

SUPREME COURT OF NOVA SCOTIA

Citation: *Contrast Engineering Ltd. v. Chapedelaine*, 2019 NSSC 286

Date: 20190918

Docket: Hfx No. 462198

Registry: Halifax

Between:

Contrast Engineering Limited

Plaintiff

v.

Wayne Chapedelaine, Lynelle Korun, (a.k.a Lynelle Vetsch),
carrying on business under the firm name and style of
Metro-Rural Fire Forensics and Fire Dynamics Analysts Inc.

Defendants

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: September 11, 2019, in Halifax, Nova Scotia

Oral Decision: September 18, 2019

Written Release: November 13, 2019

Counsel: David A. Copp, for the Plaintiff
Ron Pizzo and Jason Edwards, for the Defendants

By the Court (orally):

Introduction

[1] This is a motion brought by the Plaintiff, Contrast Engineering Limited, for an order that the Attachment Order granted *ex parte* by the Prothonotary on August 28, 2019 attaching the property in Hubble, Nova Scotia, bearing PID 41255431, of the Defendant, Lynelle Korun a.k.a. Lynelle Vetsch, be continued.

Background

[2] The Plaintiff, Contrast Engineering Limited, filed a Notice of Claim with the Nova Scotia Supreme Court on April 6, 2017, claiming that the Defendant, Mr. Chapdelaine (the correct spelling of his surname is Chapdelaine, not Chapedelaine, as indicated in the style of cause) caused damages to the Plaintiff by breaching his consulting contract with the Plaintiff due to violating the non-compete provision and soliciting clients.

[3] The Defendants filed a Notice of Defence and Counterclaim on May 1, 2017 claiming damages from the Plaintiff for breach of contract.

[4] The Plaintiff filed a Notice of Defence to Counterclaim on May 17, 2017.

[5] On August 28, 2019, the Plaintiff filed an *ex parte* motion for an attachment order, which was granted by the Prothonotary, attaching the property of Lynelle Vetsch in Hubble, Nova Scotia. The current motion is to continue the attachment order.

Issue

[6] Whether the Plaintiff's *ex parte* attachment order to attach the property of Lynelle Vetsch in Hubble, Nova Scotia, should continue.

Analysis

[7] The attachment order was obtained pursuant to Civil Procedure Rule 44.02, which reads as follows:

44.02 Motion for attachment

(1) A party who claims for damages against another party, and has evidence establishing one of the following grounds against the other party, may make an *ex parte* motion to the prothonotary for an attachment order:

- (a) the other party resides out of Nova Scotia and does not appear to have assets in Nova Scotia, or assets that can be obtained by order or request of the court, sufficient to satisfy a judgment for the amount of the claim;
- (b) the other party is a corporation not registered under the *Corporations Registration Act*;
- (c) the other party evades delivery of the document originating the proceeding;
- (d) the other party leaves, or is about to leave, Nova Scotia with intent to defraud a creditor or to avoid delivery of the document originating the proceeding;
- (e) the other party does anything to put an asset out of the reach of a creditor, or is about to do so;
- (f) the other party fraudulently incurred a debt or other liability at issue in the proceeding.

(2) The motion must be supported by an affidavit and either the bond of a recognized surety company or, unless the prothonotary permits otherwise, the party's own bond with two or more sureties.

[8] Rule 44.03(1) sets out what the Plaintiff must establish by affidavit to obtain an attachment order:

Affidavit

44.03 (1) The party who makes a motion for an attachment order must establish all of the following by affidavit:

- (a) the amount of a claim for a debt or other liquidated demand, or the amount likely to be assessed on a claim for damages;
- (b) the amount the party proposes for a limit to the attachment order, which amount may be equal to or less than the value of the moving party's claim;
- (c) that there is evidence supporting the party's claim;
- (d) one or more of the grounds for obtaining an attachment;
- (e) retention of a lawyer to advise the party about the motion and the fact, without details, that the lawyer provided advice about the requirements for an attachment and obligations under the bond.

[9] An attachment order may only be granted if all the criteria set out in Rule 44.03(1) are met, and at least one of the categories in Rule 44.02(1).

[10] It is the position of the Plaintiff that the grounds for granting an attachment of the property of Lynelle Vetsch exist. The Plaintiff claims that the Defendants

are attempting to conceal or place assets available to satisfy the Plaintiff's claims beyond the jurisdiction of the Supreme Court of Nova Scotia.

[11] The matrimonial home (the asset for which the Plaintiff is seeking to continue the attachment) has been sold, with a closing date of September 19, 2019. The Plaintiff views this sale as an attempt to put an asset out of the reach of any creditor. The Plaintiff does not wish to obstruct the sale but wants the proceeds of the sale kept in trust until the current litigation is resolved.

Jurisprudence

[12] The significance of an attachment order was described in *Nova Scotia Power Inc. v. AMCI Export Corp.*, 2005 NSCA 152, [2005] N.S.J. No. 478 where Freeman, J.A. said, for the Court, at paras. 40-41:

40 In a dissenting judgment in *Acan Windows Inc. v. Stanley*, [1995] N.J. No. 323, in which the majority of the Newfoundland Court of Appeal upheld an attachment order under rules similar to those in Nova Scotia, Justice Marshall viewed attachment orders as intrusive incursions into the defendant's rights that should be strictly linked to the rationale requiring them and be limited by conditions restricting their accessibility. Residence was not an issue in that case. Justice Marshall stated:

... The justification and purposes, then, are to foil perceived attempts to frustrate the course of justice; or, in certain circumstances, to prevent its being impeded because of normal residency of the defendant outside of the jurisdiction.

41 While this statement is *obiter*, I agree with this characterization of the purpose of the Rule making attachment orders available in certain circumstances against defendants living outside the jurisdiction. Such orders are not available against defendants who reside within the jurisdiction in the absence of perceived attempts to frustrate the course of justice. ...

[13] There is no evidence before me that the Defendants have demonstrated an intent to evade creditors. The Newfoundland Court of Appeal in *Newfoundland (Attorney General) v. Nalcap Holdings Inc.*, (1994), 124 Nfld. & P.E.I.R. 245, 1994 CarswellNfld 215 (Nfld. C.A.), held:

23 In the application for the attachment order, the respondent had relied upon the assignment agreement, simpliciter, as supporting the existence of the ground of attachment set out in r. 28.02(1)(e). The trial judge accepted that position, noting [at p. 89] that what was transferred by the agreement between the appellant and Cancapital was "the only asset which the [appellant] had within this province".

24 In his decision, the trial judge, having stated [at pp. 89-90] that the "assignor's intention must be determined objectively", concluded: "If the effect of the assignment is to hinder or delay creditors, an intention to hinder or delay is apparent and will be presumed." With the greatest respect for the trial judge, I am unable to agree.

25 The whole principle of the attachment of a defendant's assets before judgment is contrary to the ordinary sequence of instituting action, obtaining judgment and then executing on the judgment.

26 In my view, the rules under which a pre-judgment attachment order may be obtained must be strictly construed. There is no irrebuttable presumption that, because the effect of an assignment may hinder or delay creditors, the assignment was made with that intent.

[14] The Defendants rely on the decision of Justice LeBlanc in *C & R Sterling Farm Ltd. v. Sierra Forestry Inc.*, 2010 NSSC 154, where he found the plaintiff's case was built on suspicion and supposition and held that this was not the type of evidence to maintain an attachment order. The Defendant says this is analogous to the grounds upon which the Plaintiff seeks to continue the attachment order in this case. Justice LeBlanc stated, at para. 30:

Ultimately, I do not believe that the plaintiff has established any of the grounds available under the rules governing attachment orders. An attachment order should not be maintained on the basis of suspicion and supposition, which is the essence of the plaintiff's position in support (for instance, the supposition relating to the significance of the property online entry). Both the former Rule 49.01 and the current Rule 44.02 are clear in requiring the applicant to establish facts, not allegations or suspicions. On that basis, I am satisfied the attachment order must be terminated.

[15] An attachment order should only be granted in the clearest of cases. It is an extreme intrusion on personal liberty and should only be used to prevent perceived attempts to frustrate the course of justice. The Newfoundland Court of Appeal in *Stanley v. Acan Windows Inc.* (1995), 135 Nfld. & P.E.I.R. 29, 1995 CarswellNfld 327, noted that this is an extreme remedy, at para. 14:

14 Against this backdrop, the pre-judgment attachment order must be viewed as a serious measure. Inasmuch as it intrudes upon vested rights of the defendant for the protection of those of the plaintiff that are yet unestablished, the consequential incursion into the parties' relations can only be regarded as an extreme, if not drastic, judicial intervention. As such, it is reasonable to expect that a plaintiff's access to pre-judgment attachment should be strictly linked to the rationale justifying the availability of this extreme remedy and be limited by conditions restricting its accessibility to that purpose.

[16] The evidence does not suggest that the Defendants are trying to evade their creditors or frustrate the course of justice. On the contrary, it seems only that the Defendants are trying to survive. They are selling the matrimonial home. Wayne Chapdelaine is shutting down the offices for Fire Dynamics in Newfoundland and Labrador and New Brunswick. His partner, Lynelle Vetsch, will remain in the province, working at her current job as an instructor in the Pre-Employment Program of the Nova Scotia Firefighter School. Their three children will continue to attend school in Nova Scotia. I do not see any evidence of them attempting to flee the jurisdiction or conceal assets.

[17] Should the plaintiff be successful in its claim, the sale of the matrimonial home may make it more difficult for the Plaintiff to realize on an eventual order. However, for me to consider the exceptional pre-trial remedy of an attachment order there must be evidence demonstrating the sale of the home was done with the intent of evading the Plaintiff's claim.

[18] Contrary to any suggestion that they are evading the Plaintiff's claim, the Defendants have retained legal counsel, accepted service of the notice of action, and filed a defence and counterclaim.

Requirements under Rule 44.02(1)

[19] The Plaintiff is seeking to continue the attachment order granted *ex parte* by the Prothonotary attaching the property of the Defendant, Lynelle Vetsch. As a result, I shall consider the requirements of Rule 44.02(1)(a) as they relate to the Defendant, Lynelle Vetsch, with various comments as they apply to the other Defendants.

[20] The various grounds under Rule 44.02(1) are set out earlier in this decision.

[21] Rule 44.02(1)(a) is not met. Currently, both Wayne Chapdelaine and Lynelle Vetsch reside in Nova Scotia. The evidence is that Wayne Chapdelaine is moving to Calgary to see if he can build the business out West. Lynelle Vetsch intends to reside in Nova Scotia and continue working at her job as an instructor in the Pre-Employment Program of the Nova Scotia Firefighter School. Their three children will continue to reside and attend school in Nova Scotia.

[22] The Defendant company, Fire Dynamics Analysts Inc., according to the Nova Scotia Registrar of Joint Stock Companies, has not had a recognized agent since June 8, 2018 and has had its registration revoked for non-payment of

registration fees on March 8, 2019. Wayne Chapdelaine's affidavit states that this company is no longer in operation (para. 12).

[23] Rule 44.02(1)(b) is not met. The Defendant Lynelle Vetsch is a natural person, not a corporation.

[24] Rule 44.02(1)(c) is not met. The Defendants have been served with the originating documents.

[25] Rule 44.02(1)(d) is not met. The evidence indicates that the Defendant, Lynelle Vetsch, is not about to leave Nova Scotia with the intent to defraud a creditor or avoid delivery of an originating document. She intends to remain in Nova Scotia, continue working, and supporting their three dependent children. The property is being sold to allow the family to pay creditors and attempt to get out of their current financial state.

[26] Rule 44.02(1)(e) is not met. This rule applies when, "the other party does anything to put an asset out of the reach of a creditor". The Plaintiff has not convinced me that selling the property is being done to evade creditors or frustrate the course of justice.

[27] In addition, the property is subject to a mortgage in favour of the Bank of Montreal. This is a valid first charge that would take priority with respect to the property. The property was never in the potential reach of the plaintiff because the bank has a valid first charge.

[28] Rule 44.02(1)(f) is not applicable because fraud is not an issue.

[29] Based on the above, I find Rule 44.02(1) does not apply.

Conclusion

[30] An attachment order is an extreme pre-trial remedy. The attachment of a defendant's assets before judgment is contrary to the normal course of litigation where an action is instituted, judgment obtained, and then the judgment is executed on (*Nalcap, supra*, para. 25). An order should only be granted on evidence demonstrating that the Defendants are attempting to evade justice.

[31] The evidence does not suggest that the Defendants are trying to evade their creditors or frustrate the course of justice, only that they are trying to survive financially. I find no evidence demonstrating that the sale of the property was done with the intent of evading the Plaintiff's claim.

[32] It should also be noted that any judgment the Plaintiff receives in Nova Scotia would be enforceable throughout Canada. I see no merit in the Plaintiff's argument regarding the additional expense to enforce judgments outside the province as a reason for continuing the attachment order for the property.

[33] I find the requirements under Rule 44 are not met, and, therefore, I am terminating the attachment order.

[34] If the parties are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Bodurtha, J.