SUPREME COURT OF NOVA SCOTIA
Citation: *Rumsey MacLean v. Andrea*, 2021 NSSC 329

Date: 20211129
Docket: *Syd*, No. 502207
Registry: Sydney

Between:

Sara Michelle Rumsey MacLean

Plaintiff

v.

Stephen J. Andrea

Defendant

Decision on Motion
Summary Judgment on Evidence
Civil Procedure Rule 13

Judge:	The Honourable Justice Robin Gogan
Heard:	November 9, 2021, in Sydney, Nova Scotia
Counsel:	Sarah Rumsey MacLean, for the Plaintiff Guy LaFosse, Q.C., for the Defendant

By the Court:

Introduction

[1] This is a motion for Summary Judgment on Evidence. It involves a claim Sara Rumsey-MacLean makes against Stephen Andrea. The claim was filed on November 27, 2020. A defence was filed on February 2, 2021.

[2] Andrea is a lawyer and was the proctor for the Estate of Marguerite Rumsey. Margaret Rumsey died on August 6, 2010, without a last will and testament. Rumsey-MacLean is Margaret Rumsey's daughter. The nature of the estate litigation is reviewed in ***Rumsey v. Estate of Rumsey***, 2020 NSSC 404. There was no appeal from that decision. The statement of claim in the current proceeding names Andrea as the defendant but does not identify the legal basis of the claim against him. The claim does reference issues that arose in the estate proceeding.

[3] For the reasons that follow, I allow the motion and grant summary judgment. Put simply, I find that Rumsey-MacLean has no chance of success with her claim against Andrea.

Background and Evidence Review

[4] The evidence on this motion comes from the affidavits of Andrea and Rumsey-MacLean. Andrea filed an affidavit detailing the history and disposition of the related estate litigation. Rumsey-MacLean filed two affidavits that attached a number of exhibits. There was no cross-examination on the affidavits.

[5] Rumsey-MacLean is self-represented in the main proceeding and on this motion. She had a lawyer for part of the estate litigation but she and her lawyer parted ways before that matter concluded. Since then, she has been without counsel. She has been encouraged many times to obtain legal advice.

[6] The pleadings in this case do not identify a specific cause of action against Andrea. Instead, the claim raises a number of issues that arose previously during the estate litigation. The suggestion is that these issues were mishandled by Andrea and that the claim is one of negligence. During oral submissions, the claim evolved to be that Andrea mislead or misinformed the Court with implications to the outcome of the estate litigation. No facts to this effect are contained in the claim.

[7] The history of the estate litigation and the issues resolved in that proceeding are detailed in the decision in ***Rumsey v. Rumsey Estate***. I note here, as I did in the ***Rumsey Estate*** decision, that Rumsey-MacLean has advanced a consistent and insistent position throughout the litigation, especially in relation to the issue of

Manulife life insurance proceeds. She believes that the insurance proceeds should not form part of her mother's the estate, but be paid to her personally. Although this proceeding is a claim against Andrea, the issue of the insurance proceeds remains at the forefront.

[8] In response, Andrea now brings this motion for summary judgment on evidence pursuant to ***Civil Procedure Rule*** 13.04 and asks for dismissal of all claims against him in this proceeding.

Issues

[9] Should summary judgment be granted disallowing the claims against Andrea?

Position of the Parties

Stephen Andrea

[10] Andrea moves for summary judgment on evidence. He says this remedy is appropriate as there are no disputed material facts requiring trial and there is no identifiable question of law for determination. Moreover, any claim against Andrea has either no chance of success or is *res judicata* given the issues determined in the estate proceedings.

Sara Rumsey-MacLean

[11] Rumsey-MacLean asks that this motion be dismissed and that her claims against Andrea proceed. There are other issues raised in her submissions that are beyond the scope of this motion. These include allegations of a variety of complaints including delays in the administration of the estate and a lack of communication with beneficiaries.

[12] **Analysis**

Summary Judgment – Civil Procedure Rule 13.04

[13] This motion is brought under ***Civil Procedure Ru***le 13.04 which provides:

> 13.04(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (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.

[14] Motions for summary judgment have been the subject of frequent consideration. It is said that the applicable principles are no longer controversial. Oft cited is the decision in ***Burton Canada Company*** v. ***Coady,*** 2013 NSCA 95. More recently, in ***Shannex Inc. v. Dora Construction Ltd.***, 2016 NSCA 89 at para. 34, Fichaud, J.A. posed a series of questions as a guide to any motion of this kind:

> • **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, 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.
>
> This is not the case to catalogue the principles that will govern the judge's discretion under *Rule* 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, will play a role.
>
> A party who wishes the judge to exercise discretion under *Rule* 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under *Rule* 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal. (Emphasis added)

[15] After reviewing the foregoing approach, the reasons in ***Shannex*** underscore the importance of the parties putting their best foot forward on these motions:

> 36. … Under the amended *Rule*, as with the former *Rule*, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issues of law, and "real chance of success": *Rules* 13.04(4) and (5); *Burton*, para. 87.

[16] Our Court of Appeal has further considered the required analysis in ***Halifax Regional Municipality v. Annapolis Group Inc***., 2021 NSCA 3, ***Tri-County***

Regional School Board v. 3021386 Nova Scotia Limited, 2021 NSCA 4, , and ***Weaver v. Bryson***, 2021 NSCA 14. These three cases were focused mainly on the determination of whether there were genuine issues of material fact disclosed on the motion for summary judgment.

Determination of Summary Judgment Motion

[17] I turn now to a determination of the motion employing the sequential analysis from ***Shannex***:

Does the challenged pleading disclose a "genuine issue of material fact", either pure of mixed with a question of law?

[18] The answer to this first question is no.

[19] The starting point for the analysis of this question is the statement of claim against Andrea. As a self-represented litigant, Rumsey-MacLean used Form 4.02B which prompts the plaintiff to state the material facts on which the claim is based. In response, Rumsey-MacLean's claim contains the following handwritten information, "*Manulife $5076.74 claim for the policy unknown, release of mortgage $82,344.05 Lawsuit $100,000.00 unable to work do (sic) to time and pain and*

suffering". The statement of claim goes on to include the sources of information relied upon.

[20] There are no facts in the claim that provide a basis for a cause of action against Andrea. The facts referred to in the claim relate to issues that arose and were resolved in the litigation of the Rumsey Estate. There was no appeal from the findings made in that proceeding or its ultimate disposition.

[21] It is recognized that the claim names Andrea as the defendant. The oral submissions made by Rumsey-MacLean suggest that her claim relates to various ways in which Andrea mishandled her mother's estate and the issues that she advanced in that proceeding. Although claims must be made in compliance with the *Civil Procedure Rules*, I have nonetheless interpreted what Rumsey-MacLean has filed as a claim of negligence against Andrea. This is far beyond what the written words support but is reflective of the submissions made and the tone of Rumsey-MacLean's complaints during the hearing of this motion.

[22] I pause here to note that I was the presiding judge in ***Rumsey Estate*** and I consider the record before me in that matter. Many of the documents from the estate litigation were reproduced as evidence in this motion. This is a point raised by Andrea at p. 7 of his written submissions (reproduced here for convenience):

> The Plaintiff alleges that $5,076.74 of the Manulife Insurance proceeds paid to the Estate should have been payable to her directly. She also claims the entire payout, and release of the home's mortgage that was incorrectly paid to the estate, was wrongdoing by Andrea.
>
> In a Supreme Court appearance on July 4, 2018, the Plaintiff was ordered to produce evidence that she personally entitled to the $20,000 Manulife proceeds; she did not produce any further evidence as contemplated by paragraph 3 of that Order, a copy of which is attached as Exhibit "7" to Mr. Andrea's affidavit. On July 8, 2020, Your Ladyship affirmed the Registrar of Probate's decision to approve a full and final accounting of the Estate's accounts, with the exception of costs against the Plaintiff. The inventory and accounts contained in the final accounting package included the sale proceeds of the Property, the mortgage overpayment and the Policy's proceeds. A copy of Your Ladyship's decision is attached as Exhibit "13" to Mr. Andrea's affidavit.
>
> In documents filed with the Court, the Plaintiff has not provided any further evidence, or specific information to explain Mr. Andrea's wrongdoing. The Plaintiff does not support her claim that she is personally entitled to the Manulife, or the Canada Life proceeds. Rather, her submissions contain large portions of hearsay, and the procedural history of matters previously heard and adjudicated by both the Registrar of Probate, and the Supreme Court of Nova Scotia. There are no genuine issues of material fact in dispute with respect to the Plaintiff's claim.

[23] The foregoing submission is a concise summary of the contentious issues raised in the estate litigation and raised again on this motion. There is no new issue or evidence for consideration. Moreover, no new material fact or evidentiary basis has been advanced that impugns Andrea's conduct as proctor of the Rumsey Estate. I acknowledge that there have been accusations made about Andrea's conduct but such bare assertions of serious misconduct cannot be a basis to say that disputed facts exist. On this point, I consider the requirement of *Rule* 38.03(3) that full

particulars of any claim of unconscionable conduct must be disclosed in the pleading. Nothing of this kind exists in the present case.

[24] On this basis, I conclude that there is no material dispute of fact requiring trial.

Does the challenged pleading require the determination of a question of law, either pure or mixed with a question of fact?

[25] Moving now to the second question, the answer to this question is also no - but with a caveat.

[26] Returning once again to the statement of claim, Form 4.02B prompts the plaintiff to provide references to any legislation or point of law raised by the material facts. In spite of the prompt, Rumsey-MacLean's claim does not disclose anything of this kind. Nor do the facts set out in the claim ground an identifiable cause of action against Andrea.

[27] As noted above, when considering the answer to question one, for the sake of the analysis, I have considered Rumsey-MacLean's oral submissions and assessed whether the claim could be amended to raise negligence or some form of unconscionable conduct as a cause of action. There are no material facts contained in the statement of claim that could support any claim of those kinds. However, given that Rumsey-MacLean has no legal assistance to draft her claim, I have

considered whether there is any basis on which an amendment could make it sufficiently compliant with the *Civil Procedure Rules* and viable as a claim. As a result, although I have answered this question no, I go on to consider whether an amendment to the claim would survive the assessment required by question three.

[28] Before moving on to that brief analysis, I note here that answering both question one and two in the negative requires that summary judgment be granted. There is no discretion in *Rule* 13 in this regard. If there is no material dispute of fact requiring trial, and no question of law for determination, the claim is a nuisance and must be disposed of summarily.

If the answers to #1 and #2 are NO and Yes respectively, leaving only the issue of law, then the judge "may" grant or deny summary judgment – the question is "does the challenged pleading have a real chance of success".

[29] I move to consider whether the challenged pleading could have a real chance of success if framed as a claim in negligence.

[30] In ***Halifax Regional Municipality v. Annapolis Group Inc***, Farrar, J.A. considered the exercise of discretion in *Rule* 13, confirming that summary judgment should follow where there is but one outcome based on the law and uncontested facts.

[31] I have considered the undisputed facts and the written and oral submissions. I have attempted, as part of my analysis, to put the plaintiff's claims in their strongest position. Having approached the assessment in this context, I am unable to say that there is any prospect of success.

[32] Rumsey-MacLean maintains that her mother's estate was not administered or distributed as intended. She has raised her concerns repeatedly in various forums with no success. Her claim in this proceeding and her response to this motion is yet another attempt to litigate essentially the same issues already decided. The difference now is that she alleges Andrea is responsible in some way for any adverse outcomes in the estate litigation. The specific nature of the claim or potential claim against Andrea is not clear. However, the allegations made against him are serious and should not linger if there is no prospect of them being successful.

[33] The issues raised now that have an evidentiary basis are *res judicata*. Those issues raised that have no evidentiary basis have no real prospect of success. For these reasons, the claim must be dismissed.

Conclusion

[34] On the basis of the foregoing reasons, I find it appropriate to grant summary judgment. The motion is allowed and Rumsey-MacLean's action is dismissed.

[35] Andrea seeks costs on this motion. If the parties are unable to agree on costs then I invite brief written positions on costs no later than December 15, 2021. In the circumstances of this motion, I would ask that any submissions not exceed three pages.

Gogan, J.