SUPREME COURT OF NOVA SCOTIA
Citation: *Slaunwhite v. Closing the Gap*, 2021 NSSC 91

Date: 2021 03 10
Docket: Hfx No. 500867
Registry: Halifax

Between:

John Slaunwhite

Applicant

v.

Closing the Gap Healthcare Group Inc.

Respondent

Judge:	The Honourable Justice Ann E. Smith
Heard:	February 22, 2021 in Halifax, Nova Scotia
Counsel:	Ronan Holland and Jessica Rose, on behalf of the Applicant (Respondent in this motion)
	Guy Harfouche, on behalf of the Respondent (Applicant in this motion)

By the Court:

Introduction

[1] This proceeding was started as an Application in Court on October 5, 2020. An Amended Notice of Application in Court was filed on November 3, 2020.

[2] The Respondent filed a Motion to Convert the application to an action on November 16, 2020. Closing the Gap filed a Notice of Contest on November 2, 2020 and an Amended Notice of Contest on November 10, 2020.

[3] On December 11, 2020, the Nova Scotia Supreme Court published amendments to *Civil Procedure Rules* ("CPR") 5 and 6.

[4] A Motion for Directions was held before this court on February 1, 2021. During the course of that hearing, it became evident that counsel disagreed as to whether the amendments to CPR 5 and 6 governed this Application in Court, or whether the relevant CPRs prior to the recent amendments applied. The Application in Court was filed before these amendments.

[5] In an oral decision rendered by this court on Friday, February 12, 2021, this court held that the amendments at issue were procedural in nature and applied as of the date of the amendments, i.e., to the within proceeding.

[6] The motion to convert the Application to an action was heard by this court on February 22, 2021.

[7] I had before me the written briefs of counsel, the Affidavit of Sarah-Joe Briand, sworn on January 14, 2021 filed by the Respondent and the solicitor's affidavit of Jessica D. Rose, sworn January 22, 2021 and filed by the Applicant.

[8] In his brief on the motion filed on January 22, 2021, Mr. Holland estimated that the Application would take four days plus submissions to be heard. Mr. Holland states in his Solicitor's Affidavit accompanying the Notice of Application that "from review of the medical documentation, I say and believe that the Applicant is now of advanced years and is in ill health and suffers from dementia. He is in a long-term care facility". He goes on to state, "The Applicant's rights are likely to be eroded if he were to die before an order of this Honourable Court".

[9] Mr. Holland's affidavit also advises that the Nova Scotia Department of Health and Wellness has a subrogated claim under the *Health Services and Insurance Act*. A letter dated July 30, 2020 from a representative of the Department of Health to Mr. Holland is attached. As of July 30, 2020, the subrogated claim was in the amount of $280,895.78.

Background

[10] The Applicant, John Slaunwhite, is 86 years old. The Respondent, Closing the Gap Healthcare Group Inc. ("Closing the Gap" or the "Respondent") provided healthcare and home care services to Mr. Slaunwhite at his home where he lived alone.

[11] Closing the Gap was engaged by Mr. Slaunwhite and his family in September 2019, following his discharge from hospital for a hip problem. The contract for services between Mr. Slaunwhite and Closing the Gap commenced on September 5, 2019. A care plan was developed at that time, which outlined the services to be provided by the Respondent.

[12] Mr. Slaunwhite unfortunately fell at his residence at some point between September 27 and September 29, 2019. He was apparently alone during that time period. Mr. Slaunwhite was admitted to hospital as a result of injuries he sustained when he fell. He remained in hospital until November 18, 2019.

[13] The Applicant claims that employees of Closing the Gap did not attend Mr. Slaunwhite's residence on September 28 and 29, 2019 and are responsible for the injuries he sustained. The Applicant claims, *inter alia*, that Closing the Gap breached its contract with him. He also claims in negligence and breach of duty.

[14] The Respondent denies all of these claims. The defence of Closing the Gap also says that Mr. Slaunwhite's children failed to attend at their father's residence in accordance with the care plan in place after Mr. Slaunwhite's discharge from hospital in early September 2019.

Analysis

[15] A key amendment to Rule 5 is that Applications in Court are for disputes which can be ready for hearing within two years and will take no more than four days to be heard.

[16] In the brief of the Applicant's counsel to the court file January 22, 2021, Mr. Holland estimated that the Applicant would file the Affidavits of four lay witnesses, including a witness from the Department of Health and a Rule 55 expert with a Rule 55.04 report. Counsel estimated that it would take two days for the Applicant's case and two days for the Respondent's case. That leaves no time for oral submissions, but the Applicant's counsel expressed confidence on the motion to convert hearing that the Application, including submissions, could be completed in four days.

[17] This Court recognizes there are strong policy reasons which favour applications over actions, including lower cost and greater speed.

[18] In *Jeffrie v. Henriksen*, 2011 NSSC 292 at para. 13, Justice Pickup set out a three-stage analysis to be followed in a motion to convert:

> 1) First, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);
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> 2) Second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4); and
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> 3) Third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

Are There Any Presumptions in Favour of an Application?

[19] The first presumption in favour of an application is as follows: Rule 6.02(3):

> (a) Substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights and the erosion will be significantly lessened if the dispute is resolved by application.

[20] The Applicant asserts that his substantive rights will be eroded in the time it would take to bring an action to trial. Counsel asserts that Mr. Slaunwhite's age of 86 years is relevant. He also points to the contents of the care plan to demonstrate the frailty of Mr. Slaunwhite's health.

[21] In that regard, he notes that Mr. Slaunwhite is likely to pass away before the trial of this action. If that were the case, his estate would be unable to recover damages for pain and suffering, if successful, at trial – *Survival of Actions Act*, R.S., c. 453, s. 4(c).

[22] However, this Court finds that the monetary remedy of damages will not erode over time. Mr. Slaunwhite's rights are crystalized. Damages are not continuing to accrue.

[23] In *Langille v. Dzierznowski*, 2010 NSSC 379, Kennedy C.J. (as he then was) considered a motion to convert an application to an action pursuant to Rule 6.02. This was a medical malpractice case. The Defendants indicated that credibility would be an issue and that expert evidence would be involved.

[24] The Defendants also indicated that they wished to exercise their right to have a jury trial.

[25] Chief Justice Kennedy noted that Mr. Langille was elderly (91 years of age). There was actuarial evidence that he had a 75% chance of dying in the approximate three-and-a-half-year period before an action could be heard by a jury.

[26] Despite that evidence, CJ Kennedy held that the Rule 6.02(3)(a) presumption in favour of an Application did not exist. His Lordship did recognize the concern about Mr. Langille's age, but indicated that he would, if requested, appoint a Case Management Judge to expedite the process or authorize a special jury term once the matter was ready for trial.

[27] The risk of death faces every litigant. I have no evidence to suggest that Mr. Slaunwhite's age and medical issues will likely result in his death at any particular time.

[28] Accordingly, the Rule 6.02(3)(a) presumption in favour of an Application is not met.

[29] The Rule 6.02(3)(b) presumption does not apply in the circumstances.

Are There Any Presumptions in Favour of an Action?

[30] I will now consider Rule 6.02(4) which outlines when an action is presumed to be preferable to an action. One of these presumptions is where a party wishes to exercise a right to trial by jury. That is the case with the within Respondent.

[31] The second presumption is made out when it would be unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called to impeach credibility.

[32] The Respondent argues that at this point in time it would be unreasonable to require it to provide disclosure of complete witness information and that document exchange and discovery examinations must first take place before it can identify all of its witnesses.

[33] Further, credibility appears highly likely to be a fundamental issue in this case. This arises out of the Respondent's claim that Mr. Slaunwhite's family members agreed to, but failed to, attend to their father on September 28 and 29, 2019 by providing him with the supper meal.

[34] The Respondent also alleges that Mr. Slaunwhite's children had refused the level of home care recommended by the Applicant's treating medical providers, i.e. twice-daily home care and daily VON visits. The Respondent says that Mr.

Slaunwhite's children agreed to once-daily home care with the children agreeing to provide the supper meal, as noted above.

[35] The Respondent says that at this time it is unable to identify the hospital staff and other medical personnel with whom the Applicant and his children had discussions, who could be witnesses in this litigation.

[36] There is another issue about an alleged spare key for the Respondent's employees to use to access the Slaunwhite residence. The Respondent denies it knew of the presence of this key in late September 2019.

[37] This is a factual dispute between the parties that will likely be resolved after an assessment of credibility.

[38] On this basis, I conclude that both of the Rule 6.02(4)(a) and (b) presumptions in favour of an action have been met.

Factors in Favour of an Application and Relative Cost and Delay

[39] In *Monk v. Wallace*, 2009 NSSC 425, Murphy J listed the Rule 6.02(5) factors in favour of an application, which he found were not present in the case before him:

> (a) The parties cannot quickly ascertain who their important witnesses will be, and may not be able to reasonably do so until late in the process; opinion evidence will likely be required, and potential expert witnesses have not been identified;

> (b) It is unrealistic to expect that a medical malpractice case, presently only in its early stages, can be prepared and heard in months rather than years.
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> (c) At this time, the length and content of the hearing cannot be predicted; and
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> (d) The Court is not satisfied at this stage that the evidence will be such that credibility can satisfactorily be assessed during an application hearing, rather than at trial.

[40] Neither party has identified who their expert witnesses will be at this point. The Applicant anticipates having a Rule 55 expert report from a geriatric expert. The Respondent has not identified the areas of expertise of its potential experts. It may retain an expert on the issue of causation, but before doing so, it needs to have discovery of the children of Mr. Slaunwhite and as yet unidentified hospital personnel on issues concerning the agreed care plan and the recommended level of care.

[41] In my view, it will take the Respondent time to investigate these issues and it is unreasonable to expect that this matter, which is only in its early stages, will be ready for hearing by the fall of 2022.

[42] It is also difficult to predict the length and content of the hearing at this stage. I am not satisfied that this personal injury case, dealing as is likely is, with factual disputes, assessment of credibility, and expert witnesses can be heard in four days

and be ready for hearing in two years. I am not persuaded that credibility in this case can be satisfactorily assessed by cross-examination on affidavits.

[43] I agree with the following statements of Gabriel J. in *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSS 297 with respect to the need for procedural safeguards necessary to assess credibility:

> [61] However, there are cases in which the procedural safeguards inherent in an action are required in order to fully assess the positions which each party is putting forward. For example, it will be more difficult to gauge either Mr. Fullerton's credibility or reliability, or those features of Mr. Fazari's evidence, without hearing both how it is related at first instance during direct, and later as it is tested under cross-examination.
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> [62] Whether or not the representations alleged were made at all is a critical question. If they were made, the extent to which they were relied upon (if at all), and whether that reliance was reasonable under the circumstances, will also be key questions. Finally, the matter of causation, including whether the failure of The Jeanery's Dartmouth Crossing location (and the failure of all of its other locations) is attributable to these misrepresentations, must be determined.
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> 63] These will not engage merely pedestrian credibility assessments. Cross-examination on Affidavits prepared by counsel for each of the respective parties, in particular, would be an inadequate substitute for the benefits of being able to assess direct and cross-examination (*viva voce*) evidence.
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> [Emphasis added]

[44] Further, when I consider the relative cost and delay of an action (Rule 6.02(b)) the following statements of Murphy J in *Monk v. Wallace*, *supra* are instructive:

> [15] Although the expanded application route under the Rules is intended to offer prompt and more economical relief to parties who qualify for an application procedure, the Rules now also provide a more streamlined action procedure. Ms. Monk will not necessarily be subjected to inordinate delays and

> procedural hurdles because this matter will be determined through an action rather than by application. The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-of-court settlement, I am convinced that the Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.

[45] The comments of Chipman, J. in *Fana (DCD) Holdings Inc. v. Dartmouth Cove Developments Inc*., 2017 NSSC 157 concerning Rule 6.02(b) are also relevant:

> [38] Rule 6.02(6) provides that the relative cost and delay of an action or an application are circumstances to be considered. Having considered the entirety of the matter, I am of the emphatic view that it cannot be said this matter would proceed more efficiently and less expensively if by way of application. For instance, given the likely number of witnesses, I expect the time and costs associated with preparing to give testimony would be far less than if by way of affidavit. As well, there is no guarantee several potentially relevant witnesses would agree to author affidavits; it may well be that subpoenas will be necessary. Further, given the totality of what I have reviewed, I suspect that if I deny this application, the matter would lumber along and ultimately another MTC would be brought giving the same result, albeit later and at the cost of more time and money.
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> [Emphasis added]

[46] I am similarly not convinced that preparing affidavits for witnesses and experts would be a more efficient and less costly way to litigate this matter as an Application as opposed to preparing witnesses for direct and cross-examination in an action.

Conclusions

[47] For all of the reasons above, I order that:

1. The Application in Court filed by the Applicant (Respondent on this Motion) is converted to an action.

2. The Amended Notice of Application in Court shall constitute the Statement of Claim.

3. The Amended Notice of Contest filed by the Respondent shall constitute the Statement of Defence.

4. The Applicant/Respondent shall pay costs in the cause to the Respondent on this motion and on the motion concerning the applicability of the amended Civil Procedure Rules in the amount of $2,500.00.

Smith, J.