonpayment of monies due under the agreement and the parties agreed that that shall constitute an Event of Default. The parties also agreed that upon an Event of Default, the Plaintiff shall be entitled to recover monies due under the contract and consider the Agreement repudiated which, by the terms of the contract, permits recovery of liquidated damages.

In other words, the parties agreed in the contract that an Event of Default will be sufficient indication of the intention of the Defendant not to perform its side of the contract. The Defendant cannot be heard to say subsequently that it made a mistake or that he did not intend to repudiate the contract when all the ingredients of repudiation as defined in the contract exist.

There is nothing in the pleadings to substantiate that the Defendant has a fairly arguable point. The Affidavits filed only confirm my view that there is no defence to the claim for liquidated damages.

There does appear to be a legitimate dispute as to the quantum of damages. I will grant an Order by which judgment will be entered for the Plaintiff with damages to be assessed.

The Plaintiff shall have its costs of the application.

J.

Halifax, Nova Scotia
May 10, 1988