SUPREME COURT OF NOVA SCOTIA
Citation: *Crowell v. Royal Bank of Canada*, 2022 NSSC 205

Date: 20220719
Docket: Hfx No 419354
Registry: Halifax

Between:

Karen Crowell

Plaintiff

v.

Royal Bank of Canada

Defendants

DECISION ON MOTION

Judge:	The Honourable Justice Scott C. Norton
Heard:	July 18, 2022, in Halifax, Nova Scotia
Decision	July 19, 2022
Counsel:	Barry Mason, Q.C., for the Plaintiff Sean Kelly, for the Defendant

By the Court:

Introduction

[1] The Defendant, Royal Bank of Canada ("RBC"), moves, pursuant to *Rule* 13.05 for an Order permitting it to file a motion for Summary Judgment on Evidence after the Date Assignment Conference. The Plaintiff contests the motion.

[2] At the conclusion of the hearing of the motion argument on July 18, 2022, I dismissed the motion with reasons to follow. These are my reasons.

Background

[3] The underlying Notice of Action and Statement of Claim seeks damages for breach of a contract of employment related to a claim for disability benefits.

[4] The history of relevant events is set out in the RBC brief as follows:

1. The Notice of Action was filed on September 10, 2013.
2. The Defence was filed on October 21, 2013.
3. A motion by the Plaintiff to amend the Statement of Claim was heard in January 2021 and allowed by decision, dated February 11, 2021. The Statement of Claim was amended on March 2, 2021, and an amended Defence was filed May 27, 2021.
4. A Request for Date Assignment Conference ("RDAC") was filed on June 25, 2021. A Memorandum for the Date Assignment Judge was filed by RBC on July 14, 2021, and an Amended Memorandum was filed on September 8, 2021.
5. The Date Assignment Conference ("DAC") was held on September 10, 2021. Trial dates were scheduled for five days commencing October 25, 2022. A Judicial Settlement Conference ("JSC") was scheduled for March 3, 2022.
6. A second discovery examination of the Plaintiff was conducted by RBC on January 13, 2022.
7. The JSC was re-scheduled to June 13, 2022, due to a family emergency of counsel.

8. The Motion for Summary Judgment on Evidence was filed on July 4, 2022, with a return date (agreed by counsel) of August 8, 2022, for a half day hearing.

9. The present motion was also filed on July 4, 2022, with a hearing date (agreed by counsel) of July 18, 2022.

The Law

[5] Nova Scotia *Civil Procedure Rule* 13.05 states:

> **13.05 Time for bringing motion for summary judgment on evidence**
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> **(1)** 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.
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> **(2)** A judge who conducts a date assignment conference and directs that a motion for summary judgment on evidence may be made must set a deadline by which the motion is to be heard.

[6] The *Rule* contemplates that any motion for summary judgment on evidence will be made before the date assignment conference ("DAC") is requested, and if not, the judge at the DAC will consider whether to direct that such a motion will be brought and set a deadline by which the motion is to be heard. The *Rule* implies, but does not state outright, that this is the latest that a motion for summary judgment on evidence can be requested.

[7] In the present case, at the DAC, counsel for RBC did advise that it was possible that a motion for summary judgment on evidence might be filed but neither counsel raised the requirements of *Rule* 13.05. No direction was requested from, nor provided by, the court and no deadline was set by which the motion was to be heard.

[8] I leave for another case the determination of whether *Rule* 13.05 is determinative of when a motion for summary judgment on evidence can be filed. I have decided that on the facts of this case, it would not be appropriate to permit the motion to proceed in any event.

[9] The only reported case identified by counsel that has considered the *Rule* is *Henderson v. Quinn*, 2020 NSSC 312. There, Justice Wright considered a motion under *Rule* 13.05 where, with agreement of counsel and permission from a judge, an early date assignment conference was held before the completion of discoveries and where one motion for summary judgment on evidence was pending. Trial dates were

scheduled for September 2021. The motion before Justice Wright was heard on September 29, 2020, a full year before the trial. Justice Wright made the following observations regarding the development of the *Rule* in question:

> [8] … 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.
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> [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.
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> [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.
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> [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.
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> [Emphasis added]

[10] On the facts before him, Justice Wright exercised his discretion to permit the summary judgment motions to proceed:

> [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.

[Emphasis added]

[11] Summary judgment on evidence is a procedural tool permitting the court to promote timely and affordable access to the civil justice system. It permits a fair and just means of increasing access to justice. This was recognized by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. The Supreme Court observed

that "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims" (para. 5).

[12] However, the Supreme Court recognized that access to summary judgment process is not without limitation. In order for the summary judgment process to be fair and just it must be "accessible – proportionate, timely and affordable" (para. 28). The Supreme Court noted that the proportionality principle is reflected in many of the provinces' rules and "can act as a touchstone for access to civil justice" (para. 30).

[13] The Nova Scotia *Civil Procedure Rule* regarding proportionality states:

> **1.01 Object of these Rules**
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> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[14] The Supreme Court observed that for summary judgment to be consistent with the proportionality principle, judges must actively manage the litigation process. At paras. 32-33:

> 32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.
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> 33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.
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> [Emphasis added]

[15] In the present case, the motion before the court was filed ten months after the DAC. It was heard ten days before the Finish Date. The intended date of the motion for summary judgment on evidence is August 8, 2022, six days after the Finish Date. Assuming the hearing is completed in the half-day scheduled, it is reasonable to

expect that any decision would not be available until early September. If either party is unhappy with the result, an appeal would make the October trial dates impossible. This would require an adjournment of the five days scheduled for the trial. Pending the outcome of the summary judgment motion, the parties would be required to continue to prepare for the trial, as well as, prepare for the summary judgment motion.

[16] In summary, on the facts of this case, I find that directing the summary judgment on evidence motion to proceed at this late stage would be an excessive and unreasonable cost to the parties and to judicial economy. It would not serve to provide a "prompt" judicial resolution of the legal dispute. On that facts of this case, that is most fairly and justly achieved by the trial proceeding as scheduled in three months' time.

[17] The facts here are distinguishable from those that were before Justice Wright in *Henderson*. In that case, proceeding with summary judgment created no imminent threat to the scheduled trial dates pending a year later. In the present case, the Notice of Action was filed by the Plaintiff Crowell in 2013. The present trial dates are nine years later. No further risk of delay of those trial dates can be seen as fair and just.

[18] The motion is dismissed. The date scheduled for the summary judgment motion is released. RBC shall pay costs to the Plaintiff of $250 forthwith and in any event of the cause. The Plaintiff shall prepare an Order accordingly.

Norton, J.