

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Kentville (Town) v. Mike's Clothing Limited*, 2022 NSSC 10

**Date:** 20230112

**Docket:** *Kentville*, No. 511564

**Registry:** Kentville

**Between:**

Town of Kentville

*Applicant*

v.

Mike's Clothing Limited

*Respondent*

**Judge:** The Honourable Justice Gail L. Gatchalian

**Heard:** January 4, 2023, in Windsor, Nova Scotia

**Counsel:** John Shanks, for the Applicant

Richard Norman, for the Respondent

**By the Court:**

**Introduction**

[1] This is a motion for production of documents brought by the Respondent, Mike's Clothing Limited. The central question is whether there is a sufficient evidentiary basis for Mike's production request.

[2] The Applicant, the Town of Kentville, sold a piece of property to Mike's. Under the agreement of purchase and sale, Mike's is required to meet certain construction deadlines. Under the terms of the agreement, the Town may seek reconveyance of the property if Mike's fails to meet the construction deadlines. The parties amended the agreement three times to extend the deadlines. The last amendment is dated June 29, 2021, and set a revised deadline of September 30, 2021 for Mike's to complete the building's footings. Mike's did not meet the deadline. In the fall of 2021, Mike's asked for a fourth extension. On October 25, 2021, Town Council voted against the extension request, and in favour of reconveyance. The Town started this Application to enforce the reconveyance provisions of the agreement.

[3] Mike's says that Town Council denied the extension request and voted in favour of reconveyance in order to punish Andrew Zebian. Mr. Zebian is the directing mind of Mike's. He is also a Town Councillor. A dispute arose between Mr. Zebian and the Town in the summer of 2021. Mr. Zebian tried to make public a July, 2020 letter authored by Kelly Rice, a former Chief Administrative Officer ("CAO") of the Town. In the letter, Ms. Rice alleged that the mayor and certain councillors had engaged in inappropriate conduct. The Town opposed Mr. Zebian's attempts to disclose Ms. Rice's letter and allegations. The Town took the position that the letter and its contents were confidential.

[4] Mike's says that Town Council's vote against the extension request and in favour of reconveyance was retribution for Mr. Zebian's attempts to disclose Ms. Rice's letter and her allegations. Mike's says that the Town thereby breached its duty of good faith contractual performance.

[5] Mike's seeks production of the following documents: emails, text messages or other written communications between Council members, including the Mayor, and the CAO or other staff with respect to Mr. Zebian's inquiries about Ms. Rice's letter or Mr. Zebian's public statements about Ms. Rice's letter. Mike's says that these documents are relevant to its allegation that the Town breached its duty of good faith contractual performance.

[6] Under Civil Procedure Rule 15.02, the Town must disclose “relevant” documents. “Relevant” is defined in Rule 14.01(1) as having the same meaning as at the trial of an action. The motions judge assesses whether the judge presiding at the trial would find the document to be relevant. At this stage in the process, relevance can only be assessed based on the pleadings and the evidence known at this time. A relevant document is one that is probative of a material fact in issue in the proceeding. A document is probative if it logically makes something more or less likely. The motions judge does not assess how probative the document would be in the context of the trial of the action but whether it is probative of a material fact in issue. If the evidence has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence, then it is relevant.

*See Murphy v. Lawton’s Drug Store Limited*, 2010 NSSC 289 at para.16; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4 at para.46; and *Wilson Fuel Co. v. Power Plus Technology Inc.*, 2015 NSSC 304 at para.16.

[7] The motions judge should take a somewhat more liberal view of the scope of relevance in the context of disclosure and discovery than might be taken at trial, subject to concerns about confidentiality, privilege, cost of production, timing and

probative value: *Laushway v. Messervy*, 2014 NSCA 7 at para.49, citing with approval *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 57 at para.9.

[8] The Court of Appeal has suggested a number of points that a motions judge may consider in determining whether to exercise their discretion to make an order for production, including: (a) the nature of the claim and how the issues and circumstances relate to the information sought to be produced, and (b) how close the connection is between the sought-after information and the matters that are in dispute: see *Laushway, supra* at para.86.

[9] However, a request for production should be supported by evidence, lest it amount to a fishing expedition: see *Intact Insurance Company v. Malloy*, 2020 NSCA 18 at paras.36-41. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application: see *Intact* at para.35.

[10] Mike's relies on the affidavit of Mr. Zebian filed on September 1, 2022; the affidavit of Dan Troke, CAO, filed on September 2, 2022; and the affidavit of counsel for Mike's, filed on November 23, 2022.

[11] Mike's says that that there is a sufficient evidentiary basis for its production request. Mike's says that it was acting reasonably with the development in light of

the Covid-19 pandemic; that the Town had agreed to three other extension requests in response to the pandemic; that the Town had granted other developers extensions to their construction deadlines; that Mr. Troke invited Mike's to make a further request to extend the deadlines; that Mr. Zebian provided the Town with confirmation that he had financing, the required permit, plans and a detailed schedule of work; and that the Town's decision was inconsistent with its wish to develop the property, as the decision has added years to the development time-line. Mike's also relies on a transcript of a speech that the Mayor gave in February of 2022, saying that it "sheds light on her earlier motivations."

[12] Mike's says that the only sensible explanation for Council's decision to deny the extension request and seek reconveyance is that it was made to punish Mr. Zebian for trying to disclose Ms. Rice's allegations to the public. Mr. Zebian points to a meeting he had with the mayor and Mr. Troke about Ms. Rice's letter in the summer of 2021, which became heated, and a letter he received from the Town's legal counsel threatening to take legal action against him.

[13] The Town objects to the production request. The Town says that there is no evidentiary basis for Mike's claim of bad faith on the part of Council. The Town says that the motion for production is a fishing expedition.

[14] In order to determine whether I should order production of the documents, I will consider:

1. the material fact(s) at issue;
2. the evidence known at this time; and
3. whether I would find the sought-after documents to be relevant if I were presiding over the trial: see *Laushway, supra* at para.47.

### **The Material Fact(s) at Issue**

[15] Mike's says that the Town breached its duty of good faith contractual performance when Council voted against the extension request and in favour of enforcing the reconveyance terms of the agreement in order to punish Mr. Zebian for his attempts to publicize Ms. Rice's allegations. Mike's relies on the duty to exercise contractual discretion in good faith, meaning that the parties to a contract must exercise such discretion reasonably, that is, in a manner connected to the underlying purposes of the discretion granted by the contract: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paras. 1 and 4.

[16] When the parties included the original construction deadlines in the agreement, each deadline was followed by the following language: "Failing which,

the Town of Kentville reserves the right to purchase the land back for \$71,000 (Seventy-One Thousand Dollars) plus HST.” The parties provided for the possibility of extension to those deadlines as follows: “Any and all deviations from the time table are to be agreed upon by both parties 30 days prior to the dates agreed upon above.”

[17] The parties, in the last amending agreement dated June 29, 2021, set new construction deadlines, including the September 30, 2021 deadline for Mike’s to complete the building’s footings, and included the following two clauses:

3. The dates agreed to herein are critically important and [Mike’s Clothing] shall not request any further extension thereof and [Mike’s Clothing] specifically understands and agrees that the Town may buy back the property pursuant to the agreement, as amended, if [Mike’s Clothing] does not strictly comply with the terms of the agreement, as amended.

4. All terms of the agreement (as amended), except as specifically amended in this Amending Agreement, are confirmed and survive this Amending Agreement, including (without limitation) the Town’s right to buy back the property.

[18] The contractual language at issue does not contemplate extension requests and explicitly prohibits any extension requests. For this reason, in my decision dismissing the motion of Mike’s for orders authorizing discovery subpoenas, I concluded that Mike’s claim - that the Town breached its duty to exercise



contractual discretion in good faith when it denied the extension request - was not a material fact at issue: 2022 NSSC 273 at para.22. Council's decision to refuse a further extension to the construction deadlines is not linked to the Town's performance of the contract: *ibid.* Rather, Council's decision related to a request by Mike's to *alter* the contract.

[19] During the hearing of this motion, Mike's argued that the Town waived strict compliance with the terms of the amending agreement when Mr. Troke invited Mike's to submit an extension request to Council in a letter to Mr. Zebian dated October 5, 2021. In that letter, Mr. Troke referred to the September 30, 2021 deadline to install the footings, which had passed. Mr. Troke stated that a report would be going to Council, and asked Mr. Zebian to provide him with an update and whatever request Mr. Zebian would like to make of Council to extend the deadline.

[20] As best as I can articulate it, Mike's argument seems to be that because of Mr. Troke's October 5, 2021 letter, the Town waived the strict language of the June 29, 2021 amending agreement, leaving a contractual discretion to receive and grant further extension requests, which discretion was exercised by Council to punish Mr. Zebian, in breach of the Town's duty to exercise contractual discretion in good faith. However, waiver is not pleaded in Mike's Notice of Contest or its

Notice of Respondents' Claim. Mike's did not cite any authority for its waiver argument. Mike's did not set out the test for waiver, or attempt to apply the test to the facts of this case. Mike's did not identify what specific contractual language was waived, or where the discretion to grant extensions would be found in the contract, should the Court accept its waiver argument. The waiver argument was not properly pleaded or developed.

[21] Nonetheless, I will assume, for purposes of this decision, that Mike's claim - that the Town breached its duty of good faith contractual performance when Council voted against the extension request to punish Mr. Zebian for trying to publicize Ms. Rice's allegations - is a material fact at issue.

[22] As I did in my decision dismissing Mike's motion for discovery subpoenas, I also accept for the purpose of this motion that the Town's contractual right to seek reconveyance in the event of a failure of Mike's to meet the construction deadlines is one that involves discretion: *ibid.*, at para. 23. At the hearing of this motion, the Town agreed with this proposition. Therefore, Mike's claim - that Council exercised its discretion to seek reconveyance of the property in order to punish Mr. Zebian for trying to publicize Ms. Rice's allegations, in breach of the Town's duty to exercise contractual discretion in good faith - is a material fact at issue.

### **The Evidence Known at This Time**

[23] In addition to the contractual language, I will consider the other evidence known at this time, specifically:

- The importance of the development of the property to the Town.
- Mike's progress with the development.
- The meeting between Mr. Zebian, the mayor and Mr. Troke in the summer of 2021.
- The letter from the Town's legal counsel to Mr. Zebian, threatening legal action.
- The relationship between Mr. Zebian, on the one hand, and the mayor and councillors, on the other, following the events of the summer of 2021.
- The status of the development of the property in the fall of 2021.
- Mr. Troke's report to Council members before the October, 2021 meeting.
- The vote of Council on October 25, 2021.

- How the Town dealt with requests by other developers to extend construction deadlines.
- Public statements made by the mayor in February of 2022.

### **The Town's Desire to Develop the Property**

[24] The evidence of the Town is that it is experiencing a shortage of both commercial and residential properties. It says that it entered into the agreement to encourage such development on the property, which is located in a prominent intersection in the Town's downtown core. The Town says that it included construction deadlines in the agreement for this purpose.

### **Mike's Progress with the Development**

[25] Mr. Zebian says that, after the pandemic began in March of 2020, it was not possible for Mike's to meet the initial construction deadlines. He says that, locally, everything was closed. He was not able to meet with architects, planners or contractors. Throughout 2020, he kept the Town up-to-date on the challenges Mike's was having. He says that, in light of the pandemic, he wanted to think about what the development would look like. He says that, in 2021, drawings were

completed, and that in the spring of 2021, he applied for the footing permit. He says that it took about four months for the footing permit to be issued.

### **Summer, 2021 Meeting**

[26] Mr. Zebian's evidence is that, in the spring of 2021, he made a freedom of information request for a copy of Ms. Rice's 2020 letter, which was denied. He says that, in or around June of 2021, he received a copy of the letter from an anonymous source. Mr. Zebian says that, on or around July 14, 2021, he met with Mayor Sandra Snow and Mr. Troke about the letter. He says that the conversation became volatile, and that the Mayor said that she would be calling the police to retrieve the envelope that the letter came in.

### **Letter Threatening Legal Action**

[27] Mr. Zebian says that he immediately tried, unsuccessfully, to convene an emergency session of Council to discuss Ms. Rice's letter and allegations. He says that, on July 15, 2021, he received a letter from legal counsel for the Town, demanding that he refrain from speaking publicly about the letter, and threatening to take legal action against him.

[28] In the letter, legal counsel for the Town addresses Mr. Zebian's intention to disclose the contents of Ms. Rice's letter, and takes the position that the letter and its contents are confidential because, among other reasons, the contents of the letter were the subject of a settlement agreement between the Town and Ms. Rice, which required both parties to keep all such information confidential.

[29] In the letter, legal counsel for the Town informed Mr. Zebian that if he disclosed the contents of Ms. Rice's letter, he would be in breach of his fiduciary duties as a Councillor, and could be the subject of a law suit by the Town or Ms. Rice. Legal counsel for the Town informed Mr. Zebian that the Town would take all appropriate legal action to maintain the confidentiality of the letter, including obtaining an injunction to prohibit him from disclosing the letter or its contents.

### **Mr. Zebian's Relationship with Mayor and Councillors Post-Summer, 2021**

[30] Mr. Zebian says that his relationship with the Mayor and Councillors Craig Gerrard and Cate Savage subsequently changed, and that they became increasingly agitated at his public requests for disclosure of Ms. Rice's allegations and his requests to address the concerns of Ms. Rice and staff. The Mayor and Councillors Gerrard and Savage had been on Council in 2020, when Ms. Rice wrote her letter and when she was apparently terminated.

### **Status of Development in Fall of 2021**

[31] Mr. Zebian says that, in August of 2021, Mike's received its footings permit. He says that he provided the Town with detailed plans and information from his engineer, a letter from his general contractor setting out projected completion dates, and a letter confirming that he had the necessary financing for the development. Mr. Zebian says that delays relating to the pandemic continued to slow the project. As of the September 30, 2021 deadline to complete the building's footings, Mike's had not yet commenced construction on the property. Mike's had still not started construction as of the date of the Application.

### **CAO Troke's Report to Council**

[32] Mr. Troke authored a report to Council dated October 25, 2021. In the Report, Mr. Troke summarized the relevant provisions of the agreement and the amendments, the construction deadlines, the progress of the development to that point, and Mike's proposed construction timelines. Mr. Troke summarized the issue for consideration as follows:

For consideration:

The Town of Kentville consider extending the 15% completion date (footers) and final completion date for Mike's Clothing Limited. If council chooses to extend these dates it is recommended Mike's Clothing Limit [sic] place the property deed in escrow with the Town's solicitor thus if the completion dates

are not achieved the property would be bought back by the Town as per the provisions in the buyback agreement.

If an extension is granted the new dates are as follows:

15% completion by April 30, 2022 and final completion of construction April 30, 2023.

If council does not wish to extend, direction should be given to the CAO to work with the Town solicitor to execute the buy back provision of the agreement.

### **October 25, 2021 Vote of Council**

[33] Mr. Zebian says that, at the October 25, 2021 Council meeting, a motion was made to extend the deadlines for the construction work. He says that Mayor Snow and Councillors Gerrard and Savage, among others, voted against the request, and voted in favour of enforcing reconveyance of the property.

### **Other Developers' Requests to Extend Construction Deadlines**

[34] Mr. Zebian says that the Town has not done a property "buy-back" before, and that previous developers, "acting reasonably," had been given extensions to complete their development, even though none of them had met the contractual deadlines. He says that most of these were handled very casually and without decisions of extensions via Council.

### **February, 2022 Public Statements of Mayor**



[35] The transcript of the speech given by Mayor Snow in February of 2022 discusses events of July, August and September of 2020, the Town's decision to hire a human resources firm to review the allegations, negotiations to reach a settlement with "the departing member of staff," a non-disclosure agreement reached, social media posts and emails against Council, efforts to disclose "the letter" on social media and traditional media and "a stream of hate towards members of this Council" incited by social media posts by a male member of Council. The transcript does not mention Ms. Rice or Mr. Zebian by name. The only portion of the transcript that clearly relates to Mr. Zebian is as follows:

The buyback decision of the former Robinson property has exacerbated this action towards this Council and is unwarranted as the developer failed to meet any and all of the contractual milestones in the sales agreement. The Council has been more than patient and accommodating despite the declared and continued conflict of interest in this matter. His actions and behaviours in this Chamber have been disgraceful, unprofessional and childish. His lack of adherence to the rules of order has created a maelstrom for each Council meeting and has warranted the necessary and consulted changes to procedure. He has further breached the sanctity of this Chamber using it as a platform for his video series criticizing and demeaning Council for its democratic and legal actions.

### **Sufficient Evidentiary Basis?**

[36] I have carefully considered the evidence known at this time. I have imagined myself, as best I can, to be in the shoes of the trial judge. I have kept in mind that I should take a somewhat more liberal view of the scope of relevance in the context

of disclosure than I might take at trial. I have taken into account the guidance of the Court of Appeal in *Laushway, supra*. I conclude that, based on the evidence known at this time, I would not find the documents to be relevant if I were presiding over the trial. In my view, the claim by Mike's of a connection between Council's October 25, 2021 vote concerning the property and the Town's dispute with Mr. Zebian about Ms. Rice's allegations is not supported by the evidence to date.

[37] No one referred to Mike's development of the property during Mr. Zebian's meeting with Mayor Snow and Mr. Troke in the summer of 2021. The Town's legal counsel did not mention Mike's development of the property in his letter to Mr. Zebian. The Town's position, that Mr. Zebian was under a legal obligation to maintain the confidentiality of the content of Ms. Rice's letter given the terms of the settlement agreement between the Town and Ms. Rice, appears, on the evidence before me, to be reasonable and to have been taken in good faith.

[38] There is no evidence that, after the dispute between Mr. Zebian and the Town arose in the summer of 2021, the Mayor or Councillors Gerrard or Savage said or wrote anything connecting this dispute to Mike's development of the property. Mr. Troke does not mention the dispute about Ms. Rice's allegations in his October 25, 2021 report to Council. There is no evidence that, during the

meeting to consider the motion to extend the construction deadlines or to seek reconveyance, Council members discussed the Town's dispute with Mr. Zebian concerning Ms. Rice's allegations. There is nothing in the transcript of Mayor Snow's speech connecting Council's October 25, 2021 decision to Mr. Zebian's efforts to publicize Ms. Rice's allegations.

[39] Mike's attempts to tie the dispute about Ms. Rice's allegations to Council's October 25, 2021 vote by implying that, had Council exercised its discretion in good faith, it should have or would have granted Mike's extension request. The evidence known at this time does not support this assertion. Mike's had already been granted three extensions to the construction deadlines. In the last amending agreement, the parties agreed to explicit language that confirmed the critical importance of the new deadlines, prohibited Mike's from requesting further extensions, and reiterated the Town's right to reconveyance should Mike's not "strictly comply" with the new deadlines. Both parties agreed to this language on June 29, 2021, before the July 14, 2021 meeting that became heated and before the July 15, 2021 letter from the Town's legal counsel threatening legal action. By the time the new deadline for completion of the building's footings came around on September 30, 2021, Mike's had not yet broken ground on the property.

[40] Moreover, Mr. Zebian's evidence of extensions given to other developers is not reliable: he only became a councillor in the fall of 2020, he does not identify the source of his information, nor does he provide any detail of the circumstances of those alleged extensions.

[41] Mike's claim that Council's decision to deny the extension request and to enforce reconveyance was done to punish Mr. Zebian for trying to publicize Ms. Rice's allegations is completely speculative. The production request, at least at this stage, amounts to a fishing expedition.

### **Conclusion**

[42] Mike's motion for production of documents relating to Mr. Zebian's inquiries about Ms. Rice's letter or Mr. Zebian's public statements about Ms. Rice's letter is dismissed.

### **Other Documents**

[43] In Mike's motion, it also sought the production of emails, text messages or other written communications, which Andrew Zebian is not copied on, between Council members (including the Mayor) and the CAO or other staff, with respect to Mike's development of the property. The Town did not object to providing this

category of documents. However, according to Mike's, the Town has yet to produce these documents, even though they were requested from the Town on September 1, 2022. As such, Mike's seeks an Order compelling the production of this category of documents.

[44] The Town is ordered to disclose copies of the following documents to Mike's within two weeks of this decision:

emails, text messages or other written communications which Mr. Zebian is not copied on between Council members (including the mayor) and the CAO or other staff with respect to Mike's Clothing's development of the Robinson property;

[45] If the parties cannot agree on the costs of this motion, I will receive written submission from them within two weeks of this decision.

Gatchalian, J.