SUPREME COURT OF NOVA SCOTIA
Citation: *Henderson v. Quinn,* 2020 NSSC 312

Date: 20200929
Docket: Amh. No. 460159
Registry: Amherst

Between:
Patrick Henderson, Mark W. Scales, Nicola J. Scales, Richard King, Sheila King, Timothy King, Cherie Marshall, Vicki Hallet, Jo Ann Hatfield, Edith Leadbetter, Allan Mills, Donald Quinn, Kelly Quinn, Shelley Dow, Deborah Woods, Richard Porter, Nikole McCormick, James Wissman, Lynn Wissman, Carol Brown, James Yorke, Joan Andrusaitis, David Redfield, Carol Redfield, Stephen Schrempf, Mary Schrempf, John Campbell, Karen Campbell, Kevin McCormick, M. Gail McCormick, Delphine Davies, Gardiner Patterson, James Best, Donna Best, Danny Best, Heather Best, Jimmy-Lee Best, Natasha Kyte, Owen Wood, Michael Henderson, Gwendolyn Henderson, Kevin Yorke and Eric Yorke

PLAINTIFFS

and

Jacqueline Quinn and William Quinn

DEFENDANTS

and

Bruce W. Graham and G. Malcolm Graham

THIRD PARTIES

LIBRARY HEADING

Judge:	The Honourable Justice Robert W. Wright
Heard:	September 29, 2020 in Amherst, Nova Scotia
Oral Decision:	September 29, 2020
Written Decision:	October 30, 2020
Subject:	*Civil Procedure Rule* 13.05 – timeframe for bringing a summary judgment motion on evidence (between the close of pleadings and a request for a date assignment conference, unless a judge directs otherwise).

Summary: By agreement of counsel, and with permission from a judge, an early date assignment conference was held in a case involving a right-of-way dispute, at a juncture when several of the named plaintiffs had not yet been examined on discovery. Trial dates were assigned at the date assignment conference for September of 2021 along with one prior summary judgment motion on evidence pertaining to one aspect of the plaintiffs' claims.

It was only after the completion of the discovery examination of most of the remaining plaintiffs that defence counsel formed the view that six of them did not possess the evidence needed to prove their individual claims for a prescriptive right-of-way. They then filed four further related summary judgment motions on evidence soon after the completion of discoveries which was approximately six months after the request for a date assignment conference had been made. Plaintiffs' counsel objected to the scheduling of these four further summary judgment motions on evidence, relying on the presumptive timeframe set out Civil Procedure Rule 13.05. Plaintiffs' counsel then brought a cross-motion in Chambers for the dismissal of the four summary judgment motions on evidence.

Issue: (1) Whether the court should exercise its discretion to permit the summary judgment motions on evidence to be made notwithstanding the presumptive timeframe for doing so set out in Civil Procedure Rule 13.05.

Held: It would be procedurally unfair to deprive the defendants of their ability to make the intended summary judgment motions on evidence in the circumstances of this case. Neither could the plaintiffs demonstrate any prejudicial effect upon them, from a procedural point of view, were these motions permitted to go ahead. The court therefore exercised its discretion to allow the motions to proceed and scheduled hearing dates accordingly.

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Decision

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Counsel:	Douglas Shatford, QC for the Plaintiffs Dennis James, QC and Paul Wadden for the Defendants Charles Thompson for the Third Parties

Wright, J. (orally)

[1] The matter before the court to decide today is whether the defendants should be permitted to proceed with four related summary judgment motions on evidence which were filed on August 12, 2020. These motions concern the claims to a right-of-way over the defendants' property by six of the named plaintiffs.

[2] Today's motion turns on the application of Civil Procedure Rule 13.05 which provides that a motion for summary judgment on evidence may be made any time after pleadings close, and before a date assignment conference is requested, unless a judge directs otherwise.

[3] In preparation for this hearing, I have prepared a chronology of the procedural history of this file which I will now insert in this oral decision.

[4] The several plaintiffs in this action are landowners in Greenhill near Parrsboro, Nova Scotia as are the defendants Jacqueline and William Quinn. In February of 2017, the plaintiffs commenced this action claiming the right to use what is locally known as the Old Farm Road as a means of access to the Clarke Head Beach which crosses the lands owned by the defendants. The plaintiffs claim entitlement to the use of this road both on the grounds that it continues to be a

public road as it crosses the defendants' lands, and on the grounds of having established a prescriptive easement.

[5] The defendants, who purchased their property in 2015, have defended the action and have also joined as third parties the previous owners from whom they bought the property. The pleadings ultimately closed on January 25, 2019.

[6] Because the defendants blocked the use of the Old Farm Road as a means of access to the Clarke Head Beach, the plaintiffs sought an interlocutory injunction against them which was heard before Justice Arnold on April 15, 2019. In a decision released on June 21, 2019, Justice Arnold granted the injunctive relief, thereby restraining the defendants from interfering with the plaintiffs' use of the Old Farm Road as access to the beach and ordering them to forthwith remove any obstructions on the Old Farm Road at their expense. Justice Arnold's order was stated to be interlocutory only and without prejudice to the final disposition of these proceedings. At that juncture, no discovery examinations had yet been conducted by any of the parties.

[7] Since that time, the following procedural steps have been taken:

Nov. 7, 2019 – a Chambers motion was heard before Justice Hunt for exclusion of witnesses during discovery examinations that were pending. The order sought was granted and the

discovery of some of the plaintiffs followed later in November and were continued in January of 2020. Further discoveries of the parties were later held in the months of June and July, 2020.

Feb. 7, 2020 – plaintiffs' counsel filed a request for a date assignment conference (RDAC) with the consent of defence counsel notwithstanding the limitation in CPR 4.13 which contemplates completion of discovery of all parties before a DAC is held.

March 2, 2020 – the defendants filed their first motion for summary judgment pertaining to the plaintiffs' claim that the Old Farm Road was a public road. This motion was returnable in Chambers on March 19, 2020 to schedule a hearing date for that motion.

March 19, 2020 – over the objections of plaintiffs' counsel, Justice Rosinski in Chambers scheduled the defendants' summary judgment motion to be held on December 17-18, 2020 (which was later rescheduled to Feb. 11-12, 2021). In that motion, the plaintiffs had argued that the summary judgment motion could not proceed because a RDAC had earlier been filed on Feb. 7, relying on CPR 13.05. Justice Rosinski nonetheless ruled that the motion could proceed to a hearing, notwithstanding the wording of CPR 13.05 and the findings earlier made by Justice Arnold in granting the interlocutory injunction.

May 13, 2020 – a DAC was held by telephone with Justice Hunt. At that point, several of the plaintiffs had been examined on discovery but further discovery of parties was to follow in the months of late June and early July. Again, notwithstanding CPR 4.13, trial dates were scheduled by the court spanning 10 days beginning Sept. 20, 2021. In the DAC memo which followed from Justice Hunt, it was noted that the summary judgment motion on evidence filed by the defendants as above noted was being rescheduled to Feb. 11-12, 2021. It was also noted that there were two other motions then contemplated, namely, another defendants' motion for production of discovery undertakings and a motion on behalf of the plaintiffs revising and updating the list of plaintiffs going forward. As matters then stood, defence counsel was not contemplating any other advance motions prior to trial.

Early July, 2020 – after the further round of discovery examination of various plaintiff witnesses, defence counsel then decided to bring four other summary judgment motions on evidence as

against six of the named plaintiffs (who between them collectively owned four different properties). It appears from correspondence between counsel that the basis for these motions is that these plaintiffs either did not meet the requisite 20 year prescriptive time requirement and/or did not own properties that were adjacent to the defendants' property. These four motions were filed with the court on Aug. 12, 2020 with defence counsel estimating that one half day would be required for the hearing of each (requiring two full days in all).

Between July 27 and Aug. 12th – counsel corresponded back and forth, with defence counsel seeking the cooperation of plaintiffs' counsel in setting the summary judgment motions down for hearing and with plaintiffs' counsel objecting to the filing of the motions because their timing was not in compliance with the presumptive timeframe set out in CPR 13.05. Faced with that response, defence counsel then filed a Chambers motion returnable on Aug. 20th , the present motion, to force the issue seeking to have the court schedule hearing dates for the four half day motions for summary judgment on evidence.

Aug. 17, 2020 – plaintiffs' counsel filed a cross-motion, moving for the dismissal of the defence summary judgment motions and further seeking a motion by appointment or conference with the trial judge to deal with the matter. Plaintiffs' counsel also sought a motion to appoint a case management judge.

Aug. 20, 2020 – with the plaintiffs' cross-motion only coming to my attention as Chambers judge on the morning of the hearing, and needing to be heard simultaneously with the defendants' motion for summary judgment hearing dates, the entire matter was adjourned for a Chambers hearing in Truro to be held on Sept. 11th (later adjourned to September 29th).

[8] In the disposition of these motions, I begin with a brief recitation of the history of Civil Procedure Rule 13.05. Under the previous iteration of the Civil Procedure Rules on summary judgments, there was no such express restriction on

the timing for a summary judgment motion on evidence to be made. Formerly, counsel had to declare their readiness for trial before trial dates could be obtained.

[9] This court subsequently changed the ground rules a few years ago to allow counsel to obtain trial dates earlier in the litigation process. Presumptively, counsel can now request a date assignment conference ("DAC") to schedule trial dates essentially after disclosure of documents and completion of discovery examinations of individual parties (as set out in Civil Procedure Rule 4.13). As a result, trial dockets are now filled up at a much earlier stage, with cases being double-booked or even triple-booked to shorten the wait times.

[10] With that new regime came the presumptive time limit for bringing a summary judgment motion on evidence, now embodied in Civil Procedure Rule 13.05. It reads as follows:

> A motion for summary judgment on evidence may be made any time after pleadings close and before a date assignment conference is requested unless a judge directs otherwise.

[11] The purpose of that rule was to induce counsel to bring any intended summary judgment motions on evidence early on in the proceeding to make trial dockets run more efficiently.

[12] Normally, as mentioned, before a request for a DAC is made, counsel are required to have completed document disclosure and discovery of parties. Civil Procedure Rule 4.13(2) provides for certain exceptions to those requirements, but none of them are germane to the present situation. Rather, what happened here is that in an effort to accelerate the assignment of trial dates, all counsel consented to the holding of an early DAC, before discoveries were completed which request was made to the court by plaintiffs' counsel, and the DAC judge acceded to that request.

[13] As previously noted, the DAC was held on May 13, 2020 at which time the only summary judgment motion planned by the defendants was one intended to nullify the public road claim asserted by the plaintiffs. At that time, however, only about half of the plaintiffs had been discovered. Several more plaintiffs were discovered later in the June/July timeframe, including some of the plaintiffs on the receiving end of the summary judgment motions since filed.

[14] As a result of those further discoveries, defence counsel formed the view that a number of plaintiffs (the six earlier referred to) did not possess the evidence to prove their individual claims for a prescriptive right-of-way over the defendants' property. Defence counsel say that it was not possible to know this at the time of

the DAC. Thus, their summary judgment motions on evidence were not filed until August 12th, some six months after the request for a DAC was filed with the court.

[15] This case well illustrates the problems and disputes that can arise when counsel bend the rules related to the timing of a DAC, however well intentioned they were at the time in their effort to secure early trial dates. But for that prematurely held DAC, the present situation would not have developed.

[16] Counsel for the plaintiffs relies on the presumptive timing for the bringing of a summary judgment motion on evidence set out in Civil Procedure Rule 13.05, coupled with the fact that at the DAC, defence counsel identified only one intended summary judgment motion on evidence to be scheduled for a hearing (i.e., that relating to the public road claim). It is to be noted that defence counsel did not, at the DAC, give any kind of commitment or even an indication that no further summary judgment motions would be brought forward. Only the one just mentioned was raised, as matters then stood.

[17] Notwithstanding the presumptive time period prescribed, Civil Procedure Rule 13.05 confers a discretion on a judge to permit a summary judgment motion on evidence to proceed after the request for the DAC is made. The rule doesn't provide any specific guidance on how that discretion is to be exercised, but

implicitly in my view, it is all about procedural fairness in the circumstances of each case, and the extent to which prejudice to the parties may arise. I reject the argument advanced by plaintiffs' counsel that the exercise of this discretion ought to involve as well a demonstration by the defendants that the motions have merit.

[18] I have only been provided with one prior decision concerning the application of Civil Procedure Rule 13.05 and that is a decision of Justice Scanlan in Appeal Court Chambers in **Raymond v. Brauer**, [2016] NSJ No. 175. Although the presumptive time period was enforced in that case, it is entirely distinguishable on the facts where it involved a self-represented litigant bringing a fourth summary judgment motion, essentially seeking the same relief, which was considered to be vexatious. That was an entirely different situation from that which is now before the court.

[19] It is trite to say that litigation is invariably an evolving process as more evidence and information comes to light, and counsel make their procedural decisions accordingly along the way. Here, it was certainly well within the contemplation of all counsel, at the time the DAC was requested, that there was still considerably more evidence to be obtained by the defendants from discovery of the remaining half of the plaintiffs. It cannot be said that it was unforeseeable,

had counsel turned their minds to it, that those discoveries might generate evidence upon which a summary judgment motion against some of them might be made.

[20] Neither is there any basis upon which defence counsel can be said to have waived their procedural rights to bring further summary judgment motions on evidence after the completion of discoveries, merely by consenting to the plaintiffs' request for an early DAC.

[21] In my view, the fact that the parties requested a DAC at a premature stage of the proceedings, albeit by consent, and which was acceded to by the DAC judge, should not deprive the defendants of their procedural rights otherwise to bring these summary judgment motions on evidence against certain plaintiffs after discoveries were completed. These motions were filed with reasonable dispatch thereafter.

[22] To hold otherwise would impose procedural unfairness upon the defendants in the present circumstances, especially where the plaintiffs are presently unable to demonstrate any prejudicial effect upon them, from a procedural point of view, were these motions permitted to go ahead.

[23] I therefore conclude that this is a clear case for the court to exercise its discretion under Civil Procedure Rule 13.05 to permit these summary judgment motions on evidence to proceed to a hearing.

J.