SUPREME COURT OF NOVA SCOTIA

Citation: *Trout Point Lodge Limited v. Automattic Inc.*, 2019 NSSC 317

Date: 20191025
Docket: 409679
Registry: Halifax

Between:

Trout Point Lodge Limited, Vaughn Perret, Charles Leary

Plaintiffs

v.

Automattic Inc., a Delaware Corporation

Defendant

Decision on Written Motion Concerning Late Affidavit Evidence

Judge:	The Honourable Justice Darlene Jamieson
Written Submissions:	August 26 and September 5, 2019, in Halifax, Nova Scotia
Counsel:	Ms. Laura Veniot and Mr. Ben Hoskins, for the Plaintiffs Ms. Nancy Rubin Q.C. and Ms. Sarah Walsh, for the Defendant

By the Court:

Overview

[1] During the hearing of the Motion for Summary Judgment on July 18, 2019, brought by the Defendant, Automattic Inc., it sought to adduce additional evidence in the form of a supplemental affidavit of Ms. Jenny Zhu (the "Zhu supplemental affidavit"). The Plaintiffs, Trout Point Lodge Limited, Vaughn Perret and Charles Leary, oppose the request to admit the late affidavit. Written submissions from both parties were filed in relation to this sole issue of whether the Court should allow the late filing of the affidavit in support of the Defendant's summary judgment motion.

[2] The request to file the supplemental affidavit is granted. In the circumstances of this matter, where there is no prejudice to the other party, where the evidence is relevant to the determination of an issue under Rule 13, where there has been an oversight, where there has not been undue delay caused by the requesting party, the interests of justice favour the Court admitting the late affidavit. The Plaintiffs will be provided with an opportunity to respond to the affidavit with evidence and additional written submissions, should they wish to do so.

Background

[3] Automattic Inc. ("Automattic") is a San Francisco-based Internet service provider and intermediary that hosts blog content on its servers located in the United States. It does not create blog content but provides the platform for others to create and post content.

[4] Trout Point Lodge Limited ("Trout Point") is a Nova Scotia corporation that, during the times in question, owned and operated a lodge near Yarmouth, Nova Scotia. Mr. Charles Leary and Mr. Vaughn Perret are the principals of the corporation. The assets and the Trout Point Lodge were sold on January 31, 2018. The company remains in existence and Mr. Leary and Mr. Perret are Trout Point's managing partners. The principals now reside in France.

[5] The Plaintiffs' pleading alleges various entries and content on a blog at www.slabbed.WordPress.com, owned by Douglas Handshoe, contained defamatory comments and included images in contravention of the Plaintiffs' copyright.

[6] The Plaintiffs claim various email exchanges between Mr. Leary and Automattic Inc. formed a binding contract whereby Automattic agreed to remove the disputed blog from its service. They further claim Automattic has breached this contract. The Plaintiffs also advance claims for breach of duty of honesty in contractual relations and bad faith, as well as promissory estoppel and an alternative claim in tort for fraudulent misrepresentation.

[7] Automattic seeks summary judgment in relation to all alleged claims except the claim in defamation. Automattic says the Zhu supplemental affidavit is relevant to the Plaintiffs' copyright claim for which it seeks summary judgment. Automattic says that, regardless of whether the law of the United States or Canadian copyright law applies, that on the facts in this matter the Plaintiffs' claim of copyright infringement fails and the Court need not make a determination as to choice of law. Automattic asserts, as the host, it has immunity for copyright infringement by blog creators under the legislation in both Canada and the United States.

[8] This matter has had a lengthy history. The Notice of Action and Statement of Claim in this matter was issued on November 28, 2012, against two defendants, Automattic and Douglas K. Handshoe. Contemporaneous with the present action, the Plaintiffs commenced an Application in court against Mr. Handshoe, filed on January 23, 2013, which resulted in a reported decision (***Trout Point Lodge Ltd. v. Handshoe,*** 2014 NSSC 62).

[9] The pleadings in the present matter have been amended a number of times. A motion by the Plaintiffs to amend their pleadings for a third time was heard in July of 2016. The motion decision was appealed and the Court of Appeal rendered its decision on June 14, 2017 (***Automattic Inc. v. Trout Point Lodge Ltd.***, 2017 NSCA 52). There was a Fourth Amended Statement of Claim filed on August 30, 2017 which is the current pleading. Automattic filed an Amended Notice and Statement of Defence in response on October 18, 2018. Automattic filed a further Amended Notice of Defence by consent on April 10, 2019.

Evidence on the Motion

[10] In support of the summary judgment motion, Automattic filed, in totality, the following: two affidavits of Ms. Jenny Zhu sworn December 28, 2018 and March 17, 2018, Policy and Legal Manager for Automattic; an affidavit of Ms. Holly Hogan, sworn July 18, 2017, Associate General Counsel for Automattic; and two Solicitor's affidavits of Ms. Sarah Walsh dated sworn January 3, 2019 and June 25, 2019.

[11] In response to the summary judgment motion, the Plaintiffs filed, in totality, the following: three affidavits of Mr. Vaughn Perret (an affidavit sworn March 7, 2019; an affidavit titled “third affidavit” sworn July 5, 2019; and an affidavit titled “supplemental affidavit” sworn July 5, 2019); and two affidavits of Mr. Charles Leary (an affidavit sworn on July 20, 2017 and one on September 18, 2017).

[12] The Motion for Summary Judgment was originally scheduled to be heard on March 19, 2019. On March 13, 2019, counsel for the Plaintiffs wrote to the Court seeking to file a surrebuttal affidavit in response to the filing of the second affidavit of Ms. Jenny Zhu by the Defendant (unsworn affidavit filed March 12, 2019, which was later sworn on March 17, 2019). The Defendant took the position that, without having an opportunity to review the proposed Plaintiffs’ surrebuttal affidavit, which had not been provided, and consider what, if any, response was required, it could not consent to the late filing. I advised the parties that given the importance of the summary judgment motion to the parties and the importance of the parties putting their best foot forward and the Plaintiffs’ position that the affidavit of Ms. Zhu raised “a very important point” that was previously unknown to the Plaintiffs and “may seriously prejudice the Plaintiffs,” I would allow the late affidavit to be filed. As a result, the matter was adjourned to July 18, 2019. An unsworn affidavit of Mr. Perret was filed by the Plaintiffs on March 20, 2019, being the “supplemental affidavit” eventually sworn on July 5, 2019 and referred to above. The Defendant filed a solicitor’s affidavit of Ms. Walsh on June 25, 2019.

[13] During the hearing of the motion, I raised questions concerning the adequacy of the evidence before the Court in relation to Automattic’s argument concerning section 31.1 of the Canadian *Copyright Act,* R.S.C., 1985 c C-42 and section 512 of the American *Digital Millennium Copyright Act,* 17 U.S.C. 512. As a result Automattic sought leave of the Court to file an additional affidavit regarding its argument concerning the copyright legislation. The affidavit addresses network services, system caching, hosting and terms of service information.

[14] The option of adjourning the motion, with Automattic covering the costs relating to the adjournment, was presented to the Plaintiffs. The Plaintiffs chose to continue with the hearing. It was agreed that Automattic would immediately provide a draft form of affidavit to the Plaintiffs and, if they opposed its late admission, written submissions would be presented to the Court. The draft Zhu supplemental affidavit was provided to Plaintiffs’ counsel on July 26, 2019. As the Plaintiffs objected to the filing of the affidavit, written submissions were filed by

both parties. The Zhu supplemental affidavit sworn on August 8, 2019, was filed with the Defendant's written submissions.

[15] The sole issue before me is whether the Zhu supplemental affidavit should be admitted into evidence in support of the Defendant's motion for summary judgment.

Positions of the Parties

[16] Automattic argues that it is in the interests of justice to allow the late affidavit. They say the Nova Scotia Court of Appeal has held that genuine oversights in evidence should rarely defeat a just cause in the admission of new evidence. They say the evidence is material and relevant to the summary judgment motion and that Automattic will be prejudiced if the affidavit is not admitted. They say, in order for the Defendant to put its best foot forward, the technical information as explained in the affidavit is important for the statutory requirements of both the American and Canadian copyright regimes. They say there is no prejudice to the Plaintiffs as they were offered an adjournment and any additional steps that may be required by the Plaintiffs to respond to the new evidence can be adequately compensated in costs. They say it is in keeping with the purpose of a just and speedy and inexpensive determination of the proceeding as set out in Rule 1.01. They say practically Automattic could re-file a summary judgment motion with the new affidavit which would result in wasting of resources and court time.

[17] Automattic refers to Rules 23.12 and 82.22 in support of its request to file the late affidavit. Civil Procedure Rule 23.12 states as follows:

> 23.12 (1) A party may only file an affidavit after a deadline in Rule 23.11 with the permission of a judge.
>
> (2) On a motion to permit a late affidavit, the judge must consider all of the following:
>
>> (a) the prejudice that would be caused to the party who offers the affidavit, if the motion proceeds without that affidavit;
>>
>> (b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice caused by an adjournment, if an adjournment would result;
>>
>> (c) the prejudice caused to the public if motions set by appointment are frequently adjourned when it is too late to make the best use of the time of counsel, the judge or court staff.

> (3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify any other party for expenses resulting from the filing, including expenses resulting from any adjournment.

[18] Civil Procedure Rule 82.22 states:

> 82.22 (1) A party to a proceeding concluded by final order may make a motion to vary the order only in one of the following circumstances:
>
> > (a) an error is to be corrected, or time extended, under Rule 78 - Order;
> >
> > (b) legislation permits the order to be varied;
> >
> > (c) the text of the order would have it apply in circumstances in which it is not intended to apply.
>
> (2) A party may make a motion for permission to present further evidence before a final order and after one of the following events:
>
> > (a) the party closes the party's case at trial;
> >
> > (b) the party chooses to present no evidence at trial;
> >
> > (c) a jury begins deliberation or a judge reserves decision.
>
> (3) A party may make a motion to re-open the trial or hearing of a proceeding concluded by final order only in the limited circumstances in which the re-opening is permitted by law.

[19] The Plaintiffs say the request to adduce further evidence should be denied. They say both parties had closed their cases and proceeded to oral argument and that it was only during oral argument that the issue of insufficient evidence arose. They say it would be highly unusual for a party to be permitted to adduce new evidence after the closing of its case. They say this is especially true in a summary judgment motion where both parties are expected to put their best foot forward. They say this is not a case where the facts changed since the Defendant closed its case, nor is it a situation where the new evidence sought to be adduced could not have been known to the Defendant through reasonable diligence. They say the matter has been ongoing since 2012 and the Defendant's request to adduce new evidence after the closing of its case represents another unnecessary delay.

[20] The Plaintiffs further say that Rule 23.12 does not apply in the circumstances. They say that the Rule is to allow for affidavits that are late and submitted after the deadlines in Rule 23.11. They say there does not appear to be

any Civil Procedure Rule that would allow a party to adduce further evidence on a summary judgment motion, after oral argument has commenced. The Plaintiffs further say the Defendant will not be prejudiced by not being permitted to adduce another affidavit, as it speaks to the same issues. The Plaintiffs say that allowing the affidavit into evidence at this point in the proceeding would cause prejudice to the public, as the public expects a party seeking such a serious judgment to put their best foot forward in time for the hearing. The Plaintiffs say the Defendant's position that it will simply bring another motion for summary judgment with this additional affidavit would be a clear abuse of process.

Law and Analysis

[21] Civil Procedure Rule 13 governs motions for summary judgment. A motion for summary judgment can result in the dismissal of a claim or of a defence in its entirety or of a portion or portions of a claim or defence. It is a mechanism available to litigants who are able to meet the Rule 13.04 test (***Shannex Inc. v. Dora Construction Ltd.,*** 2016 NSCA 89) which poses five sequential questions and thereby, avoid the necessity of a trial of a claim or of a defence that has no prospect of success. Where summary judgment is appropriate, the considerable costs of a trial of the claim or defence are saved, as are court resources. While dealing with a very different Ontario *Rule of Civil Procedure*, the Supreme Court of Canada said that summary judgment rules should be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. Justice Karakatsanis, for the unanimous Court, said in ***Hryniak v. Mauldin***, 2014 SCC 7:

> 1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. <u>Trials have become increasingly expensive and protracted.</u> Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> 2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. <u>This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.</u> The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> 3 <u>Summary judgment motions provide one such opportunity</u>…
>
> …

> 5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.
>
> [Emphasis added]

[22] It is in this context that I approach Rule 13. Rule 13.04(6) addresses the issue of new evidence sought to be adduced in a summary judgment motion. Neither party addressed Rule 13.04(6) in their submissions. The Rule states:

> 13.04 (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.
>
> [Emphasis added]

[23] Rule 13.04(6) makes it clear that it is within the Court's discretion, on the hearing of the motion, to adjourn the hearing for any just purpose, including to permit the "collection of other evidence." At the summary judgment hearing there was no cross-examination of any of the affiants. The issue of the supplemental affidavit arose during the oral submission by counsel for the Defendant. An adjournment was discussed and the Defendant offered to pay the costs associated with an adjournment. The Plaintiffs, when presented with the option, chose to forego an adjournment and to proceed with oral argument. I directed the Defendant to provide a draft of the proposed affidavit to the Plaintiffs and, if the Plaintiffs opposed the content of the affidavit, then I would entertain written submissions concerning whether the late affidavit should be admitted. My decision on the summary judgment motion was reserved, pending resolution of the affidavit issue.

[24] In essence, what occurred in the present case was an adjournment of the motion after oral argument to determine whether the affidavit would be admitted. It was clear that, if the affidavit was admitted, the Plaintiffs would have every opportunity to respond by further evidence and/or submissions.

[25] The Nova Scotia Court of Appeal in ***Shannex Inc. v. Dora Construction Ltd.,*** 2016 NSCA 89 stated that summary judgment is not an ambush, nor is it an adjournment permission to procrastinate. Justice Fichaud specifically referred to

Rule 13.04 (6)(b) and indicated the subsection allows the judge to balance these factors:

> 34 I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]**
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton*'s first step.
>
> A 'material fact' is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 (N.S. C.A.), para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.
>
> [Emphasis added]

[26] While the Court of Appeal's comments relate to the responding party marshaling its evidence, there is nothing in Rule 13.04 (6) to indicate the Court's discretion to allow further evidence is confined solely to evidence being adduced by the responding party.

[27] The filing of late affidavits is typically unusual and requires the leave of the Court. A moving party should be very careful to ensure it has marshalled all evidence necessary for its summary judgment motion. It cannot assume an adjournment will be available for ill-prepared attempts at summary judgment. However, in appropriate circumstances, where it is just to do so under rule 13.04, late evidence may be allowed. As an example, a late affidavit of the Plaintiffs was also allowed. This motion was originally scheduled for March 19, 2019, but was

adjourned due to the Plaintiffs' request to file a late surrebuttal affidavit. This Court granted the request, as the Plaintiffs argued that the March 2019 affidavit of Ms. Zhu, filed by the Defendant, raised "a very important point" that was previously unknown to the Plaintiffs and "may seriously prejudice the Plaintiffs."

[28] The exercise of the Court's discretion under Rule 13.04 (6)(b) will depend on the circumstances. The Court should be concerned with such factors as whether there will be prejudice to either party that cannot be adequately compensated in costs, whether the affidavit is relevant to a determination under Rule 13, whether the requesting party has caused unreasonable delay, whether there has been an oversight, etc. In addition, as Rule 23.12 contemplates, not only prejudice to the parties but also possible prejudice to the public, caused by motions being frequently adjourned when it is too late to make use of the time set aside by counsel, the judge and court staff, should be considered. Where the interests of justice favour the Court admitting the late affidavit, the opposing party should be provided with an opportunity to respond.

[29] Here, I find there will be no prejudice to the Plaintiffs caused by the late filing of the Zhu supplemental affidavit and no prejudice was argued by the Plaintiffs. There is no evidence the Defendant has unduly delayed the motion for summary judgment, as the prior adjournment was due to the Plaintiffs seeking to file a surrebuttal affidavit after all filing timelines had passed. The supplemental affidavit is relevant to the issue of whether, as a host, the Defendant has immunity for copyright infringement by blog creators in both Canada and the United States. The Defendant's position is that it is exempt from liability under either the United States or Canadian legislation. Automattic seeks to introduce the affidavit in response to questions from the Court as to the sufficiency of the evidence in relation to this issue. The Defendant says it was an oversight in not presenting this evidence which only became apparent as a result of the questions posed by the Court during oral argument. The Defendant may well be prejudiced if the evidence is not allowed, as a further affidavit could potentially allow the Court to determine that the issue has no prospect of success under Rule 13, thereby avoiding a full trial of the issue. In light of the above, and the fact the Plaintiffs will be provided with an opportunity to respond to the evidence and file further submissions addressing the affidavit, I am prepared to exercise the discretion provided under Rule 13.04(6)(b) to allow the late filing of the affidavit.

[30] In ***Voltage Pictures, LLC v. Salna,*** 2019 FC 1047, although dealing with the Federal Court Rules, Justice Boswell noted the factors that should be considered when determining whether to allow a late filed affidavit:

> 31 The relevant factors to be taken into account in deciding whether leave to file a further affidavit should be granted are: relevancy of the proposed affidavit; absence of prejudice to the opposing party; assistance to the Court; and the overall interest of justice (*Pfizer Canada Inc. v. Rhoxalpharma Inc.*, 2004 FC 1685 (F.C.) at paras 15 and 16).
>
> …

[31] Late introduction of evidence has been allowed even in situations involving a trial, where the trial was complete and the decision had been rendered. The Nova Scotia Court of Appeal in ***Griffin v. Corcoran*,** 2001 NSCA 73, was addressing an issue of whether to reopen a trial to consider new evidence after the trial was complete and a written decision had been issued (although not the final Order). The Court of Appeal said, where key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the Court to reopen its consideration of the matter:

> 62 The principles which guide the exercise of this discretion attempt to balance the requirements that parties bring forward their whole case and that there must be finality in litigation with the need to reach a result that is just in substance. In other words, the judge must take account of the, at times, competing goals of employing fair procedure and achieving right results.
>
> …
>
> 64 The application to reopen a trial is one that may be made in an almost limitless variety of situations. A considerable degree of flexibility is needed in the applicable law if it is to deal justly with such diverse situations. It is preferable, therefore, for this Court to articulate the fundamental principles that must be considered, weighed and balanced and leave their application to the discretion of the trial judge. In saying this, however, I would emphasize that the reopening of a trial after the judge has given a decision is an extraordinary and rare step that must be undertaken with great caution.
>
> 65 The decision must be informed by a balancing of the risk of both procedural and substantial injustice to both parties…
>
> ...
>
> 68 <u>While fair and orderly procedure is essential, so is reaching a correct result on the merits. Genuine mistakes, oversights or even poor judgment should rarely defeat a just cause. If key evidence has been overlooked or an untruth only lately detected, there are strong arguments of justice in favour of allowing the court to reopen its consideration of the matter.</u> The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. To rephrase a familiar adage, justice must not only appear to be done; it must in fact be done.
>
> [Emphasis added]

(See also ***Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.,*** 2004 NSSC 180)

[32] Automattic stated, in its submissions, that it could simply file another summary judgment motion if the Zhu supplemental affidavit was not allowed. Whether more than one summary judgment motion will be entertained by the Court will depend on the circumstances. For example, a motion on the pleadings could certainly be followed by a motion on evidence. Motions brought prematurely could, in appropriate circumstances, where it is just to do so, be adjourned until after discovery examinations are completed or further evidence is marshalled or an expert report is filed. However, counsel should not assume there are neverending "kicks at the can" contemplated by Rule 13. Such actions would be at odds with the Supreme Court of Canada's direction in ***Hryniak, supra,*** and also the Nova Scotia Court of Appeal's comments concerning the quick, effective and less costly purpose of summary judgment motions.

[33] In ***Coady v. Burton Canada Co.,*** 2013 NSCA 95, the Nova Scotia Court of Appeal, while dealing with a prior version of Rule 13, commented on the purpose of a summary judgment motion. Justice Saunders wrote that the process is intended to be quick and effective and less costly and time consuming than a trial:

> 22 In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. Summary. 'Summary' is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judge as being doomed to fail. These matters are weeded out to free the system for other cases that deserve to be heard on their merits. That is the objective. Lawyers and judges should apply the Rules to ensure that such an outcome is achieved.

[34] We must also keep in mind the mandatory direction given to the Court in Rule 13.08(1) where a motion for summary judgment is dismissed. For example, the Court might determine an action should be converted to an application in court and set a date for hearing the application, which could render a further summary judgment motion inappropriate. Rule 13.08 states:

> 13.08(1) A judge who dismisses a motion for summary judgment on the evidence ***<u>must</u>***, as soon as is practical after the dismissal, schedule a hearing to do either of the following:
>
> (a) give directions for the conduct of the action, if it is not converted to an application;

(b) on the motion of a party or on the court's own motion, convert the action to an application in court, set a time and date for the hearing of the application, and give further directions as called for in Rule 5 - Application.

[Emphasis added]

[35] As Justice Fichaud said in ***Shannex, supra***:

42 Rule 13.08(1) says that a judge who dismisses the motion for summary judgment "must" schedule a hearing to consider conversion or directions. Accordingly, a dismissed motion under Rule 13.04 triggers the supplementary question:

- **Fifth Question**: If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?

[Emphasis by the Nova Scotia Court of Appeal]

Conclusion

[36] Leave is granted to Automattic to file the Zhu supplemental affidavit on its summary judgment motion. The Plaintiffs are entitled to file evidence in response to the Zhu supplemental affidavit and a written submission in response to the affidavit. All response materials of the Plaintiffs are to be filed within three weeks of the date of this decision.

[37] The parties have agreed that the costs of this written motion will be determined as part of the main motion for summary judgment.

Jamieson, J.