IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Rudolph v. National Bank of Canada*, 2021 NSSC 240

Date: 20210805
Docket: Hfx. No. 466461
Registry: Halifax

Between:

Douglas G. Rudolph

Plaintiff

v.

National Bank of Canada, a body corporate and National Bank Financial Ltd., a body corporate

Defendants

Decision on Summary Judgment Motion

Judge: The Honourable Justice Ann Smith

Heard: March 8, 2021, in Halifax, Nova Scotia

Counsel: Christopher I. Robinson for the Plaintiff

William Mahody, Q.C., Jaimie Tax for the Defendants

By the Court:

Introduction

[1] This is a motion for summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04 brought by Douglas G. Rudolph ("Mr. Rudolph" and "the Plaintiff") in relation to claims he has brought against National Bank of Canada and National Bank Financial Ltd. ("National Bank").

[2] Mr. Rudolph commenced this Action on August 2, 2017. At that time, he sought the following:

> - Recission of a January 19, 2012 Settlement Agreement he entered into with National Bank;
> - Recission of a December 28, 2011 Order dismissing his Counterclaim against National Bank in court action S.H. No. 175576;
> - A declaration that a certain margin agreement and margin debt are null and void; and
> - Damages for the loss of value of shares he had in Knowledge House Inc., the loss of value of Mr. Rudolph's CrossOff shares, damages for lost income, loss of future income, aggravated damages, punitive damages, general damages, special damages, solicitor-client costs, interest, and compensation in the form of disgorgement.

[3] National Bank filed a Defence on October 20, 2017. Mr. Rudolph filed an Amended Notice of Action on January 11, 2021. National Bank filed an Amended Defence on February 16, 2021.

[4] On this motion, Mr. Rudolph seeks an order establishing National Bank's liability in negligence, leaving the quantum of damages as the sole issue remaining to be determined on the trial of the action.

Background

[5] There is a significant, and relevant pre-litigation and background history between the parties that is necessary to review in order to put Mr. Rudolph's motion for summary judgment in context.

Pre-Litigation Events Leading to the 2001 Litigation

[6] On April 3, 2001, Mr. Rudolph opened a margin account with National Bank for the purpose of holding Knowledge House Inc. ("KH") share warrants. The share warrants were acquired for $1.50 each. At the time KH shares were trading at market at over $6.00 per share. Immediately thereafter, Mr. Rudolph's margin account held 91,667 KH share warrants. These share warrants were acquired on credit extended by National Bank.

[7] By September 2001, the value of KH shares had decreased significantly and National Bank pursued Mr. Rudolph for the debt in his margin account.

The S.H. No. 175576 Litigation – November 2001

[8] On November 26, 2001, National Bank commenced an action against Mr. Rudolph (S.H. No. 175576) seeking damages in the amount of $217,621.00 plus interest for an alleged breach Mr. Rudolph's margin account agreement with National Bank (the "SH 175576 Claim").

[9] On December 27, 2001, Mr. Rudolph filed a Defence and Counterclaim in which he denied liability and counterclaimed against National Bank for damages for breach of contract, negligence and breach of fiduciary duty (the "SH 175576 Counterclaim).

[10] In the SH 175576 Counterclaim, Mr. Rudolph claimed that National Bank (paras 37 – 39):

> - Reduced the established lending rates on KH common shares abruptly and without notice to him;
> - Failed to properly monitor National Bank Customer Accounts such that it allowed an increased concentration of KH share contrary to its own policies and good business practice;
> - Sold common shares from National Bank Customer Accounts into the market during a short sell when it knew that such actions would harm the value of KH common shares;
> - Allowed KH common shares to be used by Armoyan for the purpose of short selling KH common shares;
> - Failed to allow him sufficient time to reduce the concentration of KH common shares in his account;

- Failed to give him any proper notice of the change in lending rate on KH common shares;
- Treated National Bank Customers with KH common shares in their accounts in an inconsistent manner and in particular failed to properly give any or proper notice to National Bank Customers of the alleged defaults under their respective Margin Agreements;
- After improperly demanding payment from National Bank Customers, sent the accounts to a collection agency which collection agency made several telephone calls to members of the public advising of the purported demands under the Margin Agreements thereby further damaging the value of the KH common shares;
- Traded on its own account or on accounts over which it had control when the Armoyan short selling had its effect; and
- Sold only his 71,000 CrossOff Incorporated common shares, to offset the margin account losses it had created.

[11] In the SH 175576 Counterclaim, Mr. Rudolph sought the following relief (Statement of Counterclaim, para 40):

- $384,305.82 being the decline in the value of KH common shares, less the margin account;
- $83,780.00 being the value of the 71,000 CrossOff Incorporated common shares held by Mr. Rudolph and sold by National Bank to cover margins alleged to be owing;
- A declaration that the Margin Account is null and void;
- An injunction restraining National Bank from any further selling of common shares of KH and other securities;
- General damages, interest and costs.

[12] National Bank also commenced sixteen (16) separate actions against other debtors. On July 16, 2002 Warner J. of this Court issued a Consolidation Order which ordered that these sixteen (16) actions being tried together (the "Debt Actions"). The Consolidation Order provided that "no party in the consolidated action shall be liable for any damages or other relief claimed except specifically

pleaded in each particular action". The consolidated action would become SH. No. 174293.

[13] On September 10, 2002, National Bank filed a Defence to Counterclaim in which it denied Mr. Rudolph's allegations against it.

[14] On March 15, 2010, counsel for National Bank examined Mr. Rudolph on discovery. During his discovery Mr. Rudolph gave sixty-two (62) undertakings to National Bank.

[15] Mr. Rudolph did not provide responses to these undertakings, and after two Court orders requiring him to fulfil outstanding undertakings, with costs to National Bank (November 17, 2010 and June 24, 2011), on December 28, 2011, the Court issued an Order dismissing Mr. Rudolph's Counterclaim. The Court also struck numerous paragraphs of his Statement of Defence as an abuse of process under *Civil Procedure Rule 88* (the "SH 175576 Counterclaim Dismissal Order").

The Settlement of the SH 175576 Litigation

[16] In early January 2012 National Bank and Mr. Rudolph agreed to settle the SH 175576 claim. The parties agreed to settle on a without costs basis on the condition

that Mr. Rudolph agree that all claims arising from matters related to Knowledge House as between them would be at an end.

[17] National Bank and Mr. Rudolph signed a Consent Dismissal Order dismissing the action, which was issued by Warner, J on January 19, 2012 (the "SH 175576 Consent Dismissal Order").

The Settlement Agreement with the Nova Scotia Securities Commission

[18] In June 2005, National Bank entered into a settlement agreement with the Nova Scotia Securities Commission, the Investment Dealers Association of Canada and Market Regulation Services Inc. In that Settlement Agreement, National Bank made certain admissions related to its lack of supervision of Investment Advisor Bruce Clarke (the "NS Securities Settlement Agreement").

[19] In June 2005, the parties to the NS Securities Settlement Agreement entered into an escrow agreement by which they agreed not to disclose this agreement until all regulatory proceedings related to Knowledge House were complete (the "Escrow Agreement").

[20] In December 2012 the NS Securities Settlement Agreement became public when the Nova Scotia Securities Commission approved it.

The Trial of the SH 174293 Debt Actions and Decision by Justice Warner

[21] Warner J of this Court heard the trial of the remaining Debt Actions between February 13, 2012 and April 17, 2012. Mr. Rudolph did not participate in the trial. He had settled his claims with National Bank in early January 2012.

[22] Justice Warner reserved his decision. Thereafter, the NS Securities Settlement Agreement became publicly available. The Court allowed post-trial written submissions regarding the use that could be made of the NS Securities Settlement Agreement.

[23] Justice Warner released his decision in *National Bank Financial Ltd. v. Potter*, 2013 NSSC 248 in early August 2013. He found that Bruce Clarke and certain KH insiders engaged in manipulative trading, in violation of securities laws, which artificially supported the market price of KH shares. Warner J made separate findings on liability and damages for each Defendant.

Recission of Certain Settlement Agreements Between National Bank and KH Investors

[24] In May 2013, certain Knowledge House investors who had previously settled with National Bank, including prior defendants/plaintiffs by counterclaims in the Debt Actions, brought motions seeking recession of their settlement agreements with

National Bank and the consequential dismissal orders on the basis that National Bank had not disclosed the NS Securities Settlement Agreement to them prior to settling their claims.

[25] Mr. Rudolph did not participate in the rescission process which took place during the years 2013 – 2014.

The Decision of the Nova Scotia Court of Appeal

[26] Various parties, including Calvin Wadden, Craig Dunham, Lowell Weir and Mr. Weir's corporation, Blackwood Holding Incorporated, initiated appeals from Warner J's decision to the Nova Scotia Court of Appeal. The appeal was heard by the Court of Appeal in September 2014. Mr. Rudolph was not a party to the appeal.

[27] In its decision, *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, the Court of Appeal was scathing in its criticism of National Bank's conduct during the litigation and the trial, but particularly with respect to National Bank's failure to disclose the NS Securities Settlement Agreement, despite knowing that admissions contained therein were relevant to the litigation and, further, that those admissions were in direct contradiction to the positions taken by National Bank in its pleadings.

[28] However, Saunders, J.A., writing for the Court of Appeal was very clear that Court's decision only applied to the matters before it:

> [8] At this juncture, it is enough to say that National Bank's actions throughout these proceedings had proven to be so serious as to amount to an abuse of process, calling for extreme, unequivocal, and permanent sanctions. For more than 10 years the Bank maintained a position and asserted facts in its pleadings which it knew to be false. It deliberately set out on a path to hide the truth from the Court and opposing parties. In doing so it deprived the adjudicative process of highly relevant and critically important facts.
>
> [9] It would be a mistake to characterize these appeals, and their disposition, as turning on a mere failure to disclose. While undoubtedly that dereliction is serious enough, the misconduct here also involved a deliberate and ongoing pattern of deception amounting to an intentional misleading of the Court, something so egregious as to strike at the very heart of the administration of justice.
>
> [10] **I wish to emphasize that this decision only deals with the matters which form the subject of these three appeals. Readers are cautioned that nothing in this judgment should be taken to reflect upon any other proceedings or settlements, whether completed, abandoned, or ongoing, between or among parties who are not participants in these appeals.**
>
> (emphasis added)

[29] The Court of Appeal struck and stayed National Bank's claims, counterclaims and defences and awarded various heads of damages to the Appellants:

> [312] For all of these reasons I find that the Bank's repeated efforts to keep secret the contents of the settlement agreement it negotiated, as well as the other examples I have provided of very serious misconduct, constitute that rare and exceptional circumstance where the Court's own process has been abused, thereby requiring the Court's swift and unequivocal intervention.
>
> [313] **All of this justifies striking the Bank's pleadings in all of its claims, counterclaims and defences in every action in which it was a participant in matters which form the subject of these three appeals. Obviously, those are the only cases under consideration here. Nothing in these reasons should be taken to reflect upon any other outcomes or settlements achieved between or among parties who are not participants in these appeals**.

(emphasis added)

[30] The Court of Appeal again emphasized that its decision and judgment only applied to the particular cases on appeal before it. It was only those cases for which the Court of Appeal had the relevant issues and evidence:

> [317] I begin by acknowledging that the Bank's position in filing suit, or resisting claims made against it, was not solely based upon declared innocence and ignorance with respect to the conduct of its employees, particularly Clarke. **I am not saying that revealing the existence and contents of the settlement agreement would have forced the Bank to capitulate and surrender to each and every claim, without protest. Obviously, the claimants would still have had to establish a cause of action and prove their damages**. But there can be no doubt that the Bank's denial of any knowledge surrounding the activities of Clarke and those working in concert with him was the centrepiece of the Bank's claims and defences such that disclosure of the true state of affairs, in a timely manner, would have had a profound effect on the outcome. **What impact a timely disclosure of the Bank's admissions might have had on the other proceedings which were settled, abandoned or otherwise concluded, is not before us. This judgment does not speak to any other cases simply because the evidence and issues in those cases are not before us.**

(emphasis added)

The Amended Statement of Claim and Amended Defence

[31] On January 11, 2021, Mr. Rudolph amended his Notice of Action by removing the majority of the alleged contractual, tort and fiduciary breaches in his 2017 Action. He also removed his request for rescission of the December 28, 2011 Order dismissing his 2001 counterclaim.

[32] In the Amended Action, Mr. Rudolph alleges the following breaches by National Bank:

> (a) failing to properly supervise employees or properly supervise the Plaintiff's margin account…
>
> (b) negligence;
>
> (c) failure to supervise employees and agents;
>
> (d) failure to
>
> i. detect a pattern of manipulative trading;
>
> ii. to establish and implement proper internal control procedures;
>
> iii. to ensure that branch offices conformed with prudent business practices;
>
> iv. to properly supervise margin accounts
>
> (Amended Statement of Claim, para. 45)

[33] National Bank's Amended Statement of Defence asserts, *inter alia*, as follow:

- The claims raised in the Amended Statement of Claim are *res judicata* and the Plaintiff is estopped from asserting them;
- The SH 175576 Counterclaim Dismissal Order is an absolute bar to the claims raised in the Amended Statement of Claim;
- The Plaintiff is barred by the doctrine of laches and by his failure to act in a timely manner to seek recission of the 175576 Settlement and the 175576 Consent Dismissal Order;
- The Plaintiff's action for recission constitutes a collateral attack on, and is inconsistent with the procedure established by the Court in 2013 to address recission claims;
- The Plaintiff's claim is statute barred pursuant to the *Limitations of Actions Act*, SNS 2014, c. 35;
- The Defendants deny:

i. That the Plaintiff is entitled to recission of the 175576 Settlement and the 175576 Consent Dismissal Order;

ii. That the Plaintiff was induced by National Bank's non-disclosure of the Regulatory Settlement to refuse to answer his outstanding undertakings in late 2011 or to agree to the 175576 Settlement in early 2012;

iii. That a duty of care is owed to the Plaintiff in relation to the KH shares he held at third party financial institutions;

iv. That they were negligent in relation to the Plaintiff, or that they caused the Plaintiff damages;

v. All allegations of improper conduct, subject to the specific admissions expressly contained in the Regulatory Settlement which admissions are wholly unrelated to the Plaintiff's claims;

vi. That the Plaintiff has any cause of action in relation to the matters addressed in the Regulatory Settlement and deny that the Plaintiff suffered any compensable damages as a result thereof;

vii. That the Plaintiff has suffered any of the damages claimed in the Statement of Claim or at all.

- Alternatively, if the Plaintiff is entitled to recission of the SH 175576 Settlement and the SH 175576 Consent Dismissal Order, then one effect of such recission would be to revive National Bank's 175576 Claim for unpaid margin debt as it stood in January 2012.

[34] Between 2017 and 2020 there was no disclosure of documents nor discovery examinations.

Issue

[35] The issue the Court must determine is whether summary judgment should be granted to Mr. Rudolph.

Law – Summary Judgment on Evidence

[36] *Civil Procedure Rule* 13.04 governs the granting of summary judgment on evidence.

[37] The purpose of summary judgment motions is to put to an end claims or defences which have no real prospect of success. This was confirmed by the Nova Scotia Court of Appeal in *Burton Canada Co*. v. *Coady*, 2013 NSCA 95 (N.S.C.A.):

> [22] In my respectful opinion this process has become needlessly complicated and cumbersome. Summary judgment should be just that. "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 to 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.

[38] The parties agree with respect to the analytical framework to be applied on motions for summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04. That framework, which involves sequential questions and answers, was set out by Fichaud, J.A. in *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89 at paragraph 34:

> 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.

- **Second Question**: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question**: If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test. "Does the challenged pleading have a real chance of success?"

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question**: If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success"

> goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

[39] If the motion for summary judgment is dismissed, the fifth question the Court should ask is whether the action should be converted to an application and, if not, what directions should govern the conduct of the actions.

[40] In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consultation Inc.* , 2017 NSCA 61, Farrar, J.A., speaking for the Court of Appeal made it clear that a motion for summary judgment on evidence is not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, to draw inferences or to evaluate credibility. (paras. 12 – 25). In *Shannex* (*supra*), Fichaud, J.A. described a "material fact" as "one that would affect the result".

[41] As the Court said in *Shannex*, on a motion for summary judgment on evidence, each party is expected to put their best forward, with evidence and legal submissions on all of the questions, including the "genuine issue of material fact", issue of law, and "real chance of success".

Evidence on the Motion for Summary Judgment

[42] The evidence on the motion consisted of the Affidavits of Mr. Rudolph sworn November 6, 2020 and March 4, 2021 and the Affidavits of Doris Ryerson, a

Compliance Manager for National Bank, sworn August 31, 2020 and November 20, 2020. Neither affiant was cross-examined on the motion. National Bank also referred to excerpts from the transcripts of discovery examination of Mr. Rudolph held on August 4, 2011.

The Positions of the Parties

[43] Mr. Rudolph says that summary judgment on evidence should be granted, dismissing the defences advanced by National Bank, leaving the quantum of damages, (and in the alternative), the quantum of damages and National Bank's limitation period defence as the sole issues to be determined at the trial of the action.

[44] In terms of his claim in negligence, Mr. Rudolph says that there are no genuine issues of material fact relating to whether the bank owed him a duty of care, breached that duty, and that he suffered a loss caused by National Bank breach(es) of duty. In that regard, Mr. Rudolph relies heavily on the Court of Appeal decision in *Barthe v. National Bank*.

[45] National Bank says that the December 28, 2011 Order dismissing Mr. Rudolph's 2001 counterclaim in SH 175576 is an absolute bar to his current claim. The bank says that Mr. Rudolph is not entitled to recission of the 2012 Settlement Agreement and the Consent Dismissal Order without first obtaining recission of this

Settlement Agreement and Counterclaim Dismissal Order, and that the claims raised in the within action are *res judicata*. The bank also says that Mr. Rudolph is barred by the doctrine of laches and by his failure to act in a timely manner to seek recission of the Settlement Agreement and the Dismissal Order.

[46] In terms of Mr. Rudolph's claim in negligence, National Bank says that Mr. Rudolph has failed to adduce evidence that, *inter alia*, he suffered a loss, or that any loss he suffered was caused by negligence on its part.

Are there Disputes of Material Fact Which Require a Trial?

Mr. Rudolph's Claim in Negligence Against National Bank

[47] As noted earlier in this decision, Mr. Rudolph's claim against National Bank primarily lies in negligence. He alleges that National Bank failed to properly supervise employees, failed to detect manipulative trading and failed to establish and implement proper internal control procedures. There is also a claim in fraudulent misrepresentation. He seeks damages for the loss of the value of his 120,867 KH shares and damages for the loss of value of his 71,000 CrossOff shares, amongst other heads of damages.

[48] The constituent elements of satisfying a claim in negligence were confirmed by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27:

> [3] A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

[49] National Bank says that the most critical gaps in the Plaintiff's evidence before the Court on this motion is evidence of loss in fact and causation. The Plaintiff's position is that loss is presumed, leaving only quantum of loss to be determined at trial.

[50] National Bank points to the April 2001 warrants which the Plaintiff received for a penny each. Each of those warrants could be converted to a KH share at a share price of $1.50. The KH shares at that time were trading at approximately $6.00 per share. National Bank says that Mr. Rudolph contributed none of his own money to the warrant transaction. An excerpt from the transcript of Mr. Rudolph's 2010 was before the Court and confirms that Mr. Rudolph admitted he contributed none of his own money to the 2001 warrant transaction. Rather, the acquisition of the KH shares occurred solely on credit extended by National Bank which Mr. Rudolph has not repaid. National Bank also says that Mr. Rudolph did not invest his own funds to acquire the CrossOff shares, although there is a dispute of fact regarding Mr.

Rudolph's knowledge of the acquisition of those shares. Nonetheless, the CrossOff shares were acquired by Mr. Rudolph solely on credit extended by National Bank through the margin account, which National Bank says that Mr. Rudolph never has paid back.

[51] National Bank says that this raises a significant dispute as to whether Mr. Rudolph has suffered any loss and accordingly is a genuine issue of material fact requiring a trial.

[52] National Bank admits that it has an obligation to exercise a reasonable standard of care. However, it says that Mr. Rudolph needs to offer evidence on the standard of care of a bank in similar circumstances, which he has failed to do. National Bank also says that Mr. Rudolph has put forward no facts to establish a breach of that standard by National Bank.

[53] National Bank also says that Mr. Rudolph has not put forward any evidence to establish that any alleged loss he suffered was caused by National Bank's alleged breach(es) of the standard of care.

[54] With respect to causation, National Bank says that Mr. Rudolph was a sophisticated and knowledgeable investor who made his own investment decisions, including those in relation to Knowledge House. In that regard, National Bank says

that Mr. Rudolph acquired KH shares as a result of a deal made with KH insiders. In exchange for encouraging friends and professional contacts to purchase KH shares, Mr. Rudolph was provided with the opportunity to acquire 91,667 KH share warrants for $1.50 per share at a time when KH shares were trading at approximately $6.00 per share. National Bank says that there is no evidence before this Court to support the contention that if National Bank had acted differently, Mr. Rudolph's alleged loss would have been avoided. National House says that while Courts have since determined that KH insiders were manipulating the value of Knowledge House and the share price was fabricated, Mr. Rudolph played a role in encouraging people to invest in Knowledge House, both by marketing the company and proposing that individuals use their RRSPs to purchase shares.

[55] An excerpt from Mr. Rudolph's 2011 discovery examination was before the Court. When asked about the circumstances whereby he received the share warrants, he was unable to say why or how he received these warrants and whether it was part of a deal whereby he received shares in exchange for encouraging friends and contacts to invest in KH. However, his discovery evidence in 2011 did confirm that Mr. Rudolph recalled at that time that he understood that he was to hold the shares for a period of time, that they "weren't to be bought today and sold tomorrow".

[56] This Court notes that in his Supplemental Affidavit filed with the Court on March 4, 2021, a few days before the hearing of this motion, and after receiving National Bank's submissions where the bank says that there is no evidence that Mr. Rudolph suffered a loss, Mr. Rudolph says that had he been aware of the stock manipulation by Knowledge House insiders, that was artificially supporting the value of KH shares, he would have sold the shares at market the day he exercised his warrants.

[57] National Bank says that this evidence is terminal to any successful claim in negligence. The bank says it is not negligence on its part for Mr. Rudolph to have immediately sold his shares on the market, i.e. taken advantage of the manipulation, and then claimed a loss. National Bank says that what Mr. Rudolph is asking the Court to do, under this theory of loss and causation, is for the Court to sanction the knowing sale of price-manipulated shares.

[58] National Bank says that these facts raise a substantial, genuine material dispute regarding causation.

[59] National Bank says that how Mr. Rudolph acquired the share warrants and under what terms are important factual determinations that cannot be made on the evidentiary record before the Court on this motion.

The Bank's Defences – *Res Judicata* and Laches

[60] Further, in its defence, National Bank raises the December 28, 2011 Counterclaim Claim Dismissal Order, as an absolute bar to Mr. Rudolph's current claims in the within action. In that regard, National Bank says Mr. Rudolph's claims are estopped by the doctrine of *res judicata*.

[61] National Bank says that summary judgment is not the forum for this Court to make a determination as to whether Mr. Rudolph's claims are estopped by that doctrine. In order to make a finding of *res judicata,* this Court would be required to consider whether, *inter alia*, Mr. Rudolph is attempting "to rely on new facts which could have been discovered with reasonable diligence or the earlier case" or "whether the second action is simply an attempt to impose a new legal conception on the same facts" (see *Kameka v. Williams*, 2009 NSCA 107, citing Cromwell J.A. (as he then was) in *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153):

> [18]…Cromwell J.A. expressed the view that the doctrine of *res judicata* required a more nuanced approach than an automatic bar to all matters that could have been raised in a previous proceeding. He wrote:
>
> > [64] My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt

> to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present case constitutes an abuse of process.

[62] National Bank says that while Mr. Rudolph may not have become aware of the Nova Scotia Securities Commission Settlement Agreement until 2012, he was aware of the facts that underly that settlement agreement before the Counterclaim was dismissed and before he entered into the SH 175576 Settlement with National Bank. National Bank points to the evidence Mr. Rudolph gave in his discovery examination on August 4, 2011, which appears to show that Mr. Rudolph knew that Bruce Clarke had been sanctioned by the Nova Scotia Securities Commission and he intended to rely on that information to prove the allegations of wrongdoing by National Bank plead in his SH 175576 Counterclaim. His evidence was as follows:

> Q: In trying to understand your answer, am I correct in saying that, as we sit her today, you do not have evidence, either writings, documents or by way of communication to you to support the allegations? What you are saying is you believe that you can call people at trial?
>
> A: What I'm saying is I believe I can call people at trial, and with the documents that are already public knowledge. For instance, we know that your client's broker was sanctioned by the Securities Commission, and we know that there was admissions made which basically proves many of the allegations that are in this document.

[63] National Bank says that Mr. Rudolph could have raised his allegations in the current claim against National Bank but failed to do so and to do so now would

constitute an attempt to split his case. It points to the pleadings of numerous Debt Action parties (Wadden, Dunham, Weir and Blackwood Holdings) which specifically alleged a failure to supervise by National Bank, and that those allegations were known, or should have been known, by Mr. Rudolph at the time the SH 175576 litigation was active.

[64] Mr. Rudolph also seeks recission of the SH 175576 Settlement Agreement he entered into with National Bank on January 5, 2012 which resulted in the Consent Dismissal Order issued January 19, 2012.

[65] National Bank says that the law is clear that a party claiming rescission must disaffirm the agreement promptly upon discovering a new material fact. It refers to the decision of the Ontario Court of Appeal in *Louie v. Lastman*, 2002 CanLII 4561 where the Court of Appeal stated that a claim for rescission requires "special promptitude":

> [19] The authorities indicate that while equitable claims must in general be made promptly, "special promptitude" is required for certain classes of claims such as recession. See *Logan v. Williams* (1989), 1989 CanLII 8855 (BCCA), 41 B.C.L.R. (2d) 34, 24 R.F.L. (2d) 72 (CA) at pp. 40-41 and Meagher et al., supra, at 3606.

[66] National Bank has plead that Mr. Rudolph knew or ought to have known about the 2013 recissions motions for various reasons in or about May 2013. It says that Mr. Rudolph elected not to bring a motion for recission of the SH 1755576

Settlement Agreement or the Consent Order which followed until over four years. The bank says that in the circumstances, it is a genuine issue of material fact whether Mr. Rudolph acted with "special promptitude", a material fact which it says will require the weighing of evidence and the evaluation of credibility, which are not appropriate for summary determination pursuant to *Hatch*.

Analysis

The Claim in Negligence

[67] Mr. Rudolph's claim against National Bank in negligence requires a trial. This Court is not prepared, on the record before it, to ignore or read down Justice Saunders very strong statements in *National Bank v. Barthe* that the Court of Appeal's decision only related to the matters which formed the three appeals before it, and that nothing in the Court's judgment should be taken to reflect upon any other proceedings between parties not participant in the appeals before it. Justice Saunders (para. 317) states, "What impact a timely disclosure of the Bank's admissions might have had on other proceedings which were settled, abandoned or otherwise concluded is not before us. This judgment does not speak to any other cases simply because the evidence and issues in those cases are not before us".

[68] This Court finds that there are genuine material facts in issue with respect to whether, and how, the National Bank breached duties it owed Mr. Rudolph, but perhaps more importantly, how any breach(es) of those duties caused loss to Mr. Rudolph. There is also a genuine dispute of fact as to whether Mr. Rudolph suffered a loss. The Court is not prepared to presume that there are no factual differences between Mr. Rudolph and the parties before the Court of Appeal in *Barthe v. National Bank*.

[69] Mr. Rudolph has not presented evidence to establish each of the elements of negligence. That lack of evidence serves as a bar to summary judgment.

The Bank's Defences – *Res Judicata* and Laches

[70] I find that there is genuine issue of material facts with respect to National Bank's recission defence that requires a trial. Mr. Rudolph did not seek recission of the 2012 SH 175576 Settlement Agreement or Consent Dismissal Order. National Banks says that that raises the question of whether his current claim is barred by the doctrine of *res judicata*.

[71] While a party is required to put its best foot forward on a defence it has plead, the kind of nuanced analysis required for the Court to determine whether Mr. Rudolph's current claim in negligence based upon National Bank's failure to

supervise is barred by the doctrine of *res judicata* raises disputed questions of fact and requires the weighing of evidence and the evaluation of credibility - all inappropriate tasks for a summary judgment motions judge.

[72] The same applies with respect to the question of whether Mr. Rudolph is barred by the doctrine of laches and by his alleged failure to act in a timely manner to seek recission of the 175576 Settlement and the 175576 Consent Dismissal Order.

Conclusions

[73] Mr. Rudolph's motion for summary judgment is dismissed. Neither party submitted to the Court that should the summary judgment motion be dismissed, that the action should be converted to an application. Nor does this Court conclude, based on the record before it, that the proceeding should proceed by way of application. Rather, the matter should proceed in a timely fashion to the next steps in the litigation process, likely document disclosure and discovery examinations.

[74] National Bank is entitled to its costs of this motion. If the parties cannot agree on costs, the Court will receive written submissions within 20 calendar days of this decision.

Smith, J.